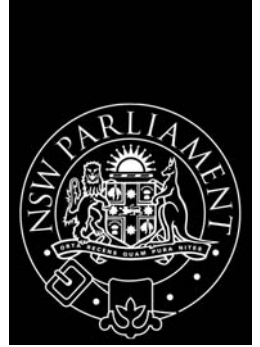


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

THE RIGHT TO SILENCE

Discussion Paper

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MEMBERSHIP & STAFF

Chairman	Peter Primrose MLC
Vice Chairman	Virginia Judge MP, Member for Strathfield
Members	Shelley Hancock MP, Member for South Coast
	Don Harwin MLC
	Noreen Hay MP, Member for Wollongong
	Paul Pearce MP, Member for Coogee
	Russell Turner MP, Member for Orange
	Peter Wong MLC
Staff	Russell Keith, Committee Manager
	Indira Rosenthal, Senior Committee Officer
	Mel Keenan, Senior Committee Officer
	Rachel White, Committee Officer
	Melanie Carmeci, Assistant Committee Officer
Contact Details	Legislation Review Committee Legislative Assembly Parliament House Macquarie Street Sydney NSW 2000
Telephone	02 9230 2899
Facsimile	02 9230 3052
E-mail	legislation.review@parliament.nsw.gov.au
URL	www.parliament.nsw.gov.au

FUNCTIONS OF THE LEGISLATION REVIEW 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.

EXECUTIVE SUMMARY

Purpose of the Discussion Paper

The Legislation Review Committee is seeking comment in relation to the principles it should apply when considering bills that trespass on the right to silence.

In commenting on bills, the Committee has applied the general principle that the right to silence is a fundamental right enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the common law, and it should only be eroded to the extent that is necessary to achieve a proportionate object in the public interest.

The Committee is aware, however, that this general principle leaves open a range of important questions. The scope of the right to silence is not clearly defined. There is no clear principle to which reference may be made in determining when it is acceptable for the right to be surrendered in the public interest.

Determining whether a trespass on the right is undue requires:

- identification of the degree of trespass to the right;
- evaluation of the right that is trespassed upon;
- evaluation of the public interest object to be obtained by that trespass; and
- assessment of the necessity of trespassing on the right to achieve the object, including a comparison of the result of trespassing on the right with the best alternative that leaves the right intact.

To better equip the Committee to assist the Parliament to perform this process, the Committee is seeking comments on issues relating to the right to silence. The Committee will then use these comments when suggesting standards and principles to which the Parliament should have regard when considering bills that trespass on these fundamental rights.

Issues arising from the Committee's consideration of bills

The Committee's consideration of bills to date has given rise to seven issues in relation to the right to silence:

- 1) When is the abrogation of the privilege justified?
- 2) Should the privilege apply to documents?
- 3) What principles should apply to the direct use of information obtained in breach of the privilege? In particular, what justification is required, if any, before use of such information in criminal, civil, administrative, disciplinary or other proceedings is allowed?
- 4) What principles should apply to the derivative use of information obtained in breach of the privilege?
- 5) What information, if any, should a person who is compelled to provide self-incriminating information be required to be given?
- 6) What action, if any, must a person take to enjoy the privilege or any immunity on the use of information provided?
- 7) What procedural safeguards should exist where the privilege can be abrogated?

Questions for comment

To assist the Committee in addressing the issues above, the Committee invites comment on the following questions:

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 should 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 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.

Address for Submissions

Submissions should be sent to:

Chairman
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
Sydney NSW 2000

Alternatively, submissions can be made on-line by following the links at **www.parliament.nsw.gov.au**

The closing date for submissions is **30 November 2005**.

Chapter One – Introduction

1. The Legislation Review Committee is seeking comment in relation to the principles it should apply when considering bills that trespass on the right to silence.
2. For the purposes of this paper, the right to silence refers to a bundle of rights that take the form of immunities from various requirements to answer questions or otherwise cooperate with public officials engaged in an investigation or prosecution. The right to silence exists independently of whether or not the questioning or the cooperation may be incriminating.
3. Elements of the right to silence of particular focus in this discussion paper are the privilege against self-incrimination and the privilege against exposure to a civil penalty (penalty privilege).
4. The “privilege against self-incrimination” refers to an immunity from an obligation to answer questions or do certain other things if this tends to incriminate oneself.
5. The “penalty privilege” refers to an immunity from an obligation to answer questions or do certain other things if this may expose oneself to a civil penalty.
6. The Committee has the function of reporting to Parliament on whether any bill:
 - (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.
7. In its consideration of bills introduced since 1 September 2003, the Committee has commented on 14 bills that have trespassed on the right to silence. In commenting on those bills, the Committee has applied the general principle that the right to silence is a fundamental right enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the common law, and it should only be eroded to the extent which is necessary to achieve a proportionate object in the public interest.
8. The Committee is aware, however, that this general principle leaves open a range of important questions. The scope of the right to silence is not clearly defined. There is no clear principle to which reference may be made in determining when it is acceptable for the right to be surrendered in the public interest.
9. Different jurisdictions have taken different approaches to clarifying the nature, scope and application of the right in different contexts. For example, the High

Introduction

Court of Australia has held that the right against self-incrimination applies to the production of documents, while the European Court of Human Rights limits the application of the right to oral testimony.

10. Determining whether a trespass on the right is undue requires:
 - identification of the degree of trespass to the right;
 - evaluation of the right that is trespassed upon;
 - evaluation of the public interest object to be obtained by that trespass; and
 - assessment of the necessity of trespassing on the right to achieve the object, including a comparison of the result of trespassing on the right with the best alternative that leaves the right intact.
11. To better equip the Committee to assist the Parliament to perform this process, the Committee is seeking comments from the Government, Members of Parliament and the community on issues relating to the right to silence. The Committee will then use these comments when suggesting standards and principles to which the Parliament should have regard when considering bills that trespass on these fundamental rights.
12. The Committee is not seeking to resolve finally the issues it is raising. However, by fostering discussion on these issues, it hopes to be able to highlight more clearly the relevant issues for Parliament's consideration and represent more closely the values of the people of New South Wales when commenting on bills.
13. The core questions raised in the Committee's consideration of bills to date relate to:
 - the circumstances in which the right to silence should give way to the Government's need to acquire information in the public interest; and
 - where the right to silence is abrogated, to what extent should immunity be provided to prevent the use of the information compelled against the person in criminal, penal, civil, administrative or disciplinary proceedings.
14. Most of the bills considered affecting the right to silence have been concerned with regulation of industries and professions, such as building, health, legal, mining and transport. In these contexts, the question of whether compelled self-incriminating statements can be used in civil or disciplinary proceedings can be particularly significant.
15. Questions that have arisen for the Committee's consideration include:
 - To what extent should information given involuntarily be available for use against the person—
 - directly in criminal proceedings;
 - derivatively in criminal proceedings;
 - directly in proceedings for a civil penalty;

- derivatively in proceedings for a civil penalty;
- in civil proceedings generally; or
- in administrative or disciplinary proceedings?
- To what extent should the privilege against self-incrimination apply to—
 - statements given involuntarily; or
 - the production of documents?
- What procedural requirements should exist for invoking or limiting either the right to silence or right against self-incrimination—eg:
 - need the right be asserted before a person provides information to be effective?
 - need a person be informed of the right before information is obtained or used?

Chapter Two – The Nature and Origin of the Right to Silence

Nature of the right to silence

1. The right to silence refers to a “bundle” of rights associated with a person’s ability to lawfully resist the coercive powers of the state to obtain information from him or her. The House of Lords in *R v Director of Serious Fraud Office; ex parte Smith* adopted the following definition:

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

- (1) a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies;
 - (2) a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them;
 - (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;
 - (6) a specific immunity (at least in certain circumstances...) 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.¹
2. The right to silence, in its broadest terms, provides that a person is not under a duty to answer questions from or provide information to public officials engaged in an investigation or prosecution.
 3. In its application, however, the right often corresponds to the more specific immunities described in paragraphs (3)-(6) above, in relation to questioning by officials, either *pre-trial* or *at trial*, in relation to a criminal offence. That questioning need not be overt. In *Swaffield and Pavic v The Queen*, the High Court emphasised that the right to silence is a fundamental rule of law, not

¹ [1993] AC 1 at 30-31 per Lord Mustill, as cited in NSW Law Reform Commission Report 95, *The Right to Silence*, 2000, www.lawlink.nsw.gov.au/lrc.nsf/pages/r95chp1.

restricted to formal interviews, and that it could be infringed even by covert questioning by police or informers.²

4. The objective of guaranteeing a fair trial, in which the rights of the accused and accuser are balanced, has been a significant rationale for the development of the right to silence at common law. With respect to pre-trial interrogation, under investigative procedures introduced in England in the sixteenth century, constables were required to bring suspects before an examining justice for interrogation as soon as possible after arrest. The interrogation, including the suspect's refusal to answer questions, was recorded and presented as evidence at trial.³ The right to silence when questioned evolved as a result of judicial distrust of the investigative techniques employed by those justices who subsequently examined the accused.⁴
5. By the mid-nineteenth century, the investigative and judicial functions of the state were formally separated by legislation, and the police were given the exclusive role of questioning suspects. In 1912, in order to clarify uncertainty arising from the varying judicial attitudes to the reliability of the resultant evidence, the judges of the Kings Bench issued the Judges' Rules. These provided that, when a police officer decided to charge a suspect with an offence and intended to interview the person, the police officer should first caution the person that he or she was entitled to remain silent.⁵ The pre-trial operation of the right to silence was further buttressed by judicial decision that an admission made by the accused to the police would only be admissible in evidence if the prosecution could establish that it had been given voluntarily.⁶
6. The modern-day context for the invocation of the right to silence has been described by the High Court in *Petty and Maiden v The Queen* (Petty):

A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of participants and the roles which they played. That is a fundamental rule of the common law... no adverse inference can be drawn against an accused person by reason of his or her failure to

² (1998) 192 CLR 159. These cases were heard together on the basis that they raised common issues for determination.

