

WHEN IS IT OK TO NOT ANSWER QUESTIONS IN THE WITNESS BOX?



**THE PRIVILEGE AGAINST
SELF-INCRIMINATION**

Consider the following fact scenario:

The Charges

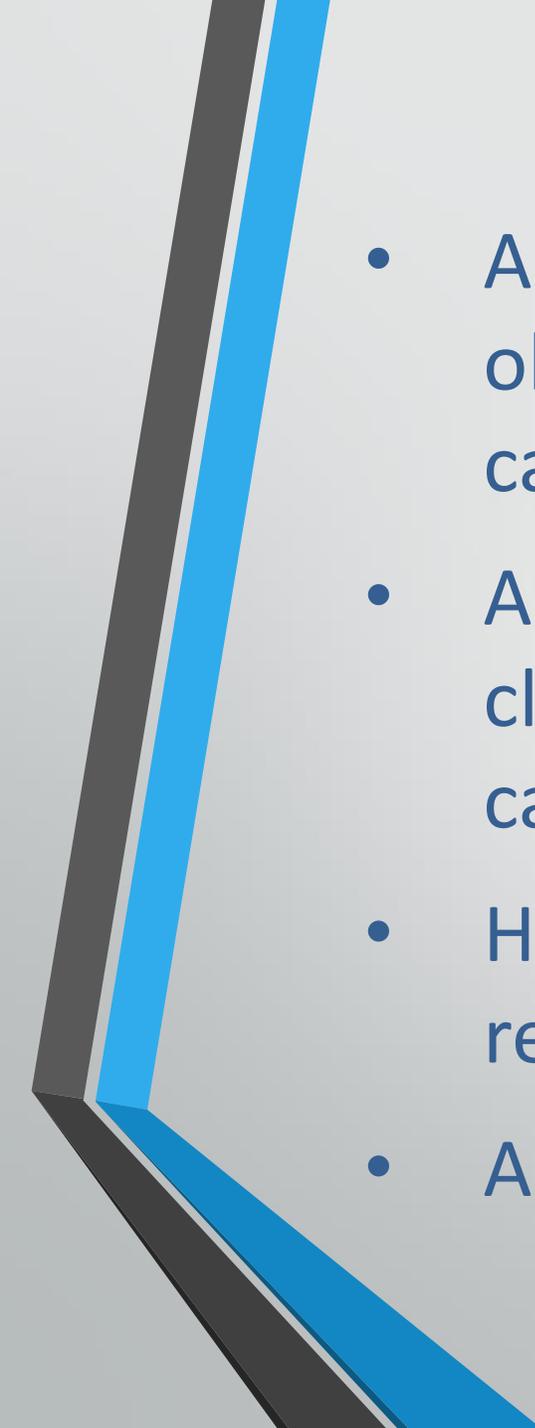
Alf is charged with the following crimes:

1. Criminal damage - to the door of premises of a shop in Cavenagh Street Darwin.
2. Unlawfully entering the shop at night.
3. Stealing clothing and money.



The Allegations:

- Alf had been at the flat of a friend, Benny, in Knuckey Street Darwin. He consumed an unknown quantity of alcohol.
- In the early hours of the following morning, at an unknown time, Alf left Benny's flat and walked to a shop, *Tanya's Fashions*, in Cavenagh Street Darwin. This shop is only 50 metres from Benny's flat.

- 
- Alf went to the rear of the shop and used an unknown object to force the side door open. In the process, he caused damage to the door.
 - Alf then entered the shop and collected 6 items of clothing and put them in a cloth bag which he had been carrying.
 - He also found \$250 cash in a drawer in the premises. He removed this cash and put it in the bag also.
 - Alf then walked back to Benny's flat.

- 
- Alf was seen on CCTV walking along Knuckey Street and then walking along Cavenagh Street. A few minutes later, he was seen on the same CCTV cameras walking back along Cavenagh Street and then back along Knuckey Street, entering the front door of the building containing Benny's flat.
 - Sometime later in the early hours of the same morning, Alf left Benny's flat with a friend, Colin. They are seen on CCTV leaving the building and getting into Colin's car, which had been parked on Knuckey Street. Colin then drove to Milner and dropped Alf off at his home in Robinson Road.

