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The nature of the profession; the state of the law*

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The address to mark the opening of Law Term examines fundamental common law rights that are integral to the nature and identity of the legal profession and the state of those rights in our society today. The Chief Justice identifies legislative encroachments on three of those rights: the rights to legal professional privilege, against self-incrimination, and the presumption of innocence. The number and strength of scrutiny mechanisms in NSW and informal common law protections against encroachment are discussed.

The nature of the profession and its identity

Concepts like the presumption of innocence and the rights to legal professional privilege and against self-incrimination are fundamental common law principles which inform our identity as legal professionals as much as anything else. They are the backdrop, the rules of the game, in which we operate. Because those rights go towards ensuring there is equality before the law, we can have some confidence that a dispassionate attitude to legal advice will achieve justice. Without those rights we would have to re-assess the nature of our profession and who we are, what we as legal professionals are doing and what point we serve in society.

This inevitably prompts the question: what is the state of those rights in our society today? To answer that question, both the protections from legislative encroachment and the extent of legislative encroachments on the rights will be discussed. In light of the Australian Law Reform Commission's (ALRC) comprehensive inquiry into Commonwealth legislative encroachments of fundamental rights and freedoms,¹ the specific focus of this article is on

the law in NSW in relation to the presumption of innocence and the rights to legal professional privilege and against self-incrimination. The state of these three rights has a direct impact on the legal profession's identity.

History of fundamental common law rights

Before discussing the extent of protections and encroachments in this State, it is important to observe that fundamental common law rights have never been absolute. Their often touted ancient status is more likely a myth or legal fiction than anything else.

Professor Wigmore, for instance, identifies legal professional, or client lawyer privilege, as "the oldest of the privileges for confidential communications".² Notwithstanding this, it has in fact only been around for over 400 years, dating from Elizabethan times.³ Even in the 18th and 19th centuries it was considered only an evidentiary rule.⁴ According to the ALRC's Freedoms Inquiry, it was only in the late 19th century that it became

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1 ALRC, *Traditional rights and freedoms – encroachments by Commonwealth laws*, ALRC Report 127 (Interim Report), 2015. Note the final report, ALRC Report 129, was tabled on 2 March 2016.

2 J Wigmore, *A treatise on the Anglo-American system of evidence in trials at common Law*, 3rd edn, Little Brown and Co, 1940 at [2290], quoted in ALRC Report 127 at [13.15].

3 ALRC Report 127, above n 1, at [13.16].

4 *ibid* at [13.18].

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a substantive right, with its scope expanding significantly in the 20th century.⁵

Equally recent, is the presumption of innocence. By this is meant the principle that in a criminal case the prosecution bears the burden of proof to a standard of beyond reasonable doubt. This is often referred to as “the golden thread” of criminal law.⁶ In 2005, the House of Lords described this right as being recognised since, “at [the] latest, the early 19th Century”.⁷ Even if the right was in fact recognised 100 years earlier, this is still relatively recent.

The historic origins of the privilege against self-incrimination are more contentious and may in fact be long standing. Some point to the unpopularity of the Star Chamber in England in the 17th century,⁸ or further back to Roman and canon law from the 12th and 13th centuries. Yet, others, including McHugh J, identify it as becoming established in the mid-19th century or even later.⁹

All of this should not distract from the importance of any of these rights. Regardless of the number of years they have been recognised in society, their rationales are, to say the least, strong. However, it is important to bear in mind that these rights are not necessarily as ancient as may be supposed by popular culture and their historic context is crucial when examining how our society currently treats such principles.

Formal State “scrutiny mechanisms”

What protections or “scrutiny mechanisms”, to borrow the ALRC terminology, are there in NSW for the three fundamental common law rights? The ALRC uses this term to refer to the formal processes that are in place to protect us from unintended or unjustified legislative encroachments.

