

**THE ABROGATION OF THE PRIVILEGE AGAINST  
SELF-INCRIMINATION**

Report No 59

Queensland Law Reform Commission  
December 2004

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SELF-INCRIMINATION**

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Queensland Law Reform Commission  
December 2004



To: The Honourable Rod Welford MP  
Attorney-General and Minister for Justice

In accordance with section 15 of the *Law Reform Commission Act 1968* (Qld), the Commission is pleased to present its Report on *The Abrogation of the Privilege Against Self-incrimination*.

The Honourable Justice R G Atkinson  
Chairperson

Mr P D T Applegarth SC  
Member

Ms A Colvin  
Member

Ms H A Douglas  
Member

Mr B J Herd  
Member

Ms R A Hill  
Member

Mr G W O'Grady  
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# Table of contents

<b>SUMMARY OF RECOMMENDATIONS</b> .....	<b>i</b>
<b>CHAPTER 1</b> .....	<b>1</b>
<b>INTRODUCTION</b> .....	<b>1</b>
TERMS OF REFERENCE .....	1
BACKGROUND .....	1
HISTORY OF THE REFERENCE .....	4
THIS REPORT .....	5
<b>CHAPTER 2</b> .....	<b>7</b>
<b>PRIVILEGE AGAINST SELF-INCRIMINATION AND PENALTY PRIVILEGE</b> .....	<b>7</b>
INTRODUCTION .....	7
THE PRIVILEGE AGAINST SELF-INCRIMINATION .....	8
The traditional view .....	8
Recent developments .....	9
THE PENALTY PRIVILEGE .....	11
THE RELATIONSHIP BETWEEN THE TWO PRIVILEGES .....	13
STATUTORY ABROGATION OF THE PRIVILEGES .....	14
Privilege against self-incrimination .....	14
Penalty privilege .....	15
PROTECTION AGAINST ABROGATION AND ITS EFFECTS.....	16
Monitoring of legislation .....	16
Restrictions on the use of compelled information .....	17
Use immunity .....	18
Derivative use immunity .....	19
<b>CHAPTER 3</b> .....	<b>21</b>
<b>RATIONALES FOR THE PRIVILEGES</b> .....	<b>21</b>
INTRODUCTION .....	21
THE PRINCIPAL RATIONALES .....	23
Systemic rationales .....	23
To prevent abuse of power .....	23
To prevent conviction founded on a false confession .....	25
To protect the accusatorial system of justice .....	25
To protect the quality of evidence .....	27
Individual rationales .....	28
To avoid the “cruel trilemma” .....	28
To protect human dignity and privacy .....	30
ARGUMENTS AGAINST THE PRIVILEGES .....	31
The effect on the prosecution’s ability to collect evidence .....	31
The effect on victims’ rights.....	32
SUBMISSIONS .....	32
THE COMMISSION’S VIEW .....	33

<b>CHAPTER 4 .....</b>	<b>35</b>
<b>THE KIND OF INFORMATION PROTECTED .....</b>	<b>35</b>
INTRODUCTION .....	35
INFORMATION THAT IS NOT PROTECTED .....	35
Information that can be otherwise obtained .....	35
“Real” evidence .....	36
DOCUMENTARY EVIDENCE .....	36
<b>CHAPTER 5 .....</b>	<b>38</b>
<b>THE TYPE OF FORUM WHERE THE PRIVILEGES MAY APPLY .....</b>	<b>38</b>
THE PRIVILEGE AGAINST SELF-INCRIMINATION .....	38
The type of forum where the privilege may be claimed .....	38
THE PENALTY PRIVILEGE .....	39
The availability of the penalty privilege .....	39
Extension of the privilege .....	39
The present position .....	40
SUBMISSIONS .....	41
THE COMMISSION'S VIEW .....	41
RECOMMENDATION .....	42
<b>CHAPTER 6 .....</b>	<b>43</b>
<b>JUSTIFICATIONS FOR ABROGATION .....</b>	<b>43</b>
INTRODUCTION .....	43
THE BALANCE BETWEEN COMPETING INTERESTS .....	44
The underlying policies .....	44
The extent of protection .....	45
The issues giving rise to the need for power to compel the provision of information .....	46
THE CIRCUMSTANCES IN WHICH ABROGATION MAY BE JUSTIFIED .....	47
THE DISCUSSION PAPER .....	49
SUBMISSIONS .....	50
Privilege against self-incrimination .....	50
The penalty privilege .....	52
THE COMMISSION'S VIEW .....	52
The need for legislative criteria .....	52
Factors that may justify abrogation .....	53
The public interest to which the information relates .....	54
The importance of the public interest .....	54
The extent to which the information is likely to benefit the public interest .....	54
Regulatory schemes .....	54
Additional factors that must be taken into consideration .....	55
The absence of alternative means of obtaining the information .....	56
The provision of an immunity .....	57
Procedural safeguards .....	58
Documents that are already in existence .....	58
The extent of the abrogation .....	59

Factors that do not justify abrogation of the privilege.....	59
The extent of the risk .....	59
Uniform legislative schemes .....	61
RECOMMENDATIONS .....	62
<b>CHAPTER 7 .....</b>	<b>64</b>
<b>IMPLIED ABROGATION.....</b>	<b>64</b>
INTRODUCTION .....	64
THE TEST FOR IMPLIED ABROGATION .....	64
THE PROBLEMS OF IMPLIED ABROGATION .....	66
THE DISCUSSION PAPER.....	67
SUBMISSIONS .....	67
IMPLIED ABROGATION OF THE PENALTY PRIVILEGE.....	70
The effect of the abrogation of the privilege against self-incrimination .....	70
Existing Queensland provisions .....	70
Issues for consideration .....	71
Submissions.....	71
THE COMMISSION'S VIEW .....	71
RECOMMENDATIONS .....	73
<b>CHAPTER 8 .....</b>	<b>74</b>
<b>THE TYPE OF FORUM WHERE THE PRIVILEGES MAY BE ABROGATED.....</b>	<b>74</b>
INTRODUCTION .....	74
EXISTING PROVISIONS .....	74
The privilege against self-incrimination .....	74
The penalty privilege .....	75
THE DISCUSSION PAPER.....	75
SUBMISSIONS .....	75
THE COMMISSION'S VIEW .....	76
RECOMMENDATION .....	76
<b>CHAPTER 9 .....</b>	<b>77</b>
<b>USE OF INFORMATION OBTAINED UNDER COMPULSION .....</b>	<b>77</b>
INTRODUCTION.....	77
WHETHER AN IMMUNITY IS DESIRABLE .....	77
Arguments for and against inclusion of an immunity.....	77
The mechanism for providing an immunity .....	79
The Discussion Paper .....	79
Submissions.....	80
THE KIND OF IMMUNITY .....	81
The scope of the protection.....	82
Issues in relation to derivative use immunity.....	82
The effect on investigations .....	82
The onus of proof.....	83
The effect on confidential sources .....	84
The Discussion Paper .....	84
Submissions.....	85

The kind of immunity.....	85
Derivative use immunity - the onus of proof.....	86
PROCEEDINGS WHERE AN IMMUNITY SHOULD APPLY .....	86
Existing provisions .....	86
The Discussion Paper .....	87
Submissions.....	87
EXCEPTIONS TO THE IMMUNITY .....	88
The Discussion Paper .....	89
Submissions.....	89
ENTITLEMENT TO THE IMMUNITY.....	90
The need to object to providing information .....	90
The effect of failure to claim the privilege .....	90
Drafting issues .....	91
The need for the information to be self-incriminatory .....	92
The Discussion Paper .....	92
Submissions.....	93
The need to object .....	93
An obligation to warn .....	93
Whether the information provided must in fact be self-incriminatory.....	94
How the issue of factual tendency should be decided .....	94
THE COMMISSION'S VIEW .....	94
The privilege against self-incrimination .....	94
Whether an immunity is desirable.....	94
The kind of immunity.....	96
Derivative use immunity - the onus of proof.....	96
The mechanism for providing an immunity .....	96
A default immunity provision.....	96
Criteria for determining whether immunity should not be conferred .....	97
Entitlement to an immunity.....	97
An obligation to inform.....	97
The need to object.....	98
The right to choose .....	98
Whether the information provided must in fact be self-incriminatory .....	98
How the issue of factual tendency should be decided.....	99
Type of proceeding where an immunity should be available .....	99
Criminal proceedings.....	99
Civil proceedings .....	100
Other proceedings .....	100
Exceptions to the grant of immunity.....	101
Proceedings that relate to the falsity of the information.....	101
The position of the individual who is compelled to give information.....	101
An individual deemed to be a public risk .....	102
Other exceptions .....	102

The penalty privilege .....	102
RECOMMENDATIONS .....	103
<b>CHAPTER 10 .....</b>	<b>105</b>
<b>PROVISIONS THAT REFER TO THE <i>COMMISSIONS OF INQUIRY ACT</i></b>	
<b>1950 (QLD).....</b>	<b>105</b>
INTRODUCTION.....	105
THE EFFECT OF THE REFERENCE TO THE <i>COMMISSIONS OF</i>	
<i>INQUIRY ACT 1950 (QLD)</i> .....	106
THE DISCUSSION PAPER.....	107
SUBMISSIONS .....	107
THE COMMISSION'S VIEW .....	108
RECOMMENDATIONS .....	109
<b>CHAPTER 11 .....</b>	<b>110</b>
<b>CORPORATIONS .....</b>	<b>110</b>
INTRODUCTION.....	110
THE COMMON LAW.....	111
The privilege against self-incrimination .....	111
The rationales for the privilege do not apply to a corporation .....	111
The need to maintain the integrity of corporate behaviour.....	112
The nature of the information.....	113
The privilege against self-exposure to a penalty.....	113
THE AVAILABILITY OF THE PRIVILEGE TO CORPORATIONS IN	
QUEENSLAND.....	114
Provisions enacted prior to <i>Caltex</i> .....	115
Provisions enacted after <i>Caltex</i> .....	115
Provisions that are expressed to apply only to individuals.....	116
Provisions that are capable of applying only to individuals.....	116
Provisions that are capable of applying to both individuals	
and corporations .....	116
LEGISLATION IN OTHER AUSTRALIAN JURISDICTIONS.....	117
ISSUES FOR CONSIDERATION.....	117
SUBMISSIONS .....	117
Should a corporation be entitled to claim the privilege against	
self-incrimination? .....	117
The need for legislation .....	118
THE COMMISSION'S VIEW .....	118
Should a corporation be entitled to claim the privilege against	
self-incrimination? .....	118
Should a corporation be entitled to claim the penalty privilege? .....	119
The need for legislation.....	119
Drafting issues .....	119
RECOMMENDATION .....	120
<b>CHAPTER 12 .....</b>	<b>121</b>
<b>ABROGATION OF PRIVILEGE: FOREIGN IMPLICATIONS.....</b>	<b>121</b>
INTRODUCTION.....	121

THE RISK OF EXPOSURE UNDER FOREIGN LAW .....	121
THE POSITION IN OTHER JURISDICTIONS .....	122
THE COMMISSION'S VIEW .....	123
<b>CHAPTER 13 .....</b>	<b>125</b>
<b>IMPLEMENTATION OF RECOMMENDATIONS .....</b>	<b>125</b>
THE DRAFT BILL .....	125
MODEL PROVISION .....	125
<b>APPENDIX 1 .....</b>	<b>127</b>
<b>DEPARTMENTS AND STATUTORY AUTHORITIES .....</b>	<b>127</b>
<b>APPENDIX 2 .....</b>	<b>128</b>
<b>LIST OF RESPONDENTS TO THE DISCUSSION PAPER .....</b>	<b>128</b>
<b>APPENDIX 3 .....</b>	<b>129</b>
<b>DRAFT BILL .....</b>	<b>129</b>
<b>APPENDIX 4 .....</b>	<b>145</b>
<b>DRAFT MODEL PROVISION .....</b>	<b>145</b>

# Summary of recommendations

## CHAPTER 5 - THE TYPE OF FORUM WHERE THE PRIVILEGES MAY APPLY

- 5-1** The Commission recommends that, in the absence of an express provision to the contrary, the privilege against self-exposure to a penalty (the penalty privilege) should be available in non-judicial proceedings and investigations as well as in judicial proceedings.

## CHAPTER 6 - JUSTIFICATIONS FOR ABROGATION

The Commission recommends enactment of legislation of general application to the effect that:

- 6-1** A legislative provision should not abrogate the privilege against self-incrimination and/or the penalty privilege unless the abrogation is justified and appropriate having regard to the matters set out below.
- 6-2** Abrogation of the privilege against self-incrimination and/or the penalty privilege depends for its justification on:
- (a) (i) the importance of the public interest sought to be protected or advanced by the abrogation of privilege; and
  - (ii) the extent to which information obtained as a result of the abrogation could reasonably be expected to benefit the relevant public interest; or
  - (b) whether the information relates to the conduct of an activity regulated under an Act, in which the individual is or was authorised to participate.
- 6-3** Abrogation of the privilege against self-incrimination and/or the penalty privilege, even though it may be justified on one or more of the matters referred to in 6-2, also depends on:
- (a) whether the information that an individual is required to give could not reasonably be obtained by any other lawful means;
  - (b) if alternative means of obtaining the information exist:

- (i) the extent to which the use of those means would be likely to assist in the investigation in question; and
  - (ii) whether resort to those means would be likely to prejudice, rather than merely inconvenience, the investigation;
- (c) the nature and extent of the use, if any, that may be made of the information as evidence against the individual who provided it;
- (d) the procedural safeguards that apply when:
  - (i) the requirement to provide the information is imposed; and
  - (ii) the information is provided;
- (e) in the case of information in documentary form, whether the document is in existence at the time the requirement to provide the information is imposed;
- (f) whether the extent of the abrogation is no more than is necessary to achieve the purpose of the abrogation.

## CHAPTER 7 - IMPLIED ABROGATION

- 7-1** The Commission recommends the enactment of a legislative provision of general application to the effect that:
- (a) in the absence of a clear, express provision to the contrary, an individual is entitled to claim the privilege against self-incrimination;
  - (b) in the absence of a clear, express provision to the contrary, express abrogation of the privilege against self-incrimination also abrogates the penalty privilege; and
  - (c) where there is no provision expressly abrogating the privilege against self-incrimination, an individual is entitled, in the absence of a clear express provision to the contrary, to claim the penalty privilege.
- 7-2** The commencement of the provision should be postponed to allow existing legislation to be reviewed.



- 7-3** If it is considered that, in the context of a particular Act, abrogation of the privilege against self-incrimination and/or the penalty privilege can be justified according to the legislative criteria recommended by the Commission in Chapter 6 of this Report:
- (a)** a specific provision should be inserted in that Act to give effect to the abrogation; and
  - (b)** appropriate consideration should be given to the nature and extent of the immunity, if any, to be provided in relation to the use of the information obtained as a result of the abrogation.

## **CHAPTER 8 - THE TYPE OF FORUM WHERE THE PRIVILEGES MAY BE ABROGATED**

- 8-1** The Commission recommends that the determination as to whether abrogation of either or both the privilege against self-incrimination and the penalty privilege can be justified should be based on the criteria identified in Chapter 6 of this Report, rather than on the forum where the provision of the information is required.

## **CHAPTER 9 - FUTURE USE OF INFORMATION OBTAINED UNDER COMPULSION**

- 9-1** A legislative provision of general application should be enacted to the effect that:
- (a)** when an individual discloses information under a provision of an Act that abrogates the privilege against self-incrimination and/or the penalty privilege, in the absence of a clear, express statement to the contrary in the Act, information that would otherwise have been subject to the privilege may not be used in evidence in any proceeding against the individual;
  - (b)** when an individual is required to disclose information under a legislative provision that abrogates the privilege against self-incrimination and/or the penalty privilege the individual must be informed:

- (i) that the individual must provide the information even though it might be self-incriminatory or might expose the individual to a penalty;
  - (ii) whether or not the provision confers an immunity against the future use of the information; and
  - (iii) the nature and extent of the immunity.
- (c) an individual who is required to disclose information under a legislative provision that abrogates the privilege against self-incrimination and/or the penalty privilege may waive any immunity to which he or she is entitled.

9-2 The provision referred to in Recommendation 9-1(a) should not be overridden in another Act unless, after the balance between the justification for the abrogation and the rights of the individual who has been compelled to disclose the information has been taken into account, there is a compelling reason why a use immunity should not apply.

9-3 A derivative use immunity should not be granted unless there are exceptional circumstances that justify the extent of its impact.

9-4 A legislative provision of general application should be enacted to the effect that, if:

- (a) an Act that abrogates the privilege against self-incrimination and/or the penalty privilege confers a derivative use immunity; and
- (b) an individual who was required under that Act to disclose self-incriminating information or information that might expose the individual to a penalty objects to the admission of evidence in a proceeding against the individual on the ground that it is the subject of the derivative use immunity;

the party seeking the admission of the evidence should bear the onus of proving that the evidence was not derived from the compelled information.

9-5 The provision referred to in Recommendation 9-1(a) should not apply to proceedings that relate to the falsity of the information.

**9-6** In relation to a civil claim for compensatory damages, the provision referred to in Recommendation 9-1(a) should be expressed to apply only to proceedings started after the provision has come into operation.

## **CHAPTER 10 - PROVISIONS THAT REFER TO THE *COMMISSIONS OF INQUIRY ACT 1950* (QLD)**

**10-1** The Commission recommends that the *Commissions of Inquiry Act 1950* (Qld) should be amended to provide that, where a provision in another Act confers on a person or body the powers of a commission of inquiry, sections 14(1A) and 14A of the *Commissions of Inquiry Act 1950* (Qld) do not apply to the person or body.

**10-2** The commencement of the amendment should be postponed to allow existing legislation that confers the powers of a commission of inquiry to be reviewed.

**10-3** If it is considered that, in the context of a particular Act, abrogation of the privilege against self-incrimination and/or the penalty privilege can be justified according to the legislative criteria recommended by the Commission in Chapter 6 of this Report:

- (a)** a specific provision should be inserted in that Act to give effect to the abrogation; and
- (b)** appropriate consideration should be given to the nature and extent of the immunity, if any, to be provided in relation to the use of the information obtained as a result of the abrogation.

## **CHAPTER 11 - CORPORATIONS**

**11-1** The Commission recommends that legislation should be enacted to the effect that:

- (a)** a corporation is not entitled to claim the privilege against self-incrimination;
- (b)** a corporation is not entitled to claim the penalty privilege;

- (c) a legislative provision that preserves the privilege against self-incrimination and/or the penalty privilege does not apply to a corporation.**

# Chapter 1

## Introduction

### TERMS OF REFERENCE

1.1 The Attorney-General, the Hon R Welford MP, has requested the Commission to conduct a review of the abrogation of the privilege against self-incrimination. The terms of reference are:

The privilege against self-incrimination (which applies to both documents and oral testimony) is sometimes abrogated by statute. Sometimes the statutory provisions contain both use and derivative use immunities and on other occasions only a use immunity. Sometimes the use immunity applies only to criminal proceedings and on other occasions to any proceedings. The Queensland Law Reform Commission is requested to:

- Examine the various statutory provisions abrogating the privilege in Queensland.
- Examine the bases for abrogating the privilege.
- Recommend whether there is ever justification for the abrogation of the privilege and, if so, in what circumstances and before what type of forum.
- If there are circumstances and forums where the abrogation may be justified, recommend whether the abrogation be accompanied by both a use and derivative use immunity, especially having regard to the limitations that a derivative use immunity may have on subsequent prosecutions.
- Recommend whether these immunities should apply to subsequent criminal proceedings only or to all subsequent proceedings (including civil or disciplinary proceedings).
- If there are circumstances and forums where the abrogation may be justified, recommend an appropriate statutory formula which can be used to rationalise existing provisions and as a model for future provisions.

### BACKGROUND

1.2 In the law of evidence, the word “privilege” denotes an immunity conferred on a witness, in particular circumstances, from the obligation to answer certain questions or to provide certain information. Privilege has been

described as:<sup>1</sup>

... a right to withhold from a court, or a tribunal exercising judicial functions, material which would otherwise be admissible in evidence.

1.3 The Commission's terms of reference concern the privilege against self-incrimination, which provides an immunity against compulsion to give evidence or to supply information that would tend to prove one's own guilt.<sup>2</sup> The privilege against self-incrimination protects not only from direct incrimination, but also from making a disclosure that may lead indirectly to incrimination or to the discovery of other evidence of an incriminating nature.<sup>3</sup>

1.4 It is one of several immunities that, together, make up what is commonly referred to as "the right to silence".<sup>4</sup> However, the privilege against self-incrimination and the right to silence are not co-extensive.<sup>5</sup>

... the privilege protects the right of witnesses not to incriminate themselves, not their right to remain silent.

1.5 There is some dispute about how the privilege came into existence.<sup>6</sup> However, whatever its historical origins, the privilege against self-incrimination has come to be regarded, in modern democratic societies, as a significant factor in the protection of individual liberties.<sup>7</sup> As a result, it is now considered as not merely a rule of evidence but rather as a substantive right:<sup>8</sup>

The privilege in its modern form is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them.

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<sup>1</sup> *Parry-Jones v Law Society and Others* [1969] 1 Ch 1 per Diplock LJ at 9.

<sup>2</sup> The terms of reference do not extend to the privilege against spousal incrimination, which protects a person from giving information that would tend to prove the guilt of that person's spouse. For a discussion of that privilege, see Lusty D, "Is there a common law privilege against spouse incrimination?" (2004) 27 *University of New South Wales Law Journal* 1 and *Callanan v B* [2004] QCA 478 per McPherson and Jerrard JJA.

<sup>3</sup> *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Mason, Wilson and Dawson JJ at 310.

<sup>4</sup> *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1 per Lord Mustill at 30.

<sup>5</sup> Donaghue S, *Royal Commissions and Permanent Commissions of Inquiry* (2001) at para 9.7.

<sup>6</sup> See para 2.5-2.18 of this Report.

<sup>7</sup> See para 3.45-3.46 of this Report.

<sup>8</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 508. See also *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Murphy J at 311; *Accident Insurance Mutual Holdings Ltd v McFadden and Another* (1993) 31 NSWLR 412 per Kirby P at 420.

1.6 The significance of the privilege has received widespread judicial recognition. It has been described as “a cardinal principle of our system of justice”,<sup>9</sup> a “bulwark of liberty”,<sup>10</sup> and “fundamental to a civilised legal system”.<sup>11</sup> It is also recognised in international human rights law.<sup>12</sup> However, sometimes the privilege as an individual right must be weighed against the need to ensure that an investigating authority is able to obtain information about the facts of a particular situation. Despite its importance, it is clear that the privilege against self-incrimination can be abrogated by legislation.<sup>13</sup>

If the legislature thinks that ... the public interest overcomes some of the common law’s traditional consideration for the individual, then effect must be given to the statute which embodies this policy.

1.7 In some circumstances, the right of an individual to refuse to provide information that is self-incriminatory has been displaced, in whole or in part, by the perceived strength of the public interest in issues raised by the investigation:<sup>14</sup>

Statutory investigations are an increasingly important tool in modern administration and regulation. In the past year, governments have come under renewed pressure to strengthen the powers of regulatory and investigatory bodies. Terrorism and dramatic corporate collapses both here and overseas have led to fresh demands on regulatory bodies. Against this call for greater powers is an equally loud plea for a review of the way in which regulators exercise their powers. ...

Inevitably a tension arises between the need to regulate and the very real prospect of diminished individual rights.

1.8 The nature of this tension has been highlighted by the Australian Law Reform Commission:<sup>15</sup>

Abrogation or modification of the privilege, combined with powers to obtain information and documents, is a useful tool for regulators unable to obtain information through informal, voluntary or cooperative methods.

On the other hand, the abrogation of the privilege - as a protection from the intrusive power of the state and as a human right - may have serious consequences for individuals, and the courts have made it clear that the privilege should not be removed lightly.

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<sup>9</sup> *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 294.

<sup>10</sup> *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 340.

<sup>11</sup> *Accident Insurance Mutual Holdings Ltd v McFadden and Another* (1993) 31 NSWLR 412 per Kirby P at 420.

<sup>12</sup> International Covenant on Civil and Political Rights, Article 14.3(g).

<sup>13</sup> *Rees and Another v Kratzmann* (1965) 114 CLR 63 per Windeyer J at 80.

<sup>14</sup> Crosbie F and Kumar B, “Power versus privilege: The Implications of *Daniels v ACCC*” (2003) 31 *Australian Business Law Review* 7 at 7.

<sup>15</sup> Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at para 18.23-18.24.

## HISTORY OF THE REFERENCE

1.9 The review requested by the Attorney-General has involved consideration of the existing statutory provisions in Queensland that have the effect of removing the common law privilege against self-incrimination.

1.10 In order to assist it to identify these provisions, the Commission wrote to the head of each government department seeking information about provisions in legislation administered by that department. It also wrote to the heads of a number of statutory authorities, to obtain information about the legislation governing those authorities. The Commission asked for identification of provisions which abrogated the privilege, and for information about whether the abrogation was accompanied by either a use or derivative use immunity<sup>16</sup> and whether the abrogation should continue. The Commission is grateful for the co-operation it received from departmental heads and officers and from relevant statutory authorities. The views expressed have been taken into account in the Commission's recommendations. A list of the departments and statutory authorities that provided the Commission with information is set out at Appendix 1 of this Report.

1.11 In August 2003, the Commission published a Discussion Paper<sup>17</sup> for the purpose of public consultation. The Discussion Paper was widely distributed to relevant organisations and interested individuals. Internet access was also made available.

1.12 The Discussion Paper briefly explained the history and the nature of the privilege against self-incrimination, and outlined the various abrogation provisions that had been identified by government departments and by the Commission's own research. These provisions were divided into a number of categories - those that do not confer any immunity, those that confer a use or a derivative use immunity, those that abrogate the privilege by reference to the *Commissions of Inquiry Act 1950* (Qld), and those that abrogate, or may possibly abrogate the privilege, not by express words, but by implication. The Discussion Paper also considered a number of issues in relation to the principles underlying the privilege, to factors that might justify its abrogation and, where abrogation might be thought to be justified, to questions of implementation raised by the existing provisions. In particular, the Discussion Paper included a number of questions to assist interested organisations and individuals to make an informed contribution to the debate which the Commission believed should take place on the questions raised by the terms of the reference.

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The terms "use immunity" and "derivative use immunity" are explained at para 2.47-2.58 of this Report.

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Queensland Law Reform Commission, Discussion Paper, *The Abrogation of the Privilege Against Self-incrimination* (WP 57, August 2003).



1.13 The Commission received 13 submissions in response to the Discussion Paper. A list of respondents to the Discussion Paper is set out in Appendix 2 to this Report.

1.14 The course of the Commission's review highlighted many interesting and challenging issues. One of these issues concerned the privilege against self-exposure to a penalty, which may conveniently be referred to as the penalty privilege, and its relationship to the privilege against self-incrimination.

1.15 The Commission came to the view that, as a result partly of existing case law and partly of some existing Queensland legislative provisions, there was a considerable degree of confusion and uncertainty about the penalty privilege, which the Commission considered important to address. The Commission also found that the interrelated nature of the two privileges made it difficult to formulate recommendations about one and not the other.

1.16 However, the Commission's terms of reference did not specifically refer to the penalty privilege. The Commission therefore requested, and received, the approval of the Attorney-General to include in its review the availability of the penalty privilege and its abrogation. Because time constraints did not permit the Commission to engage in full public consultation on these issues, the Commission sought the views of a number of key organisations.

1.17 The Commission wishes to thank all respondents to the Discussion Paper and to its subsequent requests for information for their participation in the reference and for their contribution to the recommendations made by the Commission in this Report.

## **THIS REPORT**

1.18 In this Report, the Commission has not made recommendations relating specifically to the individual provisions identified in the Discussion Paper or to those enacted since the Discussion Paper was published. Rather, the Commission has focused on general principles relating to abrogation of the privilege against self-incrimination and the closely related penalty privilege, and the development of a framework for rationalising legislative provisions that abrogate either or both of the privileges.

1.19 In addition to factors that might justify the abrogation of the privileges, the Commission has considered issues such as implied abrogation, the kind of forum where the privileges might be abrogated, abrogation by reference to the *Commissions of Inquiry Act 1950* (Qld), issues arising in relation to

corporations, and the use that may be made of compelled information as evidence in a subsequent proceeding against the person<sup>18</sup> who provided it.

1.20 The Report also includes, in Appendix 3, draft legislation prepared by the Office of the Queensland Parliamentary Counsel for implementing the Commission's recommendations and, in Appendix 4, a draft model provision for abrogating the privilege against self-incrimination and/or the penalty privilege.

1.21 The Commission would like to thank Mr Peter Drew, Parliamentary Counsel, and Ms Theresa Johnson, First Assistant Parliamentary Counsel, for their expertise and for their assistance in the preparation of the draft legislation and the model provision.

1.22 Unless otherwise specified, the law is stated in this Report as at 3 December 2004.

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In Queensland legislation, a reference to a "person" generally includes a reference to a corporation as well as to an individual: *Acts Interpretation Act 1954* (Qld) s 32D(1). The availability of privilege to a corporation is discussed in Chapter 11 of this Report. Elsewhere in the Report, the word "individual" is used where possible in preference to "person" to avoid the possibility of ambiguity.

# Chapter 2

## Privilege against self-incrimination and penalty privilege

### INTRODUCTION

2.1 The privilege against self-incrimination is sometimes confused with what is commonly called the “right to silence”, and the two terms are often used interchangeably. However, as noted in Chapter 1 of this Report, the two are not co-extensive. The privilege is a general immunity that protects against compulsion, on pain of punishment, to provide self-incriminating information. It is merely one element of the broader right to silence, which refers to a variety of immunities that differ in their nature, origins, incidents and importance.<sup>19</sup>

2.2 The term “privilege against self-incrimination” has sometimes also been used as a general term to describe both the privilege against self-exposure to conviction for a criminal offence and the privilege against self-exposure to a penalty (the penalty privilege). However, although closely linked to the privilege against self-incrimination, the penalty privilege is a different aspect or ground of privilege.<sup>20</sup>

2.3 The privilege against self-incrimination confers an immunity from an obligation to provide information tending to prove one’s own guilt.<sup>21</sup> Its current effect in Australia has been stated to be that:<sup>22</sup>

... a person is not bound to answer any question or produce any document if the answer or the document would have the tendency to expose that person, either directly or indirectly, to a criminal charge, the imposition of a penalty or the forfeiture of an estate which is reasonably likely to be preferred or sued for.

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19 Other immunities encompassed by the right to silence include those possessed by people suspected of or charged with a criminal offence from being compelled to answer questions at a police interrogation or that which protects an accused person from having to give evidence at trial. See *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1 per Lord Mustill at 30-31.

20 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 336. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [13].

21 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Brennan J at 512. The Commission’s present terms of reference do not extend to the privilege against spousal incrimination, which protects a person from giving information that would tend to prove the guilt of that person’s spouse. For a discussion of that privilege, see Lusty D, “Is there a common law privilege against spouse incrimination?” (2004) 27 *University of New South Wales Law Journal* 1 and *Callanan v B* [2004] QCA 478 per McPherson and Jerrard JJA.

22 *Bridal Fashions Pty Ltd v Comptroller-General of Customs and Another* (1996) 17 WAR 499 per Malcolm CJ, Ipp and Owen JJ at 504.

2.4 The privilege against forfeiture of an estate has been abolished in Queensland<sup>23</sup> and therefore need not be considered further. In this Report, discussion focuses on the privilege against self-incrimination and on the penalty privilege.

## THE PRIVILEGE AGAINST SELF-INCRIMINATION

### The traditional view

2.5 The traditional explanation of the origin of the privilege against self-incrimination is that it developed in England in the seventeenth century as a reaction to the “odious procedure”<sup>24</sup> formerly adopted by the Court of Star Chamber and the Court of High Commission.

2.6 In a criminal trial in these courts, the accused was obliged to take an oath - the *ex officio* oath - requiring him or her to tell the truth. The oath:<sup>25</sup>

... compelled persons to swear, at the outset of their investigatory examination, to answer any questions that the court might subsequently put ...

2.7 The *ex officio* oath was a powerful tool in the hands of the court:<sup>26</sup>

... in those days of strong religious beliefs and a strong church, the oath assumed a much greater importance than it does today; it was, like torture, a form of compulsion. It was the spiritual consequence of lying on oath, more than the risk of perjury, which compelled the truth.

2.8 Accordingly, the examination of the accused upon oath was the central feature of these proceedings,<sup>27</sup> and “torture was freely used, to extort either a confession, or the disclosure of further information.”<sup>28</sup>

2.9 The traditional theory holds that it was after the Court of Star Chamber and the Court of High Commission were abolished in 1641, and the administration of the *ex officio* oath was forbidden, that the privilege against self-incrimination made its appearance.<sup>29</sup>

23 *Evidence Act 1977* (Qld) s 14(1)(a).

24 *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Brennan J at 317.

25 Davies, the Hon Justice GL, “The Prohibition against Adverse Inferences from Silence: A Rule without Reason?” Part 1, (2000) 74 *Australian Law Journal* 26 at 32.

26 *Id* at 31.

27 Holdsworth W, *A History of English Law* (3<sup>rd</sup> ed, 1966) Vol IX at 199.

28 *Id*, Vol V at 184.

29 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 497-498.

By the second half of the seventeenth century, the privilege was well established at common law, which affirmed the principle *nemo tenetur accusare seipsum* or “no man is bound to accuse himself”.

Historically, the privilege developed to protect individual human persons from being compelled to testify, on pain of excommunication or physical punishment, to their own guilt. [notes omitted]

2.10 It was also believed that the privilege was developed “to ensure that European inquisitorial procedures would have no place in the common law adversary system of criminal justice.”<sup>30</sup> The privilege was thought to be linked “with the cherished view of English lawyers that their methods are more just than are the inquisitorial procedures of other countries.”<sup>31</sup>

## Recent developments

2.11 Recent research has raised doubts that challenge the accuracy of the traditional view.<sup>32</sup> These doubts have three principal bases.

2.12 First, it has been argued that the maxim *nemo tenetur accusare seipsum*,<sup>33</sup> from which, according to the traditional theory, the privilege against self-incrimination is derived, had its origins in the European *ius commune*, the combination of Roman and church law which developed during the middle ages, and which provided the basis for legal education in England and the basic rules that governed practice in the English ecclesiastical courts.<sup>34</sup> This early influence of the *ius commune* in English legal history, predating the Court of High Commission and the Star Chamber, is said to undermine the traditional theory of the privilege:<sup>35</sup>

... as an English invention intended to protect the indigenous adversarial criminal procedure against incursions of European inquisitorial procedure.

2.13 Secondly, it is said that the *nemo tenetur* principle, although recognised in seventeenth century English law, at that time had a much more limited application than the modern privilege against self-incrimination. The *ius*

30 The traditional view was summarised by McHugh J in *Azzopardi v R* (2001) 205 CLR 50 at 91.

31 *Rees and Another v Kratzmann* (1965) 114 CLR 63 per Windeyer J at 80.

