"I Don't Have To Talk To You, You Giraffe"

A Discussion Paper on The Right to Silence

March 2020 Edition

"I don't have to give you anything, you fat spiv.
You're nothing but a useless fat spiv.
I don't have to talk to you, you giraffe."

Garry Burns in the presence of Sergeant Gover and Constable Taylor
at Kings Cross police station; 29 June 1998 at about 8.40pm.
Burns v Seagrave [2000] NSWSC 77 per Simpson J at [3].

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WHAT IS "THE RIGHT TO SILENCE" ?

In *Azzorpardi v R* [2001] HCA 25, 205 CLR 50, 179 ALR 321, 75 ALJR 867 at [160] McHugh J cited with approval the judgment of Lord Mustill in *Smith v Director of Serious Fraud Office* [1992] 3 All ER 456 concerning the "right to silence". Lord Mustill held that rather than being a "right", what was really referred to by this expression was a "disparate group of immunities". The key passage is set out below:

***Smith v Director of Serious Fraud Office* [1992] 3 All ER 456**

Lord Mustill at 463-464:

"I turn from the statues to "The right of silence". This expression arouses strong but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin incidence and importance, and also as to the extent to which they have already been encroached upon by statute. Amongst these may be identified:

(1) a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies;

(2) a general immunity, possessed by all persons and bodies from being compelled on pain of punishment to answer questions the answers to which may incriminate them;

(3) a specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from begin compelled on pain of punishment to answer questions of any kind;

(4) a specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock;

(5) a specific immunity possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority;

(6) a specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial2 . Each of these immunities is of great importance, but the fact that they are all important and that they are all concerned with the protection of citizens against the abuse of powers by those investigating crimes makes it easy to

assume that they are all different ways of expressing the same principle, whereas in fact they are not."

SILENCE OF THE ACCUSED WHEN QUESTIONED BY POLICE - SECTION 89 OF THE *EVIDENCE ACT 1995 (NSW)*

Section 89 of the Evidence Act 1989 (NSW) reads as follows:

> ***89 Evidence of silence generally***
> *(1) Subject to section 89A, in a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:*
> *(a) to answer one or more questions, or*
> *(b) to respond to a representation,*
> *put or made to the party or other person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.*
> *(2) Evidence of that kind is not admissible if it can only be used to draw such an inference.*
> *(3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.*
> *(4) In this section:*
> ***inference** includes:*
> *(a) an inference of consciousness of guilt, or*
> *(b) an inference relevant to a party's credibility.*

The Refusal to Answer Questions

The refusal to answer question at interview with police is a matter from which no adverse inference can be drawn. This is so as a product of the terms of section 89 itself. It is also borne out by the pre-Evidence Act decision of the High Court of Australia in *Petty & Maiden v The Queen* [1991] HCA 34, 131 CLR 95. The key passage from that judgment is set out below:

Petty & Maiden v The Queen [1991] HCA 34, 173 CLR 95

At [2]:

> *"...An incident of that right of silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right of silence or to render it valueless...."*

At [3]:

> *3. That incident of the right of silence means that, in a criminal trial, it should not be suggested, either by evidence led by the Crown or by questions asked or comments made by the trial judge or the Crown Prosecutor, that an accused's exercise of the right of silence may provide a basis for inferring a consciousness of guilt. Thus, to take an example, the Crown should not lead*

evidence that, when charged, the accused made no reply. Nor should it be suggested that previous silence about a defence raised at the trial provides a basis for inferring that the defence is a new invention or is rendered suspect or unacceptable.

The Selective Answering of Questions

Section 89 (1)(a) of the *Evidence Act 1995 (NSW)* prohibits (subject to section 89A) the drawing of an inference against an accused for failing to answer *one or more questions* or (b) respond to a representation. Defence practitioners at both Local Court and trial level should seek a relevant direction regarding this issue if appropriate. The relevant direction, of course, is one to the effect that no adverse inference can be drawn against an accused person in the event that they engage in a selective answering of questions in the course of being questioned by police.

The point is highlighted in the pre-Evidence Act common law, including the following two decisions of note:

Regina v Tolmie **NSWCCA 2/8/93 unrep.**

Handley JA at p.11-12:

"However, in my opinion, and with respect, the trial Judge did err in instructing the jury that they were entitled to infer consciousness of guilty from the selective answers given by the appellant to police questions. Such a direction is not supported by anything in Woon v R and is contrary to a series of decisions of the Victorian Court of Criminal Appeal which, in my opinion, are correct, and should be followed. I R v McNamara (1987) VR 855 (Young CJ, Newton and Kaye JJ, judgment delivered in November 1976) the Court said at 868:-

> *"...we consider that it was a misdirection on the part of the learned Judge to proceed to tell the jury that the applicant's answers and the manner of his selectiveness would entitle you, if you thought fit, to hold that the interview in this case demonstrated a consciousness of guilt of the crime here charged."*

This decision was followed in R v Bruce (1988) VR 579 at 594 and in R v Smith (1990) 50 A Crim R 434 at 457 by the Victorian Court of Criminal Appeal and by Hunt CJ at CL in R v Malone (30/9/92 unreported). In principle this must be correct. ***If the jury are not entitled to draw adverse inferences from the exercise of the right to silence the position should be no different when the right has been exercised selectively."***

Regina v Helen Margaret Towers **NSWCCA 7/6/93 unrep.**

The Court (Hunt CJ at CL, Smart and Studdert JJ) stated at -page 7:

In R v Towers Court of Criminal Appeal, 7 June 1993, unreported, at 12 Handley JA, with whom Hunt CJ at CL and Badgery-Parker J agreed, pointed out that if the jury is not entitled to draw adverse inferences from an exercise of the right to silence the position should be no different when the right has been

exercised selectively. Handley discussed the authorities comprehensively and there is no need to repeat that discussion."

Leading Evidence of Having Exercised the Right to Silence

***R v Reeves* [1992] 29 NSWLR 109**

In this case the NSWCCA held that where the allegation is put to the suspect, and the suspect declines to answer questions, this evidence should be led in order to prevent any potential criticism of the investigation of the matter. However, upon such evidence being led, a direction should be given to the effect that the accused has a right not to answer questions and that no adverse inference can be drawn against the accused for availing themselves of that right.

The ***Reeves direction*** at common law takes its name from the decision of the NSWCCA decision of *R v Reeves* (1992) 29 NSWLR 109. Section 89 of the *Evidence Act 1995 (NSW)* has now put the common law position on a statutory footing. Practitioners will commonly ask for a direction pursuant to section 89; however the direction is still occasionally referred to by its common law name. The essence of the direction is that no adverse inference can be drawn against the accused for exercising his or her right to silence. The direction should be given at the time the evidence is led. It may be repeated in the summing up, though it is not essential.

The relevant "purple passage" from the judgment of Hunt CJ at CL in *R v Reeves* (1992) 29 NSWLR 109 at 115 is set out below:

"However, where such evidence is given which discloses that the accused has exercised his right of silence, a direction should invariably be given – as soon as the evidence is given, and, if necessary, again in the summing up – to make it clear to the jury that the accused had a fundamental right to remain silent and that his exercise of that right must not lead to any conclusions by them that he was guilty: R v Astill (Court of Criminal Appeal, 17 July 1992, unreported) at9. It would usually be appropriate also to remind the jury that (if it be the fact) the accused had specifically been cautioned by the police that he was not obliged to answer any questions, so as to avoid any suggestion of a familiarity by the accused with criminal investigation procedures."

