Northern Territory
Law Reform Committee

Report on

PRIVILEGE AGAINST SELF-INCRIMINATION

Report No. 23 October 2001

Our Ref:
Your Ref:

2 October 2001

The Hon Peter Toyne MLA
Attorney-General
GPO Box 3146
DARWIN NT 0801

Dear Minister

REPORT ON PRIVILEGE AGAINST SELF-INCRIMINATION

Pursuant to your request of 7 September 2001 I present to you the Report of the Law Reform Committee on the above subject, particularly in relation to Coronial Inquests.

Aspects of the privilege outside Coronial Inquests are also dealt with, but, will be given further attention in the broader Report the Committee is preparing on the "Right to Silence".

The Report now presented to you was prepared first by a Sub-Committee consisting of myself, Dr Philip Jamieson and Mr Greg McDonald with Ms Barbara Tiffin as Chief Executive Officer of the Committee. The resultant draft was then submitted to the full Law Reform Committee at the meeting on 28 September 2001 and, subject to various amendments then discussed and agreed upon, and now included, was approved.

I express my thanks to Dr Jamieson, Mr McDonald and Ms Tiffin for their assistance and to Mrs Carol Francis for her always willing help with typing and preparation.

During the preparation of the Report I sought the views of Mr John Tippett a practitioner of great experience in the field of criminal law. He prepared a commentary on the draft as it then stood, and this was extremely helpful to the Sub-Committee who incorporated some of his submissions into the draft report. On one aspect the Sub-Committee, and later the Committee, does not accept the argument put forward by Mr Tippett, but his dissenting view is set out in the body of the Report. I particularly thank Mr Tippett for his assistance so generously provided at a busy time.

I also had the opportunity of discussing with Mr Cavanagh the submission he had already provided on this question of the privilege against self-incrimination and how it affected the workings of the Coroner's Court. This opportunity for an informal discussion arose while both Mr Cavanagh and I were attending that popular clearing house of information and public opinion, namely the Parap Saturday Market. As usual, a useful exchange of knowledge and views ensued.

As will appear from the Report, the Committee sees no objection based on traditional legal barriers to the proposed legislation contained in the proposed Coroner's Amendment Act, although, for the reasons set out, it queries whether the phrase "to the satisfaction of the Coroner" in the proposed S 38 (1) & (2) is necessary or desirable, and suggests that, if a certificate is given, the protection of the certificate should extend to civil as well as criminal proceedings, as in the Tasmanian legislation.

Yours sincerely

AUSTIN ASCHE
President
Law Reform Committee

MEMBERS OF THE LAW REFORM COMMITTEE

As at the preparation of this Report

Hon Austin Asche AC QC

Mr Max Horton

Ms Maria Ceresa

Dr Philip Jamieson

Mr Greg Macdonald

Mr Hugh Bradley

Mr John Hughes

Mr Richard Bruxner

Ms Sally Gearin

Mr Peter Boyce

MEMBERS OF THE CORONERS ACT AMENDMENT SUB-COMMITTEE

Hon Austin Asche AC QC

Mr Greg Macdonald

Dr Philip Jamieson

Mr Jon Tippett

PRIVILEGE AGAINST SELF-INCRIMINATION

REPORT OF THE LAW REFORM COMMITTEE

The Attorney-General has requested the Law Reform Committee to consider the issue of privilege against self-incrimination, particularly in relation to witnesses in coronial inquests (letter 7/9/01).

The Committee already has under consideration a general survey of the "right to silence" and a sub-committee is presently working on this. One part of that report will deal with the privilege against self-incrimination in the overall field of criminal and civil law. Without pre-empting that investigation it is important to note that the jurisdiction of the Coroner under the *Coroners Act* is separate and distinct from the jurisdiction of a judge or magistrate in civil or criminal trial.

Specifically the *Coroners Act* gives the Coroner jurisdiction "to investigate a death if it appears to the Coroner that the death is or may be a reportable death" (s.14(1)). Further the Coroner is not bound by the rules of evidence and "may be informed and conduct the inquest, in a manner the Coroner reasonably thinks fit" (s.39). The significance of this will become apparent later in this report.

The Committee notes that a Bill has been drawn up by the Parliamentary Counsel on 15/6/01 amending the *Coroners Act* in relation to the privilege against self-incrimination.

