

Privilege in respect of Self Incrimination

Candidates are to have a good understanding of: Privilege (all forms)

The following provisions of the Evidence Act are examinable:

Part 3.10 Privilege, **Division 2 – Other privileges:**

- Privilege against self-incrimination: s 128

s 128: Privilege in respect of self-incrimination in other proceedings

- 1) This section applies if a witness **objects** to giving **particular evidence**, or **evidence on a particular matter**, on the ground that the evidence may tend to prove that the witness—
 - a) **has committed an offence** against or arising under an Australian law or a law of a foreign country; or
 - b) Is liable to a **civil penalty**.
- 2) The court **must** determine whether or not there **are reasonable grounds** for the objection.

3) Subject to ss (4) if the court determines that there are **reasonable grounds** for the objection, the court is **not to require** the witness to give the evidence, and **is to inform** the witness –

- a) That the witness need not give the evidence unless require by the court to do so under ss (4); and
- b) That the court will **give a certificate** under this section if-
 - i. The witness willingly gives the evidence without being required to do so under ss (4); or
 - ii. The witness gives the evidence after being required to do so under ss (4) and
- c) The effect of such certificate.

4) The court **may** require the witness give the evidence if the court is satisfied that—

- a) The evidence **does not tend to prove** that the witness has committed an offence against or arising under, or is liable to a civil penalty under, law of a foreign country; and
- b) The **interests of justice** require that the witness give the evidence.

5) If the witness either willing gives the evidence without being required to do so under ss (4), or gives it after being required to do so under that subsection, the court **must** cause the witness to be given a **certificate** under this section **in respect of that evidence**.

- 6) The court is also to **cause a witness to be given a certificate** under this section if –
- a) The objection has been **overruled**; and
 - b) After the evidence has been given the court finds that there were **reasonable grounds for the objection**.

7) In any proceeding in a Victorian court or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence –

- a) Evidence given by a person in respect of which a certificate under this section has been given; and
- b) Evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given the evidence-

Cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of evidence.

8) ss (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

9) If an accused in a criminal proceeding for an offence is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the accused for the same offence or a trial of the accused for an offence arising out of the same facts that gave rise to the offence.

10) In a criminal proceeding, this section does not apply in relation to the giving of evidence by an accused, being evidence that the accused –

- a) Did an act the doing of which is a fact in issue; or
- b) Had a state of mind the existence of which is a fact in issue.

11) A reference in this section to doing an act includes a reference to failing to act.

Background -

- The JCV Uniform Evidence manual classifies **s 128** as a '*major change*' from the common law position on privilege against self-incrimination.
 - At common law, there is an absolute right to claim privilege against self-incrimination.
 - Under the UEA, **a witness may give or be compelled to give, self-incriminating evidence** in certain circumstances and the **court will grant a certificate** excluding the admission of that evidence against the witness in any other legal proceeding (this includes both *direct* and *derivative* use)

Privilege in respect of self-incrimination in other proceedings -

1. S 128 applies if a witness objects to giving particular evidence or evidence on particular matter...
2. Because doing so may tend to prove the witness has committed an offence against, or arising under, an Australian law or a law of a foreign country, or is liable to a civil penalty (s128(1));
3. If the court determines there are reasonable grounds for the objection, it **must inform the witness**:
 - That he or she need not give the evidence unless required by the court to do so under s 128(4).
 - That the court will grant a certificate under s 128 if:
 - The witness willingly gives the evidence without being required to do so; or
 - The witness gives the evidence after being required by the court to do so; and
 - Of the effect of the certificate (s 128(3)).

Privilege in respect of self-incrimination in other proceedings (cont') -

4. The court may require the witness to give the evidence if it is satisfied that the interests of justice require the witness to give the evidence, provided that the evidence does not tend to prove that the witness has committed an offence or is liable to a civil penalty under a law of a foreign country (s 128(4)).

Note: This section does not apply in criminal proceedings where an accused gives evidence that he or she:

- Did an act, the doing of which is a fact in issue; or
- Has a state of mind, the existence of which is a fact in issue (s 128(10)).