SILENCE OF WITNESSES WHEN SPOKEN TO BY POLICE - SECTION 89 OF THE *EVIDENCE ACT 1995 (NSW)*

The Refusal of a Witness to Make a Statement to Police

It should be noted by practitioners that section 89 of the *Evidence Act* does not apply solely to the accused. It also applies in circumstances where a witness has declined to say anything to the police, yet attends Court to give evidence. This scenario most

typically arises where a witness for the defence chooses not to speak to the police, but does speak to the legal representatives of the accused, and subsequently becomes a defence witness.

Jones v The Queen [2005] NSWCCA 443 provides an example where it was held that cross-examination and closing address by the Crown Prosecutor criticising a defence witness for failing to speak to the police during the course of an investigation was held to be contrary to the section.

If there is no adverse inference that can be drawn, then the fact that the witness chose not to speak to police when they had an opportunity to do so is irrelevant. Objection should be taken to such a line of questioning on the grounds of relevance.

THE SPECIAL CAUTION – SECTION 89A OF THE *EVIDENCE ACT 1995 (NSW)*

The special caution is referred to in section 89A of the *Evidence Act 1995 (NSW).* This section can be found at Appendix 1 (page 16) of this paper.

Section 89A defines the "special caution at subsection (9) in the following terms:

> ***special caution*** *means a caution given to a person that is to the effect that:*
>
> *(a) the person does not have to say or do anything, but it may harm the person's defence if the person does not mention when questioned something the person later relies on in court, and*
> *(b) anything the person does say or do may be used in evidence.*

The special caution can only be given in the presence of an Australian legal practitioner acting on behalf of the defendant.

The special caution does not apply to a person under the age of 18 years.

The special caution only applies during the course of official questioning. This term is defined at subsection (9) in the following terms:

> ***official questioning*** *of a defendant in relation to a serious indictable offence means questions put to the defendant by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of the serious indictable offence.*

The special caution only applies to a "serious indictable offence". The *Evidence Act 1995 (NSW)* does not define this term, nor does the Evidence Act dictionary. The *Crimes Act 1900 (NSW)* section 4 defines "serious indictable offence" as an offence punishable by imprisonment for life or for a term of five years or more. Whilst one presumes the *Crimes Act* definition would apply, there is no case law on this issue to date.

The NSW Trial Bench Book has not yet formulated a standard trial direction on this issue. The UK Crown Court bench book may be of some limited assistance – though caution should be exercised her in light of the observations of the NSWCCA in *R v Hogg* [2019] NSWCCA 323 as discussed below.

The NSW Case Law

There is only one decided case on the special caution in New South Wales – namely *R v Hogg* [2019] NSWCCA 323. The NSWCCA gave only limited insight into the operation of the special caution, notwithstanding that a number of issues were raised in the Grounds of Appeal. At the trial, directions concerning the special caution were given to the jury, largely fashioned up on the UK Bench Book. The NSWCCA noted important differences in the UK legislation, disapproved of the trial direction given, but did not suggest a model direction for NSW.

One of the bases that the NSWCCA upheld the appeal was that the Crown did not put to the accused under cross-examination that his reason for exercising his right to silence was that he had no satisfactory explanation to give in the face of police questioning consistent with innocence. The appellant's evidence in chief to the effect that he exercised his right to silence as a result of legal advice was thus left unchallenged. The NSWCCA in those circumstances concluded that it was an error for a direction pursuant to section 89A to have been given.

The United Kingdom Case Law

Whilst there are a number of cases decided under the UK legislation, their utility for the purposes of proceedings in NSW is in some doubt given the NSWCCA decision in *R v Hogg* [2019] NSWCCA 323. A number of the significant authorities from the UK are discussed in the judgment in *Hogg.*

This area of the law remains uncertain in NSW at the time of writing, and will hopefully be subject of further development in our own case law in the not too distant future.

The UK Crown Court Benchbook can be found online in the event that practitioners are brave enough to seek some assistance from it.

SILENCE IN COURT - SECTION 20 OF THE *EVIDENCE ACT 1995 (NSW)*

Section 20 of the *Evidence Act 1995 (NSW)* reads as follows:

> ***20 Comment on failure to give evidence***
>
> *(1) This section applies only in a criminal proceeding for an indictable offence.*
>
> *(2) The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment must not*

suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.

(3) The judge or any party (other than the prosecutor) may comment on a failure to give evidence by a person who, at the time of the failure, was:

(a) the defendant's spouse or de facto partner, or

(b) a parent or child of the defendant.

(4) However, unless the comment is made by another defendant in the proceeding, a comment of a kind referred to in subsection (3) must not suggest that the spouse, de facto partner, parent or child failed to give evidence because:

(a) the defendant was guilty of the offence concerned, or

(b) the spouse, de facto partner, parent or child believed that the defendant was guilty of the offence concerned.

(5) If:

(a) 2 or more persons are being tried together for an indictable offence, and

(b) comment is made by any of those persons on the failure of any of those persons or of the spouse or de facto partner, or a parent or child, of any of those persons to give evidence,

the judge may, in addition to commenting on the failure to give evidence, comment on any comment of a kind referred to in paragraph (b).

The *Azzopardi* Direction

The High Court of Australia considered the interpretation of section 20 in *Azzopardi v The Queen.* This led to the formulation of what became known as the "*Azzopardi* Direction." The direction draws significantly from the judgment of Gaudron, Gummon, Kirby and Hayne JJ at [38]

Azzopardi v The Queen **[2001] HCA 25, 205 CLR 50, 179 ALR 349, 75 ALJR 931**

Their Honours Gaudron, Gummow, Kirby and Hayne JJ stated at [38]:

> *"[38]…It is, therefore, clear beyond doubt that the fact that an accused does not give evidence at trial is not of itself evidence against the accused. It is not an admission of guilt by conduct; it cannot fill in any gaps in the prosecution case; it cannot be used as a make-weight in considering whether the prosecution has proved the accusation beyond reasonable doubt[24]. Further, because the process is accusatorial and it is the prosecution that always bears the burden of proving the accusation made, as a general rule an accused cannot be expected to give evidence at trial. In this respect, a criminal trial differs radically from a civil proceeding…."*

Later, at [51], their Honours stated:

> *"In the course of argument of the present matters it was suggested that if a judge said nothing to the jury about the fact that an accused had not given evidence, the jury may use the accused's silence in court to his or her detriment.*

Plainly that is so. It follows that if an accused does not give evidence at trial it will almost always be desirable for the judge to warn the jury that the accused's silence in court is not evidence against the accused, does not constitute an admission by 2 the accused, may not be used to fill gaps in the evidence tendered by the prosecution, and may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt. It by no means follows, however, that the judge should go on to comment on the way in which the jury might use the fact that the accused did not give evidence."

THE FAILURE OF THE DEFENCE TO CALL OTHER WITNESSES

The defence case may make mention of witnesses who appear material to the defence case. However, the defence has no obligation to call such witnesses, and nor can any adverse inference be drawn from the failure of the defence to call such witnesses. This was made plain by the High Court of Australia in *Dyers v The Queen* [2002] HCA 45, 210 CLR 285, 76 ALJR 1552. The relevant "purple passage' is set out below:

***Dyers v The Queen* [2002] HCA 45, 210 CLR 285, 76 ALJR 1552.**

Gaudron and Hayne JJ at [15] stated:

"...where there is evidence that there may be persons who could have, but have not, given relevant evidence, it is almost always desirable to tell the jury that they may not speculate about what those witnesses might have said but must decide the case only on the evidence that has been led. A direction of that kind, about how the jury should not reason, is a proper form of judicial instruction to the jury."