On a Commonwealth level, the ALRC listed the following as scrutiny mechanisms. First, what was termed a “culture of justification”; second, policy development and legislative drafting guidelines and direction; third, Parliamentary scrutiny processes; and finally, other review mechanisms, such as by the Australian Human Rights Commission and ALRC itself.¹⁰

Mechanisms other than a “culture of justification” at a Commonwealth level include Parliamentary scrutiny processes. These include the Senate Standing Committee on Regulations and Ordinances, the Senate Standing Committee for the Scrutiny of Bills, the Parliamentary Joint Committee on Human Rights, the Senate Standing Committee on Legal and Constitutional Affairs, the Parliamentary Joint Committee on Intelligence and Security and, finally, the Parliamentary Joint Committee on Law Enforcement. In contrast, at a State level in NSW, there is the one joint standing Legislation Review Committee.¹¹

This Committee was established in response to the Legislative Council’s inquiry in 2001.¹² That inquiry recommended that instead of NSW having a bill of rights it have a committee to scrutinise bills.¹³ Accordingly, the Legislation Review Committee is responsible for reviewing both bills and regulations. It reports to Parliament if any provisions, amongst other things, trespass unduly on personal rights and liberties.¹⁴ While it only has the power, in relation to bills to, at worst, refer the issue to Parliament, it may recommend a regulation be disallowed. It is however, unclear how often the Committee has actually used the latter power.¹⁵ Despite this, the Committee does clearly use its other powers frequently. For example, in relation to trespassing on personal rights and liberties in 2010 alone, the Committee had corresponded with a Minister or Member in relation to three bills, noted issues in 55, and referred 37 bills to Parliament.¹⁶ The mandate of the Committee has been described as wider than that of any other Australian scrutiny committee.¹⁷

Notwithstanding this, there again may be scepticism as to whether the power that scrutiny committees wield in theory translates into practical boundaries being placed on the legislative encroachment of rights. Commentators have particularly noted alterations to the NSW Legislation Review Committee since 2011. These have meant the membership has been almost halved with the lower house now dominating Committee members.¹⁸

There has been further scepticism in light of a 2015 report from the Legal Intersections Research Centre at the University of Wollongong. The report assessed

5 *ibid.*

6 *Woolmington v DPP* [1935] AC 462, 481–482; *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 501. Both cases were recently referred to in *Lee v NSW Crime Commission* (2013) 251 CLR 196 at [174]–[175].

7 *Attorney General’s Reference No 4 of 2002; Sheldrake v DPP* [2005] 1 AC 264 at [9], quoted in ALRC Report 127 at [11.5].

8 J Heydon, *Cross on evidence*, 9th edn, LexisNexis Buttersworth Australia, 2013 at [25140].

9 *Azzopardi v R* (2001) 205 CLR 50; see ALRC 127 at [12.13]–[12.17] for details of the competing viewpoints.

10 ALRC Report 127, Ch 2, “Scrutiny Mechanisms”.

11 Although admittedly the Legislative Council Standing Committee on Law and Justice and the Legislative Assembly Committee on Law and Safety could also review legislation for the purpose of rights encroachment. Parliamentary committees were described as part of the “integrity branch of government” by former Chief Justice, JJ Spigelman, “The integrity branch of government” (2004) 78 ALJ 724 at 724.

12 Legislative Council Standing Committee on Law Justice, Report 17, *A NSW Bill of Rights*, 2001, p xv.

13 Legislation Review Committee, *Public interest and the rule of law*, Discussion Paper 1, 2010, p 1.

14 *Legislation Review Act* 1987, ss 8A and 9. Note the study which shows the Committee has largely focused on civil rights and liberties: A Byrnes, “The protection of human rights in NSW through Parliamentary process — a review of the recent performance of the NSW Parliament’s Legislation Review Committee”, paper presented at the Protecting Human Rights Conference, Sydney, 2 October 2009, p 6.

15 Neither the Legislation Review Committee nor Parliamentary Counsel’s Office had this information: telephone enquiry 3 & 4 December 2015. Note comments that such action is “rare” in D Pearce and R Geddes, *Statutory interpretation in Australia*, LexisNexis Butterworths Australia, 8th edn, 2014, p 211.

