

Concepts

A. Legal Burden of Proof

- **Criminal law:** prosecution bears onus of proving guilt of the accused (*Woolmington v DPP*)
- **Civil:** whoever makes the assertion must prove it (generally in their pleadings)

B. Evidential Burden of Proof

- The burden a party must meet to demonstrate to the Court that an allegation / assertion / defence has sufficient foundation for evidence to be taken on that particular issue. (usually for defence)
- *The Queen v Khazaal* [2012] HCA 26 **failed to meet evidential burden of proof**
 - Mr Khazaal accused of making a document connected with terrorist attack (ebook). He claimed it was educative tool. HCA held that evidence relied on was not inconsistent with the alleged purpose of facilitating violence and that **there was insufficient evidence to support his contentions (defence)**.
 - Basically he failed to meet the Evidentiary Burden of Proof that was placed on him

C. Standards of Proof

- **Criminal cases:** Prosecution must prove accused's guilt '**beyond reasonable doubt**'. (s141 EA)
 - Longstanding authority that, except in limited circumstances, **no attempt should be made to explain or embellish meaning of "beyond reasonable doubt"** *Green v The Queen* (1971)
 - No requirement for each piece of circumstantial evidence to be proved beyond reasonable doubt – **evidence as a whole considered** → (unless the circumstantial fact is so fundamental to the reasoning process. : see *Shepherd v The Queen* (1990))
- **Civil cases:** party seeking to prove an allegation contained in their pleadings convince the Court that '**on the balance of probabilities**' – ie **more likely than not**. (s140 EA)
 - The strength of **evidence necessary to satisfy the civil standard will vary depending on the gravity of the allegations** and the consequences for a party of its outcome.
 - *Briginshaw v Briginshaw* (1938) 60 CLR 336 – this case involved a petition for divorce based on adultery. Adultery was not a crime (although it was characterised as quasi-criminal behaviour) but a presumption of innocence applied.
 - *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 – this case involved deceit over the worth of a business and the subsequent rescission of a contract.

D. No Proof Required: Judicial notice

There are certain things that the law has decided do not need to be proven.

1. **Common Knowledge** (notorious facts) **s144EA** - Where court thinks something is common knowledge, evidence not required to be adduced about it - take judicial notice of that fact
2. **Common Sense** -Judicial notice can also apply to matters of common sense
 - EG court took judicial notice of fact drugs are heavier when they are wet than when dry
 - *Australian Communist Party v Commonwealth* (1951) HCA held no evidence needed to be called to prove what political and economic principles Marx and Lenin stood for. The court also took judicial notice of certain events in the history of communism.

ALL PROBLEM QUESTIONS: Admissibility – 3 Stage Process

1. **Relevant / Not Relevant ?** if relevant:
2. **Are there any Exclusionary Rules that apply ?** If no:
3. **Should the Trial Judge use Discretion to exclude the evidence ?**

1. Is the Evidence Relevant?

EVERY QUESTION POSED TO YOU IN EXAM – First sentence must state WHY it satisfies s 55 → You must show **logical or rational connection between evidence and fact we need to prove**

- EG: proving a conversation happened between A and B
- EG: proving what was said in the conversation between A and B (or both)

Process:

1. **WHEN IS IT RELEVANT** - Section 55 – can the evidence rationally affect the assessment of the probability of the existence of a fact in issue?
 - Not taken to be irrelevant only because it relates to credibility of witness, admissibility of other evidence or failure to adduce evidence
 - Told to mention: Papakosmos; Smith; Evans in exam
2. **RELEVANT EVIDENCE ADMISSIBLE** - Section 56

1. Section 55: Relevant Evidence

SECT 55 EA:

- (1) The evidence that is relevant in a proceeding is evidence that, **if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.**
- (2) In particular, **evidence is not taken to be irrelevant** only because it relates only to:
 - (a) The **credibility of a witness**, or
 - EG if witness has previously lied in a case
 - (b) The **admissibility of other evidence**, or
 - (c) A **failure to adduce evidence**.

If the material we're looking is relevant to help us assess a fact we need to decide on (something happened/didn't happen) → if that material can help us in that process, then it is relevant)

How Do We Do This?

