

TOPIC 4: PRIVILEGE

Starting Point -

s. 131A(1), EA - Requirement to disclosed objected for privilege: If (a) a person is required to give information or to produce a document which would fall within one of the privilege categories and (b) the person objects to giving that information or providing that document, *the court must determine the objection as if the objection were an objection to the giving or adducing of evidence.*

S. 132, EA - Court must satisfy itself of the right: If it appears that a witness has grounds for making an objection under privilege, the court must be satisfied that they are aware of their right to do so

S. 134, EA - Privileged Evidence Inadmissible: Evidence that must not be adduced or given in a proceeding is not admissible in the proceeding.

Privilege 1: Privilege against Self-Incrimination

Claiming the Privilege

Defendant must raise objection: The defendant must raise an objection to giving evidence on the ground that the evidence may *tend to prove* that he/she has committed an offence under Australian or foreign law (EA, s. 128(1)(a)), or is liable to a civil penalty (EA, s. 128(1)(b)). Thus there are 2 limbs: (1) self-exposure to a criminal offence, (2) self-exposure to a civil penalty.

Scope

Does not apply to protect third parties: It is a privilege against self-incrimination only, so it cannot be claimed to protect third parties.

Does not apply to real evidence: Privilege does not apply to the provision of 'real evidence' (eg. fingerprints; getting a blood test).

Giving evidence: A witness does not object, and therefore does not raise the privilege, if they want to give evidence (Song).

Does not apply to companies: The privilege cannot be claimed by companies (EA, s. 187; EPA v Caltex, left open in Song); directors of companies can only claim privilege for themselves.

Test

Objection must have reasonable grounds: The defendant must have reasonable grounds for objection (EA, s. 128(2)).

Objection must 'tend to prove' commission of an offence: The evidence must directly or circumstantially implicate the witness in the crime. There must be some real likelihood the witness will be incriminated, not a remote or fanciful chance (eg. if the person has an indemnity against prosecution, there is danger of them being incriminated, so privilege cannot be claimed) (Brebner). Consider: (1) *Whether there is any real risk of prosecution i.e. crime might be so minor that no one may prosecute (Sorby);* AND (2) *Whether the evidence is already out in the open (Brebner).*

Derivative evidence: The privilege also applies to *derivative evidence* - evidence which is not of itself incriminating, but may lead to the discovery of incriminating evidence which would tend to prove criminal activity/civil wrongdoing (eg. accidentally admitting to taking drugs while testifying in a murder trial (Sorby, Gibbs CJ; Cornwell)).

Certificate Provisions

Court must inform witness: If there are reasonable grounds for objection, the court must inform the witness that (EA, s. 128(3)) - (a) they do not need to give evidence unless required to do so under EA, s. 128(4)), (b) they may voluntarily choose to give evidence, or be compelled to give evidence, but will be granted a certificate either way, and (c) the effect of the certificate.

Overriding the privilege (EA, s. 128(4)): The Court may require the witness to give evidence if (a) the evidence *does not* tend to prove that the witness is liable for an offence or civil penalty in a foreign country, and (b) the *interests of justice* require the evidence be given.

'Interests of Justice': Relevant factors include (i) *the nature of charges* - in criminal matters, there is a stronger interest of justice argument than in civil matters, so it is more likely evidence will be compelled in exchange for the certificate; (ii) *importance of the evidence:* if the evidence is not crucial to proceedings, or can be gotten from another person, there is less of an interest of justice argument; (iii) *interests of the witness* - there may be social stigma or professional consequences from testifying which cannot be prevented by a certificate; (iv) *likelihood of prosecution/imposition of a penalty* - if the person is protected by immunity, there is more of a public interest as the person is likely to have been given immunity due to the importance of their testimony. If the person is likely to incriminate themselves, there is still a public interest, but the certificate would have to be given in exchange; (v) *interests of the accused* - would overriding the privilege mean the defence would be unable to fully cross-examine the witness? (R v Lodhi, 2006).

NOTE: Where a witness is compelled to testify, there will likely need to be an unreliability warning (Lodhi; JDA, ss. 31(d), 32; EA, s. 165(1)(d)).

Effect of certificate: If a certificate is granted under EA, s. 128(5), either because the witness gave evidence willingly or was compelled to do so under EA, s. 128(4), or because their objection was overruled, but the Court later discovered there were reasonable grounds for objection (EA, s. 128(6)), no Victorian Court can consider the evidence (EA, s. 128(7)(a)), or any information, document or thing obtained in consequence of the evidence (EA, s. 128(7)(b)). However, this does not apply in criminal proceedings in respect of falsity of evidence (i.e. perjury). The certificate continues to have effect despite any later challenges to the validity of the privilege (EA, s. 128(8)).

