

3. Privilege

Even if a witness is competent and compellable, they may refuse to give evidence or produce a document if it is privileged (*s 131A(1) EA*, *s 128 EA* for PASI). Privileged evidence must not be adduced and is inadmissible (*s 134 EA*). If the court sees grounds to raise privilege, it must satisfy itself the witness is aware (*s 132 EA*).

RED FLAG TRIGGERS

Witness may incriminate themselves by giving evidence -- PASI (*s 128 EA*)

Communication or document between client and lawyer -- CLP (*ss 118-119 EA*)

Settlement negotiation communications (civil only) -- *s 131 EA*

Confidential communication to doctor/counsellor by sexual assault victim -- EMPA

Government documents, cabinet papers, informer identities -- PII (*s 130 EA*)

Claim in pre-trial proceedings (subpoena, discovery) -- apply *s 131A EA* first

A. PRIVILEGE AGAINST SELF-INCRIMINATION (PASI)

PASI is a fundamental common law right (*Sorby*), modified by *s 128 EA*. It applies to natural persons only -- corporations cannot claim PASI (*s 187 EA; Caltex*). Applies in judicial and non-judicial proceedings (*Sorby*).

PASI applies to derivative evidence (e.g., directing someone to identify a locker key that implies possession of drugs inside) (*Sorby*). Cannot be claimed to protect third parties (*Brebner*).

At pre-trial proceedings (*subpoena, discovery, search warrant -- s 131A(2) EA*): *s 128 EA* does not apply -- rely on common law PASI test from *Brebner*: real and appreciable danger of self-incrimination + bona fide (non-collateral) purpose.

SCRIPT: PASI -- s 128 EA (at trial)

Step 1: Does the evidence **tend to prove** W committed an offence or is liable to a civil penalty? (*s 128(1) EA*)

- -> IF evidence directly implicates W in an offence (Aus or foreign law) or civil penalty: PASI potentially available.
- -> IF corporation: PASI unavailable (*s 187 EA; Caltex*).
- -> IF W claims PASI to protect third parties rather than themselves: no bona fide purpose -- PASI unavailable (*Brebner*).

WRITE: W objects to giving evidence of [*describe evidence*] on the ground that it tends to prove [*W / the maker*] committed [*identify offence*] under (*s 128(1)(a) / (b) EA*).

Step 2: Are there **reasonable grounds** for the objection? (*s 128(2)* EA) -- Apply Brebner test: real/appreciable danger of self-incrimination AND bona fide purpose.

- -> IF real danger and bona fide purpose: proceed -- court must inform W per *s 128(3)* EA.
- -> IF damage already done (e.g., admitted to police) or purpose is to protect another: no reasonable grounds (*Brebner*).
- -> COUNTER-ARGUMENT: Prosecution may argue no real danger because: (a) prosecution has other, stronger evidence; or (b) relevant offence has expired limitation period.

WRITE: There *[are / are not]* reasonable grounds for the objection because *[there is a real and appreciable danger that giving this evidence could expose W to prosecution for / Brebner test not satisfied because the damage is already done / W is protecting another]*.

Step 3: If reasonable grounds exist, **court must inform W** per *s 128(3)* EA: (a) need not give evidence unless required by *s 128(4)*; (b) will receive a certificate; (c) effect of certificate.

- -> Certificate effect (*s 128(7)* EA): evidence given AND any derivative evidence CANNOT be used against W in any Victorian court.
- -> Exception (*s 128(9)* EA): certificate does not protect D in a retrial or trial for an offence arising out of the same facts.

WRITE: The court must inform W under (*s 128(3)* EA) that *[W need not give evidence; / W may give evidence voluntarily and receive a certificate; / the certificate means the evidence cannot be used against W in any Victorian court]*.

Step 4: Can the court require W to give evidence despite PASI? Only if (*s 128(4)* EA): (a) evidence does NOT tend to prove foreign law offence; AND (b) interests of justice require it. Apply **Lodhi factors**.