32 See generally Helmholtz RH et al, *The Privilege against Self-Incrimination: Its Origins and Development* (1997). See also Davies, the Hon Justice GL, “The Prohibition against Adverse Inferences from Silence: A Rule without Reason?” Part 1, (2000) 74 *Australian Law Journal* 26 at 31 ff and *Azzopardi v R* (2001) 205 CLR 50 per McHugh J at 93 ff. But see also, in response to Helmholtz et al: Levy LW, “Origins of the Fifth Amendment and Its Critics” (1997) 19 *Cardozo Law Review* 821.

33 The Latin maxim “*Nemo tenetur se ipsum accusare (or prodere)*” translates as “No one is bound to incriminate himself”: Osborn’s Concise Law Dictionary.

34 Helmholtz RH, “Introduction” in Helmholtz RH et al, *The Privilege against Self-Incrimination: Its Origins and Development* (1997) 1 at 6-7.

35 Langbein JH, “The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries” in Helmholtz RH et al, *The Privilege against Self-Incrimination: Its Origins and Development* (1997) 82 at 100.

*commune*, the source of the principle, did not give an accused the “unqualified right to refuse to answer any and all questions about his past conduct.”<sup>36</sup> Rather, it was intended to prevent what would now be called “fishing expeditions”, to uncover evidence of wrongdoing in the absence of any specific allegation. Its protection:<sup>37</sup>

... was a check on overzealous officials rather than a subjective right that could be invoked by anyone who stood in danger of a criminal prosecution. ... It was designed to guarantee that only when there was good reason for suspecting that a particular person had violated the law would it be permissible to require that person to answer incriminating questions.

2.14 Consequently, there were significant exceptions to the *nemo tenetur* principle. It did not apply, for example:<sup>38</sup>

... where there was public knowledge that a crime had been committed, where the public had an interest in punishing the crime, and where there were legitimate indicia that the defendant being questioned had committed it.

2.15 This view therefore makes a distinction between the *nemo tenetur* principle and the privilege against self-incrimination:<sup>39</sup>

... the maxim did not make the privilege. It was rather the privilege - which developed much later - that absorbed and perpetuated the maxim. The ancestry of the privilege has been mistakenly projected backwards on the maxim ...

2.16 Thirdly, the existence of the privilege in the seventeenth century is said to be inconsistent with the practice in criminal trials in the common law courts of the era:<sup>40</sup>

... an array of structural attributes of common law criminal procedure would have made the privilege unnatural and unworkable in the criminal trial of the later seventeenth century.

2.17 The reason for this claim is that, in the seventeenth century, an accused was not allowed legal representation in a criminal trial, but was obliged to conduct his or her own defence.<sup>41</sup> The right of an accused to call witnesses

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36 Helmholz RH, “The Privilege and the *Ius Commune*: the Middle Ages to the Seventeenth Century” in Helmholz RH et al, *The Privilege against Self-Incrimination: Its Origins and Development* (1997) 17 at 44.

37 Helmholz RH, “Introduction” in Helmholz RH et al, *The Privilege against Self-Incrimination: Its Origins and Development* (1997) 1 at 7.

38 Helmholz RH, “The Privilege and the *Ius Commune*: the Middle Ages to the Seventeenth Century” in Helmholz RH et al, *The Privilege against Self-Incrimination: Its Origins and Development* (1997) 17 at 28.

39 Langbein JH, “The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries” in Helmholz RH et al, *The Privilege against Self-Incrimination: Its Origins and Development* (1997) 82 at 107.

40 Id at 103.

41 Id at 84.

to give sworn testimony on his or her behalf was also significantly restricted.<sup>42</sup> As a result, with no one else to speak on his or her behalf, an accused was forced to respond in person to the evidence against him or her. A refusal to do so would, it has been suggested, have been “suicidal”, amounting to a “forfeiture of all defense.”<sup>43</sup> According to this theory, the privilege against self-incrimination could not have come into existence in the seventeenth century since, at the time:<sup>44</sup>

... the fundamental safeguard for the defendant in common law criminal procedure was not the right to remain silent but rather the opportunity to speak.

2.18 Defence counsel were not generally permitted to examine and cross-examine witnesses until the middle of the eighteenth century or to address the jury until the beginning of the nineteenth century.<sup>45</sup> It is argued that it was these changes to common law criminal procedure, together with the adoption of the presumption of innocence and the requirement of proof beyond reasonable doubt, and the development of rules of criminal evidence,<sup>46</sup> that were the real driving force behind the emergence of the privilege against self-incrimination:<sup>47</sup>

Only when defense counsel succeeded in restructuring the criminal trial to make it possible to silence the accused did it finally become possible to fashion an effective privilege against self-incrimination at common law.

## THE PENALTY PRIVILEGE

2.19 The origins of the privilege against self-exposure to a penalty are not entirely clear. Some judges have described the penalty privilege as a common law creation adopted by the courts of equity.<sup>48</sup> However, others regard it as having been developed in equity.<sup>49</sup>

2.20 The High Court has recently confirmed the existence of the penalty privilege in relation to court proceedings.<sup>50</sup> The privilege may be claimed in a

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42 Id at 88-89.

43 Id at 83.

44 Id at 82.

45 Id at 87.

46 Id at 98-99.

47 Id at 107.

48 See for example *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 337; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per McHugh J at 547.

49 See for example *Trade Practices Commission v Abbco Ice Works Pty Ltd and Others* (1994) 52 FCR 96 per Gummow J at 135; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [13].

50 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; *Rich and Anor v Australian Securities and Investments Commission* (2004) 209 ALR 271.

civil proceeding, and is not confined to discovery<sup>51</sup> and interrogatory<sup>52</sup> procedures.<sup>53</sup>

2.21 The risk of exposure to a penalty in a court proceeding can occur in two different ways.<sup>54</sup>

2.22 The first is in what has been described as a “mere action for a penalty.”<sup>55</sup> Legislative regulatory schemes often create obligations, contravention of which is not a criminal offence but results in action by a government agency for the imposition of a penalty. Although the process generally follows the procedures in civil actions, the object of the proceeding is not, as in such actions, to obtain compensation for a private wrong. Rather, its purpose is to allow the state to enforce a public interest.<sup>56</sup>

2.23 In such a situation, where the intended outcome of the proceeding is the imposition of a penalty, the effect of a requirement that a party against whom the proceeding is brought provide information against that party’s own interest is evident from the nature of the proceeding. The basis of the privilege is therefore that the party should not, in the absence of a statutory provision to the contrary, be subjected to an order to provide information that must inevitably result in the intended consequence of the proceeding.

2.24 The second situation in which the risk of self-exposure to a penalty might arise is where the imposition of a penalty is not of itself the purpose of the proceeding in question, but where the obligation of a party to provide information may lead to the identification of conduct that would expose the party to a further proceeding for the recovery of a penalty. In this situation, since provision of the information will not necessarily result in the imposition of a penalty, there is no general rule that the party cannot be ordered to provide the information. If such an order is made, it is for the party to show that compliance with it will result in self-exposure to a penalty and to claim the privilege.<sup>57</sup>

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51 This is a process during which the parties to a court proceeding disclose to each other all documents in their possession or control relating to matters in question in the proceeding. See for example *Uniform Civil Procedure Rules 1999* (Qld) rr 211-213.

52 Interrogatories are written questions, relevant to a matter in question in a civil proceeding, submitted to an opposite party to the proceeding, to be answered on affidavit. The answer is admissible in evidence against the person to whom the interrogatory was administered. See for example *Uniform Civil Procedure Rules 1999* (Qld) r 233(1).

53 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 337.

54 *R v Associated Northern Collieries and Others* (1910) 11 CLR 738 per Isaacs J at 742-743.

55 *Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat and Livestock Corporation and Others* (1979) 42 FLR 204 per Deane J at 207-208.

56 Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at para 2.15-2.16.

57 *Trade Practices Commission v Abbco Ice Works Pty Ltd and Others* (1994) 52 FCR 96 per Gummow J at 133-134.



2.25 However, there is some doubt as to whether the privilege is available outside judicial proceedings.<sup>58</sup>

## THE RELATIONSHIP BETWEEN THE TWO PRIVILEGES

2.26 Although the penalty privilege may be regarded as distinct from the privilege against self-incrimination, it is clear that neither developed in isolation from the other.

2.27 The links between the two can be traced back over three hundred and fifty years. Towards the end of the first half of the seventeenth century, when the Star Chamber and the Court of High Commission were abolished,<sup>59</sup> the statute that outlawed the administration of the *ex officio* oath provided that an individual could not be:<sup>60</sup>

... charged or obliged ... to confess or to accuse himself or herself of any Crime, Offence, Delinquency or Misdemeanor, or any Neglect, Matter or Thing, whereby or by reason whereof he or she shall or may be liable or exposed to any Censure, Pain, Penalty or Punishment whatsoever.

2.28 Subsequently, throughout the eighteenth, nineteenth and twentieth centuries, courts continued to assimilate the risks of self-incrimination and self-exposure to a penalty:<sup>61</sup>

Under the rule, a man is not obliged to accuse himself, is implied, that he is not to discover a disability in himself.

2.29 The reason for the close association between the two grounds of privilege lies in the nature of an action for a penalty. Although a civil proceeding, such an action has been distinguished from other kinds of civil action brought for the purpose of redressing a civil wrong, whether by way of compensatory damages to the injured party or by some other means of relief:<sup>62</sup>

Civil penalty provisions have been described as a hybrid between the criminal and the civil law. They are clearly founded on the notion of preventing or punishing public harm. The contravention itself may be similar to a criminal offence ... and the purpose of imposing a penalty may be to punish the offender, but the procedure by which the offender is sanctioned is based on civil court processes. [note omitted]

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58 See para 5.5-5.12 of this Report.

59 See para 2.9 of this Report.

60 16 Car 1 Cap XI s 4 (1640).

61 *Smith v Read* (1736) 1 Atk 527, 26 ER 332. See also for example *Orme v Crockford* (1824) 13 Price 376, 147 ER 1022; *Martin v Treacher* (1886) 16 QBD 507; *R v Associated Northern Collieries and Others* (1910) 11 CLR 738; *Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat and Livestock Corporation and Others* (1979) 42 FLR 204.

62 Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at para 2.47.

2.30 It has been observed that:<sup>63</sup>

There are proceedings with both civil and criminal characteristics: for example, proceedings for a civil penalty under companies and trade practices legislation. The purposes of those proceedings include purposes of deterrence, and the consequences can be large and punishing. [notes omitted]

2.31 In such circumstances, it has been considered, by analogy with the privilege against self-incrimination, to be inappropriate to compel an individual to provide information that will have the inevitable consequence of subjecting the individual to the penalty.<sup>64</sup>

... although the penalty is not in strict law a criminal penalty, yet the action is in the nature of a criminal charge against the defendant: ... and, the object of the action being to subject the defendant to a penalty in the nature of a criminal penalty, it would be monstrous that the plaintiff should be allowed ... to ask the defendant to supply such evidence out of his own mouth and so to criminate himself.

2.32 Accordingly, it has been suggested that the modern form of both the penalty privilege and the privilege against self-incrimination developed parallel to one another, and in accordance with the same principles.<sup>65</sup>

It is ... wrong to regard the two grounds or aspects of privilege as depending on unrelated or different considerations. They should not be seen as separate props in the structure of justice, but rather as interlocking parts of a single column.

## STATUTORY ABROGATION OF THE PRIVILEGES

### Privilege against self-incrimination

2.33 Although the privilege against self-incrimination is often referred to as a substantive right, the current legal position in Australia is that it is not immutable and that it must therefore be balanced against other competing rights and interests.<sup>66</sup>

The privilege against self-incrimination is not protected by the Constitution, and like other rights and privileges of equal importance it may be taken away by legislative action.

<sup>63</sup> *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 201 ALR 1 per Hayne J at [114].

<sup>64</sup> *Martin v Treacher* (1886) 16 QBD 507 per Lord Esher MR at 511-512. See also per Lopes J at 514.

<sup>65</sup> *Trade Practices Commission v Abbco Ice Works Pty Ltd and Others* (1994) 52 FCR 96 per Burchett J at 129.

<sup>66</sup> *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 298.

2.34 It is clear that the privilege may be abrogated by statute where the legislature considers that it is outweighed by other factors:<sup>67</sup>

The legislatures have taken this course when confronted with the need, based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained.

2.35 Whether legislation does in fact abrogate the privilege against self-incrimination will depend on the construction of the provision in question.<sup>68</sup> Because of the significance of the privilege as a substantive right, the policy of the law favours an immunity from self-incrimination.<sup>69</sup> Accordingly, the courts will interpret legislation as having abrogated the privilege only if the intention to do so is clearly apparent in the legislation itself.<sup>70</sup> The exclusion of the privilege need not be expressly stated:<sup>71</sup>

... an intention to exclude the privilege may appear although there are no express words of exclusion.

2.36 Where there are no express words of abrogation, the question of whether the privilege has been impliedly excluded will depend on “the language and character of the provision and the purpose which it is designed to achieve.”<sup>72</sup>

## Penalty privilege

2.37 The penalty privilege, unlike the privilege against self-incrimination, has not received judicial recognition as a substantive right. To date, the courts have not generally regarded the consequences of self-exposure to a penalty as being as serious as self-incrimination, which can result in conviction for a criminal offence.

<sup>67</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 503.

<sup>68</sup> *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 341.

<sup>69</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Brennan J at 509. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

<sup>70</sup> *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 289-290.

<sup>71</sup> *Id* at 289. See also per Mason, Wilson and Dawson JJ at 309, and per Mason ACJ, Wilson and Dawson JJ in *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 at 341. But note the comments of Murphy J (*Sorby* at 311, *Pyneboard* at 347) in relation to the need for “unmistakeable language”.

<sup>72</sup> *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 341. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [30]. The test for implied abrogation is discussed at para 7.1-7.8 of this Report.

2.38 A provision which expressly abrogates the privilege against self-incrimination will therefore also, by implication, abrogate the penalty privilege.<sup>73</sup>

... it is irrational to suppose that Parliament contemplated that a person could be compelled to admit commission of a criminal offence yet be excused from admitting a contravention of the Act sounding in a civil penalty.

## PROTECTION AGAINST ABROGATION AND ITS EFFECTS

2.39 Abrogation of the privilege against self-incrimination or of the penalty privilege can have serious consequences for an individual who is compelled to provide information tending to prove that the individual has committed an offence or to expose the individual to a penalty. The information obtained can lead to a criminal conviction, resulting in a fine or a term of imprisonment, to imposition of a civil or administrative penalty, or to disciplinary measures under a legislative regulatory scheme.

2.40 Under existing Queensland legislation there are two kinds of protection against abrogation of privilege and against the potential consequences of abrogation for the individual concerned. First, there is a mechanism for monitoring the introduction of legislation that abrogates the privilege against self-incrimination. Secondly, in some cases where the privilege has been abrogated, there are restrictions on the use that may be made of the information obtained as a result of the abrogation.

### Monitoring of legislation

2.41 In Queensland, a Member of Parliament who presents a Bill to the Legislative Assembly must circulate to Members an explanatory note for the Bill.<sup>74</sup> The explanatory note must contain certain information, including a brief assessment of the consistency of the Bill with “fundamental legislative principles” and, if it is inconsistent with those principles, the reason for the inconsistency.<sup>75</sup> “Fundamental legislative principles” are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.<sup>76</sup> The principles include a requirement that legislation must have sufficient regard to the rights and liberties of individuals.<sup>77</sup> Whether legislation has sufficient regard to individual rights and liberties depends on a number of

<sup>73</sup> *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 345. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

<sup>74</sup> *Legislative Standards Act 1992* (Qld) s 22(1).

<sup>75</sup> *Legislative Standards Act 1992* (Qld) s 23(1)(f).

<sup>76</sup> *Legislative Standards Act 1992* (Qld) s 4(1).

<sup>77</sup> *Legislative Standards Act 1992* (Qld) s (4)(2)(a).

factors, including whether it provides appropriate protection against self-incrimination.<sup>78</sup>

2.42 Compliance of proposed legislation with the fundamental legislative principles is monitored by the Scrutiny of Legislation Committee of the Queensland Legislative Assembly.<sup>79</sup> The Committee may report its findings to the Assembly, and make recommendations for legislative amendment if it considers that legislation inappropriately abrogates the privilege or provides inadequate protection from the effects of abrogation.<sup>80</sup> However, the recommendations of the Committee are persuasive only and have no binding effect on the Assembly. Legislation that abrogates the privilege can therefore be enacted notwithstanding any recommendation of the Committee to the contrary.<sup>81</sup>

### Restrictions on the use of compelled information

2.43 Concerns have been expressed about the consequences of the subsequent use of compelled information as evidence against the individual who provided it.

2.44 There is particular concern in relation to the onus of proof in criminal proceedings, where the prosecution must establish beyond a reasonable doubt the commission of the alleged offence.<sup>82</sup>

... to remove the privilege ... without prohibiting the subsequent use of the incriminating evidence inevitably raises the question whether that onus survives unimpaired. ... There is really little difference in principle between being compelled to incriminate oneself in other proceedings so that the evidence is available at one's trial and being compelled to incriminate oneself during the actual trial.

2.45 Accordingly, legislation that abrogates the privilege against self-incrimination or the penalty privilege may restore some measure of protection to an individual compelled to provide information by imposing limits on how that information may be used. Depending on the extent of the protection it offers, such a provision is said to confer a "use immunity" or a "derivative use immunity."<sup>83</sup>

78 *Legislative Standards Act 1992* (Qld) s 4(3)(f).

79 *Parliament of Queensland Act 2001* (Qld) s 103(1)(a).

80 *Parliament of Queensland Act 2001* (Qld) s 84.

81 See for example Queensland Parliament, Scrutiny of Legislation Committee, *Report on the Queensland Building Tribunal Bill 1999* (Alert Digest No 13 of 1999 at 31-32); *Report on the Coroners Bill 2002* (Alert Digest No 1 of 2003 at 7-8).

82 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Deane, Dawson and Gaudron JJ at 532. See also *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 294.

83 Issues arising in relation to the provision of an immunity are considered in Chapter 9 of this Report.

2.46 However, any immunity conferred by legislation in relation to the use of information provided under compulsion may itself be subject to a number of exceptions. The most common exception concerns proceedings for perjury,<sup>84</sup> or for making false or misleading statements to an inquiry or an investigation.<sup>85</sup>

### **Use immunity**

2.47 Legislation that abrogates privilege may restrict the use that may be made of compelled information by conferring a “use” immunity on that information. An example of a use immunity is section 14A(1) of the *Commissions of Inquiry Act 1950* (Qld). Section 14(1A) of that Act abrogates the privilege against self-incrimination in relation to the giving of evidence about a matter relevant to the commission’s inquiry<sup>86</sup> and to answering questions before the commission.<sup>87</sup> However, section 14A(1) further provides that, subject to certain exceptions:

A statement or disclosure made by any witness in answer to any question put to the witness by a commission or any commissioner or before a commission shall not ... be admissible in evidence against the witness in any civil or criminal proceedings.

2.48 A use immunity prevents the subsequent admission of evidence of the fact of a disclosure made under compulsion, or of the information disclosed, in a proceeding against the individual who was compelled to provide the information.

2.49 However, the protection conferred by a use immunity is not the same as that given by the privilege itself. It has been said that use immunities:<sup>88</sup>

... provide less extensive protection than the privilege at common law, to some extent allowing the purposes of the privilege to be undermined.

2.50 If an individual is entitled to a privilege excusing him or her from answering questions or producing documents, the individual is therefore also protected from the use of those answers or documents to search out other evidence to be used against him or her. But where the privilege is abrogated:<sup>89</sup>

... there is the possibility that the answer may involve the disclosure of a defence or lead to the discovery of other evidence, these being consequences against which a person charged with a criminal offence is usually entitled to be protected. [note omitted]

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84 “Perjury” is the act of “making on oath by a witness ... in a judicial proceeding of a statement material in that proceeding, which he knows to be false or which he does not believe to be true”: Osborn’s Concise Law Dictionary. See for example *Cooperatives Act 1997* (Qld) s 411(3)(b).

85 See for example *Coal Mining Safety and Health Act 1999* (Qld) s 159(6).

86 *Commissions of Inquiry Act 1950* (Qld) s 14(1A)(a).

87 *Commissions of Inquiry Act 1950* (Qld) s 14(1A)(b).

88 Donaghue S, *Royal Commissions and Permanent Commissions of Inquiry* (2001) at para 9.7.

89 *Hamilton v Oades* (1989) 166 CLR 486 per Deane and Gaudron JJ at 503.

2.51 A use immunity “does not prevent the derivative use of incriminating testimony.”<sup>90</sup>

### ***Derivative use immunity***

2.52 Legislation that abrogates privilege may go one step further than a mere use immunity and also protect against the use of information obtained as a result of the abrogation to uncover other evidence against the individual who provided the information. This protection is known as a “derivative use” immunity. A derivative use immunity prevents the use of material that has been compulsorily disclosed to “set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character.”<sup>91</sup>

2.53 An example of a derivative use immunity is section 137(6) of the *Guardianship and Administration Act 2000* (Qld). Section 137 of that Act abrogates the privilege against self-incrimination for witnesses at a hearing of the Guardianship and Administration Tribunal. Section 137(6) further provides that, subject to certain exceptions:

... evidence of, or directly or indirectly derived from, a person’s answer or production of a document or thing that might tend to incriminate the person is not admissible in evidence against the person in a civil or criminal proceeding ...

2.54 The creation of a derivative use immunity gives rise to the issue of who should bear the onus of proof in relation to the derivative nature of evidence that is sought to be admitted in a proceeding against an individual who has provided compelled information. The question is whether the individual should be required to prove that the evidence *has* been obtained as a result of the information provided, or whether the party seeking to use the evidence should have to show that it *has not* been derived from that information.<sup>92</sup>

2.55 There does not appear to be an authoritative Australian statement of the law on this point.

2.56 Some commentators have assumed that the party seeking to use the evidence must prove that it is not derivative.<sup>93</sup> In relation to proceedings against an officer of a corporation for wrongdoing in the conduct of the

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<sup>90</sup> *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Brennan J at 316.

<sup>91</sup> *Rank Film Distributors Ltd and Others v Video Information Centre and Others* [1982] AC 380 per Lord Wilberforce at 443.

<sup>92</sup> See the discussion of this issue in the context of company law and securities law in Kluver J, *Report on Review of the Derivative Use Immunity Reforms* (1997) at para 3.76-3.84.

<sup>93</sup> This assumption is consistent with the position in the United States, where the prosecution has an affirmative duty to prove that evidence it proposes to use is derived from a legitimate source wholly independent of the testimony obtained under a derivative use immunity: *Kastigar v United States* 406 US 441 (1972) per Powell J at 460.

corporation's affairs, it has been observed that the effect of a derivative use immunity could be that:<sup>94</sup>

... any evidence obtained after the person has given evidence before the [Australian Securities Commission], even if not derived indirectly or directly from that evidence, is inadmissible. In such circumstances, the overall prosecution may well fail, not because the evidence it has is derived from the evidence before the Commission but because the [Commonwealth Director of Public Prosecutions] cannot discharge the onus of proving that it was not so derived.

2.57 On the other hand, there have been some suggestions in the High Court that the party who provided the information has the onus of proof:<sup>95</sup>

... immunity from derivative use is unsatisfactory, because of the problems of proving that other evidence was derivative ...

2.58 However, these observations were made in a context where the question of the onus of proof was not in issue.<sup>96</sup>

94 Menzies S, "The Investigative Powers of the ASC" (Speech delivered at the Raiders of the Lost Account: ASC Investigations and Enforcement Seminar, Perth, 31 October 1991) in *ASC Digest*, Rep Spch 106 (Update 38). See also Sofronoff P, "Derivative Use Immunity and the Investigation of Corporate Wrongdoing" (1994) 10 *Queensland University of Technology Law Journal* 122. These articles refer to s 68 (the abrogation provision) of the *Australian Securities Commission Act 1989* (Cth). As originally enacted, s 68 provided a derivative use immunity. However, it was amended in 1992 and a use immunity was substituted for the derivative use immunity: *Corporations Legislation (Evidence) Amendment Act 1992* (Cth) s 4. A 1997 review of the provision recommended that the derivative use immunity should not be reintroduced: Kluver J, *Report on Review of the Derivative Use Immunity Reforms* (1997) at 50. The current provision is located in s 68 of the *Australian Securities and Investments Commission Act 2001* (Cth).

95 *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Murphy J at 312. See also *Hamilton v Oades* (1989) 166 CLR 486 per Mason CJ at 496.

96 See also the decision of Williams J in *Re Ardina Electrical (Queensland) Pty Ltd (now known as Fused Electrics Pty Ltd) (in liq)* (1992) 7 ACSR 297. In that case, the appellant, an officer of a company, unsuccessfully sought an adjournment of an examination under the *Corporations Law* about the affairs of the company. Prior to making the adjournment application, he had been committed for trial in relation to a number of offences relating to the management of the company. It was submitted that, in the interests of justice, the examination should be adjourned until after the disposition of the criminal proceedings. However, the *Corporations Law* conferred a derivative use immunity in respect of answers given under compulsion at an examination. Refusing the adjournment, Williams J referred to the prohibition against the use of derivative evidence and noted, at 299:

That does not entirely overcome the problem of proving that evidence sought to be led on the subsequent criminal charge is "derivative", but that task is made easier here because the committal proceedings against the appellant have been completed. If, as must be assumed, the prosecution has discharged its duty by placing all relevant evidence against the appellant before the court in the committal proceedings, and such led to his being committed for trial, it can fairly be assumed that any additional evidence sought to be introduced after the examination ... would be evidence caught by [the derivative use immunity].



# Chapter 3

## Rationales for the privileges

### INTRODUCTION

3.1 The Commission's terms of reference require it to identify the circumstances, if any, in which the abrogation of the privilege against self-incrimination and the penalty privilege may be justified. In order to do this it is first necessary to consider the policies that underlie the privileges and the purposes that they serve. One commentator has observed:<sup>97</sup>

Many have ceased to see (the privilege against self-incrimination) as a self-evident truth and have begun to question it. An effort has been made to bolster it with a variety of justifications, but none of them seem wholly satisfying. ... Many of the limitations and extensions which have developed in recent years remain without any well-thought-out basis in principle.

3.2 In its modern form, the privilege against self-incrimination has been ascribed to a number of different rationales:<sup>98</sup>

... it is not easy to assert confidently that the privilege serves one particular policy or purpose.

3.3 It would appear that, as the privilege has developed over time, its underlying rationales have also changed in response to political and social conditions.

3.4 According to the traditional view of the history of the privilege, it was originally intended as a curb on State powers.<sup>99</sup>

3.5 The development of the privilege has also been portrayed as a protection for an accused or a suspect from the invidious choice imposed by the obligation to take the *ex officio* oath - that is, to be punished for refusing to testify under oath; to be punished as a result of testifying truthfully, thereby providing evidence of guilt; or to be punished for perjury for testifying untruthfully in an attempt to avoid providing evidence of guilt. It has been suggested that, today, the rationale for the privilege remains substantially the same as this historical justification, even though the original methods of

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97 Gerstein RS, "Privacy and Self-incrimination" (1970) 80 *Ethics* at 87.

98 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 335.

99 See for example *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per McHugh J at 544. See also para 2.5-2.10 of this Report.

punishment - torture or excommunication - have been replaced by more modern sanctions such as fines and/or imprisonment.<sup>100</sup>

3.6 Expanding on this rationale, Australian courts have focused on the notion of the privilege against self-incrimination as “part of the common law of human rights”,<sup>101</sup> based on the protection of personal freedom and human dignity.<sup>102</sup>

It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society’s acceptance of the inviolability of the human personality.

3.7 This view is consistent with court decisions in both the United States and Canada.<sup>103</sup>

3.8 An alternative explanation for the privilege is to maintain the accusatorial system of justice.<sup>104</sup>

3.9 A number of further justifications for the privilege are also based on benefits that it is said to confer on the legal system. Since it allows a witness to give evidence without being obliged to give answers that are against his or her own interests, it may encourage witnesses to testify. However, the effectiveness of this “carrot” may be qualified by the fact that refusal to testify on certain matters on the grounds of self-incrimination would tend to indicate that a witness had something to hide.<sup>105</sup> The privilege may also help to maintain the integrity and quality of evidence.<sup>106</sup>

If a witness is compelled to answer incriminating questions the quality of the evidence provided may well be suspect because of the likelihood of perjury. The privilege may, thus, be viewed as a recognition by the law of the folly of commanding the unlikely and the untrustworthy.

3.10 In many cases, these rationales also apply to the penalty privilege.

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100 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 498.

101 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Murphy J at 346.

102 Ibid. See also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 498-499, 508; *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Murphy J at 311; *Accident Insurance Mutual Holdings Ltd v McFadden and Another* (1993) 31 NSWLR 412 per Kirby P at 420.

103 See for example the cases cited in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 490-493 and 494-496 and per Brennan J at 513.

104 See para 3.25-3.26 of this Report.

105 Australian Law Reform Commission, Report, *Evidence* (ALRC 26, 1985) Vol 1 at 485.

106 Id at 486.

## THE PRINCIPAL RATIONALES

3.11 The rationales that have most often been put forward for the privilege against self-incrimination fall into two main categories - systemic and individual. The former are related to the criminal justice system and view the privilege as a means of achieving goals within that system, rather than as an end in itself. The latter, which are based on notions of human rights and respect for human dignity and individuality, are concerned with the privilege's intrinsic value.<sup>107</sup>

### Systemic rationales

#### *To prevent abuse of power*

3.12 Until recently, the commonly accepted rationale for the origin of the privilege against self-incrimination was that it was developed in the seventeenth century by the courts of common law in England as a protection against the oppressive inquisitorial procedures adopted by the Star Chamber and the Court of High Commission.<sup>108</sup> According to this view, the privilege was intended to ensure that an individual could not be required to submit to examination under oath for the purpose of exposing evidence of his or her own wrongdoing:<sup>109</sup>

... it probably arose as a response to what was perceived as an abuse or potential abuse of power by the Crown in the examination of suspects or witnesses. Once the Crown is able to compel the answering of a question, it is a short step to accepting that the Crown is entitled to use such means as are necessary to get the answer. ... By insisting that a person could not be compelled to incriminate himself or herself, the common law thus sought to ensure that the Crown would not use its power to oppress an accused person or witness and compel that person to provide evidence against him or herself.

3.13 It has been observed that, in the context of contemporary criminal trials in Australia, "it is difficult to justify the privilege on the ground that it is necessary to prevent an abuse of power," since a conviction based on an abuse of the proceedings by the prosecution would be set aside.<sup>110</sup>

3.14 However, the application of the privilege against self-incrimination is not restricted to court proceedings<sup>111</sup> and, unless abrogated by statute, its protection is available in a wide variety of investigatory situations where the use of coercive tactics in the course of interrogation may give rise to "a risk of considerable physical and psychological pressure being applied to suspects to

<sup>107</sup> Dolinko D, "Is there a Rationale for the Privilege against Self-incrimination?" (1986) 33 *UCLA L Rev* 1063 at 1065; Gerstein RS, "Privacy and Self-incrimination" (1970) 80 *Ethics* 87 at 88.

<sup>108</sup> See para 2.5-2.10 of this Report. However, for an alternative explanation of the development of the privilege, see para 2.11-2.18 of this Report.

<sup>109</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per McHugh J at 544.

<sup>110</sup> Id at 545. See also Dolinko D, "Is there a Rationale for the Privilege against Self-incrimination?" (1986) 33 *UCLA L Rev* 1063 at 1079.

<sup>111</sup> See para 5.1-5.3 of this Report.

co-operate by making incriminating statements or by handing over evidence such as documents.”<sup>112</sup>

3.15 Nonetheless, this also is arguably an incomplete justification for the privilege. The mere existence of the privilege, in the absence of adequate procedural safeguards for the conduct of investigations and inquiries, is unlikely to prevent an investigator who is minded to do so from exerting pressure of this kind.

3.16 The “abuse of power” explanation for the privilege is predicated upon the imbalance that exists between a State and its citizens:<sup>113</sup>

Because of its resources, the State has a considerable advantage in putting its case against most citizens. Most people dealing with the State are at a substantial organisational, monetary and knowledge disadvantage. In addition, there is considerable potential for internal corruption and misuse of its powers if they are not strictly regulated and controlled.

3.17 Hence it has been suggested that one of the main purposes of the privilege against self-incrimination is to maintain “a proper balance between the powers of the State and the rights and interests of citizens.”<sup>114</sup>

3.18 The question of the balance of power between the State and the individual may also be relevant to the role of the penalty privilege. In an action against an individual to secure the imposition of a penalty for non-compliance with a regulatory scheme, the State would generally be in a significantly more powerful position than the individual. The penalty privilege may to some extent redress the imbalance.

3.19 However, it has been claimed that the State, despite its power, also bears significant disabilities such as the requirement of proof beyond a reasonable doubt in a criminal prosecution, so that the imbalance might not actually result in an unfair advantage.<sup>115</sup> It has also been questioned, in relation to the privilege against self-incrimination, whether it is in fact necessary that there should be a balance of power between the State and an accused:<sup>116</sup>

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112 Dennis I, “Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-incrimination” (1995) 54 *Cambridge Law Journal* 342 at 376.

113 Australian Law Reform Commission, Report, *Evidence* (ALRC 26, 1985) Vol 1 at 487.

114 *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118 per Gleeson CJ at 127. Although the decision of the New South Wales Court of Criminal Appeal in this case was reversed on appeal to the High Court of Australia (*Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477), the existence of the rationale was not disputed. This issue was rather whether the rationale justified the availability of the privilege to corporations: see per Mason CJ and Toohey J at 500-501.

115 Schulhofer S, “Some Kind Words for the Privilege Against Self-incrimination” (1991) 26 *Valparaiso University Law Review* 311 at 317.

116 *Id* at 317-318.

The criminal process should lead to conviction of the guilty, preferably as quickly and easily as possible, provided of course that other values are not sacrificed. ... the question is whether other values are in jeopardy, not whether we should maintain some balance of advantage for its own sake.

### **To prevent conviction founded on a false confession**

3.20 This rationale is related to the principle that evidence of a confession is inadmissible unless it can be shown that the confession was made voluntarily.<sup>117</sup> It is based on the premise that a confession made under duress is likely to be unreliable.<sup>118</sup>

3.21 On this view, the development of the privilege may have constituted - particularly at a time when an accused could not give evidence on his or her own behalf to rebut evidence of an admission<sup>119</sup> - an important means of ensuring that confessional material could not be improperly obtained for use in evidence against the individual who allegedly provided it.

3.22 An individual against whom a proceeding for a penalty is brought by a regulatory authority may also be pressured into making unreliable admissions.