Exceptions (1) Retrial/New offence: If a defendant in criminal proceedings is given a certificate under EA, s. 128(7), a Victorian Court can consider any evidence, or information or thing obtained in consequence of the evidence in a *retrial for the same offence*, or a *different offence arising out of the same facts* giving rise to the offence (EA, s. 128(9)). **(2) Act/State of Mind:** Privilege does not apply in a criminal proceeding to evidence given by the defendant that the defendant (a) did an act, the doing of which is a fact in issue, or (b) had a state of mind, the existence of which is a fact in issue (EA, s. 128(10)). An accused has the right to remain silent. If they choose to give evidence, they lose the protection of the privilege. The Court does not want the accused to state they will give sworn evidence only to backtrack and refuse to answer questions at cross-examination on the basis of self-incrimination. However, an accused may still claim privilege in respect of other offences (eg. *drug offence at issue; privilege can be claimed in respect of murder charge*). An accused also cannot claim privilege, once choosing to give evidence, in respect of evidence from which the doing of an act or having a state of mind can be inferred (eg. location at time of offence, motive etc) (Cornwell v The Queen, 2007).

Privilege 2: Sexual Offences - Evidence (Miscellaneous Provisions) Act ('EMPA') The Privilege

Court must grant leave and notice must be given: A party cannot compel another party or witness to produce a document containing or disclosing a confidential communication unless the court grants leave and notice is given (EMPA, s. 32B(1))

What is a 'confidential communication'? A confidential communication is a communication, oral or written, made in confidence to a medical practitioner or counsellor in the course of a doctor/patient or counsellor/client relationship, by a person against whom a sexual offence has allegedly been committed, or will be committed (can occur before or after the incident). Medical practitioners must be registered; counsellor is a 'person who is treating a person for an emotional or psychological condition.' Counsellors do not need to be registered, but need to be actively treating, not just confided in (EMPA, s. 32B(1)).

When will leave be granted? The court must not grant leave to compel production of evidence unless it is satisfied on *the balance of probabilities* (BoP) that (a) the evidence will have *substantial probative value*, (b) other evidence of *similar or greater probative value* concerning the same matter *is not available*, and (c) the *public interest in preserving confidentiality* and protecting a confider from harm is *substantially outweighed by the public interest into admitting evidence of substantial probative value* (EMPA, s. 32D(1)).

Factors considered: (a) Likelihood and nature of the extent of harm that would be caused to the confider if the protected evidence is produced/adduced (*physical bodily harm; financial loss; stress; shock; damage to reputation; emotional/psychological harm* - EMPA, s. 32(B)(1) - 'Harm'); (b) Extent to which the protected evidence is necessary to allow the accused to make a full defence; (c) The need to encourage victims of sexual offences to seek counselling, and the extent to which they would be discouraged to do, or the effective of counselling diminished, if evidence was adduced; (d) whether there is a discriminatory belief/bias underlying the request to have the evidence adduced; (e) whether the protected confider objects to disclosure (*note: overriding public interest may take precedence over the wishes of an individual*); (f) the nature and extent of the reasonable expectation of confidentiality and potential prejudice to the privacy of any person (EMPA, s. 32(D)(2)).

Court must give reasons: If the court *gives/refuses* leave, they must provide reasons for doing so (EMPA, s. 32D(4)). If leave is *refused*, this cannot be referred to in the jury's presence.

Limitations on Privilege - Exceptions: Evidence may be produced - (a) with the consent of the protected confider, or if under 14, an appropriate person to give consent; (b) if it is information acquired by a registered medical practitioner by physical examination in relation to the commission of the offence; (c) where the communication was made or the document prepared for the purpose of a legal proceeding arising from the commission of the sexual offence; (d) where the communication was made or the document prepared in furtherance of the commission of a fraud or an offence which renders a person liable for a civil penalty; (e) if the communication made is evidence of the commission of wilful and corrupt perjury (EMPA, s. 32E(1)).

The Privilege

Legal Advice: 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(s) providing legal advice to the client (EA, s. 118).

Litigation: 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 that was made between the client and another person, or between a lawyer acting for the client and another person, * or (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 actual or anticipated proceedings in which the client is, may be, was or might have been a party (EA, s. 119) *Once proceedings are on foot, or are anticipated, third parties will play a far more dominant role than just giving legal advice (cf. s. 118). Thus, s. 119 extends communication to third parties, in addition to documents. Cf. s. 118: confidentiality extends to communications only in respect of client-lawyer relationships, or lawyer-lawyer acting for the same client.

Unrepresented litigants: Evidence is not to be adduced if, on objection by a party who is not represented in the proceeding by a lawyer, the court finds that adducing the evidence would result in disclosure of (a) a confidential communication between the party and another person, or (b) the contents of a confidential document, whether delivered or not, that was prepared, either by or at the direction or request of the party **for the dominant purpose** of preparing for or conducting the proceeding (EA, s. 120). S. 120 recognises the fact that an unrepresented accused may need protected communications and documents, generated with the assistance of people who are not legal qualified (eg. registrars, social workers, other support people). These communications and documents are privileged and protected, expanding beyond the client-lawyer relationship for an unrepresented party.

Definitions

'Lawyer': (a) an Australian lawyer, (b) an Australian-registered foreign lawyer, (c) an employee or agent of a lawyer (EA, s. 117).

'Client': Someone who has engaged the lawyer to provide legal services. Includes an agent or employee of the client (EA, s. 117).