‘...if a witness objects to giving particular evidence, or evidence of a particular matter’: S 128(1)

- The witness **must** object to giving the evidence to enliven the section.

'...reasonable grounds for the objection': s 128(2)

- The Act does not define or offer guidance regarding the term 'reasonable grounds'.
- In referring to *R v Boyes* (1861) 121 ER 730 (at 738) (as cited in *Sorby v the Commonwealth* (1983) 152 CLR 281 at 289 per Gibbs CJ; [1983] HCA 10) Giles JA observed that the terms of s 128 recall those used at common law, and at common law, a witness could not refuse to answer a question which tended to show he or she had committed a crime for which he or she could not be convicted or punished (*R v Bikic* [2001] NSWCCA 537 at [14] per Giles JA (Sully and Levine JJ agreeing)).
- The burden of proving there are 'reasonable grounds' lies with the person seeking protection of the provision. By s 142, the standard is the 'balance of probabilities'.

‘The court may require the witness to give the evidence if the court is satisfied...’: S 128(4)

- s 128(4) allows the court to compel a witness to give evidence and so subjects the protection against self-incrimination to the exercise of a judicial discretion. If s 128(4) is applied, s 128(5) requires the court to issue a certificate of immunity. A certificate of immunity provides the protection set out in s 128(7).
- In determining whether to admit the evidence, the court must be satisfied that the interests of justice require the admission, not merely that the evidence is relevant. This is consistent with the fact that the Act essentially abrogates a common law right (*Gedeon v R* [2013] NSWCCA 257 at [286] per Bathurst CJ (Beazley P, Hoeben CJ at CL, Blanch and Price JJ agreeing)).

(ii) 'the interests of justice' require the witness to give the evidence: s 128(4)(b)

- The Act does not provide any guidance as to the meaning of the 'interests of justice'. It is for the party seeking to have the witness compelled to give evidence to satisfy the court that the interests of justice 'require' that the evidence be adduced.
- In determining whether the interests of justice require such action in any given case, it is important to consider the scope and purpose of the provision, as well as what is its real objective.

(ii) 'the interests of justice' require the witness to give the evidence: S 128(4)(b) (cont')

- Odgers suggest that the following factors may be considered when determining whether to admit evidence:
1. the importance of the evidence in the proceeding;
 2. the likelihood that the evidence will be unreliable even if a certificate is given;
 3. the interests of the witness in obtaining a fair trial in future proceedings;
 4. if the proceeding is a criminal proceeding – whether the party seeking to adduce the evidence is a defendant or the prosecutor;
 5. the nature of the offence, cause of action or defence alleged in the proceeding;
 6. the nature of the offence or liability to penalty to which the evidence relates;
 7. any resulting unfairness to a party (e.g., unfairness arising from the party being forced to disclose potentially incriminatory conduct which would not be protected by a certificate for tactical reasons);
 8. the likely effects of requiring the evidence to be given, and the means available to limit its publication;
 9. whether the substance of the evidence has already been published;
 10. where a charge/s has/have already been brought arising out of the events to which the evidence relates, whether the charge/s have been finally dealt with;
 11. if the witness will not be required to give evidence, the way in which the refusal to give evidence is to be approached by the tribunal of fact (thus, in a jury trial, the content of anticipated directions to the jury regarding the approach to any refusal to give evidence).

Effect of a certificate: S 128(7)

- S 128(7) confers both a USE and a DERIVATE USE immunity with respect to evidence which is the subject of a certificate in any proceeding:
 - In a Victorian court (see UEA Dictionary); and
 - Before any person or body authorised by a Victorian law, or by consent of parties, to hear, receive and examine the evidence.
- See also s 128(9).

Exception – evidence of an accused: s 128(10)

- This subsection provides that, in criminal proceedings, s 128 does not apply to the giving of evidence which goes to either an *act* or a *state of mind* which is a *fact in issue*.
- This is not limited to ‘direct evidence’; it extends to ‘the giving of evidence by the defendant of facts from which the doing of the act or the having of the state of mind can be inferred’ (*Cornwell v R* (2007) 231 CLR 260; [2007] HCA 12 at [84]).