3.23 However, as a justification for the privilege, the argument fails to explain the extension of privilege to material that is not confessional in nature - for example, pre-existing documents.

3.24 It has also been suggested that, while there may be a risk that a compelled confession from an accused might be unreliable and lead to the conviction of someone who is innocent, that risk is no greater than the risk that the compelled testimony of any other prosecution witness might also be unreliable and lead to a wrong conviction.<sup>120</sup>

### **To protect the accusatorial system of justice**

3.25 The fundamental principle of the accusatorial system of criminal justice is that the prosecution bears the onus of proving, beyond a reasonable doubt, that an accused is guilty of an offence with which he or she has been

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117 See for example *R v Lee* (1950) 82 CLR 133 at 144.

118 See for example Dennis I, "Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-incrimination" (1995) 54 *Cambridge Law Journal* 342 at 376.

119 *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1 per Lord Mustill at 32.

120 Schulhofer S, "Some Kind Words for the Privilege Against Self-incrimination" (1991) 26 *Valparaiso University Law Review* 311 at 319.

charged.<sup>121</sup> It has been suggested that it is this principle of presumption of innocence that underlies the privilege against self-incrimination:<sup>122</sup>

It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt.

3.26 As a consequence, those who allege the commission of a crime should not be able to compel the accused to provide evidence of his or her own guilt.<sup>123</sup> On the same basis, those seeking to impose a civil penalty should not be able to compel a defendant to provide information that may lead to the penalty being incurred:<sup>124</sup>

... the privilege against exposure to penalties serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove it.

3.27 However, it has been suggested that to require a suspect to explain his or her actions does not necessarily reverse the onus of proof:<sup>125</sup>

... the prosecution would still have to prove its case, the only argument being about which bits of evidence it may use.

3.28 It has also been argued that the privilege does not apply to certain kinds of self-incriminating evidence that a suspect may be required to provide - for example, the taking of fingerprints or samples<sup>126</sup> - or protect a suspect from a requirement to take part in a lineup for identification purposes.<sup>127</sup>

3.29 Further, it has been acknowledged - at least in relation to corporations - that the integrity of the accusatorial system would not be compromised if the

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121 *Woolmington v Director of Public Prosecutions* [1935] AC 462 per Viscount Sankey LC at 481-482.

122 *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 294. In *Hammond v The Commonwealth of Australia and Others* (1982) 152 CLR 188 Murphy J referred (at 201) to "the elaborate accusatorial code with its protection of an accused from inquisition". In that case, the plaintiff (who had been charged with a criminal offence) successfully sought to restrain a Commission of Inquiry from requiring him to answer self-incriminating questions relating to the subject matter of the criminal charge. Gibbs CJ held (at 198) that, in the circumstances, the questioning of the plaintiff would constitute a real risk that the administration of justice would be interfered with. See also per Deane J at 206.

123 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Deane, Dawson and Gaudron JJ at 532.

124 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [31]. See also *Trade Practices Commission v Abcco Ice Works Pty Ltd and Others* (1994) 52 FCR 96 per Burchett J at 129.

125 Galligan DJ, "The Right to Silence Reconsidered" (1988) 41 *Current Legal Problems* 69 at 87. See also Dolinko D, "Is there a Rationale for the Privilege against Self-incrimination?" (1986) 33 *UCLA L Rev* 1063 at 1084.

126 Dennis I, "Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-incrimination" (1995) 54 *Cambridge Law Journal* 342 at 355.

127 Dolinko D, "Is there a Rationale for the Privilege against Self-incrimination?" (1986) 33 *UCLA L Rev* 1063 at 1083.

privilege did not apply to the production of incriminating books and documents which are already in existence:<sup>128</sup>

The fundamental principle that the onus of proof beyond reasonable doubt rests on the Crown would remain unimpaired, as would the companion rule that an accused person cannot be required to testify to the commission of the offence charged.

3.30 This view is based on the recognition of a distinction between a requirement to produce pre-existing documents, which does not amount to the creation of self-incriminating evidence, and the compulsion to give oral evidence, which is brought into existence as the result of the exercise of an investigative power and which constitutes an admission of guilt.<sup>129</sup>

### **To protect the quality of evidence**

3.31 On this view, the privilege against self-incrimination is necessary to maintain the integrity of evidence and confidence in the reliability of criminal verdicts.

3.32 The suggestion is that someone who is compelled to give self-incriminating evidence is likely to be tempted to lie in order to protect his or her own interests:<sup>130</sup>

A witness will often prefer to lie than to expose himself to criminal prosecution; the threat of perjury penalties is less directly threatening than the threat of prosecution for the commission of a criminal offence.

3.33 It is said that, without the privilege, there would therefore be a risk that unreliable evidence would adversely affect the ability of a court or jury to determine the facts of a particular case and that the credibility of the trial system would be compromised.<sup>131</sup>

3.34 However, the effectiveness of the privilege in protecting the reputation of the court system has been questioned. It has been suggested that, if the privilege is waived, the information obtained is not necessarily more likely to be truthful because of the existence of the waived privilege. Where the privilege is claimed:<sup>132</sup>

There certainly are situations where, but for the privilege, the tribunal would be given perjured testimony. But there are also situations where, but for the privilege, the tribunal would be given truthful testimony. The question here is,

128 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 503.

129 *Id* at 502-503. See also per McHugh J at 555.

130 Australian Law Reform Commission, Report, *Evidence* (ALRC 26, 1985) Vol 1 at 487.

131 *Ibid.*

132 McNaughton J, "The Privilege Against Self-incrimination: Its Constitutional Affectation, Raison d'Être and Miscellaneous Implications" (1960) 51 *J Crim L, Criminology & Police Sci* 138 n 27[2] at 143.

Does the privilege, in the instances where it is claimed, on balance leave the trier of fact in a better or worse position for purposes of finding truth? ... Evidence may be biased or even perjured. But it should not be excluded on this ground ... . From the point of view of truth-finding, it is better to hear a witness, cross-examine him, and give his testimony whatever weight it appears to deserve.

## Individual rationales

### *To avoid the “cruel trilemma”*

3.35 The “cruel trilemma” originally referred to the unfairness of placing a witness in the position of having to choose between refusing to provide the information in question (thereby risking punishment for contempt of court), providing the information (thereby furnishing evidence of guilt and risking conviction), or lying (thereby risking punishment for perjury).<sup>133</sup>

3.36 The protection conferred by the privilege against the “cruel trilemma” has since been recognised as a modern rationale for the privilege against self-incrimination that is substantially the same as its historical justification, even though the nature of the contemporary sanctions is less severe.<sup>134</sup>

3.37 This rationale attributes the development of the privilege to “the instinct that it is contrary to fair play to put the accused in a position where he is exposed to punishment whatever he does.”<sup>135</sup>

3.38 It has also been suggested that it might be cruel to put a witness in a position where he or she might choose to resolve the trilemma by giving perjured evidence:<sup>136</sup>

The thought is that it is inhumane to force a religious witness to violate his sacred oath - to commit a crime against God.

3.39 The rationale is also relevant to the development and continued existence of the penalty privilege. The purpose of an action for a penalty - to secure compliance with a legislative scheme and to punish an offender - is similar to the basis for a criminal charge<sup>137</sup> and, in the absence of the privilege, the individual against whom the action is brought would have to confront similar choices.

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133 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 498.

134 *Ibid.*

135 *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1 per Lord Mustill at 32.

136 McNaughton J, “The Privilege Against Self-incrimination: Its Constitutional Affection, Raison d’Etre and Miscellaneous Implications” (1960) 51 *J Crim L, Criminology & Police Sci* 138 at 148.

137 See para 2.22 and 2.29-2.31 of this Report.



3.40 However, the “cruel trilemma” theory has been criticised for presupposing the guilt of the accused:<sup>138</sup>

An innocent suspect would, at least in theory, have nothing to lose by answering questions truthfully. There is therefore no cruelty involved in requiring the innocent suspect to speak.

3.41 The validity of the “cruelty” argument has also been questioned, even where the suspect has in fact committed a crime:<sup>139</sup>

To call behaviour cruel is, in part, to suggest that it is in some sense excessive; it goes beyond what is justified, necessary, deserved or appropriate. ... Having a criminal justice system at all presupposes a belief that it is desirable and proper to convict and punish criminals. Thus in operating the system, we are implicitly committed to the view that identifying and punishing offenders is not a cruel or inhumane practice. To compel someone to help bring this practice to bear on himself, therefore, is not to aggravate what is already cruel.  
[notes omitted]

3.42 It has also been argued that, if it is indeed cruel to require a witness to incriminate himself or herself, the degree of cruelty involved does not outweigh the need for disclosure sufficiently to justify the privilege.<sup>140</sup>

3.43 Moreover, the choice - described by one commentator as “among the three horns of the triceratops”<sup>141</sup> - is one that is faced by all reluctant witnesses:<sup>142</sup>

... the problem is not peculiar to the situation in which self-incriminatory disclosure is demanded. In one degree or another it is a problem inherent in the principle of compulsory testimony. Witnesses reluctant for whatever reason face this trilemma.

3.44 The position of a guilty accused has been compared with that of a defendant in a civil case:<sup>143</sup>

Undoubtedly, without the privilege, the guilty defendant would face a truly tough choice. But why is the choice cruel? Defendants in civil suits face the same trilemma, possibly with much more at stake than in some criminal trials. It does not seem unfair to force civil defendants to choose ...

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138 Dennis I, “Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-incrimination” (1995) 54 *Cambridge Law Journal* 342 at 359.

139 Dolinko D, “Is there a Rationale for the Privilege against Self-incrimination?” (1986) 33 *UCLA L Rev* 1063 at 1103.

140 McNaughton J, “The Privilege Against Self-incrimination: Its Constitutional Affectation, Raison d’Etre and Miscellaneous Implications” (1960) 51 *J Crim L, Criminology & Police Sci* 138 at 148.

141 *Id* at 147.

142 *Ibid*.

143 Schulhofer S, “Some Kind Words for the Privilege Against Self-incrimination” (1991) 26 *Valparaiso University Law Review* 311 at 318.

### **To protect human dignity and privacy**<sup>144</sup>

3.45 This rationale, which is consistent with the approach taken in court decisions in the United States and Canada,<sup>145</sup> underpins the concept of the privilege against self-incrimination as a human right rather than as merely a rule of evidence.<sup>146</sup> It has been suggested that, although closely associated with the possibility of abuse of power by the Crown, the desire to protect the human dignity of an accused is a separate and important justification for the privilege, since it ensures that the prosecution must treat the accused as an innocent human being whose rights must be respected.<sup>147</sup>

3.46 On this view, the privilege is regarded as a shield against “the indignity and invasion of privacy which occurs in compulsory self-incrimination.”<sup>148</sup>

3.47 Similar considerations may arise in relation to the penalty privilege.

3.48 The privacy justification is said to operate on two levels.

3.49 First, it is claimed that compelled self-incrimination constitutes a serious intrusion into the right of privacy of an individual who is required to provide information:<sup>149</sup>

... the exercise of the privilege provides a striking expression of society’s willingness to accept constraints on the pursuit of valid, perhaps vital interests in order to recognise the right of privacy and the respect for the individual that privacy entails.

3.50 However, it is argued that this proposition is, of itself, an insufficient basis for the privilege, since the privilege protects only against self-disclosure and not against disclosure by others, and against the disclosure of information that is incriminating and not of information that might harm the individual in other ways.<sup>150</sup> Procedures such as the compelled provision of samples of breath or other bodily substances or the taking of fingerprints, which are not protected by the privilege, are equally invasive of an individual’s interest in

144 This rationale also underlies other immunities that, collectively, are commonly referred to as “the right to silence”. Some commentators contend that it has nothing directly to do with self-incrimination: see Sedley S, “Wringing out the Fault” *London Review of Books* 7 March 2002 at 27.

145 See for example the cases cited in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 490-493 and 494-496 and per Brennan J at 513.

146 *Accident Insurance Mutual Holdings Ltd v McFadden and Another* (1993) 31 NSWLR 412 per Kirby P at 420-421.

147 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per McHugh J at 546.

148 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Murphy J at 346. See also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 498-499, 508.

149 Fried C, “Privacy” (1968) 77 *The Yale Law Journal* 475 at 489.

150 Dolinko D, “Is there a Rationale for the Privilege against Self-incrimination?” (1986) 33 *UCLA L Rev* 1063 at 1107-1108.

privacy.<sup>151</sup> It is also claimed that the inadequacy of the privacy theory is demonstrated by the effect of a grant of an immunity to compensate for the abrogation of the privilege:<sup>152</sup>

Because privacy is a substantive value it should be the *nature* of the disclosure which is important rather than its consequences. Privacy is still infringed by a compelled communication even if no evidential use is made of it. [original emphasis, note omitted]

3.51 Secondly, it is suggested that the privilege prevents the erosion of individual moral autonomy. The autonomy argument is based on the belief that it is wrong to coerce confession of wrongdoing:<sup>153</sup>

Such treatment is inconsistent with the treatment of the individual as a responsible agent. It denies him the right to set his own conscience in order. ... The processes by which a man comes to know himself, by which his conscience is formed and he is brought to come to terms with it, ought not to be forced.

3.52 This view has also been criticised as failing to justify the privilege, since the very existence of the entire criminal justice system is predicated upon compulsion to conform to the principles on which that system is founded:<sup>154</sup>

Criminal laws, and the penalties annexed to them, testify precisely to our reluctance to give free play to each individual's notions of what is right and wrong, permissible or improper. If the existence of this institution - requiring some persons either to stifle and repress their desires or to risk societal condemnation and punishment - does not unduly thwart a person's potential for achieving moral autonomy, why should requiring violators of the rules either to supply accurate information or risk punishment for silence or perjury be thought to do so?

## ARGUMENTS AGAINST THE PRIVILEGES

3.53 Despite its widespread acceptance in democratic societies, the privilege against self-incrimination has been criticised for what is perceived by some as its adverse impact on the criminal justice system.

### The effect on the prosecution's ability to collect evidence

3.54 The privilege has been subject to the criticism that it has the capacity to defeat the purpose of the criminal justice system by denying it access to a

<sup>151</sup> Dennis I, "Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-incrimination" (1995) 54 *Cambridge Law Journal* 342 at 357.

<sup>152</sup> Id at 358. See also Schulhofer S, "Some Kind Words for the Privilege Against Self-incrimination" (1991) 26 *Valparaiso University Law Review* 311 at 319-320.

<sup>153</sup> Gerstein RS, "Privacy and Self-incrimination" (1970) 80 *Ethics* 87 at 93.

<sup>154</sup> Dolinko D, "Is there a Rationale for the Privilege against Self-incrimination?" (1986) 33 *UCLA L Rev* 1063 at 1144.

valuable source of cogent evidence about the commission of an offence.<sup>155</sup> An individual who has committed an offence will be uniquely placed because of his or her knowledge of events. This is particularly so in relation to offences “which occur in private and which may leave little or no tangible trace of their occurrence.”<sup>156</sup>

3.55 The loss of perhaps the only reliable evidence of guilt was a significant factor in the High Court’s decision that the privilege did not apply to corporations.<sup>157</sup>

3.56 According to one commentator:<sup>158</sup>

In order to insure that a great private interest is protected when the public need for information is small, it denies a great public need when the private interest is small.

3.57 The penalty privilege has also been criticised for its potential to detract from the effectiveness of legislative regulatory schemes.<sup>159</sup>

### The effect on victims’ rights

3.58 The privilege may also give rise to a perception that, where an offence has been committed that has resulted in harm to a victim, the rights of the perpetrator are given priority over those of the victim:<sup>160</sup>

... it is extremely hard to see how the state can justify giving priority to the interests of guilty suspects over those of their victims. From the perspective of the victim there is a double wrong perpetrated if the state refuses to vindicate the victim by placing evidential pressure on the offender to admit the offence.

### SUBMISSIONS

3.59 The Bar Association of Queensland recognised two rationales for the continued existence of the privilege against self-incrimination. It expressed the view that, because the financial and other resources of the state create a power imbalance between the state and the individual, the traditional rationale - the abuse or potential abuse of power by the state - still has relevance in

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<sup>155</sup> Dennis I, “Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-incrimination” (1995) 54 *Cambridge Law Journal* 342 at 354-355.

<sup>156</sup> Id at 354.

<sup>157</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477. See para 11.10-11.11 of this Report.

<sup>158</sup> McNaughton J, “The Privilege Against Self-incrimination: Its Constitutional Affection, Raison d’Etre and Miscellaneous Implications” (1960) 51 *J Crim L, Criminology & Police Sci* 138 at 150.

<sup>159</sup> *Rich and Another v Australian Securities and Investments Commission* (2004) 209 ALR 271 per Kirby J (dissenting) at [124].

<sup>160</sup> Dennis I, “Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-incrimination” (1995) 54 *Cambridge Law Journal* 342 at 359.

contemporary society. It also suggested that the modern rationale for the privilege “lies in the acceptance of the inviolability of the human personality.”<sup>161</sup>

3.60 Queensland Transport submitted that the most relevant rationales for the privilege are to protect against punishment for refusing to testify, for conviction based on truthful testimony that provides evidence of guilt, or for perjury for testifying untruthfully in an attempt to avoid providing evidence of guilt; to uphold the criminal onus of proof and to ensure that an accused or a suspect cannot be compelled to provide evidence against him or herself; to encourage witnesses to testify; and to help to protect and maintain the quality of evidence by preventing “tainted” evidence from a witness who might commit perjury for fear of prosecution. The respondent considered that the first and last of these rationales demonstrate that there is a need, in the interests of fairness and equality, to achieve a balance between the protection of the individual and the protection of the quality of evidence. It also suggested that the first and second rationales may be less important in the investigation of relatively minor offences.<sup>162</sup>

3.61 The Department of Tourism, Racing and Fair Trading observed that the privilege against self-incrimination is regarded as a protection from the intrusive power of the state and as a human right that should not be removed lightly.<sup>163</sup>

## THE COMMISSION’S VIEW

3.62 During the period in which the privileges have evolved,<sup>164</sup> the political, legal and social landscapes in which they operate have changed dramatically. Nonetheless, the privileges have remained a significant source of protection for citizens who find themselves having to provide answers or information that might result in their conviction for a criminal offence or in the imposition of a penalty.

3.63 The survival of the privileges is due in large measure to their ability to adapt to different circumstances. However, the process of adaptation means that there is no single rationale that can be said to underpin their existence in every situation.

3.64 The Commission recognises that, in certain circumstances, some of the rationales outlined in this chapter will be more relevant than others, and that some may be of very limited relevance. The Commission also recognises that, depending on the situation, the validity of each of the rationales may be subject to criticism.

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161 Submission 12.

162 Submission 2.

163 Submission 5.

164 The historical origins of the privileges are discussed in Chapter 2 of this Report.

3.65 However, in the view of the Commission, the fact that it is impossible to identify one rationale for the privileges' continued existence in every situation does not mean that they lack justification. Nevertheless, the Commission acknowledges that, in particular circumstances, the weight to be accorded to the rationales may not provide sufficient support to prevent the abrogation of either or both of the privileges.

# Chapter 4

## The kind of information protected

### INTRODUCTION

4.1 The privilege against self-incrimination and the penalty privilege do not apply in all situations where an individual is required to provide information in response to the exercise of an investigative power. There are some kinds of information that are outside the scope of their protection.

4.2 The privileges protect an individual only from compulsion to disclose information that would be likely to incriminate the individual or to expose him or her to a penalty. The privilege against self-incrimination, for example, has been said to be “designed not to provide a shield against conviction but to provide a shield against conviction by testimony wrung out of the mouth of the offender.”<sup>165</sup> The application of the privileges is therefore limited to information the provision of which depends on an act of communication on the part of the individual from whom the information is sought.

### INFORMATION THAT IS NOT PROTECTED

4.3 Because the essence of the privileges is protection against compelled communication of information, the privileges do not apply to information about an individual that can be obtained from that individual in a way that does not require it to be communicated by the individual.

#### Information that can be otherwise obtained

4.4 Where information about an individual is obtained from that individual without the individual’s participation, the individual is not required to incriminate himself or herself or to expose himself or herself to a penalty. In such a situation, because the individual is not required to engage in an act of communication, there is no room for the operation of the privileges.

4.5 Privilege therefore does not apply to information that can be obtained by means such as seizure under a search warrant:<sup>166</sup>

... a potential claimant of the privilege is not directly asked to perform any incriminating act where the seizure of documents is concerned and therefore he or she is disqualified from claiming the privilege against self-incrimination from the outset.

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<sup>165</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Brennan J at 514.

<sup>166</sup> McNicol S, *Law of Privilege* (1992) at 208. See also *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 per Gibbs CJ, Mason and Dawson JJ at 392-393.

## “Real” evidence

4.6 The common law draws a distinction between, on the one hand, information that an individual is asked to communicate in the context of an inquiry or an investigation and, on the other, “real” evidence provided by the individual, which has an actual physical existence apart from the individual’s act of communication. It is only the former that, because of its “testimonial” nature, can attract privilege. Privilege does not apply to “real” evidence.<sup>167</sup>

4.7 Thus, for example, while the privilege against self-incrimination applies to self-incriminating information of a testimonial kind, it will not protect an individual from an obligation to provide certain other kinds of evidence such as fingerprints or a blood sample or to undertake a breath test.<sup>168</sup>

If forced from a prisoner [a self-incriminating statement] requires him to create evidence against himself, possibly in circumstances where he makes a statement not in accordance with facts. On the other hand, a fingerprint or some physical feature is already in existence; it exists as a physical fact, and is not susceptible of misrepresentation in any relevant sense.

## DOCUMENTARY EVIDENCE

4.8 The distinction between “testimonial” and “real” evidence can be problematic in relation to documentary material.

4.9 Unless abrogated by statute, the privilege against self-incrimination and the penalty privilege apply to documents that an individual is required to produce. However, it has been recognised that some documents are “in the nature of real evidence which speak for themselves.”<sup>169</sup> The application of the privilege against self-incrimination to documentary material has therefore been described as “more far reaching in the protection which it gives”<sup>170</sup> than its application to oral answers.<sup>171</sup>

It is one thing to protect a person from testifying to guilt; it is quite another thing to protect a person from the production of documents already in existence which constitute evidence of guilt, especially documents which are in the nature of *real* evidence. ... [original emphasis]

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167 *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 292.

168 *R v McLellan* [1974] VR 773 per Gowans, Nelson and Anderson JJ at 777. See also *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 292.

169 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 502. See also per Deane, Dawson and Gaudron JJ at 527 and per McHugh J at 555.

170 *Id* per Mason CJ and Toohey J at 502.

171 *Ibid*.



4.10 This problem is particularly acute in relation to corporations, where the best, and sometimes only, available evidence of corporate wrongdoing is in documentary form:<sup>172</sup>

Corporate conduct is often complex. Assessment of a corporation's conduct may only be possible through an examination of its documents. ... A true understanding of the corporation's procedures is likely to be gained only through evidence from the corporation itself, particularly from its records. [note omitted]

4.11 It can also arise in the context of a legislative regulatory scheme, where one of the requirements of participation in the regulated activity is the keeping of specified records. In such a situation, it might be argued that the keeping and production on demand of the records are conditions of authorisation to participate in the activity in question, and that participation therefore involves the waiver of the right to refuse to produce the records on the grounds of self-incrimination or self-exposure to a penalty. It might also be argued that to allow a claim of privilege in relation to such records would thwart the purpose of the legislation, since it would facilitate a failure to keep the records, or their destruction or falsification, with little fear of detection.

4.12 These considerations have given rise to an argument that there may be a case for abrogating the privileges in relation to certain documents:<sup>173</sup>

Plainly enough the case for protecting a person from compulsion to make an admission of guilt is much stronger than the case for protecting a person from compulsion to produce books or documents which are in the nature of real evidence of guilt and not testimonial in character.

4.13 For example, in the United States of America, documents required to be kept as part of a valid legislative regulatory scheme are not protected by the privilege against self-incrimination.<sup>174</sup>

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172 Id per McHugh J at 554. The availability of the privilege against self-incrimination and the penalty privilege to a corporation is discussed in Chapter 11 of this Report.

173 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 503.

174 *Wilson v United States* 221 US 361 (1911); *Shapiro v United States* 335 US 1 (1948).

## Chapter 5

# The type of forum where the privileges may apply

### THE PRIVILEGE AGAINST SELF-INCRIMINATION

#### The type of forum where the privilege may be claimed

5.1 Until comparatively recently, the development of the privilege at common law “did not purport to extend the privilege to qualify an inquisitorial power not under judicial control.”<sup>175</sup> The widely accepted view was that the privilege against self-incrimination was a rule of evidence regulating the admissibility of evidence in judicial and quasi-judicial proceedings,<sup>176</sup> and that the scope of its protection was limited to such proceedings.<sup>177</sup>

5.2 It was also thought that there were practical reasons why the privilege against self-incrimination could not apply in non-judicial proceedings. Concerns were expressed about how, in the absence of a judge, a claim for privilege could be adequately dealt with:<sup>178</sup>

There is in addition the problem of deciding whether it is for the authority requiring the answer, production of documents or the provision of information, or the court in subsequent proceedings by way of prosecution for an offence, to decide whether the claim for privilege is correctly made. It is difficult to suppose that the determination is to be left to an unqualified person. And there are practical problems in leaving the determination of the correctness of the claim for privilege to a court in proceedings by way of prosecution for the offence of refusing to answer questions, provide information or produce documents.

5.3 It was only in the 1980s that this view gave way to judicial acceptance that the privilege against self-incrimination is too important to be categorised as merely a rule of evidence, applicable only in judicial or quasi-judicial proceedings,<sup>179</sup> and that it is part of “the common law of human rights.”<sup>180</sup> Accordingly, it has been held that the privilege can apply outside judicial

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175 *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Brennan J at 319.

176 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 340.

177 *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Brennan J at 319.

178 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 340. See also per Brennan J at 355-356. See also *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Brennan J at 321.

179 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 340.

180 *Id* per Murphy J at 346.

proceedings.<sup>181</sup> However, even though the privilege is capable of applying in non-judicial inquiries and investigations, it may be abrogated by legislation.<sup>182</sup>

## THE PENALTY PRIVILEGE

### The availability of the penalty privilege

5.4 The current extent of the availability of the penalty privilege is not entirely clear. Although its protection was originally limited to court proceedings, it was subsequently considered to have a wider application. However, more recently, doubt has been cast on the question of whether it is available in an extra-judicial context.

### Extension of the privilege

5.5 In *Pyneboard Pty Ltd v Trade Practices Commission and Another*,<sup>183</sup> the High Court considered whether the protection of the penalty privilege was confined to judicial proceedings and was, as a consequence, inherently incapable of application in a non-judicial context.<sup>184</sup> The majority concluded:<sup>185</sup>

... we are not prepared to hold that the privilege is inherently incapable of application in non-judicial proceedings. The issue of its availability in these proceedings therefore falls to be decided by reference to the statute itself.

5.6 Because the majority found that, in the circumstances of the case, the penalty privilege had been impliedly abrogated,<sup>186</sup> it was not necessary to decide whether it would otherwise have been available.

5.7 Although the majority in *Pyneboard* did not specifically state that the penalty privilege was available in non-judicial proceedings, the judgment was subsequently interpreted in this way:<sup>187</sup>

... *Pyneboard* establishes that the privilege against exposure to a civil penalty is not confined in its application to discovery, interrogatories or testimonial disclosures. It is a general privilege which, absent a contrary legislative indication, may be invoked outside the course of judicial proceedings whenever

181 Id per Mason ACJ, Wilson and Dawson JJ at 341 and per Murphy J at 347. See also *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Mason, Wilson and Dawson JJ at 309 and per Murphy J at 311.

182 See para 2.33-2.36 of this Report.

183 (1983) 152 CLR 328.

184 Id per Mason ACJ, Wilson and Dawson JJ at 337.

185 Id per Mason ACJ, Wilson and Dawson JJ at 341.

186 Id per Mason ACJ, Wilson and Dawson JJ at 345. See also per Murphy J at 347.

187 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per McHugh J at 547.

a person is asked to answer questions or provide information which may tend to expose that person to a penalty.

### The present position

5.8 The High Court has since cast doubt on this interpretation of the majority decision in *Pyneboard*.<sup>188</sup>

... [the statement in *Pyneboard*] does not amount to a holding that the privilege is available in non-judicial proceedings.

5.9 In the later case, the majority noted in relation to the penalty privilege:<sup>189</sup>

... there seems little, if any, reason why that privilege should be recognised outside judicial proceedings. Certainly, no decision of this court says it should be so recognised, much less that it is a substantive rule of law.

5.10 However, the case in question involved a claim for legal professional privilege and therefore did not directly concern the penalty privilege.

5.11 More recently, in a decision dealing with a different aspect of the penalty privilege, the majority of the High Court found it unnecessary to consider the wider question of the application of the privilege beyond judicial proceedings.<sup>190</sup>

5.12 Consequently, there is some uncertainty as to whether the penalty privilege is available in non-judicial proceedings.

5.13 The Australian Law Reform Commission, in its review of civil and administrative penalties in Australia, expressed the view that the penalty privilege is a basic and important right that should be given a “clear statutory imprimatur.”<sup>191</sup> It recommended that “the same protections for individuals afforded by the privilege against self-incrimination in criminal matters apply in relation to the imposition of a civil or administrative penalty.”<sup>192</sup>

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188 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [15].

189 *Id* at [31].

190 *Rich and Anor v Australian Securities and Investments Commission* (2004) 209 ALR 271 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at [24].

191 Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at para 18.59.

192 *Id*, Recommendation 18-1 at 662.

## SUBMISSIONS

5.14 The Queensland Law Society expressed the view that it is inherently unfair to compel an individual to provide information that results in his or her own exposure to a penalty. The Society therefore considered that the penalty privilege should be available in any circumstance where a penalty may be imposed.<sup>193</sup>

Not only should it be available in a Tribunal but it should also be available in dealings with an investigator.

5.15 On the other hand, the Public Service Commissioner advised the Commission:<sup>194</sup>

Our experience in relation to privilege has been in the context of investigations in the workplace concerning disciplinary matters. Public service employees have occasionally sought to rely on privilege to avoid answering questions about the performance of their duties on the ground that the answers may incriminate them.

...

I believe the continued abrogation (of the privilege against self-incrimination) to be a necessary cornerstone of public service management. In this context it is difficult to support the availability of penalty privilege beyond judicial proceedings.

## THE COMMISSION'S VIEW

5.16 In an era of increasing governmental regulation of many aspects of everyday life, civil penalties are a useful tool for securing compliance with a regulatory scheme. Legislation may provide for civil proceedings for the imposition of a penalty as an alternative, or in addition, to criminal liability for non-compliance. Although the imposition of a penalty does not result in a criminal conviction or the possibility of imprisonment, the consequences can nonetheless be extremely serious for the individual concerned. They can include an obligation to pay a pecuniary penalty, dismissal from employment in the public service or disqualification from engaging in a professional activity. In some circumstances, the outcome of the imposition of a penalty may be as onerous for the individual as a criminal conviction.

5.17 In the early stages of an investigation, it may not yet be apparent to the investigator nor to the individual concerned what kind of action, if any, is likely to be taken against the individual. As a result, the exercise of investigative powers by administrative or regulatory authorities may create a significant risk that an individual will be compelled to provide, in a non-judicial context, information that

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193 Submission 13.

194 Letter from the Public Service Commissioner dated 1 November 2004.

might expose the individual to a penalty. There may also be a risk that, if the privilege against self-incrimination applies to an investigation but the penalty privilege does not, derivative use could be made of information provided by an individual to discover further material that might expose the individual to prosecution for a criminal offence.

5.18 Further, the enforcement mechanism provided by the legislative scheme in question may not always involve a judicial proceeding. A civil penalty may be imposed on an individual as the result of, for example, an administrative or disciplinary proceeding. In the absence of the availability of the penalty privilege, an individual would have no protection against a requirement to provide information that must, inevitably, have the consequence of the imposition of the penalty.

5.19 The Commission is therefore concerned about the current uncertainty in the law in relation to the availability of the penalty privilege outside judicial proceedings.

5.20 The Commission acknowledges that to give statutory recognition to the penalty privilege in situations other than judicial proceedings may be to confer a right that is ultimately found not to exist at common law. However, in view of the close and long-standing association between the privilege against self-incrimination and the penalty privilege, and of the reasons underlying that association,<sup>195</sup> the Commission believes that the penalty privilege, in the absence of an express provision to the contrary, should be available not only in court proceedings but also to an individual who is required to provide information to a non-judicial inquiry or investigation.

5.21 The Commission is also of the view that the existing confusion about the availability of the privilege is likely to make it difficult for people to ascertain with any degree of confidence the true extent of their rights. It considers that statutory clarification of the situation would promote certainty and consistency in the law and therefore be in the overall interests of justice.

## RECOMMENDATION

**5-1 The Commission recommends that, in the absence of an express provision to the contrary, the penalty privilege should be available in non-judicial proceedings and investigations as well as in judicial proceedings.**

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See para 2.26-2.32 of this Report.

# Chapter 6

## Justifications for abrogation

### INTRODUCTION

6.1 The Commission's terms of reference require the Commission to examine the bases upon which the privilege against self-incrimination has been abrogated by existing Queensland legislative provisions, and to recommend whether, in fact, there is ever justification for the abrogation of the privilege.<sup>196</sup>

6.2 As explained in Chapter 2 of this Report, there is no doubt that, at common law, the parliament has power to enact legislation that abrogates, either expressly or by implication, the privilege against self-incrimination and the penalty privilege.<sup>197</sup> In order to determine whether the legislative abrogation of either or both of the privileges is justified, it is necessary to consider the comparative weight of a number of competing public interests.

6.3 In relation to the privilege against self-incrimination there is, on the one hand, the public interest in upholding the policies that underlie what has come to be judicially recognised as an important individual human right. On the other hand, there is a public interest in ensuring that relevant authorities have adequate powers to inquire into and monitor activities that give rise to issues of significant public concern.<sup>198</sup>

The courts have clearly expressed the view that the privilege against self-incrimination is an important human right. Yet the legislature must balance other public interest considerations against the protection of individual human rights. In the field of regulation, one crucial public interest is securing effective compliance or prosecutions. The policy question for the legislature is to decide in what circumstances public interest considerations should overrule human rights protection, and whether the regulation of particular activities mandates different considerations. [note omitted]

6.4 Although to date the penalty privilege has not received judicial recognition as a substantive right, but is regarded more as a rule of evidence,<sup>199</sup> similar considerations may arise in relation to its abrogation. In some situations the privilege may be an important protection against compulsion to provide to an investigator or a regulatory authority information tending to result in self-exposure to a penalty. The Australian Law Reform Commission has noted that

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<sup>196</sup> The full terms of reference are set out at para 1.1 of this Report.

<sup>197</sup> However, see the Commission's recommendations in Chapter 7 of this Report in relation to implied abrogation of the privilege against self-incrimination and the penalty privilege.

<sup>198</sup> Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at para 18.21.

