Certificates to Protect Against Self Incrimination under s 128 of the Evidence Act 1995 and s 61 of the Coroners Act 2009 NSW

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The privilege against self-incrimination has been abrogated by statute in NSW in a number of places. This paper deals with s 128 of the *Evidence Act 1995* (NSW) and a similar provision found in section 61 of the *Coroners Act 2009* (NSW). The reliance upon the mechanism of objection by a witness has raised difficulties in the context of affidavit evidence, and in connection with evidence sought to be given by a witness who is a party in response to questions from that party's counsel.

This paper will consider aspects of the development of section 128 of the *Evidence Act* and section 61 of the *Coroners Act*. The issue of compellability will be considered, with reference to *Ying v Song* [2009] NSWSC 1344 and *Song v Ying* [2010] NSWCA 237. The nature of the interests of justice standard introduced in the legislation requires a balancing of interests to be undertaken by the judge or coroner. This raises questions of what factors should be taken into account, and whether evidence should be compelled under certificate even if there is no real chance it will form the basis of a prosecutable crime.

History of the privilege against self incrimination at common law

At common law, the privilege against self-incrimination was an element of the broader right to silence, which encompasses a number of immunities. This privilege was designed to confer a particular immunity from an obligation to testify as to one's own guilt. (*Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 512 per Brennan J.) The various rationales for this privilege include the prevention of abuse of power, conviction founded on false confession, protecting the accusatorial system of justice and quality of evidence, to avoid the 'cruel trilemma' of placing a witness in the position of choosing between refusing to provide the information and risking contempt of court, providing the information and furnishing evidence of guilt, or of lying and risking punishment for perjury, and to protect human dignity and privacy. (Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-Incrimination*, R59-2004) This has always applied to self-disclosure, and not to real or tangible evidence such as fingerprints. (*Sorby v Commonwealth* (1983) 152 CLR 281 at 292 per Gibbs CJ)

Gibbs CJ in *Sorby v Commonwealth* describes the privilege against self-incrimination as 'a firmly established rule of the common law, since the seventeenth century, that no person can be compelled to incriminate himself. It is more than a mere rule of evidence and is deeply ingrained in the common law: *Sorby* at 309 per Mason, Wilson and Dawson JJ.

A person may refuse to answer any question, or to produce any document or thing, if to do so 'may tend to bring him into the peril and possibility of being convicted as a criminal': *Lamb v Muster* (1882) 10 QBD 110 at 111. The mere fact that the witness swears that he believes that the answer will incriminate him is not sufficient; "to entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer": *Reg. v. Boyes* [1861] EngR 626; (1861) 1 B & S 311, at pp 329-330 [1861] EngR 626; (121 ER 730, at p 738) . That statement of the law has frequently been approved; see *Ex parte Reynolds; In re Reynolds* (1882) 20 ChD 294' . See too *Jackson v Gamble* [1983] 1 VR 552 at 555-6 per Young CJ.

The privilege against self incrimination applies in both civil and criminal proceedings including pre-trial proceedings such as discovery and interrogatories.

An aspect of the right to silence is what has been described as the penalty privilege. That is, the privilege against self-exposure to a penalty. The existence of this privilege in relation to court proceedings has been confirmed by the High Court in *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 *and Rich v ASIC* (2004) 209 ALR 271.

At common law the privilege has to be claimed at the point when incrimination is risked, (*Warman International Ltd v Envirotech Australia Pty Ltd* (1986) 67 ALR 253 at 265 per Wilcox J) rather than as a blanket objection (*C v National Crime Authority* (1987) 78 ALR 338 at 343 per Northrop J).

The privilege is not guaranteed by the Australian Constitution and can be abrogated by statute: *Sorby* at 298 per Gibbs CJ and 314 per Brennan J.

Both sections 128 (*Evidence Act*) and s 61 (*Coroners Act*) are examples of statutory abrogation of the privilege against self incrimination.

Section 128 *Evidence Act 1995* (NSW)

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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) If the court determines that there are reasonable grounds for the objection, the

court 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.

Note:
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 The Commonwealth Act includes subsections to 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).

Operation

The procedure under section 128 is triggered when a witness objects to giving evidence on the basis of self-incrimination. At that point, the court must consider whether there are reasonable grounds for the objection.

As this section requires the witness to object to giving the evidence, the court must satisfy itself the witness or party is aware of the effect of this provision as per section 132 of the *Evidence Act*.

132 Court to inform of rights to make applications and objections
If it appears to the court that a witness or a party may have grounds for making an application or objection under a provision of this Part, the court must satisfy itself (if there is a jury, in the absence of the jury) that the witness or party is aware of the effect of that provision.

Reasonable grounds for the objection

At common law the risk of self incrimination must be "real and appreciable"[1] and not fanciful or "so improbable that no reasonable man would suffer it to influence his conduct"[2].

Section 128(2) requires that there be 'reasonable grounds *for the objection*.' This provision was analysed by Giles JA in *R v Bikic* [2001] NSWCCA 537 at [13]-[15] and was said by his Honour to be grounded in the common law notion of reasonableness, drawing from Gibbs CJ statement in *Sorby v Commonwealth* applying *R v Boyes*. The test is not whether there are reasonable grounds for a

[1] *Blunt v Park lane Hotel Ltd* [1942] 2 KB 253 at 257; *R v Bolton Magistrates Court* [2005] 2 All ER 848 at [25]
[2] *R v Boyes* (1861) 1 B & S 311, 330; 121 ER 730 at 738

conclusion that the evidence may tend to prove that the witness has committed an offence but rather whether there are reasonable grounds for the objection. In other words whilst the evidence may tend to prove that a witness has committed an offence it may be that there is no prospect of prosecution for the offence, say for example because of the operation of a limitation provision, a prior acquittal or conviction, a prior ruling in the witnesses favour concerning the civil penalty etc.

