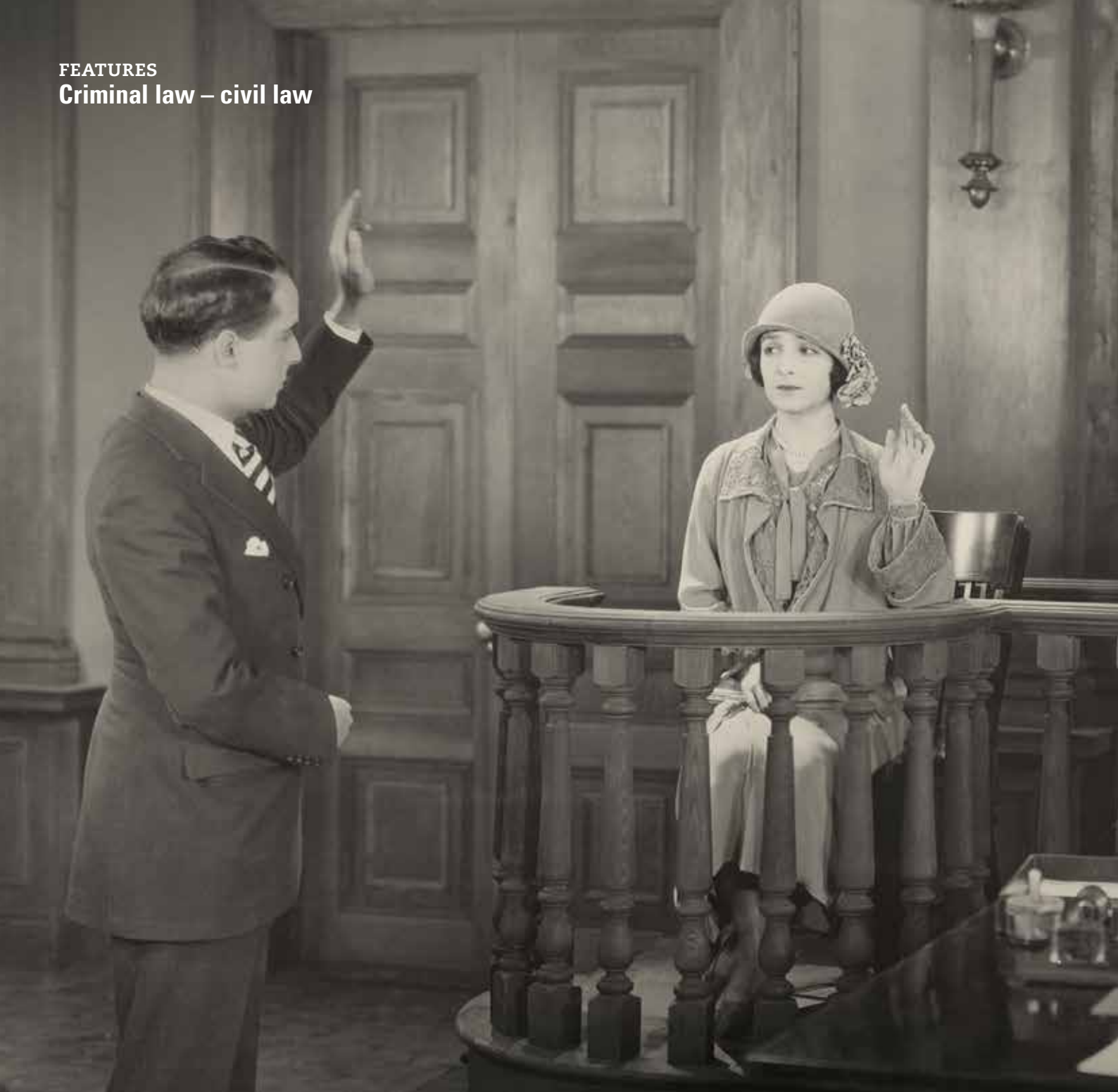

‘Pleading the fifth’

BOTH CRIMINAL AND CIVIL LAWYERS SHOULD BE FULLY AWARE OF THE PRIVILEGE AGAINST SELF-INCRIMINATION IN VICTORIA, HOW IT WORKS, AND WHAT COUNSEL’S OBLIGATIONS ARE WHEN THE PRIVILEGE MAY APPLY TO A WITNESS. BY ERIK DOBER AND BRIANNA COX

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SNAPSHOT

- There is critical information practitioners need to know about s128 of the *Evidence Act 2008* (Vic), being the privilege against self-incrimination.
- Practitioners must be able to identify when the privilege applies and what to do when it does.
- Importantly, this includes the need to ensure a witness has been provided with independent legal advice.

