**BALANCING INDIVIDUAL LIBERTIES AND COERCIVE POWERS:**

**AN AUSTRALIAN PERSPECTIVE**

**(Michael Hill Memorial Lecture presented to the annual conference of the**

**International Society for the Reform of Criminal Law in Brisbane**

**on 11 July 2019 by the Hon Alan Blow AO, Chief Justice of Tasmania)**

I have been asked to speak about the balancing of individual liberties and coercive powers. I will be doing that from an Australian perspective. I am going to examine some of the history of rights to silence and related immunities, their rationales, steps that can be taken to ameliorate the effects of their abrogation, and possible dangers associated with their abrogation.

In a House of Lords case in 1993, *R v Director of Serious Fraud Office, ex parte Smith[[1]](#footnote-1)*, Lord Mustill listed six immunities associated with the concept of a right to silence, as follows:

"(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 being compelled on pain of punishment to answer questions of any kind.

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

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

(6) A specific immunity ..., possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial."[[2]](#footnote-2)

My emphasis will be on the rights and immunities of individuals who have not been charged with criminal offences – the immunities numbered 1, 2 and 3 by Lord Mustill.

The first of Lord Mustill's immunities – the immunity from being compelled to answer questions posed by others – was described by his Lordship as "a simple reflection of the common view that one person should so far as possible be entitled to tell another person to mind his own business".[[3]](#footnote-3)

**English Historical Background**

Before the Court of Star Chamber was abolished by an Act of Parliament in 1641, that court and the ecclesiastical courts of England routinely summoned individuals who had not been charged with any crime, and examined them on oath.[[4]](#footnote-4) Those practices ceased in the 17th century, but justices of the peace routinely examined prisoners charged with felonies before committing them for trial until the passage of Sir John Jervis's Act in 1848. That Act required the committing magistrate or justice to say words to the following effect: "You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in Writing, and may be given in Evidence against you upon your Trial." Until the appearance of counsel in criminal trials became common in the late 18th and early 19th centuries, judges routinely invited accused persons to speak, not on oath. In those days their opportunity to speak, rather than their right to silence, was their chief protection.[[5]](#footnote-5)

The second of Lord Mustill's immunities – the immunity from compulsion to answer questions when the answers might incriminate the individual – is the subject of a Latin maxim *nemo tenetur prodere seipsum* – which may be translated as "no one is obliged to accuse himself". Research by American scholars in the 1990s revealed that the privilege against self-incrimination was not something that developed in reaction to the Star Chamber, but was a rule that originated from European inquisitorial procedures and became established in the English ecclesiastical courts in the middle ages. That rule did not become established in the English common law courts until the mid-19th century.[[6]](#footnote-6) There were some limited exceptions. The *nemo tenetur* maxim was applied on occasions when a justice of the peace obtained a confession by wrongly administering an oath, and on occasions when non-party witnesses refused to answer incriminating questions.[[7]](#footnote-7)

By the middle of the 17th century, the English common law courts had developed a rule, known as the "witness privilege rule", which was based on the *nemo tenetur* maxim. The operation of that rule was described by McHugh J in the High Court of Australia in *Azzopardi v The Queen* in 2001 as follows:

"... it entitled a witness, but not a party or a defendant, to refuse to answer a question on the ground that the answer would or might tend to incriminate the witness or expose that person to a penalty or forfeiture. ... it was not an exclusionary rule, in the sense that its breach did not render evidence inadmissible. The witness could claim the privilege, but if the witness was ordered to answer the question, the answer was admissible in subsequent criminal proceedings even if the witness should not have been ordered to give it. A witness who answered some questions was taken to have waived the privilege and could not then refuse to answer further questions. Moreover, the protection of those claiming the privilege was limited because their silence was treated as an admission of the fact in the proceedings."[[8]](#footnote-8)

In the 1847 case of *R v Garbett[[9]](#footnote-9)* the judges of England overruled earlier authorities and held that a witness could claim privilege against self-incrimination after answering questions and that, if the witness was compelled to answer, the answers were inadmissible against him in later proceedings. From those beginnings, it came to be recognised by the end of the 19th century that there was a general rule that a person was not obliged to answer a question if the answer would tend to incriminate him or her.