The authorities suggest that there may not be reasonable grounds for the objection in circumstances where the evidence has already been disclosed and it cannot be said that there is any increased prospect of prosecution: see *Sorby* at 290 per Gibbs CJ*; Saffron v Federal Commissioner of Taxation* (1992) 109 ALR 695 *and BTR Engineering (Aust) Ltd v Patterson* (1990) 20 NSWLR 724. However there is authority that prior disclosure does not necessarily preclude reasonable grounds of an objection: Tamberlain J in *Versace v Monte* [2001] FCA 1572 at [12]-[13].[3]

One of the principle purposes of the granting of a certificate is to assist in ensuring that the evidence given will be reliable. The rationale is simple enough: by removing the threat of prosecution on the basis of the evidence by the grant of a certificate the court is removing a practical deterrent to the giving of truthful evidence, where that evidence is likely to be against the interest of the witness.

Upon this rationale there is much to be said for the granting of a certificate in matters where there is significant room for uncertainty concerning the effects of any earlier disclosure of the evidence by the witness concerning the question of likelihood of prosecution.

The interests of justice

Section 128 adopted the approach of section 57 of the *Evidence Act 1971* (ACT), except that section 128 includes the power to compel a witness, if it is 'in the interests of justice and a certificate is granted'. The standard: 'in the interests of justice' is not further elaborated in the legislation.

Cureton v Blackshaw Services Pty Ltd [2002] NSWCA 187 held that 'interests of justice' should be construed broadly.

Odgers provides a useful list of factors which may properly be included, drawing on s130(5) of the *Evidence Act*[4]:

- the importance of the evidence in the proceedings;
- the likelihood that the evidence will be unreliable even if a certificate is given;
- if the proceedings is a criminal proceeding – whether the party seeking to adduce the evidence is a defendant or the prosecutor;

[3] Odgers, *Uniform Evidence Law*, 8th Ed at 1.3.13000
[4] Ibid at 1.3.13060

- the nature of the offence, cause of action or defence alleged in the proceeding;
- the nature of the offence or liability to penalty to which the evidence relates;
- the likelihood of any proceeding being brought to prosecute the offence or impose the penalty;
- any resulting unfairness to a party (for example, unfairness arising from the prohibition in s128(5)(b);
- the likely effects of requiring the giving of the evidence, and the means available to limit its publication;
- whether the substance of the evidence has already been published;
- where a charge or charges has/have already been brought arising out of the events to which the evidence relates, whether the charge or charges have been finally dealt with;
- if the witness is not to be required to give evidence, the way in which the refusal to give evidence is to be approached by the tribunal of fact (accordingly, in a jury trial, the content of anticipated directions to the jury as to how any refusal to give evidence is to be approached).

In *WorkCover v Lindores Contractors Pty Ltd* [2003] NSWIRComm 422 Petersen J refused to give a witness a certificate and to compel him to give evidence in circumstances where the witness, Mr Gillespie, was awaiting prosecution for offences which were closely related to the offences against defendants who had been charged under occupational health and safety legislation. A crane had collapsed and a worker had died and another seriously injured. Mr Gillespie had commissioned the crane and had been charged with offences alleging breaches of the O H and S legislation. The builder and provider of the crane had also been charged. The prosecution sought to call the witness in its case against both the builder and provider of the crane. Petersen J relied heavily upon the decision of the High Court in *Hammond v The Commonwealth* (1982) 152 CLR 188 in determining that the prosecution had not proved that it was in the interests of justice that the witness be compelled to give evidence under cover of a certificate.

In the course of his decision his Honour said:

> "22 In *Hammond*, the relevant issue concerned the juxtaposition of the privilege against self-incrimination and the effect of s 6DD of the *Royal Commissions Act 1902* (Cth), which provided that a statement or disclosure made by a person in the course of giving evidence before a Royal Commission was not admissible in evidence against that person in any civil or criminal proceedings, other than proceedings for an offence against the *Royal Commission Act. Gibbs* CJ, with whom *Mason* J and *Murphy* J relevantly agreed, said:
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> > It was common ground that if the plaintiff were again examined at the inquiry he would be bound to answer questions designed to establish that he committed the offence with which he is charged, and that his

> objection on the ground that his answers might incriminate him would not constitute a defence to a prosecution for failing to answer the questions.
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> . . . .
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> Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence.

23 Brennan J observed:

> . . . for it is not to be thought that Parliament, in arming a Commissioner with the powers to be found in the respective Acts, intended that the power might be exercised to deny a freedom so treasured by tradition and so central to the judicial administration of criminal justice.

24 Deane J said:

> It seems fair to comment that the parallel non-judicial inquiry being conducted by the Commissioner is to no small extend following the general form of a criminal trial, shorn of some of the privileges and safeguards, such as absence of compellability of an accused as a witness and observance of the ordinary rules of evidence, which protect an accused on trial in a court of law.
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> .... an inquisitorial inquiry of the type being conducted by the Commissioner into the very matters which constitute the basis of the criminal proceedings constitutes an interference with the due administration of criminal justice in his case.