<sup>199</sup> See para 5.4-5.12 of this Report for a discussion of the availability of the penalty privilege. See also Recommendation 5-1 at page 42 of this Report.

some civil and administrative penalties carry consequences that are just as serious as traditional criminal punishments. It suggested that readiness to remove the privilege more easily in relation to non-criminal penalties may require reassessment in the light of the convergence of the severity of criminal punishments and non-criminal penalties.<sup>200</sup> Yet there is also a need for certain regulatory authorities to have sufficient powers to secure compliance with legislative schemes that have been created to protect other public interests.

6.5 In this chapter, the Commission considers the balance between, on the one hand, the protection conferred by the privileges and, on the other, the development of stronger investigative and regulatory powers, as well as the circumstances, if any, in which the need for those investigative and regulatory powers may be sufficient to justify abrogation of either or both of the privileges.

## THE BALANCE BETWEEN COMPETING INTERESTS

6.6 In general terms, the abrogation of the privilege against self-incrimination is usually said to be justified in circumstances where the public interest in obtaining information is greater than the public interest in providing protection from compelled self-incrimination. Similarly, abrogation of the penalty privilege may be justified if the public interest in the ability of an investigative or regulatory authority to access the information it needs to be able to perform its functions effectively outweighs the public interest in upholding the privilege.

6.7 The process of weighing these competing public interests involves consideration of the contemporary and contextual relevance of the policies that underlie the privileges, of the extent of the protection granted in exchange for the loss of privilege and of the weight of the issues giving rise to the perceived need for power to compel the provision of information.

### The underlying policies

6.8 The public interest in upholding the privilege against self-incrimination and the penalty privilege is based on preserving the policies that underlie the privileges. The principal rationales for the privileges - both historic and contemporary - were discussed in Chapter 3 of this Report.

6.9 In considering the weight to be attributed to the policy bases that support the privileges, it must be remembered that, whatever the true explanation for their origin,<sup>201</sup> the current political conditions and the present legal system are vastly different from those prevailing at their inception. The

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Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at para 18.20.

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See para 2.5-2.19 of this Report.



New Zealand Law Commission observed:<sup>202</sup>

The privilege against self-incrimination arose in a time when the consequences of incrimination were harsh. Many current applications of the privilege have moved far from the historical roots of the privilege. ... there is a strained artificiality in modern applications of the privilege in which the potential detrimental effect of the incrimination involved is minimal.

6.10 In the circumstances of a particular situation, some of the rationales for the existence of either or both of the privileges may therefore no longer be as compelling as they once were.<sup>203</sup>

... the protection afforded by the privilege is now so far reaching that it has been described as protection against being compelled to say anything which “may tend to bring him into the peril and possibility of being convicted as a criminal” or as protection “against exposure to conviction for a crime”. ...

... the protection now conferred by the privilege extends well beyond the objects originally sought to be achieved by way of protecting natural persons from the abuses which necessitated the introduction of the privilege. [notes omitted]

6.11 On the other hand, in an era of increased legislative regulation and demands for greater investigative powers for regulatory authorities, there remains a need for protection against the way in which these powers may be exercised.

### The extent of protection

6.12 Legislation abrogating the privileges may include provisions designed to limit the potentially adverse effects of the abrogation by providing procedural and other safeguards that reflect the policies on which the privileges are based.

6.13 Procedural safeguards may include factors such as the need for an individual to be given reasonable notice of the requirement to produce information, for the time and location for giving the information to be specified, and for the general nature of the required information to be identified. This kind of compensation for the loss of privilege may alleviate concerns about potential abuse of powers of interrogation and about infringement of rights to personal liberty and privacy.

6.14 Other safeguards may include the provision of an immunity against the future use of information obtained as a result of the abrogation. An immunity protects against the use of the information, either as evidence against the individual who gave it (a “use immunity”) or, in some cases, as a lead to

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Law Commission (NZ), Report, *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at 76.

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*Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 502.

uncover further information that might be used as evidence against the individual (a “derivative use immunity”). It has been said that:<sup>204</sup>

The essentials of the privilege are not necessarily sacrificed by requiring disclosure of information when the use to which it is put is controlled and limited. Requiring disclosure under such limitations can provide relief from the necessity of choosing between complete protection and no protection at all, between a person’s right to remain silent and the government’s right to compel incriminating information and to use it for all purposes including criminal prosecution.

6.15 The existence of an immunity may also lessen the impact of the abrogation of the privilege against self-incrimination on the essential nature of the criminal justice system. The effect of the immunity would be that, if an accused had been required to provide self-incriminating information, the information could not be used directly or, depending on the scope of the immunity, indirectly to prove his or her guilt. To convict the accused of the alleged offence, the prosecution would have to rely on evidence provided by sources other than the accused, and so the risk that the onus of proof would be affected by the abrogation of the privilege would be avoided.

6.16 In an action for a penalty - a proceeding which, although following civil procedures, has been likened to a criminal prosecution<sup>205</sup> - the imposition of the penalty would also depend on independently obtained proof.

6.17 Further, restraints on the use of information obtained under a power of compulsion are likely to relieve the individual who provided the information of the need to make the invidious choice between self-exposure to conviction or the imposition of a penalty, the consequences of committing perjury or another offence for giving false information, and the risk of punishment for refusing to provide the information.

### **The issues giving rise to the need for power to compel the provision of information**

6.18 In some situations relevant authorities may need adequate powers to inquire into and monitor activities that give rise to issues of significant public concern, or to ensure compliance with a regulatory scheme intended to protect or further an important public interest.

6.19 For example, an Act may regulate road use throughout the State. It may give powers to certain officers in relation to the investigation of dangerous situations involving the transport of goods by road. In the event of an accident that resulted in the spill of a hazardous chemical, issues may arise in relation to

<sup>204</sup> Mansfield J, “The Albertson Case: Conflict Between the Privilege against Self-incrimination and the Government’s Need for Information” (1966) *Sup Ct Rev* 103 at 160. The terms “use immunity” and “derivative use immunity” are explained at para 2.47-2.58 of this Report. Specific issues in relation to the provision of an immunity are considered in Chapter 9 of this Report.

<sup>205</sup> See para 2.29-2.30 of this Report.

the safety of other road users, the health and safety of people in the immediate vicinity, the risk of damage to property or the impact on the environment. It would obviously be crucial to identify the chemical in order to allow appropriate action to be taken. The weight of the public interest in the issues involved may therefore justify the grant to an officer authorised under the Act of the power to require an individual likely to have knowledge of the identity of the spilled substance to answer questions or to produce documents, even though that information might show that the individual who provided it had committed an offence, or might be liable to a penalty.

6.20 Similarly, an Act may be designed to protect the health and safety of people at coal mines and of people affected by coal mining operations. The Act may confer certain powers in relation to the investigation of accidents or incidents at coal mines. If, for example, there were an explosion at a coal mine, it would be necessary to determine the cause of the problem so as to address any immediate risk to life or property and to identify ways of eliminating, or at least reducing, the likelihood of a future recurrence. It may therefore be in the overall public interest for an investigator to be able to compel an individual who might have relevant information about the explosion to disclose that information, even though, by so doing, the individual might incriminate himself or herself, or expose himself or herself to a penalty.

6.21 Where, as in the above scenarios, the disclosure of information is an incidental by-product of an investigation directed at ascertaining facts, rather than securing a conviction or the imposition of a penalty, the public interests protected by the legislation in question may justify the abrogation of the privilege.<sup>206</sup>

... in a great many situations, ..., use of incriminating information for purposes other than prosecution will satisfy the reason for compelling disclosure.

6.22 The information that an individual is required to disclose may also be the by-product of compliance with a regulatory requirement, such as keeping prescribed records. In such a situation, the importance placed on the regulation of a particular activity may justify the loss of protection against self-incrimination or self-exposure to a penalty that occurs as a result of a statutory obligation to produce those records.<sup>207</sup>

## THE CIRCUMSTANCES IN WHICH ABROGATION MAY BE JUSTIFIED

6.23 The range of rationales for the existence of the privileges and the variety of situations in which they may be invoked make it difficult to express a simple formula about the circumstances in which abrogation might be justified.

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<sup>206</sup> Mansfield J, "The *Albertson* Case: Conflict Between the Privilege against Self-incrimination and the Government's Need for Information" (1966) *Sup Ct Rev* 103 at 166.

<sup>207</sup> In the United States of America, this is known as the "required records" doctrine, which excludes such documents from the ambit of the privilege. See for example *Shapiro v United States* 335 US 1 (1948).

6.24 The New Zealand Law Commission proposed the following factors for consideration in determining whether removal or limitation of the privilege against self-incrimination would be appropriate in a given context:<sup>208</sup>

- the nature and the degree of the risk of self-incrimination in the particular circumstances;
- the necessity of the self-incriminatory disclosures for the effective performance of statutory functions or determination of material issues in proceedings;
- whether or not an alternative legal means of obtaining the necessary information (for example, the issue of a search warrant or the existence of real evidence) is available;
- whether or not the privilege provides important protections at the time when the disclosure is sought (for example, whether there is a prospect of abusive questioning techniques), which an immunity cannot provide; and
- whether or not any immunity provided in place of the privilege (that is, a use immunity or a derivative use immunity) can guarantee sufficient protection to the individual in the circumstances.<sup>209</sup>

6.25 In Queensland, the Scrutiny of Legislation Committee of the Queensland Legislative Assembly<sup>210</sup> has developed criteria for determining whether proposed legislation contains “appropriate” protection against self-incrimination as required by the *Legislative Standards Act 1992* (Qld).<sup>211</sup> In the view of the Committee, denial of the protection afforded by the privilege against self-incrimination is potentially justifiable only if:<sup>212</sup>

- the questions posed concern matters which are peculiarly within the knowledge of the persons to whom they are directed, and which it would be difficult or impossible to establish by any alternative evidentiary means; and

<sup>208</sup> Law Commission (NZ), Discussion Paper, *The Privilege against Self-Incrimination* (NZLC PP 25, 1996) at 86-87, 91.

<sup>209</sup> Issues in relation to the provision of an immunity are considered in Chapter 9 of this Report.

<sup>210</sup> The role of this Committee is discussed at para 2.41-2.42 of this Report.

<sup>211</sup> *Legislative Standards Act 1992* (Qld) s 4(3)(f).

<sup>212</sup> Queensland Parliament, Scrutiny of Legislation Committee, *Report on the Queensland Building Tribunal Bill 1999* (Alert Digest No 13 of 1999 at 31-32); *Report on the Guardianship and Administration Bill 1999* (Alert Digest No 1 of 2000 at 7-8); *Report on the Coroners Bill 2002* (Alert Digest No 1 of 2003 at 7-8).

- the proposed legislation prohibits the use of information obtained in prosecutions against the person,<sup>213</sup> and
- in order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any conditions (such as formally claiming the right).

## THE DISCUSSION PAPER

6.26 In the Discussion Paper,<sup>214</sup> the Commission suggested that justification for abrogation in a particular case would require an identification of the public interest at stake, consideration of any evidence that abrogation had in fact been shown to advance the public interest, and persuasion that there were no other effective means by which the information could be obtained.<sup>215</sup>

6.27 The Commission noted that determination of whether abrogation could be justified might therefore involve a case by case assessment of issues such as:<sup>216</sup>

- the rationales for the privilege in general, and the specific rationales that have relevance to the particular situation;
- the justification advanced for abrogating the privilege;
- whether the extent of the abrogation is no more than necessary to achieve the public interest supporting the abrogation; and
- whether adequate safeguards exist to minimise the potentially adverse effects of abrogation.

6.28 Submissions were sought on the following issues:

- whether, in relation to the provisions identified in Chapters 4 to 8 of the Discussion Paper, the matters put forward by the various government departments justified the abrogation of the privilege; and
- whether there were any other matters, such as the provision of procedural safeguards, that might justify the abrogation of the privilege.

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213 Issues in relation to the provision of an immunity are considered in Chapter 9 of this Report.

214 Queensland Law Reform Commission, Discussion Paper, *The Abrogation of the Privilege Against Self-Incrimination* (WP 57, August 2003).

215 Id at 178.

216 Id at 179.

## SUBMISSIONS

### Privilege against self-incrimination

6.29 A number of submissions expressed concern at the extent to which the privilege against self-incrimination has been eroded by legislation that confers regulatory and investigative powers.<sup>217</sup> The Bar Association of Queensland, for example, commented:<sup>218</sup>

In many cases, the alleged conduct the subject of investigation is not of sufficient widespread, general public interest as to justify a conclusion that the public interest in determining the truth of the alleged conduct outweighs the individual's privilege against self-incrimination.

The fact that a body is charged with the obligation to investigate potential offences, and that investigation may be hampered by reliance on the privilege against self-incrimination, can not, and should not, justify the abrogation of that privilege.

6.30 The Queensland Law Society observed:<sup>219</sup>

... the privilege against self-incrimination is a substantive human right. Governments should be extremely cautious about removing or tampering with a human right, in whatever context that might occur.

6.31 The submissions that considered the justifications put forward in the Discussion Paper for existing Queensland provisions that abrogate the privilege against self-incrimination acknowledged the need to balance the individual right not to provide self-incriminating information against the public interest in the investigation of matters of public importance.<sup>220</sup> One respondent observed:<sup>221</sup>

Whilst it is important that the public interest issue be appropriately recognized and addressed, the rights of the individual should not be unnecessarily minimized, diminished or displaced.

6.32 Not surprisingly, the submissions revealed a difference of opinion with respect to the weight that the respondents considered should be given, in resolving the tension between the competing interests, to individual rights on the one hand and to the broader public interest on the other.

6.33 The Bar Association of Queensland submitted that abrogation of the privilege against self-incrimination could be justified only "where the public

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217 Submissions 8, 10, 12.

218 Submission 12.

219 Submission 13.

220 Submissions 2, 5, 8, 9, 12, 13.

221 Submission 8.

interest far outweighs retention of the privilege”.<sup>222</sup> As an example of a situation that would satisfy this test, the Association identified circumstances involving “an allegation of general, widespread or institutionalized misconduct considered to be of sufficient general importance to warrant establishment of a Commission of Inquiry.”

6.34 However, the Department of Tourism, Racing and Fair Trading, as an agency with a strong regulatory focus, considered that some abrogation or modification of the privilege was often necessary to obtain information to ensure that alleged or potential wrongdoing in the marketplace could be thoroughly investigated.<sup>223</sup>

6.35 Some respondents supported the criteria established by the Scrutiny of Legislation Committee of the Queensland Legislative Assembly,<sup>224</sup> and those proposed by the New Zealand Law Commission.<sup>225</sup>

6.36 Two respondents referred to the need for procedural safeguards in the way self-incriminating information is obtained.<sup>226</sup> One of these respondents, a youth legal service, also expressed the view that abrogation would not be appropriate in circumstances where alternative investigative methods, such as search warrants, are available.

6.37 Some respondents identified additional criteria as potential justifications for abrogation.

6.38 In the view of the Queensland Law Society, consideration should be given to the question of “whether the public interest is advanced by abrogation”. The Law Society proposed a test:<sup>227</sup>

... based on an assessment of available evidence that demonstrates the need for the abrogation and the real results that would be expected to be achieved by any abrogation.

6.39 The Department of Tourism, Racing and Fair Trading noted an increasing trend toward development of legislation consistent with that of other States and Territories. It cited the agreement between the States and Territories to adopt certain core provisions of the *Cooperatives Act 1996 (Vic)* that abrogate the privilege:<sup>228</sup>

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222 Submission 12.

223 Submission 5.

224 Submission 9. The criteria are set out at para 6.25 of this Report.

225 Submissions 9, 13. The criteria are set out at para 6.24 of this Report.

226 Submissions 9, 10.

227 Submission 13.

228 Submission 5.

It was a recommendation of a working party of the Standing Committee of Attorneys-General for cooperatives legislation, that any changes to the core consistent provisions would require the approval of a simple majority of the members of the Ministerial Council for Co-operatives Laws. If the abrogation ... was removed from the Queensland legislation, it would be inconsistent with other Cooperative legislation throughout Australia.

6.40 Queensland Transport was of the view that, in most cases concerning the investigation of an offence, abrogation would be justified by the grant of an immunity to the witness.<sup>229</sup>

6.41 Another respondent supported abrogation of the privilege in cases of serious financial dishonesty.<sup>230</sup>

### **The penalty privilege**

6.42 The Queensland Law Society considered that there may be policy arguments in favour of a less stringent set of criteria to justify the abrogation of the penalty privilege. However, the Law Society had practical concerns about this approach:<sup>231</sup>

... there are significant difficulties particularly where the matter is one which is amenable either to penalty provisions or criminal prosecution or where the penalty provision investigation may unearth information which could lead to a criminal prosecution.

6.43 The Society therefore concluded that it would “safer” and would “create less risk of inconsistency” to adopt a uniform test.

## **THE COMMISSION’S VIEW**

### **The need for legislative criteria**

6.44 The Commission shares the view of those respondents who expressed concern at the extent to which the privilege against self-incrimination has been legislatively abrogated in Queensland. The Commission’s review of Queensland provisions that abrogate the privilege has led it to conclude that, in many instances, those provisions may have been routinely adopted without adequate thought having been given to the justification for the abrogation. In the Commission’s view, such a situation is highly undesirable.

6.45 The Commission therefore believes that there is a need for the introduction of legislative criteria for determining whether the inclusion of an abrogation provision can be justified. In the view of the Commission, the only

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229 Submission 2.

230 Submission 10.

231 Submission 13.



current mechanism for monitoring the implementation of legislation that abrogates the privilege against self-incrimination is inadequate to ensure effective protection against the enactment of abrogation provisions in circumstances where the abrogation may not be able to be justified.<sup>232</sup>

6.46 The Commission is also of the view that there is a need for legislation to clarify the situation with respect to the circumstances in which abrogation of the penalty privilege is justified. Because of the inter-related nature of the privilege against self-incrimination and the penalty privilege, and because of the potentially serious impact of the imposition of a penalty in some situations, the Commission is of the view that, in any consideration as to whether the abrogation of the penalty privilege can be justified, the same factors should be taken into account as are relevant to the justification of the abrogation of the privilege against self-incrimination. This is especially so since it has been held that abrogation of the privilege against self-incrimination will impliedly abrogate the penalty privilege.<sup>233</sup>

6.47 In considering the circumstances in which abrogation of the privileges might be justified, the Commission has had regard to the factors put forward by the New Zealand Law Commission as relevant to abrogation of the privilege against self-incrimination,<sup>234</sup> the criteria developed by the Queensland Scrutiny of Legislation Committee for deciding whether proposed legislation complies with the requirements of the *Legislative Standards Act 1992* (Qld),<sup>235</sup> recommendations made by other law reform agencies, the views expressed by government departments and statutory authorities that provided the Commission with information about legislation that abrogates either or both of the privileges, as well as the submissions received by the Commission.

### Factors that may justify abrogation

6.48 In the view of the Commission, there are only two real bases for justifying abrogation of the privilege against self-incrimination and/or the penalty privilege. The grounds for justification concern the public interest to which the information that would be compelled by abrogation of privilege relates and whether the provision of the compelled information is required in compliance with a legislative regulatory system to which the individual has voluntarily subjected himself or herself.

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232 See para 2.41-2.42 of this Report.

233 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 345. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

234 See para 6.24 of this Report.

235 See para 6.25 of this Report.

6.49 The Commission considers that it should be necessary for a proposed legislative provision that would abrogate either or both of the privileges to satisfy at least one of these criteria.

***The public interest to which the information relates***

*The importance of the public interest*

6.50 The Commission considers that abrogation of either or both of the privileges may be justified if the information to be compelled as a result of the abrogation concerns an issue of major public importance that has a significant impact on the community in general or on a section of the community.

6.51 For example, an inquiry or investigation into allegations of major criminal activity, organised crime or official corruption or other serious misconduct by a public official in the performance of his or her duties might justify the abrogation of the privileges. Abrogation might also be justified where there is an immediate need for information to avoid risks such as danger to human life, serious personal injury or damage to human health, serious damage to property or the environment, or significant economic detriment, or where there is a compelling argument that the information is necessary to prevent further harm from occurring.

*The extent to which the information is likely to benefit the public interest*

6.52 In addition to the significance of the public interest in question, the Commission believes that consideration should be given to the extent to which abrogation of either or both of the privileges could reasonably be expected to benefit that public interest. If it cannot be demonstrated that information obtained as a result of the exercise of coercive powers is likely to significantly protect or advance the relevant public interest, it is unlikely that the abrogation would be justified. Conversely, if it is clear that the abrogation is likely to substantially promote the public interest, it is more likely that the abrogation can be justified.

***Regulatory schemes***

6.53 Abrogation of either or both of the privileges may also be justified in a situation where an individual is required to co-operate with a legislative regulatory system to which the individual has voluntarily subjected himself or herself.

6.54 For example, some regulated activities require government authorisation in the form of a licence or permit in order to engage lawfully in that activity. There is a persuasive argument that society is entitled to insist on the provision of certain information from those who voluntarily submit themselves to such a regulatory scheme.<sup>236</sup> The basis of the argument is that participation in

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Sedley S, "Wringing out the Fault" *London Review of Books* 7 March 2002 at 31.

the scheme is a matter of choice and, if undertaken, necessarily involves acceptance of submission to the requirements of the scheme, including compulsion to provide information. In other words, in some situations, participation in a regulated activity may be considered to amount to a waiver of privilege. This may be particularly so in the context of records that are required to be kept as part of a mechanism for ensuring compliance within a regulatory framework.

6.55 A regulatory authority's need to secure compliance with the requirements of a legislative scheme is likely to be of particular relevance in relation to the abrogation of the penalty privilege.

6.56 However, the Commission is concerned that the argument that voluntary submission to a regulatory scheme justifies abrogation should not be taken too far. There are many activities that are government regulated, and while, in theory, participation in these activities is voluntary, often they are activities that are an essential part of daily life.

#### **Additional factors that must be taken into consideration**

6.57 Even though abrogation of the privilege against self-incrimination and/or the penalty privilege may be justified on one of the above grounds, a proposed abrogation provision may not necessarily be appropriate in the circumstances of a particular Act. There are, in the view of the Commission, several additional factors that, while not themselves justifications for the abrogation of privilege, are nevertheless relevant to the decision as to whether or not the legislation in question should abrogate either or both of the privileges. The Commission therefore considers that, once it has been established that abrogation might be justified, these factors must also be taken into account.

6.58 The relative importance of each of these factors may vary according to the context in which abrogation is proposed. The weight to be given to the various factors may also depend on the privilege sought to be abrogated.

6.59 The factors are:

- whether there are alternative means of obtaining the information;
- whether an immunity is provided against the use of compelled information;
- whether there are procedural safeguards in place;
- whether the information is contained in a document that is already in existence; and
- whether the extent of the abrogation is no more than necessary to achieve the intended purpose of the abrogation.

***The absence of alternative means of obtaining the information***

6.60 One of the factors identified by both the New Zealand Law Commission<sup>237</sup> and the Scrutiny of Legislation Committee of the Queensland Legislative Assembly<sup>238</sup> as a potential justification for abrogation of the privilege against self-incrimination is the absence of an alternative source of the information. The New Zealand Commission suggested that account should be taken of the availability of an alternative legal means (such as a search warrant) of obtaining the information. Under the Scrutiny of Legislation Committee's test, it is essential that the questions posed concern matters peculiarly within the knowledge of the persons to whom they are directed that would be difficult or impossible to prove by alternative evidentiary means.

6.61 It appears to this Commission that the perceived need for information has of itself frequently been looked upon as justifying the grant of coercive powers to obtain that information. Many of the responses received by the Commission from government departments emphasised that abrogation of privilege was necessary to obtain information relevant to the operation of legislation administered by the department in question.<sup>239</sup> While the Commission acknowledges that many statutory officers and bodies require investigative powers in order to perform their legislative functions, it believes that there is a significant distinction between the need to undertake an investigation and the need, in the conduct of that investigation, to compel an individual to incriminate himself or herself or to expose himself or herself to the imposition of a penalty.

6.62 Further, the Commission is concerned by a view that, where an investigator has been authorised by a search warrant to enter premises, a requirement that an individual produce a document that might incriminate the individual or expose him or her to a penalty can be justified because it would serve to minimise the inconvenience caused by the execution of the warrant by avoiding the need for the investigator to undertake a lengthy and disruptive search of the premises.<sup>240</sup> In the view of the Commission, the desire for a speedier and more cost-effective means of obtaining information does not justify requiring an individual to risk self-incrimination or self-exposure to a penalty.

6.63 The Commission acknowledges, however, that if abrogation is otherwise justified, the lack of an alternative source of information is relevant to

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237 See para 6.24 of this Report.

238 See para 6.25 of this Report.

239 In August 2002, the Commission wrote to the head of each government department seeking information about abrogation provisions in legislation administered by that department. The text of the letter is set out as Appendix 1 to the Commission's Discussion Paper: Queensland Law Reform Commission, Discussion Paper, *The Abrogation of the Privilege Against Self-Incrimination* (WP 57, August 2003). The responses received from the various departments are incorporated into Chapters 4-8 of the Discussion Paper.

240 Letter to the Commission from the Residential Tenancies Authority 9 July 2003.

the issue of whether abrogation is appropriate in the circumstances. In the view of the Commission, consideration must therefore be given to the following:

- whether the information could not reasonably be obtained in any other lawful way;
- the extent to which the use of another lawful way of obtaining the information would be likely to assist in the investigation in question; and
- whether resort to another lawful way of obtaining the information would be likely to prejudice, rather than merely inconvenience, the investigation.

### ***The provision of an immunity***

6.64 The test employed by the Scrutiny of Legislation Committee of the Queensland Legislative Assembly requires that, in order to justify abrogation of the privilege, proposed legislation should prohibit the use of compelled information in prosecutions against the person who provided it. The Law Commission of New Zealand also proposed that account should be taken of whether or not any immunity provided in place of the privilege against self-incrimination could guarantee sufficient protection to an individual who provided compelled information.

6.65 This Commission has considered whether the inclusion of an immunity should be a factor that would justify abrogation. However, the Commission is of the view that such an approach may obscure, or at least distort, the justification process. This is particularly so in the light of the Commission's recommendation, in Chapter 9 of this Report, that abrogation should ordinarily be accompanied by an immunity to compensate for the loss of the protection that would otherwise have been available. In the Commission's view, to justify abrogation on the ground that the compelled information is protected by an immunity may result in failure to focus on and clearly identify the reason for the need to require the provision of the information. It may create a perception that, regardless of the context, it is justifiable to compel an individual to incriminate himself or herself, or to expose himself or herself to a penalty, provided that the information thus obtained cannot be used in evidence against the individual. The Commission does not agree with this proposition.

6.66 Nonetheless, the Commission acknowledges that the inclusion of an immunity is an important protection for an individual who has been compelled to provide information that is self-incriminatory or that might expose the individual to the imposition of a penalty.

6.67 The Commission is therefore of the view that, in determining whether abrogation is appropriate in the context of a particular Act, consideration must be given to the nature and extent of any immunity provided.

### **Procedural safeguards**

6.68 The New Zealand Law Commission proposed that consideration should be given to whether or not the privilege against self-incrimination provides important protections at the time when the disclosure of the information is sought.<sup>241</sup> The privileges may, for example, protect the individual required to give the information from abusive questioning, or from an invasion of privacy.<sup>242</sup>

6.69 For the reasons expressed above in relation to the provision of an immunity, the Commission does not consider that the inclusion of procedural safeguards is a justification for abrogation of privilege. Nonetheless, it recognises that protections about the way in which a requirement to provide information must be made and the conditions that must apply when the information is provided may be highly relevant to the appropriateness of a proposed provision that would abrogate either or both of the privileges.

6.70 The Commission is therefore of the view that, in determining whether the abrogation of the privilege against self-incrimination and/or the penalty privilege is appropriate, consideration must be given to the adequacy of the procedural safeguards that will apply when the requirement to provide the information is imposed, and when the individual provides the information.

### **Documents that are already in existence**

6.71 In Chapter 4 of this Report, the Commission raised the issue of documents that are already in existence at the time when a requirement to provide information is imposed.<sup>243</sup>

6.72 In the view of the Commission, a distinction can be drawn between documents of this kind, and documents that an individual is required to bring into existence as a result of the abrogation of the privilege against self-incrimination or the penalty privilege.

6.73 In the case of the former, since the document already exists, the individual is not compelled to communicate the information for the purpose of the investigation or inquiry. Although the individual may be forced to produce the document, there may be less cause in such a situation for the application of the rationales for either of the privileges.

6.74 The Commission is therefore of the view that, with respect to information in documentary form, whether the document is already in existence at the time when the requirement to provide information is imposed is a factor relevant to the appropriateness of the abrogation of either or both of the

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241 Law Commission (NZ), Discussion Paper, *The Privilege against Self-Incrimination* (NZLC PP 25, 1996) at 91.

242 See Chapter 3 of this Report.

243 See para 4.9 of this Report.

privileges. This may be particularly so if the document is one that is required to be kept in compliance with a legislative regulatory scheme.

### ***The extent of the abrogation***

6.75 As noted in Chapter 3 of this Report,<sup>244</sup> one rationale for the existence of the privileges is to prevent an abuse of power by the State by protecting personal freedoms and maintaining “a proper balance between the powers of the State and the rights and interests of citizens.”<sup>245</sup> Following from that, it is critical that any legislative provision that abrogates either or both of the privileges should abrogate only to the extent strictly necessary to achieve the intended purpose of the abrogation. If a legislative provision abrogates either or both of the privileges more widely than is necessary, then individuals are deprived without justification of an important safeguard, and the proper balance between the powers of the State and the rights of the individual is lost. Ensuring that privilege is abrogated only to the extent necessary in the circumstances limits the potentially adverse effects of the abrogation.

6.76 The Commission is therefore of the view that, in determining whether the abrogation of the privilege against self-incrimination and/or the penalty privilege is appropriate, consideration must be given to whether the extent of the abrogation is no greater than necessary to achieve the intended purpose of the abrogation.

### **Factors that do not justify abrogation of the privilege**

6.77 There are two factors that have been proposed as justifications for abrogation but that, in the Commission’s view, should not be taken into account. These factors are:

- the extent of the risk faced by an individual as a result of the abrogation of privilege; and
- whether the abrogation provision is part of a uniform legislative scheme.

### ***The extent of the risk***

6.78 The New Zealand Law Commission proposed that one of the factors that should be taken into account when it is proposed to remove or limit the privilege against self-incrimination is the nature and the degree of risk of self-incrimination in the particular circumstances.<sup>246</sup> However, that Commission did

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<sup>244</sup> See para 3.12-3.19 of this Report.

<sup>245</sup> *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118 per Gleeson CJ at 127. Although the decision of the New South Wales Court of Criminal Appeal in this case was reversed on appeal to the High Court of Australia (*Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477), the existence of the rationale was not disputed. This issue was rather whether the rationale justified the availability of the privilege to corporations: see per Mason CJ and Toohey J at 500-501.

<sup>246</sup> Law Commission (NZ), Discussion Paper, *The Privilege against Self-Incrimination* (NZLC PP 25, 1996) at 91.

not elaborate upon how it envisaged that policymakers and legislators would assess the extent of the risk.

6.79 In the view of this Commission, there is a fundamental problem with the New Zealand Commission's approach. The considerations that it raises concern the impact of the abrogation on an individual who is compelled to provide information. They assume that the risk to the individual can be reliably predicted across the diverse circumstances in which a power of abrogation may be exercised after it has been enacted. However, this Commission believes that it will often be extremely difficult or speculative, at the time legislation is passed, to try to determine what the risk will be at some future date in the circumstances of a particular case.

6.80 For example, many Acts confer powers of investigation and enquiry that are general in nature. When such an Act is introduced, it will not be possible to identify the precise risk to which compelled information might expose an individual who provides it or the extent of the impact of the compulsion to divulge the information. The information may be relevant to a range of contraventions of the Act in question, ranging from trivial breaches to serious offences.

6.81 Further, it may not be possible to foresee how a particular abrogation provision will interact with other legislation. An abrogation provision contained in an Act may have unintended consequences if the compelled information obtained as a result of the abrogation discloses an offence or exposes the individual who provided the information to a penalty under a different Act.

6.82 There is also the possibility that circumstances may change between the time when an abrogation provision is enacted and the time, at some uncertain date in the future, when the power to compel the disclosure of information is exercised. In such a situation, any attempt to predict and assess the risks created by the provision may be falsified by subsequent events. For example, at the later date there may be a newly-created offence or a more substantial penalty for an existing offence. The risk of prosecution for an offence may also depend upon the prosecution policies of authorities and these may change over time.

6.83 It could perhaps be argued that the impact on an individual of self-exposure to a penalty is likely to be less serious than the risk of self-incrimination, which might expose the individual to conviction for a criminal offence. On this approach, the possible consequences of the risk of a criminal record, even for a minor offence, would preclude any consideration of the extent of the risk as a justification for abrogation of the privilege against self-incrimination, while the potential impact of abrogation on an individual might be a factor that would justify abrogation of the penalty privilege.

6.84 Again, however, it might not always be possible to foresee the use to which compelled information will be put. For example, if the compliance



mechanism of a legislative regulatory scheme includes the imposition of a penalty as well as prosecution for a criminal offence, the decision about the course of action to be taken against an alleged offender may not be made until after the conclusion of the investigation. The nature and extent of the risk to which an alleged offender might be exposed by compelled information would not be able to be determined in advance and therefore could not be used as a justification for abrogation.

6.85 Moreover, in considering grounds for justifying the abrogation of privilege, it may be dangerous to generalise about the potential impact of abrogation, and whether the risk of self-incrimination is necessarily more serious than the risk of self-exposure to a penalty. The extent of the risk will depend largely on the circumstances of a particular situation. While a criminal conviction is always serious, a penalty such as disqualification from a profession or the loss of a licence to carry out an activity may also be considered extremely onerous.

6.86 Even if the extent of the risk to an individual at some unspecified future date could be reliably assessed, notwithstanding the wide variety of circumstances to which a power to compel information could be applied, it is not apparent how the impact of abrogation should be taken into account. In particular, it is not apparent how a high risk of exposure to a small penalty should be compared to a low risk of exposure to a substantial penalty.

6.87 The Commission is therefore of the view that consideration should not be given to the extent of the risk to which a proposed provision that would abrogate the privilege against self-incrimination and/or the penalty provision might expose an individual.

### ***Uniform legislative schemes***

6.88 One of the submissions received by the Commission in response to the Discussion Paper raised the question of abrogation of privilege in the context of uniform legislative schemes or attempts to achieve consistency of legislation between jurisdictions.<sup>247</sup>

6.89 The Commission recognises the importance of co-operative legislative schemes in a federal system of government such as exists in Australia. There is often a need for a uniform, or at least consistent, approach to legislation to ensure that cross-border compliance can be achieved to the greatest possible extent.