16 Legislation Review Committee, *Legislation Review Digest*, Digest No 17 of 2010, 30 November 2010, Appendix 3.

17 L Grenfell, “An Australian spectrum of political rights scrutiny: ‘Continuing to lead by example?’” (2015) 26(1) *Public Law Review* 19, at 31–32.

18 *ibid.*

what impact the Committee's recommendations had on criminal bills between 2010 to 2012.¹⁹ The commentators reported, that although "the Committee performs the valuable function of identifying, and bringing to Parliament's attention, aspects of proposed new laws²⁰ there is no evidence that the Committee has any impact on the *outcomes* of parliamentary decision-making processes on criminal law bills [emphasis in original]".²¹ The report also identified an "entrenched culture" held by Parliament of "ignoring and deflecting the Committee's advice".²² This is hardly a "culture of justification".

There are also clear instances of Parliament effectively bypassing the Committee's scrutiny. For example, the *Crimes (Criminal Organisations Control) Act 2009* was introduced and passed in 2009 within 24 hours, without any possibility of rights scrutiny.²³ The 2015 report concluded that in "... the absence of a legislative mandate that Parliament must debate matters referred [to it] by the Committee, or an obligation on Ministers to respond to matters raised ... other viable mechanisms for producing legislative constraint" need to be found.²⁴

Other possible scrutiny mechanisms at a Commonwealth level, in addition to reviewing draft bills, include various policy documents and drafting directions. These ensure that at the first stage of drafting, the degree in which provisions are compatible with rights is maximised.²⁵ Essentially, it is recommended that there be pre-emptive thought on whether a Bill is likely to be the subject of comment by a Parliamentary review committee. If so, the guidelines encourage stating the reasons for nonetheless proceeding in the manner proposed.²⁶ At the point of preparing drafting instructions to be given to the Parliamentary Counsel's Office, a list of matters which may need to be considered are also specified. These include various right-issues such as retrospective legislation, burden of proof and conclusive certificates.²⁷

NSW Parliament publishes a corresponding manual for the preparation of legislation and a ministerial handbook.²⁸ It does not appear though that there are any equivalent directions to pre-empt problems that may be

flagged from the Legislative Review Committee, as there is on a Commonwealth level.²⁹

Finally, with respect to the last type of scrutiny mechanisms the ALRC discusses, obviously our State has no equivalent to the Australian Human Rights Commission, or a counterpart to the Victorian Equal Opportunity and Human Rights Commission. Admittedly, international human rights obligations bind the States as much as the Commonwealth.³⁰ Nonetheless, it would appear that the only other scrutiny review mechanism in this State, beyond the Legislation Review Committee, is the NSW Law Reform Commission.

Informal protections from encroachments

In addition to these formal mechanisms, there are of course more indirect legal mechanisms of protection. Most prominently, there are Constitutions and the principle of legality. Again, to compare between the Commonwealth and this State, it is well established that the Commonwealth Constitution protects various fundamental common law rights expressly and by implication.³¹ Admittedly, the High Court has rejected the idea that the privilege against self-incrimination is protected by implication.³² The High Court does not consider it an integral element in the exercise of judicial power by Chapter III courts. Despite this, it is possible that the presumption of innocence or right to legal professional privilege could be constitutionalised by implication.³³

Fortunately, by reason of the *Kable* doctrine,³⁴ if any such protections are found they can trickle down to our State level, despite the absence of any formal separation of powers in our State's Constitution. Already, in a 2009 case between the International Finance Trust and NSW Crime Commission, the broad right to procedural fairness received some protection in this way. The High Court held that the nature of one of the powers vested in the Supreme Court under the NSW *Criminal Assets Recovery Act 1900* was repugnant to a fundamental aspect of the judicial process.³⁵ The provision was declared invalid

19 L McNamara and J Quilter, "Institutional influences on the parameters of criminalisation: Parliamentary scrutiny of criminal law Bills in New South Wales" (2015) 27(1) *Current Issues in Criminal Justice* 21.

20 It should be acknowledged that this alone can be an invaluable way to instil "a culture of rights 'responsibilities' in Parliament": Grenfell, above n 17, p 37.