25 Deane J also stated:

> It was submitted on behalf of the Commonwealth that it has not been shown that the inquiry by the Royal Commissions into the plaintiff's involvement in matters the subject of criminal proceedings involves any substantial risk of serious injustice or serious prejudice. That submission struck me as unattractive at the time when it was made. I have found that it deteriorates upon closer consideration. The pending criminal proceedings against the plaintiff are brought by the Commonwealth. The parallel inquisitorial inquiry into the subject matter of those proceedings is being conducted under the authority of

> the Commonwealth. As I have said, the conduct of that inquisitorial inquiry is to no small extent following the general form of a criminal trial shorn of some of the privileges and safeguards which protect an accused in such a trial. The plaintiff has been compelled to be sworn as a witness and has been subjected to questioning in the course of that inquiry. Indeed, his refusal to answer questions has led to his being charged, on the information of an officer of the Australian Federal Police, with an offence under the *Royal Commissions Act 1902* (Cth). It is not, in my view, necessary to go beyond these things. In themselves, they constitute injustice and prejudice to the plaintiff.
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> 26 Those observations seem to me to resound in the circumstances of the present matter, where Mr Gillespie is to be asked to give particular evidence relating to his own conduct as an element in the charges against Lindores and/or Leighton and it is the same conduct which is to be asserted against him in his own trial. I cannot conceive of a circumstance more likely to induce the court to decline to require the witness to give evidence on those matters, regardless of the provision of a s 128 certificate. In the course of argument, the impact of Mr Gillespie having made a s 31M statement was discussed. As Mr *Hall* put it, it is one thing for Mr Gillespie to have been asked questions by an investigating inspector and another to subject him to examination, and possibly cross-examination by leave, by experienced senior counsel. I find it impossible to avoid the conclusion that to subject Mr Gillespie to the requirement to give evidence would be to expose him to a risk of serious prejudice in his defence of the charges against him, by providing the prosecutor with a valuable forensic advantage."

This is a good example of the breadth of the scope of the considerations likely to be caught by the words "interests of justice". See also *Workcover Authority of NSW v Tsougranis* (2002) NSWIRComm 282.

The policy aim of section 128 is to remove an obstacle to the taking of evidence from witnesses where that evidence would disclose that the witness has committed an offence or otherwise expose the witness to a civil penalty. The protection offered is the granting of a certificate which ensures that the evidence given cannot be directly used or indirectly used against the witness in either criminal or civil proceedings. The protection offered by a certificate is not immunity from prosecution. It is confined to the use to which the evidence can be put. By definition that protection is restricted by s 128 (7) in regards to the Commonwealth statute and s 128 (8) in regards to the NSW statute. The difference is dealt with later in this paper.

For present purposes it is sufficient to note that the NSW statute refers to the use of evidence 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...*

It will be observed that the subsection offers no protection against the use of the evidence by the executive, by one's employer, sporting association, club, or in the court of public opinion.

In *Borland v NSW Deputy State Coroner and Ors* [2006] NSWSC 982, the court considered whether the fact the certificate the Coroner could issue to a witness, who was a police officer, would offer no protection to the witness should executive action (which might include dismissal from the Police Force) be taken against the witness by the Police Commissioner, without any proceedings being taken in a court or other tribunal referred to in the relevant section ought to have been taken into account by the Coroner.

At first instance, Grove J held that the Coroner's decision to compel the witness under the cover of a certificate to give evidence was erroneous because the Coroner had not properly taken into account the circumstance that the evidence given by the witness would be available to be used to impose a civil penalty upon that witness by the Commissioner .

There was an appeal to the Court of Appeal and the decision of Grove J was upheld. Handley AJA, with whom Ipp and McColl JJA agreed, held that the fact a certificate would not protect against the particular civil penalty applicable to the witness was 'a most material consideration in the exercise of the discretion'. (*Attorney-General of NSW v Borland & Ors* [2007] NSWCA 201 at [19]). His Honour also took into account that there were other sources of evidence available to the Coroner regarding the events, including a statement which had been made by the witness.

In *Borland*, the approach taken to what is in the interests of justice was to balance the value of the evidence adduced against the cost to the witness giving the evidence. In that case, the cost included risk of civil penalty which could not be protected against by the certificate issued under section 128. In other cases, public embarrassment and humiliation were considered relevant factors. (*R v Lodhi* (2006) 199 FLR 328).

Alternatively, a court may conclude that the evidence a person may give is inherently unreliable. (*R v Collisson* [2003] NSWCCA 212) This may lead to the conclusion that the interests of justice are best served by not compelling the evidence. This could avoid perjury or unreliable testimony.

Odgers stresses that this determination must be made on a case-by-case basis, and that there is no presumption that the interests of justice will require a person to give evidence, or not to give such evidence. (Odgers*, Uniform Evidence Law*, at [1.3.13060]).

Evidence on affidavit

There does not seem to be a distinction drawn in section 128 between oral and documentary testimony. Thus section 128 applies to affidavits as well. This raises difficulties in civil proceedings which require compulsory disclosure as

the requirement to object to giving the evidence can create a tension with the requirement to file evidence and risk the disclosure of incriminating material. To a large extent this has been overcome by amendment of the *Evidence Act*.

