Foundational Approach (acts as filter at each stage)

1. Materiality (Purpose)
    a. Is the evidence material to a live issue in the case? (s 7) (What is the live issue?)
        i. 'Material' = it will help us get towards the truth, prove an element of the offence, answer the question at issue in some way.
        ii. If evidence is directed at a live issue, it is material.
        iii. S 7(3): Anything that is of consequence to determination of the proceeding:
            1. What part of the test is this evidence going to be used for? What needs to be proved?
            2. Materiality = factual question = what is the legally material fact.
2. Relevance
    a. Does the evidence have a tendency to prove or disprove a matter of consequence to the determination of the proceeding? (s 7(3)) (Does the evidence tend to prove the live issue?)
        i. PROVISION EXPANDED
        ii. S 7(1): Presumption: All relevant evidence is admissible except if it is inadmissible under this or any other Act or is excluded under this or any other Act. (*Rebuttable presumption)*
        iii. S 7(2): Evidence that is not relevant is not admissible.
        iv. Tendency to prove or disprove:
            1. First ask: What are you trying to prove or know? Then can ask: Is this evidence relevant to what you are trying to prove or know?
            2. This is a YES or NO question to whether the evidence has any probative tendency. It is NOT an issue of weight or reliability or credibility.
        v. Anything that is of consequence to determination of the proceeding:
            1. Go up to materiality.
            2. Relevance is a logic question e.g. logic of the inference getting from this piece of evidence to that material element. What is the logical connection between evidence x and material issue y?
        vi. TEST/CONDITION
        vii. Relevance is a NECESSARY but not a SUFFICIENT condition for admissibility. Evidence has to be relevant for it to be admissible but it is possible for evidence to be relevant and still not admissible.
        viii. *Wi v R* - s 7(3) is not an exacting test. "The question is whether the evidence has some, that is any, probative tendency, not whether it has sufficient probative tendency. Evidence either has the necessary tendency or it does not."
        ix. *R v A*: relevance means evidence has some tendency in logic and common sense to advance the proposition in issue. Evidence is excluded when fails relevance test.
            1. R v Bain: COA = acknowledged different interpretations of the 111 call. SC = transcript can't include these disputed interpretations, only muffled sounds, the evidence had no probative tendency.
        x. TYPES
        xi. Direct evidence = evidence which, if true/believed, will resolve a material issue.
        xii. Circumstantial evidence = evidence which requires an inference to get to a material issue.

xiii. LOGIC

xiv. **Deductive reasoning** - This can help us separate questions about whether the premise is true (a weight question) and whether the connections between the premises make logical sense (a relevance question).

xv. Major premise + minor premise = conclusion/deduction

1. Major Premise = Background assumption or inference likely to be accepted by a reasonable person.
2. Minor Premise = evidence you want to admit.
3. Conclusion or deduction = material legal elements we want to prove or disprove.
    a. Minor premise/major premise idea: encourages us to spell out the background assumptions needed to make the logical link from the piece of evidence to the material fact looking to prove.

xvi. *Validity* = This argument has validity if all premises lead from one to another in a logical way. But if we don't know the truth of the premises, we are less sure that the conclusion is true.

1. Example: All men are human (MAJ P) + Socrates is a man (MIN P) = Socrates is human. But what if Socrates was a cat, not a man. Then the minor premise is not true and the conclusion is incorrect.
2. If an argument has validity, it will be relevant.

xvii. *Soundness* = A valid argument with all true premises (and therefore a true conclusion).

1. A valid argument structure is only as good as the truth it inputs.
2. If an argument is sound, this means it is not only relevant but also admissible / passes the weight test.

xviii. There is a distinction between having a logical tendency to disprove or prove a fact (relevance) and the evidence being considered being true (weight).

1. Note: Remember that evidence is still relevant if it could prove or disprove an issue in the proceeding, even if the evidence is not very credible/not true. IF IT IS TRUE, WOULD IT HELP US SOLVE THE ISSUE? Is the question for relevance.
2. Ultimate goal = have soundness e.g. logic + true premises for a strong argument.

xix. *R v Alletson (2009) (CA)* - example of evidence that is not relevant.

