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ASPECTS OF PRIVILEGE: SELF-INCRIMINATION

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Justice Margaret Wilson

1. "A cardinal principle of our system of justice"[1], a "bulwark of liberty"[2] and "fundamental to a civilised legal system"[3]: these are some of the ways our highest Courts have described the privilege against self-incrimination. It is a substantive right[4] entitling a person to refuse to answer any question, or produce any document, if the answer or the production would tend to incriminate that person[5].

2. Compelling as those descriptions may be, it is salutary to remember that at common law a person has to claim the

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[1] *Sorby & anor v The Commonwealth of Australia & ors* (1983) 152 CLR 281 per Gibbs CJ at 294
[2] *Pyneboard Pty Ltd v Trade Practices Commission & anor* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 340
[3] *Accident Insurance Mutual Holdings Ltd v McFadden & anor* (1993) 31 NSWLR 412 per Kirby P at 420
[4] *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 508
[5] But an accused person who gives evidence in a criminal proceeding cannot refuse to answer a question on the ground that to do so would tend to prove the commission of the very offence with which he is charged: *Evidence Act* 1977 (Qld) s 15

privilege in order to be entitled to its protection. There is no obligation on a Court or someone seeking information to warn the person that he is not obliged to answer an incriminating question, or to point out that a question may be designed to elicit a self-incriminating answer[6]. And once the answer is given, the privilege is waived[7].

3. There is debate amongst legal historians whether the privilege against self-incrimination emerged as a response to the excesses of the Star Chamber or whether it arose with the adversarial criminal process and the appearance of defence counsel at the end of the eighteenth century.[8] Whatever its true origins, it is now so "deeply ingrained in the common law"[9] that it is regarded as unqualified unless excluded by

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[6] There is an obligation to warn under s 132 of the *Uniform Evidence Acts.*

[7] *R v Coote* (1873) LR 4 PC 599; New Zealand Law Commission, Discussion Paper, *The Privilege against Self-Incrimination* (Preliminary Paper 25, September 1996) at para 21; Queensland Law Reform Commission, Report, *The Abrogation of the Privilege against Self-Incrimination* (Report No 59, December 2004) at paras 9.64 – 9.67

[8] There is an interesting synopsis of the competing views in Queensland Law Reform Commission, Report, *The Abrogation of the Privilege against Self-Incrimination* (Report No 59, December 2004) at para 2.5 – 2.18.

[9] *Sorby & anor v The Commonwealth of Australia & ors* (1983) 152 CLR 281 per Mason, Wilson and Dawson JJ at 309

statute[10] or waived by the person entitled to claim it. For example, in this country appellate Courts have overruled judicial attempts to circumvent the privilege by orders for disclosure on condition that the information disclosed not be used in criminal proceedings against the disclosing party[11]. The English approach differs somewhat. In proceedings brought by a company against former officers for fraud and breach of trust[12], the House of Lords sanctioned an order requiring disclosure of information, on condition that no disclosure made in compliance with the order be used in prosecution of the offence alleged to have been committed by the disclosing party. Their Lordships considered the order provided adequate protection, because the prosecuting authorities had knowingly acquiesced in its being made.

4. The privilege against self-incrimination affords protection against the risk of incrimination by both direct evidence and

[10] *Reid v Howard* (1995) 184 CLR 1 at 11
[11] *Reid v Howard* (1995) 184 CLR 1 at 14 – 17; *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436
[12] *AT & T Istel Ltd v Tully* [1993] AC 45

indirect (or "derivative") evidence. As Lord Wilberforce explained in *Rank Film Distributors Ltd v Video Information Centre*[13]-

> "….. whatever direct use may or may not be made of information given or material disclosed, under the compulsory process of the court, it must not be overlooked that, quite apart from that, its provision or disclosure may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character. ….The party from whom disclosure is asked is entitled, on established law, to be protected from these consequences."

The Australian authorities are to the same effect[14].