In *Bax Global (Australia) Pty Ltd v Evans* (1999) 47 NSWLR 538, Austin J set out a 'sealed envelope' procedure for dealing with compulsory disclosure in an affidavit. The affidavit is placed in a sealed envelope which is delivered to the judge, who then inspects the affidavit privately to determine the validity of the objection, and if upheld, the affidavit is returned. If the objection fails, the affidavit is disclosed and a certificate appended. However, in *Ross v Internet Wines Pty Ltd & Ors* [2004] NSWCA 195, the NSW Court of Appeal rejected this approach, as it artificially makes the disclosing party a witness, and is devised by the court to limit direct or derivative use against the disclosing party.

Thus s128A was introduced. This follows the procedure set out in *Bax* with some alterations, requiring that an affidavit setting out objections to the disclosure to be served on other parties, with the court retaining the power to determine if the objection is reasonable. It also introduces the test of whether it is in the interests of justice for the material to be disclosed.

128A Privilege in respect of self-incrimination-exception for certain orders etc

(1) In this section:

"disclosure order" means an order made by a NSW court in a civil proceeding requiring a person to disclose information as part of, or in connection with, a freezing, search or other order under Part 25 of the *Uniform Civil Procedure Rules 2005* but does not include an order made by a court under the *Proceeds of Crime Act 2002* of the Commonwealth or the *Confiscation of Proceeds of Crime Act 1989* or *Criminal Assets Recovery Act 1990* of New South Wales.

"relevant person" means a person to whom a disclosure order is directed.

(2) If a relevant person objects to complying with a disclosure order on the grounds that some or all of the information required to be disclosed may tend to prove that the person:

(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,

the person must:

(c) disclose so much of the information required to be disclosed to which no objection is taken, and

(d) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken (the "privilege affidavit") and deliver it to the court in a sealed envelope, and

(e) file and serve on each other party a separate affidavit setting out the basis of the objection.

(3) The sealed envelope containing the privilege affidavit must not be opened except as directed by the court.

(4) The court must determine whether or not there are reasonable grounds for the objection.

(5) Subject to subsection (6), if the court finds that there are reasonable grounds for the objection, the court must not require the information contained in the privilege affidavit to be disclosed and must return it to the relevant person.

(6) If the court is satisfied that:

(a) any information disclosed in the privilege affidavit may tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law, and

(b) the information does not tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, and

(c) the interests of justice require the information to be disclosed,

the court may make an order requiring the whole or any part of the privilege affidavit containing information of the kind referred to in paragraph (a) to be filed and served on the parties.

(7) If the whole or any part of the privilege affidavit is disclosed (including by order under subsection (6)), the court must cause the relevant person to be given a certificate in respect of the information referred to in subsection (6) (a).

(8) 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 of information disclosed by a relevant person in respect of which a certificate has been given under this section, and

(b) evidence of any information, document or thing obtained as a direct result or indirect consequence of the relevant person having disclosed that information,

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

(9) Subsection (8) does not prevent the use against the relevant person of any information disclosed by a document:

(a) that is an annexure or exhibit to a privilege affidavit prepared by the person in response to a disclosure order, and

(b) that was in existence before the order was made.

(10) Subsection (8) 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.

Note: Section 87 of the *Civil Procedure Act 2005* makes provision with respect to protection against self-incrimination in relation to certain matters to which this section does not apply.

Reference should also be made to s 87 of the *Civil Procedure Act 2005* (NSW) which provides as follows:

87 Protection against self-incrimination in relation to interlocutory matters

(cf Act No 25 1995, sections 128 and 133)

(1) In this section:
"civil penalty" has the same meaning as it has in the *Evidence Act 1995* .
"conduct" includes both act and omission.
"culpable conduct" means conduct that, under:
(a) the laws of New South Wales, or
(b) the laws of any other State or Territory, or
(c) the laws of the Commonwealth, or
(d) the laws of a foreign country,
constitutes an offence or renders a person liable to a civil penalty.
"order for production" means an interlocutory order requiring a person (other than a body corporate) to provide evidence to the court or to a party to a proceeding before the court.
"provide evidence" means:
(a) to provide an answer to a question or to produce a document or thing, or
(b) to swear an affidavit, or
(c) to file and serve an affidavit or a witness statement, or
(d) to permit possession to be taken of a document or thing.
(2) This section applies in circumstances in which:
(a) an application is made for, or the court makes, an order for production against a person, and
(b) the person objects to the making of such an order, or applies for the revocation of such an order, on the ground that the evidence required by the order may tend to prove that the person has engaged in culpable conduct.
(2A) This section does not apply in circumstances in which section 128A of the *Evidence Act 1995* applies.
(3) If the court finds that there are reasonable grounds for the objection or application referred to in subsection (2) (b), the court is to inform the person, or the person's legal representative:
(a) that the person need not provide the evidence, and
(b) that, if the person provides the evidence, the court will give a certificate under this section, and
(c) of the effect of such a certificate.
(4) If the person informs the court that he or she will provide the evidence, the court is to cause the person to be given a certificate under this section in respect of the evidence.
(5) The court is also to cause a person to be given a certificate under this section if the court overrules an objection to the making of an order for production, or refuses an application for the revocation of such an order, but, after the evidence is provided, the court finds that there were reasonable grounds for the objection or application.