1. Facts
    a. Sexual assault of young girls by Anglican minister.
    b. Evidence question: Can they admit evidence of the minister's good character evidence of his religiosity and the respect the authorities have for him.
2. Held
    a. Is the evidence material to a live issue in the case?
        i. Could argue that the good character evidence suggests he is less likely to assault young girls or that this is a false or mistaken complaint.
        ii. But using logic, this is a dubious assumption or premise.

1. People who are pious don't sexually assault children. (Background assumption)
2. Anglican man is a pious man.
3. Therefore, Anglican man did not sexually assault children.

iii. Firstly, it is well known that pious people with good character, particularly in the church, can sexually assault children. But, using logic, if we look at this on the flip side - this background assumption makes even less sense.

xx. Inductive reasoning - Use information we have to make a prediction based on generalisations or probability. Allows for the possibility that the conclusion could be false even if the premises are all true. E.g. Because the sun has risen everyday of my life, tomorrow it will rise.

1. Can use inductive reasoning in a similar way to spell out how a background assumption is required to link a piece of evidence to a material fact we are trying to prove logically.
2. Alleston example: No one has met a religious person who has sexually assaulted a child (background assumption), this person is religious, so unlikely that they have sexually assaulted a child. = Weak background assumption.

3. Does an exclusionary rule apply?

a. <u>Privilege</u> [Trigger: where there is a confidential statement or communication made in the context of a confidential or special relationship].

i. General

1. Section 53: if we find there is a privilege, this means there is the right to refuse to disclose that information or information contained within it or opinions based on it.

ii. Step One: Statutory Class Privilege

1. Legal Professional Privilege (Statutory class privilege) [Trigger: where there is a lawyer receiving/giving information or communications in preparing for proceedings]

a. Why do we have this? This exclusion is required because we want to protect client/solicitor confidentiality relationships. It is at the heart of the legal system that lawyers can give access to sites of justice through the legal system and clients should get free and frank counsel from their lawyers.

b. Section 54: Legal Privilege

i. (1) any <u>communication</u> between client and legal adviser that is <u>intended to be confidential</u> and <u>made in the course of or for the purpose of requesting legal services</u>.

ii. (1A) <u>Privilege applies to a request of services</u>, even if a person does not actually obtain such services (e.g. initial consultation = privileged).

c. Section 56: Litigation Privilege

i. (1) communications or documents that are prepared, made, received or compiled for legal proceedings or anticipated proceedings are privileged.
ii. (2) A person who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of: (a) communications between them and any other person, (b) their lawyer and any other person, (c) information compiled/prepared by party or lawyer or (d) at request of the party/lawyer/other person.
    1. Broader than s 54 which only privileges lawyer/client communication.

d. TEST

i. Was there communication between a client and legal adviser?
    1. Communication = oral/spoken or document e.g. memo, advice, doc prepared for other lawyer, client has given to lawyer.
    2. Lawyer must be acting in capacity as a lawyer.
ii. Was communication intended to be confidential or was it a less formal setting?
iii. Legal: Was communication made in the course of requesting legal services, even if the person did not end up obtaining services?
iv. Litigation: was communication made/prepared for legal proceedings between the people in s 56(2)?

2. **Ministers of religion** (Statutory class privilege) [Trigger: where there is communication to a spiritual leader acting in role as spiritual leader]
    a. Section 58: Privilege for communications with ministers of religion
        i. (1) A person has a privilege in respect of any communication between that person and a minister of religion if the communication was— (a) made in confidence to or by the minister in the minister's capacity as a minister of religion; and (b) made for the purpose of the person obtaining or receiving from the minister religious or spiritual advice, benefit, or comfort.
        ii. (2) A person is a minister of religion if the person has a status within a church or other religious or spiritual community that requires or calls for that person— (a) to receive confidential communications of the kind described in subsection (1); and (b) to respond with religious or spiritual advice, benefit, or comfort.
    b. **TEST**
        i. Has the communication been made in confidence with expectation of privacy? (58(1)(a) and (2)(a))
        ii. Was the person receiving the communication a minister of religion? (58(2))