'Confidentiality': The communication or document must have been made/prepared in circumstances where the giver/receiver was under an express or implied obligation *not to disclose its contents* (eg. meeting with a client) (EA, s. 117).

Claiming the Privilege

'Dominant Purpose' Test: In order to claim privilege under the first limb (*legal advice*) or second limb (*legal services*), the communication or document must have been made for the 'dominant purpose' of providing legal advice or services (cf. '*sole purpose - Esso*'). It does not have to be the sole purpose, but must 'predominate' over other purposes i.e. be the prevailing or paramount purpose (*Esso v Commissioner of Taxation, 1999, applied in Hodgson*). The existence of the privilege is not established by a person merely asserting such; rather, the party claiming the privilege bears the onus of proving the communication was undertaken, or the document was brought into existence, for the dominant purpose of giving or obtaining legal advice (*Grant v Downs, applied in Hodgson*). Ancillary purposes are allowed (*Hodgson*).

Types of Protected Documents/Communications:

(1) **Legal work** - the privilege protects the disclosure of documents that record legal work carried out by the lawyer for the benefit of the client. This includes: *notes; research memoranda; collations; summaries and chronologies of documents prepared by the lawyer*, where or not they were actually provided to the client (*Propend, per McHugh J; applied in Hodgson*).

(2) **Memoranda and other documents prepared by officers or employees of the client** - that relate to information sought by the client's legal adviser to enable him or her to advise (*Stirling, applied in Hodgson*), as well as drafts, notes and other material brought into existence for the purpose of communication with the lawyer, whether or not they were actually communicated (*Saunders v Commissioner, applied in Hodgson*).

(3) **Advice** - extends to professional advice as to what a party should sensibly or prudently do in the relevant legal context. However, it does not extend to advice that is purely commercial or of a public relations character (*DSE v Intertan, AWB v Cole; applied in Hodgson*).

(4) **Third Party Communications** - a document produced by a third party for the dominant purpose of legal proceedings (eg. an accountant preparing a tax return) will be protected, but a covering letter thereof will not be.

(5) **Copies** - copies of a privileged communication/document is also privileged, as to adduce the copy would result in disclosure of the confidential communication/document. (EA, Dictionary Cl. 8; *Mann v Carnell*). A copy of a non-privileged document could become privileged if the copy was made for the dominant purpose of providing legal advice, or for evidence in the course of litigation, BUT, a copy of a non-privileged document where the original is destroyed cannot be privileged (*Propend, per Brennan J*); cf. it can be, but not when destroyed in anticipation of legal proceedings (*Propend, per Kirby & McHugh JJ*).

No resolution; argue both sides.

Scope

Applies pre-trial: A client may claim privilege in respect of any of the disclosure obligations discussed under the Act (EA, s. 131A).

Does not apply to 'observed facts': A lawyer may observe facts of the client relevant to another person which do not constitute a communication or document (features, injuries, modes of acting - eg. coming to lawyer in a blood-stained shirt). These facts do not attract privilege and may be subject to disclosure.

Name and address not usually regarded as privileged:

However, names and address may be made privileged, but this would need to be expressly and clearly made (eg. a client expressing fear for their address being disclosed would have grounds to privilege their address).

Client-lawyer relationship: There must be a lawyer-client relationship, as opposed to a casual discussion between 2 people.

In-house counsel: There can be a lawyer-client relationship between in-house counsel and employer, and privilege may be claimed, but only so long as the in-house counsel can *provide independent advice* (*Waterford v The Commonwealth, 1987, per Dawson J*). The lawyer needs to be able to approach a specific issue with a 'disinterested mind' and 'professional detachment'. Their duties, loyalties and interests cannot be engaged (*Harrington, per Branson J*).

Proving legal advice was sought: Where communication takes place between a client and their independent legal advisers, or between a client's in-house counsel and those legal advisers, it may be appropriate to assume that legitimate legal advice was sought. In the ordinary case of a client consulting a lawyer about a legal problem in uncontroversial circumstances, proof of those facts alone will provide a sufficient basis for concluding legal advice was sought or given (*Kennedy v Wallace; Hodgson*).

Waiver

Express Waiver - Consent: The client is the holder of the privilege, and so may waive it (EA, s. 122(1)). Where there are joint clients in civil proceedings, either may waive (EA, s. 124(2)).

Implied Waiver -

1. **General inconsistency** - for example: (a) calling an expert witness to give an opinion inconsistent with claiming privilege over the communications/documents which led them to form that opinion (*Roads Corp*); (b) convening an improper meeting which undermines the independence of witnesses is inconsistent with claiming privilege over the contents of that meeting (*Roads Corp*).

2. **Acting inconsistently - Disclosure:** Privilege may be lost if the client has acted inconsistently with the confidentiality the privilege serves to protect (EA, s. 122(2), *Mann v Carnell*). This includes where the client (a) knowingly and voluntarily discloses the substance of the evidence to another person, or (b) gives their express or implied consent for someone else to disclose the substance of the evidence (EA, s. 122(3); *Mann v Carnell*). Even if the gist or conclusion of privileged legal advice or documentation is revealed to a third party, there is an implied waiver of that advice (*Rich v Harrington, 2007*).

