10. The Privilege against Self-incrimination

Contents

A common law privilege

10.1 The privilege against self-incrimination is 'a basic and substantive common law right, and not just a rule of evidence'.[1] It reflects 'the long-standing antipathy of the common law to compulsory interrogations about criminal conduct'.[2]

10.2 This chapter discusses the source and rationale of the privilege; how this privilege is protected from statutory encroachment; and when laws that encroach on this privilege may be justified.

10.3 The ALRC calls for submissions on two questions about this privilege.

> **Question 10–1** What general principles or criteria should be applied to help determine whether a law that excludes the privilege against self-incrimination is justified?
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> **Question 10–2** Which Commonwealth laws unjustifiably exclude the privilege against self-incrimination, and why are these laws unjustified?

10.4 The right to claim the privilege against self-incrimination in criminal law and against self-exposure to penalties in civil and administrative law entitles a natural

1 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008).*X7 v Australian Crime Commission* (2013) 248 CLR 92, 136–137 [104] (Hayne & Bell JJ).

2 *Lee v New South Wales Crime Commission* (2013) 302 ALR 363 [1] (French CJ).

person[3] to refuse to answer any question or produce any document if it would tend to incriminate them.[4]

10.5 In its 2008 report on privilege in federal investigations, the ALRC explained the three categories of the privilege:

> Although broadly referred to as the privilege against self-incrimination, the concept encompasses three distinct privileges: a privilege against self-incrimination in criminal matters; a privilege against self-exposure to a civil or administrative penalty (including any monetary penalty which might be imposed by a court or an administrative authority, but excluding private civil proceedings for damages); and a privilege against self-exposure to the forfeiture of an existing right (which is less commonly invoked).[5]

10.6 The privilege arose from the common law maxim *nemo tenetur prodere seipsum,* meaning that people should not be compelled to betray themselves.[6] The *ius commune* or common law of the 12th and 13th centuries, a combination of the Roman and canon laws, included an early privilege against self-incrimination that influenced the modern iteration of the privilege at common law.[7]

10.7 In his *Commentaries on the Laws of England* (1765-1769), William Blackstone explained that the maxim was enlivened where a defendant's 'fault was not to be wrung out of himself, but rather to be discovered by other means and other men'.[8]

10.8 Jeremy Bentham was a fierce critic of the privilege, arguing in 1827 that the privilege had the inevitable effect of excluding the most reliable evidence of the truth—that which is available only from the person accused.[9]

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3 While companies are not entitled to claim the privilege against self-incrimination, company directors can claim the privilege where a disclosure would make them personally liable: *Upperedge v Bailey* (1994) 13 ACSR 541.

4 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [159] (Kiefel J). *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Sorby v The Commonwealth* (1983) 152 CLR 281; *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 512 (Brennan J). See also, Dyson Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 9th ed, 2012) [25065]. While the privilege is often used synonymously with the 'right to silence', the privilege against self-incrimination is just one facet of the 'right to silence': Queensland Law Reform Commission, 'The Abrogation of the Principle against Self-Incrimination' (59, 2004) 54. The right to claim the privilege against self-incrimination has been interpreted broadly by Australian courts: 'The privilege is often expressed, and sometimes authoritatively so, in circumstances where the answer or production would tend to expose the person to incrimination…Generally where that is done it is to express the privilege widely and inclusively of circumstances where answer or disclosure would expose the person to incrimination': *Griffin v Pantzer* (2004) 137 FCR 209, [38] (Allsop J).

5 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [15.89].

6 R. Helmholz, 'Introduction' in R. Helmoholz (ed), *The privilege against self-incrimination: its origins and development* (University of Chicago Press, 1997).

7 Ibid 7.

8 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol IV, 293.