1. Minister of religion = a person who has status within a religious/spiritual community to receive confidential communications and respond with spiritual advice etc. Pastoral care role that people would recognise.

iii. Was the communication for guidance, advice, benefit or comfort that has a spiritual dimension? (Purpose) (58(1)(b)).

iv. Was the minister acting in the minister's capacity as a minister of religion when receiving the communication? (58(1)(a))

1. Not enough if they just happen to be a priest.

3. **Medical Practitioners/Clinical Psychologists** (Statutory class privilege) [Trigger: communication to medical practitioner or psychologist, it is a criminal case, the communication is re drug dependency or condition that is likely to lead to criminal offending].

a. Policy: We want to encourage people to receive treatment and get help. They may be discouraged if their consultation could be used against them.

b. Section 59: Privilege for information obtained by medical practitioners

i. (1)(a) applies to a person who consults or is examined by a medical practitioner or a clinical psychologist for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct;

ii. (1)(b) does not apply in the case of a person who has been required by an order of a Judge, or by other lawful authority, to submit himself or herself to the medical practitioner or clinical psychologist for any examination, test, or for any other purpose.

c. TEST

i. Did the person consult with a medical practitioner or clinical psychologist?

1. Clinical psychologist = registered with the Psychologists Board with qualifications and they are permitted to diagnose people suffering from mental and emotional problems. (s59(6))
2. Medical practitioner = a person who is, or is deemed to be, registered with an authority as a practitioner of a particular health profession (eg Medicine; Midwifery; nursing) (s 5 Health Practitioners Competence Assurance Act 2003)

ii. Is the issue of privilege arising in a criminal proceeding?

1. There is no medical privilege if it is a civil proceeding.

iii. Was the consultation in relation to drug dependency or any other condition or behaviour that may manifest itself in criminal conduct?

1. Drug dependency = period and chronic intoxication detrimental to the user and involving a compulsive

desire to continue consuming the drug (s 59(6) and s 2(1) Misuse of Drugs Act 1975)

2. Condition that may manifest itself in criminal conduct = clinically recognised disorders that have a clear link to offending. This could be a defined disorder e.g. paedophilia, pyromania, kleptomania etc OR it could be something that may not have a precise name for disorder but there is something psychologically going on.
    a. *R v Reid* TEST: 1) What seems to be the nature of the disorder? 2) Is there a reasonably clear link between the disorder and some crime?
    b. [In this case, expressing the general desire to kill and rape = condition that may manifest itself in criminal conduct].
    c. Be careful to note where we may be pathologizing to assume that someone has a medical condition.

iv. Was this consultation voluntary? (s 59(1)(b))
    1. If consultation was because of order by Judge or other lawful authority, privilege does not apply.

v. Is the communication one that the person (ie patient) believes is necessary to enable med practitioner/clinical psych to examine/treat/care for them re the drug dependency/medical condition/behaviour (59(2)), information obtained by MP/CP as a result of consulting with/examining patient to enable MP/CP to treat/examince/care for person (59(3)) or prescriptions (59(4)) prescriptions?

iii. STEP TWO: Case-by-case privilege

1. S 69: Overriding discretion as to confidential information [Trigger: no need for special relationship, if status based do not apply but it seems like for policy reasons it might be worth protecting the communication at the expense of the truth interest.]
    a. (1) Judge can make a direction that (a) a confidential communication, (b) any confidential information, and/or (c) any information that would or might reveal a confidential source of information may not be disclosed in a proceeding.
    b. (2) A Judge may give a direction if they consider that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in—
        i. (a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
        ii. (b) preventing harm to (i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or (ii)

relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or

iii. (c) maintaining activities that contribute to or rely on the free flow of information.

c. (3) Factors Judge must have regard to:
   i. (a) the likely extent of harm that may result from the disclosure of the communication or information;
   ii. (b) the nature of the communication or information and its likely importance in the proceeding;
      1. High truth interest v affect on proceeding vs affect on person/relationship/activity.
   iii. (c) the nature of the proceeding;
   iv. (d) the availability or possible availability of other means of obtaining evidence of the communication or information;
   v. (e)the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given;
      1. Closed court? Only certain part disclosed?
   vi. (f) the sensitivity of the evidence, having regard to— (i) the time that has elapsed since the communication was made or the information was compiled or prepared; and (ii) the extent to which the information has already been disclosed to other persons;
   vii. (g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.
d. (4) The Judge may have regard to any other matters that the Judge considers relevant.

