Topic 7 – The Accused's Right to Silence

(1) Pre-trial right to silence – mention even if facts say 'what should D do at trial' to say that anything they did PRE-TRIAL (e.g. not answer intiail police Qs) can't be used against them

- **Right to remain silent** – **s 464J *Crimes Act***: nothing in this subdivision affects **(a)** the right of suspect to refuse to answer questions or participate in investigations except where required to do so under an Act.
- **Cautioning -** per **s 464A(3) *CA***, an investigating official must caution a person in custody before questioning (except for name and address).
    - This requires PO to inform X that they:
        - Do not have to say or do anything (silence – see above), but anything they do say/do may be given in evidence
        - Right to be released/ bail/ before court within reasonable time
        - Giving of information& responses must be recorded if practicable (**s 464G**)
- **Evidence of silence – s 89(1) *EA***: in a crim proceeding, no unfavourable inference may be drawn from evidence that party/another person failed or refuse –

  (a) to answer one or more questions; or
  (b) to respond to a representation –
  put by an investigating official in connection with the investigation of an offence.

    - If evidence can only be used for such an inference, inadmissible (**(2)**), but does not prevent use of evidence to prove failure/refusal to answer *if a fact in issue* (**(3)**).
    - NB: an inference includes inference of consciousness of guilt or re credibility (**(4)**).

- The CL case of ***Petty***; ***Maiden*** (see p. 99) provide that the Prosecution/jury can't give D's version of events at trial less weight merely because they didn't raise it pre-trial
    - E.g. D remains silent and then at trial they claim self-defence, his should not be considered any less credible than if they said it before trial
        - Quote from ***Petty***; ***Maiden*** at p.99: it could not be suggested that 'previous silence about a defence raised at the trial provides a basis for inferring that the defence is a mere invention or is [otherwise] rendered suspect or unacceptable'
    - BUT if D's version at trial differs to one given pre-trial, this may affect weight of version at trial (as was the case in ***Petty***; ***Maiden***)
        - E.g. ***Petty***; ***Maiden*** – before trial, M claimed that P committed the murder; at trial, M stated this interview was false and an attempt to make trouble for P – then admitted he killed victim but *in self-defence*; TJ directed jury that this difference could be taken into account in judging weight of ev. HELD: HC upheld TJ's directions – by abandoning his pre-trial account, HC allowed consideration of his credibility
        - Also consider issue of PRIOR INCONSISTENT STATEMENT

(2) Silence at trial

- **S 66 *Criminal Procedure Act 2009***: after close of prosecution's case, accused is entitled to:
  - **(a)** make a 'no case to answer' submission;
  - **(b)** answer charge and give/adduce evidence; or
  - **(c)** not give/adduce evidence.

Options after close of P's case (**S 66 CPA**)

D makes a 'no case to answer' submission (**s 66(a) CPA**)	A no case submission is made when the defence considers that the prosecution case does not support a finding of guilt and that the court should dismiss the charge without the defence having to present a case. A 'no case to answer' submission will be successful where the prosecution case, taken at its highest, is insufficient to support a finding of guilt. CONSIDER: • If case is weak, will giving evidence to defend only HARM their case • i.e. maintaining innocence, claiming 'no case to answer' supports this • Advisable unless there is quite damning evidence

D answers the charge (**s 66(b) CPA**) - gives evidence themselves	The accused may either give sworn evidence (or unsworn if not competent)
	
	REASONS/CONSIDERATION WHEN ADVISING D TO GIVE EVIDENCE
	• Giving evidence is better in a **word vs word** case
	  ○ NB: usually the case in **sexual offences** (yet also noting protections for complainants – see above)
	• How well will D fair in the witness box?
	  ○ Are they articulate?
	  ○ How do they deal under pressure?
	  • E.g. history of anxiety would suggest not to
	• Did D articulate their defence in a recorded interview?
	  ○ If so, no need to repeat in court (which would mean recorded interview wouldn't be played as PCS)
	  ○ ALSO NOTE – if they give evidence in court AND this contradicts what was said in recorded interview, it may be adduced as a PIS and affect their credibility
	
