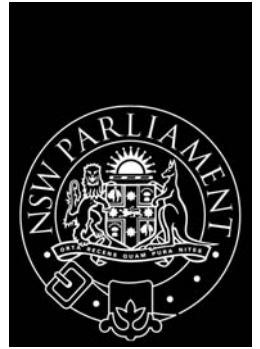


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

THE RIGHT TO SILENCE

Responses to the Discussion Paper

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Functions of the Committee

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

8A Functions with respect to bills

- (1) The functions of the Committee with respect to bills are:
 - (a) to consider any bill introduced into Parliament, and
 - (b) to report to both Houses of Parliament as to whether any such bill, by express words or otherwise:
 - (i) trespasses unduly on personal rights and liberties, or
 - (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
 - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
 - (iv) inappropriately delegates legislative powers, or
 - (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- (2) A House of Parliament may pass a bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to regulations:

- (1) The functions of the Committee with respect to regulations are:
 - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
 - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
 - (i) that the regulation trespasses unduly on personal rights and liberties,
 - (ii) that the regulation may have an adverse impact on the business community,
 - (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
 - (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
 - (v) that the objective of the regulation could have been achieved by alternative and more effective means,
 - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - (vii) that the form or intention of the regulation calls for elucidation, or
 - (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
 - (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- (2) Further functions of the Committee are:
 - (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
 - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.
- (3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

Chapter One - Introduction

DISCUSSION PAPER

- 1.1 On 21 September 2005, the Committee tabled a discussion paper seeking comment in relation to the principles it should apply when considering bills that trespass on the right to silence. The Committee sought such comment to better equip itself when considering bills under s 8A of the *Legislation Review Act 1987*.
- 1.2 The Committee advertised the discussion paper on the Parliament's website and in its *Legislation Review Digests* and wrote to all Ministers, Members of Parliament, and over 90 other agencies, organisations and individuals seeking comment. The Committee received eight submissions in response. The Committee published these submissions on the Parliament's website (www.parliament.nsw.gov.au).

QUESTIONS FOR COMMENT

- 1.3 The Discussion Paper sought comment on six questions, which are set out below.

Question 1.

To what extent, if any, should information obtained in breach of the privilege against self-incrimination be subject to an immunity from use in proceedings relating to the imposition of a civil penalty or civil, administrative or disciplinary proceedings?

Question 2.

To what extent, if any, should evidence derived from information obtained in breach of the privilege against self-incrimination be subject to an immunity from use in proceedings against the person compelled to provide the information?

Question 3.

What obligations, if any, should be placed on officials to inform persons compelled to provide information of their rights?

Question 4.

Should a person be required to object to providing an answer in order to have an immunity on the use of that answer?

Question 5.

What procedural safeguards, if any, should be provided where officials have power to compel the provision of self-incriminating information?

Question 6.

Are the following principles appropriate when considering whether bills unduly trespass on the right to silence?

Nature of the right to silence

The expression “the right to silence” describes a group of rights which includes:

- (1) a general immunity, possessed by all persons, from being compelled on pain of punishment to answer questions posed by other persons or bodies;
- (2) a general immunity, possessed by all persons, from being compelled on pain of punishment to answer questions the answers to which, or produce documents which, may tend to:
 - (a) incriminate them; or
 - (b) expose them to a penalty;
- (3) a specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind;
- (4) a specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock;
- (5) a specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority; and
- (6) a specific immunity, possessed by accused persons undergoing trial, from having adverse comment made on any failure:
 - (a) to answer questions before the trial, or
 - (b) to give evidence at the trial.

Justifications for Abrogation

A Bill should not abrogate the right to silence unless such abrogation is justified by, and in proportion to, an object in the public interest. In particular, any abrogation of the privilege against self-incrimination 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.

When the abrogation of the privilege against self-incrimination or the penalty privilege is justified, the appropriateness of a provision abrogating the privilege 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) whether the extent of the abrogation is no more than is necessary to achieve the purpose of the abrogation.

Future use of information obtained under compulsion

Unless clearly justified:

- (a) when a bill abrogates the privilege against self-incrimination or the penalty privilege, information that would otherwise have been subject to the privilege should not be used in evidence in any proceeding (including proceedings of a criminal, civil, administrative or disciplinary nature) against the individual, except for proceedings relating to the falsity of the information provided; and
- (b) when a bill requires an individual to disclose information despite the privilege against self-incrimination or the penalty privilege, the individual should 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.

Chapter Two - Overview of Submissions

2.1 In response to its Discussion Paper the Committee received submissions from the following:

- Australian Lawyers Alliance;
- Mr Shaun Cashman
- NSW Council for Civil Liberties (CCL);
- Police Association of NSW;
- the Law Society of NSW;
- the NSW Bar Association;
- the NSW Nurses Association; and
- the Office of the Director of Public Prosecutions (DPP).