³ *1 & 2 Phillip and Mary* c 13; *2 & 3 Phillip and Mary* c 10; J Wigmore, *Evidence in Trials at Common Law* (McNaughton Rev, Little Brown, Boston, 1961) at para 2250; D Harvey, "The Right to Silence and the Presumption of Innocence" [1995] *New Zealand Law Journal* 181 at 182; S Odgers, "Police Interrogation and the Right to Silence" (1985) 59 *Australian Law Journal* 78 at 83.

⁴ M Weinberg, "The Right to Silence – Sparing the Judge From Talking Gibberish", paper presented at session 24 of the *30th Australian Legal Convention* (Melbourne, 18-21 September 1997) at 4; C R Williams, "Silence in Australia: Probative Force and Rights in the Law of Evidence" (1994) 110 *Law Quarterly Review* 629 at 630-631.

⁵ Although the Judges' Rules have never had the force of law, they have "continued to provide guidance as to the standards of fairness to be observed when a question later arises as to the admissibility of a confessional statement made to police": *Van der Meer v The Queen* (1988) 62 ALJR 656 at 661, per Deane J.

⁶ *Ibrahim v R* [1914] AC 599. An admission or confession is only voluntary if it was made in the exercise of a free choice about whether to speak or remain silent: see *McDermott v R* (1948) 76 CLR 501 and *R v Lee* (1950) 82 CLR 133.

answer such questions or to provide such information. To draw such an adverse inference would be to erode the right to silence or to render it valueless... [Further] it should not be suggested, either by evidence led by the Crown or by questions asked or comments made by the trial judge or the Crown prosecutor, that an accused's exercise of the right to silence may provide a basis for inferring a consciousness of guilt.⁷

7. In *Petty*, Justice Gaudron pointed out that the right to silence necessarily follows from the fundamental principle that the prosecution bears the burden of proof of the alleged crime beyond reasonable doubt and that no defendant is required (with a few exceptions) to prove his or her innocence.
8. Kirby J, in *Swaffield and Pavic*, noted that:

[t]here are many reasons, consistent with innocence, why a person might wish to remain silent when confronted by police investigating a crime. They may be shocked by the accusation or suspicion of their involvement. They may be upset or confused. They may want to protect somebody else or themselves from embarrassing, but not necessarily unlawful, facts. They may lack the ability to articulate a defence or explanation for their action. They may just be suspicious of police officers and other officials of the State. They may have been so advised by lawyers or others.⁸
9. Maintaining the right to silence also has the practical benefit, in criminal justice terms, of ensuring that the police have an incentive to investigate a case thoroughly, looking for objective evidence of who committed a crime, because they cannot rely on the accused answering their questions. Thus, the right to silence not only protects the accused but also helps to ensure that cases are investigated and prosecuted thoroughly. It follows that removing or weakening the right risks lowering the standards of evidence in prosecutions. This increases not only the risk of the innocent being convicted but also the guilty either being acquitted or not being brought to court in the first place.
10. The need to maintain a fair balance between the state and the individual, and to safeguard the integrity of the investigatory and prosecutorial processes are, therefore, key rationales underpinning the right to silence. These rationales, similarly, underpin the existence of the privilege against self-incrimination.

Nature of the privilege against self-incrimination

11. The privilege against self-incrimination is encapsulated in the Latin maxim *nemo tenetur accusare se ipsum*: no person is bound to accuse himself or herself. It corresponds with the “immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them”, as described in paragraph (2) of the decision in *R v Director of Serious Fraud Office; ex parte Smith* referred to in paragraph 1 above.

⁷ (1991) 173 CLR 95 . Six of the Justices (Dawson J dissenting) rejected the distinction made in some earlier cases between “reliance on silence as evidence against the accused and reliance on it by way of answer to or comment upon a defence raised for the first time”.

⁸ (1998) 192 CLR 159 at paragraph 146.

12. The privilege against *self*-incrimination is not against incrimination *per se*.⁹ In other words, whilst there is no obligation to give statements that may reveal some misconduct on a person's part, he or she is not free to frustrate the conduct of investigations or proceedings that might ultimately reveal that misconduct.
13. There has been considerable debate over the origin of the privilege against self-incrimination in recent years.¹⁰ The traditional view is that the privilege developed as a response to the unpopular procedures of the Court of Star Chamber and the Court of High Commission in Ecclesiastical Causes. These Courts could compel an accused person to swear an oath to tell the truth and then interrogate that person to determine if he or she had committed an offence. However, this view has been challenged.¹¹
14. Regardless of its origin, the privilege against self-incrimination is now considered as not merely a rule of evidence but rather as a **substantive right**. As Mason CJ and Toohey J stated in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (Caltex):

[i]n one important sense, the modern rationale for the privilege against self-incrimination is substantially the same as the historical justification – protection of the individual from being confronted by the "cruel trilemma" of punishment for refusal to testify, punishment for truthful testimony or perjury (and the consequential possibility of punishment). Naturally, methods of punishment are now different: modern-day sanctions involve fines and/or imprisonment, rather than excommunication or physical punishment. Further, the philosophy behind the privilege has become more refined - the privilege is now seen to be one of many internationally recognized human rights.¹²

Rationale for the privilege against self-incrimination

15. In its 2004 Report, the Queensland Law Reform Commission divided the principal rationales for the privilege against self-incrimination into two main categories:

⁹ In *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 393, Gibbs CJ, Mason and Dawson JJ observed that the privilege:

has no application to the seizure of documents or their use for the purpose of incrimination provided that they can be proved by some independent means. The privilege is not a privilege against incrimination; it is a privilege against self-incrimination.

¹⁰ See generally R H Helmholz et al, *The Privilege against Self-Incrimination: Its Origins and Development* (1997). See also Hon Justice G L Davies, "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 Helmholz et al: L W Levy, "Origins of the Fifth Amendment and Its Critics" (1997) 19 *Cardozo Law Review* 821.

¹¹ J H Langbein, "The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries" in Helmholz et al, *The Privilege against Self-Incrimination: Its Origins and Development* (1997) 82 at 83. For a discussion of recent research that challenges the accuracy of the traditional view, see Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-Incrimination*, Report No. 59, December 2004, pp 9-11.

¹² Per Mason CJ and Toohey J at para 33. See, also, *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 150, per Murphy J.

The Nature and Origin of the Right to Silence

- *systemic* rationales that view the privilege as a means of achieving goals within the criminal justice system; and
- *individual* rationales based on notions of human rights and respect for human dignity and individuality.¹³

16. Systemic rationales include:

- *to prevent abuse of power*, such as oppressive or abusive questioning and to maintain a proper balance between the powers of the State and the rights and interests of citizens;
- *to prevent conviction founded on a false confession*;
- *to protect the accusatorial system of justice* by ensuring that the prosecution bears the onus of proving that an accused is guilty of an offence; and
- *to protect the quality of evidence* as compelled evidence is likely to be unreliable.

17. Individual rationales include:

- *to avoid the “cruel trilemma”* of a witness having to choose between risking punishment by either failing to answer, confessing to guilt, or lying; and
- *to protect human dignity and privacy* as compelled self-incrimination constitutes a serious intrusion into the right of privacy and erodes individual moral autonomy.

Nature of the penalty privilege

18. A “civil penalty” is a penalty imposed by courts applying civil rather than criminal procedures.¹⁴ The Australian Law Reform Commission describes them as a hybrid between the criminal and civil law:

They are founded on the notion of preventing or punishing public harm. The contravention itself may be similar to a criminal offence ... and may involve the same or similar conduct, 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.

...Civil penalties may be more severe than criminal penalties in many cases.¹⁵

¹³ Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-incrimination*, Report No.59, December 2004, (QLRC 59), paragraphs 3.11 – 3.52.

¹⁴ Australian Law Reform Commission, *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation*, Report No.95, 2002, (ALRC 95), paragraph 2.45. The ALRC quotes M Gillooly and N Wallace-Bruce, “Civil Penalties in Australian Legislation” (1994) 13(2) *University of Tasmania Law Review* 269, 269–270:

Civil penalties may be broadly defined as punitive sanctions that are imposed otherwise than through the normal criminal process. These sanctions are often financial in nature, and closely resemble fines and other punishments imposed on criminal offenders ... the process by which these penalties are imposed is decidedly non-criminal.

¹⁵ ALRC 95, paragraphs 2.47 and 2.49. See, eg, the provisions of the *Trade Practices Act 1974*.

19. As the effect of a civil or criminal penalty on a person are alike, similar considerations apply regarding compelling a person to expose themselves to their consequences:

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.¹⁶

20. The Queensland Law Reform Commission provides a convenient summary of the nature and origin of the penalty privilege:

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. However, others regard it as having been developed in equity.

The High Court has recently confirmed the existence of the penalty privilege in relation to court proceedings. The privilege may be claimed in a civil proceeding, and is not confined to discovery and interrogatory procedures.

The risk of exposure to a penalty in a court proceeding can occur in two different ways.

The first is in what has been described as a “mere action for a penalty.” 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.

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.

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.¹⁷

¹⁶ *Martin v Treacher* (1886) 16 QBD 507, per Lord Esher MR at 511-512.

¹⁷ See p 11 – p 12, footnotes not included. The High Court decision referred to is *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543.

Chapter Three – The Right to Silence in Australian Law

Statutory treatment of the rights

1. The right to silence and privilege against self-incrimination, as they have been developed by the common law, may be preserved, modified or abrogated by statute. As recognised in *Caltex*:

the legislatures have from time to time in different fields abrogated or interfered with the privilege in many of its aspects, including its application to the production of documents. The legislatures have taken this course when confronted with the need, based on perceptions of the public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained.¹⁸

2. Consistent with established interpretative principles, it was also noted in *Caltex* that:

[a] statutory intention to modify or abrogate a common law right, such as the privilege against self-incrimination, must emerge clearly, whether by express words or necessary implication. When it does the courts must give it effect. There is no constitutional constraint as in the United States... the legislature may, whilst compelling the production of incriminating material, provide protection against its use in the prosecution of the person producing it... Questions arise as to the extent of the protection necessary – whether it should prevent only direct use or whether it should extend to derivative use – but that is something which is properly a matter for the legislature to consider.¹⁹

3. In some jurisdictions, interpretation Acts reflect this interpretive principle. For example, some of these Acts expressly preserve the privilege against self-incrimination and exposure to a civil penalty, unless it is displaced expressly or by manifest contrary intention.²⁰
4. In circumstances where Parliament's intention may not be evident, it will be a matter of judicial interpretation whether this right has been altered by statutory provision. In *Pyneboard v Trade Practices Commission* (*Pyneboard*),

¹⁸ (1993) 178 CLR 477 at para 46, per Mason CJ and Toohey J.