**Early Coercive Powers in Bankruptcy Matters**

Bankruptcy was the first area of the law in which statutory coercive powers for the obtaining of information were conferred. Coercive powers relating to bankruptcy have existed in the English legal system for over 400 years. From the time of James I, commissioners appointed by the Lord Chancellor had powers that Prof Holdsworth described in his *History of English Law* as follows:

"They could examine the bankrupt or his wife upon oath. They could imprison him if he refused to answer their questions as to his property; and he could be punished by the pillory and cutting off of an ear if he committed perjury. They could summon before them and examine upon oath debtors of the bankrupt, or anyone suspected of being in possession of any part of the bankrupt's property. In case of a refusal to answer they could commit to prison."[[10]](#footnote-10)

In 1697 a witness named Bracy objected to answering a question as to when and in what manner he had been aiding and assisting in the carrying away of a bankrupt's goods. He was committed to prison by the commissioners of bankrupts and brought before the Court of King's Bench, which held that an answer would not have exposed him to a penalty, and that he was therefore obliged to answer.[[11]](#footnote-11) That appears to have been an early manifestation of the witness privilege rule.

Later there were cases in which the English courts held that bankrupts, when examined in relation to their affairs, were obliged to answer questions that might tend to incriminate them or expose them to liability for penalties.[[12]](#footnote-12) In *R v Scott* in 1856, Lord Campbell CJ expressed the view that the legislation as to the examination of bankrupts then in force did not allow a bankrupt to avail himself of the *nemo tenetur* maxim.[[13]](#footnote-13)

Subsequently, s 85 of the *Larceny Act* 1861 was enacted. That section provided that individuals could not be convicted of certain frauds and other misdemeanours if they had first disclosed them under compulsory examinations in bankruptcy.[[14]](#footnote-14)

**Beyond England**

In some countries, rights to silence have constitutional protection, but never absolute constitutional protection. Constitutional immunities against self-incrimination were established in the USA in the 18thcentury. In the Virginia Declaration of Rights of 1776, there was a provision that a defendant would not "be compelled to give evidence against himself".[[15]](#footnote-15) The Fifth Amendment to the US Constitution, introduced in 1791, provides, amongst other things, that no person "shall be compelled in any criminal case to be a witness against himself". Those words have not been confined to their literal meaning. For example, on the basis of the Fifth Amendment, the United States Supreme Court held in 1966that anyone under "custodial interrogation" was required, prior to questioning, amongst other things, to be warned of the right to remain silent, and warned that any statement made by him or her may be used in evidence against him or her. [[16]](#footnote-16)

The Canadian Charter of Rights and Freedoms, enacted in 1982, contains a number of provisions relevant to the right to silence. Section 11(c) provides that any person charged with an offence has the right "not to be compelled to be a witness in proceedings against that person in respect of the offence". Section 13 provides that, "a witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence". Section 7 contains a general provision to the effect that everyone has the right not to be deprived of life, liberty or security of the person "except in accordance with the principles of fundamental justice". On the basis of that requirement as to fundamental justice, the Supreme Court of Canada has held that there is a right to silence during investigations by the authorities. In *Herbert v The Queen* in 1990, it was said that "the relationship between the privilege against self-incrimination and the right to silence at the investigatorial phase is … clear", and that "The protection conferred by a legal system which grants the accused immunity from incriminating himself at trial but offers no protection with respect to pre-trial statements would be illusory."[[17]](#footnote-17)

The New Zealand *Bill of Rights Act* 1990 (NZ) states in s 23(4) that everyone who is arrested or detained under any enactment "for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right". Section 25(d) provides that everyone charged with an offence has "the right not to be compelled to be a witness or to confess guilt". The New Zealand Parliament has the power to enact legislation that is inconsistent with those rights, but s 7 requires the Attorney-General to report to Parliament when any provision in a Bill appears to be inconsistent with any rights or freedoms contained in the Bill of Rights. The Bill of Rights does not contain a general provision as to privilege against self-incrimination. That privilege is conferred on individuals, though nor corporations, by s 60 of the *Evidence Act* 2006 (NZ), but it may be removed by legislation.

Two Australian jurisdictions, the Australian Capital Territory and Victoria, have enacted legislation similar to that of New Zealand.

The International Covenant on Civil and Political Rights contains a provision[[18]](#footnote-18) to the effect that, in the determination of any criminal charge, everyone shall be entitled to a guarantee "Not to be compelled to testify against himself or to confess guilt". However there is no other provision as to any right to silence or privilege against self-incrimination. That is not surprising, given that investigatorial systems of criminal justice operate in many countries.

The European Convention on Human Rights contains no specific reference to any right to silence or privilege against self-incrimination. However Article 6 contains a provision, relating to both civil and criminal proceedings, that everyone is entitled to a fair hearing. The European Court of Human Rights gave that provision a very wide interpretation in a 1993 case*[[19]](#footnote-19)* in which a man who had not been charged with any offence was required to produce his bank statements pursuant to French customs regulations. The Court found that he had been denied the right to remain silent and the right not to incriminate himself, and held the regulations to be invalid. Subsequent decisions of the Court have not gone so far in relation to the protection of the rights of the individual.