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[13] [1982] AC 380 at 443

[14] See, for example, *Sorby & anor v The Commonwealth of Australia & ors* (1983) 152 CLR 281 at 294 – 295; 310; *Reid v Howard* (1995) 184 CLR 1 at 6 – 7.

5. How, then, does a Court determine whether a claim of privilege against self-incrimination should be upheld? The test is whether compelling answers would place the person in "real and appreciable danger of conviction"[15]. The mere statement by a witness that he believes an answer would tend to incriminate him may not be enough, but to require him to give a full explanation as to how it would have such a tendency may defeat the privilege[16]. It may not always be necessary to call evidence on the point, as the tendency to self-incrimination may be obvious or sufficiently discernible[17]. In *Accident Insurance Mutual Holding Ltd v McFadden*[18]Clarke JA cited Taylor, *A Treatise on the Law of Evidence*[19] –

> "…In all cases of this kind the court must see, from the surrounding circumstances, and the

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[15] *Sorby& anor v The Commonwealth of Australia & ors* (1983) 152 CLR 281 at 294 per Gibbs CJ; *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 at 469 per Cooke J.

[16] *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547 at 574 per Lord Denning MR

[17] *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436 at 447

[18] (1993) 31 NSWLR 412 at 430

[19] 8th ed vol 2 at 1242 - 1243

> nature of the evidence which the witness is called to give, that reasonable grounds exist for apprehending danger to the witness from his being compelled to answer. When, however, the fact of such danger is once made to appear, considerable latitude should be allowed to the witness in judging for himself of the effect of any particular question; for it is obvious that a question, though at first sight apparently innocent, may, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering….."

6. The privilege against self-incrimination is now recognised as an important individual human right – that is, one which may be asserted by natural persons but not corporations[20]. It can apply outside judicial proceedings, in non-judicial inquiries

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[20] *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477

and investigations[21]. But the assertion of that right can impede other legitimate interests, such as the protection and enforcement of an opposite party's civil rights and the exercise of investigative and regulatory powers by relevant authorities. In recent years law reform agencies and Legislatures have given increasing attention to striking the right balance between such competing interests.[22]

7. There is another privilege, the penalty privilege: a natural person (but probably not a corporation[23]) may refuse to answer questions or provide information on the ground that to do so might expose him to the imposition of a civil penalty. The penalty privilege is distinct from the privilege against self-incrimination. It is available both at common law and in

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[21] *Pyneboard Pty Ltd v Trade Practices Commission & anor* (1983) 152 CLR 328 at 341 347; *Sorby & anor v The Commonwealth of Australia & ors* (1983) 152 CLR 281 at 309; 31

[22] Australian Law Reform Commission, Report, *Principled Regulation – Federal Civil and Administrative Penalties in Australia* (ALRC 95, December 2002) at paras 18.20-18.21

[23] In *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 the point was not fully argued, but three members of the High Court considered that the penalty privilege would not be available to a corporation; one member considered it would be available to a corporation to resist discovery in a proceeding brought to enforce a penalty; and three member did not address the issue. In *TPC v Abbco Iceworks Pty Ltd & ors* (1994) 53 FCR 96 the majority of the Full Court of the Federal Court held that the penalty privilege was not available to a corporation.

equity[24]. But, as I shall endeavour to explain, it may be more limited in its scope and application than the privilege against self-incrimination.

8. First, what is a civil penalty in this context? Broadly it is a penalty designed to punish or discipline the respondent rather than to compensate the applicant[25]. Damages awarded against a defendant in civil proceedings do not comprise a civil penalty; an action against directors to recover a debt owed by the company under s 556 of the former *Companies Code* has been held not to be an action to enforce a penalty[26]; but other monetary exactions may comprise a penalty[27], as would liability to statutory disciplinary proceedings[28], removal from public office[29], disqualification from acting in the

[24] *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 337
[25] *Rich v ASIC* (2004) 209 ALR 271 at 279 -280
[26] *EL Bell Packaging Pty Ltd v Allied Seafoods Ltd* (1990) 8 ACLC 1135 at 1144 (Vic Sup Ct FC)
[27] For example, proceedings for a civil penalty under the *Trade Practices Act* 1974
[28] *Police Services Board v Morris* (1985) 156 CLR 397 at 403 per Gibbs CJ; 408 per Wilson and Dawson JJ
[29] *Taylor v Carmichael* [1984] 1 NSWLR 421

management of a corporation[30], and loss of civil status consequent on bankruptcy[31].

