

# Principles of good legislation: OQPC guide to FLPs



## Self-incrimination

Office of the Queensland Parliamentary Counsel



## Self-incrimination

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## Summary

***Consider whether legislation abrogates the common law protection that prevents a person from being compelled to provide evidence of the person's own fault or guilt. This includes the right to silence, penalty privilege, spousal privilege and use and derivative use immunities. Legislation that impacts on the common law protection against being compelled to self-incriminate may interfere with the rights and liberties of the individual under section 4(3)(f) of the [Legislative Standards Act 1992](#).***

### *The common law position*

The privilege against self-incrimination means that a person cannot be compelled to provide documents or answer questions if those documents or answers may incriminate the person.

The common law and the [International Covenant on Civil and Political Rights](#) recognise that an individual should be protected from incriminating themselves. However, the privilege can be waived or abrogated by statute (see paragraphs [12]-[16]).

The privilege may be claimed only by natural persons and, without a specific statutory application of the privilege, can not be claimed by a corporation (see paragraphs [6]-[7]).

A person cannot rely on the privilege where the evidence may incriminate another person although there may be an exception in the case of spouses: (see paragraphs [24]-[29]).

The privilege protects a person from providing documents or answering questions, but the privilege does not prevent the use of evidence obtained from a third party or under a warrant or real evidence such as fingerprints, handwriting or breath or blood samples (see paragraph [8]).

This chapter also considers the penalty privilege (see paragraphs [17]-[23]).

### *Statutory guidance*

The [Legislative Standards Act 1992](#), section 4(3)(f) states that whether legislation has sufficient regard to the rights and liberties of individuals depends on whether the legislation provides adequate protection against self-incrimination.

### *Issues considered by parliamentary committees*

The issues relating to self-incrimination privilege that have been considered by parliamentary committees include:

- abrogation of the privilege on public interest grounds (see paragraphs [30]-[33]); and
- limits on the use of evidence obtained as a result of statutory abrogation of the privilege (see paragraphs [34]-[35]); and



- whether the privilege must be formally claimed in advance (see paragraph [36]); and
- the application of the privilege to documents required by legislation to be kept (see paragraph [37]); and
- the availability of the privilege to an executive officer of a corporation in derivative liability proceedings (see paragraphs [39]-[45]).

### *Recent consideration of self-incrimination by parliamentary committees*

The Health and Community Services Committee, in its report on the Racing and Other Legislation Amendment Bill 2012, recommended that specific reference be made to the privilege against self-incrimination where an offence provides a reasonable excuse option for not giving evidence (see paragraphs [46]-[47]).

The information contained in this chapter is current as at 19 June 2013.





## The privilege against self-incrimination at common law

### *The privilege and its origins*

- [1] The privilege against self-incrimination is considered to be ‘deeply ingrained in the common law’<sup>1</sup> and has been recognised by the High Court as a human right.<sup>2</sup> The privilege is ‘based upon the deep-seated belief that those who allege the commission of a crime should prove it themselves and should not be able to compel the accused to provide proof against himself’.<sup>3</sup> Accordingly, the privilege against self-incrimination prevents a person being compelled to provide documents or answer questions if the documents or answers may tend, either directly or indirectly, to incriminate the person.<sup>4</sup>
- [2] The privilege is thought to have originated in the 17<sup>th</sup> century as a result of the inquisitorial procedures of the Star Chamber and Court of High Commission where the *ex officio* oaths compelled persons to testify to their own guilt. It has also been suggested that the privilege developed alongside changes in the criminal law where the ‘accused speaks’ trials of the 16<sup>th</sup> century transformed into an accused’s right to silence.<sup>5</sup>
- [3] Despite the uncertainty of the historical origin of the privilege, ‘its modern form is in the nature of a human right designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them’.<sup>6</sup> The privilege against self-incrimination also has application in international law. Article 14(3)(g) of the *International Covenant on Civil and Political Rights* recognises that in relation to criminal matters a person is entitled ‘not to be compelled to testify against himself or to confess guilt’.<sup>7</sup>