- -> Lodhi factors: nature of proceedings; whether Crown or defence calling W; importance of evidence; likelihood of prosecution/penalty; broader consequences for W; reliability of evidence if compelled.
- -> IF serious criminal offence AND evidence critical AND risk of prosecution low: court may compel (*Lodhi analysis favours compulsion*).
- -> IF W likely to be prosecuted and prejudiced by giving evidence: court unlikely to compel (*Lodhi -- terrorism case, W's own trial pending*).

WRITE: The court *[may / may not]* require W to give evidence under (*s 128(4)* EA) because *[applying Lodhi: the interests of justice [do / do not] require it given the [nature of the offence / importance of the evidence / likelihood of prosecution of W]]*.

Step 5: Conclude: Three possible outcomes -- (a) PASI unavailable; (b) W gives evidence with certificate; (c) W successfully claims PASI and need not give evidence.

WRITE: [W is / is not] entitled to claim PASI. [W must give evidence and will receive a certificate under (s 128(5) EA) / W need not give evidence at all / W must give evidence because the court has exercised its s 128(4) EA power in the interests of justice].

B. CLIENT LEGAL PRIVILEGE (CLP)

CLP is a fundamental common law right promoting effective administration of justice (*Baker v Campbell*). It is preserved and modified by Part 3.10, Division 1 EA. CLP applies at both trial and pre-trial (s 131A EA). Raise s 131A at the outset for pre-trial proceedings.

Privileged evidence is inadmissible (s 134 EA). If the court sees grounds to raise privilege, it must satisfy itself the client/party is aware (s 132 EA).

Three limbs: Legal Advice (s 118 EA), Litigation (s 119 EA), Unrepresented Parties (s 120 EA). All require dominant purpose test.

SCRIPT: CLIENT LEGAL PRIVILEGE -- ss 118-119 EA

Step 1: Is the **communication/document confidential?** (s 117(1) EA) A communication or document is confidential if made in circumstances where the maker or recipient was under an express or implied obligation NOT to disclose its contents.

- -> IF lawyer-client communications: generally presumed confidential (*Mann*) -- check facts for any disclosure.
- -> IF in-house counsel: must be sufficiently independent from employer to attract privilege (*Waterford -- Treasury in-house counsel sufficiently independent; Rich v Harrington -- in-house counsel insufficiently independent where allegations involved among same partners*).
- -> NOTE: copies of privileged documents are also privileged (*Mann*). A copy of a non-privileged document may become privileged if prepared for the dominant purpose of legal advice (*Propend*).

WRITE: The [communication / document] [is / is not] confidential under (s 117(1) EA) because [it was made in circumstances where client / lawyer] was under an implied obligation not to disclose / it was not made in confidence because [circumstances].

Step 2: Is there a **lawyer-client relationship?** (ss 117-118 EA)

- -> 'Lawyer' (s 117 EA): Australian lawyer; foreign lawyer admitted in Aus; foreign lawyer admitted overseas; agent or employee of a lawyer.
- -> 'Client' (s 117 EA): person who engaged legal services; employee/agent of client; in-house employee who is an individual (if State/Cth body).

- -> COUNTER-ARGUMENT: [D] may argue in-house counsel lacked sufficient independence -- apply Waterford/Rich analysis.

WRITE: There *[is / is not]* a lawyer-client relationship because *[identify the lawyer and client]; [in-house counsel is / is not]* sufficiently independent given (Waterford / Rich analysis)].

Step 3: Does the communication/document fall within a CLP limb? Apply dominant purpose test (*Esso v FCT; Hodgson v Amcor -- dominant purpose = 'prevailing or paramount purpose'*).

- -> s 118 EA (Legal Advice): confidential communication between C and L; OR between two or more Ls acting for C; OR contents of confidential document prepared by C, L or third person -- for the DOMINANT PURPOSE of the lawyer providing LEGAL ADVICE to the client.
- -> s 119 EA (Litigation): confidential communication between C and another; OR between C's L and another; OR confidential document -- for the DOMINANT PURPOSE of legal services re CURRENT OR ANTICIPATED PROCEEDINGS in which C is or may be a party.
- -> s 120 EA (Unrepresented): C and another person; OR document prepared by/at direction of C -- for dominant purpose of PREPARING FOR OR CONDUCTING A PROCEEDING.
- -> IF purposes are equal: no dominant purpose -- CLP does not apply (*Hodgson*).

