Chapter 4

Competence, Compellability and Privilege

Key Issues

4-1 A person is *competent* to testify as a witness in court if they are *allowed by law to do so*.

A person is *compellable* if they can be *forced by law to do so*.

Even though otherwise compellable, a person may have a *privilege* against *answering certain questions*.

Evidence may either be 'sworn' (ie, given after the swearing of some oath or affirmation appropriate for the witness), or 'unsworn' (ie, given without the taking of an oath, but subject to the normal laws of perjury).

As a general rule, *competence implies compellability*. The vast majority of people, these days, are both competent and compellable, and the only exceptions to that general rule exist under statute. On the whole, those statutory provisions are designed to ensure that as many people as possible are both competent and compellable to testify on oath, and this is reflected in various sections of the Uniform Laws (see **1-1**).

Competence and compellability

4-2 Section 12 of the Uniform Laws confirms that, unless the Uniform Laws state otherwise, *every person is both a competent and a compellable witness*. Section 13 of the Uniform Laws then distinguishes between evidence given *on oath*, which will normally be given by every witness who understands that they are under 'an obligation to give truthful evidence', and evidence given *unsworn* — that is, when a witness does not understand that obligation but the court is 'satisfied' that they understand 'the difference between the truth and a lie', and the trial judge has directed the witness that 'it is important to tell the truth'. In addition, the trial judge must tell the latter witness that they should tell the court if they are asked a question to which they do not know, or cannot remember, the answer, and must not feel pressured to agree with statements that they believe are untrue.

The only circumstance in which a potential witness will be deemed *incompetent* to give evidence (even unsworn) arises under s 13(1) of the Uniform Laws, when the trial judge concludes that the person 'does not have the capacity' to either understand a question put to them about a fact, or to give an answer to it that can be understood, and that incapacity cannot be overcome. However, they may be allowed to testify to *other* facts: s 13(2).

These rules cover even the parties to a civil action, and/or their spouses. However, different considerations apply in relation to criminal cases, and, so far as concerns accused persons, the effect of s 17(1) and (2) of the Uniform Laws is that while they are competent as a witness for the defence, they are not competent to testify for the prosecution. So far as concerns 'associated defendants' (ie, persons who are charged with an offence arising out of, or connected with, the same incident as that in respect of which the accused is on trial, but whose matters have not yet been disposed of), s 17(3) states that they are not compellable for or against the accused on trial.

Privilege of spouses and others

4-3 Section 18 of the Uniform Laws contains what amounts to a privilege against having to testify for the prosecution that is afforded the spouse, de facto spouse, parent or child of an accused, who can show that, if they were to testify, there would be a 'likelihood' of 'harm' being caused either to themselves or to their relationship with the accused that 'outweighs the desirability of having the evidence given'. This is a 'balancing test' to be performed in the exercise of judicial discretion. No adverse comment may be made by the prosecution regarding any claim to, or grant of, this privilege: s 18(8).

Accused competent but unwilling — Jones v Dunkel*;* Weissensteiner *direction*

4-4 Particular difficulties arise when an accused person, who is competent to testify on their own behalf, chooses not to do so. There are natural inferences that might be drawn from this, particularly since in civil cases the common law 'rule in *Jones v Dunkel*' (1959) 101 CLR 298 (which is not displaced by the Uniform Laws) allows a court to draw the necessary inferences adverse to the case of a party to a civil action who either fails to testify personally, or to call or lead evidence that they might reasonably have been expected to adduce. The question that then arises is whether or not the same adverse inferences may be drawn from the failure of a criminal accused to testify in person or call relevant evidence when it would have been possible to do so.

Section 20 of the Uniform Laws provides that while the prosecution may not make any adverse comment regarding such a decision by the defence, any 'other defendant' may do so (without any apparent limitation on the

nature of such a comment), as indeed may the trial judge, provided that they do not thereby imply guilt on the part of the accused.

This last requirement has led to conflicting judicial opinion at the highest level regarding what might be termed 'the extension of the rule in *Jones v Dunkel* to criminal cases'. The net effect of case precedents such as *Weissensteiner v R* (1993) 178 CLR 217, *RPS v R* (2000) 199 CLR 620 and *Azzopardi v R* (2001) 205 CLR 50 appears to be that, whereas a trial judge may not direct a jury that an accused's failure to testify should be taken as an indication of their guilt, or be used in any way to make up for a deficiency in the prosecution's case, they *may* direct them that, in the absence of testimony from an accused in respect of facts that were 'peculiarly within the knowledge' of that accused, and that have not been testified to by any other witness, the jury may find it easier to accept the prosecution's 'theory of the case' than they might have done had some alternative hypothesis consistent with the accused's innocence emerged from the defence evidence.