Five days later, Alf was arrested at his home. He was taken to the Darwin Watch-house. He took part in an electronically recorded interview but answered "no comment" to each of the questions asked in this interview.



Additional Information

Benny provided a statement to police. In the course of this statement,

- Benny confirmed that Alf had been at his place during the course of the evening and that Alf had been consuming alcohol there.
- Benny saw Alf go out in the early hours of the morning, but did not speak with him and did not know where he went.
- He did not see Alf return, but did see him a little later.
- He did not notice whether Alf had any bag or other property with him.
- He later saw Alf leave with Colin.

Colin refused to provide a statement to police or to assist them in any way.

Situation 1 - You are representing Alf

Alf instructs you:

- I had been drinking at Benny's flat. I consumed a considerable quantity of alcohol.
- I recall going out sometime late at night. I went to the Cavenagh Hotel.
- I had a couple of drinks while I was there - rum and Coke.
- I saw a bag, on the floor, next to a couple of tourists.
- I picked up the bag and took it out of the hotel.
- I did not go to Tanya's Fashions, did not break into that shop and did not steal anything from that shop
- I returned to Benny's flat with the bag.
- I had some further drinks at Benny's flat.

- I recall seeing Colin while I was there and I was talking with him.
- I recall getting a lift with Colin. I had the bag with me. He dropped me at my home in Milner.
- I don't recall what conversation I had with Colin, either when we were at Benny's flat or on the way home.
- I later threw the bag and the clothing into a bin, but kept the money which had been in the bag.

Alf is aware of the contents of Benny's statement.

Alf does not know what Colin will say if he is called to give evidence.



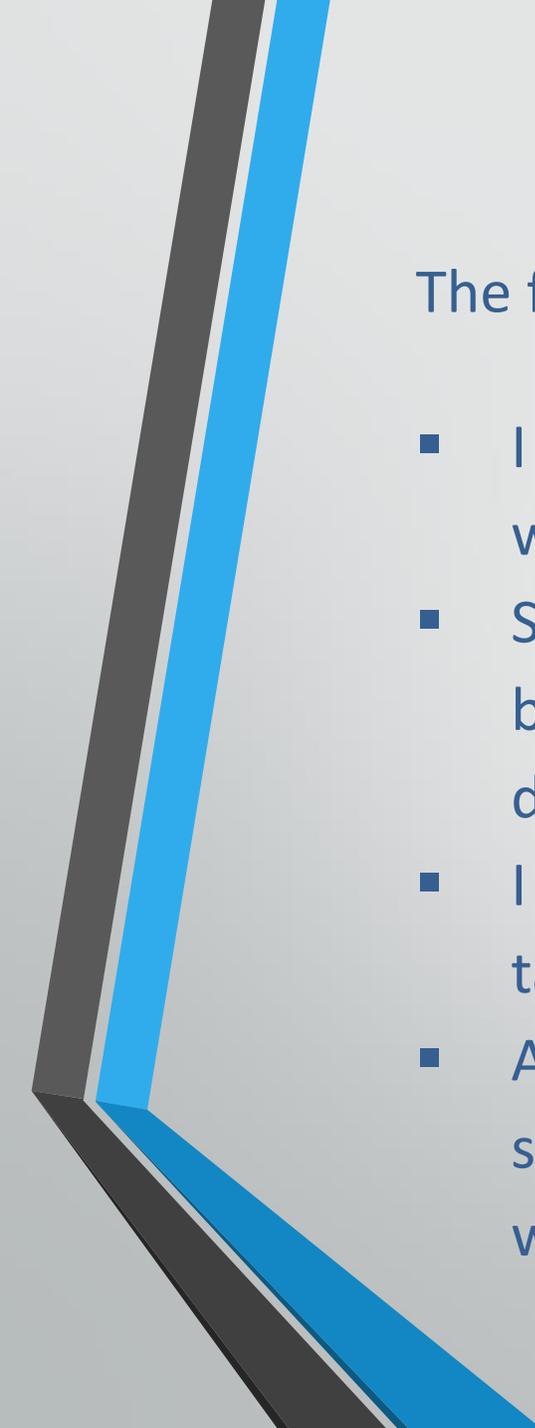
Questions to Consider:

1. How do you advise and represent Alf, particularly with regard to issues of self-incrimination?
2. How do you effectively represent Alf with regard to issues of Colin incriminating himself?