The "right to silence"

The privilege against self-incrimination may be considered one aspect of the broader concept of the "right to silence" which is a compendious and somewhat inexact term to cover a number of rights and privileges recognised by the law. For instance, any citizen has the right to refuse to answer questions put to him by the police. There are some exceptions to this, eg he must, if requested, supply his name and address to the police (*Police Administration Act* s.134), and if in possession of goods suspected of being stolen, must give an explanation or face a conviction on the basis that he has given none; s.61 *Summary Offences Act,* and (a recent example), by s.7 of the *Weapons Control Act 2001* "a person must not without lawful excuse, proof of which is on the person, carry or use a controlled weapon in a public place"; but generally he is under no obligation to "assist the police with their enquiries". Furthermore, in the Northern Territory, though not in some other jurisdictions, that right is reinforced in a criminal trial by the right to elect not to give evidence and by the prohibition in any such trial against the judge or the prosecutor commenting on his failure to answer questions put to him by the police or on his failure to give evidence. Those matters are being considered by the Committee in the earlier reference and are not particularly relevant to this enquiry except in the sense that some would maintain that the "right to silence" is a broad over reaching inviolable philosophy of the common law, which includes, as an integral part, the privilege against self incrimination, and of which no part can be interfered with without serious damage

to the whole, and in particular to the liberty of the subject. This is an important argument based on considerable legal tradition and must be properly considered.

The privilege against self-incrimination

It is clear, however, that the privilege against self-incrimination is a separate sub-set of the "right to silence" with its own characteristics and rules. For instance, it is open to judicial scrutiny, insofar as a judge or magistrate must be satisfied that there is some basis for allowing the privilege. Furthermore a witness, other than a defendant electing not to give evidence, can still be examined and obliged to answer questions on collateral matters not impinging on such matters as might incriminate him, and, since he cannot be convicted twice of the same offence, he cannot refuse to answer questions about previous convictions.

The Protection of the Courts

Courts have traditionally and often emphatically upheld the privilege against self-incrimination. Gibbs CJ in Sorby v the Commonwealth (1983) 152 CLR at 288 speaks of the, "firmly established rule of the common law since the 17th century that no person can be compelled to incriminate himself". He goes on to say at 294:

> "It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt. Moreover the existence of such a power tends to lead to abuse and "the concomitant moral deterioration in methods of obtaining evidence and in the general administration of justice".

(The last quoted words in His Honour's remarks are taken from a Canadian case (1958) 12 DLR (2d) at 470 and no doubt His Honour quoted them to show a general acceptance of this view throughout common law countries).

In Reid v Howard (1995) 184 CLR1, their Honours Toohey, Gaudron, McHugh and Gummow JJ say at 11-12:

> "The privilege which has been described as a "fundamental … bulwark of liberty' is not simply a rule of evidence, but a basic and substantive common law right. It developed after the abolition of the Star Chamber by the Long Parliament in 1641 and, by 1737, it was said that there (was) 'no rule more established in equity'. More recently the privilege has been described as 'deeply ingrained in the common law'.

Many other comments of a like nature can be found in reported cases.

It may be, as Wigmore suggests (1940) edition Vol VIII, paragraph 2263) that the rule may have been founded on an erroneous basis. It certainly originated as a reaction against the Court of High Commission and the Court of Star Chamber and their habit of haling people before them and then questioning them indiscriminately about all manner of things in order to find some cause to charge

them. Bradshaw, who was counsel for Lilburn in the famous case in 1638 made the remark that it was :

> "Contrary to the laws of God, nature and the kingdom for any man to be his own accuser".

Yet, as Wigmore points out, Lilburn himself in that case does not seem to have objected to answering a specific charge against him, but rather and very understandably, to object that, having failed to prove that charge, the court then proceeded to question him further. He complained, "you go about to ensnare me" and "seeing the thing for which I am imprisoned cannot be proved against me you will get other matters out of my examination".

Though Wigmore may be historically correct and the objection was originally only to "fishing" examinations by the court, and it may also be said that the present system of charging a person with a specific offence, and restricting the evidence to that charge, is far removed from the infamy of Star Chamber proceedings, it must be conceded that the judges have, for at least two centuries, embedded the principle deeply in precedent.

