The Self-Incrimination Privilege: Considerations for the Independent National Security Legislation Monitor (INSLM)

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Introduction

The Independent National Security Legislation Monitor (INSLM) is currently conducting a review on the questioning/detention powers of ASIO, AFP and the ACC (now the Australian Criminal Intelligence Commission (ACIC)) as found in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), Part IC of the *Crimes Act 1914* (Crimes Act) and the Australian *Crime Commission Act 2002* (ACC Act). The intersection and relationship between these statutes is also being considered by the INSLM.

The purpose of this submission is to consider the application of the self-incrimination privilege to the questioning powers of ASIO, AFP and ACIC. This submission is not intended to address the issue of detention powers or control orders. This submission first addresses the self-incrimination privilege, its history and origins and puts the case for a restatement of the self-incrimination privilege. The development of the ASIO, AFP and ACC legislation has been informed by our traditional understanding of the self-incrimination privilege. Once the case for reform of the self-incrimination privilege is understood, then the options for the future of ASIO, AFP and ACIC questioning become clearer.

This submission expands on the arguments presented in a recent article published in the Law Institute Journal titled *The High Court's Struggle with the Self-Incrimination Privilege*.[1] In that article it was argued that in a recent series of cases in the High Court (*X7 v Australian Crime Commission*[2], *Lee v NSW Crime Commission* (*Lee No. 1*)[3], *Lee v The Queen* (*Lee No. 2*)[4] and *AFP v Zhao and Jin*[5]), the High Court has been divided, inconsistent, and has struggled to articulate what it understands is the fundamental principle of the adversarial criminal trial. The article concluded by repeating the question posed in 1963 by US Supreme Court Justice William Brennan, 'Is the criminal trial a sporting contest between prosecution and defence or is it a search for the truth?[6] It is submitted that the answer to this question will not only resolve the current debate in the High Court and demonstrate that the settled and accepted legal history of the self-incrimination privilege is as McHugh J stated in *Azzopardi v R*, 'dead wrong'.[7] Once there is a paradigm shift in our thinking about whether the adversarial trial is a search for the truth or a sporting contest between prosecution and defence, then the questioning powers of ASIO, AFP and ACIC will become an integral and legitimate part of the adversarial criminal investigation and trial process.

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[1] Dr Cosmas Moisidis *The High Court's Struggle with the Self-Incrimination Privilege*, May 2016 90 (05) Law Institute Journal 44.
[2] [2013] HCA 29, 248 CLR 92
[3] [2013] HCA 39; 251 CLR 196
[4] [2014] HCA 20; 88 ALJR 65
[5] [2015] HCA 5
[6] Brennan, William J, 'The Criminal Trial: Sporting Event or Quest for Truth?' (1963) (No.3) Washington University Law Quarterly 279
[7] (2001) 179 ALR 349. See discussion by McHugh J at [118] ff.

This submission explains the development of the High Court's understanding of the fundamental principle of the adversarial criminal trial, namely that the burden of proof is on the prosecution and its companion rule that an accused cannot be compelled to assist in the discharge of that burden. In this process a tension has emerged between statutes promoting truth seeking (such as the ASIO, AFP and ACC legislation) and a proof oriented rationale for the adversarial trial.

It is argued in this submission that the companion rule does not mean that an accused is entitled to a sporting chance of an unmeritorious acquittal, with the consequence that criminal investigation statutes (which are intended to facilitate truth seeking), are to be given a restricted interpretation to ensure that the potential for such acquittals remain. Instead, it is argued that the adversarial criminal trial needs to be understood as in fact having inquisitorial and adversarial phases, with the truth seeking objective of convicting the guilty and acquitting the innocent. Instead of focusing on concepts such as 'an impermissible forensic advantage to the prosecution' or 'an interference with the administration of justice', the better view is to consider whether any inquisitorial statutory provision which promotes truth seeking, poses any risk of resulting in a miscarriage of justice at trial.

The questioning powers of ASIO, AFP and ACIC should not be looked at in a vacuum, nor should the adversarial principle and its companion rule as enunciated by the High Court. The questioning powers of ASIO, AFP and ACIC need to be seen as part of the developing field of criminal discovery, which is slowly becoming reciprocal in nature. There is for example, inconsistency between an assumed right not to disclose one's defence so as not to give the prosecution a forensic advantage at trial and statutory regimes which require disclosure of defences based on alibi or expert evidence.

This submission will also demonstrate that it is over simplistic to regard any form of defence disclosure as giving rise to immediate prejudice to the defence and a forensic advantage to the prosecution. In the common law world we have seen a decline of the oral committal hearing. A contributing factor to that decline is the reduced effectiveness of the committal hearing on account of the difficulty in attempting to fully cross-examine prosecution witnesses without disclosing the defence case. At the same time as the committal hearing has declined, there has been an increased interest in plea bargaining. The position has now been reached in the United States, that the oral committal hearing has vanished and few defendants elect to go to trial on account of the pressure of plea bargaining. What then is the value of a pre-trial right to silence if the defence case will never be ventilated? Accordingly, in this submission it is argued that not only is there a case for reciprocal discovery in criminal procedural law and that the questioning powers in issue here are part of that process, it is also argued that there will be prejudice to the defence if we do not accept that criminal discovery should be reciprocal in nature.

Traditional View of the Self-Incrimination Privilege

In *X7 v Australian Crime Commission* the High Court held that the *Australian Crime Commission Act 2002* (Cth) (ACC Act) did not 'require or authorise the examination of a person with respect to offences with which that person is charged and whose trial is therefore pending',[8] In *Lee v New South Wales Crime Commission* (*Lee No.*

[8] [2013] HCA 29, 248 CLR 92 at [157] per Kiefel J.

1)[9] the power to compulsorily examine under the *Criminal Assets Recovery Act 1990* (NSW) (CAR Act) in circumstances where the appellants risked being examined in relation to pending charges, was upheld.

In *Lee No. 1*, Hayne J in a strong dissenting judgment expressed the view that although the statutory provisions in *Lee No. 1* differed from *X7*, 'the principles recognized and applied by the majority in *X7* apply with equal force to this case.'[10] Kiefel J in *Lee* similarly concluded that there was no meaningful distinction between the examination in *X7* and an examination before the Supreme Court under the…'CAR Act'. Kiefel J emphasized that the examination was conducted not by the court, but by the Crime Commission before the Court with a risk of prejudice to the accused's defence.[11]

In *AFP v Zhao and Jin,*[12] the High Court upheld a stay of forfeiture of property proceedings under s49 *Proceeds of Crime Act 2002* (Cth) (POCA) until the determination of a criminal charge against the second respondent. The case of *AFP v Zhao* effectively extends the reasoning in *X7* and it stands for the proposition that examinations post charge whether by crime commissions or under POCA legislation are not going to be permitted if they have the potential to give rise to the disclosure of future trial defences. This decision is arguably in conflict with the previous holding in *Lee No. 1*.[13]

The High Court in *Lee v The Queen (Lee No. 2)*[14] endorsed its previous decision in *X7* and held that the examination publication power in s13(9) *New South Wales Crime Commission Act 1985* (NSW) did not permit publication to the prosecution of the transcripts of accused persons. Such conduct amounted to an impermissible shift in the balance of power to the prosecution.[15]

In *Lee No. 2* a unanimous decision was handed down by the High Court consisting of French CJ, Crennan, Kiefel, Bell and Keane JJ. In *X7*, French CJ and Crennan J delivered a joint dissenting judgment in which their Honours held that the ACC legislation did permit the examination of persons post charge. French CJ and Crennan J in *Lee No. 2* endorsed the majority holding in *X7*.

The Fundamental Principle and the Companion Rule

Central to the reasoning in the above cases, is the High Court's understanding of the fundamental principle of the adversarial trial and its companion rule. In *Lee No. 2* French CJ Crennan, Kiefel, Bell and Keane JJ described these principles in the following terms:

> [32] Our system of criminal justice reflects a balance struck between the power of the state to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person. This was accepted as fundamental in X7…

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[9] [2013] HCA 39; 251 CLR 196
[10] Ibid [62]
[11] Ibid [237]-[239]
[12] [2015] HCA 5
[13] Note 9 above [4] per French CJ
[14] [2014] HCA 20; 88 ALJR 65
[15] Ibid [46]

> [33] The companion rule to the fundamental principle is that an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof. ..[16]

A Search for the Truth or a Sporting Contest?