- The key rationale of s.55 is that there needs to be a logical or rational connection between the evidence and the facts to be proven.
 - *In order to establish relevance, it is necessary to point to a process of reasoning by which the information in question could affect the jury's assessment of probability of the fact in issue at the trial (Washer v WA 2007**)*
- This can be to prove
 - That something was said (ie a conversation took place between A and B)
 - What was said (the contents of the conversation)

A Evidence can be relevant for more than one purpose

- **Papakosmas v The Queen (1999)** Papa convicted of sexually assaulting colleague at office xmas party (Issue: consent) Complainant argued P forced her in a room away from party.
 - Evidence: Victim and 3 witnesses gave evidence of her immediate complaints
 - Witness 1: saw C crying and asked her what was wrong. C said P had raped her
 - Witness 2: C was taken outside to a table (by W1) where she repeated to W2 that P had raped her. She was crying, holding head in hands & distressed
 - Witness 3: C also told her; was crying uncontrollably and extr distressed
 - Issue: **was this evidence relevant and for what purpose?**

Held: Relevant for two purposes:

1. **Relevant to proving facts asserted** by the complainant (that she had not consented).

2. **Relevant to support her credibility as a witness** (telling people straight after incident, no time to make it up)

B. Evidence is Not Relevant where Jury is in same position to make assessment

*******Smith v The Queen (2001)*******

- Smith was suspect in two bank robberies. Fact robbery had taken place was not in issue.
- Bank security cameras had taken photographs showing what happened: prosecution's case was that it was Smith in these photos (near ATM apparently keeping lookout)
- **Question for determination by Jury: was Smith the person represented in the photograph?** The police knew Smith and identified him as the person in the photographs.
- **HELD:** because police were not eyewitnesses they were in no better position than the jury to look at the pictures. **There was nothing about police evidence that would rationally help a juror in making their own assessment of whether the person in the photograph is the accused or not** → **evidence not relevant to understand a fact or issue**
- **Kirby J** (dissenting)**: police officers were in a better position as they had seen him in variety of situations. Jurors had merely seen D immobile before them in court

C. Requirement of Relevance for Views and Demonstrations

Evans v The Queen [2007] HCA: Evans was on trial for armed robbery. Security cameras took pictures at intervals but were not clear. Robber wearing a balaclava, sunglasses and overalls, and said certain words during the robbery. During trial Prosecutor made Evans put on balaclava, sunglasses, overalls, walk around in front of the jury, & say the words that the robber had said during the robbery.

- **Issue: Was it relevant for the jury to see the defendant dressed up like that, walking around like that, and saying those words? Could it help in assessing in a fact or issue?**
- **HCA: Gummow and Hayne JJ:** not relevant here as it gave no assistance to the jury in determining whether he was the person seen by the witnesses
 - Dressing the appellant in the items provided no information to the jury that could rationally affect, directly or indirectly, the determination of any fact in issue because it revealed nothing about the wearer and nothing about the appellant that was not already apparent to the jury observing him in the dock.
- Kirby J: relevance threshold is broad and should not be used to artificially exclude evidence (ie let it in then exclude it for other reasons)
- Heydon (Crennan agreed): **evidence was relevant but did not prove the whole case against Evans.** Showing a resemblance would assist the juror.
 - Also said that, if the evidence showed that Evans *didn't* resemble the offender, it would also have been relevant for excluding the Evans as the offender.

2. Relevant Evidence is Admissible s56

EVIDENCE ACT 1995 - SECT 56 Relevant evidence to be admissible

- (1) Except as otherwise provided by this Act, **evidence that is relevant in a proceeding is admissible in the proceeding.**
- (2) Evidence that is not relevant in the proceeding is not admissible.

Step 2: Is the Evidence Excluded?

- Confidentiality
- Witnesses
- Credibility
- Hearsay, Non-Hearsay and Admissions
- Opinion Evidence
- Tendency and Coincidence

Privilege and Confidentiality

The law has **recognised certain relationships**, where the preservation of trust between confider and confidant, **overrides the law's interest in full disclosure of the facts**.