Nevertheless the courts have always conceded that the legislature can abrogate the privilege and have confined themselves to ensuring only that, if there is any ambiguity in the statute , the privilege remains.

In Sorby's case, Gibbs CJ conceded that the privilege could be taken away by parliament (p289), and in Reid v Howard their Honours Toohey, Gaudron, McHugh and Gummow JJ said at p.12 that "The privilege ….. may be abridged by statute or waived, but, that aside it has generally been accepted that it is without real exception".

And, Parliament has in fact removed the privilege in certain cases.

Such legislation is often prompted by parliamentary concerns that a certain controversial issue or alleged evil should be thoroughly investigated by a person specially appointed and given special powers for that purpose. The plainest example of this would be a Royal Commission and it is quite usual that the Commissioner is given the power to, in effect, trade the lesser evil for the greater in order to place an accurate picture before parliament. Thus he can summon any person he believes may be able to give evidence relevant to the subject being inquired into and can compel that person to give evidence even though the person objects on the ground that it might incriminate him and even if the evidence then given does in fact incriminate him. But the Commissioner may offer an incentive to the giving of such evidence, by promising the witness an indemnity from prosecution if the witness satisfies the commissioner that the evidence he has given is full, frank and honest.

Thus in 1852 the British parliament passed "An Act to provide for the more effectual Inquiry in the Existence of corrupt Practices at Elections for Members to serve in parliament".

S.9 of that Act provided that "…..every person ….. engaged in any corrupt practice ….. who is examined as a witness and gives evidence ….. and

…..makes true discovery ….. shall be freed from all penal actions ….. and no person shall be excused from answering any question put to him by the Commissioner on the ground of any privilege, or on the ground that the answer to such question will tend to criminate such person".

This was the genesis of the WA *Protection of Witnesses Act* of 1875 which, in its terms, went much further because it applied to any case before the Supreme Court.

Indeed its terms were quite revolutionary so far as the common law was concerned. Yet it was even extended in 1906, becoming ss.11-13 of the WA Evidence Act and extending its operation from "any action suit or proceeding before the Supreme Court", to "any proceeding" which in the context seems to include at least the Disctrict Court as well.

This seems to be the first statute which was not confined to a simple investigation of a specific matter, as was the British Act. It empowered any judge to require a person to give evidence notwithstanding the privilege, and, in an appropriate case, to grant a certificate to that person which, when produced in another court, operated as a bar to any prosecutions otherwise arising out of the evidence he had given.

The *Tasmanian Evidence Act* of 1910 contains similar provisions (ss87-89).

The deviation of this sort of legislation from accepted principles of the common law was acknowledged. In Woods v Smith (1976) WAR13 Jackson CJ said:

> "Apart from similar provisions in the Tasmanian Evidence Act the legislation appears to be unique to this State".

See also Burt J at p19.

The novelty of the situation was not just that the legislature had created an exception to a cardinal rule of the common law. It had also, for that purpose, placed the judge in the position of an investigator using both carrot and stick to extract the truth, and weighing up whether an indemnity for one self confessed criminal act was a proper price to pay for disclosure and proof of another and more serious one. Jackson CJ said in Woods v Smith:

> "In my experience the section is occasionally availed of in a criminal trial when the Crown wishes to have evidence from a witness who may be an accomplice of the accused or have played some minor role in the commission of the offence charged" (p15).

Although in the WA and the Tasmanian Acts these sections are now incorporated into the Evidence Act of each State and have been in force for some time, they do not appear to have been applied with any great frequency. See the remarks of Jackson CJ already cited that the section is "occasionally availed of". The reason for this is probably the fact that it requires the exercise of a judicial discretion which a judge would no doubt be reluctant to use if it meant that a witness could escape conviction for a crime, particularly if it were a serious crime.

It should be noted that the overall test governing the exercise of the judge's discretion is whether it is "expedient for the ends of justice that such person

should be compelled to answer such question". This phrase appears both in the WA legislation (s.11(1)) and in the Tasmanian legislation (s.87). In Attorney-General v Cockram (1990) 2 WAR 477 the Full Court of Western Australia set out the matters which a judge should take into account in considering whether to apply the section. They are:

(a) Can the fact be proved satisfactorily some other way?
(b) Has the question asked little bearing on the outcome?
(c) Does the question reveal a crime of a more serious nature than the present issue?