	As a result of giving sworn evidence, D can be XXN and cannot claim PSI re the offence charged (**s 128(10)**)
	• Consider would P be able to XXN re prior conviction of dishonesty (see **(1) CREDIBILITY** above)
	• Consider would P be able to XXN re bad character (see **(2) CHARACTER** above)
	  ○ May include prior convictions generally
	
	D may adduce good character evidence of themselves, h/e this will provide the P with grounds to adduce bad character evidence in rebuttal (**s 110**)

	• Suggest alternative of using character witnesses instead that can attest to this Even if D gives evidence, they are protected by the rules of fairness (***Browne v Dunn***; **s 41** – improper questioning; **s 137** – prejudicial evidence)

D remains silent (can be under **s 66(b) CPA** – answering with alternative evidence, OR **s 66(c) CPA** – not giving any evidence)	If D choses to remain silent, they are protected by the JDA
	
	The onus is on DC to request a **s 41(1) JDA** direction under **s 12 JS** (TJ not under obligation otherwise – **s 44(1) JDA**)
	• TJ must give directions unless good reasons not to (**s 14 JDA**), and if substantial/compelling reasons exist (**s 16 JDA**)
	• **S 41(2) JDA** provides that the TJ in giving such a direction must explain to the jury that:
	  ○ It's the P's obligation to prove D's guilt **(a)**;
	  ○ D is not required to give evidence/call a witness **(b)**;
	  ○ The jury should not speculate about what evidence not given by the accused **(c)(i)** would be; **and**
	  • ALSO not no speculation as to evidence that would have been given by a witness not called **(c)(ii)**
	  ○ The fact that D did not give evidence <u>is not</u> evidence against D **(d)(i)**, an admission **(d)(ii)**, to fill gaps in P's case **(d)(iii)**, and does not strengthen P's case **(d)(iv)**.
	
	S 42 JDA also prohibits any party in the court (TJ, P, DC, D) from making certain statements/suggestions in relation to D who doesn't give evidence or call witnesses
	• They can't suggest to jury that they may:
	  ○ **(a)** conclude D is <u>guilty</u>;
	  ○ **(b)** use failure to explain facts to justify an <u>adverse inference</u> on those facts to prove guilt (overruling problematic decision of HC in ***Weissensteiner***); or
	  ○ **(c)** draw <u>inference</u> that D did not give E/call W because that would not have assisted case
	
	S 43 – also provides that DC may request direction about P not calling or questioning witnesses (if they were reasonably expected to and didn't explain why they didn't – **ss2**)
	
	CL to the contrary (e.g. ***Weissenstein***, ***Dyers***, ***Azzopardi***) is abolished (**s 44(2) JDA**)
	• Thus there is a clear rule that the jury cannot draw adverse inferences from D's silence
	• NB: **s 70** also repeals **s 20** of the ***Evidence Act*** which previously governed silence.

Topic 8: Tendency/Coincidence Evidence

(1) Application of division and other introductory sections

- ➢ Applies to both criminal and civil proceedings.
- ✓ Effect of finding tendency / coincidence exception → **ev admissible**
  - Per **s 94(1)**, **Part 3.6** (on TCE) does not apply to evidence relating solely to credibility of witness and nor does it apply to evidence of character, reputation, conduct or tendency if a fact in issue (**s 94(3)**)
- × Effect of finding tendency / coincidence rule applies → **ev inadmissible**
  - If evidence is deemed inadmissible under this Part, it may be used for another purpose if relevant but not for tendency or coincidence reasoning (**s 95**).
    - See *res gestae* and *Jury Directions Act* section below

- ➢ If evidence is deemed inadmissible under this Part, it may be used for another purpose if relevant **but not** for tendency or coincidence reasoning (**s 95**). See *res gestae* and ***Jury Directions Act*** section below.

- ➢ **NB: Evidence Act provisions are a code – no CL principles are binding** (***Velkoski***).