¹⁹ (1993) 178 CLR 477 at para 25, per Deane, Dawson and Gaudron JJ.

²⁰ For example, s 170 of the ACT *Legislation Act 2001* provides:

- (1) An Act or statutory instrument must be interpreted to preserve the common law privileges against self incrimination and exposure to the imposition of a civil penalty.
- (2) However, this section does not affect the operation of the Evidence Act 1995 (Cwlth). Note: The *Evidence Act 1995* (Cwlth), s 128 contains provisions that apply if a witness raises these privileges in a proceeding. The section applies to proceedings in ACT court (see *Evidence Act 1995* (Cwlth), s 4). However, the privileges have been abolished for bodies corporate (see *Evidence Act 1995* (Cwlth), s 187).
- (3) This section is a determinative provision.

Section 6(2) of that Act provides that a determinative provision may be displaced expressly or by a contrary intention.

Mason ACJ, Wilson and Dawson JJ commented on when the privilege against self-incrimination 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. In such cases it will be so, notwithstanding that the answers given may be used in subsequent legal proceedings.²¹

The right to silence under Australian law

5. The High Court case of *Petty* represents the law on the right to silence in a number of Australian jurisdictions: Victoria, Queensland, Western Australia, South Australia, Tasmania and the Northern Territory.²²
6. In NSW, the Australian Capital Territory and in federal courts, however, the common law, at least with respect to at-trial right to silence, has been displaced by s 89 of the Commonwealth *Evidence Act 1995* and the NSW *Evidence Act 1995* (Evidence Act).
7. Section 89 of the Evidence Act provides as follows:
 - (1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:
 - (a) to answer one or more questions, or
 - (b) to respond to a representation,put or made to the party or other person in the course of official questioning.
 - (2) Evidence of that kind is not admissible if it can only be used to draw such an inference.
 - (3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.
 - (4) In this section “inference” includes:
 - (a) an inference of consciousness of guilt, or
 - (b) an inference relevant to a party’s credibility.

²¹ (1983) 152 CLR 328 at 342. On the other hand, their Honours said that an implication that the privilege has been excluded “will be less readily drawn in cases where the obligation to answer questions and produce documents is an element in an examination on oath before a judicial officer whether or not an object of that examination is to ascertain whether an offence has been committed with a view to the institution of a prosecution for that offence”. In such a situation, the focus of concern will be whether the “interests of justice require that the witness give the evidence”: p 343.

²² See paragraphs 6-7 of the previous chapter for references to this High Court decision. In the ACT, moreover, s 22(1) of the *Human Rights Act 2004* provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. Section 22(2)(i) of that Act specifically provides that anyone charged with a criminal offence is entitled not to be compelled to testify against himself or herself or to confess to guilt.

8. Section 89 substantially reflects the common law as noted in *Petty*.²³ However, it has been remarked that the scope of application of the right is somewhat different, in that s 89 applies only during “official questioning”,²⁴ whereas the principle in *Petty* is of a more general application.²⁵
9. Complementing the above provisions in the Commonwealth and NSW Evidence Acts is s 20(2). Section 20(2) of the NSW Act specifies the circumstances in which comment may be made on a failure of a defendant to give evidence in a criminal proceeding for an indictable offence.²⁶ Section 20(2) provides:

The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.
10. In *R v OGD*, the NSW Court of Criminal Appeal confirmed that the following principles determined the nature of the comment the judge was entitled to make about an accused person’s failure to testify:

First, the failure of an accused person to give evidence cannot be treated as an admission, by conduct, of guilt. The reason is that, if it were otherwise, the legal right to silence would be negated...

Secondly, it is commonly appropriate to instruct a jury that failure to contradict or explain incriminating evidence, in circumstances where it would be reasonable to expect it to be in the power of an accused to do so, may make it easier to accept, or draw inferences from, evidence relied upon by the Crown...

Third, it is ordinarily necessary to warn a jury that there may be reasons unknown to them, why an accused person, even if otherwise in a position to contradict or explain evidence, remains silent.²⁷

The privilege against self-incrimination under Australian law

11. The common law remains vital to an understanding of the privilege against self-incrimination in Australian law, notwithstanding legislative recognition of the privilege in particular contexts.²⁸

²³ In *R v Matthews* (28 May 1996), the NSW Court of Appeal held that s 89 declares the right to silence in terms not materially different from common law. The Court found that, whilst s 89 does not expressly oblige a trial judge to direct the jury on it, that obligation (as established by the common law) remains. See, more recently, *R v Skaf* [2004] NSWCCA 37 (6 May 2004).

²⁴ *Official questioning* is defined in the Dictionary to the *Evidence Act 1995* as meaning “questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence”.

²⁵ *R v Anderson* [2002] NSWCCA 141.

²⁶ The common law position is represented by *Weissensteiner v R* (1994) 178 CLR 217. In this case, the High Court held that the accused’s failure to testify could, in certain circumstances and for certain purposes, be relied on by the tribunal of fact in determining whether or not guilt has been proved beyond reasonable doubt. The High Court also indicated that this was so even in those jurisdictions, like Victoria, where there was a prohibition on judicial comment on the accused’s failure to testify.

²⁷ *R v OGD*, unreported decision 3 June 1997, 13-14 per Gleeson CJ.

12. Until the 1980s, there was some doubt whether the privilege applied to situations other than trials. However, in *Pyneboard*, the High Court clarified that the privilege was capable of application in non-judicial settings.²⁹
13. In *Caltex*, a High Court majority rejected the extension of the privilege to corporations.³⁰ Mason CJ and Toohey J, in particular, rejected two policy arguments advanced for the privilege's applicability to corporations – that it assists in maintaining a fair state-individual balance, and that the privilege is a significant element in maintaining the integrity of an accusatorial system of criminal justice.³¹ They concluded:
- 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. In respect of natural persons, a fair state-individual balance requires such protection; however, in respect of corporations, the privilege is not required... Nor is the privilege so fundamental that the denial of its availability to corporations in relation to the production of documents would undermine the foundations of our accusatorial system of criminal justice.³²
14. The overall effect of the privilege in Australia has been stated to be that:
- 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.³³
15. Thus, the privilege against self-incrimination in the Australian context extends beyond oral testimony or questioning to the production of documents.³⁴ However, while the High Court has applied the privilege to documents, it has

²⁸ For example, s 128 of the *NSW Evidence Act 1995* provides for the privilege against self-incrimination to operate in relation to a witness who objects to giving particular evidence. The section provides for the court to give an evidential certificate to a person compelled to self-incriminate so as to prevent the use of that evidence against that person, except in relation to criminal proceedings in respect of the falsity of the evidence.

²⁹ (1983) 152 CLR 328.

³⁰ In a series of cases, culminating in *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 395 Murphy J expressed the view that the privilege cannot be claimed by corporations, unincorporated associations or political entities because it is "peculiarly a human right".

³¹ (1993) 178 CLR 477 per Mason CJ and Toohey J at paragraphs 37-49.

³² (1993) 178 CLR 477 per Mason CJ and Toohey J at paragraph 59. See also McHugh J at paragraph 49, and Brennan J, who similarly found that the privilege against self-incrimination could not apply to a corporation. However, Deane, Dawson and Gaudron JJ, in their minority joint judgment, "could find no sufficient reason in principle for saying that the doctrine [ie, privilege], as it has developed in our law, has no application to corporations": paragraph 27.

³³ *Bridal Fashions Pty Ltd v Comptroller-General of Customs and Another* (1996) 17 WAR 499 per Malcolm CJ, Ipp and Owen JJ at 504.

³⁴ In *Caltex*, Mason CJ and Toohey J stated that:

the privilege against self-incrimination protects an accused person who is required by process of law to produce documents which tend to implicate that person in the commission of the offence charged. The privilege likewise protects a person from producing in other proceedings, including civil proceedings, documents which might tend to incriminate that person.

considered such application to be of less importance. For instance, Mason CJ and Toohey J observed in *Caltex* that:

[p]lainly 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 are not testimonial in character.³⁵

16. While statutes have provided for the abrogation of the privilege in a variety of contexts, they usually preserve the privilege to some degree by limiting the use that can be made of self-incriminating evidence so obtained. For example, the NSW Evidence Act limits both the direct and the derivative use of self-incriminating information. Under s 128, the Court may issue a certificate with respect to evidence a person is compelled to give that tends to prove they committed an offence or are liable to a civil penalty. Section 128(7) provides:

In any proceeding in a NSW court:

- (a) evidence given by a person in respect of which a certificate under this section has been given, and
- (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence,

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

³⁵ (1993) 178 CLR 477 at 503.

Chapter Four – International and Regional Human Rights Standards

International Covenant on Civil and Political Rights

1. Article 14 of the ICCPR provides as follows:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...

(g) Not to be compelled to testify against himself or to confess guilt.

2. The specific right in Art 14(3)(g) is an attribute of the wider right to a fair trial protected by Art 14(1).³⁶ It has been generally accepted that the presumption of innocence, as well as most of the other rights in Art 14, apply both to the defendant in a criminal case, and an accused person prior to the filing of a criminal charge.³⁷ A person has this right until a conviction is recorded.³⁸

3. In its *General Comment* on Art 14, the UN Human Rights Committee noted the following:

Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 [prohibition of torture and cruel, inhuman or degrading punishment] and article 10, paragraph 1 [persons deprived of liberty to be treated with humanity and respect], should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

In order to safeguard the rights of the accused under paragraphs 1 and 3 of article 14, judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution.³⁹

³⁶ Nonetheless, violation of the right to be presumed innocent is extremely difficult to prove. Despite considering a large number of alleged violations of this right, the UN Human Rights Committee has found it to be violated only in 2 cases, both against Uruguay: Nos. 5/1997, 8/1977 and 203/1986.