In 1995 both the Commonwealth and the State of NSW enacted Evidence Acts, both of which contained, inter alia, a section (s 128) which, with some slight variations which are not relevant here, were in identical terms. They are not, however, in identical terms to the WA and Tasmanian legislation but, subject to two variations, would appear to have the same effect namely that if a court is satisfied that "the interests of justice require that the witness give evidence" (s128(5)(c) the court may require the witness to give that evidence notwithstanding that the evidence may tend to prove that the witness has committed an offence (s128(5)).

No doubt the same factors which the WA Full Court has mentioned will affect the court's discretion and it is specifically provided that if the court finds there are reasonable grounds for the objection it is not to require the witness to give the evidence (s.128(2)). The two variations are first, that there is no provision, as there is in the WA and Tasmania sections, that if evidence is given "in a satisfactory manner" the court will grant the certificate. The NSW and Commonwealth sections merely provide that if the evidence is given the court is "to cause the witness to be given a certificate" (See s.128(3)(4) and (5)). This Committee supports the approach taken in New South Wales and the Commonwealth. The removal of the privilege places the witness in the same position as any other witness, namely subject to proceedings for contempt or perjury or, in the exercise of discretion where the witness is determined to be hostile, cross-examination from Counsel Assisting the Coroner and any other party.

The power to take proceedings for contempt or perjury against a witness (two matters the Certificate presumably would not cover) are, in our opinion, sufficiently coercive as to enable a Court to deal with an uncooperative witness. The introduction of a test as amorphous as "to the satisfaction of the Coroner" would rightly be regarded by most as being akin to meeting the requirements of an idiosyncratic value judgment devoid of criteria by which such a judgment can be measured and hence the likelihood of a Certificate being granted determined.

The second variation is that whereas, in WA and Tasmania, the giving of a certificate is a bar to any prosecution of the witness for the offences disclosed (see s.13 of the WA *Evidence Act* and s.89 of the Tasmanian *Evidence Act*), under the NSW and Commonwealth Acts the effect of the certificate is that the evidence thereby obtained "cannot be used against the person". (s.128(7)). Although the scope of that inadmissible evidence is widened to include "any information, document or thing obtained as a direct or indirect consequence of

the person having given evidence", this may lead to some very nice distinctions in the future. Nevertheless the Committee supports the position taken in the New South Wales and Commonwealth Acts as more precisely defining and confining the protection to the evidence given.

It is proper to note however, that on this point Mr Tippett, a Counsel of great experience in criminal law disagrees. He says: *"I do not agree that the Certificate should be confined to the use of evidence in later or other proceedings. In my opinion the withdrawal of the privilege should only take place in circumstances where the Coroner is prepared to grant full indemnity against prosecution. As observed at page 5 of the paper to do otherwise may lead to some very nice distinctions in the future which I read as attempts to circumvent the protection afforded. There can be no "very nice distinctions" when a complete indemnity is granted. Further, if it is intended that the evidence not be used in any other Court and there is to be put in place a protection in the absence of the right not to convict one's self out of one's own mouth it is but a small step to ensure the evidence is not used in any way at all to grant a complete indemnity.*

In the end, the Coroner, in the face of either obtaining the evidence and granting an indemnity to do so or not having the evidence at all must weigh two important considerations, the first whether the evidence would really assist him in his investigation, the second whether the community might be deprived of an offender being dealt with if the evidence is obtained. Complete indemnity would require a consideration of the matters set out in paragraph 1 at page 5 of the paper which a lesser substitute for the abrogation of the privilege would not."

The privilege questioned by the legislature

Hence in the Commonwealth and in the States of NSW, WA and Tasmania there are now statutory provisions which have intruded upon the previously sacrosanct protection of the common law that no person is bound to incriminate himself. A number of examples outside the Acts previously mentioned are collated in Appendix A. How far and to what extent this will erode the traditional bastions erected by the judges after the Star Chamber experience is a matter for the future. How far it <u>should</u> do so is a matter for policy. Some would argue that the protection is outmoded and serves only to shield the evildoers, that Star Chamber tactics do not and could not apply these days, and that no innocent person would hesitate for a moment before explaining and justifying any conduct wrongly thought to be blameworthy. Others would regard the legislation as a sinister intrusion fraught with danger to the liberty of the subject. This report takes no sides but merely points out that if this parliamentary legislation reflects, as it should, what is appropriate for society, then society no longer sees a blanket indemnity as necessary or desirable. A fortiori that perception must extend to the workings of the Coroners Courts which are specifically set up to <u>inquire</u> ie conduct inquests.