WRITE: The *[communication / document] [is / is not]* subject to CLP under (s 118 / s 119 / s 120 EA) because it was made for the dominant purpose of *[providing legal advice / legal services in connection with anticipated litigation]*, being the prevailing purpose over *[any other purpose identified on the facts]*.

Step 4: Do any exceptions/waivers apply? CLP may be lost.

- -> Express consent (*s 122(1) EA*): holder expressly consents -- but full waiver required; partial waiver not permitted.
- -> Implied waiver (*s 122(2)-(3) EA*): client acted inconsistently with maintaining privilege -- knowingly/voluntarily disclosed substance, or disclosed with express/implied consent. NOT waived if disclosure made under duress, deception, legal compulsion, or to a person in a common interest proceeding (*s 122(5) EA*). Inadvertent disclosure is NOT waiver (Expense Reduction).
- -> Accused (*s 123 EA*): D may adduce privileged evidence in criminal proceeding UNLESS it is communication/document of a co-accused in connection with prosecution of that accused. Applies only if D already possesses it (Galloway) -- not to XXN of prosecution witnesses or pre-trial disclosure.
- -> Crime/fraud (*s 125 EA*): communication made in furtherance of a crime, fraud, or deliberate abuse of power loses privilege. Distinction: seeking advice on how to protect yourself (privileged) vs. getting lawyer to DO the fraud (not privileged) (*Hodgson v Amcor; ASIC v M*).
- -> Related communications (*s 126 EA*): if one comm/doc admitted, another can be adduced if reasonably necessary to understand the first.

WRITE: CLP *[is / is not]* waived because *[client acted inconsistently with maintaining privilege by (s 122(2) EA) -- knowingly disclosing the substance of the communication to [third party] / the communication was made in furtherance of [crime/fraud] under (s 125 EA) / no exception applies and CLP is maintained]*.

C. SETTLEMENT NEGOTIATION PRIVILEGE -- S 131 EA (CIVIL ONLY)

s 131 EA applies only in civil proceedings (*s 131(5)(a)-(b)* EA). Communication/document made/prepared in connection with an attempt to settle a dispute is not admissible (*s 131(1)* EA).

The communication must form part of or be reasonably incidental to the settlement negotiations -- a question of fact (*Field: plaintiff's admission to defendant's doctor during medical examination was not incidental to settlement even though made in the context of proceedings*).

'Without Prejudice' label suggests the communication is covered but is not conclusive.

NOTE

Exceptions (*s 131(2)* EA) -- privilege does NOT apply where: (a)-(c) all parties consent; (d) document stated it is not confidential; (e) evidence contradicts/qualifies already-admitted evidence about settlement; (f) proves terms of settlement; (g) would mislead court if not adduced; (h) relevant to costs; (i) communication affects a right; (j) made in furtherance of crime/fraud; (k) made in furtherance of deliberate abuse of power.

D. CONFIDENTIAL COMMUNICATIONS IN SEXUAL OFFENCES -- EMPA

Source: Evidence (Miscellaneous Provisions) Act 1958 (Vic) (*EMPA*). Guiding principle: high incidence of sexual violence, significant under-reporting, likely no physical signs, offenders commonly known to victims (*s 32AB EMPA*).

'Confidential communication' (*s 32B EMPA*) = oral/written communication made in confidence by a victim of a sexual offence to a registered medical practitioner or counsellor in the course of that relationship, whether before or after the acts constituting the offence.

A party CANNOT compel production or adduce evidence disclosing a confidential communication WITHOUT the court's leave (*s 32C(1)* EMPA). Must give 14+ days' notice (*s 32C(2)* EMPA).

SCRIPT: CONFIDENTIAL COMMS -- s 32D EMPA

Step 1: Court must NOT grant leave unless satisfied on BOP that ALL three requirements of s 32D(1) EMPA are met:

- -> (a) Evidence must have **substantial PV** to a fact in issue -- not merely relevant.
- -> (b) **No other evidence of similar or greater PV** is available.

