# Chapter 10: Competence and Compellability

In this chapter the law as it relates to competence and compellability is examined. Part 4 of the *Evidence Act* 2009 contains the relevant sections. Competence and compellability are separate legal concepts that are often joined in application. There is also a link between competence, compellability and privilege.[1] This link was succinctly described by Heydon J in *Australian Crime Commission v Stoddart* when he said:

> *Links between non-compellability and privilege.* There are links between questions of non-compellability and privilege. A question of whether a witness is competent is for the parties and for the court, for the court has a duty to preserve the orderly administration of justice by ensuring that untoward events do not take place like the entry into the witness box of very youthful children, or mentally defective persons, or accused persons in the prosecution case. But questions of non-compellability and privilege are pre-eminently for witnesses, not the parties or the court. A person who is non-compellable and declines to enter the witness box is in effect refusing to answer any questions at all. A person who is non-compellable but decides to enter the witness box and claim privilege is refusing to answer only questions falling within the category for which privilege can be claimed. In some circumstances the court may have a duty to advise persons who are non-compellable or may claim a privilege of their rights, or may follow a practice of doing so. But in the end it is those persons who must exercise a choice to make a claim of non-compellability or of privilege. Like non-compellability, a privilege is personal to the person claiming it, or, in the case of legal professional privilege, the person on whose behalf it is claimed. Thus at least in the case of the privilege against self-incrimination, evidence given by a witness wrongly compelled to answer may not be used against the witness in other proceedings. If the court wrongly fails to uphold the claim to privilege, and the witness whose claim was wrongly rejected is a party, there is a right of appeal. A witness whose claim was wrongly rejected who is not a party obviously cannot appeal. And there is authority suggesting that a party adversely affected by the wrongful rejection (or acceptance) of a claim for privilege may not appeal.[2]

**Presumption of Competence**

Section 24 of the *Act* provides that people are presumed to be competent and if competent they are compellable. It states:

> **24.** (1) A person is presumed to be competent to give evidence in all proceedings.
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> (2) Subject to this Act, a person who is competent to give evidence about a fact is compellable to give evidence in all proceedings.

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1 An examination of 'privilege' is made in Chapter 11.

2 [2011] HCA 47, 62.

Competence in a legal sense has been defined as 'a witness' capacity or capability to testify in a legal proceeding'.[3] There are a number of reasons why a person may not be competent and therefore not compellable. The most obvious one is unfitness to stand trial, which was considered in Chapter 8. The finding that a person is unfit to stand trial relates to an accused. Where the person is a potential witness they may not be competent because of an intellectual disability or because they are too young.

**Historical Background**

Section 29 of the *Evidence Act* distinguishes a witness' incapacity to understand that in giving sworn evidence they are under an obligation to tell the truth, and the position of a witness who may be able to give unsworn evidence and in doing so is able to understand that they are required to tell the truth. Historically in England only those people who were willing to take the oath and also understood the nature and consequences of the Christian religious oath were competent. This position was gradually altered, because of the requirements of Separatists, Quakers and Moravians, to allow people who at least understood the nature and consequences of the oath to give evidence. The development of the law in respect of competence and the need to take the oath in nineteenth century England is referred to by Dixon J in *Cheers v Porter*:

> [T]he *British Criminal Law Amendment Act 1885* (48 & 49 Vict. c. 69), sec. 4. When the British Parliament passed this enactment, the provisions from which the New South Wales Legislature took sec. 3 of the *Evidence Further Amendment Act 1876* had been in force for sixteen years, and in that period had not been used, it seems, for enabling children to give evidence (*Best on Evidence*, 12th ed. (by *Phipson*), pp. 144-145). This legislation was enacted in Great Britain as sec. 4 of the *Evidence Amendment Act 1869* (32 & 33 Vict. c. 68). It provided that "If any person called to give evidence in any Court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding Judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration: I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth." In *Clarke v Bradlaugh*[6] *Lush* L.J., in the course of considering some consequences which this section was said to have produced, made the following observations, which explain its general scope:—"That leads me to the material question which was brought here for our decision, namely, whether the defendant is a person within the 4th section who is permitted by law to make a solemn affirmation. Now, in order to construe rightly any statute, one must have before one's mind the state of the law at the time the statute was passed. By several statutes beginning with the early part of the reign of William IV. and ending in the early part of the present reign, members of certain religious bodies whose tenets were known to prohibit the taking of an oath as being contrary to their view of God's word, Quakers for example, were exempted from taking oaths. The first statute passed (3 & 4 Wm. IV. c. 49) enabled Quakers and Moravians to

[3] Butterworths, Australian Legal Dictionary, 1997.

