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

29 November 2005

Dear Chairman,

Re: *The Right to Silence*, Discussion Paper No 1, 21 September 2005

New South Wales
Council for
Civil Liberties

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The New South Wales Council for Civil Liberties Inc ('CCL') is a not-for-profit non-government organisation committed to monitoring and defending civil liberties in New South Wales, across Australia and in our region of the world. CCL was founded in 1963 and has members from all walks of life.

CCL thanks the Legislation Review Committee ('Committee') for the opportunity to comment on *The Right to Silence* (Discussion Paper No 1, 21 September 2005 ('Discussion Paper')). Owing to the comprehensiveness of the background information contained in the Discussion Paper, the contents of this submission will be limited to the six questions raised by the Committee for further consideration. As the final question is dealt with substantively in the preceding sections, our response takes the form of a cross-referenced chart (Annexure A).

If the Committee would like CCL to expand on any of the points raised in this submission, please feel free to contact the authors through the CCL office.

Yours faithfully,

Leah Friedman and Anish Bhasin
Assistant-Secretary and Committee Member
NSW Council for Civil Liberties

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?**

1.1. CCL is opposed to the use in proceedings of information obtained under compulsion, and is prima facie opposed to any statutory abrogation of the privilege against self-incrimination. As the Committee explains in detail,[1] the right to silence is not simply designed to protect a person from the imposition of a penalty or from self-incrimination, but to restrain authorities from using oppressive means to compel the provision of information, and to prevent convictions from being made on the basis of false confessions. Legislative recognition of the right to silence serves as a profound deterrent against the use of violent means to compel the provision of information, including false confessions. In view of the importance of the rights involved, and their powerful deterrent effect, statutory abrogation is by no means a desirable outcome.

1.2. If however, the Committee determines that statutory abrogation must occur, CCL is of the view that it should only occur where a very pressing public interest far outweighs the interest in maintaining the privilege. In this connection, the mere fact that self-incriminating information is likely to assist authorities with their investigations is not a public interest sufficiently compelling to warrant the abrogation. Where alternative means of obtaining the information are available, CCL would favour a strong presumption against abrogation.

[1] Discussion Paper, Chapter 2, 'The Nature and Origin of the Right to Silence'.

1.3. In line with overseas authorities identified by the Committee,[2] CCL would regard the availability of an immunity as an essential precondition to any statutory abrogation. CCL is of the view that the availability of an immunity should not be regarded as one of a number of factors to be weighed in assessing the legitimacy of abrogation, but rather, as the primary criterion for determining whether abrogation is allowable. In other words, abrogation should not occur unless an immunity is available in respect of the information provided.

1.4. In the instance of abrogation, an immunity provides the *least unjust* solution because it compensates the individual for the loss of his or her fundamental rights. The purpose behind abrogation is to assist authorities by providing them with valuable information that will assist them in performing their basic investigative functions. Once that information is provided, the public interest in obtaining the information is served, but the policy justifications underpinning the retention of the privilege remain. An immunity ensures that these remaining policy justifications gain sufficient recognition once other policy objectives are served.

1.5. CCL therefore favours the imposition of a 'use' immunity in these circumstances. However, the existence of a 'use' immunity should not foreclose the availability of a wider 'derivative use' immunity in respect of evidence derived from that information (see below, section 2).

1.6. Civil and administrative penalties can be as grave in their consequences as criminal sanctions. On this basis, CCL is of the view that the protections afforded in relation to civil and administrative proceedings should mirror those afforded in relation to criminal proceedings. The privilege against self-incrimination - and relevant immunities arising in the instance of abrogation - should apply equally as between the different classes of proceeding.

[2] Discussion Paper, Chapter 5, 'Right to Silence in Some Overseas Jurisdictions'.

1.7. Owing to the importance of the rights involved, the availability of an immunity in these circumstances should not be determined on a case-by-case basis. CCL would favour the inclusion of a default provision in NSW law to the effect that, in the absence of any express statutory statement to the contrary, 'no self-incriminating evidence given by a person may be used in any criminal, civil or administrative proceedings against that person, except in proceedings in respect of the falsity of the evidence itself'.[3]

Legislation abrogating the privilege against self-incrimination must include an immunity preventing the use in criminal, civil, administrative or disciplinary proceedings of self-incriminating material obtained as a result of the abrogation. Abrogation must not occur in the absence of an immunity.