6.90 However, the fact that abrogation of the privilege against self-incrimination or the penalty privilege is a feature of a uniform scheme does not necessarily mean that sufficient regard has been had to the necessity for the abrogation. In the view of the Commission, privilege should not be abrogated,

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Submission 5. See para 6.39 of this Report.

even in the context of a uniform legislative scheme, unless the abrogation is otherwise justified in accordance with the criteria identified by the Commission in this chapter.

## RECOMMENDATIONS

**The Commission recommends enactment of legislation of general application to the effect that:**

- 6-1 A legislative provision should not abrogate the privilege against self-incrimination and/or the penalty privilege unless the abrogation is justified and appropriate having regard to the matters set out below.**
- 6-2 Abrogation of the privilege against self-incrimination and/or the penalty privilege depends for its justification on:**
- (a) (i) the importance of the public interest sought to be protected or advanced by the abrogation of the privilege; and**
  - (ii) the extent to which information obtained as a result of the abrogation could reasonably be expected to benefit the relevant public interest; or**
  - (b) whether the information relates to the conduct of an activity regulated under an Act, in which the individual is or was authorised to participate.**
- 6-3 Abrogation of the privilege against self-incrimination and/or the penalty privilege, even though it may be justified on one or more of the matters referred to in Recommendation 6-2, also depends on:**
- (a) whether the information that an individual is required to give could not reasonably be obtained by any other lawful means;**
  - (b) if alternative means of obtaining the information exist:**
    - (i) the extent to which the use of those means would be likely to assist in the investigation in question; and**
    - (ii) whether resort to those means would be likely to prejudice, rather than merely inconvenience, the investigation;**

- (c) the nature and extent of the use, if any, that may be made of the information as evidence against the individual who provided it;**
- (d) the procedural safeguards that apply when:**
  - (i) the requirement to provide the information is imposed; and**
  - (ii) the information is provided;**
- (e) in the case of information in documentary form, whether the document is in existence at the time the requirement to provide the information is imposed;**
- (f) whether the extent of the abrogation is no more than is necessary to achieve the purpose of the abrogation.**

# Chapter 7

## Implied abrogation

### INTRODUCTION

7.1 As explained in Chapter 2 of this Report, it is not necessary for a provision to include express words of abrogation for the privilege against self-incrimination to be excluded.<sup>248</sup> However, because the privilege is considered to be such an important human right,<sup>249</sup> courts will hold that legislation has abrogated the privilege only if the intention to do so is clearly apparent.<sup>250</sup>

7.2 Where the privilege against self-incrimination is abrogated, the privilege against self-exposure to a penalty will also be abrogated by implication.<sup>251</sup> However, abrogation of the penalty privilege does not impliedly abrogate the privilege against self-incrimination.

### THE TEST FOR IMPLIED ABROGATION

7.3 In the absence of express words of abrogation, the exclusion of the privilege against self-incrimination will depend on whether the provision in question sufficiently demonstrates the relevant intention by “necessary implication.”<sup>252</sup> The phrase “necessary implication” has been said to “import a high degree of certainty as to legislative intention.”<sup>253</sup>

7.4 Whether or not a particular provision has the effect of impliedly abrogating the privilege must therefore be considered in the light of not only the language of the particular provision but also the provision’s character and purpose.<sup>254</sup>

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248 *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 289 and per Mason, Wilson and Dawson JJ at 309; *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 341.

249 See para 1.5-1.6 and 3.6 of this Report.

250 *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 289-290.

251 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 345. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [30].

252 *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Mason, Wilson and Dawson JJ at 309.

253 *Hamilton v Oades* (1989) 166 CLR 486 per Mason CJ at 495.

254 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 341.

7.5 Until recently, the test adopted by the High Court of Australia to determine whether a provision had abrogated the privilege by implication was that:<sup>255</sup>

The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification. This is so when the object of imposing the obligation is to ensure the full investigation in the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation.

7.6 However, the High Court has now reconsidered the issue of implied abrogation,<sup>256</sup> and has unanimously rejected the notion that an expression in general terms is sufficient to abrogate a fundamental common law right:<sup>257</sup>

... courts do not read general words in a statute as taking away rights, privileges and immunities that the common law or the general law classifies as fundamental unless the context or subject matter of the statute points irresistibly to that conclusion.

7.7 The High Court's emphasis on the need for a clear and unambiguous statement of legislative intention to abrogate the privilege reflects a concern that words of generality in a statute might have consequences not considered by the legislature, and that judicial reliance on such words to take away or override a fundamental human right would create a risk of giving the legislation an operation that was not intended by the Parliament.<sup>258</sup>

7.8 The Court adopted a considerably more stringent approach, requiring that retention of the privilege must "significantly impair" functions under the legislation in question<sup>259</sup> or that the relevant provision would be "rendered inoperative" or "its object largely frustrated" if the privilege were to prevail over the legislation.<sup>260</sup> It was observed that a power conferred in general terms would be unlikely to contain the necessary implication, since general words would almost always be able to be given some operation, even if that operation were limited in scope.<sup>261</sup>

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255 Ibid.

256 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543. Although the issue in this case was whether a provision had impliedly abrogated legal professional privilege, the observations of the Court on the abrogation of fundamental common law rights strongly indicate the approach that the Court would be likely to take in relation to the privilege against self-incrimination.

257 Id per McHugh J at [39]. See also per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [32], per Kirby J at [90], [111] and per Callinan J at [134].

258 Id per Kirby J at [105]-[106] and per Callinan J at [134].

259 Id per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [35].

260 Id per McHugh J at [43].

261 Id per McHugh J at [43] and per Callinan J at [134].

## THE PROBLEMS OF IMPLIED ABROGATION

7.9 The lack of express words of abrogation can mean that it is sometimes difficult to identify those provisions that have the effect of impliedly abrogating the privilege.

7.10 As a general rule, where a provision makes no reference to the privilege, there is a presumption that the legislature did not intend to alter a fundamentally important common law principle.<sup>262</sup> However, because this presumption may be displaced in the context of a particular legislative scheme, it can be difficult to determine with any degree of certainty whether the privilege has survived a particular provision or has been abrogated by it.

7.11 For example, an Act may require the provision of information unless there is a reasonable excuse for failing to provide the information. If the provision does not also specifically state that self-incrimination is not a reasonable excuse, the privilege will generally survive as a ground for refusing to comply. However, the situation is less clear if there are other provisions in the same Act that require the provision of information but expressly recognise self-incrimination as a reasonable excuse for not complying with the requirement.<sup>263</sup>

7.12 Confusion can also arise if legislation that requires the provision of certain information does not refer to the privilege,<sup>264</sup> but grants an immunity in relation to the information obtained.<sup>265</sup> It is unclear in such a situation whether, in the absence of express words of abrogation, the inclusion of an immunity amounts to a sufficient indication of legislative intent to remove the privilege.<sup>266</sup>

7.13 The Australian Law Reform Commission, in commenting on the need for consistency in legislative provisions concerning the privilege and its scope of application, noted that the need is particularly apparent where legislation impliedly abrogates the privilege. It also observed that the human rights justifications for the privilege suggest that legislation should provide certainty as

<sup>262</sup> *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 289.

<sup>263</sup> See for example *Industrial Relations Act 1999* (Qld) ss 354(5), 355(2), 357(4), 371(5), which require a person to provide information unless the person has a reasonable excuse. These provisions are silent on the issue of what constitutes a reasonable excuse. Cf s 356, which also imposes an obligation to furnish information, but provides (s 356(4)) that it is a reasonable excuse for a person to fail to comply with the requirement if doing so might tend to incriminate the person. See also ss 557(4), 563(6), 572(3).

<sup>264</sup> See for example *Recreation Areas Management Act 1988* (Qld) s 40(1).

<sup>265</sup> See for example *Recreation Areas Management Act 1988* (Qld) s 40(2).

<sup>266</sup> For example, in *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281, Gibbs CJ (at 295, 300) and Murphy J (at 312, 313) held that neither s 6DD of the *Royal Commission Act 1902* (Cth) nor s 14(2) of the *Commissions of Inquiry Act 1950* (Qld) was sufficient to abrogate the privilege. Mason, Wilson and Dawson JJ expressed no view on s 6DD but, in relation to s 14(2), considered (at 311) that, if it had stood alone, the presence of the subsection may have been consistent with a legislative intent to abrogate the privilege. However, in the context of the legislative scheme in question, they held that there was insufficient indication of an intention to deprive a witness of the protection of the privilege.

to how the law applies in relation to the privilege.<sup>267</sup> Recognising the problems that can result from implied abrogation, that Commission recommended that any legislative scheme that seeks to abrogate or modify the privilege against self-incrimination or self-exposure to a non-criminal penalty must do so by express reference to the privilege or privileges that it seeks to abrogate or modify.<sup>268</sup>

## THE DISCUSSION PAPER

7.14 In the Discussion Paper,<sup>269</sup> the Commission identified a number of provisions that, although not expressed to remove the privilege against self-incrimination, may have the effect of abrogating it by implication.<sup>270</sup>

7.15 The Commission noted its concern about the uncertainty created by provisions of this kind.<sup>271</sup>

7.16 The Commission sought submissions on the issue of whether legislation that requires the provision of information unless there is a reasonable excuse for failing to provide the information should also provide whether self-incrimination is or is not a reasonable excuse for failing to provide the information.<sup>272</sup>

## SUBMISSIONS

7.17 Two submissions agreed that, where there is a legislative requirement to provide information, the legislation should also expressly state whether or not self-incrimination is a reasonable excuse for failure to comply with the requirement.<sup>273</sup> These respondents considered that clarification of the right to claim the privilege against self-incrimination would reduce the considerable degree of uncertainty about what constitutes a “reasonable excuse”.

7.18 Two respondents, in particular, highlighted the confusion created by the question of implied abrogation.<sup>274</sup> Their submissions concerned the right of a

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267 Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at para 18.45.

268 *Id.*, Recommendation 18-2 at 662.

269 Queensland Law Reform Commission, Discussion Paper, *The Abrogation of the Privilege against Self-incrimination* (WP 57, August 2003).

270 *Id.*, Chapter 8.

271 *Id.* at 193-194.

272 *Id.* at 202.

273 Submissions 2, 5.

274 Submissions 1, 7.

Queensland public servant to claim privilege in the context of a disciplinary investigation.

7.19 The relevant legislation, the *Public Service Act 1996* (Qld), expressly preserves the privilege against self-incrimination in relation to management reviews,<sup>275</sup> but is silent with respect to its availability in disciplinary and other investigations. It is also silent with respect to the penalty privilege.<sup>276</sup>

7.20 The Act provides that the chief executive of a department is responsible for the effective, efficient, economical and appropriate management of the department's resources,<sup>277</sup> and for the continuing evaluation and improvement of departmental management.<sup>278</sup> Specific responsibilities include performance appraisal,<sup>279</sup> discipline<sup>280</sup> and termination of employment<sup>281</sup> of departmental employees. The chief executive, or the chief executive's delegate,<sup>282</sup> may discipline a departmental officer who, without reasonable excuse, contravenes a direction given to the officer by a person with authority to give the direction.<sup>283</sup> The Office of the Public Service Commissioner is of the view that these provisions have the effect of impliedly excluding privilege in contexts other than management reviews, and that, accordingly, an officer may be directed to answer questions or to provide information that is self-incriminating or that might expose the officer to a penalty.<sup>284</sup>

The fact that a direction to answer a question might involve infringement of the privilege against self-incrimination or exposure to civil penalty is regarded as not affording the officer reasonable grounds (to believe) that a direction is improper or illegal if the direction is given in good faith to ascertain information required of the subordinate in connection with the discharge of the duties of either the subordinate or the superior.

7.21 This interpretation is based on the Act's focus on the efficient working of the public service, and on the need for internal disciplinary authority to maintain accountability of departmental officers and thus the integrity of the

275 *Public Service Act 1996* (Qld) s 29(6).

276 However, a disciplinary investigation is a non-judicial proceeding. The High Court has expressed the view that there is little, if any, reason why the penalty privilege should be recognised outside judicial proceedings: *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [31]. But see also Recommendation 5-1 at p 42 of this Report.

277 *Public Service Act 1996* (Qld) s 51(1)(c).

278 *Public Service Act 1996* (Qld) s 51(1)(e).

279 *Public Service Act 1996* (Qld) s 51(2)(g).

280 *Public Service Act 1996* (Qld) s 51(2)(h).

281 *Public Service Act 1996* (Qld) s 51(2)(i).

282 *Public Service Act 1996* (Qld) s 57(1).

283 *Public Service Act 1996* (Qld) s 87(1)(d), Schedule 3 (definition of "employing authority").

284 Letter to the Commission from the Acting Public Service Commissioner dated 12 November 2003.



service.<sup>285</sup> It is a view that is supported by a number of judicial decisions concerning the obligations of police officers to answer questions about their conduct whilst on official duty.<sup>286</sup>

7.22 However, there has been judicial acknowledgment that, whilst allowance should be made for the importance of the role of discipline in the efficient, equitable and proper conduct of the public service, there will be many areas of responsibility within the public service that are not of the same gravity as those involved in assuring the integrity of the police service.<sup>287</sup> Further, the decisions relied upon to support the interpretation that the provisions in question impliedly abrogate the privilege against self-incrimination and the penalty privilege were decided prior to the High Court's reconsideration of the test for implied abrogation.<sup>288</sup> It is therefore arguable that those provisions do not meet the current test, on the ground that recognition of the privilege against self-incrimination or the penalty privilege in disciplinary investigations against public servants would not render the provisions inoperative and that the object of the provisions would not be "largely frustrated" if the privilege were to prevail over the legislation.<sup>289</sup>

7.23 Further, it may be that a disciplinary investigation under the *Public Service Act 1996* (Qld) would be conducted as "an internal public service matter without any coercive powers":<sup>290</sup>

The power of inquiry, of asking questions, does not require statutory foundation, but, statute apart, the person making the inquiry cannot compel an answer.

7.24 Although the *Public Service Act 1996* (Qld) permits disciplinary action against a departmental officer who, without reasonable excuse, fails to comply with a direction given to the officer by a person with authority to give the direction,<sup>291</sup> there is authority for the argument that a provision of this kind is

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285 Ibid.

286 See for example *Police Service Board and Another v Morris and Martin* (1985) 156 CLR 397; *Hartmann v Commissioner of Police* (1997) 91 A Crim R 141.

287 *Comptroller-General of Customs v Disciplinary Appeal Committee and Day* (1992) 35 FCR 466 per Gummow J at 479.

288 The current test is discussed at para 7.6-7.8 of this Report.

289 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 per McHugh J at [43].

290 *Day v Commissioner, Australian Federal Police and Others* (2000) 101 FCR 66 per Black CJ, Tamberlin and Hely JJ at [11].

291 *Public Service Act 1996* (Qld) s 87(1)(d), Schedule 3 (definition of "employing authority").

insufficient to exclude the privilege against self-incrimination and to compel the provision of information.<sup>292</sup>

## IMPLIED ABROGATION OF THE PENALTY PRIVILEGE

### The effect of the abrogation of the privilege against self-incrimination

7.25 The statutory formula most frequently used to abrogate the privilege against self-incrimination is that it is not a reasonable excuse for failing to comply with a requirement to provide information that complying with the requirement might tend to incriminate the person. The High Court has held that a provision of this kind not only expressly abrogates the privilege against self-incrimination but also abrogates, by implication, the penalty privilege.<sup>293</sup>

7.26 In the light of this decision, it would generally be unnecessary for a provision that expressly abrogated the privilege against self-incrimination to also refer to the privilege against exposure to a penalty in order to abrogate that privilege as well as the privilege against self-incrimination.

### Existing Queensland provisions

7.27 In Queensland, a number of provisions refer to the risk of both self-incrimination and self-exposure to a penalty as not being a reasonable excuse for failing to comply with a requirement to provide information.<sup>294</sup>

7.28 The inconsistency between these provisions, and others that refer only to the privilege against self-incrimination, may create confusion and give rise to questions about the reason for the distinction.

<sup>292</sup> *Comptroller-General of Customs v Disciplinary Appeal Committee and Day* (1992) 35 FCR 466. That case involved the dismissal of a Commonwealth public servant for refusal to answer the questions of an authorised person. The *Public Service Act 1922* (Cth) provided (s 56(a)) that an officer shall be taken to have failed to fulfil his or her duty as an officer if “he wilfully disobeys, or wilfully disregards, a direction given by a person having authority to give the direction, being a direction with which it is his duty as an officer to comply.” Paragraph 8A(c) of the *Public Service Regulations* (Cth) further required an officer to “comply with any lawful and reasonable direction given by a person having authority to give the direction.” The officer successfully appealed to the Disciplinary Appeal Committee against his dismissal. In upholding the Committee’s decision, Gummow J held, at 479, that it had not been shown that the privilege was abrogated as a matter of necessary implication by the legislation under consideration.

<sup>293</sup> *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 345. See also per Murphy J at 347 and *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [30].

<sup>294</sup> See for example *Business Names Act 1962* (Qld) s 13(3); *Criminal Proceeds Confiscation Act 2002* (Qld) s 40(1)(a); *Foreign Ownership of Land Register Act 1988* (Qld) s 24(3); *Government Owned Corporations Act 1993* (Qld) s 142(12); *Local Government Act 1993* (Qld) s 696(14); *Petroleum (Submerged Lands) Act 1982* (Qld) s 115(2); *Police Powers and Responsibilities Act 2000* (Qld) s 112(1)(a); *Tobacco Products (Licensing) Act 1988* (Qld) ss 34(9), 39(6); *Trade Measurement Act 1990* (Qld) s 66(1); *Water Act 2000* (Qld) s 617(13).

## Issues for consideration

7.29 In its Discussion Paper,<sup>295</sup> the Commission referred to the ambiguity arising from certain existing Queensland provisions. The Commission sought submissions on the issue of whether legislation that seeks to abrogate the privilege against self-incrimination or against self-exposure to a civil penalty should expressly refer to the privilege or privileges it seeks to abrogate.<sup>296</sup>

## Submissions

7.30 The three submissions that considered the question were all in favour of the proposition that abrogation legislation should refer specifically to the privilege it seeks to abrogate.<sup>297</sup> One respondent expressed the view that this approach would help to avoid confusion.<sup>298</sup>

## THE COMMISSION'S VIEW

7.31 In the Commission's view, the situation created by the *Public Service Act 1996* (Qld) demonstrates the problems that can arise when it is unclear whether legislation abrogates the privilege against self-incrimination or the penalty privilege.<sup>299</sup> It is unnecessary for the Commission to express a concluded view on the effect of the relevant provisions. For present purposes, the Commission refers to those provisions merely to highlight the uncertainty resulting from implied abrogation.

7.32 The Commission is strongly of the view that such uncertainty is undesirable. Information obtained as a result of the abrogation of the privileges can lead to conviction of a criminal offence, resulting in a fine or a term of imprisonment; to imposition of a civil or administrative penalty, including disqualification from engaging in certain professional activities<sup>300</sup> or loss of a licence; or, as illustrated by the above example, to disciplinary measures, including dismissal from employment as a public servant. In the light of the serious nature of these potential consequences, the Commission considers that an individual required to provide information to an investigation or an inquiry should be able to be sure whether or not he or she is entitled to rely on either or both of the privileges.

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<sup>295</sup> Queensland Law Reform Commission, Discussion Paper, *The Abrogation of the Privilege Against Self-Incrimination* (WP 57, August 2003).

<sup>296</sup> Id at 201.

<sup>297</sup> Submissions 2, 5, 12.

<sup>298</sup> Submission 2.

<sup>299</sup> See para 7.19-7.24 of this Report.

<sup>300</sup> See for example *Rich and Anor v Australian Securities and Investments Commission* (2004) 209 ALR 271.

7.33 In the view of the Commission, in order to provide greater certainty, there should be a legislative provision of general application to the effect that, in the absence of a clear, express provision to the contrary, an individual is entitled to claim the privilege against self-incrimination. The Commission considers that the modern view of the privilege as a significant human right reinforces the argument that, if the right is to be abrogated, the abrogation should be clearly and unambiguously expressed.

7.34 The Commission also believes that, in light of the serious consequences that can flow from compelled self-exposure to a penalty, an individual should be able to be certain whether or not the penalty privilege is available.

7.35 The Commission acknowledges that it is unlikely that it would be intended that the penalty privilege should survive a legislative provision that expressly abrogated the privilege against self-incrimination. Accordingly, the Commission is of the view that legislation should be enacted to provide that, in the absence of a clear, express provision to the contrary, express abrogation of the privilege against self-incrimination also abrogates the penalty privilege.

7.36 The Commission is further of the view that, in the absence of a provision expressly abrogating the privilege against self-incrimination, an individual should be entitled to claim the penalty privilege unless that privilege is also expressly abrogated.

7.37 The Commission believes that this approach would meet the concern expressed by the Australian Law Reform Commission,<sup>301</sup> by ensuring that an individual would be able to rely on either or both of the privileges unless the person or body challenging the claim of privilege could point to a statutory provision specifically supporting that challenge. However, in circumstances in which abrogation could be justified,<sup>302</sup> there would be sufficient flexibility to allow the general presumption in favour of the privileges to be displaced in a particular provision by express words of abrogation.

7.38 The Commission acknowledges that enactment of a provision requiring express words of abrogation might alter the effect of some existing provisions currently considered to abrogate by implication either or both of the privileges. The Commission therefore recommends that commencement of the legislation proposed by the Commission should be postponed to allow existing provisions to be reviewed. If it is considered that, in the context of a particular Act, the criteria identified by the Commission in Chapter 6 of this Report are met, a specific provision should be inserted in that Act to effect an abrogation. Account should also be taken of the recommendations in Chapter 9 of this

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301 Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at para 18.60. See para 7.13 of this Report.

302 In Chapter 6 of this Report, the Commission has recommended the criteria that it considers should be established in order to justify abrogation of the privilege.

Report in relation to the granting of an immunity against the use of information obtained as a result of abrogation of privilege, and any immunity that may be appropriate in the circumstances should be conferred.

## RECOMMENDATIONS

**7-1 The Commission recommends the enactment of a legislative provision of general application to the effect that:**

- (a) in the absence of a clear, express provision to the contrary, an individual is entitled to claim the privilege against self-incrimination;**
- (b) in the absence of a clear, express provision to the contrary, express abrogation of the privilege against self-incrimination also abrogates the penalty privilege; and**
- (c) where there is no provision expressly abrogating the privilege against self-incrimination, an individual is entitled, in the absence of a clear express provision to the contrary, to claim the penalty privilege.**

**7-2 The commencement of the provision should be postponed to allow existing legislation to be reviewed.**

**7-3 If it is considered that, in the context of a particular Act, abrogation of the privilege against self-incrimination and/or the penalty privilege can be justified according to the legislative criteria recommended by the Commission in Chapter 6 of this Report:**

- (a) a specific provision should be inserted in that Act to give effect to the abrogation; and**
- (b) appropriate consideration should be given to the nature and extent of the immunity, if any, to be provided in relation to the use of the information obtained as a result of the abrogation.**

# Chapter 8

## The type of forum where the privileges may be abrogated

### INTRODUCTION

8.1 The Commission's terms of reference require it to review the type of forum where, if it is accepted that there can be a justification for abrogating the privilege, abrogation may be justified.<sup>303</sup>

### EXISTING PROVISIONS

#### The privilege against self-incrimination

8.2 A review of the existing Queensland provisions that abrogate the privilege against self-incrimination reveals a wide variety of situations where people may be required to provide information and where the availability of the privilege has been removed.

8.3 These include a coronial inquest,<sup>304</sup> a commission of inquiry,<sup>305</sup> a public examination before a judicial officer,<sup>306</sup> a public examination before a tribunal,<sup>307</sup> an appearance before a board of inquiry,<sup>308</sup> a requirement to produce a document to an inspector,<sup>309</sup> a requirement to answer a question or provide information during the course of an investigation,<sup>310</sup> and a requirement to appear before an investigator to answer questions or to produce documents.<sup>311</sup>

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303 The full terms of reference are set out at para 1.1 of this Report.

304 See for example *Coroners Act 2003* (Qld) s 39.

305 *Commissions of Inquiry Act 1950* (Qld) s 14(1A).

306 See for example *Criminal Proceeds Confiscation Act 2002* (Qld) ss 40(1)(a), 132(1)(a).

307 See for example *Commercial and Consumer Tribunal Act 2003* (Qld) s 112(4).

308 See for example *Transport Operations (Marine Safety) Act 1994* (Qld) s 147(1).

309 See for example *Explosives Act 1999* (Qld) s 100.

310 See for example *Fire and Rescue Service Act 1990* (Qld) s 58.

311 See for example *Financial Administration and Audit Act 1977* (Qld) s 87.

## The penalty privilege

8.4 As explained in Chapter 5 of this Report, there is currently some uncertainty as to the situations where the penalty privilege can apply. The Commission has recommended that the privilege should be available in non-judicial proceedings and investigations as well as in judicial contexts.<sup>312</sup>

8.5 The existing provisions that specifically abrogate the penalty privilege operate in both judicial<sup>313</sup> and non-judicial<sup>314</sup> contexts. Nonetheless, the fact that legislation has been drafted on the assumption that the penalty privilege might have been available in a particular situation does not necessarily mean that that assumption was correct.<sup>315</sup>

The circumstance that Parliament (or a drafter) assumed that the antecedent law differed from the law as the Court finds it to be is not a reason for the Court refusing to give effect to its view of the law. Parliament does not change the law “simply by betraying a mistaken view of it”. [notes omitted]

## THE DISCUSSION PAPER

8.6 In the Discussion Paper,<sup>316</sup> the Commission sought submissions on the issue of whether there is any type of investigative forum where the statutory abrogation of the privilege against self-incrimination cannot be justified.<sup>317</sup>

## SUBMISSIONS

8.7 Two respondents addressed this issue, adopting different approaches.

8.8 Queensland Transport submitted that, provided that an immunity was generally granted, there was no particular kind of forum where abrogation of the privilege could not be justified.<sup>318</sup>

8.9 The Bar Association of Queensland, on the other hand, was of the view that:<sup>319</sup>

<sup>312</sup> See Recommendation 5-1 at p 42 of this Report.

<sup>313</sup> See for example *Local Government Act 1993* (Qld) s 696(14).

<sup>314</sup> See for example *Police Powers and Responsibilities Act 2000* (Qld) s 112(1)(a); *Trade Measurement Act 1990* (Qld) s 66(1).

<sup>315</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 505-506.

<sup>316</sup> Queensland Law Reform Commission, Discussion Paper, *The Abrogation of the Privilege Against Self-Incrimination* (WP 57, August 2003).

<sup>317</sup> Id at 201.

<sup>318</sup> Submission 2.

<sup>319</sup> Submission 12.

Only bodies charged with responsibility to investigate alleged offences involving serious, widespread or institutionalized misconduct should be given a statutory abrogation of the privilege.

## THE COMMISSION'S VIEW

8.10 In Chapter 6 of this Report, the Commission has identified the factors that it considers must be taken into account in determining whether statutory abrogation of the privilege against self-incrimination and the penalty privilege is justified in the context of a particular legislative scheme. These criteria are capable of applying regardless of the forum in which the information is sought.

8.11 In the view of the Commission, the relevant issue is not the type of forum where a person is to be required to give information but, rather, whether the criteria that the Commission believes must be met in order to justify abrogation have in fact been satisfied. This would involve, for example, a consideration of the importance of the public interest to which the information in question relates and whether abrogation could reasonably be expected to advance or protect that public interest. Other factors, such as alternative sources of the information, the provision of an immunity and the existence of procedural safeguards, would also be relevant.

8.12 The Commission's view is reinforced by the diversity of the situations in which the privileges apply and can, therefore, be abrogated.

## RECOMMENDATION

**8-1 The Commission recommends that the determination as to whether abrogation of either or both the privilege against self-incrimination and the penalty privilege can be justified should be based on the criteria identified in Chapter 6 of this Report, rather than on the forum where the provision of the information is required.**



# Chapter 9

## Use of information obtained under compulsion

### INTRODUCTION

9.1 As explained in Chapter 2 of this Report,<sup>320</sup> legislation that abrogates the privilege against self-incrimination may impose limits on the use that may be made of information obtained under a power of compulsion.

9.2 The grant of an immunity in relation to such information raises a number of issues. The first of these is whether it is in fact desirable for legislation to insist that an individual provide a self-incriminatory answer or statement, or produce a self-incriminatory document or record, but to refuse to allow the information thus obtained to be used as evidence in a proceeding against the individual or, in some cases, as a tool for discovering further evidence.

9.3 If an immunity is considered desirable, further questions arise in relation to its implementation.

9.4 Similar issues arise in relation to the privilege against self-exposure to a penalty.

### WHETHER AN IMMUNITY IS DESIRABLE

#### Arguments for and against inclusion of an immunity

9.5 In Queensland, the *Legislative Standards Act 1992* (Qld) provides that Queensland legislation should have sufficient regard to the rights and liberties of individuals, including appropriate protection against self-incrimination.<sup>321</sup> One of the factors considered by the Scrutiny of Legislation Committee of the Queensland Legislative Assembly, in determining whether proposed legislation complies with this requirement, is whether, if the proposed legislation abrogates the privilege against self-incrimination, it also prohibits the subsequent use of

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320 See para 2.43-2.58 of this Report.

321 *Legislative Standards Act 1992* (Qld) s 4(3)(f).

self-incriminating information in prosecutions against the individual who provided it.<sup>322</sup>

9.6 The Australian Law Reform Commission also favours the provision of an immunity.<sup>323</sup>

9.7 The provision of a statutory immunity restricting the use of information that has been obtained as a result of the abrogation of the privilege against self-incrimination is intended to compensate for the loss of the privilege. It is seen as a way of preserving the policies on which the privilege is based whilst, at the same time, allowing relevant authorities to gain access to information that they need in order to be able to perform their role.<sup>324</sup>

This Court has been zealous to safeguard the values that underlie the privilege.

Immunity statutes, which have historical roots deep in Anglo-American jurisprudence, are not incompatible with these values. Rather, they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. [notes omitted]

9.8 However, the practice of granting an immunity in relation to the use of self-incriminating material has been the subject of some criticism. It has been argued that an immunity will not, of itself, protect an individual compelled to provide information from oppressive methods of obtaining that information. It has also been argued that, even where there are stringent safeguards in place against the use of oppression to obtain self-incriminating information, an immunity that prevents the subsequent use of such information may protect someone who is guilty from being convicted. According to this view, the provision of an immunity as compensation for the abrogation of the privilege is not, as commonly propounded, a just solution but, rather, an unhappy compromise.<sup>325</sup> The situation created by allowing regulatory regimes to insist on having answers to relevant questions, but refusing to allow the use in court of a self-incriminating response, has been described as:<sup>326</sup>

... the worst of all possible worlds - a world in which the best possible proof of criminality may be on the record and cannot be used because it has not been more circuitously and less reliably obtained.

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322 See for example Queensland Parliament, Scrutiny of Legislation Committee, *Report on the Queensland Building Tribunal Bill 1999* (Alert Digest No 13 of 1999 at 31-32); *Report on the Guardianship and Administration Bill 1999* (Alert Digest No 1 of 2000 at 7-8); *Report on the Coroners Bill 2002* (Alert Digest No 1 of 2003 at 7-8).

323 Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at para 18.60.

324 *Kastigar v The United States* (1972) 406 US 441 per Powell J (with whom Burger CJ, Stewart, White and Blackmun JJ agreed) at 445-446.

325 Sedley S, "Wringing out the Fault" *London Review of Books* 7 March 2002 at 27.

326 Id at 30.

## The mechanism for providing an immunity

9.9 The approach adopted in Queensland legislation has been to consider the inclusion of an immunity on a case by case basis in relation to individual abrogation provisions. As a result, some abrogation provisions include a use<sup>327</sup> or a derivative use<sup>328</sup> immunity, while others provide no immunity at all.

9.10 Although this approach has the theoretical advantage of promoting consideration of the circumstances in which particular legislation applies, it also creates the risk that the immunity might be inadvertently omitted, or that inconsistencies will arise between Acts or even within an individual Act.

9.11 The Australian Law Reform Commission has advocated a different mechanism. That Commission considered the compensation offered by the grant of an immunity to be an important right “that should not be removed by oversight or confusion in the law.”<sup>329</sup> It therefore recommended the enactment in federal legislation of a default provision to the effect that, in the absence of any clear, express statement to the contrary in a particular statute, no self-incriminating evidence given by any individual be able to be used in any criminal or civil penalty proceedings against that individual, except in proceedings in respect of the falsity of the evidence itself.<sup>330</sup> However, it did not identify the kinds of situations where it considered that it would be appropriate for the proposed default provision to be displaced by contrary legislation.<sup>331</sup>

## The Discussion Paper

9.12 In the Discussion Paper,<sup>332</sup> the Commission sought submissions on the following issues:<sup>333</sup>

- the desirability of an immunity;
- whether legislation abrogating the privilege against self-incrimination should generally include an immunity restricting the use that may be made of self-incriminating material obtained as a result of the abrogation;

<sup>327</sup> For an explanation of the term “use immunity” see para 2.47-2.51 of this Report.

<sup>328</sup> For an explanation of the term “derivative use immunity” see para 2.52-2.58 of this Report.

<sup>329</sup> Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at para 18.60.

<sup>330</sup> Id, Recommendation 18-3 at 662. See also Canadian Charter of Rights and Freedoms s 13, which provides:

A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

<sup>331</sup> The Australian Law Reform Commission also recommended that the application of the default immunity provision should be subject to the need to claim the privilege: see para 9.62 of this Report.

<sup>332</sup> Queensland Law Reform Commission, Discussion Paper, *The Abrogation of the Privilege Against Self-Incrimination* (WP 57, August 2003).

<sup>333</sup> Id at 201.

- whether there should be a default provision so that, in the absence of an express statutory statement to the contrary, an immunity would apply whenever the privilege against self-incrimination was abrogated;
- the situations, if any, in which an immunity should not be conferred.

## Submissions

9.13 The Queensland Law Society expressed the view that it would usually be desirable for an immunity to be granted in respect of compelled information. The Society favoured the enactment of a default immunity provision, which would be subject to statutory exceptions expressly stated in the relevant legislation:<sup>334</sup>

To provide for a general immunity does not prohibit the consideration of exceptions to the immunity where the case demands it. The grant of immunity by the default position provides a fair and reasonable balance to the abrogation of an important right. ... It is a compromise or solution which should be flexible enough, however, to give way to a proper case where, in the public interest, an immunity should not be granted. It should be up to those proposing removal of the immunity in future to do so on a case by case basis informed by empirical evidence.