THE FAILURE OF THE CROWN TO CALL WITNESSES

The failure of the Crown to call material witnesses is, on the other hand quite different. Given that the prosecution must prove the given charge or charges beyond a reasonable doubt, the failure of the Crown to call witnesses that are material may be weighed in determining whether proof beyond reasonable doubt has been made out. This was made plain by the High Court of Australia in *Mahmood v Western Australia* [2008] HCA 1, 232 CLR 397, 180 A Crim R 142 at [27]. The relevant "purple passage" is set out below:

***Mahmood v Western Australia* [2008] HCA 1, 232 CLR 397, 180 A Crim R 142 at [27].**

Gleeson CJ, Gummow, Kirby and Kiefel JJ at [27}:

" [27] It was neither necessary nor appropriate for the trial judge to direct the jury that an inference adverse to the case for the prosecution could be drawn because the presence of blood in the appellant's trouser pocket had not been the subject of evidence by the prosecution's witnesses. In the joint reasons in RPS v

The Queen it was pointed out that where a witness, who might have been expected to be called and to give evidence on a matter, is not called by the prosecution, the question is not whether the jury may properly reach conclusions about issues of fact but whether, in the circumstances, they should entertain a reasonable doubt about the guilt of the accused. Similar views were expressed by Gaudron and Hayne JJ and by Callinan J in Dyers v The Queen. "

MODERN DAY EXCEPTIONS TO THE RIGHT TO SILENCE

COURT PROCEEDINGS

Section 128 Certificates

Section 128 of the *Evidence Act 1995 (NSW)* can be found at Appendix 2 (page 18) of this paper.

The section provides a witness in proceedings protection against self-incrimination. The Court needs to:

- Firstly determine whether the witness has an objection to giving evidence.
- Secondly whether the objection is on reasonable grounds
- Thirdly, determine whether the Court requires the witness to give the evidence on the basis that, notwithstanding that the evidence may incriminate the witness, it is in the interests of justice to require the witness to give the evidence.

It should be noted that an accused person in criminal proceedings does not, as the case law currently stands, have the right to seek a certificate pursuant to section 128. Guidance on this point is obtained from the High Court of Australia in *Cornwell v The Queen* [2007] HCA 12, 231 CLR 260, 169 A Crim R 89, 81 ALJR 840 where the majority doubted that an accused in criminal proceedings could avail themselves of the section. The purple passage is set out below:

***Cornwell v The Queen* [2007] HCA 12, 231 CLR 260, 169 A Crim R 89, 81 ALJR 840**

Gleeson CJ, Gummow, Heydon and Crennan JJ stated at [111][112]:

"[111] ...raises a question whether s 128(1), and hence s 128 as a whole, applies where a witness sets out to adduce in chief evidence revealing the commission of criminal offences other than the one charged. A criminal defendant might wish to present an alibi, the full details of which would reveal the commission of another crime. A civil defendant might wish to prove the extent of past earnings, being earnings derived from criminal conduct. This raises a question whether witnesses who are eager to reveal some criminal conduct in chief, because it is thought the sting will be removed under sympathetic handling from their own counsel or for some other reason, are to be treated in the same way as witnesses who, after objection based on genuine reluctance, give evidence in cross-examination about some crime connected with the facts about which evidence is given in chief.

"[112] The view that the accused's claim of privilege in all the circumstances answered the requirements of s 128(1) has difficulties. It strains the word "objects" in s 128(1). It also strains the word "require" in s 128(5) – for how can it be said that a defendant-witness is being "required" to give some evidence when his counsel has laid the ground for manoeuvres to ensure that the defendant-witness's desire to give the evidence is fulfilled? And it does not fit well with the history of s 128(8). For one thing, s 1(e) of the 1898 Act and its Australian equivalents provided that an accused person called pursuant to the legislation could be "asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged", which implies that the protection of the accused's position in chief or in re-examination was a matter between the witness's counsel and the witness. For another thing, the Australian Law Reform Commission, in summarising the pre-s 128(8) law, assumed that s 1(e) and its Australian equivalents were to be construed as applying to questions in cross-examination only."

The Coroners Court

The relevant legislation here is section 61 of the *Coroners Act 2009 (NSW).* A copy of the section can be found at Appendix 3 of this paper (at page 20).

The section provides protection from evidence that may be self-incriminating and prohibits its use in any other criminal or civil proceedings. The Coroner must be satisfied that it is "in the interests of justice" to grant the certificate. The section also provides protection against "use derivative use". Use derivative use in essence contemplates the scenario where the protected evidence is not used directly, however it points the prosecuting or investigators to other evidence that could notionally then be used against the witness in other proceedings. The section prohibits such a course.

POLICE POWERS AND POLICE INVESTIGATIONS

Powers Pursuant to *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* – "LEPRA"

Section 11 of *LEPRA* empowers a police officer to require a person to disclose their identity if the officer suspects on reasonable grounds that the person may be able to assist om the investigation of an alleged indictable offence because the person was at or near the place where the alleged indictable offence occurred, whether before, when or soon after it occurred. Note that pursuant to sections 13A and 14 police have the power to require proof of identity. Section 11 of LEPRA is set out at Appendix 4 of this paper (at page 22).

Specific Powers re Motor Vehicles

Section 14 of *LEPRA* empowers a police officer to require the driver of a motor vehicle to disclose their identity and the identity of any other driver or passenger in or on the vehicle at or about the time the vehicle was, may have been used in connection with an indictable offence. Police are also empowered to seek the same information from any passenger, or any owner of the vehicle. Section 14 of LEPRA is also set out at Appendix 4 of this paper (at page 22).

Motor Vehicle Crashes

Road Rule 287 is set out at Appendix 5 of this paper (at page 23).

The rule requires a number of things including:

- That the driver give *required particulars* to:
- the other driver
- any other person involved in the crash who is injured, or their representative
- the owner of any property that is damaged

Regarding information to be provided to police, the rule requires: - The *required particulars* if asked by police including name and address, name and address of vehicle owner, vehicle registration, any other information necessary to identify the vehicle, and an explanation of the circumstances of the crash.

CONCEALING A SERIOUS OFFENCE OR CHILD ABUSE OFFENCE – SECTIONS 316 AND 316A OF THE *CRIMES ACT 1900 (NSW)*

Section 316 of the *Crimes Act 1900 (NSW)* is set out at Appendix 6 of this paper (at page 25).

Section 316A of the *Crimes Act 1900 (NSW)* is set out at Appendix 7 of this paper (at page26).

Section 316 in essence criminalises the circumstance of a person knowing or believing that an indictable offence has been committed by another person, and also knowing or believing that they have information that might be of material assistance in securing the apprehension, prosecution or conviction of the offender for that offence and fails without reasonable excuse to bring that matter to the attention of a member of the NSW Police Force or other appropriate authority.

A key phrase in the legislation is "without reasonable excuse." In appropriate circumstances, a reasonable excuse would be found in client legal privilege exercised by a legal practitioner, or exercising the right to silence in the case of an alleged co-offender. No doubt there are other examples.

Section 316A deals with child abuse offences (as defined in subsection 9). In contrast to section 316, liability arise if the person "knows, believes or *reasonably ought to know."* The section also carries higher penalties.

COMMISSIONS OF INQUIRY

Independent Commission Against Corruption ("ICAC")

The relevant legislation here is sections 26, 37 and 38 of the *Independent Commission Against Corruption Act 1988 (NSW).* These sections can be found at Appendix 8 of this paper (at page 28).

Section 26 provides protection against self-incrimination regarding the production of statements or documents.

Section 37(1) makes witnesses compellable. Section 37(2) stipulates that self-incrimination does not constitute a basis for refusing to answer questions or producing documents. Section 37(3) creates a general prohibitions against the use of any evidence derived at ICAC from being used in any other proceedings. Section 37(5) preserves client legal privilege as a basis for refusing to answer questions. Note that section 37 (or the ICAC legislation generally) does not provide any protection whatsoever regarding use derivative use.