Possible exam questions

- ➢ Should multiple charges be tried together? First thing to say: *In order for the charges to be tried together, they must be cross-admissible as tendency or coincidence evidence*

- ➢ If D is found guilty on one charge, is that evidence of other charges D faces?
  - Charges would have to be cross examinable as tendency or coincidence charges
- ➢ Is one charge admissible in respect of other charges?
- ➢ Can P adduce a prior conviction in examination in chief?

(1) Is it tendency or coincidence evidence? Is it both?

Tendency	Coincidence

Pattern of behaviour of SPECIFIC ASSAILANT
 	
Look for:
• Emphasis on subjective qualities
  ○ COMMON FEATURES
• Emphasis on proven facts e.g. prior conviction
• Emphasis on what is DONE
 	
PROS will use to prove that D has a tendency to behave in a certain way
	The SPECIFIC CHARGES are so similar that it therefore improbable that they occurred coincidentally
	
	Look for:
	• Emphasis on objectively improbable qualities
	  ○ SPECIAL FEATURES
	• Emphasis on unproven facts e.g. claim unproven
	• Emphasis on what the accused likes to DO
	
	PROS will use to prove that because the misconduct is so similar, it is improbable that it occurred coincidentally

IF ADDUCED → both prove that D is more likely to be guilty

1.1 The tendency rule

- *[**Prosecution**] will seek to adduce [**evidence of X**] to prove that [**accused**] has a tendency to [**tendency: e.g. sexually assault minors**] and that tendency makes it more likely s/he committed the offence now charged.*
- *[**Accused**] will argue this evidence is inadmissible per **s 97(1)**.*
- Features to look at:
  - Nature of victims
    - E.g. young women, children, middle-aged men
    - E.g. small businesses, banks
  - Nature of crime
    - E.g. murder with a knife
    - E.g. tying people up
  - Location of crime
    - Area in Melbourne
    - Specific places e.g. newsagent, casinos, 7/11, homes
  - Timing of crime
- E.g. **Sexually offend + young female tennis players + in a private/secluded area + providing them with an intoxicating substance**
- E.g. **elderly people + living alone + walking inhibitions**
- E.**g. theft** + **in Southern Melbourne**
- Even if there is ONE OUTLIER (i.e. no real similarity), identify tendency for SIMILAR ONES (ignoring outlier) *to then rule out this one later*

Notice requirements per ***Velkoski*** (*keep brief*):

- [IF NOTICE GIVEN ON FACTS]
  - *On facts, P/DC has given notice in writing that they seek to rely on [**rel evidence**] as admissible tendency evidence, therefore complying with **s 97(1)(a)**)*
- [IF NOTIVE NOT INDICATED]
  - *It is not clear whether P/DC has given notice in writing they seek to rely on [**rel evidence**] as admissible tendency evidence, however, this must be done for it to be adduced (**s 97(1)(a)**)*
- Notice may be waived by the court (**s 100**), so long as there is no prejudice (***Harker***)
  - Prejudice doesn't flow from the failure to give reasonable notice
  - LOOK FOR WHETHER:
    - 'respondent would not be in a position to meet the evidence because of the failure to give reasonable notice' (***Harker***)

1.2 The coincidence rule

- *[**Prosecution**] will seek to adduce [**evidence of X**] to prove the guilt of [**accused**] because, having regard to the similarities, it is improbable that the two events occurred coincidentally (**s 98**; ***Makin***; ***Perry***; ***CW***).*
- *[**Accused**] will argue that this evidence is inadmissible per **s 98(1)**.*
- [If unusual features]

- *Alternatively or in addition, as [**relevant events**] have such 'unusual common features', the P may lead arguments of coincidence as the witnesses' stories are so similar and unusual that they must be telling the truth – improbability of similar lies reasoning (**Boardman**; **Velkoski**; **Hoch**)*

- LOOK FOR:
  - Multiple examples of D's misconduct i.e. similar charges
    - **Unproven *but so similar***
  - SIMILAR **EVIDENCE** – whether reflects:
    - the actual offending
    - surrounding circumstances; and/or
    - the way in which the accused is alleged to have taken advantage of the setting (*PNJ*)
    - similarity between witnesses (***Hoch***; ***PNJ***)
- Even if there is ONE OUTLIER (i.e. no real similarity), identify tendency for SIMILAR ONES (ignoring outlier) *to then rule out this one later*

Notice requirements – see above. Also, do **(2)** – significant probative value.
NB: do not need to prove any events/past offences beyond reasonable doubt individually.