9.14 The Bar Association of Queensland submitted that abrogation provisions should be enacted only if the legislation also contains an immunity from using the information against the person. The Association expressed the view that the immunity should apply to all disclosures, and that a general default provision to that effect should be enacted.<sup>335</sup>

9.15 The Association's view was based on two grounds. Firstly, its submission argued that, without an immunity in relation to the use of information obtained as a result of the abrogation of the privilege against self-incrimination, the very basis for the existence of the privilege - the protection of the individual - would be rendered nugatory. Secondly, the Association considered that the requirement for an immunity would also discourage abuse of an abrogation provision.<sup>336</sup>

Any body given a power to compel a person to provide information, notwithstanding that that information may tend to incriminate that person, has the potential to abuse that power. The likelihood of such abuse is significantly lessened by an immunity in relation to the use of the information obtained pursuant to the abrogation provision.

9.16 Queensland Transport also considered the conferral of an immunity to be desirable "in almost all cases" where the privilege is abrogated, and

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334 Submission 13.

335 Submission 12.

336 Ibid.

supported the enactment of a default provision in relation to the investigation of offences.<sup>337</sup>

9.17 A pro bono project bringing together lawyers, academics and law students to work to free innocent persons who have been wrongly convicted supported existing immunities remaining or applying where the privilege against self-incrimination has been abrogated. The submission noted that the project “would be seriously concerned with any further erosion of the privilege against self-incrimination.”<sup>338</sup>

9.18 The Department of Tourism, Racing and Fair Trading did not support the introduction of a default immunity provision. In its view, the question of the desirability of an immunity is one that should be decided on a case by case basis according to factors such as the purpose of the legislation and the potential detriment to the individual providing the information. The Department noted, for example, that some of the abrogation provisions in legislation that it administers do not contain an express restriction on the use of information obtained through a requirement to produce documents related to the regulation and monitoring of various industries. The Department submitted that, because these provisions apply only to documents that are required to be kept under the legislation in question, there is no need for an immunity as the use of the information “is necessarily restricted to ensuring compliance with relevant legislation and prosecuting offences.”<sup>339</sup>

9.19 However, the Department considered that the more serious the potential criminal liability, the more likely that an immunity from use of the information in criminal proceedings should be provided. The Department also suggested that the provision of a use immunity may offer an incentive to give self-incriminatory evidence necessary to resolve important regulatory or consumer protection issues that cannot be addressed by other means.<sup>340</sup>

## THE KIND OF IMMUNITY

9.20 Existing Queensland provisions that restrict the use that may be made of information provided as a result of the abrogation of the privilege against self-incrimination confer either a use or a derivative use immunity. The terms “use immunity” and “derivative use immunity” are explained in Chapter 2 of this Report.<sup>341</sup>

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337 Submission 2.

338 Submission 8.

339 Submission 5.

340 Ibid.

341 See para 2.47-2.58 of this Report.

## The scope of the protection

9.21 While a use immunity makes self-incriminating information that has been obtained as a result of a power of compulsion inadmissible in a proceeding against the individual who provided it, the protection given by a derivative use immunity is considerably wider.

9.22 Subject to any statutory exceptions,<sup>342</sup> a derivative use immunity prevents the admissibility in evidence of not only the actual information provided, but also any other evidence obtained as a result of further investigations based on that information. A use immunity, on the other hand, does not prevent the use of compelled information as a link to other incriminating evidence.

## Issues in relation to derivative use immunity

9.23 Because of the extended scope of a derivative use immunity, the grant of an immunity of this kind raises a number of issues.

### *The effect on investigations*

9.24 There is a view that the scope of a derivative use immunity may be more likely to induce someone who is being questioned in the course of an investigation or inquiry to co-operate with the investigator and to volunteer helpful information.

9.25 However, concerns have been expressed that, although a derivative use immunity may induce the provision of information, the effect of the immunity may in fact be to hamper investigative and prosecutorial powers conferred by the legislation in question.

9.26 It has been suggested that, in the context of corporate crime, examinees might have an ulterior motive for providing information which is subject to a derivative use immunity:<sup>343</sup>

... their purpose in co-operating might simply be to achieve a considerable forensic advantage for themselves, namely to ensure that any information, document or other thing derived or obtained, directly or indirectly, from the information they provided was thereby rendered inadmissible in any later criminal or penalty-exposing proceedings against them.

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342 The question of statutory exceptions to a grant of immunity is considered at para 9.52-9.54 of this Report.

343 Kluver J, *Report on Review of the Derivative Use Immunity Reforms* (1997) at 37-38. These comments were made in the context of a review of Commonwealth company law and securities law.

9.27 The forensic advantage provided by a derivative use immunity to a self-confessed wrongdoer has been described as “far in excess of what was ever contemplated under the common law privilege,”<sup>344</sup> the result being that:<sup>345</sup>

It enables an examinee, in answering questions or making statements, to quarantine a potentially large amount of evidence against him or her. This outcome is not possible merely through the exercise of any right to refuse to answer questions.

9.28 The outcome for the planning and conduct of investigations could be that the information-gathering and enforcement process is delayed, rather than expedited, as investigators might be forced to use more circuitous, costly and less time-efficient methods of investigation.<sup>346</sup>

9.29 On the other hand, it has been suggested that there may be a reluctance to volunteer self-incriminating information, even where a derivative use immunity is provided, because there may still be a risk of civil proceedings.<sup>347</sup> The validity of this assertion depends on the extent of the particular immunity. It would not hold true if the immunity prevented the subsequent use of the information in question in not only criminal proceedings, but also civil proceedings brought against the individual who provided it.

### ***The onus of proof***

9.30 In the absence of any authoritative statement of the law in Australia, there is some doubt about the onus of proof in relation to evidence that one party seeks to have admitted but another party claims is subject to a derivative use immunity.<sup>348</sup>

9.31 Clearly, it would be incumbent upon the party opposing the admission of the evidence to object to it on the ground that it had been derived from information disclosed as a result of the abrogation of the privilege against self-incrimination. Like other issues of fact arising in relation to the admissibility of evidence, the question of whether the evidence in question was derived from the compelled information would generally be determined by the trial judge on a *voir dire*.<sup>349</sup> However, there is some doubt as to whether, once the party

344 Id at 45.

345 Id at 40.

346 Id at 38.

347 Law Commission (NZ), Discussion Paper, *The Privilege against Self-Incrimination* (NZLC PP 25, 1996) at para 309, citing Cotton, “Company Directors and the Privilege Against Self-Incrimination in Civil Proceedings: Is Use Immunity the Answer? Part 2” (1994) 15 *The Company Lawyer* 131 at 132.

348 See para 2.56-2.58 of this Report.

349 Butterworths, *Cross on Evidence* (Service 81) at [1040]. A “*voir dire*” is sometimes described as a trial within a trial where, in a criminal proceeding, the judge decides a preliminary issue in the absence of the jury:

If the proof is by witnesses, [the judge] must decide on their credibility. If counter-evidence is offered, [the judge ] must receive it before [the judge] decides; and [the judge] has no right to ask the opinion of the jury ...

See *Doe d Jenkins v Davies* (1847) 10 QB 314 per Lord Denman CJ at 323, 116 ER 122 at 125.

seeking the admission of the evidence has made out a prima facie case that the evidence is not derived from the information, that party has the burden of proving that it is not so derived or whether the burden shifts to the party objecting to the admission of the evidence to show that it is derived from the information.

9.32 The latter approach would be consistent with the common law rule that a successful claim of the privilege depends on a demonstration of reasonable grounds for the claim.<sup>350</sup> On the other hand, analogies with the admissibility of confessions, where the prosecution bears the onus of proving voluntariness,<sup>351</sup> and the competence of a prosecution witness, where the prosecution also bears the burden of proof,<sup>352</sup> suggest that once the issue of derivative use immunity has been raised, the party seeking to rely on the evidence would have the burden of proving that it was not derived from the disclosed information. This may be explained on the basis that the conditions of admissibility have to be established by those alleging that they exist.<sup>353</sup>

### The effect on confidential sources

9.33 Concerns have been expressed that a derivative use immunity could potentially thwart some criminal prosecutions by allowing the defendant to seek the exclusion of evidence on the basis that it was obtained as a result of compelled information. It has been suggested that, particularly if the prosecution bears the onus of establishing that the evidence was not derived from self-incriminating information given by the defendant, refuting such a claim may be difficult without disclosing confidential sources or informants.<sup>354</sup>

### The Discussion Paper

9.34 In the Discussion Paper,<sup>355</sup> the Commission sought submissions on the following issues:<sup>356</sup>

- if the grant of an immunity is considered desirable, whether the immunity conferred should be limited to a “use immunity” or whether it should be a “derivative use” immunity;

<sup>350</sup> *R v Boyes* (1861) 1 B & S 311 at 329-330; 121 ER 730 at 738.

<sup>351</sup> *Wendo v R* (1963) 109 CLR 559.

<sup>352</sup> *R v Yacoob* (1981) 72 Cr App R 313 at 317.

<sup>353</sup> Butterworths, *Cross on Evidence* (Service 81) at [11075].

<sup>354</sup> See for example *Criminal Proceeds Confiscation Bill 2002* (Qld) Explanatory Notes at 6.

<sup>355</sup> Queensland Law Reform Commission, Discussion Paper, *The Abrogation of the Privilege Against Self-Incrimination* (WP 57, August 2003).

<sup>356</sup> *Id* at 201.



- whether a provision that confers a derivative use immunity should also provide who has the onus of proof in relation to whether evidence has or has not been derived from material obtained as a result of the abrogation of the privilege;
- if yes to the previous question, whether the onus of proof should be borne by the party seeking to have the evidence admitted or by the party objecting to its admission.

## Submissions

### *The kind of immunity*

9.35 The Bar Association of Queensland submitted that the immunity should extend to derivative information:<sup>357</sup>

Derivative information is the fruit of the original abrogation. To allow its use undermines the very purpose of the privilege.

9.36 The Association considered that the ability to use derivative information would encourage abuse of a power to compel the provision of information.<sup>358</sup>

The power to compel information can be used to further investigations, knowing that the results of investigations based on that information can be used against the person notwithstanding the fact that but for the power to compel, those investigations could not have been undertaken.

9.37 The Queensland Law Society supported the provision of a derivative use immunity to compensate for loss of the penalty privilege.<sup>359</sup>

9.38 Queensland Transport generally favoured a derivative use immunity, but qualified its view by observing that the extent of the immunity to be conferred would depend on the circumstances.<sup>360</sup>

9.39 The Department of Tourism, Racing and Fair Trading was of the view that, where the provision of an immunity was considered appropriate, the type of immunity to be conferred would depend on the nature of the legislation. Some legislation administered by the Department, while conferring a use immunity, clearly envisages that compelled information “would be utilised to gain further information to be used against the person.”<sup>361</sup>

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357 Submission 12.

358 Ibid.

359 Submission 13.

360 Submission 2.

361 Submission 5. See for example *Fair Trading Act 1989* (Qld) ss 88B(6), 90(6) and the Second Reading Speech of Minister for Justice, the Hon D Beanland, who was at that time responsible for consumer protection legislation: *Queensland Parliamentary Debates*, 4 September 1996, at 2425-2426.

### ***Derivative use immunity - the onus of proof***

9.40 The Bar Association of Queensland submitted that any provision conferring a derivative use immunity should provide that a party seeking to have evidence admitted should bear the onus of proving that the evidence was not derived from compelled information.<sup>362</sup>

To do otherwise is to place an intolerable burden on the party who is objecting to its admission. That party is unlikely to have available to him or her all of the background and other information relevant to allow a correct determination of whether the information is, in truth, derivative information.

9.41 A community youth legal service was also of the view that the onus of proof should lie with the party wishing to use the information as evidence,<sup>363</sup> as was Queensland Transport.<sup>364</sup>

9.42 The Department of Tourism, Racing and Fair Trading supported the enactment of a legislative provision to clarify the position with respect to the onus of proof where a derivative use immunity is claimed, but did not express a view as to which party should carry the onus.<sup>365</sup>

## **PROCEEDINGS WHERE AN IMMUNITY SHOULD APPLY**

### **Existing provisions**

9.43 Some Queensland provisions confer an immunity which applies in proceedings of all kinds. For example, an Act may provide that the immunity applies “in proceedings”,<sup>366</sup> or in civil, criminal or administrative proceedings.<sup>367</sup>

9.44 Other provisions, while conferring a general immunity, allow the use of the information in proceedings of a particular kind.<sup>368</sup>

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362 Submission 12.

363 Submission 9.

364 Submission 2.

365 Submission 5.

366 See for example *Fire and Rescue Service Act 1990* (Qld) s 58.

367 See for example *Crime and Misconduct Act 2001* (Qld) s 197(2).

368 See for example *Health Rights Commission Act 1991* (Qld) s 96(5)(a); *Guardianship and Administration Act 2000* (Qld) s 137(6)(b), (c) and (d).

9.45 Still other provisions confer immunity only in specified proceedings - for example, criminal proceedings<sup>369</sup> or proceedings for certain offences.<sup>370</sup>

## The Discussion Paper

9.46 In the Discussion Paper,<sup>371</sup> the Commission noted that, in relation to existing abrogation provisions that confer an immunity, there did not seem to be any established criteria for determining the type of proceeding where the immunity should apply.<sup>372</sup>

9.47 The Commission sought submissions on the following issues:<sup>373</sup>

- whether an immunity should prevent the use in all subsequent proceedings of self-incriminating information obtained as a result of the abrogation of the privilege;
- if no to the previous question, the criteria that should be used to determine the kind of proceeding, if any, in which an immunity should apply.

## Submissions

9.48 The Queensland Law Society submitted that the immunity should apply “in relation to all forms of enquiry by any regulator in or out of Court unless modified by clear express statement.”<sup>374</sup>

9.49 The Bar Association of Queensland expressed the view that the immunity should apply in “any subsequent civil or criminal proceedings.”<sup>375</sup> The Association was concerned at the “growth of civil sanctions in recent years” and the potentially serious consequences for an individual of civil proceedings. Its submission highlighted, by way of example, the situation under the *Coroners Act 2003* (Qld), where the privilege against self-incrimination is abrogated and a

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369 See for example *Fair Trading Act 1989* (Qld) s 88B(6).

370 See for example *Environmental Protection Act 1994* (Qld) s 320(7), which provides that the information may not be used in proceedings for an offence against the Act constituted by the conduct that caused or threatened the harm disclosed by the information. See also *Recreation Areas Management Act 1988* (Qld) s 40(2).

371 Queensland Law Reform Commission, Discussion Paper, *The Abrogation of the Privilege Against Self-Incrimination* (WP 57, August 2003).

372 Id at 190.

373 Id at 201.

374 Submission 13.

375 Submission 12.

derivative use immunity conferred in respect of subsequent criminal proceedings.<sup>376</sup> The Association observed:<sup>377</sup>

Civil litigation regularly follows a coronial inquiry. Indeed, it is a far more likely outcome than criminal proceedings. In those circumstances, to abrogate the privilege but deny immunity from use of that information, or any derivative information in subsequent civil proceedings is a fundamental breach of an individual's human rights.

9.50 However, the Department of Tourism, Racing and Fair Trading, while acknowledging that an immunity from use in criminal proceedings may sometimes be appropriate, submitted that:<sup>378</sup>

There would appear to be some support for the view that a person who is entitled to immunity from prosecution as a result of abrogation of the privilege should not necessarily be entitled to immunity from civil liability.

9.51 The Department noted that the *Fair Trading Act 1989* (Qld), for example, confers a use immunity that is limited to criminal proceedings.<sup>379</sup> The effect of the immunity was intended to be that compelled information obtained under the Act would be made available to expedite civil proceedings.<sup>380</sup>

## EXCEPTIONS TO THE IMMUNITY

9.52 The extent of the protection provided by either a use or a derivative use immunity will depend on the legislative exceptions to it.

9.53 The most common exception found in existing Queensland abrogation provisions concerns proceedings for perjury,<sup>381</sup> or for making false or misleading statements to an inquiry or an investigation.<sup>382</sup> Other exceptions may involve proceedings for offences under the legislation in question,<sup>383</sup> or for other specified offences.<sup>384</sup>

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376 *Coroners Act 2003* (Qld) s 39.

377 Submission 12.

378 Submission 5.

379 *Fair Trading Act 1989* (Qld) ss 88B(6), 90(6).

380 Submission 5.

381 "Perjury" is the act of "making on oath by a witness ... in a judicial proceeding of a statement material in that proceeding, which he knows to be false or which he does not believe to be true": *Osborn's Concise Law Dictionary*. See for example *Cooperatives Act 1997* (Qld) s 411(3)(b).

382 See for example *Coal Mining Safety and Health Act 1999* (Qld) s 159(6); *Business Names Act 1962* (Qld) s 13(3); *Motor Accident Insurance Act 1994* (Qld) s 79(3).

383 See for example *Crime and Misconduct Act 2001* (Qld) s 197(3)(b)(ii); *Liquid Fuel Supply Act 1980* (Qld) s 40(4); *Local Government Act 1993* (Qld) s 696(15).

384 See for example *Commissions of Inquiry Act 1950* (Qld) s 14A(1).

9.54 The Australian Law Reform Commission has recommended the adoption of a default immunity provision that in the absence of an express provision to the contrary, would apply in all proceedings other than those with respect to the falsity of the information provided.<sup>385</sup>

### The Discussion Paper

9.55 In the Discussion Paper,<sup>386</sup> the Commission sought submissions on the issue of whether proceedings for certain kinds of offences should be excepted from the immunity.<sup>387</sup>

### Submissions

9.56 The Queensland Bar Association submitted that the only offences that should be excepted were perjury, or making false or misleading statements to an inquiry or an investigation.<sup>388</sup> Queensland Transport supported the view that immunity should not be available in proceedings for offences concerning the falsity of evidence given under oath.<sup>389</sup>

9.57 The Queensland Law Society recognised that there would be situations where the existence of an immunity would not be in the public interest.<sup>390</sup>

9.58 However, the Department of Tourism, Racing and Fair Trading considered that the less serious the potential liability (for example, for failing to keep records), the less justification there would be for conferral of immunity.<sup>391</sup>

9.59 A community youth legal service expressed the view that immunity may be inappropriate where the individual required to give the self-incriminating information is an elected person or a person with a statutory duty of care or fiduciary duty.<sup>392</sup> Similarly, Queensland Transport suggested:<sup>393</sup>

Possibly a person who is deemed likely to be a high risk to the safety and well-being of the public should not be granted an immunity at all.

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385 Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) Recommendation 18-3 at 662.

386 Queensland Law Reform Commission, Discussion Paper, *The Abrogation of the Privilege Against Self-Incrimination* (WP 57, August 2003).

387 Id at 202.

388 Submission 12.

389 Submission 2.

390 Submission 13.

391 Submission 5.

392 Submission 9.

393 Submission 2.

## ENTITLEMENT TO THE IMMUNITY

9.60 Some existing Queensland provisions that confer an immunity impose conditions that must be satisfied before the immunity will apply.

### The need to object to providing information

9.61 Under some existing provisions, there is no entitlement to an immunity unless, before the compelled information is disclosed, there has been an objection to providing the information on the grounds of self-incrimination.<sup>394</sup>

9.62 The Australian Law Reform Commission, which recently recommended the adoption of a default immunity provision where the privilege against self-incrimination is abrogated, also recommended that the application of the provision should be subject to the need to claim the privilege.<sup>395</sup> On the other hand, one of the factors currently considered by the Scrutiny of Legislation Committee of the Queensland Parliament in determining whether proposed legislation provides appropriate protection against self-incrimination is whether the proposed legislation requires, in order to secure the restriction of the use of compelled information, fulfilment of any requirements, such as formally claiming the right to the privilege before disclosing the information.<sup>396</sup> It would therefore appear that, in the Committee's view, an abrogation provision does not give a sufficient degree of protection if it requires objection to be made to the provision of self-incriminating information before there can be entitlement to an immunity.

9.63 The need to claim the privilege gives rise to two concerns. The first concern is the effect of failure to claim privilege on an individual who gives self-incriminating information. The second concern involves issues of legislative drafting and the possibility of ambiguity in abrogation provisions.

### The effect of failure to claim the privilege

9.64 There are significant consequences for an individual who is unaware of the need to object before providing information or who forgets to claim the privilege prior to answering:<sup>397</sup>

<sup>394</sup> See for example *Commercial and Consumer Tribunal Act 2003* (Qld) s 112(2); *Financial Administration and Audit Act 1977* (Qld) s 87(10); *Fire and Rescue Service Act 1990* (Qld) s 58; *Recreation Areas Management Act 1988* (Qld) s 40(2); *Water Act 2000* (Qld) s 617(14).

<sup>395</sup> Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) Recommendation 18-3 at 662. See para 9.11 of this Report.

<sup>396</sup> See for example Queensland Parliament, Scrutiny of Legislation Committee, *Report on the Queensland Building Tribunal Bill 1999* (Alert Digest No 13 of 1999 at 31-32); *Report on the Guardianship and Administration Bill 1999* (Alert Digest No 1 of 2000 at 7-8); *Report on the Coroners Bill 2002* (Alert Digest No 1 of 2003 at 7-8). The role of the Scrutiny of Legislation Committee is outlined at para 2.41-2.42 of this Report.

<sup>397</sup> Woellner R, *The ASC's Investigative Powers - Some Practical Aspects*, 50<sup>th</sup> Anniversary Conference Australian Law Teachers' Association: Cross Currents: Internationalism, National Identity and Law, 1995, <<http://www.austlii.edu.au/au/special/alta/alta95/woellner1.html>> at 14 December 2004.

Failure to claim the protection of the privilege before complying with a ... requirement [to provide information] means that the protection against subsequent use is irretrievably lost ...

9.65 The need for an objection is probably consistent with the common law, which requires a witness to claim the privilege in order to be entitled to its protection. In court proceedings, the judge might, as a matter of practice, warn a witness that he or she does not have to answer incriminating questions. However, the judge is not obliged to do so. If the witness provides incriminating evidence, his or her ignorance of the right to the privilege is irrelevant. Even if a witness is aware of the right to the privilege, he or she may not realise, in the absence of a warning, that a question is designed to elicit a self-incriminating answer. In any event, failure to claim the privilege amounts to a waiver, and the evidence can be used against the witness in the case in which it is given or in subsequent proceedings brought against the witness.<sup>398</sup>

9.66 In situations other than court proceedings ordinary citizens may be even less aware of the significance of claiming the privilege. The proliferation of regulatory legislation has resulted in the appointment of “authorised officers” who are armed with official identification and the power to demand information. An individual confronted with such a demand may not know that he or she must object to providing the information in order to be entitled to an immunity.

9.67 Some of the legislation requiring an objection to the provision of information contains an accompanying obligation on the part of the investigator to warn that no immunity will attach to the information unless the objection is made before the information is provided.<sup>399</sup>

### **Drafting issues**

9.68 Where a legislative provision abrogates privilege and confers an immunity against the use of compelled information, an ambiguity can arise if the provision does not expressly state that entitlement to the immunity is dependent on an objection to providing the information.<sup>400</sup>

On one interpretation, a person who discloses incriminating information without first claiming privilege might subsequently be able to benefit from use immunity, which arguably extends to all information obtained in compliance with the relevant statutory provision. On another interpretation, a failure to claim privilege at the outset might be deemed to be a waiver of privilege, and thus of any subsequent use immunity.

<sup>398</sup> *R v Coote* (1873) LR 4 PC 599; [1861-73] All ER Rep 1113. See also Butterworths, *Cross on Evidence* at [25105].

<sup>399</sup> See for example *Coal Mining Health and Safety Act 1999* (Qld) s 155(3); *Motor Accident Insurance Act 1994* (Qld) s 79(2).

<sup>400</sup> Australian Law Reform Commission, Discussion Paper, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation* (DP 65, April 2002) at para 9.55.

### The need for the information to be self-incriminatory

9.69 Some existing Queensland abrogation provisions impose, as a further condition of entitlement to an immunity, a requirement not only that there must be an objection to providing the information on the grounds of self-incrimination, but also that the information must in fact tend to be self-incriminatory.<sup>401</sup>

9.70 The imposition of an objective test is consistent with entitlement to the privilege at common law, where, in court proceedings, a claim by a witness that the answer to a question might be self-incriminatory does not of itself give rise to a privilege against self-incrimination. For the privilege to apply, the court must be able to see, from the circumstances of the case and the nature of the evidence that the witness is called to give, that there is reasonable ground to apprehend that, if the witness is required to answer, he or she will be in danger of incriminating himself or herself.<sup>402</sup>

9.71 However, concerns have been expressed that, particularly in an administrative context, such provisions do not usually specify who should be responsible for determining whether, when an immunity is claimed, the disclosure of particular evidence would be self-incriminatory:<sup>403</sup>

As a result, it is not clear which administrative officers are responsible for determining such claims. These procedural ambiguities are significant because they lack the certainty of self-incrimination procedures in court and thus have the potential to adversely affect the rights of the regulated.

### The Discussion Paper

9.72 In the Discussion Paper,<sup>404</sup> the Commission sought submissions on the following issues:<sup>405</sup>

- whether an abrogation provision that confers an immunity should require that, before being entitled to the immunity, a person must object to providing the information on the grounds of self-incrimination;
- if yes to the previous question, whether there should be an obligation on a person requiring a person to give self-incriminating information to warn that person of the need to object to providing the information;

<sup>401</sup> See for example *Financial Administration and Audit Act 1977* (Qld) ss 85(6), (7), 86(4), 87(9), (10); *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 421(14)(b).

<sup>402</sup> *R v Boyes* (1861) 1 B & S 311 at 329-330; 121 ER 730 at 738. See also *Sorby and Another v The Commonwealth of Australia and Others* (1983) 152 CLR 281 per Gibbs CJ at 289.

<sup>403</sup> Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at para 18.42.

<sup>404</sup> Queensland Law Reform Commission, Discussion Paper, *The Abrogation of the Privilege Against Self-Incrimination* (WP 57, August 2003).

<sup>405</sup> Id at 202.



- whether a provision that requires a person to object to providing information on the grounds of self-incrimination in order to be able to be entitled to an immunity should also require that, for the immunity to apply, the information must in fact be self-incriminatory;
- if yes to the previous question, how the issue of factual tendency should be decided.

## Submissions

### *The need to object*

9.73 The Bar Association of Queensland submitted that it should not be necessary for there to have been an objection to providing information on the grounds of self-incrimination in order for there to be an entitlement to claim an immunity in respect of that information:<sup>406</sup>

Individuals should not have differing rights, depending on their knowledge of the procedure required to claim the right.

9.74 Queensland Transport agreed that, where an abrogation provision confers an immunity, there should not be a requirement for an objection. It considered that the right to the immunity should be automatic, unless there are express exceptions contained in the legislation. The respondent also suggested the inclusion of a provision allowing the benefit of the immunity to be waived.<sup>407</sup>

9.75 However, the Department of Tourism, Racing and Fair Trading generally supported the position that it should be necessary to object to providing self-incriminating information in order to be entitled to an immunity.<sup>408</sup>

### *An obligation to warn*

9.76 Although opposed to a requirement to object, two respondents agreed that, if there were such a requirement, there should be an obligation on the court or body seeking the provision of the information to warn the individual concerned of the need for an objection.<sup>409</sup>

9.77 A youth legal service submitted that, wherever it is sought to abrogate the privilege, procedural safeguards such as appropriate warnings and legal

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406 Submission 12.

407 Submission 2.

408 Submission 5.

409 Submissions 2, 12.

information and advice are essential for those, including children, with impaired capacity under the law.<sup>410</sup>

***Whether the information provided must in fact be self-incriminatory***

9.78 The Department of Tourism, Racing and Fair Trading agreed that entitlement to an immunity should depend on, in addition to an objection to providing the information on the grounds of self-incrimination, whether the information in fact tends to be self-incriminatory.<sup>411</sup>

9.79 Queensland Transport considered it sufficient to provide that the giving of the information might tend to be self-incriminatory. It noted that the immunity would not operate unless the information was in fact self-incriminatory.<sup>412</sup>

***How the issue of factual tendency should be decided***

9.80 The Department of Tourism, Racing and Fair Trading submitted that the issue of factual tendency should be decided by a court if subsequent proceedings are brought against the individual who provided the information. It suggested that, in such a situation, the matter should be decided on the balance of probabilities.<sup>413</sup>

## **THE COMMISSION'S VIEW**

### **The privilege against self-incrimination**

***Whether an immunity is desirable***

9.81 Legislation that abrogates the privilege against self-incrimination takes away a right that confers significant protection against the compelled provision of information that would tend to prove the guilt of the individual providing it. The Commission is therefore of the view that, where the privilege is abrogated, an immunity against the use of the information obtained as a result of the abrogation should generally be provided to compensate for the loss of that right and its concomitant protection.

9.82 In coming to this conclusion, the Commission has taken into consideration the criticism that has been levelled by some commentators at legislation that both abrogates the privilege and confers an immunity against the future use of the information obtained as a result of the abrogation.<sup>414</sup>

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410 Submission 9.

411 Submission 5.

412 Submission 2.

413 Submission 5.

414 See para 9.8 of this Report.

9.83 Two particular objections to the grant of an immunity are that it is an incomplete replacement for the protection that would otherwise be given by the privilege, and that it creates the anomalous situation of an investigative authority being unable to use an admission of guilt to secure a conviction.

9.84 The first of these arguments is based on the role of the privilege as a safeguard against the use of oppressive means to obtain self-incriminating information. It is said that an immunity against the use of information will not of itself protect from oppressive means of obtaining that information. The Commission agrees with this proposition. However, in Chapter 6 of this Report, the Commission has recommended that the provision of adequate safeguards should be a consideration to be taken into account in determining whether abrogation of privilege is appropriate.

9.85 The second argument is that the abrogation of the privilege, coupled with the provision of an immunity, can lead to a situation where there is evidence of guilt, but that evidence cannot be used. It may mean that an individual who has provided self-incriminating information may nonetheless escape conviction if it is not possible to gather sufficient other evidence against the individual. The Commission acknowledges that the grant of an immunity may produce this result. However, if the privilege had not been abrogated, it would not have been possible to secure a conviction in the absence of other evidence. In the view of the Commission, it is contrary to the fundamental principles of our criminal justice system that an individual should be able to be convicted on the basis of self-incriminating information he or she has been compelled to provide.

9.86 Compelled information may also be important for purposes other than convicting the individual who provided it. It may, for example, in addition to being self-incriminating, incriminate others, thus assisting in obtaining convictions for possibly more serious offences. Alternatively, it may be used to develop policies and programmes to promote or protect a significant public interest. In these situations, if abrogation of the privilege were otherwise justified,<sup>415</sup> it would allow an investigatory authority access to valuable information that would probably have been unavailable if the privilege had not been abrogated, and the provision of the immunity to compensate for the loss of the privilege would not detract from the underlying reason for the abrogation.<sup>416</sup>

9.87 The Commission does not accept the argument put forward by the Department of Tourism, Racing and Fair Trading that, where an abrogation provision applies to documents that are required to be kept under the legislation in question, there is no need for an immunity because use of the information is restricted to compliance and prosecution purposes under the relevant Act.<sup>417</sup> In

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415 See the Commission's recommendations at p 62 of this Report in relation to the circumstances in which abrogation of the privilege may be justified.

416 See Recommendation 6-3(d) at p 63 of this Report.

417 See para 9.18 of this Report.

the view of the Commission, there is no guarantee, in the absence of an immunity, that the compelled information would not be used in other ways - for example, as evidence in a civil claim against the individual who provided it.

### ***The kind of immunity***

9.88 The Commission considers that, where an immunity is provided, it should generally be in the form of a use, rather than a derivative use, immunity.

9.89 In the view of the Commission, the potential effect of a derivative use immunity is wider than the scope of the protection that would have been available if the privilege had not been abrogated. The Commission therefore considers that a derivative use immunity, because of its capacity to effectively quarantine from use additional material that proves the guilt of an individual who has provided self-incriminating information, should not be granted unless there are exceptional circumstances to justify the extent of its impact.

### ***Derivative use immunity - the onus of proof***

9.90 To date there has been considerable uncertainty about the onus of proof in relation to a derivative use immunity. The Commission is therefore of the view that there is a need for legislation to ensure that, if a derivative use immunity is conferred, there is no doubt as to where the onus lies.

9.91 In the Commission's view, it would seem fair that, since the party seeking the admission of the evidence presumably knows how it was obtained, that party should bear the onus of proof on the issue.

### ***The mechanism for providing an immunity***

#### *A default immunity provision*

9.92 In Queensland, there is presently no immunity unless it is expressly conferred by the legislation that abrogates the privilege. A default immunity provision of the kind recommended by the Australian Law Reform Commission<sup>418</sup> would therefore result in a significant change to the existing situation.

9.93 However, as the Commission considers that an immunity should generally be granted, it is of the view that a default provision should be enacted. The default provision should state that an individual who provides self-incriminating information in response to the exercise of a power of compulsion is entitled to an immunity against the subsequent use of that information, unless there is a clear express statement to the contrary in a particular abrogation provision. In the view of the Commission, the existence of a default provision of this kind would ensure the general availability of the immunity and the need to

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Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) Recommendation 18-3 at 662. See para 9.11 of this Report.

justify its absence in a particular situation. It would also ensure that the immunity could not be omitted as the result of a legislative or drafting oversight.

*Criteria for determining whether immunity should not be conferred*

9.94 Although the Commission is of the view that, where the privilege has been abrogated, a default immunity provision should ordinarily apply, it acknowledges that there may be rare categories of cases in which the grant of an immunity is not appropriate.

9.95 Because of the wide variety of circumstances in which a power to compel the provision of self-incriminating information may be justified, the Commission does not propose to attempt to identify specific criteria for determining when abrogation legislation should displace the application of the default immunity provision.

9.96 In the Commission's view, the default provision should be able to be displaced only if, after taking into account the balance between the justification for the abrogation and the individual rights at stake, there is a compelling reason why a use immunity should not apply.

***Entitlement to an immunity***

9.97 The existence of a default immunity provision would give rise to a number of further issues.

*An obligation to inform*

9.98 The Commission is concerned that, because of the wide variety of circumstances and situations in which the privilege against self-incrimination might be abrogated, there is a risk that an individual required to provide self-incriminating information might be unaware that he or she was entitled to the protection of an immunity against the subsequent use of that information. The Commission is therefore of the view that, when information is sought under a provision that abrogates the privilege against self-incrimination, the individual providing the information must be informed:

- that the individual must provide the information even though it might be self-incriminatory;
- whether or not an immunity against the use of the information is available; and
- the nature and extent of the immunity.

9.99 The manner in which the information about the immunity is to be given and the responsibility for providing the information will depend on the circumstances surrounding the application of an individual abrogation provision.

*The need to object*

9.100 The Commission considers that entitlement to the benefit of an immunity should not be dependent on whether an individual who has been compelled to provide self-incriminating information has objected to doing so. The Commission is, of course, mindful of the common law position that failure to claim the privilege amounts to a waiver of the right to protection against self-incrimination.<sup>419</sup> However, this principle developed in the context of court proceedings, where a witness asked to provide self-incriminating information may have had legal advice and representation, or have been warned by the judge of the need to object. The privilege against self-incrimination now extends beyond court proceedings<sup>420</sup> and, as a result, provisions that abrogate the privilege operate in a wide variety of non-judicial investigative contexts. The Commission is concerned that, in such a situation, it is less likely that an individual would be aware that, by failing to object to providing the information, he or she would be at risk of losing entitlement to an immunity because he or she would be taken to have waived the right to claim the privilege. That risk is made greater by the possibility that, in a non-judicial setting, an individual might not recognise that a question or inquiry is designed to elicit a self-incriminating answer.