2. TEST

a. Is the communication confidential?
b. What interest are we protecting here?
   i. A person who was involved in confidential communication or a person who is subject to communication.
   ii. A relationship who made the confidential communication
      1. Particular relationship = Does the nature of the specific relationship mean disclosure would cause harm to their relationship?
      2. A class of relationship: Does the nature of this kind of relationship e.g. marriage mean disclosure would cause harm to these types of relationships/fail to protect them/undermine this relationship or have other adverse effects?
   iii. An activity that might be bad to curtail information sharing?
c. Does the public interest of disclosure of the communication outweigh this interest/s identified?
   i. Weigh up using s 69(3) factors + any other matters the Judge regards as relevant (69(4)).
   ii. (Example of s 6 balancing truth interest).

iv. **STEP THREE: Waiver of privilege or disallowance of privilege**

1. Section 65: Waiver of Privilege
    a. (1) The person who holds the privilege, or anyone with authority of that person, can expressly or impliedly waive this privilege.
    b. (2) Impliedly waive privilege = person holding privilege voluntarily produces or discloses, or consents to production or disclosure of, any significant part of the privileged communication etc. in circ. that are inconsistent with claim of confidentiality.
        i. If a client shared a significant part of the communication in still relatively confidential circumstances this would not be inconsistent with claim of confidentiality.
    c. (3) Impliedly waive privilege = person holding privilege puts privileged communication in issue in a proceeding.
    d. (4) Person with a privilege doesn't waive it if they disclose the document/information etc involuntarily, mistakenly, or without consent.
2. **TEST**
    a. Is the person you did the potential waiver the holder of privilege or someone with authority of that person? (65 (1))
    b. Did the person expressly say they wanted privilege to be waived? (65(1))
    c. Did the person impliedly waive privilege? (65(1))
        i. Was disclosure voluntary? (Not a mistake or without consent) (65(2) + (4))
        ii. Was information produced/disclosed a significant part of the privileged communication? (65(2))
        iii. Was disclosure in such circumstances inconsistent with the claim of confidentiality? (65(2))
            1. It will be inconsistent if put at issue in a proceeding. (65(3))
3. Section 67: Power of Judge to disallow privilege
    a. (1) Judge can disallow privilege if satisfied there is a prima facie case that communication was made etc. for a dishonest purpose, or to commit/plan what the privilege holder knew/ought to have known was an offence.
        i. Dishonest or criminal purpose = "fraud" "sham" or "trickery"
        ii. Undercuts policy rationale about furtherance of justice between clients/lawyers if communication etc. was dishonest.
    b. (2) Judge may disallow privilege if of opinion that evidence of the communication/information is necessary to allow criminal defendant to present an effective defence.
        i. Balancing power of state vs individual.
    c. (3) Any communication or info disclosed as a result of a disallowance under subsection (2) is only waived in regards to that criminal defendant and cannot be used against the holder of the privilege in a different proceeding in NZ.