The Coroners need for full Inquiry

It is in the Coroners Courts specifically that the perception seems to prevail that its proceedings are hampered by the protection given to witnesses who avail themselves of the privilege.

This committee has also been supplied with the submission of Mr Cavanagh, a Coroner of considerable experience who gives instances of where his inquiries may have been more satisfactory had he been permitted some discretion in ordering witnesses to reveal relevant matters which their privilege denied investigation. It is also cognisant of the fact that the Northern Territory and possibly Victoria are now the only States or Territories in which the privilege is absolute. Section 38 of the NT *Coroners Act* provides that: "A person shall not under this Act, be compelled to answer a question that may tend to incriminate the person".

However, it must be conceded that South Australia and Queensland come fairly close to the NT position since here, once the Coroner is satisfied that there are grounds for the objection, he must allow it.

The legislation previously referred to, (from WA, Tasmania, NSW and the Commonwealth) affects the common law courts but does not affect the Coroner's Court. This was decided in NSW in the case of Decker v State Coroner of NSW (1999) 46 NSWLR 415. Although that case was decided on NSW legislation it is probable that in WA, Tasmania and the Commonwealth a similar view would be taken because a Coroners' Court is in a very different position to other courts. Hence NSW, WA, Tasmania and the Commonwealth have all passed separate legislation dealing with Coroner's Courts or, more accurately, with coronial inquiries.

For a Coroner is in a very different position from a judge. He is an investigator with powers to call witnesses and act very much like a continental judge to find the facts – an investigator rather than an arbiter.

That is why the legislation abrogating the privilege against self-incrimination in the common law courts has an important bearing on the legislation now affecting coronial inquiries. If it is no longer a fact that a privilege prevails absolutely in common law courts, where the parties decide what witnesses to call, and the judges' power of investigation is severely limited, then there is even less reason to preserve the privilege where the Coroner is specifically charged with the duty of investigating and making reports and recommendations. In the course of the investigation a Coroner has wide powers eg to enter premises or direct others to enter premises, to inspect documents, take possession of anything considered relevant to the enquiry and give directions to the police force.(see s.19, s.25). These are not powers exercised by a judge whose duty is to adjudicate on such evidence as is placed before him by the parties.

If the Coroner is not so constrained and indeed has a specific duty to seek out the facts for himself, surely therefore the argument is strong that, if the investigation of those facts necessarily impinges upon criminal activity, he must have the power to investigate that criminal activity in order to discharge his duty

effectively. The submission of Mr Cavanagh makes it plain that the discharge of that duty can be hindered if it is met with a legally sanctioned silence in one area.

Obviously power to seek evidence and, if necessary, to compel evidence must be exercised with discretion. For instance, to question a prime suspect would be to deprive that person of that protection open at trial of not giving evidence at all. And, on the other hand, the price to be paid would be too great if it involved making inadmissible against the principal offender the very material he had supplied to the Coroner. But in these cases it is frequently the lesser offenders, or those not offending at all but caught up in a web of circumstances, who can provide evidence vital to the investigation. It is for the Coroner to determine whether the evidence is worth the price. Frequently the offences for which the witnesses seek protection are, as Mr Cavanagh puts it, "comparatively trivial or regulatory in nature, nevertheless the entitlement to silence has been taken".

Mr Cavanagh continues:

> "the result of this is that in those particular cases I have been unable to find all the relevant circumstances surrounding the death of the person who was the subject of the inquest. This is particularly frustrating to the next of kin and in many cases has the effect of preventing them from coming to terms with the death of their loved one. They have the apprehension that essential evidence is being held back from them. It is something that may have the effect of undermining general public confidence in the coronial process itself".

Interstate amendments to *Coroners Act*

NSW, WA, Tasmania and ACT now have legislation which empowers Coroners to compel witnesses to give evidence notwithstanding that the witness takes the objection that his answers might tend to incriminate him. There are some variations of approach.