³⁷ M Nowack, *UN Covenant on Civil and Political Rights. CCPR Comment*, Strasbourg, 1993, p 254.

³⁸ In addition, Art 35 and Art 36 of the UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, set out further the principles of the presumption of innocence for detained persons, and the entitlement of a person facing a criminal charge, to release pending trial, unless required for the purposes of the administration of justice.

³⁹ CCPR *General Comment* No. 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art 14), 21st Session, 1984, paragraphs 14 and 15,

European Convention on Human Rights

4. Article 6 of the European Convention on Human Rights (ECHR) provides that:
 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...
 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.⁴⁰
5. It will be noted that there is nothing in the wording of Article 6 about the right to silence or the right not to incriminate oneself. However, in *Saunders v United Kingdom* (Saunders), the European Court of Human Rights has recognised that, although not specifically mentioned in Art 6, the right to silence and the right not to incriminate oneself are:

generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6.⁴¹
6. The *Saunders* case is of particular relevance to the issues that face the Committee. Mr Saunders had been convicted on counts of conspiracy, false accounting and theft, in connection with a contested take-over bid. Prior to the criminal trial, inspectors had been appointed under the UK *Companies Act 1985* to investigate the bidder company of which Mr Saunders was the chief executive. The inspectors questioned him under powers conferred on them by that Act, which enabled them to compel a person to answer questions. Further, under that Act the answers obtained could be used in evidence in any subsequent proceedings. Transcripts of the evidence given to the inspectors were used at the criminal trial.

www.unhcr.ch/tbs/doc.nsf/. Article 7 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation; Art 10(1) provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

⁴⁰ Article 6(3) further provides that everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; and
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

By using the expression “criminal offence”, the European Court of Human Rights does not limit itself to looking at the *classification* of the alleged offence in a nation's law (criminal or otherwise), but also at the *nature* of the offence and of the penalty threatened.

⁴¹ (1996) 23 EHRR 313 at paragraph 68.

7. On appeal, it was held that this process was lawful, and that the wording of the relevant section ousted the judge's discretion⁴² to exclude such statements.
8. Subsequently, the European Court of Human Rights held that such use of the statements was in breach of Mr Saunders' right to a fair trial under Art 6(1). The Court said that the rationale for these rights was, inter alia:

the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in article 6(2) of the Convention.
9. In delineating the scope of the right not to incriminate oneself, the majority also distinguished between material compulsorily acquired and that which has an existence independent of the will of the suspect:

The right not to incriminate oneself is primarily concerned...with respecting the will of an accused person to remain silent. As commonly understood...it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.⁴³
10. The implied rights in Art 6 to remain silent and not to incriminate oneself are not absolute. In *Murray v the United Kingdom*, the European Court of Human Rights held that:

[whether] the drawing of adverse inferences from an accused's silence infringes article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.⁴⁴
11. The Court eventually held that the drawing of reasonable inferences from the applicant's behaviour did not shift the burden of proof from the prosecution to

⁴² Under s 78 of the UK *Police and Criminal Evidence Act 1984*. The ouster of the discretion was an important component of the case, in that subsequently, in *R v Hertfordshire County Council, Ex Parte Green* [2000] 2 AC 412, evidence compelled under s 71 of the UK *Environmental Protection Act 1991* was held not to be a breach of Article 6 because the trial judge retained the discretion to exclude the evidence.

⁴³ [1996] 23 EHRR 313 at paragraph 68.

⁴⁴ [1994] 22 EHRR 39 at paragraph 47. Murray was a member of the IRA arrested for conspiring to murder a police informer who was held captive in the house in which he was arrested. He maintained his silence for the entire proceedings. In particular, he refused to provide an explanation for his presence in the house, despite being cautioned that his refusal to answer could be held against him. At trial, the judge warned him that his inability to give an account of himself could be interpreted as evidence against him.

the defence and, therefore, did not infringe the principle of the presumption of innocence under Art 6.

12. In *R v Kearns*,⁴⁵ the UK Court of Appeal concluded the following from the relevant jurisprudence of the European Court of Human Rights:

- (1) Art 6 is concerned with the fairness of a judicial trial where there is an “adjudication”- it is not concerned with extra-judicial enquiries as such;
- (2) the rights to silence and not to incriminate oneself are implicit in Article 6. The rationale for the implication of those rights in criminal cases is that:
 - (a) an accused should be protected against improper compulsion by the authorities, which would militate against a fair procedure; and
 - (b) the prosecution should prove their case against the accused without using evidence obtained through methods of coercion or oppression in defiance of the will of the accused. Otherwise the principle of the presumption of innocence (Article 6(2)) is impugned;
- (3) the rights to silence and not to incriminate oneself are not absolute, but can be qualified and restricted. A law that qualifies or restricts those rights is compatible with Article 6 if there is an identifiable social or economic problem that the law is intended to deal with and the qualification or restriction on the rights is proportionate to the problem under consideration;
- (4) there is a distinction between the compulsory production of documents or other material which had an existence independent of the will of the suspect or accused person and statements that he has had to make under compulsion. In the former case, there is no infringement of the right to silence and the right not to incriminate oneself. In the latter case there could be, depending on the circumstances.
- (5) a law will not be likely to infringe the right to silence or not to incriminate oneself if it demands the production of information for an administrative purpose or in the course of an extra-judicial enquiry. However if the information so produced is or could be used in subsequent judicial proceedings, whether criminal or civil, then the use of the information in such proceedings could breach those rights and so make that trial unfair; and
- (6) whether that is the case will depend on all the circumstances of the case, but in particular (a) whether the information demanded is factual or an admission of guilt, and (b) whether the demand for the information and its subsequent use in proceedings is proportionate to the particular social or economic problem that the relevant law is intended to address.

⁴⁵ [2002] EWCA Crim 748 (22nd March, 2002).

13. Criticism has been levelled at the jurisprudence of the European Court and of the House of Lords with respect to Art 6(1) of the ECHR, on the basis that it tends to weaken the protection of the right to a fair trial. As Professor Andrew Ashworth has noted:

[t]o accept that these rights are not absolute is not to concede that they may be “balanced away” by being compared with a general public interest and put in second place.⁴⁶

Other applicable human rights standards

14. Article 8(2) of the *Inter-American Convention on Human Rights* provides that every person accused of a criminal offence has a right to be presumed innocent and, during proceedings to determine guilt, that person is entitled to the “right not to be compelled to be a witness against himself”.
15. The *African Charter on Human and People’s Rights* similarly provides, in article 7(1)(b), that a person’s right to have his cause heard comprises, amongst other rights, the right to be presumed innocent until proven guilty by a competent court or tribunal.
16. Article 66 of the Statute of the International Criminal Court also confers a presumption of innocence on all persons accused of crimes under the Statute. The right of the accused provided for in Art 67 of the Statute include the right “not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence”.

⁴⁶ A Ashworth, “Criminal Proceedings after the Human Rights Act: The First Year” (2001) Crim LR 855 at 866.

Chapter Five – Right to Silence in Some Overseas Jurisdictions

England and Wales

1. Throughout the 1990's, the UK criminal justice underwent extensive policy changes. Among these was the introduction of the *Criminal Justice and Public Order Act 1994* (the Criminal Justice Act). Sections 34 to 37 of this Act are an example of how the right to silence has been legislatively modified. These provisions relate to the at-trial inferences that may arise from the exercise of the right to silence by an accused person. The four principal sections concern the effect of an accused's:
 - failure to mention facts when questioned or charged being facts which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned and which are later relied on at trial in his or her defence (s 34);
 - silence at trial (s 35);
 - failure or refusal to account for objects, substances or marks (s 36); and
 - failure or refusal to account for his or her presence at a particular place (s 37).⁴⁷
2. As a member of the Council of Europe, the United Kingdom is bound by the provisions of the European Convention on Human Rights (ECHR). These include Art 6, which has been held to include the right to silence, as discussed in Chapter 4. Moreover, the bulk of the the ECHR was incorporated into UK law by way of the *Human Rights Act 1998*, which came into effect in October 2000.
3. In 2002, the Privy Council accepted that the common law rights to remain silent and not to incriminate oneself could, in appropriate circumstances, be qualified or restricted by statutory provisions.⁴⁸ Whether a particular statutory restriction on these rights was compatible with the rights enshrined in Art 6 of the ECHR depends on three factors:
 - the particular social or economic problem being dealt with by the statute;
 - the circumstances in which the qualification or restriction is imposed; and
 - the precise scope of the qualification on those rights that is imposed by the statutory provisions.

⁴⁷ Similar legislation to s 36 and s 37 of the UK Act is also found in the Republic of Ireland in s 18 and s 19 of the *Criminal Justice Act 1984*.

⁴⁸ *Brown v Stott* [2001] 2 WLR 817.

4. Studies in the United Kingdom have not shown that restricting the right to silence increases conviction or plea rates, but the restrictions have provided fertile grounds for appeals and acquittals.⁴⁹ The conclusion of many commentators is that the evidential gains from restricting silence are outweighed by procedural inconvenience and cost.⁵⁰
5. In *Condron v United Kingdom*,⁵¹ the appellants had been convicted of drug charges. They maintained their right of silence during police interviews on legal advice that they were not in a fit condition to be interviewed. An adverse inference was drawn at trial pursuant to s 34 of the Criminal Justice Act. The UK Court of Appeal considered the judge's direction to the jury was not enough to render the convictions unsafe.
6. However, the European Court of Human Rights held that the trial judge's direction was in fact defective, because it failed to include a direction that if the jury was satisfied that the appellants' silence at the police interview could not sensibly be attributed to their having no answer or none that would stand up to cross-examination, they should not draw an adverse inference. The Court concluded unanimously that, as a result of the defective direction, the appellants had been denied a fair trial within the meaning of Art 6(1).