v. **Privilege against self-incrimination**

1. Evidential aspect = What does it mean to give this right to silence in terms of inferences we draw from this silence as evidence?
    a. Reasons why a person might stay silent: they know it's safer to stay quiet because your words can be used against you, person may not have resources to communicate clearly, they might not present well in court, might not be confident speaking in formal settings, might be worried about prejudice because of race, class, way they speak, once you make a choice to give evidence the prosecution can raise issues like previous convictions, evidence of lack of honesty and veracity when they normally couldn't.
2. Section 60: Right to Privilege against self-incrimination
    a. (1)Someone has the right to privilege against self-incrimination where:
        i. (a) the person would otherwise be required to provide specific information. Either (i) in the course of a proceeding or (ii) by a Police officer for an investigation into a criminal offence; AND
        ii. (b) the information would, if so provided, be likely to incriminate the person under New Zealand law for an offence punishable by a fine or imprisonment.
    b. (2) When a person has privilege against self-incrimination, the person:
        i. (a) cannot be required to provide it; and
        ii. (b) cannot be prosecuted or penalised for refusing or failing to provide the information, whether or not the person claimed the privilege when the person refused or failed to provide the information.
3. Section 32: Fact-Finder not entitled to infer guilt from df's silence before trial
[Trigger: where a person does not provide information pre-trial and prosecution tries to draw inferences from silence pre-trial.]
    a. (1) Where, before trial, the defendant
        i. (a) fails to answer question /respond to statement during investigation or
        ii. (b) fails to disclose a defence
            1. *McNaughton v R*: pre-arranged fight between two groups, C produced a shotgun, MCN took gun off C to get gun out of the fight, Minto advanced at MCN, MCN shoots Minto who dies. MCN found guilty of murder of Minto at trial. He appeals conviction on basis that prosecution used the fact that MCN had never raised a self-defence argument when talking to police before trial to strongly infer that MCN's self-defence story was a lie - breach of s 32.
            2. Issue: 1) Does right to silence have to be absolute and if you speak you have waived this right? 2) Can the crown never mention inconsistency between defendants earlier and later stories? 3) Did the pros. breach s 32?

3. Held: 1) We should take a wide reading of s 32. You have a right to remain silent on particular matters, the right is subject specific. 2) Adopts *Smith*, there is a distinction between challenging a def's veracity and saying that because there is silence = def is guilty, despite *E v R* skepticism that this difference is purely semantic. 3) It is okay to have a theory that MCN is lying because the fact that he did not mention it before is tied to his credibility, but the prosecutor hammered on it in a dominant and repetitive way that created a real risk that the jury would draw inference of MCN's guilt from his silence. Also, the Judge did not give direction to the jury to not make this inference. There was a breach.
    a. If prosecution raises silence as an issue, they have to be careful to not take it too far, not make it emotive and don't make it the basis for the whole theory.
    b. If it is raised, the judge should issue directions or warnings.

b. (2) The prosecution
    i. (a) can't invite the fact-finder to draw inference that df is guilty from the silence and/or
    ii. (b) Jury trial: judge must direct jury not to make that kind of inference.
        1. It may be appropriate if there is a risk the jury will draw inference of guilt from defendant's silence.

4. Section 33: Restriction on comment on defendant's right to silence at trial

[Trigger: where a person does not provide information at trial but we may expect them to because they are attacking another person's credibility, might seem appropriate for jury to consider silence.]

a. In Criminal trial
b. No one except defendant, df counsel or judge
    i. Prosecutors and counsel for co-defendants can't comment.
    ii. When would it be appropriate for a judge to comment?
        1. *R v McCrae*: Nanny/partner of husband told ex-wife that ex-husband had spent money that went into account for child support. Husband argued Nanny took money and he challenged the credibility of the nanny and ex-wife. Appeal because the Judge made a comment in trial that Jury could take into account that the defendant did not give evidence.
        2. Held: Df allowed to cross-examine complainant as to credibility, in circs in which df could be expected to give evidence. It was fine for the Judge to make this

comment like “you may take into account that the defendant did not give evidence.”

a. When an accused relies on an exculpatory statement, it gives the suggestion that someone else is responsible, but they give no evidence to back it up.

b. Accused puts factual allegations to crown witnesses and those allegations are not accepted by those witnesses.

c. In such a situation, it is reasonable to expect to hear from the defendant to assess his credibility. It looks hypocritical/cowardly to question others credibility and not provide your own testimony to back them up.

d. Jury will draw this inference anyway so it is good to have some direction/guidance from the Judge.

c. may comment on the fact that df did not give evidence at their own trial.