### *The right to silence*

- [4] The common law recognises that ‘there is no obligation to answer questions asked by an executive agency or to produce documents requested by an executive agency’, and this

<sup>1</sup> *Sorby v Commonwealth* [1983] HCA 10 per Mason, Wilson and Dawson JJ at [14]; (1983) 152 CLR 281 at 309 (*Sorby*)

<sup>2</sup> See *Rochfort v Trade Practices Commission* (1982) [1982] HCA 66; 153 CLR 134

<sup>3</sup> *Environmental Protection Authority v Caltex Refining Co Pty Limited* [1993] HCA 74 per Deane, Dawson and Gaudron JJ at [23]; (1993) 178 CLR 477 at 532 (*Caltex*)

<sup>4</sup> There is no conclusive authority on whether the privilege against self-incrimination applies to conviction under a foreign law. See B Marshall, ‘The Penalty Privilege: Assessing its Relevance in Trade Practices Cases’ (1996) 14 *Australian Bar Review* 214 and also JD Heydon, *Cross on Evidence* (8<sup>th</sup> ed, 2004) at [25155] (*Cross on Evidence* (2004)). Note also that, under the [Evidence Act 1977](#), part 3, division 3, if a court or tribunal of another State or Territory of the Commonwealth or in an overseas country requests a Supreme Court judge to order evidence to be obtained in Queensland, a person ordered to give evidence may rely on the privilege against self-incrimination.

<sup>5</sup> C Sherrin, ‘The Privilege Against Self-Incrimination in Regulatory Proceedings: Beginnings (That Never Began)’ (2003–04) 30 *Manitoba Law Journal* 315

<sup>6</sup> *Caltex* [1993] HCA 74 per Mason CJ and Toohey at [59]; (1993) 178 CLR 447 at 508

<sup>7</sup> *International Covenant on Civil and Political Rights*, opened for signature (except art 41) 23 March 1976, ATS 1980 No. 23, art 14(3)(g) (entered into force 13 November 1980)



forms the basis of the right to silence.<sup>8</sup> The privilege against self-incrimination forms part of, but is not the same as, the right to silence. As such, any abrogation of the right to silence in statute may still leave available the privilege against self-incrimination.<sup>9</sup>

### *Whom the privilege protects*

- [5] The privilege is personal and applies only to the incrimination of the person claiming it, whether or not the person is a witness or a party.<sup>10</sup> The privilege cannot be relied on if the document or answer requested would tend to incriminate another person.<sup>11</sup>
- [6] The privilege against self-incrimination does not apply to corporations. As Mason CJ and Toohey J observed in *Caltex*:  

[s]uffice it to say that, if it ever was the common law in Australia that corporations could claim the privilege against self-incrimination in relation to the production of documents, it is no longer the common law.<sup>12</sup>
- [7] Despite the common law position, legislation may expressly provide that the privilege is available to corporations.

### *What the privilege protects*

- [8] As the privilege against self-incrimination protects a person from providing documents or answering questions which may tend to incriminate him or herself, the privilege extends to testimonial and documentary evidence but not to evidence obtained from third parties or documents seized under a warrant.<sup>13</sup> Also, the privilege is not available in relation to real evidence such as fingerprints, handwriting, or breath or blood specimens.<sup>14</sup>

### *When the privilege protects*

- [9] In order to claim the privilege a person must show that giving the document or answering the question will place the person in ‘real and appreciable danger’ of being convicted. The danger exists even if the document or answer may not be used in evidence against the person, for example, because there is a legislative provision stating that evidence given by a person can not be used to elicit further information from the person or to prosecute them.<sup>15</sup> The danger also exists if the document or answer may lead to the

<sup>8</sup> *Pyneboard Proprietary Limited v Trade Practices Commission* [1983] HCA 9 per Brennan J at [6]; (1983) 152 CLR 328 at 351 (*‘Pyneboard’*)

<sup>9</sup> *Pyneboard* [1983] HCA 9 per Brennan J at [6]; (1983) 152 CLR 328 at 351

<sup>10</sup> *Pyneboard* [1983] HCA 9 per Murphy J at [7]; (1983) 152 CLR 328 at 346

