



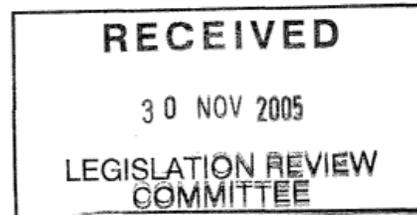
**The Law Society
of New South Wales**

ACN 000 000 699

Our Ref: RBGMM1242957

24 November 2005

Mr Peter Primrose MLC
Chairman
Legislation Review Committee
Legislative Assembly
Parliament House
Macquarie Street
SYDNEY NSW 2000



Dear Mr Primrose,

Re: The Right to Silence

The Law Society's Criminal Law Committee ('the Committee') makes the following comments in relation to the Legislation Review Committee's Discussion Paper on the right to silence:

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?

Answer

Information gained in breach of the privilege against self-incrimination should be the subject of an immunity from use in proceedings against the person compelled to provide the information.

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?

Answer

Evidence derived from information obtained in breach of the privilege against self-incrimination should be subject to an immunity from use in proceedings against that person. This is consistent with s 128(7)(b) *Evidence Act 1995 (NSW)*.

The Committee strongly supports the inclusion of immunity from derivative use in the principles that the Legislation Review Committee will apply when considering Bills that impinge on the right to silence.

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Question 3

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

Answer

A right to immunity in relation to self-incrimination is of no benefit if a person is unaware that the immunity exists. The Committee therefore strongly favours strict obligations being placed on officials to inform a person compelled to provide self-incriminating information of their relevant right and obligations.

Notable there are similar obligations in other legislation where peoples' rights are infringed. For example, police officers are required to inform suspects of a large number of matters when seeking informed consent to a forensic procedure pursuant to s 13 of the *Crimes (Forensic Procedures) Act 2000*.

Question 4

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

Answer

The Committee does not agree that a person should have to object to obtain the immunity. A person may not make an objection because he or she does not realise that the question could result in a self-incriminating answer. It is therefore important that there is no requirement to object.

If the Legislation Review Committee considers that an objection is required to gain the benefit of the immunity, the Committee suggests that this only occur in circumstances where the person has been fully informed of his or her rights.

A person should also be able to give a single objection that covers all self incriminating answers. Objections to individual questions should not be necessary.

A person should also be advised of their right to make such a "blanket" objection.

Question 5

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

Answer

The following procedural safeguards should be included:

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



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

Question 6

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.

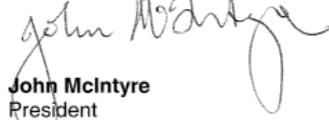
Answer

The principles above are appropriate for the Legislation Review Committee to apply when considering bills that impinge on the right to silence.

The Committee supports the Queensland Law Reform Commission's principles outlined on p 40 of the Discussion Paper with one exception. The Committee is opposed to the principle that derivative use immunity should not be granted unless there are exceptional circumstances to justify the extent of its impact. As discussed in Question 2, the Committee's view is that derivative use immunity must apply, and this position is consistent with s 128(7)(b) of the *Evidence Act 1995*.

Thank you for the opportunity to comment on the Discussion Paper. The Committee is very concerned about the erosion of the right to silence, and welcomes any opportunity to provide further assistance to the Legislative Review Committee on this point.

Yours sincerely,



John McIntyre
President