In *Lee No. 1,* Gageler and Keane JJ articulated the following contrary principles which favoured truth seeking:

> (a) The fundamental principle relied upon in this case, that no accused person can be compelled by legal process to admit the offence of which he or she is accused, is not monolithic, singular or immutable.
> (b) A real risk to the administration of justice does not arise necessarily or presumptively by reason only of the exercise of a statutory power to compel the examination of an accused person where the subject-matter of the examination will overlap with the pending criminal proceedings.
> (c) The proposition that any deprivation of an accused person to a forensic advantage necessarily involves an interference with the administration of justice or the right of an accused person to a fair trial is to be rejected as unsound in principle.[17]

Hayne J in *Lee No. 1* rejected the proposition that a criminal trial was an inquisition into the truth of the allegation made.[18] Bell J expressed the view that the accused's right to remain silent was a fundamental common law right and not a mere forensic advantage. The accused was described as 'entitled to be acquitted of a charge of criminal wrongdoing unless *unaided by him or her* the prosecution proves guilt'.[19]

By contrast, the United States Supreme Court in *Williams v Florida* has upheld truth seeking as a legitimate goal of the adversarial criminal trial:

> Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate … The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.[20]

The Self-Incrimination Privilege and the Star Chamber

In *Lee No. 1* French CJ stated at the outset that 'the privilege against self-incrimination reflects the long standing antipathy of the common law to compulsory interrogations about criminal conduct. It has been said to be partly a result of 'a persistent memory in the common law of hatred of the Star Chamber and its works…'.[21] The fundamental principle was described by Kiefel J as owing its origins

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[16] Note 14 above at [32], [33]

[17] Note 9 above at [318], [322], and [324]

[18] Note 9 above at [82]

[19] Note 9 above at [266]

[20] Williams v Florida 399 US 78 (1970) 81-82 per White J

[21] Note 9 above at [1]

to the interrogations conducted by the ecclesiastical courts and the Star Chamber.[22]

Kiefel J in *Lee No. 1* relied on the principle of legality to the effect that 'an intention to abrogate or curtail a fundamental principle or to authorize conduct which constitutes a risk of prejudice to a fair trial must be clear and unambiguous.'[23]. Kiefel J described it as a golden thread of English criminal law and a fundamental principle of the common law of Australia that it is the duty of the prosecution to prove the guilt of the accused.[24] Kiefel J described the fundamental principle as owing its origins to the interrogations conducted by the ecclesiastical courts and the Star Chamber:

> **[178]** The fundamental principle and the accusatorial system of criminal justice owe much to the reaction of the common law, and the people, to the interrogations conducted by the ecclesiastical courts and the Star Chamber. Those institutions claimed the power to summon a defendant with no warning of the charge to be made against him and to examine him on oath. In a notable case, decided even before the abolition of the Star Chamber, the Court of Common Pleas released a defendant who had been imprisoned for refusing to reply to questions put by the court of High Commission on the principle that no-one is compelled to give himself away.[351] It is from these sources that the fundamental principle and the accusatorial system of criminal justice were developed.[25]

In *Sorby v Commonwealth* Brennan J relying on sources such as Wigmore, which have since been discredited, traced the history of the self-incrimination privilege to the odious practices of the Court of Star Chamber:

> The history of the privilege shows that it is restricted to judicial proceedings. It came to be applied as a rule in the courts of common law and equity after the Court of Star Chamber and the Court of High Commission were abolished in 1641 (16 Car I, c 10 and 16 Car I, c 11 respectively). The odious procedure of those courts in administering the ex officio oath was forbidden to any person "exercising spiritual or ecclesiastical power, authority or jurisdiction" (16 Car I, c 11 s 4). Thereafter those officials were forbidden to administer an ex officio oath to a person whereby he or she should or might be obliged "… to confess or to accuse himself or herself of any crime, offence, delinquency or misdemeanor, or any neglect, matter or thing, whereby or by reason whereof he or she shall or may be liable or exposed to any censure, pain, penalty or punishment whatsoever…".
>
> The prohibition was re-enacted in 1661 (13 Car II, c 12 s 4). Not only were those officials forbidden to compel self-incrimination under oath, but the judges of the common law courts came (occasionally at first) to apply a like prohibition to their own procedure (see Professor E M Morgan: "The Privilege Against Self-Incrimination" Minnesota Law Review vol 34 (1949), p 1 at 10). From that time forward, Sir James Stephen says in his History of the Criminal Law of England (vol 1, p 358): "In some cases the prisoner was questioned, but never to any greater extent than that which it is practically impossible to avoid when a man has to defend himself without counsel. When so questioned, the prisoners usually refused to answer."
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> Soon after the Revolution of 1688, the practice of questioning a prisoner at his trial died out (Stephen, op cit, p 440; cf Wigmore on Evidence (McNaughton rev 1961) vol viii, para 2250, at p 291). [26]

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[22] Note 9 above at [178], [244]

[23] Note 9 above [165], [171]ff

[24] Note 9 above [174]

[25] Note 9 above at [178], see also the reference to the Star Chamber at [244]

[26] (1983) 46 ALR 237 at 264

Modern Scholarship on Self-Incrimination Privilege

McHugh J in *Azzopardi v R*[27] described the traditional view of the self-incrimination privilege as 'dead wrong'. The traditional view of the self-incrimination privilege as cited in cases such as *Sorby*[28], *X7* and *Lee No.1 and Lee No.2*, has been discredited by modern scholars, particularly Yale Professor John Langbein. The modern research was acknowledged by McHugh J who stated in *Azzopardi*:

> Until recently, most common lawyers believed that that privilege and the incidental right to silence were longstanding principles of the common law. They thought that the privilege against self-incrimination had been developed by common lawyers in the first half of the 17th century as a result of the reaction to the procedures in the Star Chamber and the ecclesiastical courts... These beliefs were chiefly based on the writings of Professor J H Wigmore… and… Professor Leonard Levy...
>
> It now turns out that the views of Wigmore and Levy concerning the origin and development of the self-incrimination privilege were dead wrong... Modern researchers have had access to much material that was not available to Wigmore and earlier historians and scholars...
> **…**Drawing on this research, these lawyers and historians have convincingly demonstrated that the self-incrimination principle…did not become firmly established as a principle of the criminal law until the mid-19th century or later. Its entrenchment into the criminal law at that time was the consequence of counsel being increasingly permitted to appear for the accused from the late 18th century. Until the appearance of counsel, the common law system of criminal justice, at least so far as it concerned felonies, was in substance an inquisitorial system. An accused person had no right to silence in any meaningful sense.[29]

In similar fashion Dyson J in *Australian Crime Commission v Stoddart* cautioned against conducting a historical review of the law of evidence without the assistance of modern legal historians:

> [70]…It is generally not safe to embark on an examination of pre-19th century authorities in the law of evidence without the assistance of modern legal historians. That assistance usually demonstrates that earlier accounts call for significant revision.
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> 86. For example, Helmholz et al, The Privilege Against Self-Incrimination: Its Origins and Development, (1997);Langbein, The Origins of Adversary Criminal Trial(2003).[30]

Defence counsel entered the felony criminal trial in the 1730's for the purpose of cross-examination but were not permitted to address juries so that accused would remain a testimonial resource. Only as a result of the *Prisoners' Counsel Act 1836* was there a full right to representation by counsel.[31]

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[27] (2001) 179 ALR 349. See discussion by McHugh J at [118] ff

[28] Note 26 above

[29] Note 27 above at [119] [120] and [121]

[30] (2011) 244 CLR 554

[31] John H Langbein, The Origins of Adversary Criminal Trial (Oxford University Press, Oxford; New York, 2003) 104-5, 310. See also Cosmas Moisidis Criminal Discovery From Truth to Proof and Back Again Institute of Criminology Press (Sydney 2008) Chapter 2

The origins of the self-incrimination privilege has also been considered by Cosmas Moisidis in *Criminal Discovery From Truth to Proof and Back Again* in which it is stated:[32]

> English criminal procedure for centuries stood for the principle that an accused charged with a felony should not be represented by counsel. The classic justification for denying defendants the right to counsel was given by Serjeant William Hawkins as:
>
> > [T]he very Speech, Gesture, and Countenance and Manner of Defense of those who are Guilty, when they speak for themselves, may often help to disclose the Truth, which probably would not so well be discovered from the artificial Defense of others speaking for them.
>
> The 'accused speaks' theory of the trial was said to prevail in the era prior to the introduction of the *Prisoners' Counsel Act 1836* which empowered defence counsel to address juries as well as examine witnesses in all cases. Until the late 18th century, it was typical for defendants in a criminal trial to respond in person to all accusations.
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> Both Langbein and Sir James Stephen in their respective works give examples of trials, such as the trial of Sir Nicholas Throckmorton in the 16th century, which were characterised by a continuous altercation between the prosecution, the court and the accused. Although accused persons could not give evidence on oath until the passing of the *Criminal Evidence Act 1898*, these earlier trials were characterised by accused giving unsworn evidence from the dock. Prior to the 1836 Act [*Prisoners' Counsel Act*], defendants were required to address the jury so that they would remain a testimonial resource and in order to attract leniency. Even accused who openly admitted their guilt, were encouraged to plead not guilty so that the jury and the court could take into account circumstances in mitigation.[33]

Defence counsel entered the felony criminal trial in the 1730's for the purpose of cross-examination but were not permitted to address juries so that accused would remain a testimonial resource. The overprescription of the death penalty and the independence gained by the judiciary as a result of the *Act of Settlement of 1701* contributed to the favourable exercise of the judicial discretion.[34] Langbein makes the following comment on the development of the self-incrimination privilege in the 18th century:

> I touch here on a deeper truth: The privilege against self-incrimination is the creature of defense counsel. The privilege could not emerge so long as the court required the defendant to conduct his own defense. In the 'accused speaks' trial of the early modern period, the testimonial function was merged with the defensive function. The right to remain silent when no one else can speak for you is simply the right to slit your throat, and it is hardly a mystery that defendants did not hasten to avail themselves of such a privilege.[35]

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[32] Cosmas Moisidis *Criminal Discovery From Truth to Proof and Back Again* Institute of Criminology Press (Sydney 2008) 9-10.

[33] In *Criminal Discovery* Note 32 above at 4 N3, 'the accused speaks theory' of the criminal trial is explained as follows:

> 'The expressions 'the accused speaks' and 'testing the prosecution's case' were coined by Professor John Langbein who described the history of the English criminal trial as going from an 'accused speaks theory' in which the accused was inquisitorially examined to a 'testing the prosecution theory' in which the accused was silenced by defence counsel who then put the prosecution to its proof..' See John H Langbein, 'The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries' in Helmholz (ed) *The Privilege Against Self-Incrimination: Its Origins and Development* (University of Chicago Press, Chicago, 1997) 82, 91.

[34] Note 31 above, 104-5, 310. See also Note 32 above Chapter 2.

[35] Note 32 above, 12.