<sup>11</sup> See the discussion spousal privilege at [24]–[29]

<sup>12</sup> *Caltex* [1993] HCA 74 per Mason CJ and Toohey J at [59]; (1993) 178 CLR 477 at 508

<sup>13</sup> *Cross on Evidence* (2004) at [25090]

<sup>14</sup> See generally, *Sorby*

<sup>15</sup> A provision of this kind is sometimes referred to as a ‘use immunity’ or a ‘derivative use immunity’.



discovery of other evidence of an incriminating nature.<sup>16</sup> In the words of Mason, Wilson and Dawson JJ in *Sorby*:

[t]he privilege protects the witness not only from incriminating himself directly under a compulsory process, but also from making a disclosure which may lead to incrimination or to the discovery of real evidence of an incriminating character.<sup>17</sup>

- [10] As such, the privilege is available against the risk of incrimination by direct and indirect (or derivative) use of the documents or answers.

### *Where the privilege operates*

- [11] The privilege is available in judicial and non-judicial proceedings.<sup>18</sup>

### *Abrogation of the privilege*

- [12] The privilege against self-incrimination may be waived or expressly or impliedly abrogated by legislation.<sup>19</sup> Although there is a presumption that the legislature does not intend to abrogate the privilege, it may be abrogated either expressly or impliedly. However, the legislative intent to abrogate the privilege must be clear, as there is a presumption that legislation will not displace the privilege.<sup>20</sup>
- [13] Whether legislation impliedly abrogates the privilege will depend on the language, character and purpose of the legislation as a whole and the provision in particular. The High Court has 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 the character and purpose of the provision that the obligation was not intended to be subject to any qualification.<sup>21</sup>

- [14] The privilege will not be impliedly abrogated simply because legislation provides a use immunity for the compelled answers or documents.<sup>22</sup>

### *The privilege and the Evidence Act 1977*

- [15] The privilege against self-incrimination is also recognised under the [Evidence Act 1977](#). Section 10(1) of that Act provides:

Nothing in this Act shall render any person compellable to answer any question tending to incriminate the person.

<sup>16</sup> *Sorby* [1983] HCA 10 per Gibbs CJ at [10]; (1983) 152 CLR 281 at 294, quoting Lord Wilberforce in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 443

<sup>17</sup> *Sorby* [1983] HCA 10 per Mason, Wilson and Dawson JJ at [17]; (1983) 152 CLR 281 at 310

<sup>18</sup> *Sorby* [1983] HCA 10 per Mason, Wilson and Dawson JJ at [13]; (1983) 152 CLR 281 at 309

<sup>19</sup> *Reid v Howard* [1995] HCA 40 per Toohey, Gaudron, McHugh and Gummow JJ at [15]; (1995) 184 CLR 1 at 14

<sup>20</sup> *Sorby* [1983] HCA 10 per Gibbs CJ at [5]; (1983) 152 CLR 281 at 289 and [1983] HCA 10 per Mason, Wilson and Dawson JJ at [14]; 152 CLR 281 at 309. See also *Pyneboard* [1983] HCA 9 per Mason ACJ, Wilson and Dawson JJ at [27]; (1983) 152 CLR 328 at 341 and *Caltex* [1993] HCA 74 per Deane, Dawson and Gaudron JJ at [25]; (1993) 178 CLR 477 at 534

<sup>21</sup> *Pyneboard* [1983] HCA 9 per Mason ACJ, Wilson and Dawson JJ at [28]; (1983) 152 CLR 328 at 341

<sup>22</sup> See generally, *Sorby*





- [16] Section 10(1) of the [Evidence Act 1977](#) is limited by section 15 of that Act, which relates to questioning an accused person in a criminal proceeding.

## Penalty privilege

- [17] The High Court has held that there are three privileges that are similar to the privilege against self-incrimination:
- the privilege against exposure to a penalty (the **penalty privilege**); and
  - the privilege against exposure to forfeiture; and
  - the privilege against exposure to ecclesiastical censure.<sup>23</sup>

### *Penalty privilege*

- [18] The High Court held in *Daniels* that the penalty privilege originates from the rules of equity relating to discovery although the privilege ‘has long been recognised in the common law’.<sup>24</sup> The penalty privilege is based on the understanding that ‘those who allege criminality or other illegal conduct should prove it’.<sup>25</sup> Accordingly, the penalty privilege will allow a person to refuse to provide a document or answer a question if the document or answer may tend to expose the person to a penalty.