9. Unlike the privilege against self-incrimination, the penalty privilege has not been judicially elevated to the status of a human right, and there is uncertainty about whether it can apply outside judicial proceedings. In *Pyneboard*[32] two corporations and an individual were served with notices issued by the Trade Practices Commission under s 155 of the *Trade Practices Act* 1974 requiring them to give information and produce documents relating to matters which might constitute breaches of s 45 of that Act. The respondents to the notices applied for declarations that they were not obliged to furnish information or documents which might tend to expose them to a penalty. The High Court concluded that even if it were otherwise applicable, the privilege was abrogated by s 155. In a joint judgment the majority was not prepared to hold

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[30] *Rich v ASIC* (2004) 209 ALR 271 at 280
[31] *Re a Debtor* [1910] 2 KB 59 at 66
[32] (1983) 152 CLR 328

that the privilege is inherently incapable of application in non-judicial proceedings[33]. But that has been doubted in subsequent decisions of the High Court[34]. The most recent case, *Rich v ASIC*[35], was concerned with discovery in proceedings under the *Corporations Act* 2001 for declarations that two company directors had breached their duties, and orders for compensation and disqualification The appellants succeeded in resisting discovery on the ground that the proceedings exposed them to penalties. Although the Court was not called on to determine whether the penalty privilege is available in non-judicial proceedings, the majority clearly left the question open[36]. Kirby J (who dissented in the outcome) was more strident. He said[37] -

> "…[The privileges against self-incrimination and legal professional privilege] are different

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[33] *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 341

[34] *Daniels Corporation Pty Ltd v ACCC* (2002) 213 CLR 543 per Gleeson CJ, Gummow and Hayne JJ at 554 (a decision on legal professional privilege); *Rich v ASIC* (2004) 209 ALR 271 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at 279

[35] *Rich v ASIC* (2004) 209 ALR 271

[36] *Rich v ASIC* (2004) 209 ALR 271 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at 278 - 279

[37] *Rich v ASIC* (2004) 209 ALR 271 at 309

> from the penalty privilege invoked in this case. Compared to the penalty privilege, each of those privileges has a longer history in the law. Each is more fundamental to its operation. Each is reflected in universal principles of human rights. The penalty privilege is not. The penalty privilege is of a lower order of priority. It has a more recent and specialised origin and purpose in our law. It should not be blown into an importance that contradicts or diminishes the operation of the Act and the achievement of its purposes."

10. It is interesting that despite judicial caution about the penalty privilege, the Australian Law Reform Commission recommended in its report *Principled Regulation – Federal Civil & Administrative Penalties in Australia*[38] that the same

[38] Australian Law Reform Commission, Report No 95 at recommendation 18-1

protections afforded to individuals by the privilege against self-incrimination in criminal matters should apply in relation to the imposition of a civil or administrative penalty. And the Queensland Law Reform Commission, in its report on *The Abrogation of the Privilege against Self-Incrimination*, recommended that, in the absence of an express provision to the contrary, the penalty privilege should be available in non-judicial proceedings and investigations as well as in judicial proceedings[39].