- -> (c) The public interest in preserving confidentiality and protecting the confider from harm is **substantially outweighed** by the public interest in adducing evidence of substantial PV.

WRITE: The court *[should / should not]* grant leave under (s 32D(1) EMPA) because *[the evidence [does / does not] have substantial PV; [other evidence of equal or greater PV [is / is not] available]; [the public interest in confidentiality [is / is not] substantially outweighed by the public interest in admitting the evidence]]*.

Step 2: Court must have regard to **s 32D(2) EMPA factors** (public interest in confidentiality):

- -> (a) Likelihood, nature and extent of harm to the confider if evidence adduced.
- -> (b) Extent to which evidence is necessary for accused to receive a full defence.
- -> (c) Need to encourage victims to seek counselling and extent to which they would be discouraged.
- -> (d) Whether party seeking evidence is doing so on basis of discriminatory belief or bias (e.g., slut-shaming).
- -> (e) Whether confider objects to disclosure.
- -> (f) Nature and extent of reasonable expectation of confidentiality and potential prejudice to privacy.

WRITE: Applying (s 32D(2) EMPA): *[the public interest in confidentiality [weighs heavily / does not substantially outweigh] the interest in admission because [harm to confider is [high/low]; evidence [is/is not] necessary for full defence; encouraging counselling [would/would not] be significantly impacted]]*.

Step 3: Even if leave preconditions are met, court must also consider **s 192(2) EA** leave factors before granting leave.

WRITE: Leave *[should / should not]* be granted under (s 192(2) EA) because *[granting leave would [unduly lengthen / not unduly lengthen] the hearing; [the evidence is [important / not important]; [the proceeding is [civil / criminal]]]*.

E. PUBLIC INTEREST IMMUNITY -- S 130 EA

If the public interest in admitting information/document relating to 'matters of state' is outweighed by the public interest in preserving its secrecy or confidentiality, the court may direct it not be adduced as evidence (*s 130(1) EA*).

Court may act on its own motion or on any person's application (*s 130(2) EA*). Applies at pre-trial proceedings (*s 131A EA*) and to corporations (e.g., *statutory corporations -- PTTC, noting they are different entities from government itself*).

Claim Type

Description

Class claim (<i>Sankey; Duncan</i>)	The class of document should not be disclosed regardless of the contents of the particular document -- because doing so would prejudice the class interest (e.g., all cabinet deliberations). NB: class claims generally attract stronger confidentiality than contents claims.
Contents claim (<i>Derbas; Kaddour; NLC</i>)	Disclosure of the specific contents of THIS document would be contrary to the public interest, national security, or damaging to the state. Here the quality of the document (not the agency that holds it) matters (Royal Women's Hospital).

SCRIPT: PUBLIC INTEREST IMMUNITY -- s 130 EA

Step 1: Does the information/document relate to a **matter of state**? (*s 130(4)* EA -- non-exhaustive)

- -> (a) Would prejudice security, defence or international relations of Australia (e.g., diplomatic communications).
- -> (b) Would damage relations between Cth and a State, or between two or more States (*Sankey*).
- -> (c)-(d) Would prejudice prevention, investigation or prosecution of an offence or civil penalty.
- -> (e) Would disclose/enable identification of a confidential law enforcement information source (*Derbas - police informers strongly protected as a class; Kaddour -- TJ must correctly balance, not focus on 'legitimate forensic purpose' alone*).
- -> (f) Would prejudice the proper functioning of Cth or State government (*NLC -- cabinet documents including deliberations on uranium mining project*).
- -> NOT a matter of state merely because government agencies are involved (Royal Women's Hospital -- patient records revealed nothing about hospital's decision-making).

WRITE: The *[information / document] [does / does not]* relate to a matter of state under (s 130(4) EA) because adducing it would *[prejudice security / disclose an informer's identity / prejudice proper government functioning - apply the relevant paragraph of s 130(4) EA]*.

