

Privilege Against Self-Incrimination

A witness, (X), said that he did not wish to answer some questions put to him by counsel, because to do so might incriminate him.

The fact that he successfully made that claim for privilege cannot assist you in your deliberations. It is not evidence of anything. Nor were the questions which were asked of him evidence, and there are no answers to them which could constitute evidence.

You cannot infer anything, either as to evidence or (X)'s credibility, from the fact that a claim for privilege was made, and it would be wrong for you to speculate about why it was made.

Section 10 of the *Evidence Act* 1977 preserves the common law privilege against self-incrimination, subject to s 15(1), which removes any claim of privilege by a defendant in respect of questions relating to the charge presently before the Court.¹

A defendant or a witness is accordingly protected by privilege against incriminating himself; that is to say, he cannot be required to answer questions where such answers might "lead to incrimination or to the discovery of real evidence of an incriminating character".^{2,3} While it is not incumbent to advise a witness as to an entitlement to claim privilege, it may be appropriate to do so. If a claim for privilege is made, the Court must consider in deciding whether to uphold the claim whether there is "reasonable ground to apprehend danger of incrimination to the witness if he is compelled to answer".⁴

Where a claim for privilege is made by a witness or the defendant in the presence of the jury, it is necessary to consider whether it may assume significance in the mind of the jury and accordingly whether a direction should be given in respect of it. Although there is some support for the proposition that in certain circumstances a jury may be entitled to draw inferences from a claim of privilege⁵, the general thrust of authority is to the effect that no adverse inference is available.⁶ It is suggested, therefore, that in the usual case an appropriate direction will be to the effect of that set out above.

¹ Section 15(1) applies to questions asked of a defendant on a voir dire: *R v Semyraha* [2001] 2 Qd R 208.

² *Sorby v Commonwealth* (1983) 152 CLR 281 at 310.

³ The defendant has, in addition, the protection of s 15(2) *Evidence Act* which precludes questions tending to show the commission of other offences except in certain limited instances.

⁴ *Sorby* at 290.

⁵ *Thompson v Bella-Lewis* [1997] 1 Qd R 429 at 434, 437; *R v King* (unreported CA 66/98; 26/5/98).

⁶ See *Cross on Evidence*, Aust ed, [25040].