3. **Related Communications/Documents:** If there is a non-privileged communication/document which cannot be properly understood without reference to another privileged communication/document, the other communication/document is not privileged (EA, s. 126). That is, documents referring to other confidential documents (eg. letters).

4. **Misconduct** - a communication/document may fall outside privilege because (EA, s. 125): (a) **Fraud/assistance in preparation, execution and cover up of fraud** - it was made in furtherance of a crime or fraud or liability to a civil penalty (EA, s. 125(1); *Hodgson v Amcor*) (b) **Abuse of power/assistance in preparation, execution and cover up of fraud** - it was a deliberate abuse of public power which was known, or ought to have been known, by the client/lawyer (*AG v Carney* - "conceal an abuse of delegated power to enact legislation")

5. **An Accused in Criminal Proceedings:** An accused in a criminal trial can adduce information regardless of client-lawyer privilege (EA, s. 123). However, this right does not apply to (1) adducing material which came into their possession **pre-trial** (*Galloway*); that is, an accused cannot go 'fishing' pre-trial for privileged information pre-trial, or (2) to questions asked of a prosecution witness in cross-examination. S. 123 *only applies during trial, allowing a defendant already in possession or aware of privileged material to adduce such, even if it came into their possession inadvertently*

Where privilege is not waived

'Limited and specific purpose': Privilege will not be waived where evidence is disclosed to a third party for a 'limited and specific purpose' (*Mann v Carnell*)

Associated Persons/Related Bodies: Privilege will not be waived where the client discloses information to another related person or body (eg. intra-organisation, such as Parliament body to Parliamentarian), confidentially and without liberty to disclose to a non-associated third party. A 'related person' is not considered a third party (*Mann v Carnell*).

Inadvertent Disclosure: Where a privileged document or communication is mistakenly disclosed, the court will ordinarily permit the correction of that mistake and order the return/destruction of the document or communication, provided (i) the party inadvertently disclosing the documentation or communication acts promptly, requesting the return/destruction by the receiving party in a short timeframe; and (ii) the receiving party would not be prejudiced by the return/destruction of the privileged document or communication (*Expense Reduction*). **NOTE:** There is a potential exception to this where the defendant would be prejudiced by returning the document.

Non-prejudicial disclosure: A client not taken to have waived privilege because (a) the substance of the evidence was disclosed (i) in the course of confidential communication, or in the course of preparing confidential documents, (ii) as a result of duress or deception, or (iii) under compulsion of law, or to a Minister of the Commonwealth, State or Territory (*Mann v Carnell*); (b) the disclosure to another person concerns a matter in relation to which the same lawyer is providing or will provide professional legal services to both the client and the other person; or (c) the client and the other party had a common interest in the actual or anticipated proceeding (EA, s. 122(5)).

TOPIC 6: CHARACTER EVIDENCE

Character refers to the *inherent moral qualities of a person*, a disposition to act in a particular way (**Melbourne**). Character evidence may be relevant to **(i) issue** - "he is more likely to have robbed the store because he's a bad bloke", or **(ii) credit** - "he is more likely to be lying on oath because he's a bad bloke"; or **(iii) both**.

Character of an Accused - Admissible in Criminal Proceedings ONLY

Good character evidence: In criminal proceedings, an accused can admit evidence that they are, either generally or in particular respect, a person of good character.

The hearsay, opinion, tendency and credibility rule do not apply to good character evidence (**EA, s. 110(1)**).

General good character - if the defendant admits evidence that they are *generally* of good character, the prosecution or co-accused can adduce evidence that they are *generally not of good character*. The hearsay, tendency, opinion and credibility rule do not apply (**EA, s. 110(2)**).

Specific good character - if the defendant admits evidence that they are of good character *in a particular respect*, the prosecution or co-accused can adduce evidence that they are *not of good character in a particular respect*. The hearsay, tendency, opinion and credibility rule do not apply (**EA, s. 110(3)**).

General good character: Where an accused argues that they are 'generally a person of good character', they are vulnerable to the Crown adducing evidence showing the accused has committed prior offences of a similar kind (eg. *dishonesty offences* - prior theft conviction can go towards fraud).

Specific good character: Where an accused argues they are a person of good character 'in a particular respect', the accused is not vulnerable to the Crown adducing evidence of prior convictions of any kind *other than the offence alleged* (eg. *good character in respect of sexual offences does not allow the Crown to adduce evidence of theft, a dishonesty offence, to disprove the assertion*) (**Zurita; DPP v Newman**).

Good character directions: The judge retains a discretion to give a direction to the jury about the good character of an accused. Where the good character of the accused is both probative and relevant, finding it probative in relation to the accused's propensity to commit the crime charged, or the accused's credibility, the judge will direct the jury as to its significance. However, if character evidence is lacking probative value (for example, it is vague and has no positive bearing on the truthfulness or credibility of the accused, but rather is only directed to the unlikelihood the accused would commit the offence charged - eg. *the defendant is/has "quiet", "gentle", "never been aggressive", "amiable", "well-behaved"*) it will not warrant a good character direction (**Melbourne**).

