47. Privilege against Self-Incrimination

47.1 Legislation

[Last reviewed: January 2025]

Evidence Act

Section 10 – Privilege against self-incrimination

Section 15 – Questioning a person charged in a criminal proceeding

47.2 Commentary

[Last reviewed: January 2025]

Section 10 of the *Evidence Act 1977* (Qld) 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. Section 15(1) applies to questions asked of a Defendant on a voir dire (*R v Semyraha* [2001] 2 Qd R 208).

A Defendant or a witness is accordingly protected by privilege against incriminating themself; that is to say, they cannot be required to answer questions where such answers might 'lead to incrimination or to the discovery of real evidence of an incriminating character' (see *Sorby v Commonwealth* (1983) 152 CLR 281, [310]). The Defendant has, in addition, the protection of s 15(2) of the *Evidence Act* which precludes questions tending to show the commission of other offences except in certain limited instances.

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 a 'reasonable ground to apprehend danger of incrimination to the witness if he is compelled to answer' (*Sorby v Commonwealth* (1983) 152 CLR 281, [290]).

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 privilege (see *Thompson v Bella-Lewis* [1997] 1 Qd R 429, [434], [437]; *R v King* [1998] QCA 108), the general thrust of authority is to the effect that no adverse inference is available (see ***Cross on Evidence,* 14th ed, [25040]).** It is suggested, therefore, that in the usual case an appropriate direction will be to the effect of that set out below.

47.3 Suggested Direction

[Last reviewed: January 2025]

A witness [/the Defendant**], [**X**], said that [**he/she**] did not wish to answer some questions put to [**him/her**] by counsel, because to do so might incriminate [**him/her**].**

The fact that [he/she**] 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 [**his/her**] evidence, and there are no answers to them which could constitute evidence.**

You cannot infer anything, either as to evidence or [the Defendant/witness**]'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.**