



The New South Wales Bar Association

05/13

16 January 2006

Mr Peter Primrose MLC  
Chairman  
Legislation Review Committee  
New South Wales Parliament  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Primrose

***Right to Silence Discussion Paper***

The New South Wales Bar Association welcomes the opportunity to comment on the Legislation Review Committee's discussion Paper on the Right to Silence.

A copy of the Association's submission on the discussion paper is attached.

Please do not hesitate to contact me on 9229 1735 should you have any queries about the Association's comments.

Yours faithfully

P.A. Selth  
Executive Director



The New South Wales Bar Association

**LEGISLATION REVIEW COMMITTEE DISCUSSION PAPER NO. 1  
THE RIGHT TO SILENCE**

**RESPONSE OF THE NEW SOUTH WALES BAR ASSOCIATION**

Introduction

The Legislation Review Committee of the New South Wales Parliament (LRC) is required to consider all bills introduced into parliament and to report to both Houses of Parliament as to whether any bill, whether expressly or otherwise trespasses unduly on personal right or liberties or makes rights, liberties or obligations unduly dependant upon insufficiently defined administrative powers or non-reviewable decisions<sup>1</sup>.

To date the LRC has applied the general principle that the right to silence is a fundamental right enshrined in the International Covenant on Civil and Political Rights 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<sup>2</sup>.

On 21 September 2005 the LRC published *The Right to Silence Discussion Paper No 1*, which seeks comments from interested persons on issues relating to the right to silence. Specifically, the LRC sought responses to the following questions:

The responses of The New South Wales Bar Association (Bar Association) to the specific questions asked by the LRC are set out below.

**Question 1**

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

Response

As the *Evidence Act and Regulations*, including those provisions that deal with the privilege against self incrimination, are currently under review by the Australian and New South Wales Law Reform Commissions, and the Bar Association has provided a thorough submission to the Law Reform Commissions, it is assumed that the LRC does not seek detailed submissions on the operation of s128 of the *Evidence Act*. Accordingly, the answer below is directed at legislation other than the *Evidence Act and Regulations*.

Information that may incriminate a witness, other than an accused person, in proceedings in a New South Wales Court or an Australian Court (as those terms are defined in the Dictionaries to the Commonwealth and New South Wales *Evidence Acts*) is dealt with under s128 of the *Evidence Acts* (Cth and NSW).

<sup>1</sup> Ss 8A, 9 *Legislation Review Act 1987*

<sup>2</sup> LRC Right to Silence: Discussion Paper No 1, 21 September 2005 p v

Where the information consists of evidence given by a witness in court and the evidence is the subject of a certificate under s128 of the Commonwealth *Evidence Act* it is not admissible against that person either directly or indirectly in any Australian Court<sup>3</sup>. A certificate given under the New South Wales Act prohibits direct or derivative use of the information in proceedings in any New South Wales Court. Under the new Uniform Civil Procedure Rules, the privilege now extends to interlocutory procedures such as Anton Piller orders and subpoena *duces tecum*.

In proceedings where the *Evidence Acts* do not apply, as in sentencing proceedings in New South Wales Courts, proceedings in the New South Wales Coroners Court the common law privilege against self incrimination applies to excuse a person from answering any question or producing any document if the answer or the document would have the tendency to expose the person to the imposition of a civil penalty or to a conviction for a crime and the person has not been adequately informed of his or her rights<sup>4</sup>.

The Bar Association submits that the existing common law safeguards against self incrimination should not be further eroded. However, if the legislature does propose to enact legislation that requires the provision of self-incriminating information, the Association submits that in each situation, the LRC should consider whether there is a compelling justification in the public interest and what are the minimum measures necessary to satisfy that objective.

The Bar Association submits that the matters referred to in question 6 (*'Justifications for Abrogation'*) are the matters to which regard should be had when considering whether evidence obtained in breach of the privilege against self-incrimination should be admissible in civil, administrative or disciplinary proceedings and whether the proposed provision is reasonably necessary in all the circumstances.