Evidence withheld & irrelevant evidence: Parties may choose to withhold relevant evidence. Where evidence is withheld, the evidence does not exist. Refusing a good character direction based on withheld evidence is not allowed (**DPP v Newman**).

Prior convictions for unrelated and irrelevant matters cannot be the basis for refusal of a good character direction (**Zurita; Newman**).

Charges: Good character directions cannot be refused based on the fact a person is charged with an offence (**Newman**).

Bad character evidence: Bad character evidence is almost always blocked by the tendency rule (**EA, s. 97**).

Co-accused adducing evidence of bad character: A co-accused may adduce bad character evidence of another accused. The hearsay and tendency rule do not apply (*but opinion rule does*) (**EA, s. 111(1)**). The hearsay, tendency and opinion rules do not restrict the accused from rebutting the bad character evidence of a co-accused and arguing it should not be accepted (**EA, s. 111(2); Lowery**).

XE accused as to character: A party cannot XE a co-accused as to character unless the Court gives leave (**EA, s. 112**) (*See EA, ss. 55, 135/137 192; analogise/distinguish Stanoevski*).

Character of a Victim - an accused may wish to bring bad character evidence of a victim or deceased to support their contention of self-defence, or another defence. **The character of a victim is admissible, as long as it is relevant to a fact in issue.** However, character evidence of **complainants in sexual offence cases** is given special status in this respect.

Complainants - Sexual Offence Cases

Application: Courts must have regard to the fact that **(a) there is a high incidence of sexual violence in society, (b) sexual offences are significantly underreported, (c) a significant number of sexual offences are committed against women, children and vulnerable people, (d) offenders commonly know their victims, and (e) sexual offences often occur without physical signs of the offence being evident (CPA, s. 338)**. Provisions apply to complainants in sexual offence cases (**CPA, s. 339**).

Sexual History: Definition - Sexual history is evidence which tends to establish the fact that the complainant (a) was accustomed to engaging in sexual activity, (b) has freely agreed to engage in sexual activity with the accused or another person, aside from the event to which the charge relates (**CPA, s. 340**). **General prohibitions** - a party must not adduce evidence of sexual history to support an inference that the complainant **is the type of person who is more likely to have consented** to the sexual activity to which the charge relates (**CPA, s. 343**). Questions regarding the general reputation of the complainant for chastity are not allowed (**CPA, s. 341**). **Sexual history evidence not without leave** - no evidence is admissible relating to sexual activities without the court's leave (**CPA, s. 342**). Leave will not be granted unless the court is satisfied the evidence has **substantial relevance** and would allow XE **in the interests of justice**. The court is to have regard to the following factors when considering leave for sexual history evidence: **(a) whether the probative value of the evidence outweighs the distress, humiliation, and embarrassment the complainant may experience as a result of XE or admission of evidence, in view of their age, the number of questions likely to be asked, and the nature of those questions** (pre-recorded hearings, blocking the line of sight with the accused helps); **(b) the risk the evidence may arouse discriminatory belief/bias/prejudice/sympathy/hostility in the jury, (c) the need to respect the complainant's dignity and privacy, and (d) the right of the accused to fully answer and defend the charge (CPA, s. 349)**. **Sexual history not to be regarded as relevant or proper** - sexual history is not to be regarded as **(a)** having a substantial relevance to the facts in issue by virtue of any **inferences it may raise as to general disposition** (counsel cannot use dispositional reasoning to say the complainant is the type of person likely to have engaged in that conduct), or **(b)** as being a proper matter for XE **as to credit**, unless in the circumstances it would be **likely to materially impair confidence in the reliability of the complainant's evidence (CPA, s. 352)**.

Delay in Sexual Offences: Complaints are often made a considerable time after the alleged offence, particularly in respect of child victims; some may only bring the complaint 10-20 years after the alleged offence. **Application** - applies in criminal proceedings (**JDA, s. 48**). **What is delay?** Delay in making a complaint includes **(a)** where the complainant has not pursued the complaint in a timely manner, and **(b)** complaint was not made at the first or reasonable opportunity (**JDA, s. 50**). Delay has 2 impacts: 1) **Credit** - suggests complainant is unreliable; 2) **Forensic disadvantage** to defendant.