The key section for practitioners to be aware of is section 38. This empowers the Commissioner or person presiding to declare that all answers given and any documents are produced will be regarded as having been done so on objection. In practical terms, such an objection should be raised at the very first opportunity.

Law Enforcement Conduct Commission ("LECC")

The key legislation here is sections 57 and 74 of the *Law Enforcement Conduct Commission Act 2016 (NSW).* A copy of this legislation can be found at Appendix 9 of this paper (at page 30). Section 57(2) permits a person being examined to object on the grounds that the documentary or oral evidence may tend to incriminate them

Section 57(2) provides a statutory prohibition against statements, documents, or "other things" being used against the person producing it in any other proceedings against the person. This includes both direct and indirect use. There are exceptions for proceedings for contempt of LECC, disciplining and / or removal of police officers, or disciplinary action against government sector employees.

Section 74(1) compels any witness summonsed to attend and be sworn or make affirmation, answer any question, or produce any document or thing within the witness's custody or control as required by the summons.

Section 74(2) abolishes the protection against self-incrimination.

Section 74(3) allows a witness to object on the grounds that the answer or production of documents may tend to incriminate them. Subject to limited exceptions, such objection will prohibit any such answer or document being used against them in any proceedings.

Section 74(7) permits an Australian legal practitioner to claim client legal privilege when required to answer a question or produce a document.

The NSW Crime Commission

The NSW Crime Commission's governing legislation is the *Crime Commission Act 2012 (NSW).* The key provisions concerning self-incrimination are to be found in sections 35A, 39 and 39A.

Section 35A permits a witness at the Crime Commission to be questioned about the offence for which they have been charged provided leave has been granted by the Supreme Court.

Section 39 stipulates that a witness is not excused from answering questions or producing documents on the grounds that they may incriminate themselves. The section also provides that such evidence cannot be used against the witness in any civil or criminal proceedings, providing that the witness takes objection. *It is therefore of the utmost importance to take the objection at the outset, if the objection is to be taken at all.* There are exceptions for offences under the Crime Commission legislation.

Client legal privilege is also preserved, save for a compulsion to disclose the name and address of the client on whose behalf privilege is claimed – see s.39(5) and *Z v NSW Crime Commission* [2017] HCA 7 231 CLR 75 at [5]-[6], [17].

A copy of section 39 can be found at Appendix 10 of this paper (at page 33).

Section 39A renders inadmissible the use of derivative evidence obtained as a result of the questioning or the production of documents in any subsequent civil, criminal or disciplinary proceedings.

The Australian Criminal Intelligence Commission ("ACIC")

The governing legislation for ACIC is the *Australian Crime Commission Act 2002 (Cth).*

Section 30 compels attendance, the taking of an oath or affirmation, and a requirement to answer questions. Section 30(4) permits an examinee to claim that the answer to a question or the production of a document may tend to incriminate them. If so, section 30(5) renders that evidence inadmissible in criminal proceedings, proceedings for the imposition of a penalty, or in confiscation proceedings. A copy of section 30 can be found at Appendix 11 of the paper (at page 34).

In practical terms it is wise to take the objection on behalf of your client at the very outset, rather than one question at a time. An Examiner will generally take a practical approach and permit this course, rather than have the proceedings interrupted one question at a time.

Section 24A makes it plain that an examination can be conducted either pre or post charging of a substantive criminal offence.

A person who has been charged can apply to the Court for the evidence to be given to the Court . The Court needs to determine that this is "in the interests of justice" – see section 25A(12). Once the Court receives the evidence the Court then determines

whether the "interests of justice require" that the evidence be given to the person or their legal representative.

Section 25E permits an order by a Court for disclosure to prosecutors if it is "in the interests of justice". Section 25G(2) permits a prosecutor to use such evidence in the prosecution of an examinee if no objection has been taken pursuant to section 30(4) by the examinee at the ACIC examination.

Section 25F allows disclosure to prosecutors for offences arising out of the conduct of an examination at ACIC.

Australian Securities and Investments Commission (ASIC)

The governing legislation for ASIC is the *Australian Securities and Investments Commission Act 2002 (Cth).*

Section 19 of the Act compels attendance, the giving of evidence and "all reasonable assistance."

Section 68(1) stipulates that self-incrimination does not amount to a "reasonable excuse" for a person to refuse or fail to give information, sign a record, or to produce a book.

Section 68(2) permits a person to claim privilege (on the grounds of self-incrimination) before answering a question, making of a statement or signing of a record. Note that for the privilege to be made good it must not only be claimed in advance, but a view must be formed that the evidence "might in fact tend to incriminate" – see section 68(2)(b).

Section 68(3) renders evidence given subject to a claim of privilege renders any such evidence inadmissible in civil or criminal proceedings, with the exception of any falsity of evidence or signing of the record at the ASIC examination.

A copy of section 68 of the *Australian Securities and Investments Commission Act 2002 (Cth)* can be found at Appendix 12 (page 37) of this paper.

Note that the author is aware of one section 19 examination where the witness was required to state the word "privilege" before each and every answer in order for the privilege to be claimed with respect to the individual answer.

In Regina (Cth) v OC (Oliver Curtis) [2015] NSWCCA 212 it was held that the provision of a transcript of the examination of the accused by ASIC officers to prosecutors was not only permissible but authorised by the legislation.

Royal Commissions – New South Wales

The governing legislation for New South Wales Royal Commissions is the *Royal Commissions Act 1923 (NSW).*

Section 8 compels attendance to give evidence or produce documents by way of the issuing and service of a summons.

Section 17(1) compels the giving of evidence or the provision of documents notwithstanding that any answer or production may tend to incriminate the person.

Section 17(2) provides that, subject to specific statutory exceptions contained within the section, evidence or documents obtained through a Royal Commission shall not be admissible in criminal or civil proceedings.

Section 17 does not apply unless the letters patent by which the commission is issued or other letters patent under Public Seal, the Governor declares that the section shall apply.

Royal Commissions – Commonwealth

The governing legislation for Commonwealth Royal Commissions is the *Royal Commissions Act 1902 (Cth).*

Section 6DD renders inadmissible in any criminal or civil proceedings any evidence, or any statement or disclosure to a Commonwealth Royal Commission, with the exception of proceedings for an offence under the Act.

Section 6A provides that the fact that the production of a document of giving of a statement or information may tend to incriminate a person does not amount to a "reasonable excuse" for failing to give the evidence, produce the document, or make the statement. However, there is an exception pursuant to section 6A(3) if the person is the subject of criminal proceedings and those proceedings have not yet been concluded. Similarly under subsection 6A(4) if the person is liable to a penalty, and those proceedings have not been concluded.

ACKNOWLEDGEMENTS

The author has been assisted in the preparation of this paper by a review of *"The Right to Silence"*, a paper written and published by Rosemarie Lambert in June 2010.

I have endeavoured to state the law as at 21 March 2020.

Mark Dennis SC
Forbes Chambers

March 2020

APPENDIX 1

SECTION 89A OF THE *EVIDENCE ACT 1995 (NSW)* AS AT 21 MARCH 2020

89A Evidence of silence in criminal proceedings for serious indictable offences

(1) In a criminal proceeding for a serious indictable offence, such unfavourable inferences may be drawn as appear proper from evidence that, during official questioning in relation to the offence, the defendant failed or refused to mention a fact:
   (a) that the defendant could reasonably have been expected to mention in the circumstances existing at the time, and
   (b) that is relied on in his or her defence in that proceeding.