### *What the penalty privilege protects*

- [19] The types of penalties the penalty privilege protects against include monetary penalties (but not damages), bankruptcy, dismissal from the police force, disqualification from management of a corporation,<sup>26</sup> and removal of a right to practise as a pharmacist.<sup>27</sup>

### *Whom the penalty privilege protects*

- [20] The penalty privilege is available at common law to individuals. It appears unlikely, however, that the penalty privilege is available at common law to corporations. In *Trade Practices Commission v Abbco Iceworks Pty Limited and Others*, the majority of the court held that the penalty privilege was not available to corporations at common law.<sup>28</sup> The decision was based partly on the denial to corporations of the privilege against self-incrimination in *Caltex* although, in answer to one question, the majority (a different

<sup>23</sup> *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49 at [13]; (2002) 213 CLR 543 at 553-554 (*‘Daniels’*)

<sup>24</sup> *Daniels* [2002] HCA 49 at [13]; (2002) 213 CLR 543 at 554

<sup>25</sup> *Rich v Australian Securities and Investments Commission* [2004] HCA 42 at [24]; (2004) 220 CLR 129 at 142 (*‘Rich’*)

<sup>26</sup> See generally, *Rich*

<sup>27</sup> *Jattan v Chief Executive, Queensland Health* [2010] QCA 92 (The first instance decision was upheld on appeal: [2010] QC 359)

<sup>28</sup> *Trade Practices Commission v Abbco Iceworks Pty Limited & Ors* [1994] FCA 1279; (1994) 52 FCR 96 (*‘Abbco’*)





majority from that denying the privilege against self-incrimination to corporations) found that the privilege against self-incrimination or the penalty privilege was available.<sup>29</sup>

### *When the penalty privilege protects*

- [21] It is unclear whether the penalty privilege applies outside judicial proceedings. In *Pyneboard*, Mason A-CJ, Wilson and Dawson JJ said they were ‘not prepared to hold that the privilege is inherently incapable of application in non-judicial proceedings’.<sup>30</sup> The High Court considered the issue in *obiter* in both *Daniels* and *Rich* but the issue remains unresolved.<sup>31</sup>

### *Privilege against forfeiture*

- [22] The privilege against exposure to forfeiture has limited application in Queensland by virtue of the [Evidence Act 1977](#), section 14(1)(a), which provides:
- (1) The following rules of law are hereby abrogated except in relation to criminal proceedings, that is to say—
    - (a) The rule whereby, in any proceeding, a person can not be compelled to answer any question or produce any document or thing if to do so would tend to expose the person to a forfeiture.

### *Privilege against exposure to ecclesiastical censure*

- [23] This privilege is of largely historical interest and there is some doubt as to its availability under the common law of Australia.<sup>32</sup>

## Spousal privilege

### *Spousal privilege at common law*

- [24] It is unclear whether the common law recognises the right of a person to not give evidence that may tend to incriminate their spouse (often referred to as the privilege against spousal incrimination or spousal privilege).
- [25] It appears part of the uncertainty relates to the use of spousal privilege as a privilege rather than considering issues of competency and compellability of witnesses.<sup>33</sup> A privilege must be raised in the course of giving evidence. Whether or not a person is

<sup>29</sup> Prior to *Caltex* it was assumed the penalty privilege applied to corporations: see *Pyneboard*.

