Avoiding the Minefield When Care and Crime Collide

Magistrate Albert Sbrizzi and Magistrate Paul Mulroney

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In some care cases there will be criminal proceedings or an application for an Apprehended Violence Order arising from an incident which is also in issue in the care proceedings. In many care cases there will be a possibility that criminal charges could arise from an incident in issue in the care proceedings.

In cases where charges have been laid or an AVO applied for those proceedings will often be dealt with in different courts, at different times and with different lawyers representing the party in question.

What are the key sources of information?

COPS events (Computerised Operational Policing System).
COPS events[1] are often the least reliable account as they are prepared by a police officer as soon as possible after dealing with an incident. They will be a police officer's summary of what they were told by someone at the time and will not include subsequent investigation.

Facts Sheet
The Facts Sheet is prepared by an investigating officer at the time that a person is charged with an offence. As with COPS events, it is a point in time document and not a complete account. It may well include assertions disputed by the accused. At times Fact Sheets will prove to be a most inaccurate summary.

Bail Report
This is mainly the person's criminal record and includes a history of all charges against your client, proven or not, together with breaches of bail, arrest warrants, appeal outcomes, etc.

[1] Australian bureau of Statistics Report 1368.1 - New South Wales Regional Statistics, 2007. The COPS database used by NSW Police includes information on all reported criminal incidents, data on police actions, and other occurrences attended by, or reported to, police. The scope of the dataset is police activities, including:

- all events attended;
- all recorded victim records associated with reported and detected personal crime;
- persons of interest involved in all reported and detected crime;
- incidents of all reported and detected crime;
- apprehended violence orders (AVOs) granted; and
- other information used in policing.

COPS data are categorised by date of reporting to police (or date of detection by police) rather than by date of occurrence of the incident. Information recorded in the COPS database relates to unique occurrences attended by police or reported to police (referred to as COPS events). Within each unique occurrence, linked information on incident type, persons of interest and victims is also recorded. Note that more that one incident can be included in a single COPS event. Similarly more than one offence can be included in a single incident.

Witness statements
Police must obtain a statement from any witness they seek to rely on in court. It will be signed and include an acknowledgement that it is true, accurate and that the witness may be prosecuted if the statement is tendered and found to be false.

Brief of evidence
The brief includes all documents (not just paper documents but CCTV, video records, phone calls including 000 calls. etc) that the prosecution will rely on in a hearing. This will include witness statements, statements of police involved, photographs, statements of forensic experts, DNA reports, medical and other expert statements. Quite often a transcript of a phone call rather than a recording, or a still from CCTV rather than the footage will be served. The brief is often served in instalments as statements become available, so be aware of keeping up to date. A brief won't usually be prepared until a plea of not guilty has been entered or if the charge is so serious that a committal will occur.

ERISP (Electronically Recorded Interview of a Suspected Person)
A formal interview which is video and audio recorded. The person will have been cautioned and be able to seek legal advice before taking part. If the person has taken part in a record of interview they should be given a CD of the audio. Unfortunately these copies often go missing. A transcript may be available but usually only after some time.

JIRT interviews
Joint Investigation Response Teams (JIRTs) are made up of Community Services, NSW Police and NSW Health professionals who undertake joint investigation of child protection matters.[2] When there is an allegation that a child has been the victim of a serious offence, usually a physical assault or a sexual assault, a JIRT team will investigate. Their records are usually held separately. If the child is able to be interviewed the JIRT team will be likely to have conducted a video recorded interview (ROI). There may be public interest issues in obtaining access to JIRT records, especially the ROI. With allegations of sexual assault there are at times concerns that this material may be used by an offender for further gratification.

Hearing transcripts
If a concluded criminal matter is of significance it may be worth seeking a copy of the transcript. Transcripts will usually be available of defended District Court trials but are unlikely to be available for District Court sentence proceedings or Local court hearings. Even if a person has been found not guilty the evidence may be very significant.

Subpoenas

If you are a Child's Representative especially you should consider issuing subpoenas for all the above information, with separate subpoenas issued to JIRT as well as Police.

[2] For more see http://www.community.nsw.gov.au/docs_menu/for_agencies_that_work_with_us/child_protection_services/joint_investigation_response_teams.html

How to best represent a client facing criminal charges

Inform yourself about any criminal proceedings

- Has someone been charged?
- What are the charge(s)
- What court
- When is the next appearance
- Bail conditions if any. Is there any restriction on contact with mother, child or other relevant party?