Situation 2 - You are representing Colin

Colin instructs you:

- I have received a summons to give evidence in trial concerning charges against Alf.
- I don't want to give evidence in this trial.
- I am fearful of recriminations by both Alf and some other friends and colleagues if I do give evidence against Alf.



The following is my recollection of what occurred on that night:

- I arrived at Benny's flat sometime late in the evening. I do not know what time this was.
- Sometime soon after this, I saw Alf arrive - he was carrying a blue cloth bag. I did not see what was in the bag. I noticed that Alf was fairly drunk.
- I recall talking with Alf at Benny's flat, but do not recall what we were talking about.
- About two hours after I arrived, I was about to leave to go home. I could see that Alf was quite drunk, so I decided to give him a lift home, as I was concerned that he might get himself into trouble.

- We walked to my car which was parked nearby, in Knuckey Street.
- I drove to Alf's home in Milner and dropped him off there. I noticed that he was carrying the blue cloth bag.
- While we were driving towards Alf's home, I recall that we did have some discussion. This included Alf telling me:
 - he had stolen the items in the bag; and
 - he did not say what were the items or from where he had stolen them.



Consider what possible offences had been committed by Colin?

1. Aiding and abetting Alf in the commission of his offence (CC s.12)?
2. Accessory after the fact (CC s.13)
3. Attempting to pervert justice (CC s.109)

Questions to Consider:

1. How do you advise and, if appropriate or necessary, represent Colin, as to whether he can avoid giving evidence?
2. How do you advise and, if appropriate or necessary, represent Colin, with regard to issues of self-incrimination?

The Uniform Evidence Legislation



128 Privilege in respect of self-incrimination in other proceedings

The Uniform Evidence Legislation

The relevant provision of the UEA¹ is section 128:

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 Territory court or before any person or body authorised by a law of the Territory, 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) 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) 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.