Civil Proceedings

7. The applicability of the privilege against self-incrimination in civil proceedings has been preserved by s 7 of the UK *Civil Procedure Act 1997*. The privilege has also been generally preserved under s 14 of the UK *Civil Evidence Act 1968* in cases where the refusal is to answer questions, or to produce any document or thing, which "would tend to expose that person to proceedings for an offence or for the recovery of a penalty" under UK law. It has been observed, however, that:

specific inroads into the privilege have been statutorily created.... but in each of those provisions the withdrawal of the privilege is carefully limited to the areas to which the provision is addressed.⁵²

United States

8. In the United States, the Fifth Amendment to the Bill of Rights constitutionally enshrines the privilege against self-incrimination. It provides that:

[n]o person... shall be compelled in any criminal case to be a witness against himself.⁵³

⁴⁹ See, eg, D J Seidmann, *The Effects of a Right to Silence*, Department of Economics, University of Nottingham, www.nottingham.ac.uk/economics/staff/details/papers/DS_mirandamarco.pdf.

⁵⁰ Professor P.J. Schwikkard, "Silence and Common Sense", Department of Criminal Justice, *University of Capetown Law Review*, web.uct.ac.za/law/review/03sept/silence.htm

⁵¹ (2001) 31 EHRR 1.

⁵² [2005] EWHC 238 (Ch) per Lindsay J, at paragraph 28.

⁵³ See also, eg, *Constitution of India*, s 20(3); and *Constitution of Papua New Guinea*, Art 37(1). There are comparable guarantees in each of the United States State constitutions.

Right to Silence in Some Overseas Jurisdictions

9. This constitutional protection applies to both pre-trial and at-trial questioning.⁵⁴ The Fifth Amendment protection has been recognised as a purely *personal* privilege: a witness cannot plead the fact that some third person might be incriminated, even if the witness is an agent or representative of that person.⁵⁵
10. In the nineteenth century case of *Counselman v Hitchcock*,⁵⁶ the United States Supreme Court held that the reference to compelled testimony was to the eventual *use* of the testimony and not to the *nature of the proceeding* in which the testimony was compelled. Thus, the Fifth Amendment applies to a witness in any proceedings who is compelled to give testimony that might be incriminating in a subsequent criminal prosecution.
11. More recently, in *Chavez v Martinez*,⁵⁷ a majority of the Supreme Court held that a violation of the Fifth Amendment does not occur until information obtained from an involuntary confession is *actually used* against a defendant in a criminal proceeding. This is regarded as a narrow reading of the Fifth Amendment right.⁵⁸
12. The three dissenting judges highlighted a host of concerns with the decision to deny Mr Martinez's Fifth Amendment claim. A principal concern expressed is that, by eliminating redress when police involuntarily obtain statements and never use them, the door has been re-opened to the use of violence and intimidation in the investigatory process.⁵⁹

New Zealand

13. All New Zealand legislation is examined to see if it is consistent with the rights and freedoms affirmed by the *Bill of Rights Act 1990* (BORA). In the event of any such inconsistencies, the government must provide the Parliament a justification for the limits placed on these rights and freedoms.
14. The BORA contains the following relevant rights:
 - everyone who is (a) arrested; or (b) detained under any enactment for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right: s 23(4); and

⁵⁴ See *Bram v United States* (1897) 168 US 532; *Wan v United States* (1924) 266 US 1; and *Miranda v Arizona* (1966) 384 US 436. In the United States, pre-trial warnings are generally known as "Miranda" warnings.

⁵⁵ *Hale v Henkel* (1906) 201 US 43.

⁵⁶ 142 US 547 (1892).

⁵⁷ 538 US 760 (US), decided 27 May 2003.

⁵⁸ See, for example, S D Schweizer, "Casenote: *Chavez v Martinez*: A Right Deferred?", [2004] 31(2) *American Journal of Criminal Law* 205. Justices Souter and Breyer also found that there had been no violation of the Fifth Amendment sufficient to provide financial redress. However, they recognised that, in certain instances, an extension of the "bare guarantee" of the Fifth Amendment would be "warranted, if clearly show to be [a] desirable means to protect the basic right against the invasive pressures of contemporary society" (777), quoting *Miranda v Arizona*, 384 US 436 (1966) (Harlan J dissenting).

⁵⁹ *Chavez*, 538 US at 788, 794.

- everyone who is charged with an offence has, in relation to the determination of the charge, the right not to be compelled to be a witness or confess guilt: s 25(d).
15. The New Zealand Court of Appeal has reaffirmed the importance of the privilege against self-incrimination.⁶⁰ However, in its 2002 report on the law of evidence, the New Zealand Law Commission observed that it:
- 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.⁶¹
16. The 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:
- 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.⁶²
17. In response, the *Evidence Bill 2005* was introduced to the New Zealand Parliament and referred to the Justice and Electoral Committee in May 2005.

Canada

18. The Supreme Court of Canada has held that the right to silence when detained and questioned by police is one of the principles of “fundamental justice” provided for by the 1982 Canadian *Charter of Rights and Freedoms* (the Charter).⁶³

⁶⁰ *R v Barlow* (1995) 14 CRNZ 9; 2 HRNZ 635 (CA).

⁶¹ Law Commission (NZ), Report, *Evidence: Reform of the Law* (NZLC R55 Vol 1, 1999) at 76.

⁶² Law Commission (NZ), Discussion Paper, *The Privilege against Self-Incrimination* (NZLC PP 25, 1996) at pp 86-87, p 91.

⁶³ *R v Herbert* (1990) 57 CCC (3d) 1; *R v Chambers* [1990] 2 SCR 1293. Whilst s 7 gives residual protection to rights protected in s 11.c and s 13 of the Charter, it has been recognised that it does not give an *absolute* right to silence: *R v Brown* (2002) SCR 185. The principle against self

Right to Silence in Some Overseas Jurisdictions

19. Section 7 of the Charter states that every person has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. This guarantee extends beyond the sphere of criminal law, to encompass situations where there is “state action which directly engages the justice system and its administration”.⁶⁴
20. Additionally, s 11.c of the Charter enshrines the right of non-compellability, and the presumption of innocence, in the criminal context:

Any person charged with an offence has the right
...not to be compelled to be a witness in proceedings against that person in respect of the offence
21. In addition, s 13 of the Charter protects a witness against self-incrimination.⁶⁵ Its objective is to protect individuals from being indirectly compelled to incriminate themselves, in order to ensure that the Crown will not be able to do indirectly that which s 11.c prohibits.⁶⁶
22. In *Broyles v R*, the Supreme Court of Canada held that the police may not elicit confessions from an accused through the use of a undercover officer or an informer. However, Iacobucci J did note that:

the purpose of the right to silence is to limit the use of the coercive power of the state to force an individual to incriminate himself or herself; it is not to prevent individuals from incriminating themselves per se. Accordingly, if the person to whom the impugned remarks is made is not an agent of the state, there will be no violation of the right to silence.⁶⁷

South Africa

23. In South Africa, the right to remain silent is a fundamental right, which may only be limited in terms of the limitation clause in s 36 of the Constitution.⁶⁸ Section 36 states that the rights in the Constitution may only be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
 - the nature of the right;

incrimination has also been held not to be absolute, and to reflect different rules in different contexts: *R v S (R.J.)* (1995) 1 SCR 451.

⁶⁴ *Blencoe v. B.C. (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44. See also *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46. Canadian Charter of Rights Decisions Digest, Canadian Legal Information Institution, Section 7 – Overview, July 2004, www.canlii.org/ca/com/chart/s-7.html

⁶⁵ 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.

⁶⁶ *Dubois v R* [1985] 2 SCR 350.

⁶⁷ (1991) 68 CCC (3d) 308 (SCC) at 318.

⁶⁸ Section 35(1)(a)-(c) of the Constitution enshrine the elements of the right to silence at the pre-trial stage. Section 35(3) enshrines the right of every accused person to a fair trial, including the right ... (h) to be presumed innocent, to remain silent, and not to testify during the proceedings... [and] (j) not to be compelled to give self-incriminating evidence.

- the importance of the purpose of the limitation;
 - the nature and extent of the limitation;
 - the relation between the limitation and its purpose; and
 - less restrictive means to achieve the purpose.
24. The South African Constitutional Court has declared invalid a provision in the *Criminal Procedure Act 1977* which placed an onus on an accused to prove that a confession made before a magistrate was not “made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto”.⁶⁹ The Court also explored the connection between the presumption of innocence and the right to remain silent in this case, holding that whatever advantages might accrue from the provision did not outweigh the resultant substantial infringement of fundamental rights.

⁶⁹ *S v Zuma* 1995 (2) SA 642 (CC).

Chapter Six – The Position of Other Scrutiny of Bills Committees

Commonwealth

Senate Standing Committee on the Scrutiny of Bills

1. The Senate Standing Committee on the Scrutiny of Bills (Senate Committee) has expressed the following general position on the privilege against self-incrimination:

The Committee does not see the privilege against self-incrimination as absolute. However, before it accepts legislation which includes a provision affecting this privilege, the Committee must be convinced that the public benefit which will follow from its negation will decisively outweigh the resultant harm to the maintenance of civil rights.⁷⁰

2. The Senate Committee has stated further:

One of the factors the Committee considers is the subsequent use that may be made of any incriminating disclosures. The Committee generally holds to the view that the interest of having government properly informed can more easily prevail where the loss of a person's right to silence is balanced by a prohibition against both the direct and indirect use of the forced disclosure. The Committee is concerned to limit exceptions to the prohibition against such use. In principle, a forced disclosure should be available for use in criminal proceedings only when they are proceedings for giving false or misleading information in the statement which the person has been compelled to make.⁷¹

3. Generally, the Senate Committee appears to be predisposed to consider provisions that modify the privilege as striking a reasonable balance between the competing interests of obtaining information and protecting individuals' rights if these provisions limit the circumstances in which the information may then be used, directly and indirectly.⁷²
4. However, on a number of occasions, the Committee has sought Ministerial advice on the rationale for eroding the privilege if this is not made explicit, or is insufficiently detailed, in a Bill's explanatory memorandum. For example, s 34G(8) of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2003* sought to abrogate the privilege against self-incrimination for a person from whom a "prescribed authority" required certain information. The Senate Committee noted that the provision did not impose the "usual limits on the circumstances in which information so

⁷⁰ *The Work of the Committee during the 39th Parliament November 1998-October 2001*, p 31.

