

TOPIC 4 – PRIVILEGE

In limited circumstances, a W who is otherwise competent and compellable may *refuse to give/produce evidence* on the basis of *privilege* → *Fundamental common law rights* (not just rules of procedure)

Five grounds:

- A. Privilege against **self-incrimination**
- B. **Client-legal** privilege
- C. **Settlement** negotiations
- D. Confidential communications in relation to **sexual offences**
- E. Evidence Excluded in the **Public Interest**

General features:	In general, a claim for privilege <ul style="list-style-type: none"> • Is personal to the witness; • Must be claimed in respect of each individual piece of evidence (can't have blanket claims); and • May be waived.
s132 EA – Right to Claim Privilege	The court is to satisfy itself that the witness is aware of grounds to object, if apparent to the court that a claim of privilege may be made Judges may intervene if it becomes apparent that the witness is about to incriminate themselves (caution witness)
s134 EA -	Privileged evidence is not admissible in the proceeding.

Application to **PRE-TRIAL PROCEEDINGS**

s131A EA	S131A - (a) If a person is required by a disclosure requirement to give information/produce a document which would fall within one of the privileges if adduced as evidence; and (b) The person objects – the court is to determine the privilege as if this is giving evidence in court. Disclosure requirement: ‘process or order of court that requires disclosure’ includes: Subpoena’s; pre-trial discovery; search warrants; notices to produce, summons etc Note: This section does not apply to s128: the privilege against self-incrimination (the CL continues to apply to disclosure requirements and other non-judicial contexts)
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A - Privilege Against Self Incrimination

W not obliged to answer a question or produce documents if, in the opinion of the Judge, it would have a tendency to expose that person to a criminal charge or penalty (**Blunt**)

s128 - Rule	(1) applies if a W objects to giving particular evidence (or evidence on a particular matter) on the ground that the evidence <i>may tend to prove that the W</i> – a) Has committed a criminal offence (Aus or foreign law); or b) Is liable to a civil penalty
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SCOPE OF THE PRIVILEGE

[SCRIPT]: “The court must notify [X] per **s132** that she may have a basis for invoking her right of privilege against S-I. [X] would argue per **s128(1)(a)** that giving evidence would expose her to a ‘real and appreciable risk’ (**Brebner v Perry**) of criminal prosecution/civil penalty.”

- Cannot be claimed to protect **3P**
- Applies only to **testimonial or documentary evidence (E during trial)** (**Sorby**).
 - Cf provision of ‘real’ evidence such as fingerprints.
- Applies in **non-judicial proceedings** and can only be abrogated by *express or implied* parliamentary intention (**Pyneboard**, and **Sorby**)
- **Applies to ‘derivative evidence’** – evidence which although not in *itself* incriminating ‘may set in train a process which may lead to incrimination/lead to the discovery of’ real incriminating evidence (**Sorby v Cth** per Gibbs CJ, quoting Lord Wilberforce)
- **Corporations** cannot claim the privilege (either at CL (**EPA v Caltex**) or under the EA (**s187**))

s128(2) – Claiming the Privilege – reasonable grounds?

- s128(2)** court to determine whether there are ‘**reasonable grounds**’ for the objection.
- ‘reasonable grounds’ undefined
 - A party who wishes to give evidence, but only if they get a ‘s128 certificate’ (protective measure) – the **party does not ‘object’** to the giving of E for the purposes of s128 (**Song**).
 - c/f when compelled from subpoena – no reason why they can’t object on grounds it would incriminate

COMMON LAW considerations for ‘reasonable grounds’:

- ‘**real and appreciable**’ danger (not imaginary/insubstantial/remote) of self-incrimination (**Sorby** approved in **Brebner**)
- Circumstances/facts/gravity of the offence (incriminating themselves for a trivial offence or is it murder?) (**Sorby**)
- Nature of the Evidence (**Sorby**)
- Whether the privileges is for the protection of W or for a **collateral purpose** (**Brebner** – e.g. other D) (Cannot claim for 3rd party)
- Legitimate/**bona fide** claim of privilege (Act is silent on the issue) (**Brebner**)