Is there an AVO in place?

- Interim or final?
- What court?
- Next appearance
- Is there any restriction on contact with mother, child or other relevant party?

How can you get reliable information?

Your client? Seriously?

Their lawyer, if they have one, should be a good source of information. This is someone that you should establish good communication with. They will not be likely to have the care proceedings on their radar. They may not even know about them.

If you are having trouble getting reliable information, You should also consider checking with:

- the court where the criminal proceedings are listed
- investigating police
- Sentence Administration Unit, Corrective Services (if your client is in custody)
- Community Corrections Service

Obtain copies of the most significant documents which may be used by the prosecution in the criminal proceedings

For most offences your client will have been given a copy of a Court Attendance Notice (CAN), and bail undertaking. They may have given the CAN to their lawyer. The lawyer should have a copy of the Facts Sheet and the Bail Report.

With domestic violence charges police should serve a “mini brief” at the first court appearance. The mini brief includes a statement of the alleged victim, the fact sheet and any photographs which are available.

When there is an ADVO or APVO application the client will have been served with a copy of the application. This will include an account of what is alleged to have occurred that justifies

the order. They will also have been given/posted a copy of any interim or final orders. These may have been passed on to their lawyer.

Liaise with the lawyer in the criminal/AVO proceedings

They can tell you:

- What plea has been entered
- When the matter is being dealt with
- Whether it is to be dealt with in the Local or District Court
- When it is likely to be finalised
- Where your client is being held in custody

There may be reports that they have or might request which you need to know about

- Psychological or psychiatric assessments
- Community Corrections reports
- AOD assessments or letters from a drug rehabioitation program

They may be keen to get information in your possession. This might include various reports (see above) and historical information about the client.

Discuss in advance the implications of any orders in the proceedings

AVOs or bail conditions may prevent or limit contact. This may affect counselling, contact, Children's Court Clinic or other assessments

What is the relevance of criminal proceedings for the care proceedings?

Is the criminal charge a critical incident in the care proceedings? Or is it relied upon to show a tendency or pattern of behaviour?

- Sexual assault
- Non- accidental injury
- Alcohol or drug abuse
- Domestic violence

Does the parent (or other person) have a criminal record?
Is a custodial sentence likely in the criminal proceeding? Some custodial sentences can be served by home detention or intensive corrections orders. There may be particular limitations on the person – movement, association with others, contact with victims

How can current or likely criminal proceedings be dealt with in an affidavit?

If current or potential criminal proceedings, or the incident which gives rise to them, is raised in affidavits in a care case there are a number of issues to deal with.

Affidavits

There are various options in dealing with a serious allegation.

1 Non-contest

If an allegation against a person is not dealt with in an affidavit the parties and the court are entitled to assume that the allegation is not disputed. This is not tantamount to an admission however.[3] A party may be happy to proceed on the basis that they do not contest but do not admit an allegation.

2 Confirmation

A decision can be made that the best approach is to agree that an event took place and that an explanation will be the most helpful approach. For example a person might admit a particular event of domestic violence and go on to explain the context (affected by alcohol, just heard of the death of someone close, the other person started it) in more detail than is available. This also provides the basis for the person to set out the steps that they have taken to deal with the incident. A person who denies domestic violence but takes part in a course aimed at taking responsibility for DV has a credibility problem.

If a party disputes an allegation there may be implications for the criminal proceedings. It may be that the party has already admitted the offence or advanced an explanation (eg in a record of interview). If that is the explanation that the party maintains, there is no disadvantage in dealing with it in an affidavit. This should be carefully discussed with the client and the lawyer in the criminal proceedings.

3 Denial with an explanation

If the party disputes an allegation they may have disputed the allegation in the criminal proceedings, most likely by way of a record of interview or some other statement on which the prosecution can rely. If this is so there is no problem with repeating that contention in the care proceedings.

4 Denial without explanation

In many cases, especially where there is or may be a serious charge, a party may have declined to give any account to police. In the care proceedings they are nevertheless faced with the necessity to provide an account of the incident. This is dealt with in detail below.

When is an admission protected from use in criminal proceedings?