i. Is this undermining the defendant's right to silence by giving them a penalty for exercising their right to silence?

b. Improperly obtained evidence

i. Reasons why a person might make a statement: If police are bullying a person someone might admit something so the harassment would end, especially if the person is vulnerable, tired, get confused or thinks maybe they did do it.

ii. Section 27: Defendants Statements

1. (1) Defendant statements = Evidence offered by the prosecution in a criminal proceeding of a statement made by a defendant admissible against that defendant.

a. Section 4: Statement = (a) a spoken or written assertion; or (b) Non-verbal conduct intended as an assertion of any matter.

b. Out of court statement =

i. statements to police/police interviews

ii. Testimony of accused at previous trial

iii. Responses to allegations made by non-police

iv. Cellmate confessions/disclosures

v. 111 calls (eg R v Bain)

vi. Statements that contain lies

1. The Crown case might use this to argue that the defendant is lying and that they have no repentance. You can use a statement to show that it is not true.

vii. Statements that are not hearsay (ie not offered for truth purpose)

2. (2) However, a defendant's statement is not admissible against that defendant if it is excluded under section 28, 29, or 30.

iii. Section 30: Improperly obtained evidence

1. (1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer evidence if—
    a. (a) the defendant against whom the evidence is offered raises, on the basis of an evidential foundation, the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue; or
    b. (b) the Judge raises the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue.
2. (2) The Judge must (a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and (b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice.
    a. (5) evidence is improperly obtained if it is obtained:
        i. (a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or
        ii. (b) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or
        iii. (c) unfairly.
3. (3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:
    a. (a) the **importance** of any **right** breached by the impropriety and the **seriousness** of the intrusion on it:
    b. (b) the **nature of the impropriety**, in particular, whether it was deliberate, reckless, or done in bad faith:
        i. Not quite as improper if police were negligent in creating that impression that they had to make the statement/did not have a right to remain silent.
    c. (c) the **nature** and **quality** of the improperly obtained evidence
        i. Useful/good evidence = should be admitted.
    d. (d) the **seriousness of the offence** with which the defendant is charged:
    e. (e) whether there were any **other investigatory techniques** not involving any breach of the rights that were known to be available but were not used:
        i. Easy alternatives? They could easily just caution the defendant.
    f. (f) whether there are **alternative remedies** to exclusion of the evidence that can adequately provide redress to the defendant:
        i. Could we include the evidence and the judge cautions the jury?
        ii. Could there be exclusions/censorship to the evidence?
    g. (g) whether the impropriety was **necessary** to avoid apprehended physical danger to the Police or others:
    h. (h) whether there was any **urgency** in obtaining the improperly obtained evidence.
        i. Last two give leeway to police in difficult situations if they were just trying their best/acting in good faith.
4. (4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.

iv. TEST

1. Is there a statement, either a spoken or written assertion, or non-verbal conduct intending an assertion? (s 27)
    a. Is it made by the defendant?
    b. Is it in some way against the defendants interests or may be useful for prosecution's case?
2. Presumption is that the defendant statement will be admissible.
3. Is there an exception to this rule under s 30/should the defendant's statement be admissible under s 30?
    a. Defendant or Judge has to make s 30 a live issue (evidential burden) (30(1)(a) +(b))
    b. Two-stage test for Judge to exclude/admit df statement offered by prosecution:
    c. **Step 1:** Judge determines, on BoPs, whether or not evidence was improperly obtained (s 30(2)(a))
        i. Improperly obtained evidence = if it is obtained **unfairly.** (30(5)(c).
        ii. 2007 Practice Note by Sian Elias
            1. (1) Investigating police: may ask questions of anyone who it is thought may have useful info e.g suspects & non-suspects **but they must <u>not</u> suggest it's compulsory to answer**
                a. <u>*R v PK* (2012)(HC):</u> don't have overtly say "it's compulsory that you answer". It's enough that this is the effect of what you said to the defendant.
                b. <u>*Wichman* (2016)(SC):</u> para 50: doesn't just apply when suggestion of *legal* obligation to answer. But if told don't have to answer, and free to leave at any time, that's a great way to comply with (1).
            2. (2) When Police have sufficient evidence to charge a person with an offence OR when seeking to question a person in custody, **the person must be <u>cautioned</u> before being invited to make a statement or answer questions.**
                a. Person has right to remain silent and refrain from making a statement
                b. Person has right to consult and instruct lawyer before deciding whether to answer questions
                c. That anything person says will be recorded and may be given in evidence
                    i. Without delay
                    ii. In private
                    iii. Right to free lawyer under Police Detention Assistance Scheme
            3. (3) **Questions of a person in custody/or of whom is sufficient evidence to charge must <u>not</u> amount to <u>cross-examination</u>**