> make a solemn affirmation in place of taking an oath in all places and for all purposes whatsoever. That was an immunity given to a particular class of religious persons who were to be exempted throughout the United Kingdom upon all occasions from taking an oath. Under no circumstances after that Act was passed could a Quaker or Moravian be called upon to take an oath. A subsequent statute (3 & 4 Wm. IV. c. 82) extended the same privilege to a class of persons called Separatists; and a still later statute (1 & 2 Vict. c. 77) extended the privilege to persons who had belonged to the society of Quakers or Moravians, but who had seceded from these bodies, still retaining conscientious objection to take an oath. So that at the time this Act was passed four classes of persons were permitted on all occasions and at all times to dispense with an oath and make an affirmation in lieu of it; Quakers, Moravians, Separatists, and those who had been Quakers or Moravians, and who had seceded from them, but still retained their conscientious objection to an oath. Now it must not be forgotten that at that time the Common Law Procedure Act 1854 was in force, which enacted by sec. 20 that if any person called as a witness or required or desired to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the Court or Judge, or other presiding officer or person qualified to take affidavits or depositions upon being satisfied of the sincerity of such objection, to permit such person instead of being sworn to make his or her solemn affirmation, which solemn affirmation or declaration shall be of the same force and effect as if such person had taken an oath in the usual form. Therefore, besides the classes of persons to whom I have referred who were privileged to adopt an affirmation in all cases instead of an oath, a person called as a witness in an English Court—for the statute was confined to England—no matter what his religious creed might be, if he satisfied the Judge that he had a conscientious objection to take an oath, was permitted to give his evidence upon the sanction of an affirmation only." The provisions of sec. 20 of the *Common Law Procedure Act 1854* had been extended to criminal proceedings by 24 & 25 Vict. c. 66—"An Act to give relief to persons who may refuse or be unwilling, from alleged conscientious motives, to be sworn in criminal proceedings".[4]

The according to Dixon J, the relevant amending legislation did not extend to certain persons. He stated:

> A child so young that it is completely unable to comprehend what it is asked to do, and an imbecile, and a person unable through intoxication to appreciate what he is doing, are all "incompetent to take an oath." The statute does not turn their incompetence into a qualification to testify. Yet it supplies no new tests for ascertaining whether the person of immature or abnormal intelligence is of sufficient understanding to give evidence.[5]

As noted by Evatt J, in *Cheers v Porter*, it took some before the religious component of competence was waived to save the evidence:

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4 [1931] HCA 51; (1931) 46 CLR 521.
5 Ibid.

> The oath is not to be administered to those upon whom, as an oath calling upon God, it will not be binding; but when such fact is ascertained by the Court, or the witness himself impliedly admits it by objecting, a solemn declaration may be administered, lest the testimony be lost. Until the doctrines of Bentham and his followers prevailed, witnesses were excluded as incompetent, either for "the absence of religion, or this or that erroneous opinion in regard to it." (*Rationale of Judicial Evidence, Bentham*, vol. *v.*, p. 126). By sec. 13 of the *Oaths Act 1900*, witnesses were not excluded, either for the absence of religion, or for any opinion in regard to it.[6]

Evatt J provides an interesting case example of how the law on competence changed and how in 1869 the English Parliament passed the legislation necessary to allow the change.

> A convenient commencing point is the decision in *Maden v Catanach*. In that case Mrs. Maden was called as a witness in a Lancashire County Court, and was about to be sworn when counsel for the defendant objected to her competency to be sworn. The Judge refused to swear her in the cause, but, for the purpose of the *voir dire*, himself administered the oath. The defendant's advocate then questioned her about her views upon matters of religion. Mrs. Maden stated that she had no belief in a God or in any future state of rewards or punishments, but that she was under a moral responsibility to her fellow-men and to her own conscience to speak the truth. The Judge refused to admit her to be examined in the cause and the plaintiffs were compelled to ask for a nonsuit. On appeal, the Court of Exchequer affirmed the Judge's ruling. *Pollock* C.B. said: "We are not here to make the law, as we have been invited to do, but to administer it; and by the law every witness must be sworn according to some religious ceremony; or, if that is to be dispensed with, it can only be done by the authority of an Act of Parliament, and in this case there is no such authority."
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> His Honor Judge *Parry*, commenting on this decision, has said:—
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> One cannot blame the Judges for yielding in these matters to popular bigotry, for they had to administer the bigotry of the law. As late as 1863, when Mrs. Maden in a Lancashire County Court was not allowed to give evidence because she honestly stated her views on matters of religion, the ruling was upheld in the High Court. But Baron *Bramwell*, whilst accurately administering the law, pointed out that the judgment he was giving involved the absurdity of ascertaining Mrs. Maden's disbelief by accepting her own testimony on the subject and then ruling that she was a person incompetent to speak the truth (*What the Judge Thought*, pp. 93, 94).
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> Partly as a result of such cases, no doubt, in the year 1869 the English Parliament passed the Act 32 & 33 Vict. c. 68. Sec. 4 was in the following terms:—

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6 Ibid.

