INDEMNITIES — A DOUBLE EDGED WEAPON

By Ian Temby, Q.C., Director of Public Prosecutions*

"The law confesses its weakness by calling in the assistance of those by whom it has been broken. It offers a premium to treachery, and destroys the last virtue which clings to the degraded transgressor. Still on the other hand, it tends to prevent any extensive agreement among atrocious criminals, makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate." — Chitty, A Practical Treatise on the Criminal Law (2nd ed., 1826).

THE provision of immunity from prosecution to witnesses has received considerable attention overseas. In Australia, the subject is one shrouded in obscurity.

However, the enactment by Federal Parliament of provisions relating to witness indemnities in the prosecution of Commonwealth offences has significantly altered the complexion of the law.

In general terms, an indemnity is an undertaking that evidence given by a witness will not be used to form the basis of a prosecution against that person or alternatively, that the witness will not be prosecuted.

The more limited form of indemnity — namely that an answer given or a statement or disclosure made by a person giving evidence will not be used in evidence against that person, except in a prosecution for perjury — is known as a 'use' indemnity. A 'transactional' indemnity is broader. It is an undertaking that the witness will be immune from prosecution.

There is also the 'use-derivative use' indemnity. This precludes the prosecution from leading any evidence discovered as a result of the evidence given by the witness, but does not prevent a subsequent prosecution of the witness where the prosecution is not based on evidence directly or indirectly provided by the witness.

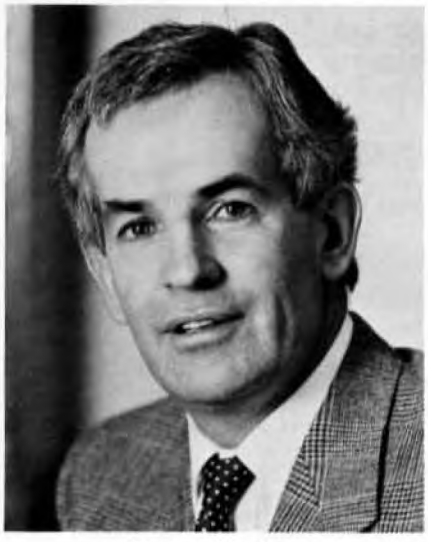
Historically, immunity against prosecution involved the Crown granting an advance pardon when it was anxious to secure the testimony of a witness. The pardon was normally given after the criminal act had been committed but before the laying of the indictment to which it acted as a bar. The practice was exercised well into this century.

In modern times, the place of the pardon has been taken by the nolle prosequi. The granting of a 'no-bill' is undertaken under section 9(4) of the Director of Public Prosecutions Act 1983. It is not strictly equivalent to the granting of a pardon as it does not guarantee that no further proceedings will be instituted. It is, however, implicit that on the termination of criminal proceedings in this manner, unless further information comes to hand, no further charges will be laid.

The Australian Debate

In 1979, the Hon. Mr Jusice Woodward in his Report on the Royal Commission into Drug Trafficking discussed the use of witness indemnities. Then in 1980 the Hon. Mr Justice E.S. Williams recommended in his report arising out of the Australian Royal Commission into Drugs that the privilege against self-incrimination should not be available where a grant of immunity is given.

His Honour further recommended that a procedure should be enacted governing the grant of such immunity.



• *Mr Ian Temby*

In his report into the activities of Terence John Clark and his associates, Royal Commissioner the Hon. Mr Justice D.G. Stewart observed that any serious attempt to combat organised crime in Australia will require a greater willingness among Crown law officers to grant immunity to potential key witnesses, as well as a properly organised and funded witness protection scheme.

He expressed the view that the authority to grant immunities should be conferred on a statutory office holder such as a Director of Public Prosecutions rather than remaining the prerogative of the Attorney-General who is, in the final analysis, a senior politician. This would ensure that this aspect of the administration of the criminal law was divorced as far as possible from politics.

Special Prosecutor R. Redlich, in his 1982–83 report, urged that the privilege of self-incrimination should not be eroded in proceedings before the National Crime Commission. If the evidence was regarded as crucial to furthering its investigations, the Commission should be able to seek from the Attorney-General or Director of Public Prosecutions the appropriate immunities to waive that privilege. He said it should not be forgotten that even if a witness were compelled to incriminate himself or herself before the N.C.C. such immunity would have to be granted for the witness to be compellable for the prosecution at trial. The power to grant indemnities must, however, be left to those charged with the responsibility to prosecute.

In his later annual report, Special Prosecutor Redlich examined the appropriate form of immunity to be given. He observed that the traditional use indemnity provided insufficient

protection to witnesses.

On the other hand, the transactional indemnity amounted to a complete absolution of past deeds which was not altogether a desirable course. The provision of use-derivative use indemnities was a compromise between the two extreme alternatives.