In NSW s.33AA of the *Coroners Act* provides that if a witness at an inquest or inquiry objects to giving particular evidence on the ground that it might incriminate him the Coroner if satisfied that the interests of justice require the witness to give the evidence, may require that witness to give the evidence but, if he so requires, is "to cause the witness to be given a certificate".

The effect of the certificate is that the evidence given and collateral matters arising from the evidence cannot be used against the person in any proceedings in a NSW Court.

In WA if the objection is taken, the Coroner may "if it appears to the Coroner expedient for the ends of justice" compel the person to give evidence and must give a certificate "if the person gives evidence to the satisfaction of the Coroner". A certificate if given means that the evidence "is not admissible in evidence in criminal proceedings against the person". (ss.46, 47 *Coroners Act*).

In Tasmania if the Coroner "reasonably believes it is necessary for the purposes of an inquest", he may "order a witness to answer questions" but a statement or

disclosure so given “is not admissible evidence against that witness in any civil or criminal proceedings in any court”, (ss. 53,54 *Coroners Act*).

In the ACT a Coroner may “require a witness to answer” but the evidence cannot then be used in other proceedings (ss. 48(3) 79(4)).

The above Acts make it plain either expressly or impliedly that the protection against proceedings in other courts does not operate in the case of perjury.

A table setting out the general operation of Coronial legislation in Australia appears in Appendix B.

These Acts vary in the particular but make it plain that the Coroner has the discretion to order any witness to give evidence notwithstanding any claim to privilege, and the discretion is governed by “the interests of justice”.

Existing NT Legislation

Nor is the removal of the privilege against self-incrimination unknown to NT law. For example, see s.75 of the *Waste Management and Pollution Control Act.*

The proposed NT Amendment

The proposed NT amendment is contained in a Draft Bill to be presented to Parliament. The contents of that draft Bill follow the WA *Coroners Act* 1996 – s.47. Therefore if “it appears to the Coroner expedient for the ends of justice” the Coroner may compel a witness to answer questions notwithstanding that that person has declined to answer on the ground that it would incriminate him. If the person gives evidence “to the satisfaction of the Coroner” the Coroner must grant a certificate. The effect of the certificate will be that the evidence of the person “is not admissible in evidence in criminal proceedings against the person”.

The effect of the amendment is not to provide an indemnity from Prosecution. The witness could still be charged with a criminal offence following the inquest. However their evidence to the Coroner cannot be adduced by the Crown in the Prosecution.

Two particular aspects of the bill may warrant further consideration. First, the policy behind the amendment is to get to the truth. As many witnesses at inquests are more concerned about civil liability than criminal charges and guilt, the policy may be more likely fulfilled if the certificate were extended to include “any criminal, civil or other proceedings”.

Secondly, it is noted that inquests are generally held in open court, and evidence and findings are not generally the subject of suppression orders. In any circumstance where a witness gives evidence effectively confessing to an indictable offence, if the confession is reported in the press and recorded in the Coroner’s findings, the guarantee of a fair trial will be eroded. This is particularly

so in a small community such as the Territory. There are however, existing discretionary powers in the Coroner to suppress evidence in an appropriate case (s.43).

CONCLUSION

In view of the legislative developments in other States and Territories which have modified the classic common law privilege against self-incrimination, and in view of a clear intention in *Coroners Acts* that the Coroner should carry out a thorough investigatory process which may be hampered if certain witnesses are allowed to take the privilege and thereby withhold information which may be vital to the investigation, and in view of the safeguards imported by the power to give certificates to prevent the evidence of witnesses from being used against them in other proceedings, on balance this Committee supports the amendments to sections 38 & 41 of the draft bill to amend the NT *Coroners Act*, and indeed considers them to be important amendments to serve the ends of justice.

The Committee would however, for the reasons already given, suggest that the words “to the satisfaction of the Coroner” in s.38(1) and (2) of the Draft Bill as it presently appears be omitted, and that in s.38(3) of the Draft Bill as it presently appears, there be added the words “civil and” before the words “criminal proceedings”.