No reasonable grounds made out? proceed to exception s128(4)(a)

s128(3) yes reasonable grounds - certificate

- If **there are reasonable grounds**, the court must **inform the WITNESS**:
- (a) That W need not give the E *unless* required by the court to do so under s128(4); **AND**
 - (b) The court will give a *certificate* under this section **if** –
 - i. W willingly gives the E without being required to do so under s128(4); **or**
 - ii. W gives the E after being required to do so under s128(4); **AND**
 - (c) of the effect of such a **certificate** (see (5)(6)(7))

<p>s128(4)</p> <p>Court can require when interests of J</p> <p>Interests of Justice Per Wheely J – R v Lodhi</p>	<p>S128(4) – The court may require W to give the E if the court is satisfied that –</p> <p>(a) The E does not tend to prove that the W has committed an offence/is liable to a civil penalty under a <i>law of a foreign country</i>; and</p> <p>(b) The ‘interests of justice’ require that the W give the E.</p> <p>Relevant factors for ‘interests of justice’: (R v Lodhi)</p> <ul style="list-style-type: none"> • The nature of the proceedings against D (Civil or Criminal) <ul style="list-style-type: none"> ◦ Greater penalty/serious charge/crim = more likely to admit for public interest • If criminal, is the E called by the defence or the prosecution? <ul style="list-style-type: none"> ◦ D should be entitled to adduce E to fully defend himself – public interest (Lodhi) ◦ Indictable offence is more serious • The importance of the E to the Prosecution’s case (what does the E show) <ul style="list-style-type: none"> ◦ Is it the only evidence available to prove FII? How detrimental is the absence of the evidence to P’s case? How strong is the evidence? • The likelihood of prosecution/imposition of a penalty <ul style="list-style-type: none"> ◦ Certificate won’t protect W anyway, or W immune anyway? • The interests of D in having a fair trial • Interests of the W in relation to their own trial <ul style="list-style-type: none"> ◦ Is their crime more serious than the current trial? If so then privilege upheld • Reliability of W’s evidence <ul style="list-style-type: none"> ◦ Courts don’t give much weight to this factor (Wheely in Lodhi) ◦ Consider wider societal influences – religious, community, family circs <p>Conclude on where interests of justice lie – do they weigh for or against admission of E?</p>
<p>s128(10) - Exception</p>	<p>In a criminal proceeding, s128 does not apply where D gives evidence that D –</p> <p>(a) Did an act the doing of which is a fact in issue; or</p> <p>(b) Had a state of mind the existence of which is a fact in issue.</p> <p>Here: if a D chooses to give evidence, they can’t claim privilege against SI in respect of a <i>fact in issue</i> – they must answer it (can’t give E then claim self-incrim when asked something difficult)</p> <p>But D can still claim self-incrim in relation to other ancillary offences giving evidence of</p>
<p>The Effect of the Certificate</p>	
<p>S128(5)(6)</p> <p>W will be given a certificate if:</p>	<p>The witness WILL be given a certificate if:</p> <ul style="list-style-type: none"> • (5) W willingly gives E or is required to give E under (4); OR • (6) The W’s objection is overruled and is required to give evidence, and Court later finds that there were reasonable grounds for objection (see Bevillesta)
	<p>If [X] is compelled then the court will issue a certificate per s128(5) which will prevent X’s evidence being used against her per s128(7).</p>
<p>128(7)</p>	<p>Evidence in respect of which the certificate has been given (including derivative evidence) can’t be used against W in subsequent proceedings (except in proceedings for perjury)</p>
<p>S128(8)(9)</p>	<p>(8) The certificate has effect despite any challenge to the decision to give the certificate</p> <p>(9) Doesn’t apply in a retrial or appeal (have to go through it all again)</p> <p>Cornwell v R – a certificate won’t apply in a retrial for the same offence</p>