The overprescription of capital punishment by the *Waltham Black Act 1722* (the *Bloody Code)* significantly shaped the adversarial criminal trial. Steps were taken to reduce the incidence of imposition of the death penalty such as the charging of non capital instead of capital offences, judges and juries downvaluing stolen goods and judges developing exclusionary rules of evidence such as the corroboration and confession rules and the beyond reasonable doubt standard of proof.[36]

Significance of Capital Punishment in the Development of the Self-Incrimination Privilege

The overprescription of capital punishment by the *Waltham Black Act 1722* (the *Bloody Code)* is described by Moisidis as having a significant impact in shaping the development of the adversarial criminal trial:

> The draconian imposition of capital punishment provided a motive for lawyers and judges to compromise the truth seeking function of criminal trials in order to ameliorate the position of accused persons. The over prescription of capital punishment by the *Waltham Black Act* or '*Bloody Code'* created an environment in which 'too much truth meant too much death'. It left a lasting legacy in the form of a criminal procedural system that subordinated truth. The rationale for the *Sir John Jervis' Act 1848* committal caution and the at trial privilege against self-incrimination, is not to be found in a desire to advance the truth seeking function of trials, but instead it stemmed from a desire to redress the excesses of 18th and 19th century penal laws and give defendants a sporting chance at acquittal.
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> In response to the *Waltham Black Act*, significant steps were taken to reduce the incidence of imposition of the death penalty. Prosecutors connived with clerks by charging non capital instead of capital offences. Jurors downvalued stolen goods in order to avoid the death penalty. Judges not only connived with jurors in downvaluing goods, they also developed exclusionary rules of evidence such as the corroboration and confession rules and the beyond reasonable doubt standard of proof. At the beginning of the 18th century, no positive presumption of innocence was known to the common law. Accused were expected to reply to the prosecution case either by attacking it or by asserting an affirmative defence. Not only did the accused have to prove that the prosecutor was mistaken, he had to prove it unaided by a lawyer and by means of immediate replies to the charges. In the late 18th and early 19th centuries, instead of benefiting from a presumption of innocence, accused struggled against a statutory presumption of guilt which prevailed for numerous summary offences. Beattie describes the idea of a presumption of innocence as being first expressed in the 1780s, and by 1820 it was expressed as 'every man is presumed to be innocent till he has been clearly proved to be guilty: the onus of the proof of guilt lies therefore on the accuser; and no man is bound, required or expected to prove his innocency'.
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> These practices were part and parcel of an English legal culture which not only tolerated, but encouraged the spread of legal fictions such as claiming benefit of clergy as a means of avoiding the death penalty. This led Cottu to comment in 1820:
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> > [The English] reserve the full measure of their severity for the most hardened offenders, and dismiss unpunished those whose guilt is not proved by the most positive testimony. They are indifferent whether, among the really guilty, such be convicted or acquitted.
>
> Judges also exercised considerable discretion to reprieve convicted offenders and recommend them for royal pardons. If a judge felt that an accused had been wrongfully

[36] Note 32 above, 16-17

convicted then a recommendation for an absolute pardon (which was equivalent to an acquittal) would be made.[37]

The philosopher Jeremy Bentham noted that in response to the oppressive nature of English penal laws, procedures were developed to paralyse the operation of such laws:

> It would be a strange mode of reasoning, to set out with the supposition that the laws are to be oppressive, and that we are to seek for the modes of procedure best fitted to paralyse them…
>
> [P]artly from the tyranny of particular reigns, and partly from religious intolerance, their mass of penal laws contain statutes so pernicious, that, had they been rigorously executed, they would have desolated society. Now, in such a situation…to oblige the accused to answer, or depose against himself, would in some measure, double his danger. If he cannot be called on to make a confession, it will often be impossible to convict him, and the mildness of the procedure will partly correct the tyranny of the law.[38]

Self-Incrimination Privilege and Inquisitorial Examinations

There is a tension between legislative regimes which permit coercive examinations and the enjoyment of a self-incrimination privilege at trial. Instead of protecting an accused from inquisitorial examination prior to trial, English criminal procedure mandated such examination. The inquisitorial origins of English committal hearings are described by Moisidis as follows;

> Justices of the Peace were officially recognised by the Statute of Westminster 1361 which empowered justices to investigate complaints, arrest accused persons and ensure that they appeared at the Quarter Sessions either by remanding in custody or granting bail. The power of justices of the peace to conduct a form of committal hearing was formalised in the Statutes of Philip and Mary 1554 and 1555 (the Marian statutes). Instead of being an innovation, the Marian statutes were part of an evolving statutory process, which as early as 1383, empowered justices of the peace to take the examination of suspects and witnesses in cases of petty crime…There was no design in the legislation to inquisitorialise English procedural law. Such a design would have involved training and bureaucratising a non professional magistracy. As Langbein stated, 'in the grand English manner, the figure of the investigating magistrate had stumbled into the common law'…
>
> The Statutes of Philip and Mary 1554 and 1555 did not provide for any form of discovery of the prosecution case. Justices were only required to record the evidence of witnesses who came forward and were not required to seek out and examine potentially important witnesses. The clear object of the examination was a search for evidence which would lead to conviction. The Marian committal has been described by Beattie as based on a theory of the trial in which truth would be revealed by an unprepared and unrepresented prisoner being confronted with the prosecution case for the first time at trial. The jury would then judge the accused based on his immediate and unprepared responses to the victim's allegations. The accused's ignorance was considered to be essential to this trial process.[39]

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[37] Note 32 above 16-17

[38] Jeremy Bentham and Etienne Dumont, A Treatise on Judicial Evidence (F B Rothman, Littleton, Colorado, 1981) (originally published 1825) 244, 245

[39] Note 32 above 8-9

The move away from the inquisitorial statutes of 1554 and 1555 which required justices to 'take the examination of the felon and those that present him' to the modern committal hearing in which the accused is cautioned and given an opportunity to test the prosecution's case, is documented by Moisidis:

> **2.2.5 Development of Modern Committal Hearing**
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> Sir John Jervis' Act 1848 formally marks the development of the modern committal or preliminary hearing. The Act provided for the examination of all witnesses in the presence of the accused and for the evidence of each witness to be taken down in the form of a deposition to be signed by the witness and by the presiding justice or justices. The Act contained the first statutory expression of a privilege against self-incrimination by providing for the formal cautioning of an accused at the conclusion of the examination of all prosecution witnesses. The Act also marked the point of a major collision between the accused speaks theory of the trial and the testing the prosecution case theory.
>
> Although the Marian committal statutes were repealed and re-enacted and extended to misdemeanours by the Administration of Criminal Justice in England Act 1826, in practice the Marian statutes were being openly defied by justices who had ceased taking the examination of defendants long before Sir John Jervis' Act 1848. Not only did the examination of the accused cease, but a self-incrimination caution found its way into the practice of the common law. The caution introduced by the 1848 Act sought to recognise an existing practice rather than introduce something new. In Archbold's Justice of the Peace published in 1840, a self-incrimination caution is given as a standard practice for magistrates. According to Chitty, in 1819 the common practice was for a magistrate to caution a defendant 'that he is not bound to accuse himself and that any admission may be produced against him at his trial'. Despite the provisions of the Marian statutes, Jeremy Bentham in a work published in 1827 noted that the practice under the Act was 'to be cautious of extracting from the defendant any testimony the tendency of which may be to his prejudice; and even, lest any such testimony should escape from him unawares, to give him warning to keep his lips well closed'.
>
> Sir John Jervis' Act was enacted after the Eighth Report of Her Majesty's Commissioners on Criminal Law was received. Views in favour and against a committal caution were expressed before the Commission. The view was expressed that committal proceedings before magistrates would be beyond improvement if it was possible to discontinue the frequent practice of 'cautioning a prisoner not to criminate himself, and stopping his mouth in the very act of confessing the crime of which he stands accused'. Lord Denman on the other hand was 'strongly opposed to the practice of questioning the prisoner by any person in authority'. In the final analysis, Sir John Jervis' Act simply codified the common law in respect of the committal caution and the position was achieved that the accused was encouraged to be silent before his trial and by law compelled to be silent during the course of his trial. The statute defying common law committal caution was created by the judiciary as a response to the over prescription of capital punishment. The common law committal caution developed in an era when the Waltham Black Act 1722 was at its height and 'too much truth meant too much death'.[40]

The overprescription of capital punishment in the 18th and 19th century in England explains the development of the self-incrimination privilege. The development of the

[40] Note 32 above 19-20

privilege was not the product of grand jurisprudential theory or the product of any social contract between the citizen and the state. Instead, it was a response to the unique circumstances of that era.

Restating the Fundamental Principle and the Companion Rule

The self-incrimination privilege was not the product of the Magna Carta of King John or even of the *Bill of Rights of 1689* or even mentioned in the catalogue of criminal procedural protections contained in the *Treason Act 1696.* Nor was it in any way related to the abolition of the Court of Star Chamber in 1641. Instead, it evolved much later in response to the overprescription of capital punishment, in an era when 'too much proof meant too much death'.[41]

It is fair to ask how do the unique historical circumstances in the 18th and 19th century that shaped the adversarial criminal trial in that era, define the values and principles that underpin the 21st century criminal trial? How does any conception of the self-incrimination privilege in the 18th and 19th century assist us in in interpreting modern criminal investigation legislation?

The adversarial system cannot be reduced to simple concepts such as 'he who asserts must prove'. The common law civil trial for example, involves highly inquisitorial procedures such as mutual discovery and interrogation. To assert that civil law concerns private interests and is not relevant to the criminal trial which represents the struggle between the citizen and the state, (and with penal consequences attaching) is incorrect. In the 18th century for example, prosecutions were mainly initiated by private citizens and half of the prison population consisted of debtors.[42]

Human Rights Perspective on the Self-Incrimination Privilege

Whether one looks at the criminal trial or information gathering by the Executive Government agencies such as ASIO, AFP or ACIC, there is a tension between permissible truth seeking or fact finding, and an adversarial relationship in which the prosecution or the Executive Government is required to prove its position without any compelled participation by an accused.