Section 128 Evidence Act *[see appendix 1]*provides a privilege against self-incrimination for evidence given in other proceedings. The provision applies

1. A witness objects to giving particular evidence , or evidence on a particular matter

[3] Evidence Act, Dictionary. ***"admission"*** means a previous representation that is:
(a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding), and
(b) adverse to the person's interest in the outcome of the proceeding.

2. The ground of objection is that the 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 (eg a civil fine, disqualification from an office, etc).
3. The court determines that the objection is reasonable.

The onus is on the witness to establish the grounds.

If these grounds are established the witness is entitled to a certificate of protection if they:

1. Give the evidence willingly, or
2. Give evidence after having been required to do so

Application of the Evidence Act in the Children's Court

Under the Children and Young Persons (Care and Protection) Act 1998 the presumption is that the Evidence Act doesn't apply. Section 93(3) provides that:

> The Children's Court is not bound by the rules of evidence unless, in relation to particular proceedings or particular parts of proceedings before it, the Children's Court determines that the rules of evidence, or such of those rules as are specified by the Children's Court, are to apply to those proceedings or parts.

For s128 to apply the Court must also make a determination that the rules of evidence apply to the particular part of the proceedings.

Family Court and NSW Court of Appeal interpretations differ

There is a divergence of treatment between the Family Court and the NSW Court of Appeal regarding the meaning of the expression "if a witness objects to giving evidence ….

Family Court

Family Court cases give a broad interpretation of the provision. In effect they assume that a party is *required* to give evidence by filing an affidavit to respond to assertions by another party. The party then objects and seeks a certificate to cover an affidavit available for filing. Evidence in chief by a party would also be able to be covered by a certificate. The key cases are *Ferrall v Blyton* and *Jarvis v Pike*. *[see appendix 2]*

NSW Court of Appeal

The Court of Appeal seeks to interpret the words of the section rather than seeking to facilitate the admission of evidence. In the Criminal Trial Courts Bench Book published by the Judicial Commission there is the following[4]:

> … the court identified the following propositions, at [24], [27]–[29], that:

[4] http://www.judcom.nsw.gov.au/publications/benchbks/criminal/privilege_against_self-incrimination.html

(a) unless a party to the proceedings is giving evidence in response to questions from their own legal representative, witnesses are compellable to give evidence
(b) compellability of this nature makes sense of the word "objects" in s 128(1) and of "require" in s 128(4): see also Cornwell v The Queen at [112]. A motivation to give evidence which avoids a judgment being made against a defendant does not amount to relevant compellability
(c) a party to proceedings who wishes to give particular evidence in response to questions from his or her own legal representative "but is not willing to do so" without a s 128 certificate does not "object" within the meaning of s 128(1)
(d) a witness who is compelled by a party to give evidence during the proceedings (for example under cross-examination) can raise an objection at any stage during their evidence: see, in particular, Song v Ying at [30].

In *Song v Ying* [2010] NSWCA 237 the court did not accept the decision in *Ferrall*. The Full Court in *Jarvis* was not apparently referred to *Song v Ying*. The court stated that the word "objects" in s128 refers to a circumstance where a witness protests against giving evidence in circumstances where, but for the privilege, they would be compelled to do so.

Which approach applies to the Children's Court?

The broad reading of *Ferrall* is more consistent with the approach in the Children's Court to facilitate admission of evidence in order that the needs and interests of the child are properly dealt with. However we believe that in NSW the *Song v Ying* approach is most likely to prevail.

If you find yourself in this situation the best approach may be to include in an affidavit:

- A general denial of the assertion or a statement that a particular account is not accurate
- A statement that the maker is concerned that any account given by them in an affidavit may tend to incriminate them and is therefore unwilling to file regarding the particular issue
- A statement that the maker is willing to give answers about the event in court if required to do so and would seek a s128 certificate.

Dispute Resolution Conferences

We cannot see how a s128 certificate would apply to a DRC. What is said at a DRC is not evidence. The confidentiality of DRCs is not absolute. Practitioners should be aware of exceptions to this.[5] If an admission to a criminal offence was made at a DRC, a witness to the admission cannot be called to give evidence.

[5] cl 11 (5) of the *Children and Young Persons (Care and Protection) Regulation 2000. Re Anna* [2012] NSWChC 1
Practice Note 3, cl22. Confidentiality
22.1 Parties attending an external ADR service will be required to sign a Confidentiality Agreement. The disclosure of matters discussed during external ADR is only permitted where such disclosure is required by law. Any agreement reached by all the parties during external ADR (or the fact that agreement could not be reached) is not subject to confidentiality.