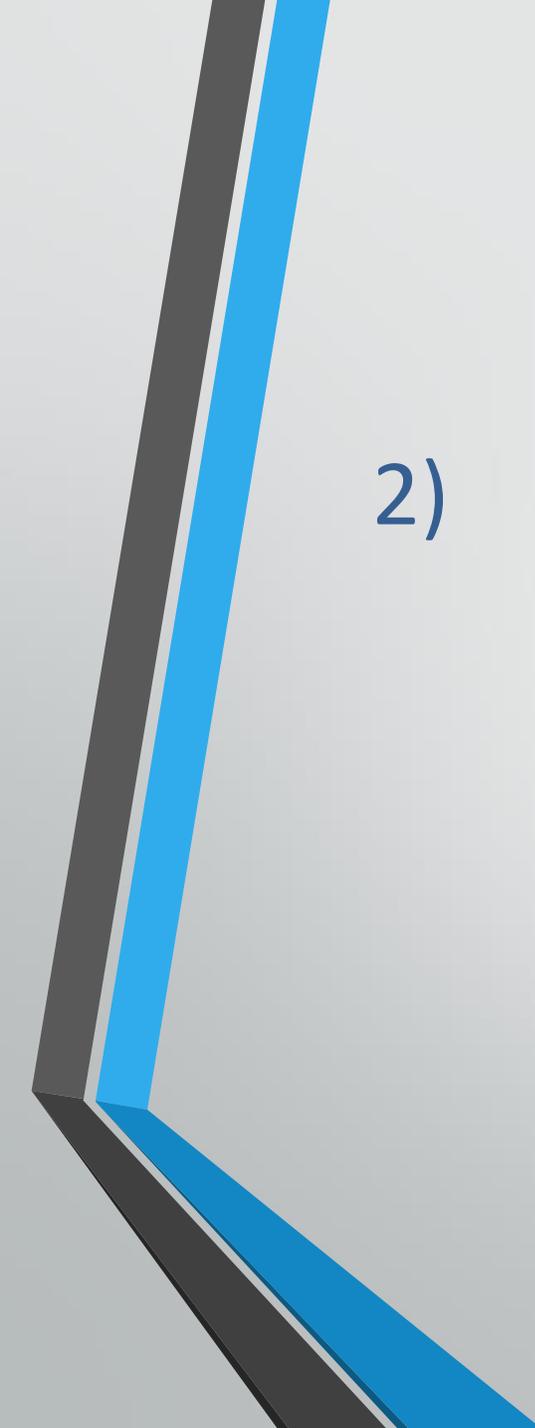
The Uniform Evidence Legislation

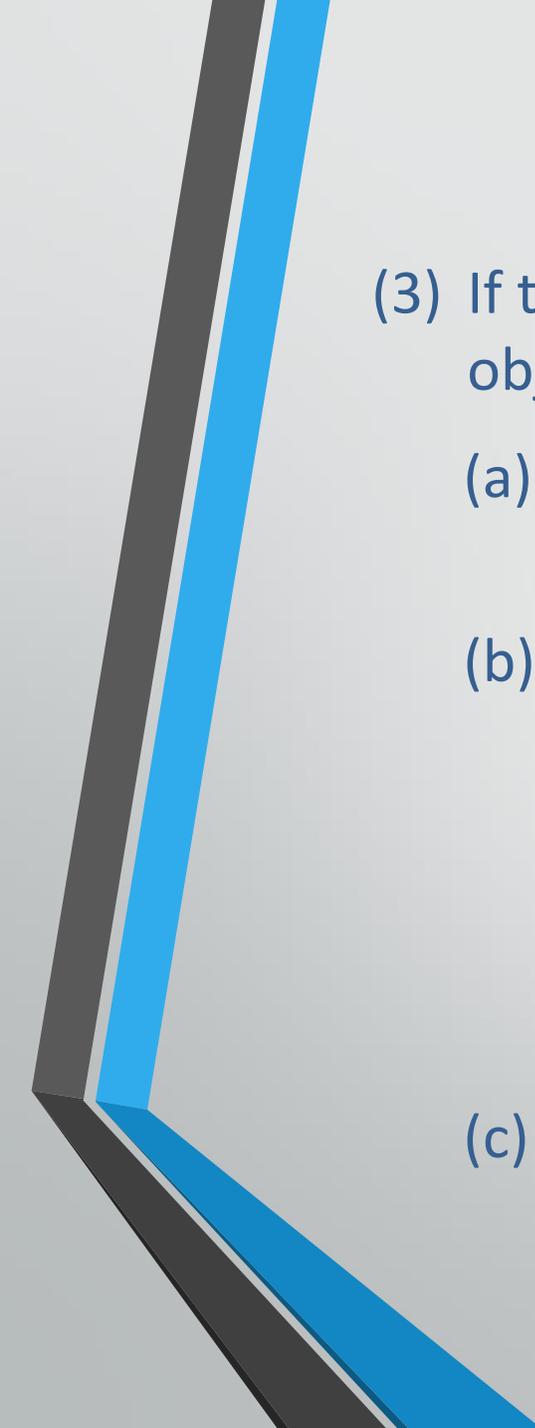
The relevant provision of the UEA is section 128:

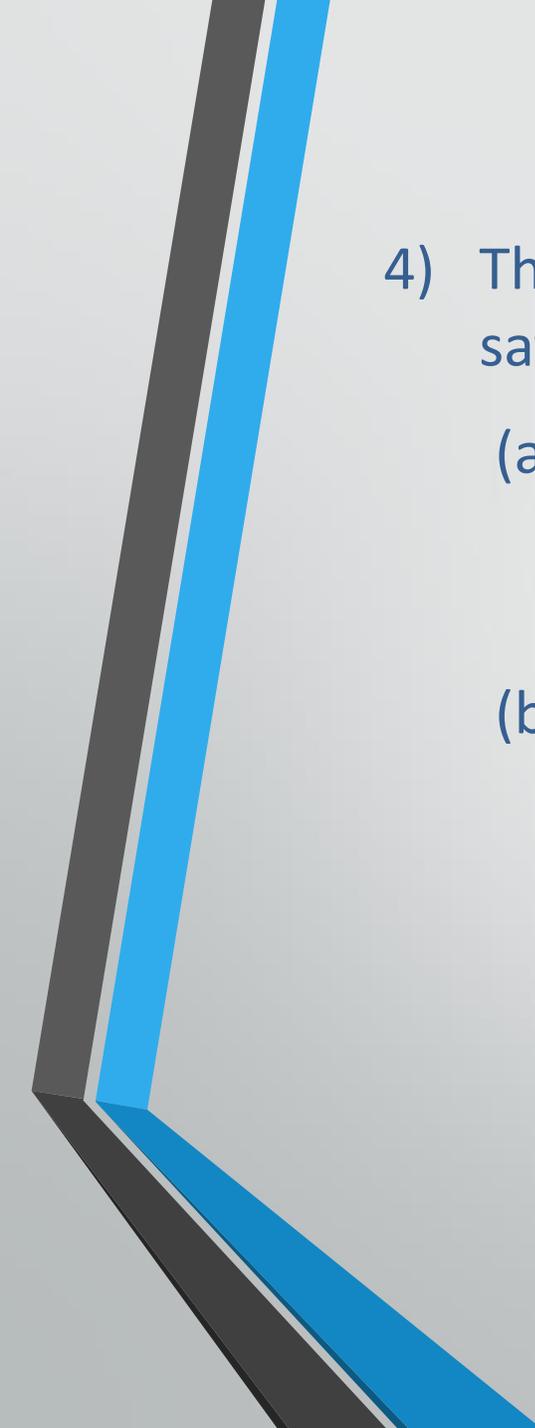
128 Privilege in respect of self-incrimination in other proceedings

(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.