a. *Hannigan* (2013) (SC): means more than what we talked about in module 3 re questioning a trial – ie more than leading questions/ challenging.
b. *Chetty* (2016)(SC): "the police are not inquisitors and must not act as such. Questioning which is, in the circs, aggressive, intimidatory, unnecessarily persistent or otherwise designed to wear a suspect down is likely to cross the boundary of what is permissible."[at para 27]

4. (4) **When questions about statements from others or other evidence, substance must be fairly explained.**
   a. *Chetty*: "obligation of the police… to put the complainant's version of events to the suspect" and to give "a fair explanation of the nature of the complainant's evidence." [at paras 27 and 30]
   b. They have to be accurate, they can't lie about statements made by others, particularly where it is a he said/she said issue.
5. (5) **Preferably, should video record statements** (by person in custody, or of whom there is sufficient evidence to charge)
   a. unless impracticable
   b. unless person declines to be video recorded
   c. If not video, must be recorded permanently on audio tape or in writing.
   d. Person making statement must have opportunity to review tape/written statement + correct errors/add info
   e. If written statement, ask if wishes to confirm statement by signing.

d. **Step 2:** If yes, Judge determines whether or not exclusion of the evidence is proportionate to the impropriety. (s 30(2)(b))
   i. Judge must:
      1. give appropriate weight to impropriety/unfairness and
      2. take account of the need for an effective and credible system of justice.
         a. This could be true confession, but there's something dodgy about the process that means it's better not to admit (even if results in an acquittal) bc it's a bad look for police to behave in this way
         b. Would it be bad for the effectiveness/credibility of our justice system if we let this evidence be admitted because it would look bad/have ramifications for future actions of police. Excluding = punish police/dissuade them from using those tactics again.
      3. Weigh up s 30(3) factors (above).
         a. What is a breach?
         b. How serious is breach?
         c. What are the implications of the breach?

d. What are the implications of not admitting it?
e. If exclusion is proportionate to impropriety, Judge must exclude (s 30(4)).

4. S 8 Exclusion (General Exclusion)
    a. The final filter where evidence that is material and relevant may be found to not be admissible.
    b. S 8 (1) = Probative value > prejudicial effect. Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding.
        i. Probative value = weight.
        ii. Prejudicial effect = risk of prejudicing the fact finder in some way so to give the evidence more weight than it deserves.
        iii. Needlessly prolong proceeding = The evidence does fulfill it's goal as evidence as outlined in s 6.
            1. Section 6: Purpose
            2. S 6(1)(a) - Provide for facts to be established by application of logical rules = TRUTH INTEREST.
                a. Other interests are often at tension with this interest.
            3. S 6(1)(b) - provide rules of evidence that recognise the importance of NZBORA rights.
                a. Even if evidence is weighty, if it was unfairly obtained it cannot be used e.g. illegal searches.
            4. S 6(1)(c) - promote fairness to parties and witnesses.
                a. Particularly fairness of defendants in criminal trials because of the power imbalance. Prosecution has to prove evidence BRD.
            5. S 6(1)(d) - protect rights of confidentiality and other important public interests.
                a. Don't want to brutalise witness because they have to give evidence in front of their attacker. Tweak requirements for humane and policy reasons.
            6. S 6(1)(e) - avoid unjustifiable expense and delay.
                a. Even if evidence is relevant if it is tricky to obtain because it is time consuming to put together or expensive then the evidence may not be worth it. Pragmatic consideration.
            7. S 6(1)(f) - Enhance access to the law of evidence.
                a. Makes these rules easy to understand and access.
    c. S 8(2) = In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.
        i. This ensures that the crown is sticking to the rule of s 1, they will be particularly careful with crown evidence because of the imbalance of power / BORA rights etc.
    d. Approach
        i. QUESTION 1: How useful is the evidence? Does probative value outweigh prejudicial effect or outweigh how it prolongs the proceeding?
            1. Factors to work out probative value
                a. Go to witness credibility. Trustworthy? Young? Old? Ill health?