<sup>30</sup> *Pyneboard* [1983] HCA 9 per Mason ACJ, Wilson and Dawson JJ at [27]; (1983) 152 CLR 328 at 341

<sup>31</sup> *Daniels* [2002] HCA 49 at [13]; (2002) 213 CLR 543 at 554 and *Rich* [2004] HCA 42 at [24]; (2004) 220 CLR 129 at 142

<sup>32</sup> *Pyneboard* [1983] HCA 9 per Murphy J at [3]; (1983) 152 CLR 328 at 345

<sup>33</sup> ‘A person is *competent* if that person may lawfully be called to give evidence...A person is *compellable* if that person can lawfully be obliged to give evidence. The general rule is that all competent witnesses are compellable.’: *Cross on Evidence* (2004) at [13001] (emphasis added), quoted in *Australian Crime Commission v Stoddart* [2011] HCA 47 at [20]; (2011) 244 CLR 554 at 566 (*‘Stoddart’*)



competent and compellable to give evidence must be resolved before the person gives evidence. Accordingly, a privilege attaches to the evidence a person may give while competency and compellability attach to the witness.<sup>34</sup> As the High Court stated:

... “compellable” was used to indicate that the witness might be obliged to give evidence in the ordinary sense of the term, not that, in response to particular questions, a privilege might be claimed by the witness.<sup>35</sup>

- [26] The relationship between competence, compellability and spousal privilege was recently considered by the High Court in *Stoddart*. Ms Stoddart had been summoned for examination by the Australian Crime Commission. She was both competent and compellable but refused to answer questions put to her by the Australian Crime Commission about her husband’s business dealings on the ground that she had a ‘right not to give evidence that might incriminate her husband’.<sup>36</sup> The majority of the High Court rejected the privilege claim, holding that in the circumstances where Mrs Stoddart was both competent and compellable, the privilege she asserted was not recognised at common law.<sup>37</sup>

### *Spousal privilege and the Evidence Act 1977*

- [27] The [Evidence Act 1977](#) deals with the competency and compellability of spouses in criminal and civil proceedings. Section 7(2) of the Act applies in civil proceedings and provides that a husband or wife of a person who is a party to a proceeding, or on whose behalf a proceeding is brought or defended, is both competent and compellable to give evidence for any of the parties to the proceeding.
- [28] Section 8(2) of the [Evidence Act 1977](#) applies in criminal proceedings and provides that the husband or wife of an accused person is competent and compellable to give evidence for either the prosecution or defence. The consent of the accused is not required before the husband or wife gives the evidence.
- [29] From these provisions it would appear that spousal privilege is not available in civil or criminal proceedings to which the Act applies.

## Privilege against self-incrimination as an FLP

### *Scrutiny Committee’s statement of the privilege*

- [30] The [Legislative Standards Act 1992](#), section 4(3)(f) provides that legislation may have sufficient regard to the rights and liberties of individuals if it provides appropriate protection against self-incrimination. The Scrutiny of Legislation Committee (the *Scrutiny*

<sup>34</sup> *Cross on Evidence* (2004) at [13001]; *Stoddart* at 566, [2011] HCA 47 at [20]

<sup>35</sup> *Stoddart* [2011] HCA 47 at [41]; (2011) 244 CLR 554 at 571

<sup>36</sup> *Stoddart* [2011] HCA 47 at [174]; (2011) 244 CLR 554 at 620

<sup>37</sup> *Stoddart* [2011] HCA 47 at [41]; (2011) 244 CLR 554 at 571 (emphasis added) and [2011] HCA 47 at [233]; (2011) 244 CLR 554 at 637. It remains unclear from the decision whether the common law recognises ‘spousal privilege’ in other circumstances and, if so, whether the recognition extends to non-judicial proceedings.



*Committee*) had a general position on whether legislation abrogating the privilege still provided sufficient protection. Abrogation of the privilege may be justifiable if:

- the questions posed, or the information required, concern matters which are peculiarly within the knowledge of the person to whom the requirements are directed, and which would be difficult or impossible for the Crown to establish by any alternate evidentiary means; and
- the bill prohibits the use of the information obtained in prosecutions against the person; and
- in order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any conditions (such as formally claiming the right).<sup>38</sup>

### *Peculiarly within the knowledge*

[31] It may be justifiable to abrogate the privilege against self-incrimination in instances where Parliament considers the public interest is elevated over individual interests, for instance, where it is more important to determine the facts of a matter.<sup>39</sup> As Mason A-CJ and Wilson and Dawson JJ observed in *Pyneboard*, the privilege may be abrogated:

... when the object of imposing the obligation [for example, answering questions or producing documents] is to ensure the full investigation in 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*.<sup>40</sup>

[32] Instances where Scrutiny Committee found matters peculiarly within the knowledge of a person include the following:

- A provision in the [Criminal Law Amendment Bill 1996](#) requiring witnesses in proceedings for offences under the Criminal Code relating to bribery to answer any question relating to the offence, on the basis that the witness would be giving evidence against the person charged. The Scrutiny Committee observed that:  
...the section is aimed at the other party to a bribery offence where that party is a witness against the person charged. In these circumstances, it would clearly be a matter uniquely within the knowledge of that other party.<sup>41</sup>
- A provision in the [Legal Profession Bill 2004](#) providing that an associate or former associate of a law practice or another person may be required to appear before a court and answer all questions that the court allows in relation to regulated property (for example, trust money) of the law practice.<sup>42</sup>

<sup>38</sup> [AD 2006 No 6 p 21 para 35](#)

<sup>39</sup> *Pyneboard* [1983] HCA 9 per Mason ACJ, Wilson and Dawson JJ at [28]; (1983) 152 CLR 328 at 341 and *Caltex* [1993] HCA 74 per Mason CJ and Toohey J at [46]; (1993) 178 CLR 477 at 503-504;

<sup>40</sup> *Pyneboard* [1983] HCA 9 per Mason ACJ, Wilson and Dawson JJ at [27]; (1983) 152 CLR 328 at 341 (emphasis added)

<sup>41</sup> [AD 1997 No 2 p 19 para 1.91](#)

<sup>42</sup> [AD 2004 No 2 pp 14-15 paras 33-39](#)



- A requirement under the [Food Amendment Bill 2006](#) for a responsible person for a food business to advise the chief executive if the person suspects food has been intentionally contaminated.<sup>43</sup>
- A requirement under the [Transport \(Rail Safety\) Bill 2008](#) for a person to provide information about a suspected contravention relating to rail incidents, where the information would assist an incident investigation.<sup>44</sup>

[33] Even though matters peculiarly within the knowledge of a person may justify the abrogation of the privilege, the Scrutiny Committee repeatedly insisted that a use and derivative use immunity should apply to the answers given or documents produced under the requirement.

### *Use and derivative use immunity*

[34] At common law the privilege against self-incrimination protects a person from providing documents or answering questions that may tend to *directly or indirectly* incriminate them. If the privilege is to be abrogated by statute it should give the same immunity to the evidence that 'otherwise would have been privileged'.<sup>45</sup> As such, if a statute abrogates the privilege a use and derivative use immunity should be provided because, as Deane, Dawson and Gaudron JJ observed in *Caltex*:

[t]here is really little difference in principle between being compelled to incriminate oneself in other proceedings so that the evidence is available at one's trial and being compelled to incriminate oneself during the actual trial.<sup>46</sup>

[35] The only exception generally to the use and derivative use immunity is in proceedings relating to the falsity of the evidence provided.

### *Formally claiming*

[36] The Scrutiny Committee generally opposed the imposition of a condition that a person must first claim the privilege for it to be available, or claim the use and derivative use immunity if the privilege is not available.<sup>47</sup>

### *Documents issued or required to be kept under an Act*

[37] The Scrutiny Committee considered that it may be easier to justify the abrogation of the privilege against self-incrimination where a person is required to produce documents required to be issued or kept under an Act. Similarly, the Queensland Law Reform Commission expressed the view that by participating in a statutory regime (through obtaining a licence or other form of registration) a person has, as a condition of

<sup>43</sup> [AD 2006 No 4 p 22 para 21](#)

<sup>44</sup> [AD 2008 No 2 p 23 paras 56-62](#)

<sup>45</sup> *Sorby* [1983] HCA 10 per Gibbs CJ at [11]; (1983) 152 CLR 281 at 295

<sup>46</sup> *Caltex* [1993] HCA 74 per Deane, Dawson and Gaudron JJ at [21]; (1993) 178 CLR 477 at 532