(6) Despite anything in this section, the court may make an order for production if it is satisfied of the following:
(a) that the evidence required by the order may tend to prove that the person has engaged in culpable conduct,
(b) that the culpable conduct does not comprise conduct that, under:
(i) the laws of any State or Territory (other than New South Wales), or
(ii) the laws of the Commonwealth, or
(iii) the laws of a foreign country,
constitutes an offence or renders a person liable to a civil penalty,
(c) that the interests of justice require that the person provide the evidence.
(7) If the court makes an order for production under subsection (6), it is to cause the person to be given a certificate under this section in respect of the evidence required by the order.
(8) In any proceedings:
(a) evidence provided 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 provided such evidence,
cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.
(9) If a question arises under this section relating to a document, the court may order that the document be produced to it and may inspect the document for the purpose of determining the question.

The Family Court has adopted a far more flexible approach to the requirement of 'objecting' to tendering the evidence. As evidence in chief in this court is often given via affidavit, a certificate can be issued for that evidence. The necessary objection for the purposes of obtaining a section 128 certificate was the refusal to file the affidavit unless the certificate was granted. (*Ferrall v Blyton; Attorney-General of the Commonwealth (Intervener)* (2000) 27 Fam LR 178).[5]

In *Hui & Ling* [2010] FamCA 743, a certificate under section 128 was given after a piece of evidence which would prove a crime had occurred was produced in court, in this case a marriage certificate which would prove the respondent had committed bigamy, a crime punishable by up to 5 years imprisonment. The respondent had not objected to producing the evidence in the proceedings, and the judge noted he had disclosed the evidence voluntarily. The only objection seemed to be to forwarding the matter for referral to the relevant prosecuting authorities.

After ALRC 102, amendments were made to the section to streamline the process in light of the difficulty in explaining the procedure to witnesses. Section 128A was introduced to deal with the privilege in the context of compulsory disclosure orders. In addition, the section was altered after the case of *Cornwell v The Queen* (2007) 231 CLR 260, by the insertion of subsections (8) and (9). This means that evidence is not protected by a certificate in a retrial of the defendant.

[5] The correctness of this decision has been doubted, see below.

Compellability

Ying v Song [2009] NSWSC 1344; *Song v Ying* [2010] NSWCA 237; *Reliance Financial Services NSW Pty Limited v Sobbi & Anor* [2009] NSWSC 1375

Ying v Song raised the issue of whether a section 128 certificate could be issued to cover evidence sought to be adduced from a party to the proceedings by that party's own counsel. The question which Ward J formulated at paragraph [7] is 'The question before me, therefore is limited to whether s 128 applies in circumstances where a witness wishes to give particular evidence in chief but only if he or she is protected from the consequences of the giving of that evidence. In those circumstances, can the witness be said to 'object' to giving particular evidence or evidence on a particular matter so as to enliven the operation of s 128?'

In answering this question, Ward J analysed the approach taken by the Full Family Court in respect of affidavit evidence filed in chief, quoting from *Ferrell v Blyton; Attorney-General of the Commonwealth (Intervener)* (2000) 27 Fam LR 178.[6] Her Honour then quoted from *Ollis v Melissari* [2005] NSWSC 1016 which considered the power to grant a certificate for evidence brought out in re-examination. Her Honour also noted that the position in the Full Family Court and dicta in *Cornwell v R* (2007) 231 CLR 260 were at odds. As noted above the Family Court approach is that a refusal to file an affidavit in chief is sufficient to fulfill the requirement of 'objecting'. On the other hand, the majority in *Cornwell* of Gleeson CJ, Gummow, Heydon and Crennan JJ questioned whether it is possible to 'object' when giving evidence in chief and counsel had laid the groundwork for raising such an objection. The majority characterised the objection as 'an attempt to ensure that s 128 protected him from some potentially adverse consequence of evidence which he did not 'object' to giving, but strongly wanted to give.' (*Cornwell* at paragraph [106])

The conclusion Her Honour reached was that, in the present case, section 128 was not enlivened. This was due to 'someone who chooses to adduce incriminating evidence (albeit because he or she feels forced to make such a disclosure to defend a claim made against him or her) is not in any real sense 'unwilling' or averse to doing so.' (*Ying v Song* at paragraph [51]). Since at common law, there would be no right to the privilege against self-incrimination, unless the person is otherwise legally compelled to give the relevant evidence, Her Honour concluded that section 128 did not introduce any ground for the privilege which would otherwise not exist.

The appeal *Song v Ying* [2010] NSWCA 237 upheld Ward J's judgment. Hodgson JA adverted to the availability of section 128 certificates for evidence in chief where compulsion exists in the form of subpoena and threat of imprisonment. Thus his Honour formulated the issue as 'the question in my opinion is not

[6] The correctness of this decision has been doubted. For an examination of the authorities see *Sheikholeslami v Tolcher* [2009] NSWSC 920, per Rein J and *Reliance Financial Services* supra

whether the evidence is given in chief or in cross-examination, but rather whether an objection under s128 is limited to an objection to giving evidence which the witness would otherwise be compellable to give.' (*Song v Ying* at [20]). His Honour preferred the approach of construing section 128 against the background of the common law, and taking a case-by-case approach to determining whether the evidence was compellable for the purposes of the section. Compellability is required to give meaning to 'objecting' to giving evidence.