A default statutory provision should exist to ensure that, in the absence of an express statutory statement to the contrary, an immunity would apply whenever the privilege against self-incrimination was abrogated.

[3] This position accords with that of the Australian Law Reform Commission. See Australian Law Reform Commission, Report, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002), 18-3 at 662.

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?**

2.1. CCL favours the imposition of a derivative use immunity. Absent a derivative use immunity, abrogation provisions are open to abuse by authorities, who are liable to use their compulsion powers for an ulterior purpose - obtaining further incriminating information to be used in separate proceedings against the person who has provided it.

2.2. CCL draws no distinction between the harm that may flow from incriminating information provided directly, and incriminating evidence derived from it. From the provider's perspective, derivative information can present consequences as deleterious as the original, self-incriminating information. A 'use' immunity provides insufficient protection to the provider of incriminating information because its operation allows authorities to secure the fruit of the original abrogation and to use it against the person who has provided it, while still complying with the requirements of the use immunity. In these circumstances, derivative use of the information would have the same consequences for the provider as would use of the original information. As a result, the use of derivative information should be subject to the same level of protection afforded to the original information, namely, immunity from use in proceedings against the person who has provided it.

2.3. CCL is also of the view that there are investigative benefits to be gained from the imposition of a derivative use immunity. The scope of the protection afforded by a derivative use immunity is likely to induce someone who is being questioned in the course of an investigation or inquiry to volunteer information which may assist investigators. Because the protection afforded by a derivative use

immunity is greater than that afforded by a 'use' immunity, it is arguable that the incentive to provide information is greater where a derivative use immunity is available.

2.4. It is also arguable that the failure to protect against derivative use of incriminating information violates Article 14(3)(g) of the ICCPR.[4] The UN Human Rights Committee has issued a General Comment relating to article 14, in which it explains:

> Subparagraph 3(g) of Article 14 of the ICCPR 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 and article 10, paragraph 1, 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.*[5]

2.5. As HREOC has explained, the words 'evidence provided by…any other form of compulsion' are probably adequate to encompass derivative use of material provided in abrogation of the privilege against self-incrimination.[6] The Convention on the Rights of Child, article 40(2)(b)(iv) addresses the issue in very similar terms to article 14(3)(g) of the ICCPR.[7] It is arguable then that article 40(2)(b)(iv) of the CRC is also sufficiently wide to cover 'derivative use'.[8] In conformity with these requirements, the protection conferred by NSW statutes should be broadened to exclude derivative use.

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[4] International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, *entry into force* 23 March 1976.

[5] Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), UN Doc HRI\GEN\1\Rev1 (1994), at 14.

[6] Human Rights and Equal Opportunities Commission, Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD: Review of Division 3 Part III of the *ASIO Act 1979* (Cth), 4 April 2005, para 69 - 70.

[7] Convention on the Rights of the Child, GA res 44/25, annex, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), *entry into force* 2 September 1990.

[8] Human Rights and Equal Opportunities Commission, n 5 above, para 97.

2.6. CCL is also of the view that any provision conferring a derivative use immunity should provide that a party seeking to have evidence admitted bear the onus of proving that the evidence was not derived from compelled information. As the Queensland Bar Association has noted, 'to do otherwise is to place an intolerable burden on the party who is objecting to its admission'.[9] That party is unlikely to have available to him or her all of the information relevant to a correct determination of whether the information is, in actuality, derivative information. Fairness therefore requires that the person seeking to have the evidence admitted bear the burden of proof.

2.7. Owing to the importance of the rights involved, and in light of the positive deterrent effect of a derivative use immunity, its availability should not be determined on a case-by-case basis. CCL would favour the inclusion of a default provision in NSW law to the effect that, in the absence of any express statement to the contrary in a particular statute, 'no self-incriminating evidence derived from information given by any person may be used in any criminal, civil or administrative penalty proceedings against that individual, except in proceedings in respect of the falsity of the evidence itself'.

Legislation abrogating the privilege against self-incrimination must include an immunity restricting the derivative use that may be made of self-incriminating material obtained as a result of the abrogation.

