OUR REFERENCE

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DATE
28 November 2005

DIRECTOR'S CHAMBERS

DPP
NEW SOUTH WALES

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

Dear Mr Primrose

I refer to your letter dated 21 September 2005 seeking comment on a discussion paper on the Right to Silence published by the Legislation Review Committee.

Enclosed is a short submission prepared by several of my senior officers, with which I am in agreement.

Thank you for the opportunity to comment.

Yours faithfully

N R Cowdery AM QC
Director of Public Prosecutions

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

RESPONSE OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (NSW)

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

Information obtained in breach of the privilege against self-incrimination should be admissible in proceedings relating to the imposition of a civil penalty or civil, administrative or disciplinary proceedings in circumstances where the abrogation is justified by and in proportion to an object in the public interest. In each situation in which it is proposed to require provision of self-incriminating information, one must consider whether there is compelling justification in the public interest and what type of measure is necessary to achieve the public interest objective.

The matters set out in Question 6 under the heading *"Justifications for Abrogation"* are the matters to which regard should be had when considering whether such information should be admissible in such proceedings and whether the proposed provision is appropriate in 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 answer to question 1 applies equally to this question.

Question 3.

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

Response

An obligation should be imposed on officials to inform persons compelled to provide self-incriminatory information of:

(a) their right to object to provision of the information. This information should be made available to the person prior to or at the time the official requires the provision of the relevant information (for example in the relevant notice to produce or prior to the witness commencing the giving of evidence); and
(b) the proceedings in which the compelled information will be admissible (or be sought to be admitted) against the person; and
(c) the person's right to seek legal representation if they wish to do so; 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.

Where the relevant legislation requires that the person compelled to provide self-incriminatory information object to each question, then the official's obligation should include an obligation to inform the person to that effect.

Where the person is not advised of his/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 nature of the official's obligation should be clearly stated 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 approach taken to this issue in section 18B(5) of the New South Wales Crime Commission Act 1985 appears a sensible one. That section provides:

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

The important issue, if a later prosecution for perjury or provision of false information is to be successful, is that there is no room for argument or misunderstanding about which answers do and which do not attract the immunity; ie. which answers are admissible in a subsequent prosecution.

In the context of the provisions of section 128 of the Evidence Act, this issue was considered by the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission in their recent Discussion Paper on the *Uniform Evidence Acts (ALRC DP No. 69 July 2005).* At page 418 para 13.220 the Commissions stated:

"Some New South Wales District Court Judges submit that generally s.128 (of the Evidence Acts) serves a useful purpose. However, their view is that the provision is clumsy to apply and requires redrafting. In particular the Judges submit that:

- *the form of words used by the judge is confusing to witnesses;*
- *the necessity to invoke the process in relation to each question is clumsy. It should be the broader 'subject matter' of the evidence (rather than 'particular evidence') that is protected, for example, 'the use of cocaine by the witness when living in Kings Cross in 1997-98';"*

The Commissions at para 13.225 (page 419) said:

"Rather than the current practice, where a certificate is required to be issued for each question, one option would be to be define 'particular evidence' under the section to include 'evidence both in response to questions and evidence on particular topics'. Section 128(1) could state the section applies to witnesses giving 'any or some evidence which may tend to prove' that the witness has committed an offence or is liable to a civil penalty."

The Commissions are due to report in December 2005.

Question 5.

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

Response

Refer to the answer to Question 3.

In addition, the following safeguards should be included in the relevant legislation:

(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 an appeal on a question of law from the decision of that court;
(b) entitlement to seek legal representation;
(c) if the information is being sought at a hearing of an investigating agency, an entitlement of the legal practitioner to examine or cross-examine a witness on a relevant matter; and
(d) availability of non-publication orders in relation to particular evidence, the contents of documents and the identity of witnesses if failure to make such orders might prejudice the safety or reputation of a person or prejudice a fair trial.

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 authorized 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

Subject to the comments below, the principles listed in Question 6 are appropriate for the Legislation Review Committee to apply when considering proposed legislation which compels provision of self-incriminating information.

The following suggestion is made in relation to the factors listed under "Justifications for Abrogation".

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

As noted above, the ALRC, the NSW LRC and the VLRC have reviewed the *Uniform Evidence Acts* and recently published Discussion Paper 69. The Commissions dealt with the privilege in respect of self-incrimination in other proceedings commencing at para 13.213 on page 416.

In para 13.234 at page 422, the Commissions referred to the following :

> *"A committee of the Council of Chief Justices of Australia and New Zealand is currently investigating the question of the harmonization of rules of court, practice notes and forms in relation to **Mareva** orders and **Anton Piller** orders. The Committee has made a submission to this Inquiry suggesting that the Uniform Evidence Acts be amended to abrogate the privilege so that an order for disclosure of the general kind mentioned must be obeyed.*
>
> *The Committee notes that, in the United Kingdom, the privilege has been abrogated by statute in intellectual property and passing off proceedings. It is in proceedings of these kinds that **Anton Piller** orders are most commonly made.*
>
> *There are a number of potential ways in which s.128 could be amended to abrogate the prvilege in civil proceedings for **Mareva** orders and **Anton Piller** orders. The section could be amended to abrogate the privilege in civil proceedings generally, where any order is made against an individual or a question is put to an individual. Alternatively, the privilege could be specifically abrogated where an order is made requiring an individual to disclose assets or other information (or to attend court to testify regarding assets or other information) or to permit premises to be searched. The information would not, however, be available to be used against that individual in any criminal proceedings or in any proceeding that would expose the individual to a penalty, (except a proceeding for perjury or contempt of court).*

The Commissions consider that a general abrogation of the privilege in civil proceedings is unwarranted and prefer the limited abrogation of the privilege to specific types of orders to rectify the present problem with s.128."

The Committee included a draft provision in Appendix 1 of its Discussion Paper.

His Honour Justice Campbell in *Pathways Employment Services v West* [2004] NSW SC 903 (at paras 12, 13 and 46) referred to the conflict between the policy underlying the privilege against self-incrimination and the policy underlying procedures of discovery and interrogatories; for example, the desire to prevent the use of the privilege against self-discrimination by a criminal defendant to avoid discovery and interrogatories in associated civil proceedings for the recovery or administration of property.