(2) Significant probative value?

- *As above, for the [**tendency/coincidence**] evidence to be admissible, [**prosecution**] must convince court that the evidence has significant probative value per [**s 97(1)(b)/98(1)(b)**], (abolishing the prior 'no other rational view' admissibility test from **Hoch** and **Pfennig**.*
  - Significant means important or of consequence (***Lockyer***).
  - Probative value: the extent to which evidence could rationally affect the assessment of the probability of the existence of a fact in issue (**Dictionary, Part 1**).
- Here, the touchstone of admissibility is "underlying unity", "a pattern of conduct" or sufficient similarities (no longer require 'striking') in the offending, surrounding circumstances or way in which accused took advantage of circumstances (***Velkoski***; ***PNJ***).
- *On the facts, evidence of [**X**] may have significant probative value in proving [**Fact in issue Y**] given…*

2.1 Tendency Cases

✓ CASES/FEATURES PROVING TENDENCY	× CASES/FEATURES DISPROVING TENDENCY
An assessment of probative value requires two step process (***McPhillamy***, clarifying judgment from ***Hughes***) 1) First, assessment of the extent to which the evidence supports the tendency ○ Look at the priors/other evidence ○ *The test for admissibility under **s 97(1)(b) EA** comes from **Ford**: 'the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged'.* 2) Second, assessment of the extent to which the tendency makes more likely the facts making up the charged offence ○ Compare tendency taken from priors AND apply to main offence ○ *H/e it is not necessary that the 'disputed evidence has this effect by itself. It is **sufficient if the disputed evidence together with other evidence** makes*	

*significantly more likely any facts making up the' charged offence (**Hughes**, HC at p.356 [40])*

- Consider ***Velkoski*** (how it would be decided today) – sexual interest in young children at wife's day care centre significant; differences in type of offending and gender of children
  - PER ***HUGHES***: despite difference in offending and gender of victims, 'together with other evidence' i.e. the overall sexual nature of these offences AND their occurrence at his wife's work, it makes or more likely he committed the offence charged

Fiona thinks: the test in ***McPhillamy*** was too strict and that an interest in boys should have been enough. This creates uncertainty, it is unclear what approach the courts will take on this in the future.

GENERALLY – looking for: ➢ Look for 'sufficient particularity' (***Hughes***, Kiefel CJ, Bell, Keane and Edelman JJ at p.355) ○ No necessity to show 'striking similarity' or other CL rules (their Honours in ***Hughes*** (p.347) commenting that this ***Velkoski*** approach was 'unduly restrictive') ➢ Evidence showing D acts in a particular way (***Ford***)	**GENERALLY** – looking for: ➢ Key differences NB: different charges MUST ultimately be severed (include line in conclusion)
Likeliness of offending via *modus operandi* ➢ Evidence strongly points to the actual *identity* of offender being the same e.g. Time intervals being close in time (***Pfennig***) e.g. ***Pfennig*** – MO to leave a false trail (bike on side of road + clothes folded upstream – when this was so unlikely to be the case) e.g. ***Ellis*** – NON-SEXUAL – burglary; stole case and cigarettes; **panel of glass removed to effect entry into building** ➢ HELD: so distinctive as a matter of tendency that they were all linked together e.g. Opportunistic nature of offending with young girls (***Hughes*** – once in driveway, once on set; also ***RHB***) e.g. ***Straffen*** – S put in jail for murder of young girl via strangulation, no sexual interference, no concealment; S goes to mental facility –	**No *modus operandi*** e.g. Time intervals being spread out (e.g. ***McPhillamy*** – 10 years) e.g. Merely that D is the 'type of person' that would commit a particular crime (***Hughes***) ➢ E.g. P alleges tendency to commit murder, but only evidence is that accused got aggressive or violent in both instances → does nothing more than prove they are inclined to murder AND NOTHING ELSE UNODRDINARY