(2) Subsection (1) does not apply unless:
   (a) a special caution was given to the defendant by an investigating official who, at the time the caution was given, had reasonable cause to suspect that the defendant had committed the serious indictable offence, and
   (b) the special caution was given before the failure or refusal to mention the fact, and
   (c) the special caution was given in the presence of an Australian legal practitioner who was acting for the defendant at that time, and
   (d) the defendant had, before the failure or refusal to mention the fact, been allowed a reasonable opportunity to consult with that Australian legal practitioner, in the absence of the investigating official, about the general nature and effect of special cautions.

(3) It is not necessary that a particular form of words be used in giving a special caution.

(4) An investigating official must not give a special caution to a person being questioned in relation to an offence unless satisfied that the offence is a serious indictable offence.

(5) This section does not apply:
   (a) to a defendant who, at the time of the official questioning, is under 18 years of age or is incapable of understanding the general nature and effect of a special caution, or
   (b) if evidence of the failure or refusal to mention the fact is the only evidence that the defendant is guilty of the serious indictable offence.

(6) The provisions of this section are in addition to any other provisions relating to a person being cautioned before being investigated for an offence that the person does not have to say or do anything. The special caution may be given after or in conjunction with that caution.

Note.
See section 139 of this Act and section 122 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

(7) Nothing in this section precludes the drawing of any inference from evidence of silence that could properly be drawn apart from this section.

(8) The giving of a special caution in accordance with this section in relation to a serious indictable offence does not of itself make evidence obtained after the giving of the special caution inadmissible in proceedings for any other offence (whether or not a serious indictable offence).

(9) In this section:

official questioning of a defendant in relation to a serious indictable offence means questions put to the defendant by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of the serious indictable offence.

special caution means a caution given to a person that is to the effect that:

(a) the person does not have to say or do anything, but it may harm the person's defence if the person does not mention when questioned something the person later relies on in court, and

(b) anything the person does say or do may be used in evidence.

APPENDIX 2

SECTION 128 OF THE *EVIDENCE ACT 1995 (NSW)* AS AT 21 MARCH 2020

128 Privilege in respect of self-incrimination in other proceedings

(1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness:
  (a) has committed an offence against or arising under an Australian law or a law of a foreign country, or
  (b) is liable to a civil penalty.

(2) The court must determine whether or not there are reasonable grounds for the objection.

(3) Subject to subsection (4), if the court determines that there are reasonable grounds for the objection, the court is not to require the witness to give the evidence, and is to inform the witness:
  (a) that the witness need not give the evidence unless required by the court to do so under subsection (4), and
  (b) that the court will give a certificate under this section if:
    (i) the witness willingly gives the evidence without being required to do so under subsection (4), or
    (ii) the witness gives the evidence after being required to do so under subsection (4), and
  (c) of the effect of such a certificate.

(4) The court may require the witness to give the evidence if the court is satisfied that:
  (a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, and
  (b) the interests of justice require that the witness give the evidence.

(5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the court must cause the witness to be given a certificate under this section in respect of the evidence.

(6) The court is also to cause a witness to be given a certificate under this section if:
  (a) the objection has been overruled, and
  (b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.

(7) In any proceeding in a NSW court or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence:
  (a) evidence given by a person in respect of which a certificate under this section has been given, and
  (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence,

  cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

Note.

This subsection differs from section 128 (7) of the Commonwealth Act. The Commonwealth provision refers to an "Australian Court" instead of a "NSW court".

(8) Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

(9) If a defendant in a criminal proceeding for an offence is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the defendant for the same offence or a trial of the defendant for an offence arising out of the same facts that gave rise to that offence.

(10) In a criminal proceeding, this section does not apply in relation to the giving of evidence by a defendant, being evidence that the defendant:

(a) did an act the doing of which is a fact in issue, or

(b) had a state of mind the existence of which is a fact in issue.

(11) A reference in this section to doing an act includes a reference to failing to act.

(12) If a person has been given a certificate under a prescribed State or Territory provision in respect of evidence given by a person in a proceeding in a State or Territory court, the certificate has the same effect, in a proceeding to which this subsection applies, as if it had been given under this section.

(13) For the purposes of subsection (12), a prescribed State or Territory provision is a provision of a law of a State or Territory declared by the regulations to be a prescribed State or Territory provision for the purposes of that subsection.

(14) Subsection (12) applies to a proceeding in relation to which this Act applies because of section 4, other than a proceeding for an offence against a law of the Commonwealth or for the recovery of a civil penalty under a law of the Commonwealth.

APPENDIX 3

SECTION 61 OF THE *CORONERS ACT 2009 (NSW)* AS AT 21 MARCH 2020

61 Privilege in respect of self-incrimination

(1) This section applies if a witness in coronial proceedings objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness—
  (a) has committed an offence against or arising under an Australian law or a law of a foreign country, or
  (b) is liable to a civil penalty.

(2) The coroner in the coronial proceedings must determine whether or not there are reasonable grounds for the objection.

(3) If the coroner determines that there are reasonable grounds for the objection, the coroner is to inform the witness—
  (a) that the witness need not give the evidence unless required by the coroner to do so under subsection (4), and
  (b) that the coroner will give a certificate under this section if—
    (i) the witness willingly gives the evidence without being required to do so under subsection (4), or
    (ii) the witness gives the evidence after being required to do so under subsection (4), and
  (c) of the effect of such a certificate.

(4) The coroner may require the witness to give the evidence if the coroner is satisfied that—
  (a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, and
  (b) the interests of justice require that the witness give the evidence.

(5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the coroner must cause the witness to be given a certificate under this section in respect of the evidence.

(6) The coroner is also to cause a witness to be given a certificate under this section if—
  (a) the objection has been overruled, and
  (b) after the evidence has been given, the coroner finds that there were reasonable grounds for the objection.

(7) In any proceeding in a NSW court within the meaning of the *Evidence Act 1995* or before any person or body authorised by a law of the State, or by consent of parties, to hear, receive and examine evidence—
  (a) evidence given by a person in respect of which a certificate under this section has been given, and
  (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence,

  cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

(8) Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

(9) A reference in this section to doing an act includes a reference to failing to act.

(10) A certificate under this section can only be given in respect of evidence that is required to be given by a natural person.

APPENDIX 4

SECTIONS 11 AND 14 OF THE *LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002 (NSW)* AS AT 21 MARCH 2020

11 Identity may be required to be disclosed

(1) A police officer may require a person whose identity is unknown to the officer to disclose his or her identity if the officer suspects on reasonable grounds that the person may be able to assist in the investigation of an alleged indictable offence because the person was at or near the place where the alleged indictable offence occurred, whether before, when, or soon after it occurred.

(2) A police officer may require a person whose identity is unknown to the officer to disclose his or her identity if the officer proposes to give a direction to the person in accordance with Part 14 for the person to leave a place.

Note. Safeguards relating to the exercise of power under this section are set out in Part 15.

14 Power of police officer to require disclosure of driver or passenger identity

(1) A police officer who suspects on reasonable grounds that a vehicle is being, or was, or may have been used in or in connection with an indictable offence may do any one or more of the following—

(a) require the driver of the vehicle to disclose his or her identity and the identity of any driver of, or passenger in or on, the vehicle at or about the time the vehicle was or may have been so used or at or about the time the vehicle last stopped before the requirement was made or a direction was given to stop the vehicle,

(b) require any passenger in or on the vehicle to disclose his or her identity and the identity of the driver of, or any other passenger in or on, the vehicle at or about the time the vehicle was or may have been so used or at or about the time the vehicle last stopped before the requirement was made or a direction was given to stop the vehicle,

(c) require any owner of the vehicle (who was or was not the driver or a passenger) to disclose the identity of the driver of, and any passenger in or on, the vehicle at or about the time the vehicle was or may have been so used or at or about the time the vehicle last stopped before the requirement was made or a direction was given to stop the vehicle.