Comparative Table of Coroners Acts in Relation to Self-Incriminating Evidence

Appendix "A"

State/Territory	Legislation	Section	Details	Comment
Northern Territory	*Commission of Inquiry (Chamberlain Convictions) Act 1986*	9	"A person is not entitled to refuse or fail to answer a question that he is required to answer by the Commissioner on the ground that the answer to the question might tend to incriminate him."	Abrogates the privilege. Does not provide for protection against further proceedings for any evidence that is given. Applies to a specific section.
Victoria	*Credit (Administration) Act 1984*	38	"A person is not excused from answering a question or producing a document under this Part on the ground that the answer or document might tend to incriminate the person."	Abrogates the privilege and does provide that the evidence is inadmissible in criminal proceedings only. Applies to a specific Part.
Commonwealth	Sex Discrimination Act 1984	91	"It is not a reasonable excuse …for a person to refuse or fail to furnish information… might incriminate the person…".	Abrogates the privilege and provides that the evidence is inadmissible in any proceeding. Applies to a specific section.
Western Australia	*Equal Opportunity Act 1984*	164	"It is not a reasonable excuse…to refuse or fail to furnish information… might incriminate the person".	Abrogates the privilege for a specific section. Provides that the evidence is inadmissible in any proceeding.
South Australia	*Rail Safety Act 1996*	49	"It is not an excuse for a person to refuse or fail to answer a question…on the ground that to do so might tend to incriminate the person".	Abrogates that privilege for a specific division. Provides that the evidence is inadmissible in a proceeding for an offence or penalty.
Australian Capital Territory	*Trade Measurement Act 1991*	66	"A person is not excused from answering any question …on the ground that the answer might tend to incriminate the person".	Abrogates the privilege for a specific part. Provides that the evidence is inadmissible in any criminal proceeding.
Queensland	*Evidence Act 1977*	10	"Nothing in this Act shall render any person compellable to answer any question tending to criminate the person."	Protects the privilege.

New South Wales	*Independent Commission Against Corruption Act 1988*	26	"If the statement, document or other thing tends to incriminate the person and the person objects to production at the time, neither the fact of the requirement nor the statement, document or thing itself (if produced) may be used in any proceedings against the person (except proceedings for an offence against this Act).	Protects the privilege. Provides that if the privilege is waived then the evidence is inadmissible in any proceedings.

There is a pattern then, that if the privilege is abrogated then the evidence given will be inadmissible in either criminal or civil proceedings, or both. The abrogation does not apply generally in relation to an Act. It usually applies to a specific section, part or division. The key words that are used are "not a reasonable excuse" and "might tend to incriminate". The *Sex Discrimination Act 1984* (Cth) actually provides for what will be a "reasonable excuse", the Act reads:

"S.91 (2) Without limiting the generality of the expression "reasonable excuse" in s90, it is hereby declared for the removal of doubt that it is a reasonable excuse for the purposes of that section for a person to refuse or fail to answer a question put to the person at an inquiry, or to refuse to produce a document, that the answer to the question or the production of the document, might incriminate the person."

SELF-INCRIMINATION AND THE COMMON LAW

- The privilege against self-incrimination applies equally to documentary and oral evidence
  - *Pyneboard Pty Ltd v Trade Practices Commission (1983) 45 ALR 609.*

- The privilege does not apply to corporations
  - *Environmental Protection Authority v Caltex Refining Company PTY Ltd (1993) 118 ALR 392 at 412*.

- "The privilege is designed to protect human dignity. It is designed not to provide a shield against conviction, but to provide a shield against conviction wrung out of the mouth of the offender." – Brennan J
  This shows an emphasis on the human rights aspect of the privileges.
  - *Environmental Protection Authority v Caltex Refining Company Pty Ltd (1993) 118 ALR 392*.

- "…the privilege can only be justified on two grounds, first that it discourages the ill-treatment of a suspect and secondly, that it discourages the protection of dubious confessions." – Lord Templeman.
  AT & T Istel v Tully (1993) ACT 45 at 53.

The court has also described the privilege as one of the group of rights and immunities covered by the expression "the right to silence".
- *Discussion Paper 41 (1993) – The Right to Silence – Lawlink*.