The Senate Standing Committee on Constitutional and Legal Affairs in its report on the National Crime Authority Bill considered that, rather than abrogate the privilege against self-incrimination generally where a witness properly claims that an answer to a question or the production of a document may incriminate him or her, the Authority itself should expeditiously determine whether it will require that answer, but where it does abrogate a properly made claim of privilege the appropriate indemnity should operate.

The Committee took the view that the appropriate indemnity to be granted should be of the use-derivative use type so that where the privilege against self-incrimination is abrogated, no testimony compelled under the order to testify, or any information derived from it could be used against the witness in any criminal case other than a prosecution for perjury.

These deliberations constituted the major impetus for the introduction of specific legislative provisions. In contrast to the National Crime Authority Act 1984, the Director of Public Prosecutions Bill 1983 passed through both Houses of Parliament with little dissension.

Present Position

Under section 9(6) of the D.P.P. Act the Director is empowered to give a use indemnity. Where such an undertaking is made, the evidence obtained is inadmissable other than in a prosecution for perjury. In contrast, under section 30(5) of the National Crime Authority Act 1984, it is not a reasonable excuse to fail to answer questions put by the Authority where a use-derivative use undertaking has been given by the D.P.P.

The Director in giving the undertaking must state that, in his opinion, there are special grounds that in the public interest require that answers be given or documents or things be produced by that person; and the general nature of those grounds.

Section 30(6) of the N.C.A. Act provides that the Authority may recommend to the D.P.P. that a person who has been or is to be served with a summons to appear as a witness at a hearing is to be given an undertaking in accordance with the terms set out in the sub-section.

The two legislative provisions do not sit well with each other. On the one hand the D.P.P. is given little guidance under his own Act as to what the appropriate criteria are when deciding whether an indemnity should be granted. On the other hand, the major considerations governing the decision the D.P.P. is required to make in relation to prospective witnesses before the N.C.A. are specified.

The decision as to whether the public interest would require the granting of an indemnity can be undertaken with confidence when one has reached the prosecution stage. It can only be done with trepidation at the earlier investigative stage contemplated by the N.C.A. Act. This means that the Director is heavily reliant upon the content of the recommendation put to him by the N.C.A. and some may therefore say that this places him in the invidious position of not being able to fully exercise his independent discretion but is acting under dictation.

Secondly the fact that the N.C.A. has to refer the decision to the D.P.P. was no doubt seen as a safeguard to ensure objectivity on the serious question of granting indemnities. A truly objective decision can only be made when all the facts are put forward, adequate time is given to consider the question and the significance of the witness' evidence is sufficiently clear.

Given the apparent differences in the legislative provisions concerning witness indemnities, are separate sets of criteria applicable to the respective decisions to indemnify? In practice the same matters are considered material whether the indemnification is sought under the D.P.P. Act or the N.C.A. Act.

What, then, are the relevant criteria? In 1982 the then Acting Attorney-General issued a set of guidelines which recognise that while it is desirable that the criminal justice system should operate without the need to grant indemnities or pardons, there are occasions when the interests of justice necessitate the granting of pardons or immunity from prosecution.

The guidelines note that one possible alternative which should invariably be contemplated is whether to proceed to conviction of a prospective witness in respect of at least some offences committed before commencement of the trial of the principal offender. In broad principle, it adds, this course is preferable to giving an indemnity in respect of all offences committed by the prospective witness.

In deciding whether the granting of the indemnity is appropriate, the policy regards the following matters as relevant:

- Do the interests of justice require the case to proceed against the principal offender?
- Is the evidence of the person in respect of whom indemnity or pardon is sought essential to achieve the conviction of the principal offender?
- Whether it would be possible to proceed to conviction of this person on at least some of the charges that would be disclosed by his or her evidence before the trial of the principal offender?
- What is the degree of involvement of the person in the offence compared with the involvement of the principal offender?
- What is the general character of the person and the previous criminal record?
- Was any reward or inducement offered to the person as a condition of his or her giving evidence?

I believe that by making publicly known the criteria under which any decision to grant an indemnity is made, and informing both the witness and the court of the content of the indemnity, any possible unfairness and unreasonable element of secrecy is minimal. Indemnities are generally granted in order to "catch a big fish' using for the purpose the available option of throwing back a 'small fry'. This general approach can be seen to have particular utility with respect to drug importation offences. It is a notorious fact that couriers are often caught and dealt with, but others are not. Far more useful results can be achieved by catching the operational captains or their lieutenants, or even more attractive, the financiers and others at the apex of the criminal activity.

Options and Problems

It is occasionally remarked that immunity from prosecution need not be provided as co-operation can be secured by offering the informer a concession at the sentencing stage. This is a much more discretionary and uncertain process than the offer of immunity. The D.P.P. cannot guarantee that the discretion will be exercised in the informer's favour, although he may indirectly be able to assist by the choice of charge.

A problem also sometimes arises, where both State and Federal offences are disclosed, as to whether it is necessary to seek indemnities from both sets of authorities. If the Commonwealth provides an indemnity does that preclude State authorities from prosecuting?