> If any person called to give evidence in any Court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding Judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration: "I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth." And any person who, having made such promise and declaration, shall wilfully and corruptly give false evidence, shall be liable to be indicted, tried, and convicted for perjury as if he had taken an oath.
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> The application of sec. 4 to the case of children not otherwise disqualified from giving evidence, was thus referred to by Sir *James Fitzjames Stephen* in his well-known digest (5th ed. (1887) pp. 190-191):
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> The practice of insisting on a child's belief in punishment in a future state for lying as a condition of the admissibility of its evidence leads to anecdotes and to scenes little calculated to increase respect either for religion or for the administration of justice. The statute referred to would seem to render this unnecessary. If a person who deliberately and advisedly rejects all belief in God and a future state is a competent witness, a fortiori, a child who has received no instructions on the subject must be competent also.[7]

***Evidence Act 2009***

Section 29 of the *Evidence Act* broadens the scope for the taking of evidence well beyond the limitations for competence imposed by an oath or an affirmation to tell the truth. It provides:

> **29.** (1) A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence is not competent to give sworn evidence but the person may be competent to give unsworn evidence.
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> (2) Prior to a person giving unsworn evidence, the court must inform the person of the importance of telling the truth.
>
> (3) A person is not competent to give evidence (sworn or unsworn) about a fact if –
>
> (a) for any reason (including physical disability), the person lacks the capacity to understand or to give an answer that can be understood, to a question about the fact; and
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> (b) that incapacity cannot be overcome,
>
> except that the person may be competent to give evidence about other facts.
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> (4) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by

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7 Ibid.

> information from a person who has relevant specialised knowledge based on the person's training, study or experience.

This section introduces laws in respect of competency that are in line with section 13 of the Australian *Uniform Evidence Act 1995* and the *Youth Justice and Criminal Evidence Act 1999* (UK).

Before the introduction of section 29 of the *Evidence Act 2009* it was at least necessary for the court to determine that the witness understood the difference between the truth and a lie before they were competent to give evidence. In summary, the section provides:

- Sworn evidence cannot be given if the witness does not understand their obligation to tell the truth: section 29(1).
- Unsworn evidence may be given where the witness does not understand their obligation to tell the truth: section 29(1).
- Prior to giving evidence the court must inform the witness of the importance of telling the truth: section 29(2).
- The witness is incompetent to give sworn or unsworn evidence if they cannot give an answer that can be understood about a fact unless the incapacity can be overcome: section 29(3)(a)(b).
- The witness may be competent to give evidence about some facts and not others: section 29(3).

Section 29(4) provides for the court to seek the assistance of an expert. The assistance that can be provided by expert evidence is covered in some detail in Chapter 8. The section, however, does not limit the way the evidence can be received by the court. So the evidence may be able to be received without the need to call the expert.

Section 29 is particularly suited to cover the evidence of children, and adults who have a disability that may be able to be overcome with assistance.

**Unsworn Evidence**

Where unsworn evidence is given, section 31 of the *Act* provides that such evidence is admissible for all purposes. It states:

> **31.** (1) Unsworn evidence is admissible for all purposes.
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> (2) The probative value of the evidence is not decreased only because –
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> (a) the evidence is unsworn; and
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> (b) a person charged with an offence may be convicted on the evidence; and

(c) the person giving the evidence is liable to be convicted of perjury to the same extent as if the person had given the evidence on oath.