2.2 A number of submissions did not directly address the questions as posed by the Committee, but made general comments on the content and application of the right to silence. Mr Cashman's submission was alone in positing that the State should have broad powers to compel a person to self-incriminate.

2.3 In its submission, the Australian Lawyers Alliance concluded that any reduction of the right to silence will jeopardise the protection of the individual that the Australian criminal justice system has been designed to preserve.

2.4 The Nurses Association noted that areas of most relevance to nurses are where a nurse:

- is the subject of an investigation by the Health Care Complaints Commission; or
- is required to appear in matters before the Coroner.

The Association submitted that adequate safeguards within the legislation cover both situations.

2.5 The submission by the Police Association generally dealt with the issue at an academic level, without specifically addressing the questions posed by the Committee.

Chapter Three - Issues raised in Submissions

QUESTION 1: USE IMMUNITY

To what extent, if any, should information obtained in breach of the privilege against self-incrimination be subject to an immunity from use in proceedings relating to the imposition of a civil penalty or civil, administrative or disciplinary proceedings?

- 3.1 The DPP submitted that information obtained in breach of the privilege against self-incrimination should be admissible:
- in proceedings relating to the imposition of a civil penalty or civil, administrative or disciplinary proceedings in circumstances where the abrogation is justified by and in proportion to an object in the public interest.
- 3.2 The DPP maintained that, in each situation in which it is proposed to require the provision of self-incriminating information, consideration must be given as to whether there is compelling justification in the public interest to do so, and as to what type of measure is necessary to achieve the public interest objective. The DPP agreed that the matters to be taken into account are those set out in the Committee's Question 6.
- 3.3 CCL takes a different approach, and is opposed to the use in proceedings of information obtained under compulsion, and is *prima facie* opposed to *any* statutory abrogation of the privilege against self-incrimination. It notes that:
- [I]n legislative recognition of the right to silence serves as a profound deterrent against the use of violent means to compel the provision of information, including false confessions.
- 3.4 Moreover, CCL favours the inclusion of a default provision in NSW law to the effect that, in the absence of any express statutory statement to the contrary:
- no self-incriminating evidence given by a person may be used in any criminal, civil or administrative proceedings against that person, except in proceedings in respect of the falsity of the evidence itself.¹
- 3.5 CCL regards the availability of an immunity from the use of self-incriminatory material against a person as an essential precondition to any statutory abrogation, and considers that the availability of such an immunity should be the primary criterion for determining in each instance whether an abrogation of the principle is permissible. According to CCL, such an immunity provides the "least unjust" solution, because it compensates the individual for the loss of his or her fundamental rights in the process of being compelled to provide self-incriminating information. Once that information has been provided, the public interest has been served.
- 3.6 The Bar Association also submitted that a default statutory provision should exist to ensure that, in the absence of an express statutory statement to the contrary, an immunity would apply whenever the privilege against self-incrimination was abrogated.
- 3.7 The Police Association was of the view that where a person is compelled or directed to provide an answer, there should be a general immunity on the use of that answer in civil proceedings. The Association submitted that the exception to this would be in regard to the use of self-incriminatory material in the course of internal disciplinary

¹ CCL noted that this position accords with that of the Australian Law Reform Commission: Australian Law Reform Commission Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, ALRC 95, December 2002, 18-3 at 662.

proceedings, citing s 181D of the *Police Act 1990* (Commissioner may remove police officers).

QUESTION 2: DERIVATIVE USE IMMUNITY

To what extent, if any, should evidence derived from information obtained in breach of the privilege against self-incrimination be subject to an immunity from use in proceedings against the person compelled to provide the information?

- 3.8 The DPP noted that its answer to Question 1 applies equally to this question.
- 3.9 The Law Society maintained that evidence derived from information obtained in breach of the privilege against self-incrimination should be subject to an immunity from use in proceedings against that person.²
- 3.10 As noted above, CCL favours the imposition of a “use” immunity. With respect to a derivative use, CCL draws no distinction between the harm that may flow from incriminating information provided directly, and any incriminating evidence derived from it.
- 3.11 The Bar Association submits that where evidence is derived either directly or indirectly from information obtained in breach of the privilege against self-incrimination it should not be used against the person to whom the privilege belongs, other than in criminal proceedings in respect of the falsity of that evidence.

QUESTION 3: INFORMING OF RIGHTS

What obligations, if any, should be placed on officials to inform persons compelled to provide information of their rights?