21 McNamara and Quilter, above n 19, p 35.

22 *ibid.*

23 Grenfell, above n 17, fn 89.

24 McNamara and Quilter, above n 19, p 35.

25 ALRC Report 127 at [2.6].

26 Department of Prime Minister and Cabinet, *Legislation Handbook*, 1999 at [8.19].

27 *ibid* at [6.18]–[6.26].

28 NSW Parliamentary Counsel's Office, *Manual for the preparation of legislation*, 8th edn, 2000; Department of Premier and Cabinet General Counsel (Policy and Strategy Division), *NSW Government ministerial handbook*, 2011.

29 See the lack thereof in the "Drafting Instructions" in Department of Premier and Cabinet General Counsel (Policy and Strategy Division), *NSW Government ministerial handbook*, 2011, p 31.

30 Legislation Review Committee, "Information Paper: 'Rights and Liberties' considered by the Legislation Review Committee", Information Paper, NSW Parliament, 2005–2006, at [14].

31 ALRC Report 127 at [1.15].

32 *Sorby v Commonwealth* (1983) 152 CLR 281 at 308; *Lee v NSW Crime Commission* (2013) 251 CLR 196 at [22]–[24].

33 See G Williams and D Hume, *Human rights under the Australian Constitution*, 2nd edn, OUP, 2013, p 376.

34 *Kable v DPP (NSW)* (1996) 189 CLR 51.

35 See for instance *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, [56]–[59]; [95]–[98]; and [155]–[165].

because it affected the court's capacity as a repository of federal jurisdiction under Chapter III of the Constitution.³⁶

There are obvious limitations in relying upon a Commonwealth Constitution as a State scrutiny mechanism. Beyond the awkward indirect nature of its protection, it also only ensures the actions of a court (reposed with federal jurisdiction) are not inconsistent with the judicial process mandated by Chapter III of the Constitution. There is, therefore, no way of ensuring that the obligations or rights that may exist in a Commonwealth setting can be applied on a State level when the activities are outside a relevant court arena. This is a significant inadequacy, particularly given the large number of State executive entities that have been created and the significant powers they have been given. The problem is further compounded by the fact that often these entities, tribunals or boards, not being courts, will also not apply the *Evidence Act* 1995. This rules out the many other protections afforded in that piece of legislation.³⁷

Given these limitations, in comparison, the principle of legality appears a far stronger informal protection mechanism. As the High Court has summarised, the principle is that “[u]nless the Parliament makes *unmistakably* clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation”. [Emphasis added.]³⁸ The principle, by virtue of its common law origins, has greater flexibility than a doctrine predicated on the set words of a constitution. Thus, although there are lists on what constitutes a fundamental freedom, these are not set.³⁹ Moreover, as the principle of legality is fundamentally a common law principle of statutory interpretation, it is not hindered by federal and State divides, like the application of the Commonwealth Constitution to State courts under the *Kable* doctrine.

However, like many things in the law, the devil is in the detail. Although the principle of legality may be “a strong presumption” requiring “irresistible clearness”⁴⁰ or words that are not “general or ambiguous”,⁴¹ it is not all that hard to get around it. For instance, it is well established that although a provision does not expressly disallow a fundamental freedom, if the purpose or objective of the provision or broader Act encroaches it by necessary implication, then the principle of legality's presumption will be displaced.⁴²

This appears perfectly logical as a matter of statutory interpretation and gives appropriate deference to Parliamentary sovereignty. Yet, it does have the unfortunate consequence that individuals will never be certain, upon reading a provision, of whether or not a

freedom has in fact been encroached. Even if they have the time to read the whole Act and deduce whether one of the multiple, often competing, purposes in their opinion, necessarily implies the abrogation of a freedom, they will never know for sure. Nothing will be even close to certain until a court considers the particular provision in question.

This makes the principle of legality somewhat of a smaller shield than many people may think it theoretically is. Although it may be very strong, it can easily and subtly be side-stepped, a fact which many individuals will not be aware of until they feel the jab of the sword. If nothing else, it certainly makes any attempt to catalogue all the provisions in our State that encroach on fundamental freedoms particularly difficult. This is because searching solely for express encroachments is not sufficient.