A default provision should exist to ensure that, in the absence of an express statutory statement to the contrary, an immunity would apply whenever the privilege against self-incrimination was abrogated.

[9] Bar Association of Queensland, Submission, quoted in Queensland Law Reform Commission, Report no 59, *The Abrogation of the Privilege Against Self-Incrimination*, December 2004, 86.

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

3.1. Where the right to silence is abrogated, there is a profound risk that an individual required to provide self-incriminating information may be unaware that he or she is entitled to an immunity against the use or derivative use of that information. The risk is greatest where the person providing the information is a child or young person. The immunity would confer few benefits if the person relying on it was not aware that they were entitled to rely upon it.

3.2. CCL is therefore of the view that, when information is sought under a provision that abrogates the privilege against self-incrimination, the individual providing the information must be informed:

3.2.1. That the individual must provide the information even though it might be self-incriminatory;

3.2.2. Whether or not an immunity against the use of the information is available;

3.2.3. Whether or not an immunity against the derivative use of the information is available;

3.2.4. The nature and extent of the immunity; and

3.2.5. Whether or not they are entitled to legal advice.

When information is sought under a provision that abrogates the privilege against self-incrimination, the individual providing the information must be adequately informed of his or her rights.

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

4.1. CCL is of the view that a legislative provision that confers an immunity against the use of 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.

4.2. CCL shares the Committee's concern 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.[10] This is especially so where the person providing the information is a child or young person.

4.3. In this connection, it is notable that the privilege under discussion is not limited to judicially supervised court proceedings and may arise in situations where an accused has no legal representation or assistance. In these situations, CCL is concerned that the accused would lack knowledge of his or her rights and would not be informed about the need to object. An individual might also be unaware that a particular line of inquiry is actually designed to elicit a self-incriminating answer and as a result, may not know to object. In light of these concerns, fairness persuades against the need for a person to object.

A legislative provision that confers an immunity against the use of self-incriminating information must not require that the individual who provides the information object to doing so in order to be entitled to claim the immunity.

[10] Discussion Paper, p 38.

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

5.1. CCL is of the view that the existence of procedural safeguards should not be used to justify the abrogation of the privilege against self-incrimination. The privilege serves specific values whose loss cannot be compensated through the addition of procedural safeguards, however stringent they may be in their protection of a person's privacy or other interests. Moreover, the procedural safeguards identified by the Committee are not a sufficient substitute for the protection afforded by an immunity.

5.2. However, if the privilege is to be abrogated, CCL is of the view that the abrogation must be subject to the rules of procedural fairness. Safeguards support other considerations raised by the Committee, including the significance of ensuring that a person be adequately informed of his or her entitlements.[11]

5.3. CCL welcomes the safeguards identified by the Committee (reasonable notice of the requirement to produce information; specification of the time and location for giving the information; and identification of the general nature of the required information). In addition, CCL would favour the provision of legal advice and warnings in these circumstances, particularly where the person providing the information is a child or young person.

[11] Discussion Paper, pp 46 – 47.

ANNEXURE A

Principles recommended by the Committee

Principle	CCL's Position	Cross-Reference
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	CCL is in agreement with these principles.	

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.	CCL is of the view that the right to silence should not be abrogated unless a very pressing public interest far outweighs the interest in maintaining the privilege. CCL favours a presumption against abrogation.	**1.1 - 1.2**
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;	CCL is of the view that abrogation should not occur where alternative, lawful means of obtaining the information are available. CCL is of the view that abrogation should not occur where the information provided is not subject to an immunity (preferably a derivative use immunity).	**1.2** **1.3**
(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	CCL is of the view that procedural safeguards should only persuade in favour of abrogation where an immunity is also available. Safeguards should not serve as a substitute for relevant immunities.	**5.1 – 5.3**

the abrogation.		
Future use of information obtained under compulsion Unless clearly justified: 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	CCL is of the view that a 'derivative use' immunity should apply in addition to – or in substitution of – a 'use' immunity in these circumstances.	**2.1 – 2.7**
(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.	In addition, CCL is of the view that the person should be informed as to whether or not they are entitled to legal advice; and whether or not the information provided is subject to a derivative use immunity.	**3.2**