11. Section 128 of the *Uniform Evidence Acts* applies to the penalty privilege as well as to the privilege against self-incrimination. It does not abolish the common law privileges, but rather provides a process by which a witness may give, or be required to give, evidence which may tend to incriminate him or expose him to a civil penalty, in return for a certificate granting him immunity from direct or indirect use[40] of that

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[39] Queensland Law Reform Commission Report No 59, December 2004 at para 5.1

[40] Sometimes referred to as "use" and "derivative use" immunities.

evidence in an Australian court (other than in a criminal proceeding in respect of the falsity of the evidence.) Specific legislation may displace the general operation of s 128 in judicial proceedings.[41] Where a witness objects to giving evidence in reliance on one of these privileges, the Court must determine whether there are reasonable grounds for the objection. If it finds that there are reasonable grounds for the objection, the witness is not required to give the particular evidence unless –

(a) he chooses to do so, having been informed that he will be given a certificate; or

(b) while the evidence may expose the witness to self-incrimination or a civil penalty under Australian law, it does not tend to prove that he has committed an offence

[41] For example, the *Corporations Act* 2001 s. 1316A; and the *Australian Securities and Investments Commission Act* 2001 s. 68.

under foreign law, and the interests of justice require that he give the evidence.

If at first the Court does not find that there are reasonable grounds for the objection, the witness must give the evidence, although if the Court subsequently finds that there were reasonable grounds for the objection, it must give him a certificate.

12. The Australian Law Reform Commission and its New South Wales and Victorian counterparts have recently conducted a review of the *Uniform Evidence Acts.* Their report was published in December 2005[42]. In the conduct of the review, they issued a discussion paper[43], to which the Queensland Law Reform Commission responded in its report *A Review of the Uniform Evidence Acts* dated September 2005 [44].

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[42] Australian Law Reform Commission & ors, Report, *Uniform Evidence Law,* (ALRC 102, December 2005)
[43] Australian Law Reform Commission, Discussion Paper, *Review of the Uniform Evidence Acts* (DP 69, 2005)
[44] Queensland Law Reform Commission, Report No 60

13. The ALRC and its NSW and Victorian counterparts took on board criticisms of the certification procedure as clumsy and unclear, and recommended some amendment of s128 to simplify its provisions. The QLRC was opposed to the adoption of a certification procedure.

14. The Queensland Law Reform Commission had earlier reported on *The Abrogation of the Privilege against Self-Incrimination*[45] in December 2004. (In fact it dealt with both the privilege against self-incrimination and the penalty privilege.) It considered that a person should be entitled to claim the privileges in the absence of a clear, express provision to the contrary[46], and recommended against the wholesale abrogation of either penalty. It said that there are only two real bases on which abrogation may be justified in a particular case –

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[45] Queensland Law Reform Commission Report No 59

[46] Queensland Law Reform Commission, Report, *The Abrogation of the Privilege against Self-Incrimination* (Report No 59, December 2004) at Recommendation 7-1

(a) the significance of the public interest in question: whether the information sought to be compelled concerns an issue of major public importance with a significant impact on the community in general or on a section of the community; and

(b) that a person has voluntarily subjected himself to the regulatory scheme with which he is required to cooperate[47].

It considered that there are several additional factors that, while not themselves justifications for the abrogation of privilege, are nevertheless relevant to whether legislation should abrogate either or both privileges –

- whether there are alternative means of obtaining the information;

[47] Queensland Law Reform Commission, Report, *The Abrogation of the Privilege against Self-Incrimination* (Report No 59, December 2004) at paras 6.48 – 6.56

- whether an immunity is provided against the use of the compelled information;
- whether there are procedural safeguards in place;
- whether the information is contained in a document already in existence; and
- whether the extent of the abrogation is no more than necessary to achieve its intended purpose[48].

The QLRC also considered that a derivative use immunity should not be granted in the absence of exceptional circumstances justifying the extent of its impact[49]. It recommended legislation of general application to the effect that an Act not abrogate either privilege except so far as expressly provided, and that where a privilege has been abrogated, an individual must be informed –

[48] Queensland Law Reform Commission, Report, *The Abrogation of the Privilege against Self-Incrimination* (Report No 59, December 2004) at paras 6.57 – 6.59

[49] Queensland Law Reform Commission, Report, *The Abrogation of the Privilege against Self-Incrimination* (Report No 59, December 2004) at Recommendation 9-3

(a) of his obligation to comply with a requirement to answer a question or give information or produce a document, even though doing so might tend to incriminate him or to prove he is liable to a civil penalty;

(b) whether he has the benefit of any immunity from the use of the compelled information; and

(c) the nature and extent of any immunity.