⁷¹ *The Work of the Committee during the 39th Parliament November 1998-October 2001*, p 31.

⁷² See, for example, the Committee's comments on the *Building and Construction Industry Improvement Bill 2003* (Alert Digest 15/03, pp 8-9), the *Trade Practices Legislation Amendment Bill 2004* (Alert Digest 9/04, p 36), the *Agricultural and Veterinary Chemicals Legislation Amendment (Levy and Fees) Bill 2005* (Alert Digest 2/05, p 8) and the *Offshore Petroleum Bill 2005* (Alert Digest 08/05).

provided is admissible”, noting in particular that it permitted information acquired indirectly from the information compulsorily acquired to be used for any purpose whatever.⁷³ The Senate Committee observed:

The Explanatory Memorandum justifies this provision by asserting that the “protection of the community from [the violence of terrorism] is, in this special case, considered to be more important than the privilege against self-incrimination”. While the protection of the community from the violence of terrorism is obviously of vital concern, the Committee seeks the Attorney’s General advice as to why this can only be achieved by removing the long-standing protections of use and derivative use immunity.⁷⁴

5. The Senate Committee expressed similar concerns in relation to the *Australian Protective Service Amendment Bill 2003*. An initial provision in this Bill - limiting the use of self-incriminating information obtained from an Australian Protective Service officer in criminal proceedings - was removed in the House of Representatives. Whilst the Senate Committee noted that the omission of the provision would not affect the ability of a person to claim the privilege, it expressed concern that the Explanatory Memorandum to the Bill did not indicate how the information would be used and for how long it might be kept.⁷⁵

Victoria

6. In 1997, the Victorian Scrutiny of Acts and Regulations Committee received a reference to review the right to silence. The Victorian Committee examined issues including the appropriateness of allowing comment, and the type of comment, that might be made where an accused remains silent.
7. The terms of reference noted that:

[t]here is a perception that people who are innocent will provide an explanation for their actions and that silence is used as a shield by criminals. This must be viewed in the context of ensuring that persons charged with offences receive a fair trial

and specifically asked the Committee “to consider the desirability of introducing legislation equivalent or similar to the English scheme.”⁷⁶

⁷³ Senate Standing Committee on the Scrutiny of Bills, Alert Digest 4/02, p 10.

⁷⁴ Senate Standing Committee on the Scrutiny of Bills, Alert Digest 4/02, p 10. Subsequently, in the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill [No. 2]*, the Committee reported that the original provision had been amended to restrict the circumstances in which self-incriminating evidence is admissible. However, the Committee noted “that the Bill still did not provide for derivative use immunity, which may appear to trespass unduly on personal rights and liberties”. The Committee concluded that “it was for the Senate to weigh the breaches against the intended policy outcomes of the Bill”: Alert Digest 4/03, pp 9-10.

⁷⁵ See Alert Digest 15/03, pp 8-11, which includes an extract from the Minister’s reply to the Committee on the issue of the privilege against self-incrimination.

⁷⁶ Namely, the provisions of the UK *Criminal Justice and Public Order Act 1994* discussed in Chapter 4. Scrutiny of Acts and Regulations Committee, *Inquiry into the Right to Silence*, Final Report, March 1999, available online at www.parliament.vic.gov.au/sarc/RTS%20Report/RTStoc, Terms of Reference.

8. The Victorian Committee recommended that no changes be made to the law relating to pre-trial silence. It found that the law should continue to be that no adverse inferences may be drawn from an accused person's failure to answer questions put to him or her by investigating officials such as the police, and specifically rejected the introduction of legislation similar to the UK Criminal Justice Act.⁷⁷
9. The Victorian Committee reasoned that the right to silence continues to serve a useful purpose, particularly in redressing the power and resource imbalance between the state (as represented by the police) and an individual suspect.⁷⁸ It concluded that the right to silence does not create any significant problems, either in terms of evidence presented to it that it hampers police investigations to an unacceptable degree, or that it is abused by "hardened criminals".⁷⁹ The Victorian Committee also expressed the view that changing the right to pre-trial silence may have undesirable results of creating a lack of clarity in the law, threatening those vulnerable in the criminal justice system, and creating an unacceptable risk of miscarriage of justice.⁸⁰
10. Nonetheless, the Committee recommended the repeal of the blanket prohibition in s 399(3) of the *Crimes Act 1958* (Vic) on the making of comment about an accused's failure to testify. It recommended the adoption of s 20(2) of the Commonwealth Evidence Act, which is substantially similar to s 20(2) of the NSW Evidence Act.⁸¹ That recommendation has not been the subject of legislative reform.
11. The Victorian Committee also commented on whether abridgements of either the right to silence or the privilege against self-incrimination, are appropriately adapted to the public policy purposes of Bills before the Parliament.
12. Like other scrutiny committees, one common concern expressed by the Victorian Committee is that provisions displacing the privilege against self-incrimination are not always accompanied by protections against the use and derivative use of the information compulsorily acquired.⁸² In 2004, however, it found no instances where the modification of the privilege was unreasonable having regard to the competing public policy sought to be achieved by the legislation necessitating the modification. In most cases, the Victorian

⁷⁷ Scrutiny of Acts and Regulations Committee, *Inquiry into the Right to Silence*, Final Report, March 1999, Recommendation 1.

⁷⁸ Scrutiny of Acts and Regulations Committee, *Inquiry into the Right to Silence*, Final Report, March 1999, Chapter 2 – Pre-Trial Silence, p 2.

⁷⁹ Scrutiny of Acts and Regulations Committee, *Inquiry into the Right to Silence*, Final Report, March 1999, Chapter 2 – Pre-Trial Silence, pp 2-3.

⁸⁰ Scrutiny of Acts and Regulations Committee, *Inquiry into the Right to Silence*, Final Report, March 1999, Chapter 2 – Pre-Trial Silence, pp 4-5.

⁸¹ Scrutiny of Acts and Regulations Committee, *Inquiry into the Right to Silence*, Final Report, March 1999, Recommendation 4.

⁸² See, for example, the Scrutiny of Acts and Regulation Committee's comments on the *Major Crimes (Investigative Powers) Bill 2004*, *Alert Digest* No 1 of 2005, p 19.

Committee observed that the modification related to persons under a general statutory obligation to keep and provide documents, on request.⁸³

Queensland

13. The Queensland Scrutiny of Legislation Committee has formulated a general policy on provisions that erode the privilege against self-incrimination. Its policy is that denial of the protection afforded by the right to self-incrimination is only potentially justifiable if certain conditions are met:
- the questions posed concern matters which are peculiarly within the knowledge of the person to whom they are directed, and which would be difficult or impossible for the Crown to establish by any alternative evidentiary means; and
 - the Bill prohibits use of the information obtained in prosecutions against the person; and
 - the “use indemnity” should not require the person to fulfil any conditions before being entitled to it such as formally claiming the right.⁸⁴
14. Accordingly, the Queensland Committee often enquires whether provisions that displace the privilege provide both a use and derivative use immunity, and, if so, the nature and scope of those protections.⁸⁵ The Queensland Committee has generally expressed a preference for the widest form of immunity, which prohibits the use and derivative use of compelled information, other than in proceedings relating to the falsity of the information.⁸⁶ It also considers whether or not the information compelled may be peculiarly within the knowledge of the person to whom the questions are directed.⁸⁷
15. The Queensland Committee has placed weight on other factors when reporting on Bills that erode the privilege. For instance, in its consideration of a provision displacing the privilege in the *Contract Cleaning Industry (Portable Long Service Leave) Bill 2005*, it conceded that denying the benefit of the self-incrimination rule in relation to documents issued, or required to be kept, under a statute may be less problematical than in other contexts.⁸⁸ The Queensland Committee nonetheless referred the relevant provision to Parliament.⁸⁹

⁸³ Scrutiny of Acts and Regulations Committee, *Annual Review 2004*, March 2005, available at www.parliament.vic.gov.au/sarc/AnnualReview2004/Annual_Review_2004.htm

⁸⁴ See an early statement of that general policy in *Alert Digest* No. 13 of 1999, p 31.

⁸⁵ See, for example, the Committee’s comments on the *Transport Infrastructure Amendment Bill 2004* in *Alert Digest* No. 1 of 2005, Chapter 7, pp 28-30, and various provisions in the *Public Health Bill 2005: Alert Digest* No. 4 of 2005, Chapter 4, pp 14-15.

⁸⁶ See, for example, the Committee’s comments on the *Transport Operations (Road Use Management) and Another Act Amendment Bill 2003* in *Alert Digest* No. 10 of 2003, Chapter 6, p 27.

⁸⁷ See, for example, the Committee’s comments on proposed s 342(4) of the *Legal Profession Bill 2004: Alert Digest* No. 2 of 2004, Chapter 4, pp 14-15.

⁸⁸ *Alert Digest* 4 of 2005, Chapter 1, Part 1, p 5, citing QLRC 59, p 37.

⁸⁹ *Alert Digest* 4 of 2005, Part 1, pp 5-6.

Australian Capital Territory

16. The ACT Standing Committee on Legal Affairs has also made a statement of policy in relation to the displacement of the privilege against self-incrimination.⁹⁰ Its position is that a proponent of a bill which would displace the privilege should provide adequate justification for it. The factors it considers as relevant to determining whether there is an adequate justification for displacing the privilege include:

- the importance of the information to be gathered by displacement, having regard to the objects of the legislative scheme under which displacement would occur;
- the nature of the inquiry being made by the judicial or non-judicial body under the relevant legislative scheme;
- the nature of the offence or liability or penalty to which the person providing the information might be exposed if displacement of the privilege occurs; and
- the likelihood the revelation of the information will result in a proceeding to prosecute the offence or recover the penalty.⁹¹

17. If the privilege is displaced, the ACT Committee has expressed a general position on the level of protection that should be afforded to a person who is compelled to self-incriminate:

The starting point should be that there is protection against immediate and derivative use of the information provided by the person except in relation to a proceeding based on the falsity of the information provided. This is the policy reflected in section 128 of the Evidence Act 1995... If the Bill proposes a lesser degree of protection, then its proponents should provide adequate justification in that respect.⁹²

18. Like other scrutiny committees, the ACT Committee has observed that provisions that require a person to self-incriminate arise regularly.⁹³ Its two-fold concern has been that any displacement of the privilege be justified, and that there must be protection against derivative use of the information after a person self-incriminates.⁹⁴

19. For instance, when reporting on proposed s 254(3) of the *Confiscation of Criminal Assets Bill 2002*, the ACT Committee expressed concern that a provision displacing the privilege was not accompanied by a derivative use immunity.⁹⁵ The rationale given for excluding derivative use immunity in

⁹⁰ Scrutiny Report No. 3 of 1999, 23 March 1999.