<sup>47</sup> [AD 2002 No 6 p 45-47 paras 14-24](#); [AD 2003 No. 11 pp 4-6 paras 14-21](#)





participation, accepted the enforcement provisions and thus waived the benefit of the privilege against self-incrimination.<sup>48</sup> The Commission further observed that:

[i]t might also be argued that to allow a claim of privilege in relation to such records would thwart the purpose of the legislation, since it would facilitate a failure to keep the records, or their destruction or falsification, with little fear of detection.<sup>49</sup>

The Scrutiny Committee conceded this position had some merit.<sup>50</sup>

### *The penalty privilege*

- [38] The Scrutiny Committee included the penalty privilege in its consideration of whether legislation provided appropriate protection against self-incrimination, indicating that a provision abrogating the penalty privilege may not provide appropriate protection.<sup>51</sup>

### *Corporations*

- [39] The Scrutiny Committee considered its role to be essentially related to individuals. As a corporation cannot be imprisoned, abrogation of the privilege against self-incrimination to it assumes a different aspect from its abrogation to an individual.<sup>52</sup> The Scrutiny Committee therefore typically either abstained from commenting about, or expressed no objection to, provisions abrogating the privilege where the explanatory notes confirmed that the provisions would, in practice, only ever apply to corporations.<sup>53</sup>
- [40] In considering the [Local Government and Other Legislation Amendment Bill 2006](#), the Scrutiny Committee noted that executive officers of corporations can often be liable for the acts or omissions of the corporation.<sup>54</sup> Denying the privilege to corporations ‘might conceivably have an indirect prejudicial effect on individuals who are executive officers of the corporation’.<sup>55</sup> However, the Scrutiny Committee did not take this issue further, or subsequently raise it when considering other legislation because:

... due to the number of variables associated with the matter and the indirect nature of the potential prejudice, the actual likelihood of this occurring is impossible to gauge, and it is impractical for the committee to do more than flag the issue.<sup>56</sup>

- [41] In *Caltex*, McHugh J gave some consideration to the argument that denying the privilege against self-incrimination to corporations would deny the benefit of the privilege to individuals. However, his Honour reiterated that a person (in this instance the corporation) cannot claim the privilege if a third party (the executive officer) is likely to be incriminated.<sup>57</sup> While McHugh J acknowledged that denying the privilege to

<sup>48</sup> Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-Incrimination* (2004), Report No 59 p 37 para 4.11 (‘QLRC Report No 59 (2004)’)

<sup>49</sup> QLRC Report No 59 (2004) p 37

<sup>50</sup> [AD 2005 No 4 p 5 paras 36-38](#)

<sup>51</sup> [LA 2010 No 11 p 14 para 52](#)

<sup>52</sup> [AD 2007 No 1 p 6 para 20](#)

<sup>53</sup> [AD 2006 No 10 p 8 para 6](#); [LA 2010 No 6 p 60 para 57](#)

<sup>54</sup> [AD 2007 No 1 pp 4-9 paras 1-39](#)

<sup>55</sup> [AD 2007 No 1 p 7 para 22](#)

<sup>56</sup> [AD 2007 No 1 p 7 para 22](#)

<sup>57</sup> *Caltex* [1993] HCA 74 per McHugh J at [27]; (1993) 178 CLR 477 at 549



corporations would inevitably have ramifications for the company officers, he concluded that although '[m]embers of a corporation may be adversely affected by the conviction of a corporation ... they are not convicted'.<sup>58</sup>

- [42] The matter was also addressed in *Abbcco*, where Burchett J appeared to rely on the legal fiction that a corporation is a separate entity from its executive officers to justify denial of the privilege, holding that:

[w]here both a corporation and its officers are at risk of prosecution, to require discovery of the corporation is to make available documents which may accuse its officers. But their privilege has never been, nor should it be, a shield against the use of incriminating evidence - only a right to decline to be themselves the authors of their own destruction by *producing* the evidence. If evidence produced by the corporation condemns them, the relevant law is vindicated without any breach of the principle against self-incrimination.<sup>59</sup>