Hall J followed *Ying v Song* in Reliance Financial Services (supra) and concluded that in the circumstances of that case a certificate could not be issued to cover evidence in re-examination:

> 103 I turn to examine whether any such evidence could be considered to be given *"unwillingly"* if it were adduced in re-examination of Mr Ghandi Sobbi.
>
> 104 Re-examination, of course, must in some way arise out of cross-examination. Re-examination is permitted wherever an answer in cross-examination would, unless explained, leave the Court with an impression of the facts, whether they be facts in issue or facts relating to credibility, which is capable of being construed unfavourably to the party calling the witness and which represents a distortion or incomplete account of the truth as the witness is able to present it: Regina v Lavery (No 2) (1979) 20 SASR 430 at 4350; Regina v Szach (1980) 23 SASR 504 at 568; Regina v Phair [1986] 1 Qd R 136; Regina v Clune and Gergis (1999) 72 SASR 420 at [118].
>
> 105 Evidence sought to be led from Mr Ghandi Sobbi as evidence by way of re-examination under objection may possibly be considered as having a connection with matters raised in cross-examination. Answers given by him in cross-examination in relation to inconsistencies in his evidence were capable of negatively affecting his credibility.
>
> 106 However, it cannot be said that in the particular circumstances of this case that Ghandi Sobbi would be objecting to giving evidence (ie, *"unwillingly"*) whether it was given as evidence in chief or in re-examination. It is clear that Mr Ghandi Sobbi is not unwilling to give the evidence, but rather, he is seeking leave to give evidence that recasts or reformulates his case. By giving evidence as to the falsity of earlier affidavits, Mr Ghandi Sobbi would be seeking to establish that the version of events in those affidavits were false. Even if the evidence was to be given by way of re-examination, the effect would essentially be to give a wholly new version of the facts which is not the permissible function of re-examination.
>
> 107 As was the case in Ying v Song (supra), the argument raised by the defendants, in effect, is that if Mr Ghandi Sobbi is not given the benefit of a certificate, relevant evidence as to the true nature of the transaction upon which the plaintiff sues will not be placed before the Court, which is not in the interests of justice. However, Mr Ghandi Sobbi, in choosing to adduce incriminating evidence as he apparently proposes to do in respect of other evidence he has given, is not in any real sense unwilling or averse to doing so.

In those circumstances, I am of the opinion that there is no basis upon which a certificate under s 128 may be given.

High Court of Australia dicta on compellability
Cornwell v R (2007) 231 CLR 260

As noted above the majority in *Cornwell* questioned whether it is possible to 'object' when giving evidence in chief and counsel had laid the groundwork for raising such an objection:

Did the accused "object" to giving particular evidence?

> [106] Finally, one other aspect of s 128 may be referred to. The opening words of s 128(1) provide that s 128 only applies if "a witness objects to giving particular evidence". A fair characterisation of the exchanges between counsel for the accused and Howie J set out earlier [99] is that while in one sense the accused "objected" to the 35th question he was asked in chief when he claimed privilege, in another sense he did not object at all. He evidently wanted to give some evidence about the Diez-Lawrence conversations. He could only be sure of giving it in the way he would have liked if he gave it in chief; if he took the risk of leaving its reception to the chance of particular questions in cross-examination, he ran the risk of not being able to give it, or not in the way perceived to be most favourable to his interests. Hence his claim of privilege was arguably not a means by which he "objected", but was an attempt to ensure that s 128 protected him from some potentially adverse consequences of evidence which he did not "object" to giving, but strongly wanted to give.
>
> [107] The accuracy of that characterisation is supported by the following factors.
>
> [108] First, counsel for the accused carefully spent time in the days preceding 5 May 2003 seeking to prepare the ground for a favourable ruling on the evidence. He had hopes of a favourable ruling before the accused's case opened. While Howie J was resistant to blandishments seeking a favourable ruling, the course being charted for the accused was plainly driven by the desire of the accused to give evidence in chief about the Diez-Lawrence conversations.
>
> [109] Secondly, the 34th question was leading and the 35th question explicitly triggered the claim to privilege which the accused made: what was happening was no surprise to the accused.
>
> [109] Thirdly, if the accused had objected to counsel's question in the sense of not wanting to answer it, or not wanting it to be asked, the issue probably would have been sorted out before the accused entered the witness box, or the accused could have reacted in such a way as to cause

counsel to withdraw the question. The fact that the thirty-fifth question, and all the later questions in chief about the Diez-Lawrence conversations, were asked supports the conclusion that the accused wanted to give evidence about them and instructed counsel to structure events so that he could do so with a measure of impunity.

[111] This characterisation raises a question whether s 128(1), and hence s 128 as a whole, applies where a witness sets out to adduce in chief evidence revealing the commission of criminal offences other than the one charged. A criminal defendant might wish to present an alibi, the full details of which would reveal the commission of another crime. A civil defendant might wish to prove the extent of past earnings, being earnings derived from criminal conduct. This also raises a question whether witnesses who are eager to reveal some criminal conduct in chief, because it is thought the sting will be removed under sympathetic handling from their own counsel or for some other reason, are to be treated in the same way as witnesses who, after objection based on genuine reluctance, give evidence in cross-examination about some crime connected with the facts about which evidence is given in chief.

[112] The view that the accused's claim of privilege in all the circumstances answered the requirements of s 128(1) has difficulties. It strains the word "objects" in s 128(1). It also strains the word "require" in s 128(5) - for how can it be said that a defendant-witness is being "required" to give some evidence when his counsel has laid the ground for maneuvers to ensure that the defendant-witness's desire to give the evidence is fulfilled? And it does not fit well with the history of s 128(8). For one thing, s 1(e) of the 1898 Evidence Act and its Australian equivalents provided that an accused person called pursuant to the legislation could be "asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged"[100], which implies that the protection of the accused's position in chief or in re-examination was a matter between the witness's counsel and the witness. For another thing, the Australian Law Reform Commission, in summarising the pre-s 128(8) law, assumed that s 1(e) and its Australian equivalents were to be construed as applying to questions in cross-examination only.