In *Dyers v R* (2002) 210 CLR 285, the High Court ruled that it was inappropriate for a trial judge in a trial in which the accused failed to call a key witness to direct the jury that they might conclude that this was because the evidence of that witness would not have 'assisted' the accused's case.

Other privileges affecting compellability

4-5 There are other matters in respect of which witnesses who might otherwise be compellable to answer questions may be relieved of the obligation to do so as the result of the existence of a 'privilege' against having to. These privileges are in relation to (a) self-incrimination (s 128 of the Uniform Laws), (b) communications between lawyers and clients (ss 117–126 of the Uniform Laws) and (c) negotiations that were conducted under 'without prejudice' arrangements, in a genuine effort to settle a civil action (s 131 of the Uniform Laws). There is also a 'public interest immunity' claim that may be raised in suitable cases against being required to disclose 'matters of state' that it is in 'the public interest' not to disclose: s 130 of the Uniform Laws. More recently, s 126K of the Commonwealth Act has added a privilege against journalists being required to disclose the identity of an 'informant'.

In addition, in New South Wales the Evidence Act 1995 (NSW) ss 126A–126I recognise a wider range of 'professional confidential relationship' privilege that is not found in other versions of the Uniform Laws. Under this provision, privilege may be claimed by a whole range of professional persons who engage in confidential communications with others — for example, doctors and other health professionals, journalists, counsellors and social workers, accountants and private investigators. The privilege has the effect that evidence arising from confidential communications between such professionals and their clients, patients or whoever need not be

disclosed if to do so would be 'likely' to cause physical, emotional or financial 'harm' to the person who originally confided the information in question, or lead to their suffering humiliation, shame or fear. All of this must be balanced against 'the desirability of the evidence being given': Evidence Act 1995 (NSW) s 126B(3). An identical privilege in relation to sexual assault counsellors may also be found in s 298 of the Criminal Procedure Act 1986 (NSW).

Finally, s 127 of the Uniform Laws recognises the confidentiality of confessions made to clergymen, who are privileged against disclosing their contents except when such a confession 'was made for a criminal purpose'.

4-6 Before tackling the questions below, please check that you are familiar with the following:

✓	the distinction between the 'competence' and 'compellability' of a witness;
✓	the precise statutory rules that relate to the competence and compellability of witnesses;
✓	the special positions occupied by parties to a civil action and the accused in a criminal trial;
✓	the number and extent of 'privileges' that exist under the Uniform Laws.

Question 1

4-7 Advise on the competence and compellability of the witnesses in the following scenarios:

1. Jack pleaded guilty, some months ago, to his part in an attempted warehouse break-in with Jill (no relation) following their apprehension by police at the side of a broken window that had set off a silent alarm. Jack received a reduced sentence in return for undertaking to give evidence later against Jill, who was employed at the warehouse in question, and who was aware of the weakness of the side window, but not the existence of the silent alarm. At Jill's subsequent trial:
   (a) Can Jill prevent Jack's evidence being admitted?
   (b) Can Jack retract his promise to testify?

   Would either of your answers to (a) and (b) be different if, instead of the scenario above:
   (i) Jack is a co-accused awaiting trial with Jill, but willing to give evidence on his own behalf, claiming to have been duped by

Jill into going down the side of the building, unaware that Jill was about to break the window?; or

(ii) Jack has pleaded guilty at the start of the trial, awaits sentence at the end of it, and is prepared to give the same evidence as he was in the original scenario above?; or

(iii) Jack and Jill are in a de facto relationship?

2. Brian is on trial for the theft of certain items of Brenda's property. Brian and Brenda are separated but still married, and the alleged theft occurred when Brian visited Brenda's unit, at her invitation, to discuss various property matters, and Brenda was in the kitchen making them both coffee. Brian's counsel objects to Brenda testifying, and she appears very unwilling to do so. The trial judge suspects that Brenda has been threatened with physical reprisals by Brian if she testifies, but is determined that the case will proceed. May Brenda be forced to testify?

3. Husband and wife drug-dealing team Dan and Julie are on trial following the supply, by Julie, of a quantity of 'ice' to an undercover police officer. Julie is prepared to testify that she did the deal after pretending that the undercover officer was an old school friend of hers, and asking Dan — who was ignorant of her drug-supply activities in this particular instance — to wait while she took the officer a few yards down the street in order to discuss 'a private matter'. May Julie be allowed to give this evidence?