Introduction

There are all kinds of witnesses, with all kinds of backgrounds. Not all of them are model citizens. Consequently, during examination it is not uncommon for a witness's own misdeeds to come out. Whether it is tax evasion, drug use, jaywalking or making false statements (including the "I made it all up" retraction well known to those who practise in family violence cases), witnesses need to be advised how they can be protected from incriminating themselves when giving evidence.

What is the self-incrimination privilege?

Section 128 of the *Evidence Act 2008* (Vic) (EA) – part of the Uniform Evidence Law – codifies the common law privilege against self-incrimination. That privilege allows a witness to object to giving certain evidence during a proceeding because it may incriminate them. The statute differs from the common law in that it is not an absolute privilege. A court can still require the evidence be given where the interests of justice require it (s128(4)). In such circumstances, the witness will be issued a certificate preventing the incriminating evidence from being used against them in subsequent proceedings.

A certificate can also be provided when a witness makes an objection but is willing to give evidence under the protection of a certificate.

Ultimately, the purpose of s128 is to enable witnesses to give evidence relevant to the proceeding at hand while being protected from prosecution for other offences.

Legal advice to witnesses

Section 132 of the EA requires a court to ensure that a witness who might have a right to object under s128 is informed of the effect of the privilege. In practice, counsel should raise s128 with the court whenever it appears that a witness may have grounds to object. A court may need to stand down or adjourn a hearing to enable the advice to be provided.

If the witness is a party to the proceeding, their legal representatives can provide the advice. However, if the witness is not a party, they will need to obtain independent legal advice on the issue. Often this is arranged by the party that is calling them.

What type of evidence does it apply to?

Section 128 applies to a witness "giving" evidence in court. This includes oral evidence as well as documents that are produced through the witness.[1]

The privilege only applies to protect a witness from having to give evidence that may incriminate themselves in court. It cannot be used to avoid incriminating someone else, such as a spouse.[2]

There is also a related privilege available that applies to orders for disclosure. This is contained in s128A of the EA.[3]

Accused in criminal proceedings

A "witness" protected by the privilege includes an accused who gives evidence in a criminal proceeding.[4] However, the privilege does not apply to any evidence given by an accused about whether the accused "did an act the doing of which is a fact in issue" or "had a state of mind the existence of which is a fact in issue" (s128(10). In other words, an accused cannot object under s128 to answering questions in cross-examination on matters of fact which may tend to show that they committed the offence charged.

This exception under s128(10) is not limited to direct evidence that the accused did the act or had the state of mind; it also applies to evidence given by the accused about facts from which inferences can be drawn.[5]

How does it apply?

There are four steps to the application of s128.

Step 1: The witness must 'object'

Section 128 is enlivened when a witness objects to giving particular evidence on the ground that the evidence may tend to prove that the witness:[6]

- has committed an offence against or arising under an Australian law or a law of a foreign country
- is liable to a civil penalty.

Where a party to a proceeding becomes aware that s128 may apply, they should inform both the court and their opponents. This is especially important where the witness is being called by that party.

Foreshadowing the application of s128 is important for two reasons:

- it allows time for the witness to be given legal advice about s128 before the hearing
- advance notice enables the parties and the court to discuss the application of s128 before the witness is called. However, in the usual course, the objection is not formally made under s128 until a question arises in examination that is cause for objection.

Plaintiffs/applicants calling in aid s128

Section 128 cannot be called in aid by a plaintiff or applicant when giving evidence

in chief. This is because the jurisdiction is contingent on an objection by a witness. A plaintiff, who carries the onus of proof, may freely choose not to give evidence that may assist their case at their own peril. They are not compelled to give the evidence. However, a plaintiff or applicant may be permitted to invoke s128 during cross-examination since they are compelled at that point.[7]

Step 2: The court must determine there are 'reasonable grounds'

A witness who objects must prove – on the balance of probabilities[8] – that there are "reasonable grounds" for the objection.[9] The court must determine whether the evidence subject to the objection may tend to prove that the witness has committed an offence or is liable to a civil penalty. The evidence does not need to prove the commission of an offence or liability outright. Evidence will be sufficient to "tend to prove" the commission of an offence by the witness even if it only provides a "link in the chain of evidence".[10]

However, the question is directed to whether there are reasonable grounds for the objection, not whether there are reasonable grounds for concluding that the evidence proves the liability/commission of an offence. In determining whether an objection is reasonable, the question is whether the witness would be putting themselves at risk of prosecution or liability to a penalty by giving the evidence.[11] In other words, reasonable grounds for an objection will not be made out for evidence that may tend to show the witness engaged in conduct for which they cannot be held liable or which is already well known.[12]

If satisfied there are reasonable grounds, the court must uphold the objection. The witness will then be given two choices:

- give the evidence willingly under protection of a certificate
- refuse to give the evidence, in which case they will not have to give the evidence unless the court requires it.

It is possible for a court to overrule the objection but then subsequently determine that there were reasonable grounds for it. In those circumstances, the court can issue a certificate retrospectively (s128(6)).

