

Topic 5 – Police Questioning

Chapter 7 of the text book

Under Victorian law, the right of an individual to cautioned about the right to be silence and other matters is now dependant on whether or not that individual is in 'custody' or in the case of commonwealth law, 'under arrest' or classified as 'protected person' under the Crimes Act 1914 (Cth)

Definition of 'in custody'

Section 464(1) of the Crimes Act 1958 (Vic)

A person will be considered to be 'in custody' if he or she is:

- a. Under lawful arrest by warrant; or
- b. Under lawful arrest under s 459 (finds committing - police arrest) or s 458 (finds committing civilian arrest) of the Crimes Act 1958 (vic) or a provisions of any other act; or
- c. In the company of any investigating official and is:
 - i. Being questioned; or
 - ii. To be questioned; or
 - iii. Otherwise being investigated.

Definition of 'investigating official'

Section 464(2) of the Crimes Act 1958 (Vic)

"investigating official" means a police officer or a person appointed by or under an Act (other than a police officer or person who is engaged in covert investigations under the orders of a superior) whose functions or duties include functions or duties in respect of the prevention or investigation of offences.

Definition of 'custody'

Section 464(2) of the Crimes Act 1958 (Vic)

'Custody' is defined as encompassing situations in which a person is either under arrest to in the company of an investigating official who individually possess sufficient information that would justify a lawful arrest.

Detention of individuals in custody

Section 464A (1) of the Crimes Act (vic)

Every person taken into custody for an offence (whether committed in Victoria or elsewhere) must be—

- (a) released unconditionally; or
- (b) released on bail; or
- (c) brought before a bail justice or the Magistrates' Court —

Cautioning individuals

The Crimes Act 1958 (Vic), provides individuals with a number of protections and rights to peoples in 'custody'. Individuals must be apprised of these rights and protections prior to any period of police questioning or detention. These protections and rights include:

Section 464A(3) of the Crimes Act 1958 (Vic) – Right to remain silent

Section 464C of the Crimes Act 1958 (Vic) – Right to communicate with a friend or relative and/or legal practitioner

Section 464D of the Crimes Act 1958 (Vic) – Right to have a assistance of any interrupter (if required)

Section 464F of the Crimes Act 1958 (Vic) – Right to the assistant of a consular official (non-citizens or permanent residents)

Section 464E of the Crimes Act 1958 (Vic) – Right for persons under 18 years to communicate with a parent or independent person (1)(b) and to have one of these person present during the questioning or investigation (1)(a)

Section 464A(4) of the Crimes Act 1958 (Vic) – Right to be released within a reasonable period of time

Recording of Caution

Section 464G of the Crimes Act 1958 (Vic)

If a person is in custody in relation to an indictable offence, an investigating official who is required by sections 464A(3), 464C(1) and 464F(1) to give the person in custody certain information must record (by audio recording or audiovisual recording), if practicable, the giving of that information and the person's responses, if any.

Right to Silence

Section 89 of the Evidence Act 2008 (Vic)

The right of silent differs from the privilege against self-incrimination in that it applied only where the person is exercising it not under any form of legal coercion to answer questions from persons in position of authority. When this is so, a person has an unqualified right to remain completely silence without fear that an adverse inference of any type can be drawn from their silence.

(1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused—

(a) to answer one or more questions; or

(b) to respond to a representation—

put or made to the party or other person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.

(2) Evidence of that kind is not admissible if it can only be used to draw such an inference.

- (4) In this section, "inference" includes—
- (a) an inference of consciousness of guilt; or
 - (b) an inference relevant to a party's credibility.

Petty and Maiden v The Queen (1991) 173 CLR 95

Pages 213 – 214 of the text book

In the above case Manson CJ, Deane, Toohey and McHugh JJ, accepted the view that this is no meaningful distinction 'between inferring a consciousness of guilt from silence and denying credibility to a late defence or explanation by reason of earlier silence'. The also established that no adverse inference for any type may be drawn from an exercise of the right to silence.

The admissibility of confessional evidence

Confessional evidence can be made in several ways. Most commonly, it is in the form of an oral or written statement. However, a person may also make an admission by adopting a statement of another person, either expressly or by way of conduct.

In *Sinclair v The Queen* (1946) 73 CLR 316, Dean J stated that 'confessions, like other admissions out of court, are received in evidence as narrative statement made trustworthy by the improbability of the party's falsely stating what tends to expose him to penal or civil liability'.

Admissions

Section 89 of the Evidence Act 2008 (Vic) – Hearsay and opinion rules – exceptions for admission and related to representations.

- (1) The hearsay rule and the opinion rule do not apply to evidence of an admission.
- (2) The hearsay rule and the opinion rule do not apply to evidence of a previous representation—
 - (a) that was made in relation to an admission at the time the admission was made, or shortly before or after that time; and
 - (b) to which it is reasonably necessary to refer in order to understand the admission.

Note

Specific exclusionary rules relating to admissions are as follows—

- evidence of admissions that is not first-hand (section 82)
- use of admissions against third parties (section 83)
- admissions influenced by violence and certain other conduct (section 84)
- unreliable admissions of an accused (section 85)

- records of oral questioning of an accused (section 86)