Difference between Commonwealth and NSW Evidence Act

The difference between the NSW and Commonwealth *Evidence Act* so far as the operation of section 128 is concerned principally lies in the definition of 'Australian court'. The definition in the Commonwealth Act it is far broader, encompassing '(e) a person or body authorised by an Australian law, or by consent of the parties, to hear, receive and examine evidence'. At this moment in the NSW Act, there is no corresponding provision. The only non-court bodies brought within the NSW Act are those required to apply the laws of evidence (mirroring (f) in the Commonwealth Act definitions).

However, the *Evidence Amendment Act 2010* (NSW) will amend the NSW provision to recognise any certificates issued under a prescribed State or Territory provision. It will give such certificates the same effect as if they had been issued under the NSW Act. This follows the recommendations made in the Uniform Evidence Law Report 2005, a joint report of the Australian, NSW and Victorian Law Reform Commissions. This amendment has been assented to, but will commence only upon proclamation.

Section 128 (12)–(14)
Insert after section 128 (11) (before the notes):

(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.

Section 128, note 3
Omit the note. Insert instead:
Note 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.

A similar amendment will alter s128A.

Section 61 *Coroners Act 2009* (NSW)

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61 Privilege in respect of self-incrimination

(cf *Coroners Act 1980* , s 33AA)

(1) This section applies if a witness in coronial proceedings 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 coroner in the coronial proceedings must determine whether or not there are reasonable grounds for the objection.

(3) If the coroner determines that there are reasonable grounds for the objection, the coroner is to inform the witness:

(a) that the witness need not give the evidence unless required by the coroner to do so under subsection (4), and

(b) that the coroner 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 coroner may require the witness to give the evidence if the coroner 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 coroner must cause the witness to be given a certificate under this section in respect of the evidence.

(6) The coroner 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 coroner finds that there were reasonable grounds for the objection.

(7) In any proceeding in a NSW court within the meaning of the *Evidence Act 1995* or before any person or body authorised by a law of the 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.

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

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(10) A certificate under this section can only be given in respect of evidence that is required to be given by a natural person.

Operation

Section 61 of the *Coroners Act* operates in a similar way to section 128 of the *Evidence Act*. It requires a witness to object to giving evidence in a coronial proceeding, and gives the coroner the power to compel evidence in the interests of justice and issue a certificate protecting that evidence.

Section 61 is based on s33AA of the *Coroners Act 1980* (NSW). That section was introduced in response to *Decker v State Coroner* (1999) 46 NSWLR 415 which held that the *Evidence Act 1995* (NSW) did not apply to coronial proceedings, and that a coroner could not compel evidence and issue a certificate under section 128 of that Act. (Albernethy et al, *Waller's Coronial Law & Practice in New South Wales*, at [61.1]). The history was explained by Bell J in *Correll v Attorney General of NSW* [2007] NSWSC 1385 as follows:

> "26 Section 33 of the Act gives statutory recognition to the privilege against self-incrimination. Section 33AA permits the coroner to require a witness to give evidence that may incriminate the witness of an offence in certain circumstances. The provisions are as follows:
>
> **33 Rules of procedure and evidence**
>
> A coroner holding an inquest or inquiry shall not be bound to observe the rules of procedure and evidence applicable to proceedings before a court of law, but no witness shall, except in accordance with section 33AA, be compelled to answer any question which criminates the witness, or tends to criminate the witness, of any offence.
>
> **33AA Privilege in respect of self-incrimination**
>
> (1) This section applies if a witness at an inquest or inquiry held by a coroner who is a Magistrate objects to giving particular evidence on the ground that the evidence may tend to prove that the witness has committed an offence or is liable to a civil penalty.
>
> (2) The coroner is to cause the witness to be given a certificate under this section in respect of the evidence if the objection is overruled but, after the evidence has been given, the coroner finds that there were reasonable grounds for the objection.
>
> (3) If the coroner is satisfied that the evidence concerned may tend to prove that the witness has committed an offence or is liable to a civil penalty but that the interests of justice require the witness to give the evidence, the coroner may require the witness to give the evidence. If the coroner so requires, the coroner is to cause the witness to be given a certificate under this section in respect of the evidence.

(4) In any proceedings in a NSW court (within the meaning of the Evidence Act 1995):

(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 that answer,

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

(5) A certificate under this section can only be given in respect of evidence that is required to be given by a natural person.

...

42 Section 33AA was introduced into the Act by the Courts Legislation Amendment Act 2000. It followed the decision of this Court in Decker. In that case the Coroner upheld a claim of privilege made by a geologist in the employ of the New South Wales Roads and Traffic Authority, whose responsibilities had included planning and execution of a range of geo-technical work relating to the Alpine Way, at the inquest into the Thredbo landslide. It is not difficult to think of cases in which there may exist a public interest in requiring a witness to give evidence notwithstanding that it may tend to prove that the witness has committed an offence or be exposed to liability for a civil penalty. The public interest in requiring a prime suspect in the investigation of a murder to give evidence at the inquest which may incriminate him or her, subject to immunising the evidence under a s 33AA certificate, is less apparent."