9.101 The Commission is therefore of the view that a legislative provision that confers an immunity against the use of compelled self-incriminating information should not require that the individual who provides the information object to doing so in order to be entitled to claim the immunity.

*The right to choose*

9.102 Although the Commission favours the enactment of a default immunity provision, it acknowledges that there might be situations in which, for a variety of reasons, an individual might not wish to take advantage of the protection offered by the immunity. The Commission therefore considers that an individual who has been required to provide self-incriminating information should be able to choose to waive the benefit of the default provision.

*Whether the information provided must in fact be self-incriminatory*

9.103 Some existing Queensland abrogation provisions that confer an immunity against the use of self-incriminating information obtained as a result of the abrogation require that, in order for the immunity to apply, the information must in fact tend to incriminate the person who provided it. However, there are other abrogation provisions that do not expressly include this requirement.

9.104 In the view of the Commission, it is clear that the immunity should not apply unless the information does in fact tend to incriminate the individual who

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419 See para 9.65 of this Report.

420 See para 5.3 of this Report.

provided it. The purpose of the immunity is to compensate the individual for the loss of the right to refuse to provide self-incriminatory information. The entitlement to the immunity is therefore dependent on the nature of the information given in response to the exercise of a coercive power. It would not be open to an individual who had provided information to object, on the basis of the immunity, to the use as evidence in a subsequent proceeding of information that did not in fact tend to incriminate the individual.

9.105 The Commission is therefore of the view that, to avoid any doubt as a result of inconsistency among different abrogation provisions, a provision that confers an immunity against the evidentiary use of compelled information should be expressed to apply only to information that does in fact tend to incriminate the individual.

*How the issue of factual tendency should be decided*

9.106 An immunity expressed to be available only if the information to which it relates in fact tends to incriminate the individual who provided it raises the question of who is to decide the factual tendency of the information.

9.107 The effect of an immunity is to prevent the use of compelled information as evidence against the individual who provided it. The question of entitlement to the immunity will therefore not arise until an opposing party seeks to rely on the information in a subsequent proceeding, and the party who provided the information objects to its use.

9.108 Consequently, the issue is one that concerns the admissibility of evidence in the forum in which the subsequent proceeding is heard and is, in the view of the Commission, beyond the scope of this reference.

***Type of proceeding where an immunity should be available***

9.109 In the view of the Commission the immunity should generally be available in all kinds of subsequent proceedings against an individual who has been required to give self-incriminating information. This would include not only criminal and civil proceedings, but also, for example, proceedings of an administrative or disciplinary nature.

9.110 However, the Commission acknowledges that, in the circumstances of a particular Act, an immunity that applied in all proceedings may not be appropriate. In such a situation, it would be possible for a specified kind of proceeding to be excepted from the operation of the immunity.

*Criminal proceedings*

9.111 The purpose of the privilege against self-incrimination is to protect an individual from having to provide information that would tend to prove that the individual had committed a criminal offence. The Commission therefore considers it appropriate that an immunity granted to compensate for the loss of

protection that results from the abrogation of the privilege should apply in criminal proceedings against the individual who provided the information.

#### *Civil proceedings*

9.112 It is possible that compelled information might tend to make the individual who provided it liable in a claim for damages for compensation for a civil wrong - for example, for negligence. Whilst there is no equivalent to the privilege against self-incrimination that protects a defendant in a civil claim from having to disclose information that would tend to establish the defendant's liability, the Commission considers that to allow a compelled admission of criminal behaviour to be used in such a proceeding might give a plaintiff a significant advantage that the plaintiff would not have had if the privilege had not been abrogated. The Commission considers that a benefit of this kind to an opposing party would be unduly unfair to the individual who was forced to make the admission. In the view of the Commission, abrogation of the privilege should not generally be able to be used to further the interests of a claimant in a civil action.

9.113 The Commission recognises, however, that there may be circumstances where there is a need for an exception to this general proposition. Such a situation could arise, for example, if the self-incriminating information is contained in a document that confers a right or imposes a liability that is in issue in the civil proceeding. Where the use of compelled self-incriminating information in a civil proceeding can be justified, it would be possible for the general rule to be displaced by a specific provision in individual legislation.

9.114 The Commission also acknowledges the existence of a number of abrogation provisions that currently allow the use of compelled self-incriminatory information as evidence in a civil proceeding against the individual who provided it. The enactment of a default immunity provision preventing the admissibility of this kind of evidence in a civil proceeding could therefore impact adversely on a plaintiff if litigation had already been commenced. In the view of the Commission, the default immunity provision should be expressed to apply only to proceedings started after the provision has come into operation in order to ensure that existing rights are not affected.

#### *Other proceedings*

9.115 Because other kinds of proceedings - for example, proceedings that are administrative or disciplinary in nature - may also have potentially serious consequences for an individual against whom they are brought, the Commission is of the view that self-incriminatory information that the individual has been compelled to provide should not be admissible in such proceedings.

9.116 The Commission is further of the view that, from a practical perspective, extending the effect of the immunity to all kinds of subsequent



proceedings would avoid potential disputes about the nature of a proceeding where it is sought to use the information.

### ***Exceptions to the grant of immunity***

9.117 Legislative provisions that grant an immunity as compensation for abrogation of the privilege often exclude certain specified proceedings from the operation of the immunity. The Commission has therefore given its consideration to possible exceptions to the grant of an immunity.

#### *Proceedings that relate to the falsity of the information*

9.118 The exception most commonly found in the existing legislation is a proceeding that relates to the falsity of the information given as the result of the exercise of a power to compel disclosure. If the immunity applied to such a proceeding, the effect would be that the information in question would be inadmissible in the proceeding and it would therefore be impossible to prove the allegation that the compelled information was in fact false.

9.119 The Commission agrees that the immunity should not apply in a proceeding about the falsity of the compelled information. In the view of the Commission, if the need for the information is such that it justifies the abrogation of the privilege according to the criteria recommended by the Commission in Chapter 6 of this Report, it is unacceptable that it should be possible to thwart the purpose of the abrogation provision and to avoid punishment for giving false information because the information is subject to an immunity.

#### *The position of the individual who is compelled to give information*

9.120 One respondent suggested that there should not be any entitlement to an immunity if the individual who is required to give the self-incriminating information is an elected person or a person with a statutory duty of care or fiduciary duty.<sup>421</sup>

9.121 The Commission acknowledges that individuals who occupy public positions or positions of trust have a responsibility to conduct themselves with a high degree of probity and integrity. However, in the view of the Commission, if the behaviour of an individual in such a position falls short of the required standard, the position does not of itself justify refusal of the benefit of any immunity that may be available against the use of compelled self-incriminatory information.

9.122 Further, the Commission sees no basis for distinguishing between an individual who is under a statutory duty of care and one who owes such a duty at common law. The Commission is also concerned that uncertainty in relation

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See para 9.59 of this Report.

to the law of fiduciary relationships might give rise to arguments about whether a fiduciary duty existed in the circumstances of a particular case.

*An individual deemed to be a public risk*

9.123 Another respondent proposed that the immunity should automatically be denied to “a person who is deemed likely to be a high risk to the safety and well-being of the public”.<sup>422</sup> However, the Commission is unable to agree with this submission. In the Commission’s view, the problems inherent in the proposal - for example, the mechanism for deciding that an individual has these characteristics, and the lack of any necessary connection between the nominated risk, the self-incriminatory information and the subsequent proceeding - create the potential for a serious miscarriage of justice.

*Other exceptions*

9.124 The Commission acknowledges that, in the circumstances of an individual abrogation provision, there may be additional grounds for excluding certain proceedings from the operation of the immunity. These grounds may include, for example, proceedings for offences under the legislation in question, proceedings of a particular kind, or other proceedings where the information is of particular relevance.<sup>423</sup>

## **The penalty privilege**

9.125 Although the penalty privilege is regarded as a separate aspect or ground of privilege, historically it is closely connected to the privilege against self-incrimination.<sup>424</sup>

9.126 The Commission is therefore of the view that, in the interests of certainty and consistency, the legislative provisions proposed above by the Commission should apply to the penalty privilege in the same way as they do to the privilege against self-incrimination.

9.127 This is not to say that abrogation of the penalty privilege should always be accompanied by an immunity against the use of information obtained as a result of the abrogation. The Commission recognises that there may be situations where it would not be appropriate for the loss of the penalty privilege to be compensated for by the provision of an immunity. However, in such situations, the default immunity can be overridden by specific legislation.

9.128 It is the Commission’s intention that an individual who is compelled to provide information that might expose him or her to a penalty should not be disadvantaged by the inadvertent omission of an immunity from the legislation

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422 Ibid.

423 See para 9.53 of this Report.

424 See para 2.2 and 2.26-2.32 of this Report.

that abrogates the privilege. In the Commission's view, therefore, it should be the responsibility of those seeking the abrogation of the privilege to consider whether the provision of an immunity is appropriate and, if not, to include a provision to the effect that the default immunity does not apply.

## RECOMMENDATIONS

- 9-1 A legislative provision of general application should be enacted to the effect that:**
- (a) when an individual discloses information under a provision of an Act that abrogates the privilege against self-incrimination and/or the penalty privilege, in the absence of a clear, express statement to the contrary in the Act, information that would otherwise have been subject to the privilege may not be used in evidence in any proceeding against the individual;**
  - (b) when an individual is required to disclose information under a legislative provision that abrogates the privilege against self-incrimination and/or the penalty privilege, the individual must be informed:**
    - (i) that the individual must provide the information even though it might be self-incriminatory or might expose the individual to a penalty;**
    - (ii) whether or not the provision confers an immunity against the future use of the information; and**
    - (iii) the nature and extent of the immunity;**
  - (c) an individual who is required to disclose information under a legislative provision that abrogates the privilege against self-incrimination and/or the penalty privilege may waive any immunity to which he or she is entitled.**
- 9-2 The provision referred to in Recommendation 9-1(a) should not be overridden in another Act unless, after the balance between the justification for the abrogation and the rights of the individual who has been compelled to disclose the information has been taken into account, there is a compelling reason why a use immunity should not apply.**

**9-3 A derivative use immunity should not be granted unless there are exceptional circumstances that justify the extent of its impact.**

**9-4 A legislative provision of general application should be enacted to the effect that, if:**

**(a) an Act that abrogates the privilege against self-incrimination and/or the penalty privilege confers a derivative use immunity; and**

**(b) an individual who was required under that Act to disclose self-incriminating information or information that might expose the individual to a penalty objects to the admission of evidence in a proceeding against the individual on the ground that it is the subject of the derivative use immunity;**

**the party seeking the admission of the evidence should bear the onus of proving that the evidence was not derived from the compelled information.**

**9-5 The provision referred to in Recommendation 9-1(a) should not apply to proceedings that relate to the falsity of the information.**

**9-6 In relation to a civil claim for compensatory damages, the provision referred to in Recommendation 9-1(a) should be expressed to apply only to proceedings started after the provision has come into operation.**

# Chapter 10

## Provisions that refer to the *Commissions of Inquiry Act 1950 (Qld)*

### INTRODUCTION

10.1 In Queensland, there are a number of provisions that abrogate the privilege against self-incrimination by reference to the *Commissions of Inquiry Act 1950 (Qld)*. These provisions also abrogate, by implication, the penalty privilege.<sup>425</sup>

10.2 The way in which abrogation is effected by reference to the *Commissions of Inquiry Act 1950 (Qld)* varies from Act to Act, probably as a result of changes in legislative drafting style. The most common methods are to deem a person or body to be a commission of inquiry within the meaning of that Act<sup>426</sup> or to provide that a person or body is to have the powers conferred on a commission of inquiry by the Act.<sup>427</sup> Other provisions state that an investigation or inquiry is to be conducted as a commission of inquiry,<sup>428</sup> or that the *Commissions of Inquiry Act 1950 (Qld)* applies to a person or body conducting an investigation or inquiry.<sup>429</sup>

10.3 The provisions apply to bodies that are charged with a range of functions, including support for Aboriginal<sup>430</sup> and Torres Strait Islander<sup>431</sup> communities, setting judicial salaries,<sup>432</sup> appeals by local government officers against the promotion of other officers,<sup>433</sup> the professional registration of veterinary surgeons,<sup>434</sup> and control of casino operations.<sup>435</sup>

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425 *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 345. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [30].

426 See for example *Alcan Queensland Pty Limited Agreement Act 1965 (Qld)* Schedule s 50.

427 See for example *Petroleum Act 1923 (Qld)* s 8(3).

428 See for example *State Development and Public Works Organisation Act 1971 (Qld)* s 12(2).

429 See for example *Law Reform Commission Act 1968 (Qld)* s 11(2).

430 *Community Services (Aborigines) Act 1984 (Qld)* s 13(1).

431 *Community Services (Torres Strait) Act 1984 (Qld)* s 11(1).

432 *Judges (Salaries and Allowances) Act 1967 (Qld)* s 13(3).

433 *City of Brisbane Act 1924 (Qld)* Schedule 1 s 19(3).

434 *Veterinary Surgeons Act 1936 (Qld)* s 29.

435 *Casino Control Act 1982 (Qld)* s 91(2).

## THE EFFECT OF THE REFERENCE TO THE *COMMISSIONS OF INQUIRY ACT 1950 (QLD)*

10.4 The purpose of the *Commissions of Inquiry Act 1950 (Qld)* is to facilitate the operation of commissions of inquiry established to make investigations into matters of public importance. The Act sets out the powers of a commission of inquiry and the obligations of witnesses summoned to appear before a commission. Section 14(1A) of the Act provides:

A person attending before a commission is not entitled -

- (a) to remain silent with respect to any matter relevant to the commission's inquiry upon the chairperson's requiring the person to give evidence with respect to that matter; or
- (b) to refuse or fail to answer any question that the person is required by the chairperson to answer; or
- (c) to refuse or fail to produce any book, document, writing, record, property or thing that the person has been summoned to produce or required by the chairperson to produce;

on the ground that to do otherwise would or might tend to incriminate the person.

10.5 To compensate for the abrogation of the privilege against self-incrimination, section 14A of the *Commissions of Inquiry Act 1950 (Qld)* confers a use immunity on answers given by the witness. It provides:

- (1) A statement or disclosure made by any witness in answer to any question put to the witness by a commission or any commissioner or before a commission shall not (except in proceedings in respect of contempt of the commission or of an offence, or a conspiracy by the witness with another person to commit an offence, against any of the sections of the Criminal Code specified in section 22)<sup>436</sup> be admissible in evidence against the witness in any civil or criminal proceedings.
- (2) A book, document, writing, record, property or anything produced by a witness is not and it is declared never was a statement or disclosure to which subsection (1) applies. [note added]

10.6 In relation to a person or body that is given the powers of a commission of inquiry, the effect of the reference to the *Commissions of Inquiry Act 1950 (Qld)* is generally that the person or body, by virtue of the status as a commission of inquiry, can hold an investigation where the privilege against self-incrimination does not apply for a witness required to provide information to that investigation. Unless the application of section 14(1A) of the Act is

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Section 22 of the *Commissions of Inquiry Act 1950 (Qld)* specifies the following provisions of the *Criminal Code*, which are located in Chapter 16 (Offences relating to the administration of justice): ss 120 (Judicial corruption), 123 (Perjury), 126 (Fabricating evidence), 127 (Corruption of witnesses), 128 (Deceiving witnesses), 129 (Destroying evidence) and 130 (Preventing witnesses from attending).

excepted,<sup>437</sup> a witness cannot refuse to provide information on the ground of self-incrimination. Similarly, unless a provision states otherwise, the abrogation of the privilege against self-incrimination by reference to the *Commissions of Inquiry Act 1950* (Qld) would also confer a use immunity on oral answers to questions, but not on documents produced by the witness, in relation to all subsequent civil or criminal proceedings against the witness.

## THE DISCUSSION PAPER

10.7 In the Discussion Paper,<sup>438</sup> the Commission noted that reference to the *Commissions of Inquiry Act 1950* (Qld) appeared to have been used as a kind of drafting shortcut to avoid the need to specify the particular powers to be conferred on individual bodies with investigative functions. The Commission was concerned, however, that, whilst this approach to legislative drafting may promote a degree of uniformity, it fails to take into account the circumstances of each piece of legislation. It was also of the view that, in the context of this reference, abrogation of the privilege against self-incrimination by reference to the powers of a commission of inquiry would generally fail to address the issue of whether, and to what extent, the abrogation of the privilege was warranted in a particular situation.<sup>439</sup>

10.8 The Commission sought submissions on the issue of whether the privilege against self-incrimination should be able to be abrogated by the means of reference to the *Commissions of Inquiry Act 1950* (Qld).<sup>440</sup>

## SUBMISSIONS

10.9 Only two of the submissions received by the Commission in response to the Discussion Paper addressed this issue.

10.10 Queensland Transport supported abrogation of the privilege by reference to the *Commissions of Inquiry Act 1950* (Qld), as long as the abrogation was accompanied by an immunity.<sup>441</sup>

10.11 The Department of Tourism, Racing and Fair Trading, on the other hand, considered the extent of the immunity conferred by this method of abrogation to be too wide.<sup>442</sup>

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437 See for example *Gaming Machine Act 1991* (Qld) s 335(2).

438 Queensland Law Reform Commission, Discussion Paper, *The Abrogation of the Privilege Against Self-Incrimination* (WP 57, August 2003).

439 Id at 195.

440 Id at 202.

441 Submission 2.

442 Submission 5.

... it confers an immunity from use of the evidence so obtained in any civil or criminal proceedings. This department is of the view that there may be circumstances where no immunity should be conferred while in other circumstances only immunity from criminal proceedings should be conferred.

## THE COMMISSION'S VIEW

10.12 The Commission acknowledges that the provisions identified in the Discussion Paper as abrogating the privilege against self-incrimination by reference to the *Commissions of Inquiry Act 1950* (Qld)<sup>443</sup> are not of recent origin, and that they reflect a style that is no longer used for drafting Queensland legislation. Nonetheless, in Queensland, a significant number of bodies can hold an investigation where the privilege against self-incrimination and the penalty privilege do not apply for a witness required to provide information to that investigation. The privileges are automatically abrogated because the investigatory body has the powers of a commission of inquiry.

10.13 In relation to these existing provisions, the Commission considers that it is inappropriate for the privileges to be abrogated in this way. The method of abrogation indicates that, at the time the provisions were enacted, specific consideration was not given to the question of whether the abrogation was justified in the circumstances of each particular provision. The Commission remains of the view that this shortcut approach to legislative drafting failed to ensure that proper regard was paid to the reason for the abrogation. It also failed to take into account whether, if the abrogation could be justified, the extent of the immunity provided as compensation for the loss of the privilege was appropriate.

10.14 In the view of the Commission, the *Commissions of Inquiry Act 1950* (Qld) should be amended to provide that legislative provisions that confer on a person or body all the powers of a commission of inquiry do not automatically abrogate the privileges.

10.15 The commencement of the amendment should be postponed to allow existing legislation that confers the powers of a commission of inquiry to be reviewed. If it is considered that, in the context of a particular Act, the criteria identified by the Commission in Chapter 6 of this Report are met, a specific provision should be inserted in that Act to effect an abrogation. Account should also be taken of the recommendations in Chapter 9 of this Report in relation to the granting of an immunity against the use of information obtained as a result of the abrogation, and any immunity that may be appropriate in the circumstances should be conferred.

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See Queensland Law Reform Commission, Discussion Paper, *The Abrogation of the Privilege Against Self-Incrimination* (WP 57, August 2003) Chapter 7.



## RECOMMENDATIONS

- 10-1** The Commission recommends that the *Commissions of Inquiry Act 1950* (Qld) should be amended to provide that, where a provision in another Act confers on a person or body the powers of a commission of inquiry, sections 14(1A) and 14A of the *Commissions of Inquiry Act 1950* (Qld) do not apply to the person or body.
- 10-2** The commencement of the amendment should be postponed to allow existing legislation that confers the powers of a commission of inquiry to be reviewed.
- 10-3** If it is considered that, in the context of a particular Act, abrogation of the privilege against self-incrimination and/or the penalty privilege can be justified according to the legislative criteria recommended by the Commission in Chapter 6 of this Report:
- (a)** a specific provision should be inserted in that Act to give effect to the abrogation; and
  - (b)** appropriate consideration should be given to the nature and extent of the immunity, if any, to be provided in relation to the use of the information obtained as a result of the abrogation.

# Chapter 11

## Corporations

### INTRODUCTION

11.1 A corporation, although an artificial legal entity, may nonetheless be prosecuted for a criminal offence or subjected to proceedings that could result in the imposition of a penalty.<sup>444</sup>

The liability of a corporation to criminal conviction and to the imposition of a criminal penalty is well-established, although the application of criminal sanctions to corporations is of comparatively recent origin. [note omitted]

11.2 The impetus for the development of corporate liability came originally from a combination of the rapid industrialisation that took place in England in the nineteenth century and the use of corporate structures for financing industrial growth. Today, legislation that regulates commercial and industrial activity frequently includes provisions that create offences for which a corporation may be made liable.<sup>445</sup>

While much of this regulation was not specifically established with corporations in mind, the dominance of the corporate entity in all areas of business activity means that the regulation of business necessarily includes the regulation of corporations.

11.3 The prosecution of corporations for criminal offences gives rise to the question of whether a corporation can claim the privilege against self-incrimination. For many years this question remained unresolved in Australia. While one member of the High Court consistently maintained that the privilege against self-incrimination was available only to a natural person,<sup>446</sup> some judges

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444 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Brennan J at 512.

445 Clough J and Mulhern C, *The Prosecution of Corporations* (2002) at 16. There are many Queensland provisions under which a corporation may be convicted of a criminal offence. See for example *Anti-Discrimination Act 1991* (Qld) ss 129 (Victimisation), 131A (Offence of serious racial, religious, sexuality or gender identification vilification), 221 (False or misleading information), 222 (Obstruction); *Child Protection Act 1999* (Qld) s 189 (Prohibition of publication of information leading to identity of children); *Electricity Act 1994* (Qld) Chapter 11 Part 1 (Offences); *Environmental Protection Act 1994* (Qld) s 361 (Offence not to comply with order); *Fair Trading Act 1989* (Qld) ss 43 (Offering gifts and prizes), 46 (Bait advertising), 50 (Harassment and coercion), 92 (Offences); *Food Act 1981* (Qld) ss 10 (Sale of unsafe food), 16 (Compliance with food standards code); *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 51 (Offence of contravening general obligation to insure); *Workplace Health and Safety Act 1995* (Qld) s 24 (Discharge of obligations).

446 See the comments of Murphy J in *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 150; *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328 at 346-347; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 395.

were content to assume, without actually deciding, that a corporation was entitled to the benefit of the privilege.<sup>447</sup>

11.4 The situation at common law was clarified by the decision of the High Court in *Environment Protection Authority v Caltex Refining Co Pty Ltd*.<sup>448</sup> In that case, the court held, by majority, that the privilege against self-incrimination does not apply to corporations.<sup>449</sup> However, the position is less clear in relation to the privilege against self-exposure to a penalty.<sup>450</sup>

11.5 Despite the *Caltex* decision, some Queensland legislative provisions raise questions about the entitlement of a corporation to claim the privilege.

## THE COMMON LAW

### The privilege against self-incrimination

11.6 The High Court decision in *Caltex*<sup>451</sup> was based on a number of factors.

#### ***The rationales for the privilege do not apply to a corporation***

11.7 The majority considered that the rationales for the privilege did not, or did not fully, support its extension to corporations.<sup>452</sup>

11.8 According to the traditional view of the development of the privilege, it was the result of a desire to protect individuals from the excesses of seventeenth century court procedures.<sup>453</sup> However, the concept of the corporation had not emerged at that time and, in any event, a corporation would not have been at risk of the dangers of physical torture or excommunication, against which, on this view, the privilege was intended to provide a shield.<sup>454</sup> Members of the Court referred to the observation by an English judge that a corporation “has no body to be kicked or soul to be damned.”<sup>455</sup> Moreover, the

447 See for example *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 152 CLR 328, where Mason ACJ, Wilson and Dawson JJ at 335 assumed, without deciding, that both the privilege against self-incrimination and the penalty privilege were available to a corporation.

448 (1993) 178 CLR 477.

449 Id per Mason CJ and Toohey J at 507-508, per Brennan J at 516 and per McHugh J at 556 (Deane, Dawson and Gaudron JJ dissenting). See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [31].

450 See para 11.15-11.19 of this Report.

451 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

452 Id per Mason CJ and Toohey J at 507-508, per Brennan J at 516 and per McHugh J at 553.

453 See para 2.5-2.10 of this Report.

454 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 498 and per Brennan J at 512.

455 *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 per Lord Denning MR at 1127, cited in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 494 and per Brennan J at 512.

traditional concern to protect an individual against abuse of State power was not seen as relevant to a corporation.<sup>456</sup>

In general, a corporation is usually in a stronger position vis-à-vis the state than is an individual; the resources which companies possess and the advantages which they tend to enjoy, many stemming from incorporation, are much greater than those possessed and enjoyed by natural persons.

11.9 Similarly, the contemporary rationales for the privilege were thought to be unconvincing reasons for its application to a corporation. In the modern context, the privilege is regarded as a substantive human right that protects personal freedom and dignity. As such, it was held not to apply to an artificial entity.<sup>457</sup> The modern view of the privilege as protecting the privacy of an individual was also considered irrelevant in relation to a corporation, since corporations are already compelled by law to make disclosures about their affairs beyond those required of individuals.<sup>458</sup> Even the importance of the privilege as an element of the adversarial system of justice was insufficient to extend its protection to corporations,<sup>459</sup> despite acknowledgment that denial of the privilege would considerably weaken the forensic position of a corporation in the adversarial system.<sup>460</sup>

### ***The need to maintain the integrity of corporate behaviour***

11.10 The overriding factor in the decision not to allow a corporation to claim the privilege was the public interest in upholding the integrity of corporate behaviour.<sup>461</sup>

The doctrine of the corporation as a separate legal entity and the complexity of many corporate structures and arrangements have made corporate crime and complex fraud one of the most difficult areas for the state to regulate effectively.

11.11 The majority recognised that, from a practical point of view, the records of a corporation constitute the best evidence of the corporation's activities and that, if a corporation were entitled to rely on the privilege, inability to access the corporation's documents would significantly hamper the enforcement of laws regulating the corporation's conduct.<sup>462</sup>

<sup>456</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 500. See also per Brennan J at 514 and per McHugh J at 548.

<sup>457</sup> Id per Mason CJ and Toohey J at 500, per Brennan J at 514 and per McHugh J at 551.

<sup>458</sup> Id per McHugh J at 549-550. See also per Mason CJ and Toohey J at 500.

<sup>459</sup> Id per Mason CJ and Toohey J at 503 and per McHugh J at 556. However, Deane, Dawson and Gaudron JJ, in dissent, expressed the view (at 532-534) that the rationale for the privilege was that "those who allege the commission of a crime should prove it themselves and should not be able to compel the accused to provide proof against himself" and that there was therefore no reason in principle why the privilege should not be available to a corporation.

<sup>460</sup> Id per McHugh J at 552.

<sup>461</sup> Id per Mason CJ and Toohey J at 500.

<sup>462</sup> Id per Brennan J at 516. See also per Mason CJ and Toohey J at 504 and per McHugh J at 554-556.

... if investigative powers were qualified by a privilege against self-incrimination enuring for the protection of corporations, the liability of corporations to criminal sanctions would frequently be unenforceable.

11.12 This approach was criticised by the dissenting members of the court, who were of the view that, if the protection of the privilege were to be denied to corporations for pragmatic reasons, rather than for reasons of legal principle, that decision should be made by the legislature rather than the court.<sup>463</sup>

### ***The nature of the information***

11.13 Another important consideration for the majority was the nature of the information that a corporation can be required to provide. As an artificial entity, a corporation cannot be a witness.<sup>464</sup> The information that a corporation itself, as opposed to an officer of the corporation, can be compelled to provide is therefore restricted to material in documentary form.<sup>465</sup>

11.14 The case for protecting information in the form of a corporation's books and records, which "are in the nature of real evidence which speak for themselves as distinct from testimonial oral evidence which is brought into existence in response to an exercise of investigative power or in the course of legal proceedings",<sup>466</sup> was viewed as considerably weaker than the case for protecting an individual from being compelled to make an admission of guilt.<sup>467</sup>

In producing such documents, the corporation is not creating evidence against itself, as would occur if an individual could be compelled to give incriminating answers. The documents already exist.

### **The privilege against self-exposure to a penalty**

11.15 The situation in relation to a corporation's right to the protection of the penalty privilege has not been finally resolved.

11.16 In *Caltex*, three members of the court held, although the point was not fully argued, that the penalty privilege would not be available to a corporation.<sup>468</sup> A fourth member, on the other hand, held that a corporation would be able to rely on the penalty privilege to resist discovery of documents in proceedings

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463 Id per Deane, Dawson and Gaudron JJ at 534.

464 Id per Brennan J at 512-513.

465 Oral evidence about the conduct of the corporation can be given only by its officers, who may be required to testify against the corporation unless they are able to claim the privilege personally: *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 504. Officers of a corporation, unless they are able to claim privilege, may also be compelled to provide self-incriminating answers to an authorised investigator.

466 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 502-503.

467 Id per McHugh J at 555.

468 Id per Mason CJ and Toohey J at 504-505 and per McHugh J at 548.

brought to enforce liability to a penalty.<sup>469</sup> The remaining three members of the Court did not directly address the issue.

11.17 Subsequently to the High Court decision in *Caltex*, the issue arose in the Full Court of the Federal Court in *Trade Practices Commission v Abbco Iceworks Pty Ltd and Others*, where a majority held that the penalty privilege was not available to a corporation.<sup>470</sup> The principal reason for the majority view was the need for consistency:<sup>471</sup>

It would be an odd result if an order might properly be made for production of documents which expose a corporation to criminal liability, but no order would be made if it might result in the imposition of a civil penalty.

11.18 The majority was also influenced, as was the High Court in *Caltex*,<sup>472</sup> by the difficulty of enforcing the law against a corporation if its documents could not be made subject to discovery.<sup>473</sup>

11.19 Although the question has not yet come directly before the High Court for an authoritative determination, it now seems likely that the High Court might approve the decision of the Full Court of the Federal Court. Four judges of the Court have observed, in a joint judgment, that:<sup>474</sup>

... it should now be accepted that, as the privilege against self-incrimination is not available to corporations, the privilege against exposure to penalties is, similarly, not available to them. [notes omitted]

## THE AVAILABILITY OF THE PRIVILEGE TO CORPORATIONS IN QUEENSLAND

11.20 Despite the *Caltex* decision,<sup>475</sup> there are some legislative provisions in Queensland that raise questions about the availability of the privilege against self-incrimination to a corporation.

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469 Id per Brennan J at 521.

470 (1994) 52 FCR 96 per Burchett J (with whom Black CJ and Davies J agreed) at 129-130 and per Gummow J at 132, 146, Sheppard J dissenting.

471 Id per Gummow J at 132. See also per Gummow J at 146 and per Burchett J at 129-130.

472 See para 11.11 of this Report.

473 *Trade Practices Commission v Abbco Iceworks Pty Ltd and Others* (1994) 52 FCR 96 per Burchett J (with whom Black CJ and Davies J agreed) at 130. See also per Gummow J at 132.

474 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [31]. However, as the case concerned legal professional privilege, these remarks, while indicating the attitude of certain members of the Court towards the right of a corporation to claim the penalty privilege, do not form part of the reasons for decision and are therefore not binding.

475 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477. See para 11.4 of this Report.

11.21 Many Queensland provisions expressly retain the privilege by providing that it is a reasonable excuse for a “person” to refuse to answer a question or to produce a document because to do so might be self-incriminating. A reference in Queensland legislation to a “person” generally includes a reference to a corporation as well as to an individual.<sup>476</sup>

11.22 While some of these provisions pre-date the High Court decision in *Caltex*,<sup>477</sup> others have been enacted subsequently to it.

### Provisions enacted prior to *Caltex*

11.23 With respect to provisions that were enacted before the *Caltex* decision, the effect of that decision is that the only category of “person” who can claim the privilege is an individual. The *Caltex* decision makes it clear that, in these provisions, the word “person” cannot be interpreted to include a corporation.

### Provisions enacted after *Caltex*

11.24 The situation is less clear with respect to provisions enacted after the *Caltex* decision.

11.25 It is arguable that, if a provision preserving the privilege by reference to a “person” has been enacted subsequently to and in the light of the High Court decision, that provision is intended, where the context permits, to override the effect of the High Court decision. Unless a contrary intention is evident from the legislation itself, a provision of this kind could operate to confer the privilege on a corporation.

11.26 Provisions enacted in Queensland since the *Caltex* decision and preserving the privilege against self-incrimination fall into three principal categories:

- provisions that are expressed to apply only to individuals;
- provisions that are capable of applying only to individuals; and
- provisions that are capable of applying to both individuals and corporations.

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*Acts Interpretation Act 1954* (Qld) s 32D(1). Although the form of this provision has altered since its initial insertion in 1991, the subsequent amendments do not seem to have been intended to change its meaning. This provision is not displaced merely because there is an express reference to either an individual or a corporation elsewhere in the Act: *Acts Interpretation Act 1954* (Qld) s 32D(2).

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*Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

**Provisions that are expressed to apply only to individuals**

11.27 Provisions in this category preserve the privilege by reference not to “a person” but to “an individual”<sup>478</sup> or to “a natural person”.<sup>479</sup>

11.28 It is clear from these express references that, although the legislation in question contains references to “a person”, including a corporation,<sup>480</sup> the privilege is not intended to apply to corporations.

**Provisions that are capable of applying only to individuals**

11.29 Provisions in this category preserve the privilege by reference to “a person”, without specifying whether the “person” in question is an individual or a corporation.

11.30 However, although the application of these provisions is not expressly limited to individuals, the context in which they operate excludes the possibility that the term “person” could be interpreted to include a corporation.<sup>481</sup>

11.31 These provisions are therefore capable of referring only to an individual.

**Provisions that are capable of applying to both individuals and corporations**

11.32 Provisions in this category preserve the privilege by reference to “a person”, without expressly stating whether the “person” in question is an individual or a corporation.

11.33 The context in which they operate permits the term to be interpreted to include both corporate entities and natural persons. The relevant legislation regulates activities that may be undertaken by either an individual or a corporation. It imposes obligations in relation to those activities, including a requirement to provide information. Where that requirement is to be met by the production of a document, the obligation is capable of applying not only to individuals but also to corporations. On this basis, the privilege might apply to corporations as well as to individuals.<sup>482</sup>

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478 See for example *Child Care Act 2002* (Qld) ss 80(3), 81(3).