Step 3: Exception – s128(4)

Even when the court finds there are "reasonable grounds" for an objection to giving evidence, s128(4) allows the court to require a witness to give that evidence where the "interests of justice" require it. The burden is on the party seeking to have the witness compelled to give the evidence to satisfy the court that this is the case.[13]

The "interests of justice" is a broad term offering courts discretion to consider each individual case on its merits.[14] Some factors which may be relevant include:[15]

- the importance of the evidence in the proceeding
- whether the evidence is likely to be reliable
- the nature of the proceedings (civil or criminal)
- the nature/seriousness of the offence or liability to which the evidence relates
- if a criminal proceeding, whether the evidence is called by the defence or prosecution
- the likelihood of any proceeding being brought to prosecute the offence/impose the penalty with respect to which the witness may incriminate themselves
- any resulting unfairness to a party/witness
- the interests of the accused in obtaining a fair trial in the proceeding
- the interests of the witness in obtaining a fair trial in future proceedings.

In determining whether the exception should apply, it is important to consider the limitations of the protection a certificate can provide (set out under Step 4).

Step 4: The certificate

If the court finds reasonable grounds for the objection but the witness nevertheless gives the evidence (either willingly or by compulsion), the court must provide the witness with a s128 certificate.

The certificate prevents the reception of the evidence into any proceeding in a Victorian court or by any person or body authorised by a law of Victoria.[16] It will also have effect in federal courts and tribunals.[17]

However, a s128 certificate will not offer protection where:

- a witness gives false evidence and is subsequently prosecuted for doing so (s128(7))
- in a criminal proceeding, an accused gives evidence and there is a subsequent trial (including a retrial) arising out of the same facts (s128(9).

There are also practical limitations. For instance, a certificate does not prevent a witness from becoming subject to professional disciplinary proceedings, the commencement of a criminal investigation based on other evidence, or social stigma in their community.

What form should the certificate take?

Form 1 in Schedule 1 of the *Evidence Regulations 2019* is a template certificate. The template form of order is not mandatory, however.[18] A party who seeks a s128 certificate for their client should prepare a draft order that conforms with Form 1.

The court will publish that order and attach to it the transcript pages that are covered under the certificate. A party seeking the certificate should carefully review the transcript of evidence and provide the applicable page references to the court to assist in finalisation of the order.

However, a certificate will have effect even if procedural formalities are not complied with.[19] The policy rationale for this is to give a witness confidence they can rely on a certificate once they are told it will be granted.

Conclusion

It is critical that a legal practitioner calling a witness is aware when a s128 issue may arise. The practitioner can ensure that the witness is provided independent legal advice. This is important for protecting the interests of the witness as well as efficiently using court time.

The steps in dealing with a s128 application are not complicated but need to be followed as a sequence. It does not mean necessarily that the evidence will not be heard but can in fact facilitate witnesses giving honest evidence while confident that they are not incriminating themselves. ■

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1. *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 393 (Gibbs CJ, Mason and Dawson JJ).
2. See, instead, s18 EA.
3. For recent High Court authority on this area, see *Deputy Commissioner of Taxation v Shi* [2021] HCA 22.
4. EA Dictionary, Pt 2, cl 7.
5. *Cornwell v The Queen* (2007) 231 CLR 260 at [84].
6. *Evidence Act 2008* (Vic), s128(1).
7. *Song v Ying* (2010 79 NSWLR 442, 449-450 at [26]-[28] (Hodgson JA, Giles and Basten JJA agreeing); *De Lutis v De Lutis* (2017) 51 VR 797, see especially 799 at [8] and 803 at [25]. See also *Cornwell v The Queen* (2007) 231 CLR 260, 302-303 at [111]-[112] (Gleeson CJ, Gummow, Heydon and Crennan JJ).
8. Note 5 above, s142.
9. Note 5 above, s128(2).
10. Stephen Odgers, *Uniform Evidence Law*, Thomson Reuters, 15th edn, 2020, [EA.128.180].
11. *R v Bikic* [2001] NSWCCA 537 at [13]-[15] (Giles JA).
12. Note 10 above, at [14]; Note 9 above, [EA.128.360].
13. Note 5 above, s142; *Gedeon v R* [2013] NSWCCA 257 at [285].
14. *Cureton v Blackshaw Services Pty Ltd* [2002] NSWCA 187 at [37].
15. *R v Lodhi* [2006] NSWSC 638, see Note 9 above, [EA.128.540].
16. Note 5 above, s128(7).
17. *Evidence Act 1995* (Cth) ss128(12) and (13) and *Evidence Regulations 2018* (Cth) r9.
18. *Evidence Regulations 2019*, r10.
19. *Cornwell v R* (2007) 231 CLR 260, 296 [91] (Gleeson CJ, Gummow, Heydon and Crennan JJ); Note 5 above, s128(8).