⁹¹ Scrutiny Report No. 3 of 1999, 23 March 1999.

⁹² Scrutiny Report No. 3 of 1999, 23 March 1999.

⁹³ Peter Bayne, Legal Adviser, ACT Standing Committee on Legal Affairs, *Towards National Principles of Scrutiny Review - Paper for Chairs and Deputy Chairs Working Group Meeting of Monday 3 February 2003*, Scrutiny Report No. 9, 2 May 2005, Appendix A, p 4.

⁹⁴ Peter Bayne, Legal Adviser, ACT Standing Committee on Legal Affairs, *Towards National Principles of Scrutiny Review - Paper for Chairs and Deputy Chairs Working Group Meeting of Monday 3 February 2003*, Scrutiny Report No. 9, 2 May 2005, Appendix A, p 4.

⁹⁵ Scrutiny Report No. 25, 2003, p 10.

respect of that Bill was that it would significantly impair efforts to investigate other criminal activities, and that such activities are not unusual among persons who are the subject of a criminal proceeds investigation.⁹⁶ The ACT Committee noted that this rationale for excluding the immunity:

points to a deeper problem. The displacement of privilege against self-incrimination... might well encourage the use of civil confiscation proceedings as a way of investigating crime. In this way, the very rationale of the privilege, and of the presumption of innocence, is undermined, and there is a radical change in the balance between the State and the citizen.⁹⁷

⁹⁶ Scrutiny Report No. 25, 2003, p 10, citing the Explanatory Memorandum to the *Confiscation of Criminal Assets Bill 2002*.

⁹⁷ Scrutiny Report No. 25, 2000, p 10. See, also, the Committee report on the *Australian Crime Commission (ACT) Bill 2003*, particularly proposed s 26(8)(c): Scrutiny Report No. 39, 12 November 2003, p 9. Conversely, in commenting on the displacement of the privilege in the *Occupational Health and Safety Amendment Bill 2004*, the ACT Committee noted that:

a grant of an immunity from use of the compelled evidence that corresponds to the extent of the displacement of the privilege against self-incrimination and exposure to civil liability removes a substantial rights objection to the displacement: Scrutiny Report No. 45, 9 March 2004, p 11.

Chapter Seven – Issues Arising from the Committee's Consideration of Bills

1. The Committee has identified 14 Bills between September 2003 and June 2005 that directly raise concerns associated with the rights to silence, of which 11 raise issues related to self-incrimination.⁹⁸ The Committee's analyses of these Bills have highlighted a number of issues that are likely to be relevant to its consideration of future Bills:
 - 1) when is the abrogation of the privilege justified?
 - 2) should the privilege apply to documents?
 - 3) what principles should apply to the direct use of information obtained in breach of the privilege? In particular, what justification is required, if any, before use of such information in criminal, civil, administrative, disciplinary or other proceedings is allowed?
 - 4) what principles should apply to the derivative use of information obtained in breach of the privilege?
 - 5) what information, if any, should a person who is compelled to provide self-incriminating information be required to be given?
 - 6) what action, if any, must a person take to enjoy the privilege or any immunity on the use of information provided?
 - 7) what procedural safeguards should exist where the privilege can be abrogated?

1) When is abrogation justified?

Public interest

2. The Committee has stated that the privilege against self-incrimination should only be modified or restricted to achieve a legitimate aim in the public interest and in a manner proportionate to that aim. Blanket removal of the privilege should be avoided where possible and unnecessary use of the information should be proscribed.

⁹⁸ **Right to silence only:** *Sporting Venues (Pitch Invasions) Bill 2003* (Digest No. 2 of 2003), *Native Vegetation Bill 2003* (Digest No. 6 of 2003), *Environmental Planning and Assessment Amendment (Quality of Construction) Bill 2003* (Digest No. 6 of 2003),

Self-incrimination: *Transport Legislation Amendment (Safety and Reliability) Bill 2003* (Digest No. 5 of 2003), *Electricity (Consumer Safety) Bill 2003* (Digest No. 1 of 2004), *Mine Health and Safety Bill 2004* (Digest No. 8 of 2004), *Commercial Agents and Private Inquiry Agents Bill 2004* (Digest No. 9 of 2004), *Health Legislation Amendment (Complaints) Bill 2004* (Digest No. 15 of 2004), *Jury Amendment Bill 2004* (Digest No. 15 of 2004), *Special Commission of Inquiry (James Hardie Records) Bill 2004* (Digest No. 15 of 2004), *Legal Profession Bill 2004* (Digest No. 1 of 2005), *Building Professionals Bill 2005* (Digest No. 7 of 2005), *Criminal Assets Recovery Bill 2005* (Digest No. 7 of 2005) and *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005* (Digest No. 7 of 2005).

3. An example of the Committee's articulation of its general position can be found in its commentary on the *Building Professional Bill 2005*:

The Committee is of the view that such legislation [abrogating or restricting the privilege] should only be made with clear and proper justification on significant public interest grounds. Further, where possible, it should avoid providing for a blanket removal of the right but distinguish between situations in which there is a genuine and justifiable belief that public safety or some other equally serious matter of public interest is at stake and other possibly less serious matters. In the former case derogation of the right may be warranted. In the latter, it may be possible to obtain the information from another source or in a way that does not require derogation...

In line with the view that any derogation of the right not to incriminate oneself should be the minimum necessary to achieve an aim in the public interest and in proportion to that aim, the Committee considers that the use of information obtained in breach of the privilege should be constrained as much as practicable. Consequently, the use of such information in civil proceedings and the indirect use of such information should likewise be the minimum necessary to achieve an aim in the public interest and in proportion to that aim.⁹⁹

4. The objects sought to be achieved by compelling a person to unwillingly incriminate him or herself are varied. In NSW, they have included:
- determining whether a juror has made private inquiries about a trial matter which may directly affect an accused's right to a fair trial;¹⁰⁰
 - conducting a special inquiry into matters that may affect public health or public safety;¹⁰¹
 - investigating complaints against persons in certain industries and professions whose conduct may affect public health, public safety or another matter of public interest;¹⁰² and
 - recovering money unlawfully obtained or used.¹⁰³

Voluntary submission to a regulatory scheme

5. Like the Queensland Scrutiny of Legislation Committee, the NSW Committee also takes account of whether the privilege is modified in relation to a requirement to answer questions or furnish documents under a regulatory scheme which is voluntarily entered, or as a condition of an administrative approval.¹⁰⁴ An example of such a provision is s 122F of the *Environmental Planning and Assessment Act 1979*. This provision, introduced by the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005*, requires a person to supply information arising

⁹⁹ *Digest* No. 7 of 2005, p 11.

¹⁰⁰ See, eg, the *Jury Act 1977*, s 55DA, which was inserted by the *Jury Amendment Bill 2004*.

¹⁰¹ See, eg, proposed s 96 of the *Mine Health and Safety Bill 2004*, which was reported on in *Digest* No. 8 of 2004, pp 24-39.

¹⁰² See, eg, s 37A of the *Health Care Complaints Act 1993*, s 639 and s 724 of the *Legal Profession Act 2005* and s 59 of the *Building Professionals Act 2005*.

¹⁰³ *Criminal Assets Recovery Bill 2005* and the *Legal Profession Bill 2005*.

¹⁰⁴ See the comments of the Queensland Committee on this issue at Chapter 6, paragraph 15.

from monitoring or environmental audits that the person is obliged to undertake, irrespective of whether the information is incriminating. In relation to this provision, the Committee reasoned that the modification of the privilege was not undue:

The Committee notes that the provision of such information is a condition entered into in order to obtain the project approval.

The Committee also notes that a scheme providing for self-monitoring and audit would be rendered impotent if any self-incriminating information collected could not be used.

The Committee further notes that the provision does not require a person to testify against him or herself but only to provide information required to be collected under the conditions of approval for the project...

[Given] that such material is in the nature of real evidence and is not testimonial in character, the Committee does not consider that proposed section 122F trespasses unduly on personal rights and liberties.¹⁰⁵

6. On this point, the Committee also notes the warning of the Queensland Law Reform Commission:

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.¹⁰⁶

2) Application of the privilege to documents

7. All except one of the bills considered by the Committee requiring the production of documents that may tend to incriminate a person limited the direct use of those documents in criminal proceedings. The exception was information supplied in connection with a report of monitoring, or an environmental audit, under Part 3A of the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005*, discussed above. However, the Committee did not consider that this provision unduly trespassed on personal rights as it was more in the nature of real evidence and was required in compliance with a regulatory system to which the individual voluntarily subjects him or herself.¹⁰⁷

3) Direct use immunity

8. All the bills considered by the Committee limited the *direct* use of self-incriminating answers to questions and, except as noted above, provision of documents in **criminal proceedings** generally. However, four of the bills allowed

¹⁰⁵ *Digest* No. 7 of 2005, p 32.

¹⁰⁶ QLRC 59, p 55. The Commission noted that "participation in [a regulatory] 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".