The rights of the individual need to be balanced against their obligations not to the Executive Government, but to the rest of the community. This community obligation is relevant in determining whether information seeking and any criminal or civil adjudication in respect of any information gathered, ought to emphasise truth seeking or a proof oriented sporting contest between the relevant branch of the Executive Government and the individual.

A human rights analysis of the self-incrimination privilege, needs to not only take account of the human rights of an accused, it also needs to take account of the human rights of other members of society. Is an accused entitled to argue that personal freedom means that there is never a requirement to be accountable for or be required to explain one's actions? Is an accused entitled to decline to participate in any criminal investigation and argue that this not only advances self-interest, it also accords with community values and the public interest?

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[41] Note 31 above 6, 270-272

[42] Note 32 above Chapter 8 *Lessons from Civil Discovery*

In developing their social contract theories, the philosophers Locke, Rawls and Nozick saw the liberty of an accused in the context of the liberty of the rest of society. Lockean social contract theory does not support basing the self-incrimination privilege on a sporting contest theory of the criminal trial. As Moisidis states:

> A suggested better social contract theory for evaluating the privilege against self-incrimination is that of John Locke. Locke described man in the state of nature as willing to give up his empire and subject himself to the dominion and control of a political society because his enjoyment of his rights in the state of nature 'is very uncertain and constantly exposed to the invasion of others' and this makes him 'willing to join in society with others who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name "property".' Upon entering a political society, a man's obligation was 'to part also with as much of his natural liberty, in providing for himself, as the good prosperity and safety of the society shall require, which is not only necessary, but just, since the other members of the society do the like.' Locke emphasized that in giving up liberty and executive power in entering society, men did so with 'an intention in every one the better to preserve himself, his liberty and property—for no rational creature can be supposed to change his condition with an intention to be worse—the power of the society, or legislative constituted by them, can never be supposed to extend farther than the common good'. Locke also contemplated that if legislators endeavoured to 'destroy the property of the people, or to reduce them to slavery under arbitrary power' then the legislators put themselves into a state of war with the people and the people then had the right to resume their original liberty. Locke was concerned with increasing general utility rather than utility maximisation. In other words, rather than sacrificing some for the greater happiness of others, Locke was concerned with the happiness of each individual.
>
> The creation of the Lockean state involves the creation of a government which exercises authority in the interests of an entire community. The authority of such a government derives from the consent of the governed and is limited to the extent of that consent. Accordingly, citizens can put themselves back into a state of nature by asserting a right to resist tyranny. Nevertheless, it was Locke's view that the judiciary was subordinate to the legislature and that as an inferior body it could not dictate to a superior. If the legislature attempted to enslave or destroy the people, then the people instead of appealing to a judge could only 'appeal to heaven' which was as Jeffrey Goldsworthy describes, 'an extra-constitutional resort to arms'. Locke wrote his *Two Treatises of Government* well before the English judiciary gained independence and developed the modern adversary system as a response to the over prescription of capital punishment by the legislature. Considering that Locke wrote in an era when the judiciary was subservient and partial to the interests of Charles II and James II, it is understandable that he could not conceive of how a government which was 'absolutely *arbitrary* over the lives and fortunes of the people' could be resisted by the people other than by armed rebellion.
>
> …the Lockean social contract was not conceived with the adversarial system being taken as given. Locke contemplated 'the mutual preservation of…lives, liberties and estates' and the parting of as much liberty as the 'good prosperity and safety of the society shall require'. Simmons has described all Lockean rights as being in principle alienable. Furthermore, Locke described the state of nature as not being 'a state of licence' and as being governed by a law of nature by which 'all the power and jurisdiction is reciprocal, no one having more than another'.
>
> This suggests that under the Lockean social contract, reciprocity in criminal discovery would have been part and parcel of the parting of mutual liberties which the prosperity and safety of the society would have required. The assertion of an affirmative defence at trial would call for pre-trial discovery. Whether or not the state could compel an accused who intended to stand mute to testify would have depended on the method of adjudication adopted. If an impartial tribunal had the function of evidence gathering, then an accused facing a prima facie case could reasonably be compelled to respond. However, if Lockean criminal trials were characterised by partisan evidence gathering and presentation, with the fortunes of accused dependent on their

> finances and intellectual capacity to stand up to adversarial cross-examination, then the Lockean ideal of legislating for the public good and every person in it would not be satisfied. If Locke had addressed this issue directly, it is likely that the partisan adversarial trial would not have been the favoured trial model, because Locke saw a vice in people being encouraged to pursue self-interest.
>
> Those who interpret the Lockean social contract as not supporting the self-incrimination privilege are unlikely to interpret it as adopting the English criminal justice system of the 18th and 19th centuries (which was characterised by the over prescription of capital punishment) as the most appropriate system for citizens leaving the state of nature and entering society. A truth seeking criminal trial process which can be guaranteed to be fair to accused persons in its adjudicative and sentencing practices has no need for a self-incrimination privilege. [43]

The privilege against self-incrimination is embodied in Article 14(3)(g) of the *International Covenant on Civil and Political Rights* (ICCPR). The significance of the ICCPR is debated in the *Independent National Security Legislation Monitor Declassified Annual Report 20 December 2012 by Bret Walker SC* (2012 INSLM Report).

A rationale for the self-incrimination privilege is not to be found in human rights discourse. If as Murphy J stated in *Rochfort v Trade Practices Commission* '[t]he privilege against self-incrimination is a human right, based on a desire to protect personal freedom and human dignity'[44] does that mean that the absence of an equivalent privilege in civil inquisitorial jurisdictions constitutes a breach of human rights? The view of the High Court is to be contrasted with the view of the European Court of Human Rights in *Telfner v Austria* which held that '[t]he Court considers that the drawing of inferences from an accused's silence may also be permissible in a system like the Austrian one where the courts freely evaluate the evidence before them, provided that the evidence adduced is such that the only common-sense inference to be drawn from the accused's silence is that he had no answer to the case against him.'[45]

The case of *Re Application under the Major Crime (Investigative Powers) Act 2004*[46] demonstrates the difficulties in attempting to apply human rights instruments such as the ICCPR or the *Charter of Human Rights and Responsibilities Act 2006* (Vic) for the purpose of analysing the self-incrimination privilege.

In *Re Application under the Major Crime (Investigative Powers) Act 2004* Warren CJ accepted that the self-incrimination privilege was the product of the common law and not of human rights instruments. In detailing the leading common law cases on the privilege, Her Honour's judgment was clearly influenced by the traditional understanding of the history of the privilege as 'a response to the horrors of the Star Chamber' as well as the 'fundamental rationale of the privilege is that those who allege the commission of a crime should prove it themselves and not be able to compel the accused to prove it for them':

> **[41]** The self-incrimination right is part of the "common law of human rights" as explained by Murphy J in *Hammond v Commonwealth*:

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[43] Note 32 above, 5.2.2 *Lockean Social Contract Theory*.

[44] (1982) 153 CLR 134, 150

[45] (2002) 34 EHRR 7 [17]

[46] (2009) 24 VR 415

> The privilege against self-incrimination is part of our legal heritage where it became rooted as a response to the horrors of the Star Chamber (see *Quinn v United States* (1955) 349 US 155). In the United States it is entrenched as part of the Federal Bill of Rights. In Australia it is a part of the common law of human rights. The privilege is so pervasive and applicable in so many areas that, like natural justice, it has generally been considered unnecessary to express the privilege in statutes which require persons to answer questions. On the contrary, the privilege is presumed to exist unless it is excluded by express words or necessary implication, that is, by unmistakable language. [Citations as in original.]

[42] The privilege, as a deep-seated fundamental common law right, hardly needs emphasising. It defines the relationship between the individual and the state and protects people against aggressive behaviour of those in authority.[30] The fundamental rationale of the privilege is that those who allege the commission of a crime should prove it themselves and not be able to compel the accused to prove it for them. As explained by Mason, Wilson and Dawson JJ in *Sorby*,[31] the privilege operates by protecting a witness from being compelled to answer questions, or produce documents, or things, if to do so might tend to incriminate that person. Their Honours held that the privilege:

> … protects the witness not only from incriminating himself directly under a compulsory process, but also from making a disclosure that might lead to incrimination, or to the discovery of real evidence of an incriminating character.

[43] Despite the importance of the privilege at common law, it can be abrogated by statute and the right is not protected by the Constitution. For the abrogation to have the appropriate effect, it must clearly represent the unmistakable intention of Parliament, either by express words, or necessary implication.

[146] To this effect, the right to a fair hearing and the privilege against self-incrimination are rights which define the relationship between the individual and the state and protect people against aggressive behaviour of those in authority. They reflect the philosophy that the state must prove its case without recourse to the suspect. They are fundamental to the criminal justice system and their importance should not be underestimated.

Warren CJ in *Re Application under the Major Crime (Investigative Powers) Act 2004* acknowledged that the self-incrimination privilege could be 'abrogated by statute and the right is not protected by the Constitution.' Her Honour also saw the criminal trial as a sporting contest between the prosecution and the defence rather than a search for the truth. Furthermore, Her Honour acknowledged that neither the Victorian Charter nor other human rights instrument before the Court, provided a clear answer to the question of derivative use immunity in the case of coercive crime commission examinations:

> **Does the Act limit rights?**
>
> **[80]** Whether the Act limits rights is the critical disagreement between the parties. As already observed, human rights should be construed in the broadest possible way. The purpose and intention of Parliament in enacting the Charter was to give effect to well-recognised and established rights in the criminal justice system.[79] The Charter should be construed in a way that is consistent with, and gives effect to, the right against self-incrimination. It should not be assumed that the Charter has narrowed traditional common law rights. Rather, the Charter's protection of the right against self-incrimination is at least as broad as the traditional common law right not to have an unfair trial and the right not to incriminate oneself. The Charter supports the approach that rights should be construed in the broadest possible way before consideration is given to whether they should be limited in accordance with s 7(2) of the Charter. That section serves the purpose of mitigating any damage to society that may arise from upholding an individual's right.