- 3.12 The DPP submitted that the officials should be obliged to inform persons compelled to provide self-incriminatory information of:
- their right to object to provision of the information. This information should be made available to the person prior to or at the time the official requires the provision of the relevant information (eg, in the relevant notice to produce, or prior to the witness commencing the giving of evidence);
 - the proceedings in which the compelled information will be admissible (or be sought to be admitted) against the person;
 - the person’s right to seek legal representation if they wish to do so;
 - if applicable, whether there is any assistance provided for legal representation; and
 - if applicable, whether there is any right of appeal against relevant decisions of officials.
- 3.13 The Bar Association also proposed these obligations.
- 3.14 The DPP noted that where the relevant legislation requires that the person compelled to provide self-incriminatory information object to *each question*, then the official’s obligation should include an obligation to inform the person to that effect. Where the person is not advised of his or her right to object, the information provided by him or

² The Law Society noted that this is consistent with s 128(7)(b) of the *Evidence Act 1995* (NSW).

her should not be admissible in later proceedings against the person, except proceedings for the falsity of the information provided.³ The nature of the official's obligation should be clearly stated in the relevant legislation.

- 3.15 The Law Society submitted that a right to immunity in relation to self-incrimination is of no benefit if a person is unaware that the immunity exists. Accordingly, the Law Society maintains that strict obligations should be placed on officials, requiring them to inform a person compelled to provide self-incriminating information of his or her relevant right and obligations.
- 3.16 The Law Society noted that there are similar obligations in other legislation where peoples' rights are infringed, eg, police officers are required to inform suspects of a large number of matters when seeking informed consent to a forensic procedure pursuant to s 13 of the *Crimes (Forensic Procedures) Act 2000*.

QUESTION 4: REQUIREMENT TO OBJECT

Should a person be required to object to providing an answer in order to have an immunity on the use of that answer?

- 3.17 The DPP supported the approach taken to this issue in s 18B(5) of the *Crime Commission Act 1985*:

The member presiding at the hearing (before the Commission) may declare that all or any classes of answers given by a witness or that all or any classes of documents or other things produced by a witness will be regarded as having been given or produced on objection by the witness, and there is accordingly no need for the witness to make an objection in respect of each such answer, document or other thing.⁴

- 3.18 The DPP noted that this issue was recently considered by the Australian, New South Wales and Victorian Law Reform Commissions, where they suggested that one option would be to define "particular evidence" under s 128 of the Evidence Act to include "evidence both in response to questions and evidence on particular topics".⁵
- 3.19 The Law Society submitted that a person should not have to object to obtain the immunity. A person may not make an objection because he or she does not realise that the question could result in a self-incriminating answer. Moreover, the Law Society maintains that a person should also be able to give a single objection that covers all self-incriminating answers. Objections to individual questions should not be necessary: a person should also be advised of their right to make such a "blanket" objection.
- 3.20 The Bar Association noted that the value of such a requirement is dependent upon the person being made aware of his or her rights, as discussed in its response to Question 3 above. Assuming such cautions have been given, the Bar Association submits that it should be sufficient that a person objects to giving any information or information about a specific topic. It should not be necessary for a person to take a specific objection to each question, as may currently be the position under s 128 of the *Evidence Act 1995*.

³ See, eg, the provisions of s 13A(2)(b) of the *Criminal Assets Recovery Act 1990*.

⁴ The DPP noted that, with respect to any subsequent prosecution for perjury or provision of false information, the important issue is that there ought to be no room for argument or misunderstanding about which answers do and which do not attract the immunity, ie, which answers are in fact admissible in that prosecution.

⁵ ALRC Discussion Paper No. 69, *The Uniform Evidence Acts*, July 2005, paragraph 13.225 at p 419.

QUESTION 5: PROCEDURAL SAFEGUARDS

What procedural safeguards, if any, should be provided where officials have power to compel the provision of self-incriminating information?

3.21 The DPP referred to its answer to Question 3, and submitted that the following safeguards should be included in any relevant legislation:

- a right to appeal to a court against the decision of the official that a person is not entitled to refuse to provide particular documents or information; and an appeal on a question of law from the decision of that court;
- entitlement to seek legal representation;
- if the information is being sought at a hearing of an investigating agency, an entitlement of the legal practitioner to examine or cross-examine a witness on a relevant matter; and
- availability of non-publication orders in relation to particular evidence, the contents of documents and the identity of witnesses if failure to make such orders might prejudice the safety or reputation of a person or prejudice a fair trial.

3.22 These safeguards were also submitted by the Bar Association.

3.23 The Law Society also suggested that:

- a person should be advised of his or her rights and obligations in relation to self-incrimination, and of the need to make a “blanket” objection to giving self-incriminating information in order to invoke the immunity; and
- legal representation should be allowed, and the person should be advised of their right to be legally represented.