Before the enactment of the D.P.P. Act the position was very much that State indemnities did not extend to Commonwealth offences and vice versa. The present position, however, is less clear. I think it undesirable that Commonwealth indemnities be provided which would extend either expressly or impliedly to State offences without prior consultation

with State authorities. In practical terms, where the possibility of the commission of both State and Federal criminal offences is disclosed, both indemnities are often provided rather than reliance being placed upon the Federal indemnity precluding use of the witness' evidence against him or her in State proceedings for the State offence disclosed in testimony.

The third issue requiring consideration relates to sanctions. What are the sanctions if an immunised witness then refuses to testify, and what happens if the prosecution breaks its promise and launches criminal proceedings? Sanctions against witnesses depend on the basis on which the indemnity is provided. There is certainly no statutory provisions in the case if the witness is before any but the N.C.A., where it is an offence for an immunised witness to refuse to answer questions. There are, however, the laws of contempt available to the court.

On the other hand, where an indemnity has been provided, what sanctions exist where the prosecution reneges? there are various avenues available. It would seem that any prosecution brought in contravention of an undertaking might properly be stayed as an abuse of process. Alternatively, the person charged could seek a ruling on the construction of the indemnity as to whether it extends to the subject matter of the current prosecution. The other alternative redress would be to bring an action in the Federal Court for judicial review under the Administrative Decisions (Judicial Review) Act. These are theoretical considerations — the D.P.P. stands by its word.

The procedures so far outlined apply to prosecution witnesses. This is not necessarily always the case. It would be rare to have matters coming before the courts where defence witnesses have been indemnified, however, on four occasions in recent years that has occurred. These were given in relation to defence witnesses in the "Mr Asia" trial in proceedings against them for offences against Commonwealth law. Similar undertakings were given by the New Zealand prosecuting authorities and the English D.P.P.

I would be reluctant to see the use of the witness indemnity as a frequent and regular event. To use immunised witnesses too often may give rise to a temptation on the part of investigating authorities to place too high a reliance on the evidence of accomplices, which, in any event, the defence is likely to seek to vigorously discredit.

*** This is an edited version of an address given to the Australian Legal Convention in Melbourne on 8 August 1985.**

SECURING ROYAL VIPs

• *Under the watchful eyes of the police escort, the Queen and Prince Philip chat with members of the public on their arrival in Sydney. (Courtesy Worldwide photos Ltd.)*

THE AFP's contribution to the success of the Royal Visit to Australia in March has been praised by the Commonwealth officer responsible for coordinating the visit.

The Queen and Prince Philip arrived in Australia on 2 March and left again on 13 March for London. The AFP had the task of liaising with State Police on the planning of operational protective security arrangements.

Security for the visit was tight, following incidents in New Zealand and the possibility of threats from dissident organisations.

AFP Security Liaison Officer for the Australian visit was Detective Inspector George Davidson, VIP Protection Branch.

The Commonwealth Director, Department of the Prime Minister and Cabinet, Mr J.D. Anderson, said of the AFP contribution:

> "In particular (the) common sense and good personal relations with the relevant State Police facilitated the sort of working relations between Federal and State Police that are important for high level visits."

Detective Inspector Davidson said the success of the tour from the security point of view was largely due to the extensive planning and the familiarity of officers concerned with the complexities of such a visit.

Planning for the visit began last November when he accompanied the Queen's Deputy Private Secretary, Sir William Haseltine, the Queen's Police Officer, Chief Inspector Peter Prentice, and Commonwealth Officers on a five-day visit to all proposed function venues. This preliminary tour set the scene for the security arrangements in each area visited by the Royal Couple.

Detective Inspector Davidson said the only major hitch on the tour occurred in South Australia where the Queen and Prince Philip were to land from the Royal Yacht at Glenelg, scene of the foundation of the colony 150 years ago.

Heavy seas prevented the landing going ahead and the Royal Couple were forced to come ashore at Adelaide's Outer Harbour.

The AFP was involved at all stages of the tour. In the ACT, there was a full commitment to security during the three days the Queen was in the Territory. Operations Commander was Chief Superintendent Alan Bird, ACT Regional Commander.

In Sydney, the AFP airport teams and the Bomb Response Unit worked in conjunction with and under the direction of the NSW Police.

In Melbourne, the Bomb Response Unit carried out mail checks and supervision of goods deliveries to HMY Britannia.

During the SA visit, bomb response activities were assisted by the use of equipment set up on a permanent basis in a warehouse at Port Adelaide. An AFP explosives detector dog was attached to the SA Police for venue searches.

During the return flight to Britain, the Overseas Liaison Officer stationed in Singapore, Station Sergeant Dave Lewington assisted with security arrangements on transit.

Detective Inspector Davidson said the security measures put into place during the tour did not detract in any way from the objective of achieving maximum exposure of the Royal Couple to the public and the media.