Children's Court Clinic

A certificate cannot apply to what is said to a clinician during CCC assessments. Curiously a S128 certificate was granted in the Federal Magistrates Court proceedings in *Jarvis & Pike* to cover anything said to a family consultant who was to prepare a report under s11F Family Law Act. The Full Court briefly referred to this issue but made no comment as it was not the subject of the appeal. Unlike with a DRC, if an admission to a criminal offence was made to a clinician, they could be called to give evidence of the admission. No privilege would apply.

Evidence Act

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 subsection (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 required by the court to do so under subsection (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 subsection (4), or

(ii) the witness gives the evidence after being required to do so under subsection (4), and

(c) of the effect of such a certificate.

(4) The court may require the witness to 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, a law of a foreign country, and

(b) the interests of justice require that the witness give the evidence.

(5) If the witness either willingly gives the evidence without being required to do so under subsection (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 the 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 NSW 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 evidence, cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

Note. This subsection differs from section 128 (7) of the Commonwealth Act. The Commonwealth provision refers to an"Australian Court" instead of a "NSW court".

(8) Subsection (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 a defendant 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 defendant for the same offence or a trial of the defendant for an offence arising out of the same facts that gave rise to that offence.

(10) In a criminal proceeding, this section does not apply in relation to the giving of evidence by a defendant, being evidence that the defendant:

(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.
(12) If a person has been given a certificate under a prescribed State or Territory provision in respect of evidence given by a person in a proceeding in a State or Territory court, the certificate has the same effect, in a proceeding to which this subsection applies, as if it had been given under this section.
(13) For the purposes of subsection (12), a prescribed State or Territory provision is a provision of a law of a State or Territory declared by the regulations to be a prescribed State or Territory provision for the purposes of that subsection.
(14) Subsection (12) applies to a proceeding in relation to which this Act applies because of section 4, other than a proceeding for an offence against a law of the Commonwealth or for the recovery of a civil penalty under a law of the Commonwealth.
Notes.
[1] Bodies corporate cannot claim this privilege. See section 187.
[2] Clause 3 of Part 2 of the Dictionary sets out what is a civil penalty.
[3] Section 128 (12)–(14) of the Commonwealth Act give effect to certificates in relation to self-incriminating evidence under the NSW Act in proceedings in federal and ACT courts and in prosecutions for Commonwealth and ACT offences.
[4] Subsections (8) and (9) were inserted as a response to the decision of the High Court of Australia in *Cornwell v The Queen*[2007] HCA 12 (22 March 2007).

Family Court

Ferrall and McTaggart as Trustees for the Sapphire Trust and Ors and Blyton and Blyton and Attorney-General of the Commonwealth **[2000] FamCA 1442 (17 November 2000)**

> 20. In proceedings before O'Ryan J on 25 June 1999, the husband, having been granted a certificate by his Honour under s.128 of the *Evidence Act* 1995 (Cth) ("the Evidence Act") in respect of the evidence contained in his affidavit sworn on that day, made admissions therein in relation to a number of issues which were identified in the trial Judge's reasons for judgment delivered following a directions hearing in the pending property proceedings on 31 July 1998. The husband stated in this affidavit that he had, in previous sworn affidavits, wrongly denied the wife's assertion…..
> 83. Mr Jackson QC for the applicants submitted that the question of whether a certificate should be granted arises only when the witness "objects" to giving evidence and in this regard they refer to the opening words of s.128(1) and the reference in s.128(4) to "overruling the objection". They said that in this case, the husband sought to give evidence and was not objecting to doing so and that as a consequence the terms of the section were not satisfied.
> 85. In reply, Mr Brereton SC for the respondents said that there was nothing to suggest that s.128 was intended to operate only in relation to cross-examination and he said that it clearly extended to evidence in chief in respect of evidence which a witness would otherwise wish to give except that it would be self-incriminatory. He said that all that was intended by the reference to "objects" in sub-s.(1) and "objection" in sub-s.(4) was to cover the situation of witnesses giving evidence both in chief and in cross-examination. In this regard he relied upon the decision of the Full Court in *Atkinson v Atkinson* (1997) FLC 92-728. He pointed out that the offer of a certificate does not compel the witness to give the evidence but if the witness does so, the Court must give a certificate. He said this was inconsistent with the section being concerned only with a witness who objects to giving the evidence at all and wholly consistent with its being directed to a witness who, subject to the offer of a certificate, wishes to give evidence……..
> 89. We think the trial Judge was clearly correct in holding that it was within his discretion to grant such a certificate. Firstly, we think it would be unrealistic to limit the availability of a certificate to a situation where a witness is asked a particular question in cross-examination. We think the availability of a certificate clearly applies to evidence given in chief, otherwise an inappropriate forensic advantage would rest with the other party who would be in a position to prevent the question of an objection arising by simply not seeking to cross-examine.
> 90. ***In the particular circumstances of the Family Court of Australia, evidence in chief is normally given by affidavit. We think that in the circumstances of the present case, the witness was objecting, in the sense required by s.128, by indicating that he would not file the affidavit unless a certificate was given. We see the situation as no different from that which would have been the case if he had been sworn in and asked to answer questions concerning the matter in evidence in chief, and had objected to doing so without the issue of such a certificate.*** [emphasis added]