3.24 The Law Society also submitted that a court should have to make an order before an organisation can compel a person to provide self-incriminating information. A relevant official of the organisation should have to make an application to a court for such an order, and the court would then determine whether there were reasonable grounds on which to make the order. A procedure similar to that in the *Search Warrants Act 1985* and the *Crimes (Forensic Procedures) Act 2000* could be followed.

QUESTION 6: PROPOSED PRINCIPLES

Are the principles set out in Question 6 (see pp 1 – 3) appropriate when considering whether Bills unduly trespass on the right to silence?

3.25 The DPP considered that the principles listed in Question 6 are appropriate for the Legislation Review Committee to apply when considering proposed legislation which compels provision of self-incriminating information. One addition was suggested:

Para (e) currently reads: whether the extent of the abrogation is no more than is necessary to achieve the purpose of the abrogation. We suggest the insertion of the word *reasonably* before the word *necessary*.

3.26 The DPP made further reference to the recent Discussion Paper 69 on the *Uniform Evidence Acts*, where the Commissions dealt with the privilege in respect of self-incrimination in proceedings seeking *Mareva* orders (which prevent a party from removing from the jurisdiction of the court, or otherwise dealing with, assets which are

the subject of an action) or *Anton Pilar* orders (the civil equivalent of a search warrant). Even in these instances the Commissions considered that a *general* abrogation of the privilege in civil proceedings was unwarranted.⁶

- 3.27 The DPP also noted recent judicial reference to the conflict between the policy underlying the privilege against self-incrimination and the policy underlying procedures of discovery and interrogatories; eg, the desire to prevent the use of the privilege against self-incrimination by a criminal defendant to avoid discovery and interrogatories in associated civil proceedings for the recovery or administration of property.⁷
- 3.28 The Bar Association and the Law Society also consider that the principles set out in Question 6 are appropriate for the Committee to apply when considering proposed legislation which compels provision of self-incriminating information.
- 3.29 The Law Society supports the Queensland Law Reform Commission's principles outlined on p 40 of the Discussion Paper, with the exception that rather than derivative use immunity being granted only where there are exceptional circumstances to justify the extent of its impact, derivative use immunity *must* apply, a position consistent with s 128(7)(b) of the *Evidence Act 1995*.

⁶ Paragraph 13.234 at p 422.

⁷ See Campbell J in *Pathways Employment Services v West* [2004] NSW SC 903, at paragraphs 12, 13 and 46.

Chapter Four - Conclusion

- 4.1 The overwhelming majority of the submissions noted the importance of maintaining the right to silence.
- 4.2 The Bar Association noted in its submission that:
- [t]he right to silence is a fundamental right of every person. It is one of the most important pillars of the common law and it is essential to the maintenance of the rule of law.
- Over the last decade there has been a slow but alarming erosion of the right to silence both at common law and legislatively, in civil matters, administrative matters and criminal cases.
- 4.3 While there was a range of views on some of the details regarding the questions raised, there was general support for the proposed principles for the committee to apply when considering bills. The Committee accepts the suggestion to replace the word “necessary” with “reasonably necessary” when considering whether the extent of an abrogation of the right was justified.

PRINCIPLES ADOPTED

- 4.4 Given this response, the Committee has adopted the following principles to apply when considering bills:

Nature of the right to silence

The expression “the right to silence” describes a group of rights which includes:

- (1) a general immunity, possessed by all persons, from being compelled on pain of punishment to answer questions posed by other persons or bodies;
- (2) a general immunity, possessed by all persons, from being compelled on pain of punishment to answer questions the answers to which, or produce documents which, may tend to:
 - (a) incriminate them; or
 - (b) expose them to a penalty;
- (3) a specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind;
- (4) a specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock;
- (5) a specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority; and
- (6) a specific immunity, possessed by accused persons undergoing trial, from having adverse comment made on any failure:
 - (a) to answer questions before the trial, or
 - (b) to give evidence at the trial.

Justifications for Abrogation

A Bill should not abrogate the right to silence unless such abrogation is justified by, and in proportion to, an object in the public interest. In particular, any abrogation of the privilege against self-incrimination 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.

When the abrogation of the privilege against self-incrimination or the penalty privilege is justified, the appropriateness of a provision abrogating the privilege 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) whether the extent of the abrogation is no more than is reasonably necessary to achieve the purpose of the abrogation.

Future use of information obtained under compulsion

Unless clearly justified:

- (a) when a bill abrogates the privilege against self-incrimination or the penalty privilege, information that would otherwise have been subject to the privilege should not be used in evidence in any proceeding (including proceedings of a criminal, civil, administrative or disciplinary nature) against the individual, except for proceedings relating to the falsity of the information provided; and
- (b) when a bill requires an individual to disclose information despite the privilege against self-incrimination or the penalty privilege, the individual should 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.