Credit: Prohibited suggestions - the judge, prosecution and defence counsel **must not say or suggest to the jury that (a)** the law regards complainants in sexual offence cases as an **unreliable class of witness, (b)** complainants in sexual offence cases are an unreliable class of witness, or **(c)** complainants who delay in making a complaint or do not make a complaint are, as a class, **less credible or require more careful scrutiny** than other complainants (**JDA, s. 51(1)**). The judge **must not say/suggest** to the jury that, **because the complainant delayed/did not make a complaint (a)** it would be **dangerous or unsafe** to convict the accused, or **(b)** the complainant's evidence should **scrutinised with great care (JDA, s. 51(2))**. **Mandatory corrective directions** - where the complainant delayed/didn't make a complaint, the judge **must direct the jury (a) that people may react different to sexual offences**, and there is no typical, proper or normal response to sexual offences, and **(b) some people complain immediately** to the first person they see, while others **may not complain for some time**, and others **may never make a complaint**, and **(c) delay in making a complaint in respect of a sexual offence is a common occurrence (JDA, s. 52)**. **Optional prosecution direction** - the prosecution may request the judge direct the jury that there **may be good reasons why a person does not complain, or may delay in complaining**, about a sexual offence (eg. too young) (**JDA, s. 53**). **Abolition of common law** - common law authorities regarding judicial directions for delay in complaints is abolished (**JDA, s. 54**) (**Kilby; Crofts**).

Forensic Disadvantage: Delay in complaints may present the accused with significant forensic difficulties. An allegation of an offence committed years or decades previously are difficult to defend, because memory fades as time passes/alibi defences are difficult/corroboration of an accused's alibi may be impossible because the person has died/material evidence is lost, or the opportunity to test it is. **Definition** - forensic disadvantage means a disadvantage **(more than the existence of delay** i.e. cannot simply claim it has been a long time since the offence) to the accused in **(a)** challenging, adducing or giving evidence, or **(b)** conduct their case because of the time that has elapsed between the offence and trial (**JDA, s. 38**). **Optional defence directions** - defence counsel may request the judge direct the jury on forensic disadvantage experienced by the defendant (**JDA, s. 39(1)**). The judge may direct the jury only if satisfied the accused has experienced a **significant forensic disadvantage** (will not give a direction where it would waste the jury's time, obfuscate or sow doubt) (**JDA, s. 39(2)**). In giving a direction, the judge **(a)** must inform the jury of the specific nature of the disadvantage experienced by the accused, and the need to take the disadvantage into consideration when considering the evidence, and **(b)** must not say or suggest to the jury that it would be dangerous or unsafe to convict the accused, or that the complainant's evidence should be scrutinised with great care (**JDA, s. 39(3)**). **Common law on judicial directions abolished (JDA, s. 40; Longman)**. Forensic disadvantage arises not because of the delay itself, but because of the consequences of delay. Instances have included **(a)** the inability of a defendant to establish an alibi or call more convincing evidence of their alibi; **(b)** an inability to carry out medical examinations in a timely manner; **(c)** an inability to explore the detail of the circumstances of the alleged offending; **(d)** an inability to identify the alleged events with specificity (**PT v R**); **(e)** so much time has passed that it is impossible to explore the circumstances surrounding the complainant accounts; **(f)** a crucial witness has died or disappeared (**Greensill**). The onus is on the defendant to prove the forensic disadvantage by evidence. The disadvantage must be more than just hypothetical or speculative (**PT v R**).

TOPIC 9: HEARSAY

Hearsay - The Rule

The Rule: Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that can be reasonably be supposed the person intended to assert by the representation (EA, s. 59(1)). This means that hearsay evidence is inadmissible if tendered to prove a statement was true i.e. used testimonially in substitution for the maker being present. However, evidence is *not hearsay*, and is therefore admissible, if tendered to show the statement was made, not attested that it was true (*Subramaniam* - evidence of the previous representation by the insurgent was *not* adduced to prove the insurgent had threatened to kill him, but adduced only as proof it was said).

Previous representation: Means a representation made in the course of giving evidence, at any other time than the current proceeding.

Representation: Includes (a) an express/implied representation (whether oral or in writing); (b) a representation *inferred from conduct* (eg. a gesture, such as drawing one's finger across their throat); (c) a representation *not intended to be communicated or seen by its maker* (eg. statements made in a diary); (d) representations *not communicated* (eg. an email which was forgotten to be sent). **Representations in documents** - a representation contained in a document is taken to have been made if (a) the document was written, made or otherwise produced by the person, or (b) the representation was recognised by the person as their representation by signing, initialling or otherwise making the document.

Unintended/Intended representations - the court can look at the **circumstances** in which the representation was made in order to determine whether the maker intended to assert a particular fact (EA, s. 59(2A)).

Is it merely a spontaneous representation, without calculated intention to convey? *Walton v R - implied unintended representation*: "Daddy is on the phone" = **express representation, intended to assert the father was on the phone**. *Prohibited by hearsay rule, as would prove the truth of an asserted fact*; "hello daddy" = **implied representation, as child did not first query whether his father was on the phone. Also unintended representation, as the child was not intending to assert to anybody that his father on the phone, Ratten v R - implied but intended**: Wife said "get me the police" = **implied, but intended - inadmissible as it would be adduced to prove the truth of the assertion. Ratten's phone call = request, relevant and going to fact in issue. Admissible; R v Benz - 2 representations - express and implied**: "My mother is sick" = **express; this woman is 'my mother' = implied & unintended - admissible (but there is an argument that because it was a fabrication, it was intentional, even though implied - excluded)**.

Esoteric knowledge: Evidence tendered to prove an accused has esoteric knowledge or a situation or crime scene (i.e. knowledge not known to the public eg. 'the TV was turned up' *avoids the hearsay rule*, and may be admitted (*Kamleh v R*)).