¹⁰⁷ *Digest* No. 6 of 2005, p 32.

the direct use of such answers and information for certain offences under the relevant Act.¹⁰⁸

9. Two of the bills provided immunity for the use of self-incriminating information in **civil proceedings**,¹⁰⁹ although one of these stated the immunity did not extend to disciplinary proceedings.¹¹⁰ Under eight bills there appeared to be no impediment to the use of compelled, self-incriminating information in civil proceedings.¹¹¹
10. This shows that, over the last two years, bills that have required persons to provide self-incriminating information have usually not provided any limit on the use of that information in civil, administrative or disciplinary proceedings.
11. The Committee takes the general view that when it is necessary to abrogate a personal right to achieve an object in the public interest, the adverse effects of abrogating that right should be limited as much as is practicable. In regard to the privilege against self-incrimination, this means that the use of information provided in breach of the privilege should be limited as much as practicable without significantly compromising the objective to be achieved.
12. The Committee also notes the view of the Queensland Law Reform Commission it would be unfair to allow an opposing party in civil proceedings to use a compelled admission that would not have been available if the privilege had not been abrogated.¹¹²
13. It also notes the Commission's view that:

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, ... self-incriminatory information that the individual has been compelled to provide should not be admissible in such proceedings.¹¹³

Question 1.

14. **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?**

¹⁰⁸*Electricity (Consumer Safety) Bill 2003, Health Legislation Amendment (Complaints) Bill 2004, Legal Profession Bill 2004, and the Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005.*

¹⁰⁹*Health Legislation Amendment (Complaints) Bill 2004; Special Commission of Inquiry (James Hardie Records) Bill 2004.*

¹¹⁰*Health Legislation Amendment (Complaints) Bill 2004.*

¹¹¹*Transport Legislation Amendment (Safety and Reliability) Bill 2003, Electricity (Consumer Safety) Bill 2003, Mine Health and Safety Bill 2004, Commercial Agents and Private Inquiry Agents Bill 2004, Legal Profession Bill 2004, Building Professionals Bill 2005, Criminal Assets Recovery Bill 2005 and the Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005.*

¹¹²QLRC 59, p 100.

¹¹³QLRC 59, p 100.

4) Derivative use immunity

15. No bill considered by the Committee limited the derivative use of self-incriminating information. The effect of one provision was to ensure that derivative use immunity did not exist.¹¹⁴
16. In line with its view that the adverse effects of a trespass on a right should be limited as much as is practicable, the Committee has frequently raised the question of why a bill has provided for no limitation on the derivative use of self-incriminating information.¹¹⁵ The Committee has also referred to the Senate Committee's view that the power to compel answers is more easily balanced if both the direct and indirect use of such information is prohibited.
17. Limiting derivative use of self-incriminating information is also consistent with s 128(7)(b) of the Evidence Act.
18. However, limiting the indirect use does not simply partially restore a person to the situation he or she would be in, had they not been compelled to provide self-incriminating information. It may be difficult to determine what evidence has in fact been derived from the self-incriminating information, and it is possible that evidence which would have been obtained without that information could be excluded.

Question 2.

<p>19. To what extent, if any, should evidence derived from information obtained in breach of the privilege against self-incrimination should be subject to an immunity from use in proceedings against the person compelled to provide the information?</p>

5) Informing of rights

20. None of the bills considered by the Committee required that a person be informed of their rights and obligation regarding self-incriminating statements. However, six bills required that a person object to providing information in order to limit the use of the information in criminal proceedings. Of these, five provided that any information given could not be used in criminal proceedings if no warning were given of this need to object to an answer. In the case of the one bill where a person *could* lose their right to immunity in criminal proceedings without first being warned, the Attorney General has undertaken to the Committee to pursue changing this.¹¹⁶
21. Consequently, apart from one exception, the failure to be advised of one's rights and obligation in relation to self-incriminating answers will not lead to the forfeiture of rights under the bill.

¹¹⁴*Criminal Assets Recovery Amendment Bill 2004: Digest No. 7 of 2005.*

¹¹⁵See, eg, *Mine Health and Safety Bill 2004 (Digest No. 8 of 2004, p 29)*, *Building Professionals Bill 2005 (Digest No. 7 of 2005, pp 11-12)* and the *Criminal Assets Recovery Amendment Bill 2004: Digest No. 7 of 2005, pp 23-25.*

¹¹⁶See report on this Bill in *Digest No. 1 of 2005* & correspondence with the Attorney General in *Digest No. 5 of 2005.*

22. However, an immunity from the use of information may be of little benefit if the person who possesses that immunity is not aware of it. The Committee considers that when a person is compelled to provide self-incriminating information, he or she should be informed of their relevant rights in this regard.

Question 3.

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

6) Conditions on rights

24. As noted above, five of the bills considered by the Committee provided that, if a person was so warned, he or she would not have any immunity regarding the use of self-incriminating answers in criminal proceedings unless they objected to answering beforehand.
25. The Committee has noted with respect to this particular issue that the Supreme Court of Canada in *R v Liew* has specifically rejected this approach, observing that:

[i]t would be absurd to impose on the accused an obligation to speak in order to activate the right to silence.¹¹⁷

26. On this issue, the Queensland Law Reform Commission stated:

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. 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 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.¹¹⁸

¹¹⁷[1999] 3 SCR 227 at paragraph 44, cited in *Digest* No. 15 of 2004 in relation to the *Health Legislation Amendment (Complaints) Bill 2004*. *Liew* followed the decision in *Herbert v R* [1990] 2 SCR 151, that in determining whether the privilege has been waived, the Court will be concerned: not with subterfuge *per se*, but with subterfuge that, in actively eliciting information, violates the accused's right to silence by depriving her of her choice whether to speak to the police. Precisely because the detainee retains her freedom in that respect, not all of her speech can be immediately deemed involuntary merely by virtue of her being detained: per Major J at paragraph 41.

¹¹⁸QLRC 59, p.98.

27. The Committee notes that most of the provisions it has considered in bills requiring an objection to obtain an immunity only apply if a person is first informed of that requirement. This substantially addresses the concern raised by the Queensland Law Reform Commission regarding persons not being informed of their rights when questioned outside court. However, the Committee also notes that persons subject to official questioning may be in vulnerable situations where they are unable to understand the official warning and do not have any assistance.
28. The Australian Law Reform Commission has recommended that immunity from the use of information in any criminal or civil penalty proceedings should require a claim of privilege.¹¹⁹ This is to ensure greater certainty regarding what information might be self-incriminating and to maintain consistency with the Evidence Act.¹²⁰

Question 4.

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

7) Procedural safeguards

30. One of the rationales for the privilege against self-incrimination is to prevent the abuse of power. When officials are given power to compel a person to provide self-incriminating information, it may be appropriate to have procedural safeguards in place to ensure such power is not abused.
31. Such safeguards might include requirements that:
- an individual is to be given reasonable notice of the requirement to produce information;
 - the time and location for giving the information is to be specified; and
 - the general nature of the required information is to be identified.¹²¹
32. The provisions compelling self-incrimination considered by the Committee did not contain such procedural safeguards.

Question 5.

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

¹¹⁹ALRC 95, Recommendation 18-3.

¹²⁰ALRC 95, paragraph 18.43.

¹²¹See QLRC 59, p 45.

Chapter Eight – Proposed Principles

1. In its report on *The Abrogation of the Privilege Against Self-incrimination*, the Queensland Law Reform Commission drew a number of relevant conclusions:
 - the privilege has remained a significant source of protection for citizens who find themselves having to provide answers or information that might result in their conviction or the imposition of a criminal penalty;¹²²
 - the fact that it is impossible to identify one rationale for the privilege in every situation does not mean that it lacks justification;¹²³
 - in particular circumstances, the weight to be accorded to the rationales may not provide sufficient support to prevent the abrogation of the privilege;¹²⁴
 - in view of the close and long-standing association between the privilege against self incrimination and the penalty privilege, and the reasons underlying that association, the penalty privilege, in the absence of an express provision to the contrary, should be available to an individual who is required to provide information to a judicial or a non-judicial inquiry or investigation;¹²⁵
 - because of the inter-related nature of the privilege against self-incrimination and the penalty privilege, and the potentially serious impact of the imposition of a penalty in some situations, 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;¹²⁶
 - there are only two real bases for justifying the abrogation of the privilege against self-incrimination:
 - the public interest to which the information that would be compelled by abrogation of the 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 him or herself;¹²⁷
 - if an abrogation of the privilege can be justified on the above grounds, the appropriateness of any abrogation in the particular circumstances requires consideration of:
 - whether there are alternative means of obtaining the information;

¹²²QLRC 59, p 33.

¹²³QLRC 59, p 34.

¹²⁴QLRC 59, p 34.

¹²⁵QLRC 59, p 42.

¹²⁶QLRC 59, p 53.

¹²⁷QLRC, 59 p 53.

Proposed Principles

- 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 provision of immunity on the use of information compelled is not relevant to whether an abrogation of the right is justified but is relevant to determining whether abrogation is appropriate in the context of a particular Act;¹²⁸
- the forum in which the information is required is not relevant to whether abrogation is justified;¹²⁹
- 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 the right and its concomitant protection;¹³⁰
- because of its capacity to effectively quarantine from use additional material that proves the guilt on an individual who has provided self-incriminating information, derivative use immunity should not be granted unless there are exceptional circumstances to justify the extent of its impact;¹³¹
- when information is sought under a provision that abrogates the privilege against self-incrimination, the individual providing the information must be informed of the requirement to provide the information, whether or not an immunity against the use of the information is available, and the nature and extent of the immunity;¹³²
- 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;¹³³
- 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;¹³⁴
- the immunity should generally be available in all kinds of subsequent proceedings against the individual who has been required to give self-incriminating information, including not only criminal and civil

¹²⁸ QLRC 59, p 57.

¹²⁹ QLRC 59, p 76.

¹³⁰ QLRC 59, p 94.

¹³¹ QLRC 59, p 96.

¹³² QLRC 59, p 97.

¹³³ QLRC 59, p 98.

¹³⁴ QLRC 59, p 99.

- proceedings but also, for example, proceedings of an administrative or disciplinary nature;¹³⁵
- the immunity should not apply in a proceeding about the falsity of the compelled information;¹³⁶
 - the penalty privilege should normally be treated in a similar way to the immunity against self-incrimination
2. It appears to the Committee that the Queensland Law Reform Commission's conclusions provide a useful starting point for developing principles for the Committee to apply when considering bills in New South Wales.

Question 6.

3. 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.

¹³⁵QLRC 59, p 99.

¹³⁶QLRC 59, p 101.

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.