> **[96]** Despite the difficulty of the problem, it is not clear from the terms of the Charter, nor from any extrinsic materials, as to what form of immunity must be provided when the privilege against self-incrimination is abrogated so as to comply with the right against self-incrimination. Section 32 directs that the court *may* draw from the judgments of domestic, foreign and international courts and tribunals relevant to the human right in question. The power to do so is exercised at discretion.[85] The novelty of the issue requires analysis of foreign law. The parties were unable to assist me with any relevant Australian authority for this purpose. I am of the view that assistance may be gained from international and comparative approaches to determine how to address the problem faced.
>
> **[97]** The approach to the right to a fair hearing and the right against self-incrimination in other jurisdictions is not uniform. Some jurisdictions require a derivative use immunity for consistency with rights (Canada[86] and the United States[87]); others do not (South Africa[88] and Hong Kong[89]). Others are yet to adopt a clear position (International Covenant on Civil and Political Rights and Europe[90]). The applicant submitted that by virtue of the nature of the human rights instruments in some jurisdictions being constitutional in effect (conferring power on the courts to invalidate laws inconsistent with the human right in question), this court should not have regard to jurisprudence flowing from these instruments. It seems to me that the only difference of importance between such instruments and the Charter is in the remedial powers of the courts under such instruments. This fact alone should not impact on the question of whether jurisprudence from these jurisdictions may be of assistance in determining comparable principle.

In *Re Application under the Major Crime (Investigative Powers) Act 2004* Warren CJ arguably adopted a test for derivative use immunity which was unduly restrictive and which would give rise to unnecessary arguments as to whether or not any derivatively obtained evidence was permissibly discovered:

> **[157]** Returning to the hypothetical examples I set out earlier, I note the problem highlighted in each instance falls squarely into the first category of derivative evidence established in *S (RJ)*. My approach will continue to allow investigations to take place under the Act, and will not exclude the Crown from utilising any of the following:
>
> > (2) evidence that was discovered as a result of the testimony, but that could have been discovered without such testimony; (3) evidence that would, or would probably, have been discovered even without the testimony; and (4) evidence that was discovered after the testimony was given, but independently of the testimony.

In *Re Application under the Major Crime (Investigative Powers) Act 2004* Warren CJ in considering permissible limitations on the self-incrimination privilege, accepted that a balance needed to be struck between the privilege and the state's interest in investigating organised crime offences. Whilst accepting that organised crime offences had become serious and were detrimental to society, Her Honour took the view that 'the applicant was unable to assist the court to better understand the difficulty of investigating organised crime and did not present any evidence on the point.' In the final analysis, Her Honour arguably expressed a personal view and preference for the sporting theory of the criminal trial by concluding that it was 'not necessary to compel the persons who are intended to be charged to give evidence' and that 'it would be sufficient to compel persons who will ultimately not be charged to give evidence, or to compel persons who will be charged based on evidence obtained independently from their own testimony':

> **[149]** A balance must be struck between the principle against self-incrimination and the state's interest in investigating organised crime offences. I have discussed at

some length the nature of the right and the nature and extent of the limitation. With this in mind, I turn to the remaining elements of s 7(2).

[150] The court is directed by s 7(2) to consider the importance of the purpose of the limitation and the measures adopted to achieve the objective in question. It seems a matter of logic that the measures adopted in limitation of the right must be of sufficient importance to uphold a free and democratic society to justify limiting a human right guaranteed by the Charter. It is clear the "more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society".

[151] It is apparent that the purpose of the Act is to provide for the prevention and prosecution of organised crime offences that fall within the scope of the Act. Organised crime has become a substantial blight on our society. The offences are serious and significantly detrimental to society. The types of crimes encompassed by the Act are wide-ranging. Presumably, the purpose of abrogating the privilege against self-incrimination and foregoing a derivative use immunity is to better enable the investigation of such offences. The abrogation responds to perceived difficulties in investigating organised crime in circumstances where derivative evidence cannot be used. This much is clear from the terms of the Act and the extrinsic materials. That said, the applicant was unable to assist the court to better understand the difficulty of investigating organised crime and did not present any evidence on the point. I was directed, without a great deal of precision, to the observations of LaForest J in *Thompson Newspapers Ltd v Director of Investigation and Research*, and the more limited observations of Murphy J in *Sorby*[144] in which some comments were made about the difficulties that may arise from excluding derivative evidence, but these do not assist me in understanding the importance of the *purpose* of the limitation.

[152] It is conceivable that sophisticated criminal activity presents a number of difficulties to investigative authorities, one of which being that in all investigations of the type contemplated by the Act, there comes a point in time in which the investigator must seek explanations from those participating in the criminal activity. By virtue of the often hierarchical nature of organised crime, questions asked of a participant may be innocuous in themselves, but may relate to a chain of events which ultimately, when placed together, have the effect of compelling the conclusion that the witness is part of the criminal organisation. It may be that the indirect questions and their answers ultimately assist the investigator to piece other evidence together.

[153] I find that the limitation is rationally and purposefully connected to its purpose; a purpose important enough to lead to such limitation. Investigative authorities are no doubt greatly assisted by the power to compel suspected participants to answer questions, and to use the information obtained from those answers derivatively to prosecute a person for serious offences. It is apparent that the limitation increases the ability of the State to investigate organised crime offences.

[154] But does the limitation, even if rationally connected to the objective, achieve its purpose in the least restrictive way possible? Is there proportionality between the effects of the measures which are responsible for limiting the right, and the objective which has been identified as of sufficient importance?

[155] I find that the relationship between the limitation and its purpose is more drastic than is justified. In the context of organised crime, such a limitation means that investigators are not *required* to give careful consideration to which persons will be charged and interrogated (which is different to saying that they do not give such consideration), thereby raising the possibility of innocent or deliberate breaches of the right against self-incrimination, and possibly other human rights. Under the procedures in the Act, it is not necessary to compel the persons who are intended to be charged to give evidence. In reality it would be sufficient to compel persons who

> will ultimately not be charged to give evidence, or to compel persons who will be charged based on evidence obtained independently from their own testimony.

It is submitted that the concluding views expressed in the 2012 INSLM Report are entirely correct on the subject of the self-incrimination privilege and derivative use. The case of *A v Commissioner of Independent Commission Against Corruption*[47] cited by the INSLM, puts the case for derivative use of compelled answers. As Lord Hoffman stated in *A v Commissioner of Independent Commission Against Corruption*:

> [77]. Such statutes generally do not seek to prohibit and do not have the effect of prohibiting "derivative use" of the compelled answers. Thus, there is usually no prohibition against using the compulsorily obtained answers to develop new lines of inquiry; to identify sources of independent evidence; to assist in formulating applications for search warrants; and so forth. Such derivative use of the compelled answers does not raise any issue concerning self-incrimination or admissibility since it is use which does not involve any attempt to adduce the answers in evidence in any curial setting. The law has always drawn a distinction between (inadmissible) compelled answers themselves and (admissible) derivative evidence independently developed from indications contained in the compelled answers.

In ALRC Report 127 *Traditional Rights and Freedoms Encroachments by Commonwealth Laws*, various statutes are identified which permit use and derivate use immunities or use only immunities. Competing arguments are also identified.. At 12.66 reference is made to *Deputy Commissioner of Taxation v De Vonk*, where the court said:

> If the argument were to prevail that the privilege against self-incrimination was intended to be retained in tax matters, it would be impossible for the Commissioner to interrogate a taxpayer about sources of income since any question put on that subject might tend to incriminate the taxpayer by showing that the taxpayer had not complied with the initial obligation to return all sources of income. Such an argument would totally stultify the collection of income tax.

The *ALRC Report 127* at 12.94 identified the following further arguments in favour of permitting derivative use:

> 12.94 On the other hand, derivative use immunities have been criticised on the basis that they have the potential to quarantine large amounts of material and render a witness immune from prosecution altogether. A thorough review conducted by the Queensland Law Reform Commission in 2004 concluded that the default position should be use immunity, rather than derivative use, because the potential effect of a derivative use immunity is wider than the scope of the protection that would have been available if the privilege had not been abrogated. The Commission therefore considers that a derivative use immunity, because of its capacity to effectively quarantine from use additional material that proves the guilt of an individual who has provided self-incriminating information, should not be granted unless there are exceptional circumstances to justify the extent of its impact.

The human rights discourse invites consideration of factors such as human dignity, equality and freedom as stated in s7 of the *Charter of Human Rights and*

[47] [2012] HKCFA 79

Responsibilities Act 2006 (Vic). If the self-incrimination privilege is based on the values of human dignity, equality and freedom, then any other forms of compelled evidence gathering such fingerprinting, physical body searches, the taking of forensic samples and search warrants, are arguably far more invasive investigative tools and are far more likely to involve a compromise of human dignity and freedom.[48] If the self-incrimination was upheld on this basis, then these other criminal investigative powers would also be called into question.

The Australian Law Reform Commission in its Freedoms Inquiry *Interim Report 127* accepted that the self-incrimination privilege did not prevent requiring individuals to incriminate themselves through non testimonial evidence:

> 12.8 The privilege does not prevent persons from being compelled to incriminate themselves through the provision of evidence that is non-testimonial in nature. Non testimonial evidence may include, for instance, fingerprints or DNA samples. In *Sorby v Commonwealth*, Gibbs CJ explained that the privilege
>
> > prohibits the compulsion of the witness to give testimony, but it does not prohibit the giving of evidence, against the will of a witness, as to the condition of his body. For example, the witness may be required to provide a fingerprint, or to show his face or some other part of his body so that he was identified.[49]

Danger of Putting Words into the Mouth of an Accused

At the heart of the self incrimination privilege is the following statement in the ALRC *Freedoms Inquiry Interim Report 127*:

> 12.7 The privilege is testimonial in nature, protecting individuals from convicting themselves out of their 'own mouths'.

In *Hamilton v Oades*[50] Mason CJ held that 'it is well established that Parliament is able to 'interfere' with established common law protections, including the right to refuse to answer questions the answers to which may tend to incriminate the person asked.' Mason CJ in *Hamilton v Oades* described the rationale for the self-incrimination privilege as 'guarding against the possibility that the witness will convict himself out of his own mouth—the principal matter to which the privilege is directed.'[51] This observation can be contrasted with what Mason CJ acknowledged as a developing concept of discovery of the defence case. At 499-500 Mason CJ stated:

> There are two other matters to be mentioned. The Court of Appeal referred to the respondent's right not to disclose his defences to the pending charges. Except in the sense that a witness enjoys what is known as the right to silence, the respondent has no relevant right, either at common law or by virtue of statute. The privilege against self-incrimination would not ordinarily protect a person against disclosure of his defence to a criminal charge. The so called right not to disclose a defence is the result merely of the absence in ordinary circumstances of any statutory requirement that defences be revealed. In some instances there is such a specific requirement,

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48 The *Crimes Act 1914* (Cth) contains a range of invasive evidence gathering powers which include the following powers: ordinary search of arrested person s3ZF, frisk search s3ZE, strip search s3ZH, taking fingerprints, recording samples of handwriting or photographs s3ZJ, the drawing of an adverse inference if a suspect declines to participate in an identification parade s3ZM(3), and intimate and non intimate forensic procedures under Part 1D *Crimes Act 1914* (Cth).

49 Australian Law Reform Commission Traditional Rights and Freedoms—Encroachments by Commonwealth Laws Interim Report 127, 3 August 2015

50 (1988-89) 166 ALR 486 at 494

51 IBID 496

> e.g., in relation to alibi defences. And there is implicit in the general words of s. 541 such a general requirement. The possibility of disclosure of a defence is, accordingly, not a matter in respect of which a witness needs to be protected, except perhaps in the most exceptional circumstances. The second matter to be mentioned is Clarke J.A.'s reference to the fact that an accused person is not required ordinarily to submit to pre-trial discovery. Granted that this is so, it is a consideration which must yield to the statutory abrogation of the privilege unless the circumstances of the particular case are so compelling as to call for an exercise of the statutory discretion.

The debate on compelled examinations and derivative use needs to focus on this question. The key concern in relation to the self-incrimination privilege is whether or not individuals "convict themselves out of their 'own mouths'". The very reason for use immunity is to guard against this danger. The reason for the danger when the privilege arose in the 18th century was the risk a of death sentence if accused convicted themselves out of their own mouths. This rationale doesn't apply to our modern circumstances. The modern rationale for the testimonial privilege is the danger not that accused convict themselves 'out of their own mouths' but that through oppressive or unfair questioning 'words are put into their mouths'. This provides a rationale for use immunity. It does not provide a rationale for derivative use immunity.

The self-incrimination privilege should be limited in its application. Its application in an adversarial trial is justified, not because an accused deserves a sporting chance of an acquittal, but because there is a potential risk that in cross-examination, words may be put into an accused's mouth and an unfair conviction results. The truth defeating dangers of adversarial cross-examination is the true rationale for the self-incrimination privilege. As stated by Moisidis:

> The self-incrimination privilege also protects accused against the potential dangers of truth defeating and overzealous cross-examination. The classic statement of the art of cross-examination which has been religiously followed in the United States and in Australia, is Irving Younger's 'Ten Commandments of Cross-Examination'. Cross-examination commandments which urge advocates to always ask leading questions, ask only questions to which the answer is known or will not be damaging, not to give the witness an opportunity to explain, to avoid questions relating to the ultimate issue in a case and to conceal conclusions from cross-examination until closing addresses, are all truth defeating practices. In restating the Ten Commandments of Cross-Examination, Stephen Easton emphasises that in cross-examination, 'all of the information should come from the attorney, not the witness stand'. The goal of cross-examination is said to be 'to force the witness to acknowledge information that is helpful to your case'.[52]

It is not the case that any questioning of an accused is inherently oppressive, unfair and ought to be resisted at all costs. The European civil inquisitorial system routinely questions all accused without giving rise to allegations of unfairness or breaches of international human rights covenants: see *Telfner v Austria* (2002) 34 EHRR 7, [17] . However, there is a key distinction between adversarial and inquisitorial trial examinations:

> Partisanship reveals itself in the evidence gathering and interrogation practices of police. It also reveals itself in the cross-examination practices at trial. It is here, that the true rationale for the right to silence and the privilege against self-incrimination can be found. The examination of an accused by a neutral *juge d'instruction* who has

[52] Note 32 above 138

> compiled a dossier of evidence and who is free to ask open ended questions as well as asking leading questions, is quite removed from an investigator who is trying to confirm suspicions against a suspect, or a cross-examiner who is only interested in advancing his or her case. Partisanship explains why cross-examination is conducted in a truth defeating rather than truth enhancing manner. As Frankel has stated, 'partisan lawyers do not try to uncover the truth. On the contrary, lawyers … are engaged very often in helping to obstruct and divert the search for truth'….[53]

A Paradigm Shift from Proof to Truth Seeking

The fundamental principle of the adversarial trial and its companion rule as enunciated by the High Court have set the framework by which questioning powers in the ASIO, AFP and ACC legislation have been interpreted. The case has been put in this submission for these fundamental principles to be revisited and for consideration to be given to interpreting investigation statutes so as to acknowledge that the criminal trial is a search for the truth rather than a sporting contest between prosecution and defence.

Such a paradigm shift in thinking, involves revisiting cases such as the judgment of Dawson J in *Whitehorn v The Queen*,[54] in which truth seeking was rejected as a goal of the adversarial trial:

> A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. When a party's case is deficient, the ordinary consequence is that it does not succeed.[55]

Instead, it is appropriate to embrace the jurisprudence from the United States which has recognised truth seeking as a legitimate purpose of the criminal trial.
In *Jones v Superior Court of Nevada County* a principle of reciprocal discovery in criminal law was enunciated by State Supreme Court of California in 1962:

> (1)Discovery is designed to ascertain the truth … in criminal as well as in civil cases …
> (2) Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits …
> (3) Similarly, absent the privilege against self-crimination or other privileges provided by law, the defendant in a criminal case has no valid interest in denying the prosecution access to evidence that can throw light on issues in the case.
> (4) Nor is it any less appropriate in one case than in the other for the courts to develop the rules governing discovery in the absence of express legislation authorizing such discovery …
> (5) Pre-trial discovery in favor of defendants, however, is not required by due process … Accordingly, when this court permitted discovery in advance of as well as at the

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[53] Moisidis 144-145.

[54] (1983) 152 CLR 657 at 682

[55] Similar views have been expressed in *R v Griffis* (1996) 67 SASR 170 at 174 where Cox J stated:

> 'A trial is not an inquiry into the truth of an issue but is concerned simply with the narrower question of whether the Crown has proved its case against the accused beyond reasonable doubt.'

> trial … it was not acting under constitutional compulsion but to promote the orderly ascertainment of the truth. That procedure should not be a one-way street.[56]

The United States developed alibi statutes ahead of England or Australia. When these statutes were challenged on the basis of breaching the Fifth Amendment Privilege Against Self-Incrimination, not only were the statutes upheld, but the US Supreme Court emphasised truth seeking in its judgments. In *Williams v Florida*[i] White J stated:

> Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate … The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.[57]

In *Wardius v Oregon* Marshall J of the United States Supreme Court in upholding another alibi statute stated:

> [T]he ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial … The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system.[58]

Considering that in the state of California a reciprocal criminal discovery statute has been enacted as a result of a citizen's ballot initiative known as *Proposition 115*, [59] it is strongly arguable that public confidence in Australia is eroded not by a criminal justice system that advances truth seeking, but by a criminal justice system that treats a trial as a sporting contest between the prosecution and the accused, and in

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[56] Cited in Moisidis Note 32 above at 70-71.

[57] Williams v Florida 399 US 78 (1970) 81-82.

[58] Wardius v Oregon, 412 US 470 (1973) 473-474. At 479-480, Douglas J in dissent described notice of alibi provisions as breaching the Fifth Amendment which was 'written with the inquisitorial practices of the Star Chamber firmly in mind'.

[59] See the discussion in Moisidis (Note 32 above) at 72ff in relation to the enactment of the *Crime Victims Justice Reform Act*, also known as *Proposition 115* by which the voters of the State of California through the citizen's ballot initiative process enacted a statute which provided for reciprocal discovery in criminal matters. The sponsors of the initiative submitted 938,278 signatures to county election officials to qualify the measure for the initiative process. On 5 June 1990 *Proposition 115* was passed by 57.3 percent of California voters. This resulted in an unprecedented scheme of prosecution discovery of the defence case. Section 1054.3 of the California *Penal Code* now provides:

> The defendant and his or her attorney shall disclose to the prosecuting attorney:
>
> (a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at the trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.
>
> (b) Any real evidence which the defendant intends to offer at the trial.