In that report the QLRC grappled with vexed issues surrounding derivative use immunity, including the onus of proof that evidence sought to be adduced was not derived from the compelled information. It recommended that where an individual objects to the admission of evidence on the ground that it was directly or indirectly derived from compelled information, the party wanting to adduce it should bear the onus of proving that it was not derived from the compelled information.

15. In its more recent report *A Review of the Uniform Evidence Acts* the QLRC suggested that if Queensland were to consider adopting the uniform legislation generally, consideration should be given to doing so without the adoption of the provisions dealing with the privilege against self-incrimination[50].

16. The common law privileges afford protection against having to produce or identify incriminating documents or reveal their whereabouts or explain their contents in an incriminating fashion[51]. Such a requirement in relation to documents may arise not only at trial, but at an interlocutory stage of a proceeding, or in the course of a non-judicial investigation or inquiry.

17. Generally the privilege against self-incrimination applies only to testimonial evidence and not to real evidence – that is, it

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[50] Queensland Law Reform Commission, Report No 60 at Recommendation 7-16

[51] *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 per Gibbs CJ, Mason and Dawson JJ at 393

applies to evidence which comprises a statement, rather than evidence admitted as an object[52]. Some documents speak for themselves, and so a person cannot resist producing them in reliance on the privilege. As Mason CJ and Toohey J explained in *Environment Protection Authority v Caltex Refining Co Pty Ltd*[53] -

> "It is one thing to protect a person from testifying as to guilt; it is quite another to protect a person from the production of documents already in existence which constitute evidence of guilt…. [documents] are in the nature of real evidence which speak for themselves as distinct from testimonial oral evidence which is brought into existence in response to an exercise of investigative power or in the course of legal proceedings."

[52] *Sorby& anor v The Commonwealth of Australia & ors* (1983) 152 CLR 281 per Gibbs CJ at 291 – 292; *Wigmore on Evidence* (1961 ed),vol VIII, p 378, para 2263
[53] (1993) 178 CLR 477 at 493

In the same case McHugh J cited Lord Templeman in *AT & T Istel Ltd v Tully*[54] -

> "It is difficult to see why in civil proceedings the privilege against self-incrimination should be exercisable so as to enable a litigant to refuse relevant and even vital documents that are in his possession or power and which speak for themselves."[55]

The New Zealand Law Commission has recommended that the privilege be removed for pre-existing documents[56]

18. In civil litigation, *Mareva* and *Anton Piller* orders, or freezing and search orders as they are often called, have been described as "the law's two nuclear weapons"[57]. They are interlocutory orders, usually obtained *ex parte* - *Mareva*

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[54] [1993] AC 45 at 53
[55] (1993) 178 CLR 477 at 555
[56] New Zealand Law Commission, Report, *Evidence* (Report 55 – Volume 1, August 1999) at para 281
[57] *Bank Mellat v Nikpour* [1985] FSR 87 (CA) at 92 per Lord Donaldson LJ; Biscoe *Mareva and Anton Piller Orders – Freezing and Search Orders* (2005) at para 1.1

orders restraining the removal of assets from the jurisdiction or their dissipation and *Anton Piller* orders allowing inspection and seizure of evidence needed to prove the applicant's claim and in danger of being destroyed, concealed or removed. A *Mareva* order is often accompanied by an ancillary order for the disclosure of assets and sometimes for attendance at court for an oral examination as to assets, usually following the preparation of an affidavit of assets. An *Anton Piller* order may include a direction that the respondent disclose information and documents that would not necessarily be found by search alone. The effectiveness of such orders can be seriously dented if an individual respondent invokes one of the privileges, as he is entitled to do[58].