Why is this exercise worthwhile?

It is perhaps first necessary to explain why this exercise of cataloguing encroachments is worthwhile. Let us assume Parliament were to pass legislation generally abrogating, in all cases, the rights to legal professional privilege and against self-incrimination. There would be an outcry, and not only from lawyers. That is because these rights are fundamental to the rule of law as we understand it and partly inform our identity as legal professionals. It is important, therefore, that we, as lawyers, appreciate the extent of any encroachment on these rights. It is equally important to form a view, on which minds might differ, as to whether the encroachments are both individually and cumulatively justified. If we don't do that, we may end up in a position where, without protest, those rights are so substantially diminished that the underpinning of the basis on which we conduct our profession is itself substantially impaired.

Legislative encroachments of certain fundamental common law rights

The following review of NSW legislation encompasses all current legislation including subordinate legislation.

Legal professional privilege

There were 162 provisions which arguably abrogate the right to legal professional privilege. Just under 70 per cent of these provisions relate to the mandatory production of information subject to a “reasonable” or “lawful” excuse. Thirty-six provisions relate to an express obligation to provide information in strict language with no reference to an excuse or exception. For instance words such as “shall not fail” to provide are used. Thirteen provisions expressly removed the entitlement to legal professional privilege, or

36 NSW Parliament subsequently enacted provisions to ameliorate the lack of procedural fairness, see *Criminal Assets Recovery Act* 1990 (NSW), ss 10A(4) and 10C.

37 The rights to legal professional privilege and against self-incrimination and the presumption of innocence are preserved in the *Evidence Act* 1995 Pt 3.10, Div 1, Div 2 and s 141.

38 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523; *Coco v The Queen* (1994) 179 CLR 427 at 437; *X7 v ACC* (2013) 248 CLR 92 at [86].

39 See ALRC Report 127 at [1.30] fn 45 for a compilation of relevant lists.

40 *Potter v Minahan* (1908) 7 CLR 277 at 304.

41 R French, “Human rights protection in Australia and the United Kingdom: contrasts and comparisons: Part Two” (2015) 42(3) *Brief* 30 at 33. See also Pearce and Geddes, above n 15, p 215 for a list of the different phrases used in Caselaw.

42 Pearce and Geddes, above n 15, pp 238, 239 and 241 for specific application of the presumption to self-incrimination and legal professional privilege and the circumstances where the rights will be encroached by necessary implication.

prevented it from forming. An example of the latter is s 75V of the *Crimes (Forensic Procedures) Act 2000*. This states a police officer need not allow a registrable person to communicate with an Australian lawyer in private, if the police officer suspects on reasonable grounds that the registrable person might attempt to destroy or contaminate any evidence that might be obtained by carrying out a forensic procedure.⁴³ This could very well prevent any privilege from forming.

Section 75V is somewhat confusing. Unless the provision is implying that the destruction or contamination of evidence would be facilitated by communicating with an Australian lawyer — that is, by a lawyer clearly acting against the law and the professional ethics which bind them, there is, to me, no apparent rationale for this provision. Even if someone had the intention to attempt to destroy or contaminate evidence (a difficult thing to be sure of in itself), why should such a fact preclude a person from private communications with a lawyer? Why, in that scenario, should a person's right to confidential communication with his or her lawyer be denied? It is not immediately apparent to me.

At least, in contrast, s 22 of the *Crime Commission Act 2012* identifies the rationale for refusing a person access to a lawyer. It states that the Commission may refuse permission if it believes on reasonable grounds and in good faith that representation by the particular legal practitioner will, or is likely to, prejudice its investigation. Admittedly, despite this more clear articulation of why access to a lawyer is precluded under the legislation, quite when it will operate is still ambiguous. What constitutes likely prejudice to the Commission's investigation? What if sound and solid legal advice would defeat the legality of one of the Commission's investigations? Can the Commission refuse access to a lawyer in that case to prevent its investigation being "prejudiced"? Presumably, a more narrow meaning of the word "prejudice" is meant.