b. Proximity defence - Are there any external factors that might make this evidence incorrect? E.g. if there is an eye witness, how clearly could they see because of distance, lighting, things obstructing their view.
c. Body language or the way they speak. Confident? Emotional?
d. How good is expert evidence?
e. Type of evidence - how relevant is this evidence to the overall issue e.g. blood splatter
f. Admissions and confessions have high probative value but are not indisputable (under pressure, someone who is susceptible might make a false confession)
g. What is the logical inference from the evidence to the material fact we are trying to prove? Is it very uncontroversial or clearly true or is it weaker? (Deductive/inductive reasoning)
    i. Heuristics (enabling someone to learn or discover something themselves) is useful but human's make mistakes and can be biased. Problem if heuristic is used from one context in a different context.

2. Examples of prejudicial effect
    a. Most evidence will have a prejudicial effect. The question is not - Is it prejudicial? BUT - Is it prejudicial so that it will be illegitimate?
    b. Weatherston
        i. Facts
            1. Photographs showed stab wounds over 200 times. Argued that if the jury was shown these photos they would be unfairly biased against the defendant because they are so disturbed by the photos.
        ii. Held
            1. Judge said the photos would incite an emotional reaction in the jury because they are so distressing. So there could be an issue that the jury would gloss over the details of the case.
            2. But depends on <u>the argument the defence is running.</u> The defence is arguing that the defendant was out of control, acting frenzied. This photo evidence relates to or is part of the defendants arguments, so introducing it isn't prejudicial on the defence since they indicate this to the jury themselves.
            3. Judge held the evidence was admissible because while there is some prejudicial effect in admitting the evidence it is not illegitimate because it is in the defences argument and the judge could manage to use of the evidence by presenting it to the jury in a way that didn't give the photos too much weight.
    c. Judge's role: If there is a risk of prejudicial effect, this can be overcome by the Judge giving the jury a warning or direction on how to look at evidence.

d. Previous convictions - generally are prejudicial because it undermines the presumption of innocence. Don't want to essentially retry people for the past offences just because it is relevant to the offence. Using logic, we also don't want to use the background assumption that just because you have offended before you will offend again because on the flip side that suggests that because someone hasn't offended before they didn't offend in this scenario (which is often not true).
e. *R v R*
    i. Facts
        1. Domestic violence case. Being tried for physical/sexual violence but there is also evidence of coercive control.
    ii. Issue
        1. Should the evidence of coercive control have been admitted at trial? Does it have probative value?
    iii. Held
        1. The evidence of his coercive control was not relevant to whether he had done the charged offences. It painted him as a monster, inhumane - so quite intense.
        2. COA finds that the fact finder at trial did a good job of balancing the evidence. There were some convictions but also some acquittals on the charges. This suggests that the evidence of coercive control did not make them blindly prejudice the defendant so the evidence was fine to be admitted.

3. Examples of needlessly prolonging proceedings.
    a. Partial exception: If the exclusionary rule you looked at under step 3 already had a similar balancing exercise to the one under s 8.
        i. Example: *Mohammed* - they had already discussed whether they should evidence of early conduct (death of a child) to show propensity to cause this kind of harm under a propensity section under step 3.
    b. Efficiency consideration - do not want to waste court time.

ii. QUESTION 2: Take account of the defendant's right to offer an effective defence.
1. In practice, more lenient on defence than on crown.