Exclusion of matters of state

Candidates are to have a good understanding of: Privilege (all forms)

The following provisions of the Evidence Act are examinable:

Part 3.10 Privilege, **Division 3 – Evidence excluded in the public interest:**

- Matters of state: s 130

S 130: Exclusion of evidence of matters of state

- 1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document NOT be adduced as evidence.
- 2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).
- 3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit.

4) Without limiting the **circumstances** in which information or a document may be taken for the purposes of ss (1) to relate to matters of state, **the information or document is taken for the purposes of that subsection to relate to matters of state** if adducing it as evidence would –

- a) Prejudice the **security, defence** or **international relations** of Australia; or
- b) Damage the **relations** between the Cth and a State or between 2 or more States; or
- c) Prejudice the prevention, investigation or prosecution of an **offence**; or
- d) Prejudice the prevention or investigation of, or the conduct of proceedings for the recovery of civil penalties brought with respect to, **other contraventions of the law**; or
- e) Disclose, or enable a person to ascertain, the **existence or identity of a confidential source of information** relating to the enforcement or administration of a law of the Cth or a State; or
- f) **Prejudice the proper functioning** of the government of the Cth or a State.

- 5) Without limiting the **matters** the court may take into account for the purposes of ss (1), **it is to take into account** the following matters–
- a) The **importance** of the information or the document **in the proceeding**;
 - b) If the proceeding is a **criminal proceeding** – whether the party seeking to adduce the evidence of the information or document is an **accused** or the **prosecutor**;
 - c) The nature of the **offence, cause of action** or **defence** to which the information or document relates, and the nature of the **subject matter** of the proceeding;
 - d) The **likely effect** of adducing evidence of the information or document, and the **means available to limit its publication**;
 - e) Whether the substance of the information or document has already been published;
 - f) If the proceeding is a **criminal proceeding** and the party seeking to adduce evidence of the information or document is an accused – whether the direction is to be made **subject to the condition that the prosecution be stayed**.
- 6) A reference in this section to a State includes a reference to a Territory.

Background

- This provision is essentially a restatement of the common law public interest immunity, and common law authorities continue to inform the operation of the exclusion (*Ryan v State of Victoria* [20015] VSCA 353).
- However, the UEA provides a non-exhaustive formulation to balance competing interests (s 130(5)).

Principles applicable to a claim for public interest immunity:

1. There is no absolute immunity from the production and inspection of cabinet documents;
2. The public interest has two aspects: the protection of government from the harm which may be caused by disclosure, and the interest in ensuring that justice can be effectively administered;
3. The court must weigh the competing elements of the public interest;
4. A court may inspect the documents in order to determine any claim, but the circumstances in which that power should be exercised is unclear. If the documents clearly fall into a class which attracts the immunity they should not be inspected;
5. The *intended use* of the documents, particularly if required to found a defence to a criminal charge, is a relevant consideration. Where a person's liberty is at stake, production is more likely to be ordered.

‘the public interest in admitting into evidence... is outweighed... by the public interest in preserving secrecy or confidentiality’: s 130(1)

1. The Act does not define ‘public interest’ but some relevant considerations are provided by s 130(5). It has been observed that the proper balancing of the test requires a judge to ‘identify with precision, and then balance fairly and sensibly, the two competing interests to which subs(1) makes reference’ (*Attorney-General v Kaddour* [2001] NSWCCA 456 at [15] per Sully J (Spigelman CJ and Adams J agreeing)).
2. Other public interest considerations (some from the common law) include, but are not limited to:
 - assessment of the evidentiary value and importance of the documents in the particular litigation (*Alister v R* (1983) 154 CLR 404 at 44-45 per Gibbs CJ); and
 - the accused’s right to a fair trial (*Alister*).

Disclose etc a 'confidential source of information relating to the enforcement or administration of a law': s 130(5)(e)

1. This subsection recognises a state's interest in protecting, inter alia, the identity of police informers. At common law it is recognised that unless the identity of such persons is protected, important sources of information would 'dry up and the prevention and detection of crime would be hindered' (*R v Smith* (1996) 86 A Crim R 308 at 312 per Gleeson CJ, Clarke and Sheller JJA).