35. *Ferrall & Blyton* is a Full Court decision reported as *Ferrall and McTaggart (trustees for Sapphire Trust) v Blyton* [2000] FamCA 1442; (2000) FLC 93-054. There it was held that the discretion to grant a s 128 certificate is not limited to a situation where a witness is asked a particular question in cross-examination, and the availability of a s 128 certificate clearly applies to evidence given in chief. Applying that decision here, a s 128 certificate can be granted to cover evidence-in-chief given by way of affidavit.

36. … [I]t is not readily apparent on what basis the Federal Magistrate declined to make the order sought. The most that can perhaps be said is that
his Honour considered it would be inappropriate to extend the s 128 certificate beyond the evidence given in response to the particular paragraphs in the mother's affidavit because without knowing what other or further evidence the father might give, his Honour could not determine whether it was necessary in the interests of justice for that evidence to be given in the proceedings.

37. It is submitted on behalf of the father that there is error in that approach, but the particular error in relation to the orders made on 13 July 2012 is not specifically identified either in the Notice of Appeal or in the father's written or oral submissions.

38. Plainly the complaint is a general one, namely once there was an objection by the father to giving evidence on reasonable grounds, that required the Federal Magistrate to grant a certificate to cover all of the evidence, including in chief, in cross-examination and by affidavit that the father intended to give in the proceedings.

39. There would appear to be no issue that the father's objection was made on reasonable grounds, namely that he would like to give evidence in relation to the allegations made by the mother in her affidavit, but to do so may place him at risk of incrimination. However, at the point that the application for a certificate was made, the mother had filed her affidavit containing the allegations, the father was due to file an affidavit in response, and a s 11F appointment had been listed to take place. Clearly, it was appropriate and necessary for the Federal Magistrate to grant the s 128 certificates that he did, but the question seems to be should his Honour have projected ahead and found that it would be necessary subsequently for the father to give further evidence, both in chief and in cross-examination (and maybe by way of affidavit) that might tend to incriminate him, as opposed to waiting until the time to give that evidence and addressing any further application for a s 128 certificate when it was known what that evidence might be.

40. There seems to be no direct authority on that point, but we are not persuaded that the Federal Magistrate erred in the approach that he took and in refusing to grant the broad certificate that was asked for, given the state of the proceedings.

41. In his written summary of argument the father submits that once an objection is made on reasonable grounds then there is "no judicial discretion not to grant a certificate". That may be so, but that says nothing about the issue of breadth of the certificate in terms of the evidence that it covers, and it certainly does not provide the answer to the question posed above.

42. We further note that it was submitted on behalf of the father that it would be burdensome for him to have to make further applications for a s 128 certificate as and when the occasion arose. However, we reject that submission, given that it is not until it is necessary for further or other evidence to be given that an assessment can be made as to whether there are reasonable grounds for there to be an objection to giving that evidence.

43. During the hearing of the appeal the father's counsel suggested that any concerns about the breadth of the certificate would have been overcome if the Federal Magistrate had granted a s 128 certificate to cover any evidence to be given by the father in relation to

the specific allegations made by the mother in her affidavit filed on 26 May 2012 including but not limited to evidence-in-chief, evidence in cross-examination, evidence in re-examination, and evidence by affidavit, and evidence given in relation to any family report or psychological assessment ordered by the Federal Magistrate. We agree that that may have been appropriate in the circumstances, but such an order was not sought from the Federal Magistrate and thus there is still no error demonstrated by his Honour.