479 See for example *Gas Pipelines Access (Queensland) Act 1998* (Qld) s 41(5).

480 See for example *Child Care Act 2002* (Qld) ss 16, 19.

481 See for example *Land Title Act 1994* (Qld) s 24(2); *Queensland Competition Authority Act 1997* (Qld) s 184(2). The former applies to a person appearing as a witness at an inquiry held under the Act by the Registrar of Titles and the latter to a witness at a hearing under the Act. However, a corporation, as an artificial entity, cannot be a witness: *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Brennan J at 512-513 and per Deane, Dawson and Gaudron JJ at 535.

482 See for example *Education (Overseas Students) Act 1996* (Qld) s 30(4); *Fossicking Act 1994* (Qld) s 86(4); *Land Protection (Pest and Stock Route Management) Act 2002* (Qld) s 265(2).



## LEGISLATION IN OTHER AUSTRALIAN JURISDICTIONS

11.34 The *Evidence Act 1995* (Cth) expressly abrogates the privilege against self-incrimination and the penalty privilege for a corporation<sup>483</sup> in relation to all proceedings in a federal court.<sup>484</sup> The abrogation provision, which also applies in a court of the Australian Capital Territory,<sup>485</sup> is mirrored in evidence legislation in New South Wales<sup>486</sup> and Tasmania.<sup>487</sup> There is no immunity conferred on evidence that a corporation is compelled to give.

## ISSUES FOR CONSIDERATION

11.35 In the Discussion Paper,<sup>488</sup> the Commission sought submissions on the following issues:<sup>489</sup>

- whether there are any circumstances in which a corporation should be entitled to claim the privilege against self-incrimination;
- the circumstances, if any, in which a corporation should be entitled to claim the privilege;
- whether there should be a legislative provision to the effect that, in the absence of an expressed intention to the contrary, a corporation is not entitled to claim the privilege.

11.36 The Commission also highlighted the uncertainty that could arise as a result of the drafting of certain Queensland provisions.

## SUBMISSIONS

### Should a corporation be entitled to claim the privilege against self-incrimination?

11.37 The Bar Association of Queensland expressed the view that, in the light of the proliferation of substantial civil sanctions against corporate bodies, a reconsideration might be justified of whether the privilege, and any immunity provisions, should be available to corporations. The submission noted that,

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483 *Evidence Act 1995* (Cth) s 187.

484 *Evidence Act 1995* (Cth) s 4.

485 *Evidence Act 1995* (Cth) s 4.

486 *Evidence Act 1995* (NSW) s 187.

487 *Evidence Act 2001* (Tas) s 187.

488 Queensland Law Reform Commission, Discussion Paper, *The Abrogation of the Privilege Against Self-Incrimination* (WP 57, August 2003).

489 *Id* at 202.

although corporations cannot be subject to imprisonment, the imposition of massive monetary penalties could often, in a practical sense, result in the destruction of a corporate entity. Accordingly, the Association considered that the view that neither the traditional nor modern rationales for the existence of the privilege applied to corporations may have lost its validity.<sup>490</sup>

11.38 Queensland Transport, on the other hand, supported the legislative abrogation of the privilege in relation to corporations, provided that officers of the corporation are adequately protected. It based its view that a corporation should not be able to claim the privilege on the fact that the privilege is a personal right and on the need for corporations to be held open to accountability.<sup>491</sup>

### **The need for legislation**

11.39 The Department of Tourism, Racing and Fair Trading supported the introduction of a general legislative provision to the effect that, in the absence of an expressed intention to the contrary, a corporation is not entitled to claim the privilege against self-incrimination. The Department considered that the enactment of such a provision would remove any perceived uncertainty at common law.<sup>492</sup>

## **THE COMMISSION'S VIEW**

11.40 The Commission acknowledges that the issue of whether a corporation should be entitled to the benefit of privilege against self-incrimination or self-exposure to a penalty may be thought to be outside its terms of reference, which concern statutory abrogation of privilege.

11.41 However, in the view of the Commission, the ambiguity created by certain Queensland legislative provisions is highly undesirable and needs to be remedied. To do so requires consideration of the question of whether a corporation should be able to claim the privileges.

### **Should a corporation be entitled to claim the privilege against self-incrimination?**

11.42 The Commission is unable to accept the minority view put forward in *Caltex* that the reasons for denying the privilege against self-incrimination to

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490 Submission 12.

491 Submission 2.

492 Submission 5.

corporations are purely pragmatic, based on the difficulty of “detecting and prosecuting corporate crime.”<sup>493</sup>

11.43 Rather, the Commission considers, for the reasons expressed by the majority in *Caltex*, that the rationales for the privilege do not support its application to a corporation.<sup>494</sup> The Commission also considers that, since corporations are created by statute and can exercise only statutory rights and powers, they must be taken to be subject to the regulatory regime of the legislative environment within which they exist and operate.

11.44 The Commission is therefore of the view that a corporation should not be entitled to claim the privilege against self-incrimination.

### **Should a corporation be entitled to claim the penalty privilege?**

11.45 The Commission is of the view that it would be anomalous if a corporation, although unable to claim the privilege against self-incrimination, were able to rely on the privilege against self-exposure to a penalty in order to resist the disclosure of information.

### **The need for legislation**

11.46 The Commission considers that, despite the High Court’s decision in *Caltex* that the privilege against self-incrimination is not available to a corporation, there is a need for clarification of the common law in relation to two issues - the question of whether certain Queensland provisions preserving the privilege apply to corporations, and the question of whether a corporation is entitled to claim the penalty privilege.

11.47 The Commission is therefore of the view that legislation is desirable.

11.48 This view is consistent with the present position in those jurisdictions in which the *Evidence Act 1995* (Cth) applies, in New South Wales and in Tasmania.<sup>495</sup> Implementation of the Commission’s recommendation would therefore have the added advantage of promoting uniformity of legislation in Australia.

### **Drafting issues**

11.49 Although the High Court held in *Caltex* that the privilege against self-incrimination is not available to a corporation,<sup>496</sup> it is possible that, in

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<sup>493</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Deane, Dawson and Gaudron JJ at 533. The *Caltex* case is discussed at para 11.4-11.14 of this Report.

<sup>494</sup> See para 11.7-11.9 of this Report.

<sup>495</sup> See para 11.34 of this Report.

<sup>496</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

Queensland, some legislative provisions enacted since the High Court decision have the effect of conferring the privilege on a corporation.

11.50 The usual method of preserving the privilege is to provide that it is a reasonable excuse for a “person” to refuse to disclose information on the basis that the information might incriminate the person. The problem arises because of the definition of “person” in the section 32D(1) of the *Acts Interpretation Act 1954* (Qld), which includes a corporation.

11.51 Consistently with its conclusion that a corporation should not be entitled to claim the privilege against self-incrimination, the Commission is of the view that legislation should be enacted to clarify that provisions that preserve the privilege do not apply to corporations.

## RECOMMENDATION

**11-1 The Commission recommends that legislation should be enacted to the effect that:**

- (a) a corporation is not entitled to claim the privilege against self-incrimination;**
- (b) a corporation is not entitled to claim the penalty privilege;**
- (c) a legislative provision that preserves the privilege against self-incrimination and/or the penalty privilege does not apply to a corporation.**

# Chapter 12

## Abrogation of privilege: foreign implications

### INTRODUCTION

12.1 When the privilege against self-incrimination or the penalty privilege is abrogated by a Queensland law, the result is that an individual may be compelled to provide certain information, even though the provision of that information might expose the individual to the risk of criminal conviction or imposition of a penalty. In some situations, the risk of conviction or imposition of a penalty might arise in a jurisdiction outside Australia.

### THE RISK OF EXPOSURE UNDER FOREIGN LAW

12.2 The *Evidence Act 1995* (Cth) provides that an individual may claim the privilege against self-incrimination or the penalty privilege if giving particular evidence might tend to prove that the individual had committed an offence against the law of a foreign country or would be liable to a penalty arising under the law of a foreign country.<sup>497</sup> There is no equivalent provision in Queensland.

12.3 In the absence of such a provision, the question of whether, in a Queensland court, or in an investigation or an inquiry conducted under Queensland law, an individual can claim privilege on the basis of a potential risk to the individual under foreign law must be determined by reference to the decided cases on the issue.

12.4 Unfortunately, however, the Australian case law is not conclusive.<sup>498</sup> Some Queensland authorities suggest that incrimination under foreign law can provide a basis for extending the privilege against self-incrimination,<sup>499</sup> at least where the possibility of incrimination under the foreign law is “a fact ... established by the evidence”<sup>500</sup> and the content of the foreign law itself is proved by a “foreign expert’s evidence”,<sup>501</sup> particularly if that evidence is

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497 *Evidence Act 1995* (Cth) s 128. This provision applies in all proceedings in a federal court or a court of the Australian Capital Territory: *Evidence Act 1995* (Cth) s 4. See also *Evidence Act 1995* (NSW) s 128; *Evidence Act 2001* (Tas) s 128.

498 See Butterworths, *Cross on Evidence* at [25155]; McNicol S, *Law of Privilege* (1992) at 215-223; Theophilopoulos C, *The Anglo-American Privilege Against Self-incrimination and the Fear of Foreign Prosecution* (2003) 25 *Syd LR* 305.

499 See *Adsteam Building Industries Pty Ltd v Queensland Cement & Lime Co Ltd (No 4)* [1985] 1 Qd R 127 at 141; *R v McDonnell and Armstrong; ex parte Attorney General* [1988] 2 Qd R 189.

500 *Adsteam Building Industries Pty Ltd v Queensland Cement & Lime Co Ltd (No 4)* [1985] 1 Qd R 127 at 141.

501 *Ibid.*

“uncontradicted”.<sup>502</sup> Other decisions tend to leave the matter open.<sup>503</sup> The question has not yet arisen for authoritative determination by the High Court.

12.5 In the light of those Queensland cases where privilege has been successfully claimed on the ground of exposure to the risk of conviction of an offence in a foreign jurisdiction,<sup>504</sup> abrogation of privilege by Queensland legislation may have unintended consequences for an individual compelled to provide information, either during the course of a court proceeding or to an investigation or inquiry. Having disclosed the information, the individual might be exposed to punishment for a criminal offence or to the imposition of a penalty in the foreign jurisdiction, and would not be protected by any immunity conferred by the provision that abrogated the privilege in Queensland.

## THE POSITION IN OTHER JURISDICTIONS

12.6 In the United States<sup>505</sup> and in Canada,<sup>506</sup> the privilege does not extend to self-incrimination under the laws of foreign countries.

12.7 In England, the Law Reform Committee recommended that there be no absolute privilege against self-incrimination under foreign law. The Committee concluded that the matter was “best left to the general discretion of the judge in the particular circumstances in which the claim arises.”<sup>507</sup>

12.8 The Privy Council, on an appeal from New Zealand, remarked upon the unsettled state of the authorities. It recognised that the privilege against self-incrimination had been incorporated as a right in many charters enshrining fundamental rights and liberties and that the primary purpose of the right was the protection of the individual.<sup>508</sup> However, the Privy Council rejected the idea of an absolute right to privilege against self-incrimination under foreign law. It observed:<sup>509</sup>

Seen from the point of view of the witness, the right may be as much needed where foreign law is involved as where it is not. The difficulty confronting the individual may be just as acute when the feared prosecution is under the law of

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502 Ibid.

503 *Jackson v Gamble* [1983] VR 552; *Commissioner of Australian Federal Police v Cox* (1989) 87 ALR 163; *Sharp v Australian Builders Labourers' Federated Union of Workers (WA)* (1989) WAR 138.

504 See *Adsteam Building Industries Pty Ltd v Queensland Cement & Lime Co Ltd* (No 4) [1985] 1 Qd R 127 at 141; *R v McDonnell, ex parte Attorney-General* and *R v Armstrong, ex parte Attorney-General* 1988] 2 Qd R 189.

505 *United States v Balsys* (1997) 524 US 666.

506 *Spencer v The Queen* (1985) 21 DLR (4th) 756.

507 Law Reform Committee, Report, *Report on Privilege in Civil Proceedings* (16<sup>th</sup> Report, Cmnd 3472, December 1967) at para 11.

508 *Brannigan v Davison* [1997] AC 238 at 249.

509 Id at 249-250.

another country. There is, however, a real problem in letting this lead to the conclusion that the privilege should apply in such a case. The privilege is rigid and absolute. The witness has an unqualified right. Where the privilege applies the witness need not answer. Unless the case falls within a statutory exception, that is the end of the matter. There is no scope for the court to exercise any discretion.

It is the unqualified nature of the right, so valuable as a protection for the witness, which gives rise to the problem when a foreign law element is present. If the privilege were applicable when the risk of prosecution is under the law of another country, the privilege would have the effect of according primacy to foreign law in all cases. Another country's decision on what conduct does or does not attract criminal or penal sanctions would rebound on the domestic court. The foreign law would override the domestic court's ability to conduct its proceedings in accordance with its own procedures and law. If an answer would tend to expose the witness to a real risk of prosecution under a foreign law then, whatever the nature of the activity proscribed by the foreign law, the witness would have an absolute right to refuse to answer the question, however important that answer might be for the purposes of the domestic court's proceedings.

This surely cannot be right. Different countries have their own interests to pursue. At times national interests conflict. In its simple, absolute, unqualified form the privilege, established in a domestic law setting, cannot be extended to include foreign law without encroaching unacceptably upon the domestic country's legitimate interest in the conduct of its own judicial proceedings.

12.9 In relation to the "important question" as to whether a court, under its inherent power to conduct its process in a fair and reasonable manner, has a discretion to excuse a witness from giving self-incriminating evidence because of feared prosecution under foreign law, the Privy Council found it unnecessary to decide. However, its observations support the recognition of such a discretion.<sup>510</sup>

If the unqualified application of the privilege to foreign law is unsatisfactory, so also is the opposite extreme. The opposite extreme is that the prospect of prosecution under a foreign law is neither here nor there. Since the privilege does not apply to prosecution under foreign law, the witness must always answer a relevant question in the domestic proceedings, regardless of the nature of the crime under the foreign law and regardless of the likely practical consequences for the witness under that law.

This would be a harsh attitude. It would be a reproach to any legal system. One would expect that a trial judge would have a measure of discretion.

## THE COMMISSION'S VIEW

12.10 As a matter of principle, the Commission considers it desirable that courts should retain a discretion to allow the privilege to be claimed in an

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Id at 251.

appropriate case. This was the recommendation of the English Law Reform Committee,<sup>511</sup> and is consistent with the opinion of the Privy Council.<sup>512</sup>

12.11 However, in the context of the Commission's current review of existing Queensland provisions that abrogate the privilege against self-incrimination or the penalty privilege, the question of exposure to risk in a foreign jurisdiction is beyond the Commission's terms of reference.

12.12 Accordingly, the Commission has made no recommendations on the issue. The draft Bill in Appendix 3 to this Report does not refer to the laws of jurisdictions outside Australia or to the risk of exposure to self-incrimination or self-exposure to a penalty under those laws.

12.13 If the Parliament takes the view that the privilege against self-incrimination does or should extend to self-incrimination under a law of a foreign country or that the penalty privilege should extend to liability to a penalty arising under a law of a foreign country, then the draft Bill will need to be revised.

12.14 But if, for the reasons that have commended themselves to courts in the United States, Canada and New Zealand and to the Privy Council, the Parliament considers that the privileges should not extend to self-exposure to offences and penalties under foreign law, then the enactment of legislation should be coupled with an express recognition of a discretion to not require an individual to answer a question, give information or produce a document if to do so would tend to incriminate the individual or prove the individual is liable to a civil penalty under a law of a foreign country.

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511 See para 12.7 of this Report.

512 See para 12.9 of this Report.



# Chapter 13

## Implementation of recommendations

### THE DRAFT BILL

13.1 In the preceding chapters of this Report, the Commission has made recommendations about statutory abrogation of the privilege against self-incrimination and/or the penalty privilege. For the majority of these recommendations, implementation will require the enactment of legislation.

13.2 The draft legislation for implementing the Commission's recommendations is set out in Appendix 3 to this Report. The draft Bill was prepared by the Office of Parliamentary Counsel. The Commission wishes to thank Mr Peter Drew, Parliamentary Counsel, and Ms Theresa Johnson, First Assistant Parliamentary Counsel, for their co-operation and assistance in the drafting of the Bill.

### MODEL PROVISION

13.3 The Australian Law Reform Commission has observed in relation to the privilege against self-incrimination in the federal sphere:<sup>513</sup>

The variance across different legislative and penalty schemes clearly demonstrates the need for consistency and a definitive statement of the nature and scope of application of the privilege.

13.4 That Commission also noted that the human rights justifications for the privilege and the potentially serious consequences of self-incrimination or self-exposure to a penalty underline the need for legislation to provide certainty.<sup>514</sup>

13.5 A survey of current Queensland legislative provisions that abrogate the privilege against self-incrimination and/or the penalty privilege also reveals wide variations in the form of abrogation. The Commission is concerned that these variations may lead to uncertainty of interpretation.

13.6 While some differences may be able to be explained simply by changes over time in legislative drafting styles and practices, the Commission agrees that there can be little doubt of the need to attempt to overcome some of the inconsistencies and uncertainties arising from the existing legislation:<sup>515</sup>

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513 Australian Law Reform Commission, Discussion Paper, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation* (DP 65, April 2002) at para 9.70.

514 Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at para 18.45.

515 Saul B and McCabe M, "The privilege against self-incrimination in federal regulation" (2001) 78 *Reform* 54.

... the common law privilege is subject to seemingly arbitrary exclusion by a maze of express or implied legislative provisions. The inconsistent and contradictory nature of these provisions potentially undermines public confidence in equal treatment before the law, makes it difficult for individuals to comply with their legal obligations, and ultimately confuses and confounds the rule of law.

13.7 The Commission's terms of reference require it to "recommend an appropriate statutory formula which can be used to rationalise existing provisions and as a model for future provisions."<sup>516</sup>

13.8 Appendix 4 to this Report contains a model provision for use in those situations where the criteria for justifying the abrogation of the privilege can be met.<sup>517</sup> The model provision provides a template that is consistent with the Commission's recommendations in the preceding chapters of this Report. In the view of the Commission, use of this template to review existing provisions and to draft new legislation will help to remove uncertainty and to prevent inconsistencies occurring in the future.

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516 The full terms of reference are set out at para 1.1 of this Report.

517 See Chapter 6 of this Report.

# Appendix 1

## Departments and statutory authorities

Crime and Misconduct Commission  
Department of Aboriginal and Torres Strait Islander Policy  
Department of Emergency Services  
Department of Families<sup>518</sup>  
Department of Industrial Relations  
Department of Justice and Attorney-General  
Department of Local Government and Planning<sup>519</sup>  
Department of Natural Resources and Mines  
Department of the Premier and Cabinet  
Department of Primary Industries<sup>520</sup>  
Department of State Development<sup>521</sup>  
Department of Tourism, Racing and Fair Trading<sup>522</sup>  
Disability Services Queensland  
Environmental Protection Agency  
Guardianship and Administration Tribunal  
Office of the Adult Guardian  
Office of the Auditor-General of Queensland  
Official Solicitor to the Public Trustee of Queensland  
Queensland Health  
Queensland Police Service  
Queensland Transport  
Queensland Treasury  
Residential Tenancies Authority

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518 Relevant legislation administered by Department of Child Safety and Department of Communities from 14 October 2004.

519 Relevant legislation administered by Department of Local Government, Planning, Sport and Recreation from 14 October 2004.

520 Relevant legislation administered by Department of Primary Industries and Fisheries from 14 October 2004.

521 Relevant legislation administered by Department of State Development and Innovation from 14 October 2004.

522 Relevant legislation administered by Department of Tourism, Fair Trading and Wine Industry Development and Department of Public Works (Racing Division) from 14 October 2004.

## Appendix 2

### List of respondents to the Discussion Paper

Bailey, P  
Bar Association of Queensland  
Department of Employment and Training  
Department of Natural Resources and Mines  
Department of Tourism, Racing and Fair Trading<sup>523</sup>  
Griffith University Innocence Project  
Hudson, K  
Lee, WA  
Office of the Public Service Commissioner  
Queensland Law Society  
Queensland Transport  
Townsville District Law Association  
YFS Youth Legal Service

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Department of Tourism, Fair Trading and Wine Industry Development and Department of Public Works (Racing Division) from 14 October 2004.

# **Appendix 3**

## **Draft Bill**





Queensland

# Privilege Against Self-Incrimination and Penalty Privilege Bill 2004

## Contents

Draft

		Page
<b>Part 1</b>	<b>Preliminary</b>	
1	Short title .....	4
2	Commencement .....	4
<b>Part 2</b>	<b>Corporations</b>	
3	No privilege .....	4
<b>Part 3</b>	<b>Individuals</b>	
4	Definitions for pt 3. ....	5
5	Meaning of privilege .....	6
6	Privilege generally available .....	6
7	Abrogation of privilege .....	7
8	Individual to be informed if no privilege .....	7
9	Use immunity .....	8
10	Derivative use immunity and onus if objection .....	9
11	Waiver of immunity .....	10
<b>Part 4</b>	<b>Amendment of Commissions of Inquiry Act 1950</b>	
12	Act amended in pt 4 .....	10
13	Insertion of new s 14AA .....	10
	14AA Non-application of provisions if presiding entity is not the commission .....	10
<b>Part 5</b>	<b>Amendment of Legislative Standards Act 1992</b>	
14	Act amended in pt 5 .....	11
15	Insertion of new s 4A .....	11
	4A Abrogation of privilege against self-incrimination and penalty privilege .....	11

**Draft**



**Draft**

**2004**

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**A Bill**

for

**the regulation of statutory abrogation of the privilege against self-incrimination and the penalty privilege, and for other purposes**

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*Privilege Against Self-Incrimination and Penalty  
Privilege Bill 2004*

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The Parliament of Queensland enacts—

## Part 1 Preliminary

### 1 Short title

This Act may be cited as the *Privilege Against Self-Incrimination and Penalty Privilege Act 2004*.

### 2 Commencement

- (1) Part 5 commences on assent.
- (2) The remaining provisions of this Act commence on [date 6 months after assent].

## Part 2 Corporations

### 3 No privilege

- (1) This section applies if, under a law of the State or in a proceeding, a corporation is required to do a relevant thing.
- (2) The corporation is not entitled to refuse or fail to comply with the requirement on the ground that doing the relevant thing might tend to incriminate the corporation or make the corporation liable to a penalty.
- (3) Subsection (2) applies even if an Act, whether enacted before or after the commencement of this section, states that a person is not required to do a relevant thing on the ground that doing the relevant thing might tend to incriminate the person or make the person liable to a penalty.
- (4) In this section—  
*do a relevant thing* means—

Draft

*Privilege Against Self-Incrimination and Penalty  
Privilege Bill 2004*

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- (a) answer a question or give information; or
- (b) produce a document or any other thing; or
- (c) do any other act whatever.

## Part 3                      Individuals

### 4            Definitions for pt 3

In this part—

*Australian court* means—

- (a) the High Court; or
- (b) a court exercising federal jurisdiction; or
- (c) a court of a State or Territory; or
- (d) a judge, justice or arbitrator under an Australian law; or
- (e) an entity authorised by an Australian law, or by consent of parties, to hear, receive and examine evidence; or
- (f) an entity that, in exercising a function under an Australian law, is required to apply the laws of evidence.

*Australian law* means a law, whether written or unwritten, of or in force in the Commonwealth, a State or a Territory.

*civil penalty* see section 5(3).

*civil proceeding* means a proceeding, however described, in an Australian court, other than a criminal proceeding.

*compelled information*, in relation to an individual required to do a relevant thing, means the answer or information given, or the document produced, by the individual.

*criminal proceeding* means a prosecution for an offence in an Australian court and includes a proceeding in an Australian court for the committal of a person for trial or sentence for an offence.

*derivative use immunity* see section 10(1).

Draft

*Privilege Against Self-Incrimination and Penalty  
Privilege Bill 2004*

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***dishonesty proceeding***, in relation to an individual's compelled information, means a proceeding for an offence in relation to the false or misleading nature of the compelled information.

***do a relevant thing*** means—

- (a) answer a question or give information; or
- (b) produce a document.

***incriminate***, in relation to an individual, means proving that the individual has committed an offence against or arising under an Australian law.

***penalty privilege*** see section 5(2).

***privilege against self-incrimination*** see section 5(1).

***use immunity*** see section 9(1).

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## 5 Meaning of privilege

- (1) The ***privilege against self-incrimination*** means that an individual who is required under a law of the State or in a proceeding to do a relevant thing may refuse or fail to comply with the requirement on the ground that doing the relevant thing might tend to incriminate the individual.
- (2) The ***penalty privilege*** means that an individual who is required under a law of the State or in a proceeding to do a relevant thing may refuse or fail to comply with the requirement on the ground that doing the relevant thing might tend to prove the individual is liable to a civil penalty.
- (3) An individual is taken to be liable to a ***civil penalty*** if, in a civil proceeding, the individual would be liable to a penalty arising under an Australian law.

## 6 Privilege generally available

If an individual is required under a law of the State or in a proceeding to do a relevant thing, the individual is generally entitled to the benefit of either or both of the privilege against self-incrimination and the penalty privilege.

*Privilege Against Self-Incrimination and Penalty  
Privilege Bill 2004*

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Draft

**7 Abrogation of privilege**

- (1) An Act does not abrogate the privilege against self-incrimination or the penalty privilege except so far as the Act expressly provides.
- (2) However, if—
  - (a) an Act expressly abrogates the privilege against self-incrimination in relation to an individual doing a relevant thing; and
  - (b) the Act does not make any provision about the penalty privilege in relation to an individual doing the relevant thing;the Act is taken to expressly abrogate the penalty privilege in relation to an individual doing the relevant thing.
- (3) This section applies whether the Act was enacted before or after the commencement of this section.

**8 Individual to be informed if no privilege**

- (1) If—
  - (a) under a law of the State or in a proceeding, an individual is required to do a relevant thing; and
  - (b) under section 7(1), the privilege against self-incrimination has been abrogated in relation to an individual doing the relevant thing;the individual must be informed, in a way that is reasonable in the circumstances—
  - (c) that the individual must comply with the requirement even though doing the relevant thing might tend to incriminate the individual; and
  - (d) whether, if the individual complies with the requirement, any immunity applies, including under section 9, against the future use of the individual's compelled information; and
  - (e) if any immunity applies, the nature and extent of the immunity.

*Privilege Against Self-Incrimination and Penalty  
Privilege Bill 2004*

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- (2) If —
- (a) under a law of the State or in a proceeding, an individual is required to do a relevant thing; and
  - (b) under section 7(1) or (2), the penalty privilege has been abrogated in relation to an individual doing the relevant thing;
- the individual must be informed, in a way that is reasonable in the circumstances—
- (c) that the individual must comply with the requirement even though doing the relevant thing might tend to prove the individual is liable to a civil penalty; and
  - (d) whether, if the individual complies with the requirement, any immunity applies, including under section 9, against the future use of the individual's compelled information; and
  - (e) if any immunity applies, the nature and extent of the immunity.

**9 Use immunity**

- (1) If *use immunity* applies in relation to an individual's compelled information, evidence of the compelled information may not be admitted in a proceeding against the individual, other than—
- (a) if an Act expressly provides that evidence of the compelled information may be admitted in a particular proceeding—the particular proceeding; or
  - (b) in all cases—a dishonesty proceeding.
- (2) If—
- (a) under a law of the State or in a proceeding, an individual is required to do a relevant thing; and
  - (b) the individual complies with the requirement; and
  - (c) under section 7, either or both the privilege against self-incrimination and the penalty privilege have been abrogated in relation to an individual doing the relevant thing;

Draft

*Privilege Against Self-Incrimination and Penalty  
Privilege Bill 2004*

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then, unless an Act expressly states that this subsection does not apply, use immunity applies in relation to the individual's compelled information for the following proceedings—

- (d) a civil proceeding for compensatory damages started on or after the commencement of section 1;
- (e) if, before starting a civil proceeding for compensatory damages, the taking of a step or the making of an application is necessary—a civil proceeding in which the step was taken or the application was made on or after the commencement of section 1;
- (f) a civil proceeding that is not for compensatory damages whether started before or after the commencement of section 1;
- (g) a criminal proceeding whether started before or after the commencement of section 1.

**10 Derivative use immunity and onus if objection**

- (1) If *derivative use immunity* applies in relation to an individual's compelled information, the following evidence may not be admitted in a proceeding against the individual, other than an exempted proceeding—
  - (a) evidence of the compelled information;
  - (b) other evidence directly or indirectly derived from the compelled information.
- (2) If—
  - (a) derivative use immunity applies in relation to particular compelled information in relation to an individual; and
  - (b) the individual objects to the admission of evidence in a proceeding against the individual on the ground that the evidence is directly or indirectly derived from the compelled information;

then, the party in the proceeding who wants the evidence admitted has the onus of proving the evidence was not derived from the compelled information.
- (3) In this section—

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*Privilege Against Self-Incrimination and Penalty  
Privilege Bill 2004*

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*exempted proceeding* means—

- (a) if an Act expressly provides that evidence of the compelled information and other evidence directly or indirectly derived from the compelled information may be admitted in a particular proceeding—the particular proceeding; or
- (b) in all cases—a dishonesty proceeding.

**11 Waiver of immunity**

An individual may waive the application of an immunity against some or all future use of the individual's compelled information.

**Part 4 Amendment of Commissions of Inquiry Act 1950**

**12 Act amended in pt 4**

This part amends the *Commissions of Inquiry Act 1950*.

**13 Insertion of new s 14AA**

After section 14A—

*insert—*

**'14AA Non-application of provisions if presiding entity is not the commission**

- '(1) This section applies if a provision enacted in another Act before the commencement of this section provides either expressly or otherwise that section 14(1A) or 14A applies in relation to a person attending before an entity that is not the commission as if the entity were the commission.
- '(2) Despite the provision, section 14(1A) and 14A do not apply in relation to a person attending before the entity.'

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## **Part 5                      Amendment of Legislative Standards Act 1992**

### **14      Act amended in pt 5**

This part amends the *Legislative Standards Act 1992*.

### **15      Insertion of new s 4A**

Part 2, after section 4—

insert—

### **‘4A      Abrogation of privilege against self-incrimination and penalty privilege**

‘(1) It is the Parliament’s intention that an Act should not abrogate the privilege against self-incrimination or the penalty privilege unless—

(a) the abrogation is justified—

(i) because of—

(A) the importance of the public interest sought to be protected or advanced by the abrogation; and

(B) the extent to which the relevant information could reasonably be expected to benefit that public interest; or

(ii) because the relevant information relates to the conduct of an activity in which the individual is or was authorised to participate under an Act; and

(b) the abrogation is appropriate having regard to the following matters—

(i) whether the relevant information could not reasonably be obtained in another lawful way;

(ii) if the relevant information could reasonably be obtained in another lawful way during an investigation—

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*Privilege Against Self-Incrimination and Penalty  
Privilege Bill 2004*

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Draft

- (A) the extent to which using the other way would be likely to help the investigation; and
  - (B) whether using the other way would be likely to prejudice, rather than merely inconvenience, the investigation;
  - (iii) the nature and extent of the use, if any, that may be made of an individual's relevant information as evidence against the individual;
  - (iv) the procedural safeguards applying—
    - (A) when the requirement to give the relevant information is imposed; and
    - (B) when the relevant information is given;
  - (v) if the relevant information is a document, whether the document already exists when the requirement to produce the document is imposed;
  - (vi) whether the extent of the abrogation is no more than is necessary to achieve the purpose of the abrogation.
- ‘(2) Unless there is a compelling reason why use immunity should not apply, it is the Parliament's intention that, in relation to a proposed abrogation of privilege, the application of the *Privilege Against Self-Incrimination and Penalty Privilege Act 2004*, section 9(2) should not be excluded.
- ‘(3) In deciding whether there is a compelling reason why use immunity should not apply, consideration is to be given to the balance between the relevant justification for the proposed abrogation of privilege and the rights of individuals who would be required to do a relevant thing if there were an abrogation of privilege.
- ‘(4) It is also the Parliament's intention that, in relation to a proposed abrogation of privilege, an Act should not apply derivative use immunity in relation to relevant information other than in exceptional circumstances.
- ‘(5) For the purposes of this section, a word used in this section has the same meaning as in the *Privilege Against Self-Incrimination and Penalty Privilege Act 2004*, part 3.

*Privilege Against Self-Incrimination and Penalty  
Privilege Bill 2004*

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‘(6) In this section—

***abrogation of privilege*** means the abrogation of either or both the privilege against self-incrimination and the penalty privilege.

***relevant information***, in relation to an abrogation, means the information resulting from the abrogation.’

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## **Appendix 4**

### **Draft model provision**

## Model provision for the abrogation of the privilege against self-incrimination and the penalty privilege

### ‘1 No privilege against self-incrimination or penalty privilege for particular purposes

- ‘(1) An individual is not entitled to refuse or fail to comply with a requirement to answer a question or give information or produce a document (*do a relevant thing*) on the ground that doing the relevant thing might tend to—
- (a) incriminate the individual; or
  - (b) prove the individual is liable to a civil penalty.
- ‘(2) The individual must be informed, [in a way that is reasonable in the circumstances *OR insert more specific details of how and by whom the individual must be informed*]—
- (a) that the individual must comply with the requirement even though doing the relevant thing might tend to—
    - (i) incriminate the individual; or
    - (ii) prove the individual is liable to a civil penalty; and
  - (b) that, under subsection (3), there is a limited immunity against the future use of the individual’s compelled information.
- ‘(3) If—
- (a) but for subsection (1), the individual would be entitled to refuse or fail to comply with the requirement on the ground that doing the relevant thing might tend to incriminate the individual or make the individual liable to a civil penalty; and
  - (b) the individual complies with the requirement;
- then—
- (c) evidence of the individual’s compelled information may not be admitted in any proceeding against the individual, other than an exempted proceeding; and
  - [(d) other evidence directly or indirectly derived from the individual’s compelled information is not admissible in any proceeding against the individual, other than an exempted proceeding].

#### ***Important note to users—***

Paragraph (d) should be inserted only if the Act is to provide derivative use immunity in relation to compelled information. See the *Legislation Standards Act 1992*, section 4A(5) in relation to the provision of derivative use immunity.

- ‘(4) [*Insert here any other procedural safeguards that are to apply.*]
- ‘(5) For the purposes of this section, a word used in this section has the same meaning as in the *Privilege Against Self-Incrimination and Penalty Privilege Act 2004*, part 3.

‘(6) In this section—

*exempted proceeding*, in relation to an individual’s compelled information, means—

- (a) a dishonesty proceeding in relation to the compelled information; or
- (b) *[Insert here other types of proceeding, if any, in which the immunity is not to apply].*