Time allowed: 20 minutes

Answer Plan

4-8 **Question 1** raises the following issues:

(a) Jack's compellability to testify (scenario 1)

The answer to this question may be found in s 17(3) of the Uniform Laws, which states that once Jack is no longer 'an associated defendant', in the sense that his matter has already been disposed of, he becomes both competent and compellable as a witness under the normal witness competence provisions of s 12 of the Uniform Laws. Your answer should incorporate some reference to the likely consequences for Jack of going back on his undertaking to give evidence against Jill.

You must not overlook the alternative scenarios that the question then poses. Jack is perfectly entitled to give evidence in his own defence at trial, even if it implicates his co-accused Jill, and operates indirectly as prosecution evidence. Until he is sentenced, he is arguably still an 'associated defendant', and the same rules apply as in the first scenario — Jack is 'competent' as a witness on his own behalf, but cannot be compelled to testify. Even if Jack and Jill are de facto partners, the laws relating to their co-accused status apply, and your answer should be no different.

(b) Brenda's compellability to testify (scenario 2)

Even when an accused person and their victim are husband and wife, the wife no longer receives any privilege under the Uniform Laws against testifying, and is just as compellable as any other witness (under s 12), unless, in terms of s 18 of the Uniform Laws, she can satisfy the trial judge that if she is obliged to testify against Brian, there is a likelihood that she could suffer 'harm', which must be balanced against the desirability of receiving the evidence.

(c) Julie's competence to testify on Dan's behalf (scenario 3)

Julie, as 'an associated defendant', is competent, but not compellable, to testify for the defence. This is interpreted so as to allow one co-accused to give evidence in favour of another co-accused, should they so wish. Once again, Julie and Dan's relationship as husband and wife makes no difference to their legal status as co-accused, assuming that Julie is willing to testify and does not claim that she may suffer 'harm' by so doing — other, of course, than the 'harm' of finishing up as the only offender to be sentenced.

Answer

Jack's compellability to testify

4-9 The Uniform Laws provision relating to the competence of an accused person to testify is s 17. This section establishes the rule that an associated defendant is competent but not compellable to testify for the defence (which includes testifying *on behalf of* a co-accused), but incompetent to testify for the prosecution.

However, these rules only apply for as long as Jack is, in the words of s 17, an 'associated defendant' in the case. Having pleaded guilty, and been sentenced, he is no longer in that category (as defined in the Dictionary to the Uniform Laws), since his matter has been fully disposed of, and he may be treated like any other witness. In short, Jack is both competent and compellable, and there is nothing that Jill can do to stop him testifying against her (part (a)). The implications for Jack of retracting his promise to testify for the Crown (part (b)) are that he may be (1) charged with contempt for his refusal, and (2) returned to court and re-sentenced in respect of his own involvement.

If Jack becomes a co-accused in the ongoing trial, he may of course give evidence on his own behalf, even if that means that he, in effect, gives evidence against Jill from which the prosecution will indirectly benefit (part (i)). However (as will emerge in a later chapter), by so doing he exposes his own criminal past to disclosure to the jury. So far as concerns the second scenario (part (ii)), it is 'best practice' to have Jack sentenced first, in order to avoid the accusation that his evidence is designed to minimise his involvement in the case, and, hence, his ultimate sentence.

Arguably, until sentenced, he is still 'an associated defendant' anyway, since until then the prosecution is not 'completed', as required in the definition of that term in the Dictionary.

Even if Jack and Jill are de facto partners, their status as 'associated defendants' takes precedent, as emerges below, and the above answers will remain unchanged.

Brenda's compellability to testify

4-10 Even when the accused and victim are spouses, the normal 'witness competence and compellability' rules remain unchanged. In short, the fact that Brenda is, in law, still Brian's wife makes no difference to the applicable law, which is contained in s 12 of the Uniform Laws, and renders Brenda both competent and compellable to testify for the Crown, whether she — or, indeed, Brian — likes it or not.

Under the special provisions of s 18 of the Uniform Laws, Brenda may not be compelled to testify against Brian if she can satisfy the trial judge that, if she is obliged to do so, there is a likelihood that she could suffer harm (either to her person, or to her relationship with Brian), which must be balanced against the desirability of receiving the evidence. Hers is the only evidence that the Crown may rely upon, and there can be no obvious harm to her relationship with Brian, which appears to be at an end anyway. We are not advised of any perceivable harm to Brenda's person, so she is unlikely to be able to hide behind the privilege of s 18, and will probably be obliged to testify.

Julie's competence to testify on Dan's behalf

4-11 Even when co-accused are spouses, the normal witness competence and compellability rules remain unchanged, so far as concerns the competence of one defendant to testify in favour of another. The fact that Julie is Dan's wife makes no difference to the applicable law. In short, Julie, as 'an associated defendant', is competent, but not compellable, to testify for the 'defence' — that is, either on her own behalf or on behalf of Dan. Section 17 of the Uniform Laws is drafted so as to allow one co-accused to give evidence in favour of another co-accused, should they so wish. Julie and Dan's relationship as husband and wife makes no difference to their legal status as co-accused, assuming that Julie is willing to testify and does not claim that she may suffer 'harm' by so doing.

Like any witness giving evidence, Julie is open to cross-examination by the opposing party, and this rule applies equally to an accused when the opposing party is the Crown. There is no 'privilege against self-incrimination' in relation to an accused with regard to the offence for which they are on trial, as the result of s 104(5) of the Uniform Laws. There is also no privilege in law against incriminating another person. In short, Julie must answer any questions put to her in cross-examination that may have that effect, even though she may incidentally be giving

evidence against Dan. The irony of this is that the Crown could not have called her directly as a witness against Dan.

Examiner's Comments

4-12 This is a good example of a question that is simple to respond to *if you know the answer*, and that requires only a minimum amount of time to answer. You will, however, impress the examiner if you are able to link your simple answer to other areas of the subject (eg, the indirect way in which evidence could be obtained by the Crown from Julie which, in effect, would make her a Crown witness via the 'back door').

Keep in Mind

4-13 You should avoid the following common errors:

- Being 'freaked out' by the apparent simplicity of the questions, and looking for hidden 'trapdoors' in them. Once again, if you have confidence in the exam preparation you have done, then you should know how simple the questions are.
- Attempting to answer the question without being aware of the relevant statutory provisions for your jurisdiction.
- Omitting to answer part of the question because of the convoluted way in which it was laid out.

The suggested answers to **Question 1** covered only the Evidence Act 1995 (Cth), and should be amended accordingly if you are a student in one of the other Uniform Laws states or territories (see **1-1**), which use slightly amended wording. However, the suggested answers may be of value to you in structuring your answer in order to obtain the maximum mark with the minimum effort.

Question 2

4-14 Karl is on trial for a violent robbery committed against Giles while he was staying overnight at the Sweaty Palms Motel. Giles's evidence will be that the door to his motel room was forced while he was dozing off to sleep, and that two hooded assailants — believed to have been a male and a female — set about him with baseball bats and robbed him of cash and all his personal documents. When the room was forensically examined following Giles's complaint to the police, a credit card in Karl's name was found lying under the bed, the inference being that the person whose credit card it was must have been one of the assailants, who lost it during the struggle to subdue Giles.

When first interviewed by police, Karl denied any knowledge of how his credit card could have finished up under the bed, but during a subsequent interview he admitted that earlier in the day on which the robbery took

place he made use of the services of a prostitute, Narelle, and he can only conclude that she must have stolen the card from him while he was showering afterwards, then either taken part in the subsequent robbery or handed the card to one of Giles's assailants. Karl refused to disclose any further details regarding Narelle, and he goes on trial alone for the robbery when the police make no further attempt to identify the female co-offender.

When instructing his defence solicitor, Karl explains all about Narelle, but is emphatic that this explanation must not come out during his trial. His solicitor advises him that in the absence of any credible evidence as to how his credit card could have come to be in the motel, Karl runs a much higher risk of conviction, but Karl remains adamant on that point.

At trial there is no reference to Narelle and the circumstances in which Karl probably lost his credit card, and Karl does not give evidence on oath. In his directions to the trial jury, the trial judge advises them as follows:

> The only direct evidence you have heard that might identify the male person who was one of the assailants is the finding of the accused's credit card under the bed at the scene of the crime, in circumstances suggestive that it may have been lost by that male assailant during the course of the robbery. It is not in contention that this credit card was that of the accused.
>
> There may be many reasons to explain how this came about, consistent with the innocence of the accused, but we have not heard any. The Crown maintains that the document was dropped by the accused in the course of committing the crimes of which he stands accused, and in the absence of any rebutting evidence from the one man who can tell you how it got there — who has chosen never to break his silence on the matter — you may find that easier to accept as the real explanation.
>
> I remind you again that an accused person is not required by law to testify at his own trial. It is entirely a matter for him, and the law will always jealously defend that privilege. Be that as it may, only the Crown has produced a plausible explanation for the presence of the accused's credit card at the scene of the robbery. You may find that significant, but it is — as I advised you at the start of my summary — entirely a matter for you.

Karl is convicted, and now seeks your advice on the prospect of an appeal based on a judicial misdirection.

Time allowed: 15 minutes

Answer Plan

4-15 **Question 2** has two elements:

(a) Background law on a Weissensteiner *direction*

Again, this is a 'gift' question to those who are good at 'issue spotting'. We are given a scenario in which an accused who could give an explanation

for some fact of which he is aware fails to do so. This situation was dealt with in *Weissensteiner v R* (1993) 178 CLR 217, and your answer should explain in full what the High Court laid down in that case.

(b) Specific application of the direction in the given scenario

There is the additional complication that Karl has not remained totally silent on the matter, since he offered an explanation to the police. However, that explanation was not made known to the jury, who do not have the benefit of any alternative 'case theory' to the one offered by the Crown. Despite this, there is case authority to suggest that, in these circumstances, a *Weissensteiner* direction should not be given to the jury: see *Dyers v R* (2002) 210 CLR 285.

The question also seems to raise issues relating to legal professional privilege, given the defence that Karl offered to his solicitor but instructed him not to bring out at trial.

Answer

Background law on a Weissensteiner *direction*

4-16 This scenario is reminiscent of *Weissensteiner*, in which the High Court held that when an accused who is in a position to give an explanation regarding some fact in issue within their knowledge fails to do so, it is permissible for the trial judge to direct the jury that, in the absence of any alternative explanation from the accused, the jury may find it easier to accept the Crown's 'theory of the case'. An accused who maintains their right to silence in the face of a credible Crown case against them is taking a risk of not discharging the 'tactical burden' that has been imposed on them.

Specific application of the direction in the given scenario

4-17 The High Court in *Weissensteiner* itself placed considerable constraints on the circumstances in which this line of reasoning may be used. Specifically, the court limited its use to circumstances in which the evidence of innocence 'must be within the knowledge of the accused': *Weissensteiner* at [28]. It need not be *exclusively* within their knowledge, but it must be something they can clearly assist the court with.

It might be possible for Karl, in the present case, to argue that he did not know how his credit card came to be inside the motel room, but of course he could at least assist the court by explaining how he believes he came to lose it, and to give evidence that he has no idea would be perjury. To let him give that evidence would also present his counsel with an ethical dilemma.

However, a further limitation on the use of the *Weissensteiner* direction that is relevant to the present case emerged in *R v Ryan* [2002] QCA 92 (admittedly under the common law of Queensland, although the *Weissensteiner* principle applies equally there, and *Weissensteiner*

originated in Queensland); namely that such a direction may not be given when the accused *has*, on a previous occasion, given an explanation of the fact(s) against him that is consistent with his innocence *even though it has not come out in evidence before the jury.*

The trial judge should have, from papers sent to him in advance of the trial, a copy of the transcript of the record of interview with the police in which Karl explained how he believes his credit card came to be where it was. While it is not for the trial judge to make the jury aware of this explanation, he cannot overlook it when deciding to give the direction. Put more bluntly, once he knows of the previous explanation, he *cannot* give such a direction.

The fact that Karl also explained the true events to his solicitor cannot be disclosed in evidence, because what a client tells their lawyer is 'privileged', and only the client can 'waive' that privilege: Uniform Laws s 119. For professional reasons, therefore, Karl's counsel cannot reveal what Karl has told him, even though it would assist Karl's case.

In his direction to the jury, the trial judge arguably came too close to suggesting that, somehow, once the Crown had produced the evidence of the finding of the credit card, it transferred the burden of proof onto the accused, in the sense that Karl was obliged to explain it away. While the judge did go through the motions of mouthing the mantra about it being easier to believe hypotheses of guilt, he should instead have expressed it as being *less* easy to believe hypotheses consistent with innocence.

Examiner's Comments

4-18 You will receive only 50 per cent of the marks allocated to this question for remembering *Weissensteiner*, and the remainder for being aware that there are limitations on its application, and that this question involves one of those limitations.

The time allowed in which to answer the question (20 minutes) should suggest that there is more than one simple issue involved here.

Keep in Mind

4-19 You should avoid the following common errors:

- Not spotting the relevance of *Weissensteiner* to the facts of the case. Whenever you are given a scenario in which an accused fails to give evidence regarding facts of which they must be aware, this is likely to raise the *Weissensteiner* issue. Students in the past who have failed to spot it have wallowed around instead dealing with factual issues regarding the likely impact on an accused's credibility of not testifying, or have wandered into the area of 'privilege against self-incrimination'.
- Not being aware of the climb-down from the full rigour of *Weissensteiner* that has occurred in recent years.

- Not linking *Weissensteiner* with the 'right to silence' and 'tactical burden'.
- Not picking up on the 'legal professional privilege' and *Dyers* issues.

Question 3

4-20 Jackie is suing the proprietors of 'Kiddyhaven' for damages in respect of injuries sustained by her four-year-old daughter Skye when she fell from a trampoline that was part of the outdoor facilities supplied by Kiddyhaven in their registered and accredited preschool childcare business. It is Jackie's case that the defendants failed to adequately supervise the outdoor play area at the time when Skye fell from the trampoline and landed on a solid concrete base where there should have been a rubber mat.

Jackie's solicitors are seeking access to an email submitted by the supervisor employed by Kiddyhaven — Sonja Kemp — to Kiddyhaven's solicitors, in which she advised them of the accident to Skye, and sought their advice on whether or not they would be likely to lose their accreditation with the State Government Department of Family Services because they had falsely reported to that Department, following an inspection, that they had replaced the concrete surround to the trampoline with a rubber mat. It had been a condition of their continued accreditation that they complete this work within 21 days, and that the trampoline not be used until the work had been completed. In her email to the solicitors, Sonja admitted that the work had not been completed because of a shortage of staff, which was also the reason why no one had been supervising Skye while she used the trampoline.

Argue for and against an order that the solicitors make pre-trial disclosure of this email.

Time allowed: 15 minutes

Answer Plan

4-21 The question could not be clear enough — be prepared to argue both sides of the submission. Since it was an email from an authorised employee of a client, the solicitors, on behalf of their client Kiddyhaven, will be asserting legal professional privilege under ss 118 and 119 of the Uniform Laws, claiming that the email was written for the 'dominant' purpose of either seeking legal advice or preparing for anticipated litigation.

There are two potential counter-arguments. The first is that the 'dominant' purpose was not that of seeking legal advice, citing cases such as *New South Wales v Jackson* [2007] NSWCA 279, and the second is that suppressing the truth regarding the failure of Kiddyhaven to comply with a condition of its continued accreditation would be fraudulent,

or would have the effect of concealing an unlawful act. There is also an element of public interest involved, since parents are entitled to have confidence in the safety of their children in preschool environments.

Answer

Argument against disclosure

4-22 Kiddyhaven may argue, in terms of ss 118 and 119 of the Uniform Laws, that the communication from Sonja is covered by legal professional privilege, in that it was written by her as a request for legal advice regarding the childcare centre's accreditation status following its failure to comply with an improvement order, or alternatively in anticipation that the centre would be sued by Skye's mother. This was the 'dominant' purpose for the writing of the email, which is all that is required under s 119, and the privilege is that of Kiddyhaven to assert or waive.

Argument for disclosure

4-23 First of all, there is no evidence that at the time Sonja sent the email she was aware of pending litigation from Jackie. As for the issue of possible loss of accreditation, was this really the seeking of legal advice, or was it intended merely to alert the solicitors to the fact that there might be a problem in the future? In the analogous case of *New South Wales v Jackson*, the court that decided that a report completed by a school following an accident to a pupil was privileged was clearly swayed by the fact that the standard report form clearly indicated that it was intended for use by legal advisers in anticipation of legal proceedings, which is not the case here.

There are also two other strong arguments in favour of disclosure. The first is that if the fact that the childcare centre had not complied with a compliance condition is suppressed, then the legal process under which the State Government accredits and monitors such centres would be frustrated. It was held in *R v Bell; Ex parte Lees* (1980) 146 CLR 141 that legal professional privilege will not be upheld if to do so would 'frustrate the processes of law'. There is, additionally, an important public interest in ensuring that childcare centres are properly managed, and pose no threat to the health and safety of infants, and it is clearly a matter of considerable concern when such a centre continues to operate in breach of a safety condition.

On balance, disclosure is likely to be ordered.

Examiner's Comments

4-24 If you did not spot that **Question 3** is about the extent of lawyer–client privilege, then you have no business taking the evidence exam in the first place. Once again, it is likely that the examiner will allocate only 50 per cent of the available marks to 'spotting the issue', and the

remainder will be awarded for a clear and comprehensive application of the principle to the facts, with particular reference to the ability to argue both sides of a case.

Keep in Mind

4-25 You should avoid the following common errors:

- Settling for spotting the principle of law involved, and ignoring the clear requirement to argue both sides of the case;
- Not citing case authority to support your arguments;
- Not venturing 'outside the square' in order to incorporate the obvious public policy argument in favour of disclosure.

Question 4

4-26 A class action has been brought against the State Government by the relatives of a group of inmates of Blackbog Correctional Centre who perished in a fire at the Centre. It is alleged that when the fire broke out in the kitchen, and the order was given for that particular wing to be evacuated, it was discovered that the electrical system that governed the opening and closing of the automatic doors that gave entry to the wing had been tampered with — possibly by prison inmates — and as a result the doors could not be operated, even manually.

The plaintiffs are claiming that the inability to evacuate the prisoners was due to the negligence of the State Government and its chosen contractors during the commissioning and installation of the automatic doors, and are demanding 'discovery' of the entire contractor specifications relating to the security systems within Blackbog.

What legal ground may the defendant cite for a refusal to hand over those specifications, and what counter-arguments might the plaintiffs be able to raise?

Time allowed: 15 minutes

Answer Plan

4-27 This is a good exercise in 'issue spotting'. The documents that are being demanded are clearly of a sensitive nature, and a loud bell labelled 'public interest' should be sounding in your head. You may even recall a case involving submarine plans during the Second World War. There is every possibility that the examiner is requiring an answer based on public interest immunity as described in s 130 of the Uniform Laws.

Answer

4-28 The documents that are being sought are clearly highly sensitive, containing, as they do, information regarding the security system within a

prison. It is arguable that it is not in the overall interest of public safety to disclose them, given the risk that they might, if made public, compromise the integrity of the Correctional Services's arrangements for the secure incarceration of prisoners, many of whom pose an ongoing threat to the community. The most obvious way of resisting the application for discovery or pre-trial disclosure would be by way of a claim to public interest immunity under s 130 of the Uniform Laws.

4-29 Section 130 permits a judge to whom application is made to decline to order disclosure of a document such as the one in the instant case if, on balance, the public interest in admitting a document into evidence which relates to a 'matter of state' is outweighed by the public interest in preserving secrecy or confidentiality in relation to the contents of that document. 'Matters of state' have long included matters of national security (eg, the submarine plans in *Duncan v Cammell Laird and Co Ltd* [1942] AC 624 during the ongoing World War Two), but additionally s 130(4)(f) includes the 'proper functioning' of a state government among those matters that may be considered to be 'matters of state'. The argument for the defendant will be along the lines that to reveal the requested plans will impinge adversely on the state's ability to securely house dangerous offenders as part of its ongoing duty to protect society.

4-30 It is a balancing act between the two 'public interests': one the public interest in the plaintiffs receiving justice, and the other the public interest in preserving prison security. Subsection (5) of s 130 supplies a non-prescriptive list of the factors to be weighed when performing this balancing act, which includes the importance of the document in the proceedings, any alternative means of proving the same issue of fact without resort to the contested document, whether or not the information sought has already been published, and any possible means of limiting its publication.

4-31 Weighing all those factors together is obviously a subjective process, but given the extreme sensitivity of the document sought, and the likely public reaction if prison security is in any way compromised, it is highly unlikely that disclosure will be granted unless general publication can be in some way limited, perhaps by means of 'closed court' proceedings, reporting embargos and the like. If the security system in question is now 'old generation', and has since been superseded by a more sophisticated one, this will obviously operate in favour of disclosure.

Examiner's Comments

4-32 Again, the issue of law highlighted by the question was not difficult to spot, if you'd done any research at all — and, of course, even easier to identify because it had to come from somewhere within this chapter. The vast majority of the available marks would be allocated to the more complex matter of applying the statutory provision to the facts of the scenario, and arguing both sides of the case realistically.

Keep in Mind

4-33 You should avoid the following common error:

- Not providing the detailed answer that the question requires. Merely recognising the principle of law that applies in this case, and blandly citing it, will not earn a high proportion of the available marks. Fifteen minutes have been allocated to a short question involving one legal principle, which should suggest that a detailed answer is required, and that detail can only come from a substantive explanation of the current state of the law, a reference to relevant case law, and a thoughtful and incisive application of principle to fact.

Joining up the Dots

4-34 Refer to the section of the same name in **Chapter 2** (at **2-25**) for the significance of this part of the chapter.

Question 5

4-35 John and Beth are charged jointly with cultivating cannabis on their rural property, which they own in joint names. The charge arises from the discovery by police, following 'information received', of a large greenhouse to the rear of the property, in which over 50 cannabis plants were thriving with the assistance of additional electric heating and a sophisticated sprinkler system. When police raided the property they discovered only the couple's son Simon, aged ten, who cheerfully invited them into the greenhouse to admire 'Dad's fairy plants, that'll be sent to Hogwarts when they're fully grown'. When questioned further, Simon willingly advised them, without any seeming hesitation, that 'Dad planted them a couple of months ago, and he said that they'll be worth a fortune when they're ready.' Advise on the following issues arising in the case.

(a) John is simply denying his guilt, while Beth advises her counsel that she only went along with it because John threatened her with severe violence if she mentioned the cannabis crop to anyone, and that she took no part in the cultivation process. Which of the parties bears what burdens of proof?

(b) It emerges during the course of the preparation for trial by John's new solicitor, Mark, that the so-called 'tip-off' came from John's former solicitor, Edmund, who advised police, without any prompting from them, that when he enquired regarding the outstanding payment of his fees in respect of previous legal services John advised him 'in confidence' that he anticipated being able to pay him when he sold a substantial cannabis crop that he'd been cultivating. Can John's counsel object to this evidence being led?

(c) There is some doubt regarding Simon's fitness to be called as a witness. An educational psychologist has assessed him as 'borderline

intellectually disabled, but with no obvious cognitive impairment'. What process must be followed to assess Simon's fitness to testify, and if he appears reluctant, can he be compelled?

(d) When Beth declines to give evidence, and none of the witnesses is cross-examined by her counsel beyond a vague suggestion that she knew nothing of what was growing in the greenhouse, the trial judge advises her counsel that the jury will not be allowed to consider even the possibility that she was acting under duress from John. Was she correct in adopting this position?

Time allowed: 20 minutes

Answer Plan

4-36 The examiner has given no indication of the mark allocation, so one must assume that each question attracts an equal mark (eg, 4 × 5 = 20 marks). This said, a quick perusal of the questions reveals that some may be answered more economically than others, and that (d) may be answered immediately after (a), since they are closely linked. The issues appear to be:

(a) the distribution of the burdens of proof in a criminal case;
(b) legal professional privilege;
(c) the 'competence and compellability' rules for witness testimony;
(d) the obligation of a criminal accused to lay an evidential basis for any defence.

Answer

4-37 (a) The old common law principle laid down in the *Woolmington* case, and reproduced in s 141 of the Uniform Laws, is that the Crown in a criminal case must prove the guilt of the accused beyond reasonable doubt. Both John and Beth need only raise a reasonable doubt in the minds of the jury regarding their guilt, and they must then be acquitted. However, with regard to Beth's claim of duress, the position is slightly different, and it is convenient to deal with question (d) at this point.

4-38 (d) When an accused person raises a defence on which they do not also bear the 'legal burden' of proof (as, for example, with insanity), they bear the 'evidential burden' of ensuring that some evidence exists that creates a reasonable doubt that the defence might be genuine. Once this is achieved, the Crown must disprove that defence beyond reasonable doubt. Since there has been no evidence (either from Beth in chief, or by means of cross-examination of Crown witnesses) of duress by John against Beth, there is no defence to be left to the jury, and the trial judge was correct.

4-39 (b) The only possible ground for excluding the evidence of what John said to Edmund would be that of legal professional privilege. However, as laid down under ss 118 and 119 of the Uniform Laws, that privilege only applies to things said or written by a client to their legal

adviser either in the course of seeking legal advice or in anticipation of litigation. Clearly, the context in which John made the statement regarding the cannabis harvest was neither of those things, and the privilege cannot therefore apply. Edmund may therefore give that evidence against John.

4-40 (c) Sections 12 and 13 of the Uniform Laws govern the competence of a witness. The ultimate test of competence is whether or not Simon has the 'capacity' to either understand a question put to him or to give an answer that can be understood. The circumstances in which he spoke to police in the greenhouse suggest that he understood what was being asked of him, and could give a comprehensible reply. His 'difficulty' may lie in an underdeveloped comprehension of the difference between fiction and reality, but even if he is convinced that Harry Potter exists, that does not in any way suggest that he is incapable of advising the court that his father was growing the plants in the greenhouse. This is borne out by the psychiatrist's assessment, but in the circumstances — reinforced by Simon's young age — it is probably preferable for his evidence to be given 'unsworn' (ie, without taking the oath), given that for him the borderline between truth and a lie may be a very narrow one.

Less clear is whether or not Simon may be forced to testify against his father. Section 18 of the Uniform Laws establishes a privilege against testifying to any child of an accused if it can be shown that by testifying they would be exposing themselves to 'harm', either to their person or to their relationship with the accused, which outweighs the desirability of receiving their evidence. It is theoretically the function of the trial judge to advise Simon of the existence of this privilege, but in practice the point will have been raised by John's counsel, in seeking to have Simon's evidence excluded. Given Beth's assertion that she feared physical violence from John if she revealed the details of his horticultural initiative, it might be possible to have Simon's evidence excluded on the ground of apprehended physical harm, but there is insufficient information supplied to take this beyond mere conjecture.

Examiner's Comments

4-41 There was nothing challenging about this question, which tested only your recall of what you are supposed to have absorbed, mainly in this chapter, but with a reminder that in the real world issues arising out of the law of evidence cannot be confined to one chapter at a time.

Keep in Mind

4-42 You should avoid the following common errors:

- As ever, falling short of a full answer, and settling simply for identifying the target without firing at it.
- Not appreciating how some time and writing could be saved by answering part (d) immediately after part (a), making use of all that was written in (a).