NORTHERN TERRITORY LAW REFORM COMMITTEE

Appendix "B"

State/Territory	Legislation	Section	Details of Section	Comment
Northern Territory	*Coroners Act 1993*	38	"A person shall not, under this Act, be compelled to answer a question that may tend to incriminate the person."	The Coroner cannot compel a person to answer a question. Will not apply to giving information or producing documents.
South Australia	*Coroners Act 1975*	16(2)	"A person is not obliged to answer a question put to the person under this section, if the coroner is satisfied the answer would tend to incriminate the person, or to produce any books, papers or documents, if the coroner is satisfied their contents would tend to incriminate the person."	Person can refuse to answer a question if the Coroner is satisfied that the answer is incriminating. Will apply to documents etc.
Queensland	*Coroners Act 1958*	38A	(a) being called to give evidence, refuses without just excuse to be sworn as a witness, or to give evidence, or to answer any question put to the person by the coroner or allowed by the coroner to be put to the person;"	Person cannot refuse to answer a question without 'just excuse'. Will apply to documents etc. Refusal is punishable by 2 penalty units or imprisonment not exceeding 14 days.
Western Australia	*Coroners Act 1996*	47	(1)If a person called as a witness at an inquest declines to answer any question on the ground that his or her answer will criminate or tend to criminate him or her, the coroner may, if it appears to the coroner expedient for the ends of justice that the person be compelled to answer the question, tell the person that if the person answers the question and other questions that may be put to him or her, the coroner will grant the person a certificate under this section.	The coroner can compel the person to answer the question where it is expedient. They must be granted a certificate that will not allow their statement to be used in evidence in a criminal proceeding against them. Except for perjury committed in criminal proceedings against the person.

GPO Box 1535, DARWIN NT 0801
Telephone: (08) 8999 6320 Facsimile: (08) 8999 7095
Email: barbara.tiffin@nt.gov.au

New South Wales	*Coroners Act 1980*	33AA	"(3)If the coroner is satisfied that the evidence concerned may tend to prove that the witness has committed an offence or is liable to a civil penalty but that the interests of justice require the witness to give the evidence, the coroner may require the witness to give the evidence. If the coroner so requires, the coroner is to cause the witness to be given a certificate under this section in respect of the evidence."	The privilege of self-incrimination exists. The coroner can compel a witness to give evidence but must grant a certificate if he or she orders so that the evidence cannot be used against the witness in any proceedings.
Victoria	*Coroners Act 1985*	46		Coroner can order or summon a witness to answer questions. Failure to obey the order is punishable by 10 penalty units and up to 3 months imprisonment.
Australian Capital Territory	*Coroners Act 1997*	48(2), 79(4)	"A coroner may – require a witness to answer a question put to the witness."	Coroner can require a witness to answer. However the Act does allow for a reasonable excuse not to do so. Also, a person is not excused from producing a document or thing on the grounds of self-incrimination, but any evidence given cannot be used in proceedings against them except for an offence in involving the bribing of witnesses under section 86 which is punishable by 500 penalty units and up to 5 years imprisonment.

Tasmania	*Coroners Act*	53,54	"53(1)(c) order a witness to answer questions; and (d) order a witness to take an oath or affirmation to answer questions; and (4) A person must not, without reasonable excuse, disobey a summons, order or direction under subsection (1). 54. A statement or disclosure made … in the course of giving evidence …. at an inquest is not admissible in evidence against that witness in any civil or criminal proceeding in any court other than a prosecution for perjury in the giving of that evidence."	The coroner can order a witness to answer questions and the witness must not disobey this order without reasonable excuse. If the person does give evidence then that evidence cannot be used against them in any subsequent proceedings. Excepting a prosecution for perjury in the giving of that evidence.
Commonwealth	*National Crime Authority Act 1984*	30	"It is not a reasonable excuse….to refuse or fail to answer a question put to him or her at a hearing before the Authority….."	This is an exhaustive section that basically abrogates the privilege but the evidence given cannot be used against them in any proceedings.
Commonwealth	*ASIC Act 1984*	68	"…it is not a reasonable excuse for a person to refuse or fail: (a) to give information; ……might tend to incriminate the person or make the person liable to a penalty."	This section abrogates the privilege and once again the evidence which is given is inadmissible in evidence against the person in any proceedings.

The Northern Territory *Coroners Act 1993* is the only act of these surveyed that protects the privilege to refuse to answer a question on the grounds of self-incrimination. In a number of different ways, all other State and Territory legislation abrogate the privilege whether absolutely or by requiring that there need be a 'reasonable excuse' to refuse to answer a question. In circumstances where the privilege is removed and the witness is compelled to answer a question, the legislation provides, in most cases, that the evidence is inadmissible in proceedings against that person. Unless they have perjured themselves in relation to the giving of that evidence.