-**** **EXAM:** won't be much on this (identify which may be applicable in certain circumstance)***

A. Privilege

- **It is the right to resist compulsory demands for information:** *Federal Police v Propend Finance* – lead case to say privilege is a right to refuse to hand over or disclose materials
- It important to remember Common Law privileges operate alongside EA

B. Different Types of Privilege

1. Client Legal Privilege
2. Professional Confidential Relationship Privilege
3. Sexual Assault Communication Privilege
4. Other Privileges (eg. Religious Confessions, Self-Incrimination)
5. Public Interest Immunities

1. Client Legal Privilege (EA s118, 119)

Client Legal Privilege is broader than Legal Professional Privilege (Common Law)

- **Client Legal Privilege attaches to the Client** – it is not a **Lawyer's entitlement**.
- Dealt with under EA as two sub-categories: Advice and Litigation.
- Both deal with communications and documents

1. Advice (s118)

- Privilege attaches to communications between a client and their legal advisor for the **dominant purpose of obtaining or giving legal advice**.
- s118 requires a client/lawyer relationship
 - **Does not extend to communications with 3rd parties**
 - **Does extend to** documents provided by 3rd party to the client or lawyer for the **dominant purpose of providing legal advice**. (eg if you need tax advice before you can give advice on a tax matter)

2. Litigation (s119)

- **Attaches to communications between a client, the client's legal advisor and third parties**, for the **dominant purpose of use in or in relation to litigation**, which is **either pending or in contemplation** (pre-cursor stuff)
 - **DOES** extends to third party communications

Definitions s 117:

- **Client** – includes *inter alia*:
 - Employer of lawyer.
 - Employee or agent of a client.

- An employer being the Cth, State or Territory, or a body established under the law of the Cth, State or Territory.
- **Confidential Communication means:** a communication made in such circumstances that when it was made the person who made it or to whom it was made was under an express or implied obligation not to disclose its contents.
- **Confidential Document means:** document prepared in circumstances that when it was prepared the person who prepared it or for whom it was prepared was under an express or implied obligation not to disclose its contents.
- **Lawyer:** Includes Australian and over-seas registered foreign lawyers and an employee or agent of a lawyer. (ie includes employees and agents of lawyers)

3. Dominant Purpose Test

Confidential communications are only privileged **if they are created** for the **dominant purpose** of the legal advisor providing **legal advice or services**. (*Esso* 1999)

- **The dominant purpose is 'the ruling, prevailing or most influential purpose' for which a document is brought into existence.** *Spotless Services Ltd* (1996)

A. Multiple Purposes

- If there are several purposes for docs creation, only one of those purposes will be the dominant one. Doesnt have to be only purpose but has to be main one *Singapore Airlines*
 - The purpose for which a document is brought into existence is a question of objective fact, which is generally determined by reference to:
 - Evidence itself – the communication or document
 - Nature of the document – and issues behind it
 - Submissions from the parties – what parties have to say.

B. Timing

Generally, the **dominant purpose is to be determined at the time at which the document is brought into existence**, not the time of its communication *Carnell v Mann* (1998)

- Has this doc been brought into existence with the primary purpose of a view to litigation?
- **VS:** A doc that's been made and sometime down the track decided it'll be useful in litigation?

Self-Represented Litigants

Client Legal Privilege also **applies to self-represented litigants s120EA** where the **dominant purpose is for preparing for or conducting the proceeding**.

- **Extends to** communications/documents **between a self-represented litigant and a 3rd Party**.

LOSING Client Legal Privilege

1. **Consent or waiver, CLP** may be **waived**, by the **client only**; either expressly or where the person has "acted in a way that is inconsistent with" the privilege. (s122 refers)
2. Compulsion of law,
3. Misconduct and
4. By statute removing the privilege.
5. **Mistaken disclosure will not necessarily result in loss of privilege.** *Armstrong* [2012]
document accidentally disclosure during formal discovery – this did not amount to waiving privilege
6. **Other Reasons:**
 - Partially revoked on clients death – only in respect of evidence of the intentions or competence of the deceased (s121(1));
 - If it prevents the enforcement of a court order (s121(2));
 - If it interferes with someone's rights (s121(3)); or
 - **If the communication is made in pursuit of fraud, crime or other abuse of power** s125

2. Professional Confidential Relationship Privilege ('PCRP')

Circumstances where person in a professional capacity is told something in confidence. This is called a 'protected confidence' – see Definitions in s126A.