Note. Safeguards relating to the exercise of power under this section are set out in Part 15.

(2) Nothing in this section limits the operation of section 11.

APPENDIX 5

ROAD RULE 287 AS AT 21 MARCH 2020

287 Duties of a driver involved in a crash

(1) A driver involved in a crash must comply with this rule.

Maximum penalty—20 penalty units.

Note 1.

Crash is defined in the Dictionary.

Note 2.

The law of this jurisdiction also requires a driver involved in a crash to stop and give assistance to anyone who is injured.

(2) The driver must stop at the scene of the crash and give the driver's required particulars, within the required time and, if practicable, at the scene of the crash, to—

(a) any other driver (or that driver's representative) involved in the crash, and

(b) any other person involved in the crash who is injured, or the person's representative, and

(c) the owner of any property (including any vehicle) damaged in the crash (or the owner's representative), unless, in the case of damage to a vehicle, the particulars are given to the driver of the vehicle (or the driver's representative).

(3) The driver must also give the driver's required particulars, within the required time, to a police officer if—

(a) anyone is killed or injured in the crash, or

(b) the driver does not, for any reason, give the driver's required particulars to each person mentioned in subrule (2), or

(c) the required particulars for any other driver involved in the crash are not given to the driver, or

(d) a vehicle involved in the crash is towed or carried away by another vehicle (except if another law of this jurisdiction provides that the crash is not required to be reported), or

(e) the police officer asks for any of the required particulars.

Note 1. ***Police officer*** is defined in the Dictionary.

Note 2. Subrule (3)(e) is not uniform with the corresponding paragraph in rule 287 of the *Australian Road Rules*. However, the corresponding paragraph in the *Australian Road Rules* allows the required particulars to be given if another law of this jurisdiction requires a particular crash to be reported to a police officer. Different rules may apply in other Australian jurisdictions.

(4) For this rule—

required particulars, for a driver involved in a crash, means—

(a) the driver's name and address, and

(b) the name and address of the owner of the driver's vehicle, and

(c) the vehicle's registration number (if any), and

(d) any other information necessary to identify the vehicle,

and, for subrule (3), includes an explanation of the circumstances of the crash.

Note 1. ***Driver's vehicle*** is defined in the Dictionary.

Note 2. This definition is not uniform with the corresponding definition in rule 287 of the *Australian Road Rules*. However, the corresponding definition in the *Australian Road Rules* allows the additional information to be provided to a police officer for the purposes of subrule (3) if another law of this jurisdiction requires the information to be given. Different definitions may apply in other Australian jurisdictions.

required time, for a driver involved in a crash, means as soon as possible but, except in exceptional circumstances, within 24 hours after the crash.

APPENDIX 6

SECTION 316 OF THE *CRIMES ACT 1900 (NSW)* AS AT 21 MARCH 2020

316 Concealing serious indictable offence

(1) An adult—

(a) who knows or believes that a serious indictable offence has been committed by another person, and

(b) who knows or believes that he or she has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for that offence, and

(c) who fails without reasonable excuse to bring that information to the attention of a member of the NSW Police Force or other appropriate authority,

is guilty of an offence.

Maximum penalty—Imprisonment for—

(a) 2 years—if the maximum penalty for the serious indictable offence is not more than 10 years imprisonment, or

(b) 3 years—if the maximum penalty for the serious indictable offence is more than 10 years imprisonment but not more than 20 years imprisonment, or

(c) 5 years—if the maximum penalty for the serious indictable offence is more than 20 years imprisonment.

(2) A person who solicits, accepts or agrees to accept any benefit for the person or any other person in consideration for doing anything that would be an offence under subsection (1) is guilty of an offence.

Maximum penalty—Imprisonment for—

(a) 5 years—if the maximum penalty for the serious indictable offence is not more than 10 years imprisonment, or

(b) 6 years—if the maximum penalty for the serious indictable offence is more than 10 years imprisonment but not more than 20 years imprisonment, or

(c) 7 years—if the maximum penalty for the serious indictable offence is more than 20 years imprisonment.

(3) It is not an offence against subsection (2) merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making of reasonable compensation for that loss or injury.

(4) A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Director of Public Prosecutions if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.

(5) The regulations may prescribe a profession, calling or vocation as referred to in subsection (4).

(6) In this section—

serious indictable offence does not include a child abuse offence (within the meaning of section 316A).

Note. Concealing a child abuse offence is an offence under section 316A. A section 316A offence can only be committed by an adult.

APPENDIX 7

SECTION 316A OF THE *CRIMES ACT 1900 (NSW)* AS AT 21 MARCH 2020

316A Concealing child abuse offence

(1) An adult—

(a) who knows, believes or reasonably ought to know that a child abuse offence has been committed against another person, and

(b) who knows, believes or reasonably ought to know that he or she has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for that offence, and

(c) who fails without reasonable excuse to bring that information to the attention of a member of the NSW Police Force as soon as it is practicable to do so,

is guilty of an offence.

Maximum penalty—Imprisonment for—

(a) 2 years—if the maximum penalty for the child abuse offence is less than 5 years imprisonment, or

(b) 5 years—if the maximum penalty for the child abuse offence is 5 years imprisonment or more.

(2) For the purposes of subsection (1), a person has a reasonable excuse for failing to bring information to the attention of a member of the NSW Police Force if—

(a) the person believes on reasonable grounds that the information is already known to police, or

(b) the person has reported the information in accordance with the applicable requirements under Part 2 of Chapter 3 of the *Children and Young Persons (Care and Protection) Act 1998* or believes on reasonable grounds that another person has done so, or

(c) the person has reported the information to the Ombudsman under Part 3A of the *Ombudsman Act 1974* or believes on reasonable grounds that another person has done so, or

(d) the person has reasonable grounds to fear for the safety of the person or any other person (other than the offender) if the information were to be reported to police, or

(e) the information was obtained by the person when the person was under the age of 18 years, or

(f) the alleged victim was an adult at the time that the information was obtained by the person and the person believes on reasonable grounds that the alleged victim does not wish the information to be reported to police, or

(g) the information is about an offence under section 60E that did not result in any injury other than a minor injury (for example, minor bruising, cuts or grazing of the skin) and the alleged offender and the alleged victim are both school students who are under the age of 18 years, but only if the person is a member of staff of—

(i) a government school and the person has taken reasonable steps to ensure that the incident reporting unit (however described) of the Department of Education is made aware of the alleged offence, or

(ii) a non-government school and the person has taken reasonable steps to ensure that the principal or governing body of the school is made aware of the alleged offence.

(3) Subsection (2) does not limit the grounds on which it may be established that a person has a reasonable excuse for failing to bring information to the attention of a member of the NSW Police Force.

(4) A person who solicits, accepts or agrees to accept any benefit for the person or any other person in consideration for doing anything that would be an offence under subsection (1) is guilty of an offence.

Maximum penalty—Imprisonment for—

(a) 5 years—if the maximum penalty for the child abuse offence is less than 5 years imprisonment, or

(b) 7 years—if the maximum penalty for the child abuse offence is 5 years imprisonment or more.

(5) It is not an offence under subsection (4) merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making of reasonable compensation for that loss or injury.

(6) A prosecution for an offence under subsection (1) is not to be commenced against a person without the approval of the Director of Public Prosecutions in respect of information obtained by an adult in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.

(7) The regulations may prescribe a profession, calling or vocation as referred to in subsection (6).

(8) The reporting of information by a person in good faith under this section—

(a) does not constitute unprofessional conduct or a breach of professional ethics on the part of the person, and

(b) does not make the person subject to any civil liability in respect of it (including liability for defamation).