19. In the United Kingdom s 72 of the *Supreme Court Act* 1981 now provides that defendants in intellectual property

[58] *Rank Film Distribution Ltd v Video Information Centre* [1982] AC 380; *Reid v Howard* (1995) 184 CLR 1

infringement cases (which are the kind of proceedings where *Anton Piller* orders are most frequently made) cannot resist production of documents on the ground of self-incrimination, but that the documents so produced cannot be used in any subsequent prosecution. In New South Wales s 87 of the *Civil Procedure Act* 2005 has extended the certification procedure under s 128 of the *Uniform Evidence Acts* to interlocutory proceedings. The New Zealand Law Commission has recommended the abrogation of the privilege in relation to *Anton Piller* orders, and the introduction of a certification procedure[59].

20. A committee established by the Council of Chief Justices of Australia and New Zealand and chaired by Justice Lindgren of the Federal Court has been considering the harmonisation of rules of court, practice notes and forms in relation to *Mareva* and *Anton Piller* orders. This committee has all but

[59] New Zealand Law Commission, Report, *Evidence - Reform of the Law* (Report 55 – Volume 1, August 1999) at para 292 – 295.

completed its deliberations in this area, and it is up to the Rules Committees of the various Courts to consider whether its recommendations should be implemented in their jurisdictions. The Queensland Rules Committee has not addressed this yet.

21. The Lindgren Committee submitted to the Australian Law Reform Commission's inquiry into *Uniform Evidence Law* that the *Uniform Evidence Acts* should be amended to abrogate the privileges so that an order for disclosure must be obeyed, but that there should be use and derivative use immunities given. In a subsequent submission the Committee suggested that the privileges should be abrogated in relation to documents in existence before a disclosure order was made; that a person should not be able to resist a disclosure order at any stage of a civil proceeding in reliance on either of the privileges, and that a certification procedure should be introduced (except in relation to pre-existing documents or

things)[60]. Ultimately the ALRC and other Commissions undertaking the review recommended –

(a) that the privileges not be available in respect of orders made in civil proceedings requiring a person to disclose information about assets or other information, or to attend court to give evidence regarding such assets or other information, or to permit premises to be searched; and

(b) that there should be a use immunity in relation to documents created or information supplied pursuant to the court order (but not a pre-existing document or thing)[61].

22. The Queensland Law Reform Commission's report was finalised before the second submission of the Lindgren

[60] Australian Law Reform Commission & ors, Report, *Uniform Evidence Law* (ALRC Report 102, December 2005) at para 15.142.
[61] Australian Law Reform Commission & ors, Report, *Uniform Evidence Law* (ALRC Report 102, December 2005) at para 15.151.

Committee. It did not support the abrogation of the privileges in relation to disclosure orders, saying that the provision proposed by the Committee would require rigorous examination particularly to determine whether the abrogation was justified and appropriate in accordance with the QLRC recommendations in its report on *The Abrogation of the Privilege against Self-Incrimination*, and whether there were exceptional circumstances justifying a derivative use immunity[62].

23. A basic philosophical divide seems to underlie the differing approaches of the ALRC and the QLRC to the privilege against self-incrimination and the penalty privilege. It is not just a question of the efficacy and convenience of a certification procedure. The QLRC regards the privileges as so important that they can be abrogated only by legislation specific to the instance in hand, while the ALRC (and others

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[62] Queensland Law Reform Commission, Report *A Review of the Uniform Evidence Acts* (Report No 60, September 2005) at recommendation 7-18

who support the *Uniform Evidence Acts* approach) give more weight to a generalised recognition of the need to protect and enforce other legitimate interests, such as an opposite party's civil rights and the exercise of investigative and regulatory powers by relevant authorities. These are matters of policy, for decision by the respective Legislatures. As yet, those Legislatures have not signalled their responses to the reports, which are still under consideration.