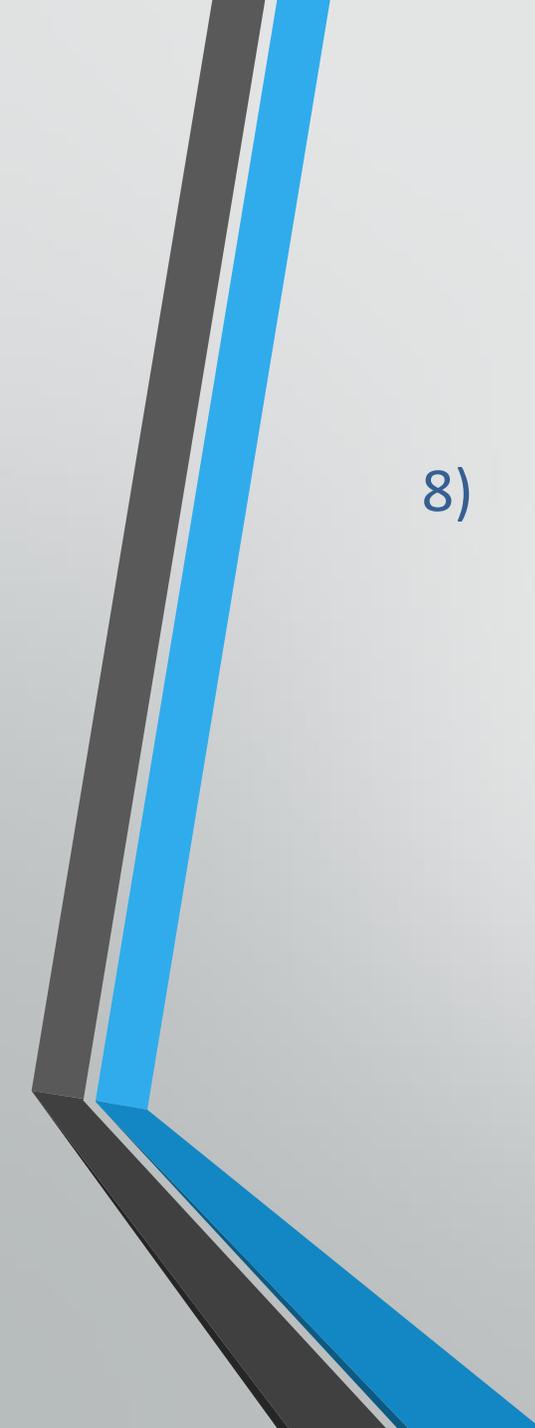


7) In any proceeding in a Territory court or before any person or body authorised by a law of the Territory, or by consent of parties, to hear, receive and examine evidence:

(a) evidence given by a person in respect of which a certificate under this section has been given; and

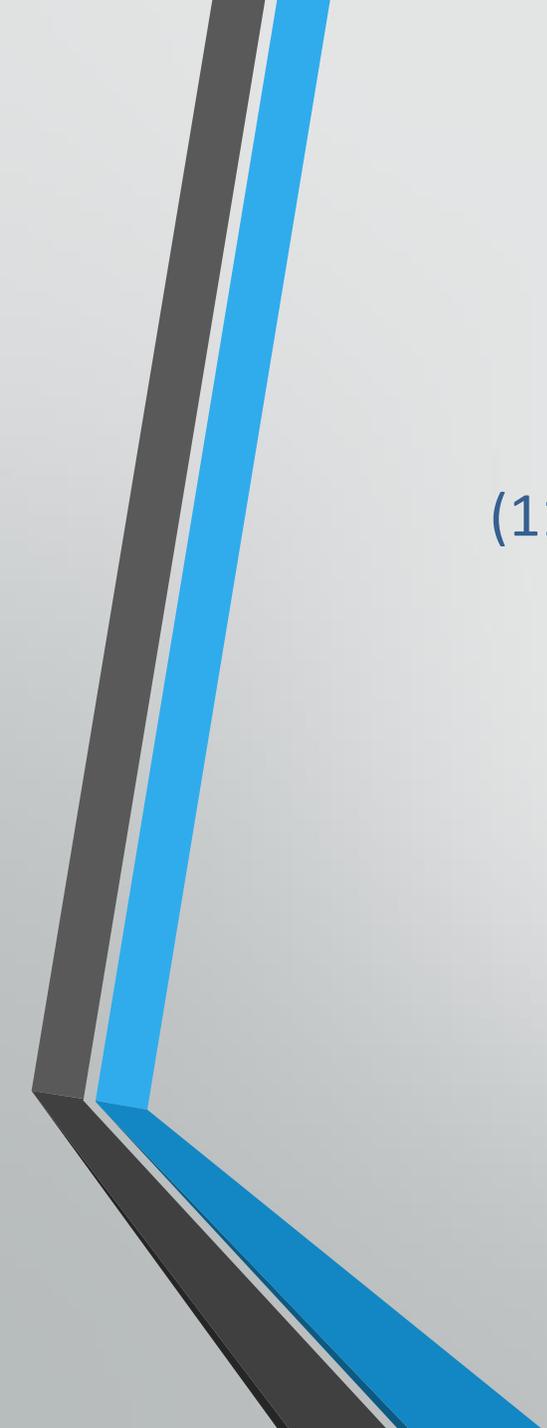
(b) any information, document or thing obtained as a direct or indirect consequence of the person having given evidence;

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) 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.

Questions to Consider:

1. How do you advise and represent Alf, particularly with regard to issues of self-incrimination?
2. How do you effectively represent Alf with regard to issues of Colin incriminating himself?

Questions to Consider:

1. How do you advise and, if appropriate or necessary, represent Colin, as to whether he can avoid giving evidence?
2. How do you advise and, if appropriate or necessary, represent Colin, with regard to issues of self-incrimination?