44. Before completing the discussion in relation to this ground, we make two further comments. First, it is apparent from the transcript that his Honour initially queried whether a s 128 certificate could be granted in relation to what the father might tell the family consultant at the s 11F appointment given that that was not strictly "evidence". We also note that the same issue arises in relation to the "evidence" to be given for the purposes of the family report and the psychological assessment. However, his Honour concluded that he was able to give such a certificate for that "evidence", and that has not been challenged in this appeal and we say nothing further about this issue.

***Song v Ying* [2010] NSWCA 237**

19 Under s 12 of the *Evidence Act*, except as otherwise provided in the Act, a person who is competent to give evidence is also compellable to give it. That compulsion can be exercised by use of subpoenas to get witnesses to court and into the witness box; and refusal to answer questions which a witness is compellable to answer (whether in chief or in cross-examination) can result in imprisonment.

20 Plainly, in my opinion, if a witness gives evidence in chief because actually compelled to do so (by subpoena and threat of imprisonment), or because of the availability of such compulsion if he or she does not do so, there is no reason why that witness may not object to giving evidence in chief on the ground that that evidence may tend to incriminate. The question in my opinion is not whether the evidence is given in chief or in cross-examination, but rather whether an objection under s 128 is limited to an objection to giving evidence which the witness would otherwise be compellable to give.

21 In *Ferrall*, the Court's reasons for holding that it was within the discretion of the trial judge to grant a s 128 certificate were:

> [89] We think the trial judge was clearly correct in holding that it was within his discretion to grant such a certificate. First, we think it would be unrealistic to limit the availability of a certificate to a situation where a witness is asked a particular question in cross-examination. We think the availability of a certificate clearly applies to evidence given in chief, otherwise an inappropriate forensic advantage would rest with the other party who would be in a position to prevent the question of an objection arising by simply not seeking to cross-examine.
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> [90] In the particular circumstances of the Family Court of Australia, evidence-in-chief is normally given by affidavit. We think that in the circumstances of the present case, the witness was objecting, in the sense required by s 128, by indicating that he would not file the affidavit unless a certificate was given. We see the situation as no different from that which would have been the case if he had been sworn in and asked to answer questions concerning the matter in evidence-in-chief, and had objected to doing so without the issue of such a certificate.

22 While I agree with the view that the availability of s 128 is not limited to questions in cross-examination, in my opinion these reasons are flawed in that they do not advert at all to the question of whether the witness was otherwise compellable to give the evidence objected to.

26 In my opinion, it is appropriate to construe s 128 against a background of the common law, where privilege against self-incrimination was relevantly a privilege against being compelled to give evidence that might tend to incriminate; and also against a statutory framework in which witnesses are generally compellable to give evidence. ***A party giving evidence in chief, in response to questions from that party's own legal representative, is not generally giving evidence which that party is, in any real sense, compellable to give: unless called by another party and asked questions in chief by that other party, a party's evidence in chief is given entirely at the choice of that party and is not evidence that the party is compellable to give at the instance of anyone else.*** [emphasis added] It is true that a party's legal representative can ask questions in chief without specific instructions to ask them; but if the party instructed the representative to withdraw such a question, there would in my opinion be no possibility of the witness being compelled to answer the question, at least unless it was pressed by another party or the judge, in which case no doubt s 128 could apply.

27 In all cases apart from a party giving evidence in chief or re-examination in response to questions from the party's own legal representative, witnesses are compellable to give evidence either at the instance of the party calling them, or the party directing questions in cross-examination, or the judge (if the judge asks questions). It is compellability of this nature that gives sense to the word "objects" in s 128(1) and makes sense of the word "require" in s 128(4). In my opinion, such motivation as a defendant may have to give evidence to avoid having a judgment entered against him or her does not amount to relevant compellability.

28 In my opinion, having regard to the wording of s 128 and the scope of the common law privilege which it displaced, it is not the case that a party to proceedings who is also a witness, giving evidence in chief in response to questions from the party's own legal representative, and who wishes to give that evidence but is not willing to do so except under the protection of a s 128 certificate, "objects" to giving that evidence within the meaning of s 128(1). This is not because the witness subjectively wishes to give the evidence, but rather because there is no element of compulsion or potential compulsion which makes the expression "objects" apposite.