(9) In this section—

child means a person who is under the age of 18 years.

child abuse offence means—

(a) murder or manslaughter of a child (including under section 22A), or

(b) an offence under section 27, 29, 33, 35, 37, 38, 38A, 39, 41, 41A, 44, 45, 45A, 46, 59, 60E, 86 or 91J or Division 10, 10A, 10B or 15 of Part 3 where the alleged victim is a child, or

(c) an offence under section 42, 43, 43A, 91G or 91H, or

(d) an offence under a provision of this Act set out in Column 1 of Schedule 1A where the alleged victim was a child, or

(e) an offence of attempting to commit an offence referred to in paragraphs (a)–(d), or

(f) an offence under a previous enactment that is substantially similar to an offence referred to in paragraphs (a)–(e).

government school and ***non-government school*** have the same meanings as in the *Education Act 1990*.

member of staff, ***school*** and ***school student*** have the same meanings as in Division 8B of Part 3.

obtain includes receive or become aware of.

APPENDIX 8

SECTIONS 26, 37 AND 38 OF THE *INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988 (NSW)* AS AT 21 MARCH 2020

26 Self-incrimination

(1) This section applies where, under section 21 or 22, the Commission requires any person—
   (a) to produce any statement of information, or
   (b) to produce any document or other thing.

(2) 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 or except as provided by section 114A (5)).

(3) They may however be used for the purposes of the investigation concerned, despite any such objection.

37 Privilege as regards answers, documents etc

(1) A witness summoned to attend or appearing before the Commission at a compulsory examination or public inquiry is not entitled to refuse—
   (a) to be sworn or to make an affirmation, or
   (b) to answer any question relevant to an investigation put to the witness by the Commissioner or other person presiding at a compulsory examination or public inquiry, or
   (c) to produce any document or other thing in the witness's custody or control which the witness is required by the summons or by the person presiding to produce.

(2) A witness summoned to attend or appearing before the Commission at a compulsory examination or public inquiry is not excused from answering any question or producing any document or other thing on the ground that the answer or production may incriminate or tend to incriminate the witness, or on any other ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.

(3) An answer made, or document or other thing produced, by a witness at a compulsory examination or public inquiry before the Commission or in accordance with a direction given by a Commissioner under section 35 (4A) is not (except as otherwise provided in this section or section 114A (5)) admissible in evidence against the person in any civil or criminal proceedings or in any disciplinary proceedings.

(4) Nothing in this section makes inadmissible—
   (a) any answer, document or other thing in proceedings for an offence against this Act or in proceedings for contempt under this Act, or
   (b) any answer, document or other thing in any civil or criminal proceedings or in any disciplinary proceedings if the witness does not object to giving the answer or producing the document or other thing irrespective of the provisions of subsection (2), or
   (c) any document in any civil proceedings for or in respect of any right or liability conferred or imposed by the document or other thing.

(5) Where—

(a) an Australian legal practitioner or other person is required to answer a question or produce a document or other thing at a compulsory examination or public inquiry before the Commission or in accordance with a direction given by a Commissioner under section 35 (4A), and

(b) the answer to the question would disclose, or the document or other thing contains, a privileged communication passing between an Australian legal practitioner (in his or her capacity as an Australian legal practitioner) and a person for the purpose of providing or receiving legal professional services in relation to the appearance, or reasonably anticipated appearance, of a person at a compulsory examination or public inquiry before the Commission,

the Australian legal practitioner or other person is entitled to refuse to comply with the requirement, unless the privilege is waived by a person having authority to do so.

(6) (Repealed)

38 Declaration as to objections by witness

The Commissioner or person presiding at the compulsory examination or public inquiry may declare that all or any classes of answers given by a witness or that all or any classes of documents or other things produced by a witness will be regarded as having been given or produced on objection by the witness, and there is accordingly no need for the witness to make an objection in respect of each such answer, document or other thing.

APPENDIX 9

SECTIONS 57 AND 74 OF THE *LAW ENFORCEMENT CONDUCT COMMISSION ACT 2016 (NSW)* AS AT 21 MARCH 2020

57 Self-incrimination

(1) This section applies if because of section 56 (3) any person (other than a body corporate) must comply with a requirement under section 54 or 55 to produce—
   (a) any statement of information, or
   (b) any document or other thing.

(2) If the statement, document or other thing tends to incriminate the person and the person objects to production at the time the person is required to produce it, 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, proceedings for contempt under this Act or as provided by subsections (3), (4) and (5)). This subsection extends to any further information, document or other thing obtained as a direct or indirect consequence of the statement, document or other thing produced.

(3) They may however be used for the purposes of the investigation concerned, despite any such objection.

(4) A statement, document or other thing may be used in deciding whether to—
   (a) make an order under section 173 or 181D of the *Police Act 1990* (and is admissible in any proceedings under Division 1A or 1C of Part 9 of that Act), and
   (b) make an order under section 183A of the *Police Act 1990* or any proceedings for the purposes of Division 2A of Part 9 of that Act with respect to such an order, and
   (c) make an order in any disciplinary proceedings, and
   (d) without limiting paragraph (c), take action under section 69 or 70 of the *Government Sector Employment Act 2013*.

(5) Nothing in this section makes inadmissible—
   (a) any statement, document or other thing in proceedings for an offence against this Act or in proceedings for contempt under this Act, or
   (b) any statement, document or other thing in any civil or criminal proceedings if the witness does not object to making the statement or producing the document or other thing, or
   (c) any document in any civil proceedings for or in respect of any right or liability conferred or imposed by the document or other thing.

74 Abrogation of privilege as regards answers, documents and other things

(1) A witness summoned to attend or appearing at an examination is not entitled to refuse—
   (a) to be sworn or to make an affirmation, or
   (b) to answer any question relevant to an investigation put to the witness by the examining Commissioner, or

(c) to produce any document or other thing in the witness's custody or control that the witness is required by the summons or by the examining Commissioner to produce.

(2) The witness is not excused from answering any question or producing any document or other thing at an examination on the ground that the answer or production may incriminate or tend to incriminate the witness, or on any other ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.

(3) If the answer made or document or other thing produced might in fact tend to incriminate the witness and the witness objects to answering the question or the production at the time of answering or producing the document or other thing, neither the answer nor the document or thing itself (if produced) may be used in any proceedings against the witness except—

(a) disciplinary proceedings, or

(b) proceedings for an offence against this Act, or

(c) proceedings for contempt under this Act, or

(d) as provided by subsections (4), (5) and (6).

This subsection extends to any further information, document or other thing obtained as a direct or indirect consequence of the answer made or document or other thing produced.

(4) They may however be used for the purposes of the investigation concerned, despite any such objection.

(5) An answer, document or thing may be used—

(a) in deciding whether to make an order under section 173 or 181D of the *Police Act 1990* (and is admissible in any proceedings under Division 1A or 1C of Part 9 of that Act), and

(b) in deciding whether to make an order under section 183A of the *Police Act 1990* (and is admissible in any proceedings under Division 2A of Part 9 of that Act with respect to such an order), and

(c) in deciding whether to take action under section 69 or 70 of the *Government Sector Employment Act 2013*, and

(d) for the purposes of the Director of Public Prosecutions providing advice about the commencement of proceedings against particular persons for criminal offences against laws of the State.

(6) Nothing in this section makes inadmissible—

(a) any statement, document or other thing in proceedings for an offence against this Act or in proceedings for contempt under this Act, or

(b) any statement, document or other thing in any civil or criminal proceedings if the witness does not object to making the statement or producing the document or other thing, or

(c) any document in any civil proceedings for or in respect of any right or liability conferred or imposed by the document or other thing.