**Onus of Proof of Competence**

At common law where it is suggested by a party that a potential witness is not competent the onus is on the party calling the witness to prove that the witness is competent. The standard of proof at common law in these circumstances is beyond reasonable doubt. In *R v Yacoob* the court said:

> [I]t is for the prosecution, once the issue of the competence of one of the witnesses is raised, to prove that that person is competent to testify. See Cross on Evidence (5th ed), p 75, where it is stated: "Decisions as to which party bears the burden of establishing a fact constituting a condition precedent to the admissibility of an item of evidence belong to the law of evidence. However, there is very little authority on the subject, no doubt because, as a matter of common sense, the conditions of admissibility have to be established by those alleging that they exist".
>
> The burden will be discharged if the trial judge is satisfied beyond reasonable doubt upon admissibility and sufficient evidence of competence.[8]

Section 30 of the *Evidence Act* follows the common law by placing the onus on the party calling the witness to prove competence but alters the standard of proof and requires it to be on the balance of probabilities. Section 30 states:

**30.** (1) Whenever the question arises as to whether a witness in criminal proceedings is competent to give evidence in the proceedings, whether raised by a party or the court, shall be determined by the court in accordance with this section.

(2) Once a court accepts that the issue of competence is properly raised, it is for the party calling the witness to satisfy the court that, on the balance of probabilities, the witness is competent to give evidence in the proceedings.

(3) In determining competency, the court shall treat the witness as having the benefit of any of its directions that may be made in relation to the taking of his or her evidence.

(4) Any questioning of the witness in relation to competency shall be conducted by the court in the presence of the parties.

(5) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by information from a person who has relevant specialised knowledge based on the person's training, study or experience.

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8 (1981) 72 Cr App R 313, 317.

Section 30(2) does not limit the ways in which the question of competence can be raised. Section 30(4) ensures that the questioning of a witness about his or her competence occurs in the presence of the parties. Section 30(5) provides for expert evidence to assist the court.

Section 25 of the *Act* preserves evidence given by a witness before he or she died or became incompetent. It states:

> **25.** Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.

Section 26 of the *Act* removes any question that may arise at common law about the competence of a person who has an interest in the case, an interest in the results of proceedings or who may have previously been convicted of an offence. It states:

> **26.** A person shall not be excused from giving evidence in any proceeding on the ground that the person –
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> (a) has or may have an interest in the matter in question; or
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> (b) has or may have an interest in the result of the proceeding; or
>
> (c) has previously been convicted of any offence.

**Historical Background to the Incompetence of Witnesses**

The historical background to the incompetence of witnesses who may have an interest in the proceedings is summarised in *Australian Crime Commission v Stoddart*:

> In medieval times no means had been available to compel witnesses to come forward to testify. The Statute of Elizabeth of 1562-1563 established, at least in civil proceedings, that all competent witnesses were compellable to give evidence. In aid of that power the common law courts borrowed procedures such as that of subpoena from the Chancery courts. The common law courts developed their own rules, different from those of the canon law, concerning who was able to testify. The variety of persons held by the courts not to be competent to testify was elaborated upon in the 16th and 17th centuries.
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> The courts determined that parties were incompetent as witnesses in their own cause. The rule may have owed something to the viewpoint of continental and of Roman law. It was extended to disqualify other witnesses who had an interest in the case and it was later applied in criminal proceedings. It may have been thought to follow, logically, from the disqualification on account of interest, that a husband and wife should be disqualified in giving evidence in favour of the other. The source of the rule that spouses were disqualified from giving evidence against each other is not clear. But by the time of Coke's First Institute, in 1628, a single rule was expressed – that husband and wife were not competent to give evidence *for or against* each other.

> Coke stated that it had been resolved by the justices that a wife "cannot be produced either against or for her husband" and gave as reasons that husband and wife were regarded by the law as one flesh and that to allow her to give evidence might be a "cause of implacable discord and dissention between the husband and the wife, and a meane of great inconvenience". The firstmentioned reason was later adapted to the husband and wife having a common or unified interest.[9]

**Compellability**

An accused is competent but not compellable. The situation with co-accused can vary but they are generally not compellable. The competence and compellability of accused and co-accused is considered in some detail in Chapter 5.

Section 27 of the *Evidence Act* allows the court to compel a witness to give evidence and produce documents or things despite the fact that the witness may not have been subpoenaed. It states:

> **27.** (1) The court may order a person who –
>
> (a) is present at the hearing of a proceeding; and
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> (b) is compellable to give evidence in the proceeding,
>
> to give evidence and to produce documents or things even if a subpoena or other process requiring the person to attend for that purpose has not been duly served on the person.
>
> (2) A person so ordered to give evidence or to produce documents or things is subject to the same penalties and liabilities as if the person has been served with such a subpoena or other processes.
>
> (3) A party who inspects a document or thing produced to the court because of subsection (1) need not use the document in evidence.

Section 28 of the *Act* allows a person to produce a document to court without necessarily becoming a witness. It states:

> **28.** A person summoned to produce a document does not become a witness by the mere fact that the person produced it and cannot be cross-examined unless and until he or she is called as a witness.