9 Jeremy Bentham, *Rationale of Judicial Evidence* (Garland Publishers, 1827) Bk 9, Ch 1, 339.

10.9 There is some debate among legal historians about the origins of the privilege.[10] Professor John Langbein points to the development of the privilege as part of the rise of the adversarial criminal justice system where the prosecution is charged with proving the guilt of a defendant beyond a reasonable doubt and subject to protections surrounding the manner of criminal discovery.[11]

10.10 Others point to the development of the privilege in the 17th century as a response to the unpopularity of the Star Chamber in England whose practices included requiring suspects on trial for treason to answer questions without protection from self-incrimination.[12]

10.11 The protection afforded by the privilege may encourage people to cooperate with investigators and prosecutors, where otherwise they may fear the risk of self-incrimination:

> it is thought that without such protections witnesses might be loath to come forward to give evidence.[13]

10.12 In criminal law, the privilege offers some protection against any perceived power imbalance between the prosecution and a defendant.[14]

10.13 It has also been suggested that the right to claim the privilege against self-incrimination may protect individuals from unlawful coercive methods used to obtain confessions.[15]

10.14 A corollary of this rationale is that the stressful environment of police interviews may be 'conducive to false confessions on account of the authority of police, the isolation, uncertainty and anxiety of the suspect and the expectations of the interrogation officer'.[16] These factors may place pressure on defendants to provide information which may incriminate them, is prejudicial to their case, or even information which is false. The right to claim the privilege against self-incrimination can act as one safeguard against the false confession of nervous, yet innocent, defendants.[17]

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10 For instance, in *Azzopardi* McHugh J in dissent rejects the conventional historical understanding of the development of the privilege: 'now turns out that the views of Wigmore and Levy concerning the origin and development of the self-incrimination privilege were dead wrong. In the last 25 years, research by modern scholars has demonstrated a very different—almost opposite—view of the history and origin of the principle': *Azzopardi v R* (2001) 205 CLR 50, 91 [120] (McHugh J). See also, Cosmas Mosidis, *Criminal Discovery: From Truth to Proof and Back Again* (Institute of Criminology Press, 2008); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 135 [100] (Hayne and Bell JJ).

11 John Langbein, 'The Historical Origins of the Privilege against Self-Incrimination at Common Law' (1994) 92 *Michigan Law Review* 1047, 1047.

12 Leonard Levy, *Origins of the Fifth Amendment* (Macmillan, 1986); John Wigmore, *Evidence in Trials at Common Law* (Little Brown, 1961) vol 1. See also, *Sorby v The Commonwealth* (1983) 152 CLR 281, 317; *Griffin v Pantzer* (2004) 137 FCR 209 [40]. For further background, see, David Dolinko, 'Is There a Rationale for the Privilege against Self-Incrimination?' (1986) 3 *UCLA Law Review* 1063, 1079.

13 Heydon, above n 4 [25140].

14 Mosidis, above n 10, 136.

15 Ibid 133.

16 Ibid 129.

17 Queensland Law Reform Commission, above n 4 [3.20].

10.15 The privilege has been described by the High Court as a 'fundamental bulwark of liberty'.[18] The privilege has also been said to protect human dignity by providing a 'shield against conviction by testimony wrung out of the mouth of the offender'.[19] In *Pyneboard Pty Ltd v Trade Practices Commission*, Murphy J stated that

> The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigation. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society's acceptance of the inviolability of the human personality.[20]

Statutory protection

10.16 Some legislative provisions codify the principle against self-incrimination. For example, s 128(1) of the uniform Evidence Acts provides that where a witness objects to giving particular evidence that 'may tend to prove' that the witness has committed an offence under Australian or foreign law, or is liable to a civil penalty, a court may determine whether there are 'reasonable grounds' for an objection to providing that evidence.

Protections from statutory encroachments

Constitution

10.17 The privilege is not expressly protected by the *Australian Constitution,* nor has it been implied by the courts.

Principle of legality

10.18 The principle of legality provides some protection to the privilege against self-incrimination.[21] When interpreting a statute, courts will presume that Parliament did not intend to interfere with the privilege, unless this intention was made unambiguously clear.[22] In *Pyneboard Pty Ltd v Trade Practices Commission* (1985), the High Court held that the right to claim the privilege against self-incrimination could be revoked where a statutory body, like the Trade Practices Commission, was authorised to compel individuals to produce information which may incriminate that individual. In that case, s 155(1) of the *Trade Practices Act 1974* (Cth) required a person to provide information or documents to the Commission. The High Court held that

> The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from

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18 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 340 (Mason CJ, Wilson & Dawson JJ).

19 *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 541 (Brennan J).

20 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346.

21 The principle of statutory interpretation now known as the 'principle of legality' is discussed more generally in Ch 1.

22 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Crafter v Kelly* [1941] SASR 237.