- [43] At least two statutory provisions take account of the issue identified by McHugh J and Burchett J in *Caltex* and *Abbcco* respectively. Section 209 of the [Animal Care and Protection Act 2001](#) provides the standard provision that an executive officer of a corporation must ensure the corporation complies with the Act.<sup>60</sup> However, section 209(5) of that Act provides that:

[i]t is also a defence in a proceeding against an executive officer for the officer to prove information that tended to incriminate the corporation was obtained under a help requirement or a document production requirement.<sup>61</sup>

- [44] Section 104 of the [Transport Operations \(Marine Pollution\) Act 1995](#) requires a person to comply with a requirement to give information unless the person has a reasonable excuse. Subsection 104(4) provides that it is not a reasonable excuse for a corporation not to comply if complying might tend to incriminate the corporation, but section 104(5) goes on to provide that:

If information is given under section 88(2) by a person who is a corporation, the information is not admissible in evidence against a representative of the person in a civil or criminal proceeding other than a proceeding against the representative—

- (a) for an offence against this section; or
- (b) in relation to the falsity of the information.

- [45] Consistent with its general practice of not commenting on provisions relating to corporations, the Scrutiny Committee did not comment on these provisions of the [Animal Care and Protection Act 2001](#) or the [Transport Operations \(Marine Pollution\) Act](#)

<sup>58</sup> *Caltex* [1993] HCA 74 per McHugh J at [27]; 1993) 178 CLR 477 at 549. However, the precise form of the provisions contemplated by McHugh J is unclear, as discussed in J Puls, *Corporate Privilege—Do Directors Really Have a Right to Silence Since Caltex and Abbcco Iceworks?* (1996) 13 *Environmental and Planning Law Journal* 364 ('Puls (1996)').  
<sup>59</sup> *Abbcco Iceworks* (1994) 52 FCR 96 at 116; [1994] FCA 1279 per Burchett J at [13]. Burchett J's findings are discussed in Puls (1996).

<sup>60</sup> As at January 2013, section 209 is subject to proposed amendments under the [Directors' Liability Reform Amendment Bill 2012](#).

<sup>61</sup> A 'help requirement' is defined in s 138 of the Act where a person must give an inspector reasonable help to exercise a power. Under s 139 it is a reasonable excuse only for an individual to not comply on the basis complying might tend to incriminate them. A 'document production requirement', dealt with in ss 168 and 169, is to the same effect.



1995.<sup>62</sup> However, these provisions go some way to protecting the rights and liberties of individuals who may be impacted by denial of the privilege to corporations.

*Specific reference to the privilege against self-incrimination*

- [46] The [Racing and Other Legislation Amendment Bill 2012](#) inserted sections 113AU and 113AV into the [Racing Act 2002](#), which allowed the Racing Integrity Commissioner to give a person a written notice requiring that the person attend before the commissioner, give information or produce a document. Section 113AW made it an offence to fail to appear, produce a document or give information without a reasonable excuse. While the Explanatory Notes stated that a reasonable excuse would include if compliance with the provision would incriminate the person or would breach legal professional privilege, the Health and Community Services Committee (*HCSC*) said the provision did not specifically provide that a reasonable excuse for failure to comply was on the basis of the privilege against self-incrimination.<sup>63</sup>
- [47] After considering the Minister's response, the HCSC recommended that the Bill be amended to specifically provide that a reasonable excuse for not complying with the Racing Integrity Commissioner's notice to answer a question or for failing to attend or provide a document was that the action may incriminate the person.<sup>64</sup> The HCSC said:

... the committee considers that it would be preferable that proposed section 113AW specifically provide that self-incrimination is a reasonable excuse for failing to comply with a notice under clause 113U [sic] or 113AV. *The committee therefore unanimously recommends an amendment to the Bill.*<sup>65</sup>

<sup>62</sup> See [AD 2001 No 5 pp 1-11](#); [LA 2010 No 6 p 60 para 57](#)

<sup>63</sup> [HCSC Report No 14](#) on the Racing and Other Legislation Amendment Bill 2012 p 14 ('HCSC Report No 14')

<sup>64</sup> [HCSC Report No 14 p 15](#) Recommendation 4

<sup>65</sup> [HCSC Report No 14 p 14-15](#) (emphasis added)