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9 [2011] HCA 47, 193, 194,195.

**Sovereigns, Heads of State and the Governor General**
Sovereigns, Heads of State and the Governor General while he is in office are not compellable. Section 32 states:

> **32.** (1) None of the following persons is compellable to give evidence –
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> (a) the Sovereign;
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> (b) the Governor General while in office;
>
> (c) a foreign Sovereign or Head of State of another country while in office.

**Judicial Officers**
Section 33 of the *Act* excludes compellability for judicial officers who were acting judicially unless leave is given. It states:

> **33.** A person who is or was acting judicially in a proceeding in Solomon Islands or another country is not compellable to give evidence about that proceeding, unless the court in which the officer is or was acting judicially gives leave.

**Close Relatives**
Where the compellability of witnesses is concerned the main area of interest for practitioners relates to relates in spouses of an accused. Section 34 of the *Act* defines a close relative and makes them compellable to give evidence for the defence. However, it does not make them compellable to give evidence for the prosecution, and removes the compellability for the defence where they are also charged with a criminal offence. It states:

> **34.** (1) In a criminal proceeding, a close relative of each person charged is compellable to give evidence on behalf of that person.
>
> (2) For the purposes of this section and section 36, a close relative of an accused person means a spouse, parent or child and includes an adoptive parent or an adopted child.
>
> (3) Nothing in this section shall make the close relative of a person charged –
>
> (a) compellable to give evidence for the prosecution; or
>
> (b) compellable to give evidence for the defence,
>
> in a criminal proceeding in which that close relative is also charged.

Section 35 of the *Act* gives the court the power to excuse a close relative from giving evidence in criminal proceedings. The court can do this if the public interest in giving the evidence is not outweighed by the public interest in preventing harm to the relationship. The section also provides a

number of matters that the court must consider when determining whether or not to compel a close relative. Section 35 states:

> **35.** (1) A person who is a close relative of an accused in a criminal proceeding may be excused by the court from giving evidence for the prosecution in that proceeding.
>
> (2) In determining whether to excuse a close relative from giving evidence the court must consider whether the public interest in the evidence being given is outweighed by the public interest in preventing harm to the relationship resulting from the giving of that evidence.
>
> (3) For the purpose of making the assessment required by subsection (2), the court must consider –
>
> (a) the nature and gravity of the offence for which an accused is being prosecuted;
>
> (b) the substance and importance of any evidence the close relative might give and the weight likely to be given to it by the court;
>
> (c) whether any other evidence concerning the matters which the person might give evidence about, is reasonably available to the prosecution;
>
> (d) the nature of the relationship between the accused and the close relative;
>
> (e) whether, in giving the evidence, the close relative would have to disclose matter that was received by the close relative in confidence from the accused.
>
> (4) If any close relative is excused from giving evidence, the close relative must be treated as unavailable as a witness.

Section 36 of the *Act* removes any protection that a former spouse may have had from giving evidence. It states:

> **36.** In any criminal proceeding (and at every stage of the proceeding), a former spouse of an accused shall be competent and compellable to give evidence on behalf of the prosecution, the accused or any person being tried jointly with the accused.

**Character and Compellability**

Section 38 of the *Act* protects an accused from answering questions that may reveal their bad character, subject to certain exceptions. It is generally accepted that juries or magistrates and judges who decide whether a case has been proved beyond reasonable should not be burdened by knowledge about an accused's prior bad character or criminal record, because it may

influence their judgement about the accused's role in the alleged offending before the court.

Section 38 states:

> **38.** An accused called as a witness at his or her trial, shall not be asked or required to answer, without leave of the court, any question tending to show that the accused is of bad character or has committed, been charged with, or found guilty of any offence, other than that with which he or she is charged, unless –
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> (a) proof that the accused has committed or been found guilty of that other offence is admissible to show that the accused is guilty of the offence with which he or she is charged; or
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> (b) the accused or his or her legal practitioner asked questions of a witness for the prosecution with a view to establishing the accused's good character, or has given evidence of good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witness for the prosecution; or
>
> (c) the accused has given evidence against any other person charged with the same offence.

Sections 37 and 40 of the *Evidence Act* that are contained in Part 4 relate to the accused and co-accused not being compellable and are considered in Chapter 5.

Sections 41 and 42 of the *Evidence Act* that are contained in Part 4 relate to the capacity and methods of examining certain categories of vulnerable witnesses. These sections are considered in Chapter 4.

Chapter 11 considers privilege and some of the issues arising from this area of law that confront practitioners.