> the character and purpose of the provision that the obligation was not intended to be subject to any qualification. That is so when the object of imposing the obligation is to ensure the full investigation on 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. [23]

International law

10.19 The right to claim the privilege against self-incrimination is enshrined in art14(3)(g) of the ICCPR which provides that, in the determination of any criminal charge, everyone shall be entitled not to be compelled to testify against himself or to confess guilt.

10.20 International instruments cannot be used to 'override clear and valid provisions of Australian national law'.[24] However, where a statute is ambiguous, courts will generally favour a construction that accords with Australia's international obligations.[25] The High Court has confirmed the 'influence' of this article on the common law.[26]

Bills of rights

10.21 In other countries, bills of rights or human rights statutes provide some protection to certain rights and freedoms. The European Convention on Human Rights enshrines the privilege against self-incrimination.[27] In the UK case of *R v Lambert* (2001), Lord Hope explained that art 6(2):

> Is not absolute and unqualified, the test to be applied is whether the modification or limitation of that right pursues a legitimate aim and whether it satisfies the principle of proportionality.[28]

10.22 The privilege is enshrined in bills of rights and human rights statutes in the United States,[29] the United Kingdom,[30] Canada[31] and New Zealand.[32] For example, s 11(c) of the *Canadian Charter of Rights and Freedoms* provides:

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23 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 618 (Mason ACJ, Wilson & Dawson JJ).

24 *Minister for Immigration v B* (2004) 219 CLR 365, 425 [171] (Kirby J).

25 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). The relevance of international law is discussed more generally in Ch 1.

26 *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499 (Mason CJ & Toohey J).

27 *European Convention for the Protection of Human Rights and Fundamental Freedoms* 4XI, 1950 (entered into Force 3 September 1953) art 6. The European Court of Human Rights has upheld the centrality of the presumption of innocence as part of the inquisitorial systems of European nations' criminal justice systems: *Funke v France* [1993] 16 EHRR 297 (1993).

28 *R v Lambert* [2001] UKHL 37 [88].

29 *United States Constitution* amend V.

30 *Human Rights Act 1998* (UK) c 42, sch 1 pt I, art 6. The right against self-incrimination is implied by art 6 of the ECHR according to the European Court of Human Rights; as the European Court states, 'the right is one of certain generally recognised international standards which lie at the heart of a fair procedure under Article 6': *Heaney and McGuinness v Ireland* (2001) 33 Eur Court HR 12, 40.

31 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 13.

32 *Bill of Rights Act 1990* (NZ) s 25(d).

> 11. Any person charged with an offence has the right …
>
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence.[33]

10.23 The right or privilege against self-incrimination is also protected in the Victorian *Charter of Human Rights and Responsibilities* and the ACT's *Human Rights Act*.[34]

Justifications for encroachments

10.24 The High Court has on several occasions held that the privilege is not immutable and can be abrogated in order to balance competing rights and the public interest:

> The legislatures have taken this course when confronted with the need, based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained.[35]

10.25 This public interest may be enlivened in circumstances where the information gleaned from a witness or defendant as a result of suspending the privilege reveals an issue of major public importance that has a significant impact on the community in general or on a section of the community.[36] For example, an inquiry or investigation into allegations of major criminal activity, organised crime or official corruption or other serious misconduct by a public official in the performance of his or her duties might justify the abrogation of the privilege. It may also be justified to exclude the privilege where there is an immediate need for information, for example, to avoid risks such as personal injury, and where authorities have reasonable cause for believing that an individual can provide that information.

10.26 Bills of rights allow for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'.[37]

10.27 Some laws exclude the privilege against self-incrimination. The ALRC invites submissions identifying those Commonwealth laws that are *not* justified, and explaining why they are not justified.

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33 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 11(c).

34 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(k); *Human Rights Act 2004* (ACT) s 22(i).

35 *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503 (Mason CJ and Toohey J). See also, *Sorby v The Commonwealth* (1983) 152 CLR 281, 298 (Gibbs CJ). In the UK courts have been 'willing to find breaks and knots in the golden thread even where the relevant statute was silent as to the allocation of burdens of proof': Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford University Press, 2004) 374.

36 Queensland Law Reform Commission, above n 4, [6.3].

37 *Canada Act 1982 c 11, Sch B Pt 1 ('Canadian Charter of Rights and Freedoms')* s 1. See also, *Charter of Human Rights and Responsibilities 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28; *Bill of Rights Act 1990* (NZ) s 5.