

1. IDENTIFY IF PRIVILEGE ARISES

ASK: Is the witness objecting to answering a question or producing evidence because it may expose them to a criminal offence or civil penalty?

If **yes** → **s 128** applies

Under **s 128**, a witness may claim privilege against self-incrimination to avoid giving evidence that may expose them to prosecution or a civil penalty. *Reid v Howard (1995)*.

2. DETERMINE IF THERE ARE REASONABLE GROUNDS FOR OBJECTION

- Under **s 128(2)**, the court must decide whether there are **reasonable grounds** for the objection, meaning a real and appreciable risk that the evidence could tend to prove an offence or penalty. (*Reid v Howard (1995)*)
- If reasonable grounds exist, the witness cannot be compelled to answer unless ordered under **s 128(4)**

3. IF THE WITNESS GIVES EVIDENCE (VOLUNTARILY OR BY COURT ORDER), PROTECTIVE CERTIFICATE MUST BE ISSUED

- Under **s 128(3)**, If the court later requires the evidence to be given, or the witness gives it voluntarily, the court must issue a **protective certificate**. This certificate grants immunity, and therefore the evidence cannot be used against the witness, except for perjury.
 - Perjury = lying under oath

4. THE COURT CAN STILL COMPEL EVIDENCE

Under **s 128(4)**, The court can still compel evidence if:

1. The evidence does not tend to prove guilt, or
2. The interests of justice require the witness to give evidence

RELEVANCE CHECKLIST

Section 55: evidence is relevant if it is capable of rationally affecting (directly or indirectly) the assessment of the probability of the existence of a fact in issue.

- Sets a low threshold: if the evidence could *logically affect* the decision on a fact in issue, even slightly, it is relevant.
- The test is one of *logical connection, not weight*.
- *DPP v Kilbourne*, relevance requires that the evidence be **logically probative or disprobative of some matter in issue**.
- **Section 55** confirms that evidence should not be dismissed as irrelevant merely because it relates to credibility, the admissibility of other evidence, or a failure to adduce evidence (**section 55(2)**).

As confirmed in *Festa v The Queen*, even evidence of slight probative value will satisfy the test, provided it could make the existence of a fact in issue more or less probable.

Once the evidence is found to be relevant under **section 55**, it is prima facie admissible under **section 56**, unless excluded by another provision (eg. hearsay, opinion, tendency, credibility)

Therefore, the test to apply: ask whether the evidence, if accepted, could logically assist the fact-finder in determining a fact in issue, does it make the fact more or less probable than it would be without the evidence?

- If yes, it is relevant;
- If not, it is irrelevant.

HEARSAY CHECKLIST

1. IS IT DIRECT EVIDENCE OR HEARSAY?

Direct Evidence = maker of the assertion is in court testifying to the fact (gives evidence in chief, under oath, can be cross-examined)

Eg. Victim in court says: "X shot me"

Hearsay = someone else reports what the maker said, to prove the fact is true (statement is a previous representation, and it's tendered for its truth.)

Eg. "The victim said to me, 'X shot me'"

2. IDENTIFY THE TYPE OF CASE (CIVIL / CRIMINAL)

Determines exceptions to apply.

- **Civil:** ss 63–64
- **Criminal:** ss 65–66

3. IDENTIFY THE PREVIOUS REPRESENTATION

- **What is the previous representation?**

The out of court statement, document or conduct being tendered (eg. Annie said, "I saw the Holden run the red light")

- **Who made it?** (the maker)
- **Who is giving evidence of it?** (the witness)

4. PURPOSE TEST - s 59

Ask: Is the evidence being used to prove the truth of what was said?

- **Yes** → hearsay rule applies under **s 59**
- **No** → Admissible for a non-hearsay purpose

Eg.

Effect on listener (duress in *Subramaniam*)

State of mind (fear, belief, intention, knowledge)

Credibility (consistency/inconsistency)

5. WAS IT AN EXPRESS OR IMPLIED ASSERTION?

IF IT'S AN IMPLIED ASSERTION, CAN IT REASONABLY BE SUPPOSED THAT THEY INTENDED TO ASSERT THE FACT?

An **express assertion** is a **clear, direct statement** where the maker **intends to assert a fact**. Eg. "the light was red", "Jack shot me", "I am speaking to my father"

- Express assertions are clearly hearsay and inadmissible when used to prove the truth of the fact asserted.

An **implied assertion** is a representation that is not directly asserted but can be **inferred** from what was said or done. Eg. child saying "Hello Daddy" - does not expressly assert that her father was on the line, but it **implies** her father was present on the call.

Did the maker intend to imply the assertion?

2. By tendering a document that contains the representation, including any further representation reasonably necessary to understand it

4) **Is there more than one purpose for which the evidence of the representation is being led? (s 60)**

7. DOES THE COURT RETAIN DISCRETIONARY POWERS TO CONTROL OR EXCLUDE THE EVIDENCE

- **s 135** – **general discretion** to exclude evidence if its probative value is substantially outweighed by the danger of **unfair prejudice, confusion, or waste of time**.
- **s 136** – permits the court to **limit the use** of evidence to a specific purpose (e.g. allow it for credibility but not for truth).
- **s 137** – in **criminal cases**, the court must exclude the evidence if its probative value is outweighed by the danger of **unfair prejudice to the accused**.

OPINION CHECKLIST

1. IDENTIFY IF THE WITNESS IS EXPRESSING AN *INFERENCE OR CONCLUSION* DRAWN FROM OBSERVED AND COMMUNICABLE DATA, RATHER THAN SIMPLY DESCRIBING WHAT THEY SAW, HEARD OR PERCEIVED.

- **If yes** → opinion it is opinion evidence, triggering the opinion rule under **s 76**
 - ***Allstate Life v ANZ (1996)*** — opinions are inferences, not direct observations.
- **If no** → not an opinion

2. IS THE OPINION EVIDENCE BEING USED TO PROVE THE TRUTH OF THE FACT THE OPINION IS ABOUT?

- **If yes** → inadmissible unless an exception applies
- If being used for another purpose (eg. to explain conduct, show belief, bias or credibility) → **not** caught by **s 76**
 - ***R v Whyte (2006)***: Statement “a man tried to rape me” admitted to show credibility and consistency of conduct, not truth.
 - ***Lakatoi Universal v Walker (1999)***: Doctor’s incorrect HIV result admitted to show accused’s state of mind.

3. DOES AN EXCEPTION APPLY?

Exception: Relevant for another purpose (Section 77)

Is it being used for another (non-opinion purpose?)

- An opinion can be admitted if it helps explain for eg. a person’s state of mind, belief, behaviour or credibility

Exception: Lay Opinion (Section 78)

Is the opinion based on what the person personally perceived and is it necessary to understand their testimony?

- A non-expert witness may give opinion evidence if two conditions are met: