

Compellability

'I don't want to give evidence against my husband'
Sections 18 & 128 Evidence Act (NSW) 1995

I have witnessed many criminal hearings in which witnesses were required to give evidence against family members. Such witnesses should have applied to be excused under s18 Evidence Act. However, this seldom occurs as many lawyers appear to be unaware of the section and its effect. This article relates to matters in the Local Court of NSW.

Subpoenas & Competence

First of all, no witness needs to attend court unless they have been properly served with a valid subpoena. See [here](#) for details of the NSW subpoena service provisions.

If the witness does come to court, the court will then determine whether the witness is competent to give evidence.¹ The parties can object to a particular witness giving evidence on the basis that the witness is not competent because of age or illness. If the witness is found to be competent, the court will then determine whether they can be compelled to give evidence.

Compellability

Section 18 provides that a witness can object to giving evidence against their spouse, de facto partner, parent or child. Section 18(6) further provides that the witness must not be required to give evidence if:

- (a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence, and*
- (b) the nature and extent of that harm outweighs the desirability of having the evidence given.*

Section 18(7) further provides that the court must take into account the following:

- (a) the nature and gravity of the offence for which the defendant is being prosecuted,*
- (b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it,*
- (c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor,*
- (d) the nature of the relationship between the defendant and the person,*
- (e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.*

¹ ss12 - 17 Evidence Act (NSW) 1995

So it is not enough that the witness does not want to give evidence. The defence submission must address the harm that will be done to the witness or the relationship.

The police will then routinely submit that the court should compel the witness because of the seriousness of the offending and because the evidence is essential to the police case. No defence lawyer should ever submit that an offence is trivial. Simply submit that the alleged offending falls at the lower end of the scale of seriousness.

Section 128 Certificate

If the objection is overruled and the witness is compelled to give evidence, they can still apply for a certificate under s128. This involves the witness entering the witness box and saying:

'My statement to police was not accurate. If I give truthful evidence, I fear I may incriminate myself. I seek a certificate under s128.'

This certificate which means that the evidence the witness gives cannot be used against them in any criminal proceeding – provided they tell the truth. So the witness can then traverse a previous written statement. Once a certificate is provided to them, the witness can admit that their previous statement was all lies motivated by spite which they regret. It follows that the charge should be dismissed.

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