## Question 2

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

### Response

The Bar Association submits that where evidence is derived either directly or indirectly from information obtained in breach of the privilege against self-incrimination it should not be used against the person to whom the privilege belongs, other than in criminal proceedings in respect of the falsity of the evidence<sup>5</sup>.

## Question 3

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

### Response

The Bar Association considers that an obligation should be imposed on all relevant officials to inform persons compelled to provide self-incriminatory information of the following prior to or at the time the official requires the provision of the relevant information:

<sup>3</sup> s128 (7) *Evidence Act* (Cth) 'Australian Court' is defined in the Dictionary to the Commonwealth *Evidence Act*

<sup>4</sup> *Hamilton v Oades* (1989)168 CLR486, *R v Hood* (1997) 91 A Crim R 526

<sup>5</sup> As is the position under s128(7) of the *Evidence Act* (Cth and NSW)

- (a) their right to object to provision of the information; and
- (b) the proceedings in which the compelled information may be admissible (or be sought to be admitted) against the person; and
- (c) the person's right to seek legal representation; and
- (d) if applicable, whether there is any assistance provided for legal representation; and
- (e) if applicable, whether there is any right of appeal against relevant decisions of officials; and
- (f) if the relevant legislation requires that the person compelled to provide self-incriminatory information object to each question, then the official's obligation should include an obligation to inform the person to that effect.

Where the person is not advised of his/her right to object, the information provided by him/her should not be admissible in later proceedings against the person, except proceedings for the falsity of the information provided; see, for example, the provisions of section 13A(2)(b) of the *Criminal Assets Recovery Act 1990*.

The Bar Association submits that the purpose and extent of the official's obligation should be clearly defined in the relevant legislation.

#### **Question 4.**

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

##### Response

The value of such a requirement is of course dependent upon the person being made aware of his or her rights, as discussed in the response to question 3 above.

Assuming such cautions have been given, the Bar Association submits that it should be sufficient that a person objects to giving any information or information about a specific topic<sup>6</sup>. It should not be necessary for a person to take a specific objection to each question, as may currently be the position under s128 of the *Evidence Act 1995*<sup>7</sup>.

#### **Question 5**

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

##### Response

We refer to the answer to question 3 above. Additionally the following further protections should be included in the relevant legislation:

<sup>6</sup> As is provided for in s18B(5) of the *New South Wales Crime Commission Act 1985*

<sup>7</sup> See the report of the Australian Law Reform Commission, the NSW Law Reform Commission, and the Victorian Law Reform Commission Discussion Paper on the *Uniform Evidence Acts* (ALRCDP No 69 July 2005 p418 [13.220 ff]).

- (a) a right to appeal to a court against the decision of the official that a person is not entitled to refuse to provide particular documents or information; and the right of appeal from the decision of that court;
- (b) where there has been a breach of the obligations referred to in question 3, the right to apply to a court for an order that the information obtained by the official not be used against the person;
- (c) an entitlement to seek legal representation on any matters arising out of the disclosure of or refusal to disclose information;
- (d) if the information is being sought at a hearing of an investigating agency, an entitlement to call evidence or cross-examine a witness on a relevant matter; and
- (e) availability of non-publication orders in relation to particular evidence, the contents of documents and the identity of witnesses.

#### 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
  - (iii) 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-incriminatory 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.

Response

The Bar Association considers that the principles set out in question 6 are appropriate for the LRC to apply when considering proposed legislation which compels provision of self-incriminating information.

Summary

The right to silence is a fundamental right of every person. It is one of the most important pillars of the common law and it is essential to the maintenance of the rule of law.

Over the last decade there has been a slow but alarming erosion of the right to silence both at common law and legislatively, in civil matters, administrative matters and criminal cases.

The Bar Association strongly opposes any further undermining of this basic civil right.