In Australia, our Constitution does not contain a Bill of Rights. We have a common law right of silence, in effect a right to tell other people to mind their own business, except in circumstances where legislation has taken that right away. Privilege against self-incrimination is respected in evidence legislation in every Australian jurisdiction. In proceedings before administrative tribunals that are not required to apply the laws of evidence, privilege against self-incrimination is accepted as a common law right.[[20]](#footnote-20) The privilege may be restricted or abrogated by legislation, but the High Court has held that a statute will not be taken to have abrogated the privilege unless that is made clear "by express words or by necessary intendment".[[21]](#footnote-21)

**Rationales**

So, what are the reasons for the existence of common law and constitutional rights of silence and related immunities?

Lord Mustill's first immunity – the general immunity from being compelled on pain of punishment to answer questions posed by others – can readily be justified as establishing a fair balance between the powers of the State and the privacy or dignity of the individual. In a free and democratic society, it is appropriate that individuals should have such a right unless there is a good reason to override that right by legislation.

Lord Mustill acknowledged the need for that right often to be curtailed. He said this:

"All civilised states recognise this assertion of personal liberty and privacy. Equally, although there may be pronounced disagreements between states, and between individual citizens within states, about where the line should be drawn, few would dispute that some curtailment of the liberty is indispensable to the stability of society; and indeed in the United Kingdom today our lives are permeated by enforceable duties to provide information on demand, created by Parliament and tolerated by the majority, albeit in some cases with reluctance."[[22]](#footnote-22)

I turn to his Lordship's second immunity, the privilege against self-incrimination. One justification for that privilege is that it is necessary to protect personal freedom, privacy, and human dignity.[[23]](#footnote-23)

The privilege is also justified by considerations relating to the integrity of the adversarial system of justice. In a case in the High Court of Australia in 1993, *Environment Protection Authority v Caltex Refining Co Pty Ltd*, McHugh J made the following points:[[24]](#footnote-24)

* The privilege "operates to encourage persons to give evidence by removing the fear that they might have to give evidence which will incriminate them".
* It "avoids the giving of false evidence since witnesses who are obliged to answer questions may prefer to commit perjury rather than incriminate themselves".
* It "maintains the integrity of the accusatorial system by forcing the prosecution to rely upon independent evidence rather than the self-incrimination of the accused".
* It "ensures that the prosecution must treat the accused as an innocent person whose rights as a human being must be respected".

The third of Lord Mustill's immunities, the immunity of suspects from being compelled on pain of punishment to answer the questions of police officers and others in authority, has similar justifications relating both to human rights and the integrity of the adversarial system of justice. A suspect's right not to answer questions protects the individual from the abuse of the power of the State. It also reduces the risk of unreliable involuntary confessions. As long ago as 1783, it was said in *The King v Warickshall[[25]](#footnote-25)* that "a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it".

**Safeguards for Individual Liberties**

Legislation conferring coercive investigative powers on public officials and public authorities has become prolific since the days when such powers existed only in relation to the affairs of bankrupts. By 1890, the English Parliament had legislated to provide for the public examination of the directors and officers of companies in liquidation.[[26]](#footnote-26) Australian jurisdictions now have legislation conferring coercive powers on Royal Commissions, anti-corruption commissions, and an assortment of investigative authorities. Many spheres of government activity depend for their functioning on the provision of information by citizens. Modern governments would not function without the collection of taxes, and taxation systems depend on the compulsory provision of information, to cite an obvious example. More controversially, there is a clear need for coercive powers to be available in situations where traditional investigative methods are inadequate, and the subject matter of the investigation warrants some abrogation of personal freedoms.

In a democratic society it is essential that any legislation that erodes or abrogates rights to silence and related immunities, particularly the privilege against self-incrimination, should contain safeguards for the protection, to a reasonable extent, of personal liberty and privacy. Minds differ as to the extent to which rights to silence should be protected. Jeremy Bentham described an accused person's right not to enter the witness box as "one of the most pernicious and most irrational notions that ever found its way into the human mind".[[27]](#footnote-27) Closer to home, Davies J of the Supreme Court of Queensland, writing in the Australian Law Journal in 2000, argued strongly against the retention of Lord Mustill's sixth immunity – the immunity of an accused person from having adverse comment made about either a failure to answer questions before the trial or a failure to give evidence at the trial.[[28]](#footnote-28)

In relation to the coercive powers of modern public authorities and public officials, there is quite a smorgasbord of safeguards from which to choose. I am not in a position to say when any particular safeguard is desirable or appropriate. All I can do is to mention a number of safeguards that are available:

* Secrecy provisions applying to public officials are practically universal in Australia. Some public authorities are even immune from subpoenas requiring the production of documents to courts. The Australian Taxation Office is one example.[[29]](#footnote-29)
* The rights of individuals can be protected by provisions allowing an ombudsman to investigate alleged abuses of coercive powers. However there can be situations when an ombudsman presents a damning report and no action is taken.
* In some public authorities, decisions to authorise investigations or the use of coercive powers must be taken at a high level, and not by those officers who question individuals or require them to supply documents or information.[[30]](#footnote-30)
* Legislation can require or permit the questioning of individuals in private.
* Legislation can provide for reports, or parts of them, not to be made public.
* Legislation should permit an individual's legal representatives to be present during questioning, and to object to questions.
* Legislation can provide that coercive powers are not to be used to question or obtain information from a person who has been charged with a criminal offence relating to the same subject matter. That protection can also be extended to individuals affected by the confiscation of assets.
* In Australia, legislation sometimes prohibits the use of information compulsorily obtained from an individual in criminal proceedings against that individual if he or she claims privilege against self-incrimination before providing the information.[[31]](#footnote-31) Alternatively, legislation can provide that the information supplied by an individual is not admissible in proceedings against that individual, without creating any need to claim privilege. Exceptions are usually made so as to permit prosecutions for the provision of false information.
* When an individual is given immunity from the use of information in criminal proceedings against him or her, the legislation sometimes provides for a derivative immunity, so that any further evidence obtained as a result of the individual's provision of information may not be used against that individual either. Obviously an immunity relating only to the use of the individual's answers will often be of no practical value without a derivative immunity relating to evidence obtained as a result of those answers having been given.
* Legislation can confer a power to give a co-operative individual immunity from prosecution.
* Legislation can provide that an investigative authority is not to have a power to make a finding of guilt.
* A court can be given a statutory power to stay an investigation or examination in appropriate circumstances.

In Australia it has been held by the High Court that an authority that reports to Parliament owes a common law duty of procedural fairness or natural justice to anyone whose reputation might be damaged by material in one of its reports. The *audi alteram partem* rule requires the authority to give the individual an opportunity to make submissions before submitting its report. Courts can grant a limited form of prerogative relief – prohibition quousque – to prohibit reporting until the individual has been given an opportunity to make submissions.[[32]](#footnote-32)

When an authority exercises coercive powers unlawfully, or exercises coercive powers in a manner that is inconsistent with our accusatorial system of justice, then a judge can stay a criminal prosecution.[[33]](#footnote-33), an appeal court can quash a conviction[[34]](#footnote-34), or a judge can prohibit or restrain unlawful conduct on the part of the authority, either by granting prerogative relief, by granting equitable relief, or by making orders under judicial review legislation.[[35]](#footnote-35)

The conferring of coercive powers to question individuals and obtain information obviously involves dangers of interfering too greatly with personal freedom, privacy and human dignity. However there are a number of more specific dangers that sometimes need to be guarded against in the use of coercive investigative powers. Those dangers including the following:

* There is a risk of unauthorised disclosure of information or documents that have been compulsorily acquired.[[36]](#footnote-36)
* There is a risk that authorities with coercive powers that are intended for use only in special and serious cases might be prevailed upon by police officers to use those powers to assist in routine investigations.
* When individuals are questioned in public, there is a risk of publicity interfering with the impartiality of jurors in any subsequent criminal trial relating to the same subject matter.
* There is a risk that individuals who are required to give evidence might be unfairly intimidated by those examining them.
* Witnesses questioned by investigative authorities can be unfairly disadvantaged when the scope of the investigation is not clearly defined. That of course is a problem that normally does not exist in a criminal trial, when the issues in dispute can readily be ascertained.

**Conclusion**

The trend towards the conferring of coercive investigative powers on public authorities and public officials shows no sign of abating. That trend carries with it a danger that excessive incursions will be made upon rights to silence and associated immunities. It is therefore of great importance that legislatures not confer coercive powers willy nilly, that they provide statutory safeguards; that those entrusted with coercive powers use them responsibly, honourably, and not excessively; and that the courts interpret legislation conferring coercive powers, so far as the language of such legislation permits, so as not to go too far in eroding the rights and immunities of individuals.