Proposition 115 has survived constitutional challenge: see Izazaga v Superior Court, 54 Cal 3d 356 (1991).

which the prosecution is required to demonstrate its ability to put the pieces of a jigsaw puzzle together without in any way being aided by any defence disclosure.[60]

A Restatement of the Self-Incrimination Privilege

When the self-incrimination privilege is considered holistically taking into account historical, jurisprudential, comparative and practical considerations, there is a clear need for a restatement of the principle to take account of the following considerations:

1. Coercive examinations which are judicially supervised are in the public interest as they are intended to promote a search for the truth. A use indemnity is appropriate because the examinations are adversarial in character and there is a risk of putting words into the mouth of an examined witness. Such examinations should allow for derivative use in order to obtain evidence which will promote the search for the truth in any subsequent criminal trial.
2. A right to silence at interviews with police should continue to be enjoyed by all suspected persons without any adverse inferences being drawn from such silence. The risk of words being put into the mouth of the suspect, provides the rationale for this course.
3. The self-incrimination privilege should continue to be enjoyed as a trial privilege by accused persons without any inferences being drawn against an accused by reason of the exercise of that right. The risk of a cross-examiner putting words into the mouth of an accused provides the rationale for this course.
4. Reciprocity in discovery at trial between the prosecution and the defence is appropriate. Whilst an accused can remain silent and put the prosecution to its proof, there is no right to take the prosecution by surprise and ambush. An accused who wishes to go forward with an affirmative defence should be required to give the prosecution notice of that defence and furnish any proofs of evidence in support of that affirmative defence. It is inconsistent to limit discovery of the defence case to alibi disclosure and disclosure of defences based on expert evidence.
5. An accused should enjoy a right to a committal hearing as a means of discovering the strengths of the prosecution case and being able to make an informed decision whether or not to plead guilty.

The implications of last point above have not been fully understood. The collapse of the oral committal hearing in the common law world ought to be a major concern. One of the reasons the committal hearing has collapsed is that it has been ineffective as a screening tool. This is due to the fact that it is difficult to fully cross-examine prosecution witnesses whilst at the same time trying to retain a forensic advantage by not putting the defence case to any witnesses. In Australia, close to 20 percent of defendants have elected to go to trial rather than plead guilty. In NSW for example, in 2013 18.8 percent of defendants elected to go to trial before the District Court or the Supreme Court. In 2014, 20.3 percent of defendants elected to go to trial before either the District Court or the Supreme Court.[61] Across the United States, not only has the oral committal hearing been abolished and replaced by a paper committal, it has also been the case that only 2 to 3 percent of defendants go to trial. In the state of California for example for the fiscal year 2013-2013 statewide out of a total of 239,840 felony dispositions before the Superior Courts, 98 percent or 234,331 cases

[60] In *R v Seller; R v McCarthy* [2012] NSWSC 934 Garling J at [142] in concluding that a prosecution witness being a forensic accountant was materially assisted by being present at ACC examinations, used the analogy of a person who is required to put together a jigsaw puzzle unaided, but is then given the benefit of seeing the complete picture of the finished jigsaw puzzle.

[61] See NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2014* p.13 at www.bocsar.nsw.gov.au

were disposed before trial, less than 1 percent or 599 cases were disposed by way of a court trial, and 2 percent or 4,910 cases were disposed of after a jury trial.[62]

The reason for the collapse in trials in the United States is due to the pressure of plea bargaining and the ability of the prosecution to put specific sentencing dispositions to sentencing judges for approval.[63]

If American style plea bargaining is introduced in Australia, then the reality is that pre-trial will be far more significant than trial and processes such as committal hearings will need to looked at in a new light. Apart from the arguments in this submission which advance truth seeking, it will potentially be to the detriment of accused persons to endeavour to retain a forensic advantage at trial by making as few pre-trial disclosures as possible. Accordingly, rather than seeing coercive examinations by ASIO or the ACC as only aiding the prosecution, there is the potential for such enquiries to bring exculpatory and mitigatory evidence to light and to better inform a subsequent plea bargaining and trial process.

With this discussion in mind, I make the following comments in relation to the legislative questioning powers of ASIO, AFP and ACIC.

Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act)

The *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act) has its functions stated in s17 of the Act which include 'to obtain, correlate and evaluate intelligence relevant to security.' It is significant that under s17A of the Act, this function does not extend to limiting the right of persons to engage in lawful advocacy, protest or dissent.' In the case of the Questioning Warrants (QW) regime in Division 3 of Part III of the ASIO Act, the issue of a QW is subject to an issuing authority being satisfied under s34E(b) that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.' A relevant public interest is immediately apparent as a purpose for the issuing of a QW. It is also apparent that a QW can not only serve the purpose of intelligence gathering, it can and does serve the purpose of evidence gathering for a potential terrorism offence. To this end, the ASIO Act removes the protection of the self-incrimination privilege for QW proceedings by providing a penalty of 5 years imprisonment for failing to give any information: s34L(2) or failing to produce any record or thing: s34L(6). The ASIO Act also provides under s34L(9) that anything said or given in evidence before a prescribed authority in response to a QW cannot be given in evidence against the person in criminal proceedings other than proceedings for an offence against the section. The QW regime provides use, but not derivative use immunity.

The QW regime and to the extent that it is replicated in the Question and Detention Warrants (QDW) regime serves a criminal investigation truth seeking function. The QW regime seeks to balance the rights of a person being questioned against the rights of the rest of the community to be protected from crimes such as terrorism. The abrogation of the self-incrimination privilege is justified in these circumstances. The coercive adversarial questioning of a witness before a prescribed authority, justifies a

[62] See Judicial Council of California 2014 Court Statistics Report Statewide Caseload Trends 2003-2004 Through 2012-2013 p.77 at www.courts.ca.gov. For the 2013-2014 year 97 percent of felony cases were disposed of before trial, and only 2 percent were disposed of after a jury trial: 2015 Court Statistics Report p.75.

[63] See Note 32 above 210.

use immunity because of the risk that words may be put into the mouth of the witness. A derivative use indemnity is not justified, because that would be truth defeating.

However the legitimate truth seeking function of a QW is not the end of the matter. It is a paramount objective of the adversarial criminal trial process to avoid miscarriages of justice. In order to achieve the conviction of the guilty and the acquittal of the innocent, it is important that criminal investigations are also characterised by a search for the truth. This means that a QW is not limited to only gathering inculpatory intelligence or evidence in relation to a terrorism offence, it also means that exculpatory or mitigatory evidence or lines or inquiry should also be pursued. If a QW takes place at a time when allegations are fresh, then there needs to be an awareness about the totality of the intelligence or evidence that can be gathered. In order to achieve this objective, the powers of the prescribed authority to regulate a QW hearing and also give directions as to further lines of inquiry need to be considered.

The criteria for appointment of prescribed authorities in s34B of the ASIO Act is commendable. The appointment of a retired or serving judicial officer provides independence and integrity for QW hearings. Having said that, the contribution which serving and retired judicial officers could make to QW hearings is unduly restricted by the terms of s34K of the ASIO Act. Section 34K(1) limits the prescribed authority to formal and procedural matters such as convening and adjourning hearings. Section 34K(1) shouldn't be limited to dealing with matters such as deferring questioning. The prescribed authority should also be permitted to deal with the actual questioning process so that when a witness is questioned, he or she has a fair opportunity to respond. The prescribed authority should also be expressly permitted to use their discretion to ask further questions.

Although there is provision in s34D(4)(c) of the ASIO Act for the Minister to prescribe a *Protocol* to be followed in the exercise of authority under QW, the prescribed authority is not empowered under s34K(1) to either deal with breaches of the *Protocol* or to make recommendations about matters which should be subject to the *Protocol*.

Whilst a person is subject to a direction under s34K, they are required to be treated with respect for their human dignity, and must not be subject to cruel, inhuman or degrading treatment. The prescribed authority should under s34K, be permitted to address the issue of compliance with s34T.

In my view, s34K(2) of the ASIO Act is an unreasonable fetter on the authority of a prescribed authority. The prescribed authority should not be limited to giving directions which are consistent with the warrant or as approved in writing by the Minister or as directed by the Inspector-General of Intelligence and Security (IGIS). Section 3K(2) assumes that what will unfold at a QW can be pre-determined. Without knowing what evidence a witness will give, it is impossible to predict prior to the hearing, what directions should be given. Section 3K(2) should be amended to give the prescribed authority broader powers to give directions, perhaps subject to criteria such as in accordance with the interests of justice. Furthermore, if the evidence of a witness suggests that particular lines of inquiry should be pursued, then the prescribed authority should be permitted to make recommendations to that effect.

The power of the Inspector-General of Intelligence Security (IGIS) to be present at QW examinations under s34P of the ASIO Act should not be treated as a substitute for an adequately empowered prescribed authority.

The right to legal representation for a person subject to a QW is an important safeguard, even if a witness is required to choose a lawyer other than their initially preferred lawyer. The safeguards in s34ZQ of the ASIO Act are important. However, they should be strengthened. The rights of a legal adviser to address the prescribed authority under section 34ZQ(6) and (7) are quite limited. Apart from seeking to clarify ambiguous questioning, the legal adviser should be permitted to make submissions on the fairness or adequacy of the questions asked and even be permitted to suggest supplementary questions to the prescribed authority. As it will be apparent to the lawyer what is the subject matter of the investigation, the lawyer should be permitted to make submissions to the prescribed authority on any directions or recommendations that the prescribed authority is able to make. For example, the evidence of the witness may point to potential exculpatory evidence or other lines of enquiry. The lawyer acting in the interests of his or her client should be permitted to make submissions on such matters.

Finally, the *INSLM Declassified Annual Report 2012* makes the following recommendation:

> Recommendation IV/7: The QW provisions should be amended to make clear that a person who has been charged with a criminal offence cannot be subject to questioning until the end of their criminal trial.