Like s 75V, it is again unclear whether the provision is focused at dishonest lawyers, as appears to be suggested by the reference to a "particular" legal practitioner. Yet, unlike s 75V, who carries the burden for establishing the Commission had reasonable grounds in refusing permission to a lawyer is not specified. Section 75V at least lays this on the prosecution.

Interestingly, and also somewhat at odds with the principle that legal professional privilege is in fact a right of the client not the lawyer, at least one provision expressly protects lawyers from divulging privileged information, while seeming to force the client to provide it.⁴⁴ Similarly there are many provisions which could avoid encroaching on the right altogether, while still obtaining the information sought after. For instance, provisions could obtain the consent of the client to waive the right⁴⁵ or obtain a warrant to seize information rather than force production.

Privilege against self-incrimination

Turning now to the privilege against self-incrimination,⁴⁶ there were 183 provisions which arguably encroach this privilege. Ironically, some of these were headed "protection against self-incrimination" or something similar.⁴⁷ The fact that the headings use the word "protect" rather than "abrogate" is arguably a revealing one. Could it be construed as an attempt to avoid the "political cost" of these provisions? There were in fact only six out of the 183 provisions which had headings admitting their legal effect. These had headings stating "Abrogation of privilege against self-incrimination" or "Self-incriminatory information not exempt".⁴⁸

Returning to the overall statistics, a smaller proportion, around 34 per cent of the 183 provisions, were subject to a "reasonable" or "lawful" excuse. A much larger proportion, approximately 58 per cent, were provisions which expressly removed the privilege. There was a considerable amount of overlap between these provisions and the provisions caught in the searches concerning legal professional privilege. This is unsurprising given both privileges are subsets of a broader right to silence.

There were 111 provisions which had some form of qualification on the legislative encroachment. Usually these clarify that information or answers made that were self-incriminatory are not admissible in criminal proceedings. However, criminal proceedings are often defined to exclude proceedings under the Act in question and sometimes also civil penalty provisions.⁴⁹ Furthermore, the information is only inadmissible in a criminal proceeding if a person had objected to providing the information on the ground that it would be self-incriminating or if they were not warned that they may so object. Moreover, this protection often does not extend

43 Section 75V(2). Note this Act also encroaches on the presumption of innocence in so far as s 75W authorises the detaining of persons registered under the *Child Protection (Offenders Registration) Act 2000* to conduct forensic tests without consent.

44 Compare *Co-operatives (Adoption of National Law) Act 2012*, ss 517 and 523 with ss 500 and 521 respectively.

45 For example, a client who has made a complaint under the *Legal Profession Uniform Law* presumably would more often than not be willing to consent to waive their right to legal professional privilege to progress the investigation. This would effectively remove the need to encroach the right in those circumstances as the legislation currently does by way of s 466(1)(c) or (d) in conjunction with s 466(2).

46 It should be noted that in referring to the privilege against self-incrimination I have assumed the privilege does not apply to companies and have not made any distinction between provisions allowing for the direct or derivative use of evidence.

47 See *Biosecurity Act 2015*, Pt 4, Div 3, s 34 and Pt 4, Div 5, s 42; *Children (Education and Care Services) National Law*, Pt 9, Div 4, s 211(2) with a heading of "protection against self-incrimination"; *Health Care Complaints Act 1993* Pt 2, Div 5, s 37A; *Mental Health Act 2007*, Ch 5, Pt 4, s 139; *Passenger Transport Act 1990* Pt 4C, Div 3, s 46U; and *Co-operatives (Adoption of National Law) Act 2012*, Appendix, Ch 6, Pt 6.4, s 503 (with a heading of "protection from incrimination"). Also see *Coroners Act 2009* Ch 6, Pt 6.3, s 61 which has the heading "privilege in respect of self-incrimination".

48 *Combat Sports Act 2013*, s 87; *Rail Safety National Law* s 155; *Work Health and Safety Act 2011*, s 172; *Protection of the Environment Operations Act 1997*, s 178; *Mining Act 1992*, s 246S; and *Fisheries Management Act 1994*, s 275H.