- **PCRP is a statutory privilege; no comparable privilege at CL** because the CL does not recognise confidentiality as a ground of privilege from disclosure (*Wran v ABC* [1984] 3 NSWLR 241).

Note: these sections are NSW: Cth Act only covers confidential communications with Journalists.

NSW Act does not attempt to define the ambit but considered to include

- Doctor / Health Professional Journalist Social Worker Accountant

A. Section 126B EA

- (1) The court may direct that evidence not be adduced if court finds adducing it would disclose:
 - (a) a protected confidence, or
 - (b) the contents of a document recording a protected confidence, or
 - (c) protected identity information.
- (3) The court **must give such a direction** if it is satisfied that: (*balancing exercise*)
 - (a) **it is likely that harm would or might be caused** (whether directly or indirectly) to a protected confider if the evidence is adduced **AND**
 - (b) **Nature & extent of harm outweighs the desirability of the evidence being given.**

Factors to Consider:

- (4) Without limiting the matters court may take into account, it is to take into account:
 - (a) The **probative value** of the evidence
 - (b) The **importance of the evidence** in the proceeding
 - (c) the **nature and gravity** of the relevant offence
 - (d) the **availability of other evidence**
 - (e) the effect or harm of admitting the evidence
 - (h) whether the substance of the confidence has already been disclosed elsewhere.

B. Statutory Definitions

126A (1) In this Division:

- **Harm: wide def:** includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).
- **Protected confidence:** a communication made by person in confidence to another person
 - (a) in course of a r/s in which the confidant was acting in a professional capacity, **AND**
 - (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.
- **protected confider** means a person who made a protected confidence.
- **protected identity information** means information about, or enabling a person to ascertain, the identity of the person who made a protected confidence.

(2) A communication may be made in confidence even if it is made in the presence of a third party if the third party's presence is necessary to facilitate communication.

LOSS OF PCPR

1. Confider **gives consent** for the protected material to be disclosed (s126C); or
 2. The confidential material **relates to or was made as part of a fraud/offence / misconduct** (s126D) (*not enough it evidences fraud; must be made with intention to facilitate that fraud*)
- When communication/doc has lost privilege SO DOES evidence of any commun/doc that is necessary to enable understanding of the communication will also be lost. →

3. Sexual Assault Communications Privilege

Originally: debate if sexual assault counsellors fell under 126B. Following *R v Young*; s126HA

A. The Problem in Young

R v Young (1999): 16 year old girl sexual assaulted, which led to Young being charged. To deal with trauma, girl saw counsellor who took notes during their sessions

- Court held that there was not a privilege attaching to the notes, and they must be handed over. Counsellor refused, and sent to prison for contempt of court.
- Why did Young want access? Common thing for victims to blame themselves for what happened; notes may detail it was her fault, or she should have done something differently

B. Legislative Response

Sex Assault Communication Privilege in ***Criminal Procedure Act (NSW)*** ss295-298

- s296(1) CPA '**protected confidence means** a counselling communications made by/to/about victim of a sexual assault offence...' (2) A counselling communication is a protected confidence
- s300 CPA **Protected Confider may release the privileged material by consent in writing**
- s126H EA – protected sexual assault communications also excluded in civil proceedings
 - Only applies if evidence was excluded in a criminal trial for sexual assault, where substantially the same acts are in issue.

4. Other Privileges

A. Privilege Against Self-Incrimination

Common law: a person is not obliged to answer a question, or to produce documents, or to do anything if, in doing so, it might expose them to a criminal conviction or a civil penalty.

- This **Common Law privilege has been codified in s128 EA**.
 - Privilege only applies to individuals. **Does not apply to companies**.