Evidence dependent on competency: The hearsay rule does not allow evidence of a previous representation if, when it was made, the person was not competent (EA, s. 61(1); *child in Walton*) - unless the person was talking about their health, feelings, sensation, intention, knowledge or state of mind (EA, s. 61(2)).

First-Hand Hearsay (FHH) v Second-Hand Hearsay (SHH)

Personal knowledge: FHH is where the maker has **personal knowledge** of an asserted fact (EA, s. 62(1)). A person has 'personal knowledge' if the assertion is reasonably supposed to be based on something the person **saw, heard or otherwise perceived** ('SHOP'), **other than a previous representation made by another person about the fact** (EA, s. 62(2)). **Health, feelings, sensations, intention, knowledge & state of mind:** A person has personal knowledge of the asserted fact if it is a fact about the person's health, feelings, sensations, intention, knowledge or state of mind (SoM) at the time the representation was made (EA, s. 62(3)).

EXCEPTIONS TO FHH

1. Non-Hearsay Purpose: Evidence which is admissible for a non-hearsay purpose (eg. *prior inconsistent statements going to credit*), which is also relevant for a hearsay purpose, is admissible (EA, s. 60(1)). This applies to SHH as well (EA, s. 60(2)). **Lee v R:** When Cailin gave evidence of what Lee had said to him, the representation was Lee's, not Cailin's. Lee's representation is FHH because he may reasonably be supposed to know whether Lee 'did a job', based on what Cailin SHOP. However, if a police officer gave evidence of Cailin's representation of what Lee told him, it is SHH as to whether Lee 'did the job', because only Cailin SHOP what Lee said. This rule does not apply to admissions (EA, s. 60(3)).

2. Where the Maker is Available/Unavailable: A maker of a representation is unavailable to give evidence if (a) the person is *dead*, (b) the person is *not competent*, (c) it would be *unlawful for them to give evidence*, (d) a provision in the Act prevents it (eg. *privilege*), (e/f) **all reasonable steps have been taken to find the person and compel attendance, but without success** (eg. witness is overseas; cannot travel because of a medical ailment); (g) the person is *mentally/physically unable to give evidence*, and that inability cannot be reasonably overcome (EA, s. 4).

Unavailable - Civil Matters: The hearsay rule does not apply to a representation given by a person who SHOP a representation being made (FHH) (EA, s. 63(a)). The hearsay rule does not apply to a document which contains the representation, or another representation necessary to refer to in order to understand the representation (EA, s. 63(b)).

Available - Civil Matters: Where the maker is available but not going to give evidence, the hearsay rule does not apply to person who SHOP a representation being made (FHH), or to a document which contains the representation, or another representation necessary to refer to in order to understand the representation if it would cause **undue expense or undue delay**, or it is not reasonably practicable to call the person who made the representation to give evidence (EA, s. 64(2)). **However**, if the maker is **available and is able to give evidence**, the hearsay rule does not apply to evidence of the representation given (a) by the maker, or (b) by a person who SHOP (FHH), *but not through a document* (EA, s. 64(3)).

NOTE: Where the maker is unavailable in civil proceedings, FHH is allowed. However, if the defence objects, EA, s. 135 can be used.

Unavailable - Criminal Matters: The hearsay rule does not apply to evidence of a previous representation by a person who SHOP (FHH) (*not in a document*) IF THE REPRESENTATION - EA, s. 65(2)(a) - **Was made a duty to make the representation** - For example, a duty to report for police officers or medical practitioners to report (not written).

EA, s. 65(2)(b) - **Was made shortly after the asserted fact, in circumstances making it unlikely to be a fabrication** - *Shortly after*: Means it is 'temporally restricted' (eg. dying declarations); does not need to be fresh in the memory. There is no need for common law contemporaneity, but must be made during or under proximate pressure of the event, to exclude an opportunity to concoct evidence (*Williams v R; Harris*). *Williams v R* - Williams charged with armed robbery; Mr Stewart, neighbour, alleged Mr Williams buried a rifle in his backyard; gave taped interview; died before trial. *Court: 'Shortly after' - not strictly contemporaneous, but must be shortly after* (1 or 2 hours = no longer contemporaneous; here = several days after). *Harris v R* - Wright punched in head; taken to hospital, not admitted; next day Harris gave a statement to police; died one week later. *Court: 'Shortly after' - making a statement after recovering consciousness several days after an event, but pushes boundaries. Munro v R* - years; cannot be argued as 'shortly after'. **Unlikely to be a fabrication**: Consider the likelihood of a concoction, not an honest mistake (*Munro; cf. Williams, Conway*). Look out for potential motives to life, evidence of intoxication etc, which could cloud judgment: If that is an issue, EA, s. 137 facts can be argued.