For the reasons given in the first part of this submission, I am unable to agree with this submission. If it is accepted that a criminal trial should be a search for the truth, then there is no legitimate prejudice to an accused by reason of a post charge examination. Such an issue should not be resolved on the basis of whether the prosecution or the defence will gain the upper hand by way of a forensic advantage. The more relevant issue is whether a post charge examination has any potential to result in a miscarriage of justice. A miscarriage of justice will only result if there is a risk of an innocent accused being wrongfully convicted. An accused who loses a sporting chance of an unmeritorious acquittal does not suffer a miscarriage of justice.

Post charge examinations can achieve positive purposes other than the assumed purpose of only lending themselves to strengthening the prosecution case against an accused. Firstly, an investigation may be ongoing and a post charge examination may be critical to uncovering evidence against other accomplices. If offending is ongoing, especially in the case of serious offences such as terrorism, then new evidence coming to light might only be fully investigated if those who have already been charged are effectively recalled for further questioning. If post charge questioning has the potential to stop a further act of terrorism, is that option to be dismissed so that a charged suspect has a maximum forensic advantage in putting the prosecution to its proof at trial?

Post charge examinations may also reveal mitigatory or exculpatory evidence in favour of the person examined. For example, the person charged may reveal that they acted under duress or that that they played a lesser role in the hierarchy of offending. A post charge examination provides an opportunity to test the potential evidence of an accused in circumstances where the prosecution is considering offering an indemnity in return for the giving evidence against other co-offenders

Part IC Crimes Act 1914

There is an inter-relationship between the ASIO Act and Part 1C *Crimes Act 1914* (Cth) which warrants discussion. This is due to the fact that a QW under the ASIO Act may lead to detention and interviewing under Part 1C *Crimes Act 1914* in respect

of terrorism offences. This raises concerns about the adequacy of safeguards for suspected persons who have first been questioned under an ASIO Act QW and are then detained for questioning under Part IC *Crimes Act 1914* (Cth).

In my view, the following issues need to be addressed:

1. Section 34L ASIO Act removes the self-incrimination privilege in respect of persons who are subject to a QW. Section 34L(9) of the ASIO Act offers the protection that anything said or produced before a prescribed authority is not admissible in criminal proceedings against the person. Whilst the QW interview cannot be led in evidence in a subsequent criminal trial, the position as to what can put to a suspect in a subsequent Part 1C *Crimes Act* interview is far from clear. Whilst the derivative use of ASIO QW evidence ought to be supported, such derivative use should not extend to putting admissions made before a prescribed authority under the ASIO Act, to the suspect in a subsequent Part 1C *Crimes Act 1914* interview. In short, if there is any risk that words were put into the mouth of the suspect under an QW, the AFP should not be permitted to seek the adoption of those admissions under a Part 1C *Crimes Act 1914* interview. A coercive QW should not be a dry run for a subsequent rights and caution interview under Part IC *Crimes Act 1914*.

2. Whilst Part 1C *Crimes Act 1914* Subdivision B (s23DBff Period of Investigation if arrested for a terrorism offence) makes specific reference to investigation periods in respect of terrorism offences, it makes no reference to previous questioning or previous detention and questioning under the ASIO Act. Considering that Part1C questioning may follow on from questioning and detention under the ASIO Act, even without a requirement of disclosure of what transpired before the prescribed authority, the fact that such previous questioning (and detention if applicable) occurred under the ASIO Act, is a factor which should be disclosed before any magistrate hearing an application under Part 1C *Crimes Act 1914*.

3. An ASIO QW which is followed by a Part 1C *Crimes Act 1914* interview raises the potential for prejudice to a suspected person if the Part IC interview is treated as a vehicle for the putting into evidence any admissions made in the QW hearing. The transition from coercive questioning to the giving of rights and a caution may lead to confusion on the part of suspects as to whether or not they really do have a right to silence. Accordingly, consideration has to be given to strengthening the safeguard in s23G *Crimes Act 1914* in terms of access to a legal practitioner. In the case of suspects who have previously been questioned under an ASIO QW, Part 1C *Crimes Act 1914* should provide that no questioning can occur unless legal advice is actually obtained prior to the Part IC interview and a lawyer is present during the entire questioning under Part IC *Crimes Act 1914*. A suspect should not be permitted to waive this right.

Australian Crime Commission Act 2002

Examinations under the *Australian Crime Commission Act 2002* (Cth) have a truth seeking function and full derivative use should be permitted both pre-charge and post charge. It is also submitted that underpinning the High Court's decision in X7 v ACC is an erroneous understanding of the history of the self-incrimination privilege. The case for a restatement of that privilege has been put in this submission.

Based on the case that has been put forward in this submission, it is submitted that the extensive amendments made to the *Australian Crime Commission Act 2002* (Cth) by the *Law Enforcement Legislation Amendment (Powers) Act 2015* were unnecessary and should be repealed. The extensive amendments to the ACC Act which have imposed restrictions on the conduct of post charge examinations and publications of examination transcripts were based on the decisions in the High Court in *X7 v ACC*, *Lee No.1* and *Lee No.2*. This is demonstrated by the *Explanatory Memorandum to the Enforcement Legislation Amendment (Powers) Bill 2015* in which the following rationale for the legislation was offered:

> This Bill primarily amends the Australian Crime Commission Act 2002 (ACC Act) and the Law Enforcement Integrity Commissioner Act 2006 (LEIC Act) to clarify the powers of Australian Crime Commission (ACC) examiners to conduct examinations, and the Integrity Commissioner, supported by the Australian Commission for Law Enforcement Integrity (ACLEI), to conduct hearings. The powers of these bodies to conduct examinations and hearings have been affected by a number of recent cases, including R v Seller and McCarthy (2013) 273 FLR 155 (Seller and McCarthy), X7 v Australian Crime Commission (2013) 248 CLR 92 (X7), Lee v NSW Crime Commission (2013) 251 CLR 196 (Lee No. 1) and Lee v R (2014) 88 ALJR 656 (Lee No. 2).
>
> This Bill responds to those cases and more clearly sets out the circumstances in which the ACC and Integrity Commissioner are able to use their powers to conduct examinations and hearings, to disclose information obtained directly and indirectly from examinations and hearings and the uses to which such information may be put. These amendments are based on the `principle of legality', identified by the majority of judges in X7, which requires `that a statutory intention to abrogate or restrict a fundamental freedom or principle or to depart from the general system of law must be expressed with irresistible clearness'.

It is clear from the above extract from the *Explanatory Memorandum to the Enforcement Legislation Amendment (Powers) Bill 2015*, that the legislation was enacted in response to the decisions in the High Court. Not only did the legislation seek to follow the reasoning of the High Court, it is arguable that the truth seeking function of the ACC was curtailed in favour of treating the adversarial trial as a sporting contest. The notion of a fair trial was equated with forensic advantages to the defence:

> These amendments will engage the right to a fair trial. As noted above, an examinee or witness cannot refuse to answer questions in an examination or hearing on the grounds that the answer may tend to incriminate him or her (dealt with further, below). Where an examination or hearing occurs after the examinee or witness has been charged with an offence, answers that he or she gives about the subject matter of that offence may affect his or her fair trial and the equality of arms principle, which is described above. This is particularly the case if the examination or hearing material were to be provided to the prosecutors of the examinee or witness. This questioning may require the examinee or witness to provide a version of events that limits his or her choices in how to defend the charges at trial.
>
> First, there are limitations on the purposes for which an examination or a hearing may be conducted. As noted above, under the ACC Act, an examiner may only conduct an examination in support of a special operation or special investigation (section 24A). He or she may only ask questions about matters relevant to the special operation or special investigation (subsection 25A(6)). An examination may occur post-charge (new subsection 24A(2)), and questioning may cover the subject matter of any

charges the examinee faces (new subsection 25A(6A)), but it must always relate to the relevant special investigation or special operation.

The Schedules also contain additional protections to limit the circumstances in which examination and hearing material can be provided to a prosecutor of the examinee or witness. Under new section 25C of the ACC Act, once an examinee has been charged with an offence (or such a charge is imminent), examination material cannot be disclosed to a prosecutor of the examinee without an order from the court hearing the charges. Under subsection 25E(1), the court may only order the disclosure of examination material to a prosecutor if it would be in the interests of justice.

The *Law Enforcement Legislation Amendment (Powers) Act 2015* has given rise to limitations as well as complications. For example, under s25E(1) the court may order the disclosure of examination material to the prosecution if it would be in the interests of justice. Exactly what 'the interests of justice' requires in this context is not clear.

Conclusion

This submission seeks to highlight the influence of common law principles on the development of criminal investigation statutes. The recent amendments to the ACC Act, have been expressly made in an effort to achieve alignment with the reasoning of the High Court in the cases of *X7 v ACC*, *Lee No. 1* and *Lee No. 2*. In this process, the assumption has been made that the High Court is correct and that if necessary, statutes need to be amended to align with the reasoning of the High Court.

What has not been contemplated is that the High Court might be wrong in its reasoning and that its recent decisions *X7 v ACC*, *Lee No. 1* and *Lee No. 2* were effectively decided *per incuriam,* and that these cases in turn were based on earlier decisions such as *Sorby* which were also decided *per incuriam*. The correct course of action is to re-open these cases in the High Court and to achieve a restatement of the self-incrimination privilege as a result of a more holistic understanding of the field of criminal discovery. If that course is adopted, a substantial revision of the ACC Act will be warranted. A revision of the ASIO Act and the Crimes Act will also be warranted. The question posed by United State Supreme Court Justice William Brennan in 1963, whether the criminal is a sporting event or a quest for the truth, will finally be answered.