The Provision: **S128 EA** (this section is paraphrased)

- s128(1) A **Witness may object to answering a question on the grounds that their evidence may incriminate them or make them liable to suit.**
- (2) The court **must [then] determine** whether or not there are reasonable grounds for the objection.
- (3) If court determines reasonable ground for objection exist, Judge will inform person they do not need to give evidence
- (4) Court may also decide that the **Witness should give evidence** because:
- (a) The evidence **does not tend to prove** that witness **has committed an offence** against or arising under, or is liable to a civil penalty under, a law of a foreign country, **OR**
- (b) **The interests of justice require that the witness give the evidence.**
- (5) If evid is required for interests of justice, Court may issue a Certificate (called an Immunity)
- Following *Cornwell v The Queen* HCA - Certificate still continues even if given in error or issued by mistake
- (10) **Privilege does not apply in criminal proceedings in relation to evidence from a Defendant which relates to either:**
- (a) An act by the Defendant - the doing of which is a fact in issue **OR**
- (b) The Defendant had a state of mind - the existence of which is a fact in issue

IE Defendant cannot claim privilege where his evidence tends to show (directly or indirectly) that the Defendant committed the crime for which he is charged → D cannot turn around and say I don't want to answer that Q on grounds of self-incrimination... if evidence is in relation to charges ON FOOT the privilege will not operate → ie its self-incrimination for OTHER offences

B. Religious Confessions

s127(1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.

- "Religious confession" means confession made by person to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination concerned
 - IE having beer at pub with local priest and tell him you killed someone – not in relms of professional capacity

C. Public Interest Immunities

Deals with information which is otherwise relevant to the proceedings but is withheld on basis that the public interest in its disclosure is outweighed by the public interest to suppress it.

- When dealing with the Public Interest Immunities Court is required to undertake a balancing exercise when assessing the competing interests. *Sankey v Whitlam* (1978)

Different types of Public Interest Immunities

1. Exclusion of evidence of reasons for judicial decisions (s130) - Not disclosing what went towards making the judgement
2. Exclusion of evidence of matters of state (s131) - State secrets, national security
3. Exclusion of evidence of settlement negotiations (s132)

Witnesses

How is Evidence Adduced? (*Adducing: get it before Court*)

- Documents and Real Evidence are tendered and if they conform to the Rules governing relevance and authenticity they will be admitted into evidence.
- **Court must not use information that was not part of formal process of receiving evidence** (Bilal Skaf case – Jurors undertaking ‘unofficial’ view)

Stage 1: Before Court

1. Competence: Who **can** give evidence?

The legal ability to give evidence is referred to as ‘Competence’.

A. The Principle

- **Competence is the ability to give a rational reply to questions about facts.**
- Except as otherwise provided by this Act, every **person is presumed to be ‘competent’ to give evidence unless some form of exception applies.** (s12 EA)

B. Exceptions

1. Those **lacking capacity to do so owing to mental, intellectual or physical disability** s13
S13(1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):
 - (a) The person does not have the capacity to understand a question about the fact, or
 - (b) Person does not have the capacity to give an answer that can be understood to a question about the fact**and that incapacity cannot be overcome.**
(3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact **if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.**
**** If person falls here 13(3): go to stage 2: unsworn evidence’*****
2. The **Accused is not competent** to give evidence for the Prosecution. (s17(2)EA)
*IE Prosecution **cannot call accused to give evidence against themselves***

2. Compellability: Who **must** give evidence?

A. The Principle

- **A person who is competent to give evidence about a fact is compellable to give that evidence. (s12 EA)**
- If a person is a compellable Witness **they may be legally forced** to give evidence despite being reluctant to do so. (*where they refuse; held in contempt and see below*** in exam****)

B. Exceptions

1. **Accused in his own trial** s17(1) – A defendant is not competent to give evidence as witness for prosecution **s17(2)** (*as above*)
2. **Co-accused - if not given separate trial s17(3)** - An associated defendant is not compellable to give evidence for or against a Defendant in a criminal proceeding unless associated defence is being tried separately from the defendant
3. **Sovereign / Governor-General / Governor** – s15(1)
4. **Members of Parliament** (if parliament is sitting) – s15(2)
 - Running of state seemed more important than a particular trial