1. [1993] AC 1. [↑](#footnote-ref-1)
2. [1993] AC 1 at 30-31. [↑](#footnote-ref-2)
3. [1993] AC 1 at 31 [↑](#footnote-ref-3)
4. Williams, G, *The Proof of Guilt*, 1955, pp 36-37. [↑](#footnote-ref-4)
5. *Azzopardi v The Queen* [2001] HCA 25, 205 CLR 50, per McHugh J at [140]-[141]. [↑](#footnote-ref-5)
6. Helmholtz, Gray, Langbein, Moglen, Smith and Alschelur, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997), discussed by McHugh J in *Azzopardi v The Queen*,above, at [121] ff. See also the Hon Justice G L Davies, *The Prohibition Against Adverse Inferences from Silence: A Rule Without Reason?* (2000) ALJ 26. [↑](#footnote-ref-6)
7. Davies, above, at 32. [↑](#footnote-ref-7)
8. *Azzopardi*, above, at [149]. Footnotes omitted. [↑](#footnote-ref-8)
9. (1847) 1 Den 236, 169 ER 227. [↑](#footnote-ref-9)
10. Holdsworth, W S, *History of English Law*, Vol 8, pp 238-239, referring to 1 James I c 15, ss 7-10, 21 James I c 19, ss 6, and 13 Elizabeth c 7, ss 5, 6. [↑](#footnote-ref-10)
11. *Bracy's Case* (1697) 1 Ld Raym 99; 91 ER 962. [↑](#footnote-ref-11)
12. *R v Scott* (1856) Dears & Bell 47; 169 ER 909; *In re a Solicitor* (1890) 25 QBD 17; *R v Erdheim* [1896] 2 QB 260; *In re Atherton* [1912] 2 KB 251; *In re Paget, ex parte Official Receiver* [1927] 2 Ch 85; *In re Jawett* [1929] 1 Ch 108. [↑](#footnote-ref-12)
13. *R v Scott*, above, at 57, 913 [↑](#footnote-ref-13)
14. *In Re Atherton*, above, at 254. [↑](#footnote-ref-14)
15. Davies, above, at 40, n88. [↑](#footnote-ref-15)
16. *Miranda v Arizona* 384 US 436 (1966). [↑](#footnote-ref-16)
17. *Herbert v The Queen* [1990] 2 SCR 151, per Dickson CJ, Lamer, La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ at 174. [↑](#footnote-ref-17)
18. Article 14(3)(g). [↑](#footnote-ref-18)
19. *Funke v France* (1993) 256-A Eur Court HR (ser A). [↑](#footnote-ref-19)
20. See, for example, *Dolan v Australian and Overseas Telecommunications Corporation* (1993) 42 FCR 206. [↑](#footnote-ref-20)
21. *X7 v Australian Crime Commission* [2013] HCA 29, 248 CLR 92, per Hayne and Bell JJ at [125]. [↑](#footnote-ref-21)
22. [1993] AC 1 at 31. [↑](#footnote-ref-22)
23. *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 per Murphy J at 346; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per McHugh J at 545, where United States authorities are also cited. [↑](#footnote-ref-23)
24. Above, at 546. [↑](#footnote-ref-24)
25. (1783) 1 Leach 263 at 263-264, 168 ER 235. [↑](#footnote-ref-25)
26. *Companies (Winding up) Act* 1890 (53 & 54 Vict c 63) (UK). [↑](#footnote-ref-26)
27. *Williams*, above, p 47. [↑](#footnote-ref-27)
28. Davies, above, (2000) 74 ALJ 26-41, 99-106. [↑](#footnote-ref-28)
29. *Taxation Administration Act* 1953 (Cth), Sch 1, s 355-75. [↑](#footnote-ref-29)
30. See, for example, the *Australian Crime Commission Act* 2002, s 7C(2) which empowers the Board of the ACC to make a determination that has the effect of allowing the exercise of coercive powers only after considering "whether methods of collecting the criminal information and intelligence that do not involve the use of powers in this Act have been effective". [↑](#footnote-ref-30)
31. *Australian Crime Commission Act* 2002, s 30; *Australian Securities and Investments Commission (Act* 2001, s 68. [↑](#footnote-ref-31)
32. *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. See also *Branch-Allen v Easther* [2016] TASSC 29, 27 Tas R 63. [↑](#footnote-ref-32)
33. *Strickland v Commonwealth Director of Public Prosecutions* [2018] HCA 53, 361 ALR 23. [↑](#footnote-ref-33)
34. *Lee v The Queen* [[2014] HCA 20](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2014/20.html?query=), 253 CLR 455. [↑](#footnote-ref-34)
35. *Hammond v Commonwealth* (1982) 152 CLR 188. [↑](#footnote-ref-35)
36. *Lee v The Queen* (above); *Strickland v Commonwealth Director of Public Prosecutions* (above). [↑](#footnote-ref-36)