Clearly her Honour was of the view that it would be an exceptional case for a Coroner to require a suspect in a murder, for that is what Mr Correll was said to be by Counsel Assisting the Coroner, to give evidence about his relationship with the deceased and his knowledge of the circumstances of her death.

The regime in the old Coroners Act was replaced by s61 of the 2009 Act which follows the form of s 128 of the *Evidence Act 1995*.

Section 61 of the *Coroners Act 2009* interacts with section 58 of that Act and provides the only situation where a coroner can compel evidence which may be self-incriminating.

Section 58(1) of the *Coroners Act 2009* operates to exclude coronial proceedings from following judicial rules of procedure and evidence. There is no equivalent of section 132 of the *Evidence Act* to ensure a witness knows he or she can object to giving as required by section 128. *Maksimovich v Walsh* (1985) 4 NSWLR 318 held that although there is no legal duty for a judge to warn a witness that

he/she is not required to incriminate themselves, judges may do so, and Kirby P (in dicta) suggested that would be 'proper judicial practice' (at 328). This is especially where the witness is not legally advised, as is usually the case in coronial proceedings.

58 Rules of procedure and evidence

(cf *Coroners Act 1980*, s 33)

(1) A coroner in coronial proceedings is not bound to observe the rules of procedure and evidence that are applicable to proceedings before a court of law.

(2) Except as otherwise provided by this Act, a witness in coronial proceedings who is a natural person cannot be compelled to answer any question or produce any document that might tend:

(a) to incriminate the witness for an offence against or arising under an Australian law or a law of a foreign country, or

(b) to make the witness liable to a civil penalty.

As any certificate granted under section 61 will give a witness immunity at a later criminal proceeding, the practice in the Coroners Court has been not to ask persons of interest questions which may be incriminating for offences such as murder, manslaughter and arson. (*Waller's Coronial Law & Practice in NSW* at [61.27]). This is largely in recognition of the wide-ranging effect of derivative use immunity granted by the certificate. It could raise difficulties demonstrating that evidence obtained after the inquest was not obtained as a result of evidence given at the inquest. (*Waller* at [61.28]). Thus the usual practice has been to not require witnesses to give evidence. So while all witnesses are compellable (in contra distinction to parties in judicial proceedings in examination in chief and re-examination), the investigative and thus preliminary nature of coronial proceedings has affected the operation of this section.

The standard which the coroner is to apply when determining whether a section 61 certificate should be issued is whether the disclosure of the evidence objected to is 'in the interests of justice'. The section does not define what this means. *Waller's Coronial Law* adapts Odger's criteria formulated for section 128 to coronial proceedings, listing relevant considerations as:

- the importance of the evidence in the proceedings;
- the likelihood that the evidence will be unreliable even if a certificate is granted;
- whether the person giving evidence is a 'person of interest' or not;
- the nature and subject-matter of the inquest or inquiry;
- the extent of the witness's apprehended or potential liability for criminal charges or a civil penalty;
- the likelihood of any prosecution or other action flowing from the evidence;
- the likely effects of giving the evidence;
- the means available of limiting any publication of the evidence;
- the desirability of limiting any publication of the evidence;
- whether any criminal or civil proceedings relating to the witness and the subject matter of the inquest or inquiry have concluded;

- if the witness is not required to give evidence, the way the refusal to give evidence is to be dealt with by the coroner;
- the availability of the evidence from other reliable or more reliable sources.

(Abernethy et al, *Waller's Coronial Law & Practice in NSW*, at [61.24]).

This raises two different approaches to dealing with witnesses in a case which the coroner does not believe on the evidence before him will be referrable to the DPP. The first is that where there is no prospect of later criminal proceedings, the coroner may wish to compel vital evidence in order to reach findings on the balance of probabilities. (*Waller* at [61.28]). The other view is that it is wrong to force a witness, particularly a suspected perpetrator, to give evidence under certification, even if there is insufficient evidence to prosecute and investigation by police authorities can take the matter no further.

As we have seen, *Correll* dealt with the situation where evidence was sought to be adduced at a coronial hearing from a suspect for a murder. Counsel for the witness contended that the questioning was for the purpose of gaining a forensic advantage, and sought a global objection to compelling the witness to give evidence. The witness had at this point given three interviews to police before the coronial inquest, however he had not been charged with any offence. Bell J in the NSW Supreme Court (as her Honour then was) held that a Coroner is not required to consider whether each individual question might criminate or tend to criminate the plaintiff of an offence. Rather, the plaintiff was entitled to decline to answer any of the questions relating to a particular topic or subject matter which might incriminate him. Her Honour approved of the making of a global objection and indicated that the Coroner had been wrong not to deal with the issue on that basis.

For my part whilst I can truly appreciate the caution which Coroners exercise in declining to require persons who are thought to be concerned in the felonious death of another I also recognize that there are cases where there is insufficient evidence to support a prima facie case of murder or manslaughter or arson but where an individual is strongly suspected of involvement and where there is little or no prospect of the police investigation advancing to the point of arrest or charge. In these cases, rare though they are, there is a real public interest in compelling the suspect to give evidence under the cover of a certificate.

In saying this I recognize the difficulty presented by the 'use indemnity' afforded by the certificate and the strong temptation that investigators might have to disguise use of any admissions made by the witness in order to build a case against him/her. However, I am also aware of the strong public interest in having a proper and timely determination of what happened to cause the death or fire as the case maybe.