(7) If—

(a) an Australian legal practitioner or other person is required to answer a question or produce a document or other thing at an examination, and

(b) the answer to the question would disclose, or the document or other thing contains, a privileged communication passing between an Australian legal practitioner (in his or her capacity as an Australian legal practitioner) and a person for the purpose of providing or receiving legal professional services in

relation to the appearance, or reasonably anticipated appearance, of a person at an examination,

the Australian legal practitioner or other person is entitled to refuse to comply with the requirement, unless the privilege is waived by a person having authority to do so.

APPENDIX 10

SECTION 39 OF THE *CRIME COMMISION ACT 2006 (NSW)* AS AT 21 MARCH 2020

39 Privilege concerning answers and documents

(1) A witness summoned to attend or appearing before the Commission at a hearing is not (except as provided by section 40) excused from answering any question or producing any document or thing on the ground that the answer or production may incriminate or tend to incriminate the witness, or on any other ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.

(2) An answer made, or document or thing produced, by a witness at a hearing before the Commission is not (except as otherwise provided in this section) admissible in evidence against the person in any civil or criminal proceedings (other than a proceeding for the falsity of evidence given by the witness) or in any disciplinary proceedings.

(3) Nothing in this section makes inadmissible:

(a) any answer, document or thing in proceedings for an offence against this Act or in proceedings for contempt under this Act, or

(b) any answer, document or thing in any civil or criminal proceedings or in any disciplinary proceedings if the witness does not object to giving the answer or producing the document or other thing irrespective of the provisions of subsection (1), or

(c) any document in any civil proceedings for or in respect of any right or liability conferred or imposed by the document, or

(d) any answer made, or document or thing produced, by a corporation at a hearing before the Commission.

(4) If:

(a) an Australian legal practitioner or other person is required to answer a question or produce a document or thing at a hearing before the Commission, and

(b) the answer to the question would disclose, or the document or thing contains, a privileged communication passing between the legal practitioner (in his or her capacity as a legal practitioner) and a person (the ***client***),

the legal practitioner or client is entitled to refuse to comply with the requirement, unless the privilege is waived by a person having authority to do so.

(5) However, the Australian legal practitioner must, if so required by the executive officer presiding at the hearing, furnish to the Commission the name and address of the client to whom or by whom the privileged communication was made.

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

APPENDIX 11

SECTION 30 OF THE *AUSTRALIAN CRIME COMMISSION ACT 2002 (CTH)* AS AT 21 MARCH 2020

Failure of witnesses to attend and answer questions

Failure to attend

(1) A person served, as prescribed, with a summons to appear as a witness at an examination before an examiner shall not:

(a) fail to attend as required by the summons; or

(b) fail to attend from day to day unless excused, or released from further attendance, by the examiner.

Failure to answer questions etc.

(2) A person appearing as a witness at an examination before an examiner shall not:

(a) when required pursuant to section 28 either to take an oath or make an affirmation--refuse or fail to comply with the requirement;

(b) refuse or fail to answer a question that he or she is required to answer by the examiner; or

(c) refuse or fail to produce a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed.

(3) Where:

(a) a legal practitioner is required to answer a question or produce a document at an examination before an examiner; and

(b) the answer to the question would disclose, or the document contains, a privileged communication made by or to the legal practitioner in his or her capacity as a legal practitioner;

the legal practitioner is entitled to refuse to comply with the requirement unless the person to whom or by whom the communication was made agrees to the legal practitioner complying with the requirement but, where the legal practitioner refuses to comply with the requirement, he or she shall, if so required by the examiner, give the examiner the name and address of the person to whom or by whom the communication was made.

Use immunity available in some cases if self-incrimination claimed

(4) Subsection (5) limits the use that can be made of any answers given at an examination before an examiner, or documents or things produced at an examination before an examiner. Subsections (5) and (5A) only apply if:

(a) a person appearing as a witness at an examination before an examiner:

(i) answers a question that he or she is required to answer by the examiner; or

(ii) produces a document or thing that he or she was required to produce by a summons under this Act; or

(iii) produces a document or thing that he or she was required to produce under subsection 28(4); and

(b) in the case of the production of a document that is, or forms part of, a record of an existing or past business--the document sets out details of earnings received by the person in respect of his or her employment and does not set out any other information; and

(c) before answering the question or producing the document or thing, the person claims that the answer, or the production of the document or thing, might tend to incriminate the person or make the person liable to a penalty.

(5) The answer, document or thing is not admissible in evidence against the person in:

(a) a criminal proceeding; or

(b) a proceeding for the imposition of a penalty; or

(c) a confiscation proceeding.

(5A) Subsection (5) does not affect whether the answer, document or thing is admissible in evidence against the person in:

(a) a confiscation proceeding, if the answer was given, or the document or thing was produced, at the examination at a time when the proceeding had not commenced and is not imminent; or

(b) a proceeding about:

(i) in the case of an answer--the falsity of the answer; or

(ii) in the case of the production of a document--the falsity of any statement contained in the document.

Note: For paragraph (a), the court may order otherwise (see subsection 25H(4)).

(5B) Subsection (5A) does not, by implication, affect the admissibility or relevance of the answer, document or thing for any other purpose.

Offence for contravention of subsection (1), (2) or (3)

(6) A person who contravenes subsection (1), (2) or (3) commits an indictable offence that, subject to this section, is punishable, upon conviction, by a fine not exceeding 200 penalty units or imprisonment for a period not exceeding 5 years.

(7) Notwithstanding that an offence against subsection (1), (2) or (3) is an indictable offence, a court of summary jurisdiction may hear and determine proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent.

(8) Where, in accordance with subsection (7), a court of summary jurisdiction convicts a person of an offence against subsection (1), (2) or (3), the penalty that the court may impose is a fine not exceeding 20 penalty units or imprisonment for a period not exceeding 1 year.

Legal professional privilege

(9) Subsection (3) does not affect the law relating to legal professional privilege.

APPENDIX 12

SECTION 68 OF THE *AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (CTH)* AS AT 21 MARCH 2020

s. 19 Notice requiring appearance for examination

(1) This section applies where ASIC, on reasonable grounds, suspects or believes that a person can give information relevant to a matter that it is investigating, or is to investigate, under Division 1.

(2) ASIC may, by written notice in the prescribed form given to the person, require the person:

(a) to give to ASIC all reasonable assistance in connection with the investigation; and

(b) to appear before a specified member or staff member for examination on oath and to answer questions.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(3) A notice given under subsection (2) must:

(a) state the general nature of the matter referred to in subsection (1); and

(b) set out the effect of subsection 23(1) and section 68.

68 Self-incrimination

(1) For the purposes of this Part, of Division 3 of Part 10, and of Division 2 of Part 11, it is not a reasonable excuse for a person to refuse or fail:

(a) to give information; or

(b) to sign a record; or

(c) to produce a book;

in accordance with a requirement made of the person, that the information, signing the record or production of the book, as the case may be, might tend to incriminate the person or make the person liable to a penalty.

(2) Subsection (3) applies where:

(a) before:

(i) making an oral statement giving information; or

(ii) signing a record;

pursuant to a requirement made under this Part, Division 3 of Part 10 or Division 2 of Part 11, a person (other than a body corporate) claims that the statement, or signing the record, as the case may be, might tend to incriminate the person or make the person liable to a penalty; and

(b) the statement, or signing the record, as the case may be, might in fact tend to incriminate the person or make the person so liable.

(3) The statement, or the fact that the person has signed the record, as the case may be, is not admissible in evidence against the person in:

(a) a criminal proceeding; or

(b) a proceeding for the imposition of a penalty;

other than a proceeding in respect of:

(c) in the case of the making of a statement—the falsity of the statement; or

(d) in the case of the signing of a record—the falsity of any statement contained in the record.