EA, s. 65(2)(c) - **Was made in circumstances making it highly probable it is reliable** - **Highly reliable**: Not 'temporally restricted', but a higher standard is required. This is a holistic assessment; person must be in a position to know, and be likely to tell the truth. *Munro v R* - Grace was describing a system of honest work, done for years, highly likely to be well-remembered; no personal interest in the subject matter (cf. *Williams*); any inclination to exaggerate likely outweighed by need to avoid prosecution for giving false information; cf. *Williams v R* - Stewart would assist in criminal activity; statements highly probable to be unreliable. *Conway v R* - Wife's statements highly probable to be unreliable, due to her drug-induced state.

EA, s. 65(2)(d) - **Was against the maker's interests, and highly likely to be reliable**. A representation is taken to be against a person's interests if it tends (a) to damage the person's *reputation*, (b) shows they have committed an offence for which they have not been convicted, or (c) shows they may be *liable to an action for damages* (EA, s. 65(7)). This section also likely include making a representation against one's *financial interests*, such as admitting to a debt.

Available - Criminal Matters: HS rule does not apply to evidence which the *maker* gives of their own representation, provided that at the time the representation was made, the occurrence of the asserted fact was **fresh in the maker's memory** (EA, s. 66(2)(a)). HS rule does not apply to evidence which the *witness* gives of the *maker's representation* if, at the time the representation was made, the occurrence of the asserted fact was **fresh in the maker's memory** (EA, s. 66(2)(b)). **'Fresh in the memory'** - there is no temporal requirement (ALRC). Although the length of time since the event is a factor (*Graham* - 6 years after alleged incidents), primary considerations are (a) the nature of the event concerned, (b) the age and health of the person, and (c) the period of time between the asserted fact and making of the representation (EA, s. 66(2A); *Clay*). However, 20 years is too long to be fresh in the memory; up to 20 years is considered fresh, provided the nature of the offending is striking, unusual and the representation is made in vivid detail (*Clay*).

3. Adduced by Accused: HS rule does not apply to an accused adducing evidence of a witness who SHOP a representation being made, or a document containing that representation (EA, s. 65(8)); *Baker*).

4. Contemporaneous Statements about a Person's Health: HS rule does not apply where the maker's statement was a **contemporaneous representation about their health/feelings/sensations** (eg. "I felt sick at the time", not "I felt I was going to be sick"; latter is not contemporaneous) **intention** (eg. *Walton* - "I'm going to meet John at the town centre"; intention is a state of mind. It is not adduced to prove the truth of the assertion, but to show a fact from which can be inferred the person carried out their intention), **knowledge** (*esoteric knowledge - Kamleh*) or **state of mind** at the time the representation was made (EA, s. 66A).

5. Business Records (extends to FHH and beyond): HS rule does not apply to a document that (a) is or was part of the records kept by a person, body or organisation **in the course of, or for the purposes of, a business** (i.e. is a record the business keeps; not a record handed over to the customer, such as a receipt) and (b) contains a **previous representation made or recorded in the document in the course, or for the purposes of, the business** (EA, s. 69(1)). **What is a 'document'?** Includes (a) anything on which there is writing, (b) anything on which there are marks, symbols, or perforations having a meaning for persons qualified to interpret them, (c) anything from which sounds, images or writing can be reproduced with or without aid of anything else, (d) a map, plan, drawing or photo (**Dictionary**). **What is a 'business'?** (a) a profession, calling, occupation, trade or undertaking, (b) any activity carried on by the Crown in any of its capacities, (c) activities carried on by the government of a foreign country, (d) public officeholders, (e) parliamentary proceedings, (f) not for profits (*Lancaster*), (g) activities engaged in or carried on by DHS, other social welfare agencies, hospitals, medical practices and kindred healthcare providers, (h) individual patient records (*Lancaster*).

Personal knowledge requirement: The HS rule does not apply to a business record document containing a representation if the representation was made (a) by a person who had or might reasonably be supposed to have **personal knowledge of the asserted fact** (FHH), or (b) on the basis of information **directly or indirectly supplied** by a person who had or might reasonably be supposed to have had personal knowledge of the fact (SHH and beyond; *Lancaster*). **'Directly or indirectly'** - not limited to FHH or SHH. As long as the nature and context of the recorded representation allows an inference to be drawn that it was given by a person with personal knowledge of the representation, it is admissible (eg. *teacher tells mother about child's behaviour; mother tells DHS employee; DHS employee evidence can still be admitted, even though it's THH, because the representation can be traced back to the teacher*) (*Lancaster*). **'Personal knowledge'** - someone must have personal knowledge of the representation (*Lithgow* - ambulance officer did not have personal knowledge of how Jackson came to be injured). However, the precise person with that knowledge need not be identified (*Lancaster*). **Representations in documents** - made by the person who wrote it, unless another person signs off on it. **NOTE:** Exception can be excluded 135/137.

Exception to business records exception - litigation: The HS exception does not apply where a document is prepared or obtained in **connection with or in contemplation of litigation**, either in civil proceedings (EA, s. 69(3)(a)), or in criminal proceedings (EA, s. 69(3)(b)).

Unreliability warning: Defence counsel may request an unreliability warning under JDA, s. 32, warning the jury that HS evidence can be unreliable, and the circumstances in which it could be unreliable (JDA, s. 31).