Step 2: Does the **public interest in secrecy outweigh the public interest in disclosure**? (*s 130(5)* EA -- mandatory factors)

- -> (a) Importance of info/document in the proceeding -- if needed for accused's defence, weighs heavily in favour of admission (*Sankey; R v Alister*).
- -> (b) Whether adducing party is accused or prosecution in criminal proceedings.
- -> (c) Nature of offence/cause of action and subject matter.
- -> (d) Likely effect of adducing and means to limit publication (*court may close, issue non-publication order, or release only part of document -- Sankey*). Courts: Supreme Court has inherent power to close; County/Magistrates have implied power.
- -> (e) Whether substance already published -- if published as true copy, should be admitted (*Sankey*). Documents supplied to court by subpoena are NOT 'publication' (Marsden).
- -> (f) In criminal proceedings: whether prosecution will be stayed.

- > STRONG PRESUMPTIONS: cabinet documents/deliberations -- near absolute protection, especially in civil proceedings (*NLC*); current/controversial matters attract more protection than historical ones (*NLC*; *PTTC*); commercial/contractual matters cannot shelter behind PII (*PTTC*).

WRITE: The public interest in *[secrecy / disclosure]* *[outweighs / does not outweigh]* the other because *[applying (s 130(5) EA): the document is [important to D's defence / of historical interest only / already published / relates to contractual not policy matters] -- [cite NLC / Sankey / Derbas / PTTC as applicable]]*.

Key Cases -- Privilege

Case	Principle	Watch Out / Application
Sorby v Cth (1983) HCA	PASI applies to judicial and non-judicial proceedings (e.g., Royal Commissions). Also applies to derivative evidence. Cannot be abrogated except by clear Parliamentary intention.	Use for scope of PASI and derivative evidence arguments.
Brebner v Perry (1961)	PASI requires: real/appreciable danger of self-incrimination AND bona fide (non-collateral) purpose. No PASI if damage already done or purpose is to protect another.	Key test for assessing reasonable grounds at common law and at pre-trial proceedings.
Lodhi v R (2007) NSWCCA	Non-exhaustive factors for 'interests of justice' under s 128(4) EA: nature of proceedings, importance of evidence, nature of charges, likelihood of prosecution, interests of W in fair trial, reliability of evidence.	Use factor by factor -- terrorism case; W's own trial pending; IOJ did NOT require W to give evidence.
Mann v Carnell (1999) HCA	Chief Minister disclosed privileged legal advice to a Member of Parliament to explain government action. Not inconsistent with maintaining privilege -- the purpose of CLP was to protect NT from further disclosure, not prevent the CM explaining government action.	A copy of a privileged document is also privileged. Inconsistency for implied waiver requires more than any disclosure.
Esso v FCT (1999) HCA	Dominant purpose test applies to CLP -- need not be sole purpose. Onus on party claiming CLP to establish dominant purpose.	Do not import 'sole purpose' test -- dominant purpose is sufficient.

Field v Commissioner for Railways (1957)	Settlement privilege only where communication is part of or reasonably incidental to negotiations. Plaintiff's admission to defendant's doctor was not incidental -- unnecessary to settle and not privileged.	Test for whether communication is covered by settlement privilege -- a question of fact.
Northern Land Council v Cth (1987) HCA	Cabinet deliberations attract near absolute protection from disclosure, especially in civil proceedings. Current and controversial subject matter (uranium mining) required 'exceptional' reasons for disclosure. Doubtful that high-level policy documents can ever be disclosed in civil proceedings.	Leading case for government documents and cabinet papers -- cite for strong presumption against disclosure.
Derbas v R (1977)	Police informer identities strongly protected as a class. Public interest in encouraging informers to come forward. Protected unless substantially relevant and NECESSARY to D's case (not merely important).	Two-step: (1) importance; (2) necessity. D can re-apply later if necessity arises.
Expense Reduction Analysts v Armstrong (2013) HCA	Inadvertent disclosure of privileged documents to opposing party is NOT a waiver. The party receiving the documents should return them without using their contents.	Cite for distinction between voluntary and inadvertent disclosure.