49 See also *Confiscation of Proceeds of Crime Act 1989*, s 62(3) which limits even more narrowly what constitutes a criminal proceeding.

to documents or further information that is obtained as a result of the information that was mandatorily provided.⁵⁰

In contrast, the effect of legislative encroachments on legal professional privilege is sometimes limited by a catch-all provision in the Act. This usually limits disclosure of information obtained under the Act for specific purposes.⁵¹ All the same, sometimes the limitations are not very great, or actually are of no effect at all.⁵² At other times, they appear to be wishful thinking or paying lip service to the right. For instance Pt 2A in the *Terrorism (Police Powers) Act 2002* limits the purpose for which someone can contact a lawyer when they are being preventatively detained. In those circumstances, the Part states that they may only be advised on their legal rights in relation to being detained.⁵³ Despite this, s 26ZQ states that, to avoid doubt, nothing in the Part affects the law relating to legal professional privilege.⁵⁴ Given the otherwise clear limitations imposed on what lawyers may give advice on, this section, if anything, creates rather than avoids doubt.

Presumption of innocence

The last specific right surveyed was the presumption of innocence. In comparison to the rights to legal professional privilege and against self-incrimination, there were significantly less encroachments on this right. Nonetheless, 52 provisions were found to encroach on the presumption in the narrow sense explained earlier. The provisions ranged from reversing or altering the onus of proof for an element of an offence,⁵⁵ to removing the presumption of innocence for an entire offence altogether.

A particularly extreme example of the latter may be found in s 685 of the *Local Government Act 1993*. This not only reverses the presumption of innocence, it also makes mere allegations “sufficient proof of the matter[s]” alleged.⁵⁶ Thus the section renders someone guilty of a criminal offence by a mere accusation. As stated, the provision then requires the defendant to prove the contrary.

Another extreme example is s 60E of the *Water Management Act 2000*. This deems the occupier of premises where a contravention has occurred to be guilty of the contravention. Reassuringly, subs (2) says, despite the deeming provision, proceedings can still be undertaken against the person who “actually committed the offence”.

Another example is s 20 of the *Public Interest Disclosures Act 1994*. This outlines a criminal offence, attracting the not inconsiderable maximum penalty of two years imprisonment. Under the section it is an offence for someone to take “detrimental action” against a person “substantially in reprisal” for that person making a public interest disclosure. Subsection (1A) presumes an element of the offence (the motivation for taking detrimental

action was substantially in reprisal for the making of a disclosure), as given. The burden for disproving this element of the offence is placed on the defendant.

Now, it may be very easy to pass over these less well known shifts of burden as of no great import. However, what may seem like subtle shifts in insignificant Acts can have dramatic consequences for individuals and their families. They can result in criminal outcomes that may not have otherwise been reached. They can also cause a person to not take action they are legally entitled to undertake, for example in the case of the *Public Interest Disclosures Act*, defending their reputation, purely out of a fear caused by such shifts in the burden. In essence, the effect of any alteration to the presumption of innocence should never be made light of or under-estimated.

Among the less well-known encroachments are more conspicuous provisions. For instance, the most recent permutation of the *Bail Act 2013* retains the show cause provisions. These require an accused person to explain why they should be granted bail. The 2015 amendments expanded the circumstances under which a person must do this.⁵⁷

There are also the continuing detention orders under the *Crimes (High Risk Offenders) Act 2006*, preventative detention orders under the *Terrorism (Police Powers) Act 2002*, or control orders under the *Crimes (Criminal Organisations Control) Act 2012*. The control orders can be issued against members of declared criminal organisations. These are organisations that among other things have members which associate for the purpose of serious criminal activity. It is worth mentioning that serious criminal activity includes activity whether or not any person has been charged with or convicted for any of the offences that are considered serious. Suspicion of committing a serious offence therefore seems to constitute serious criminal activity.

Conclusion

Even when conservative searches are performed, there are at least 397 legislative encroachments on either the rights to legal professional privilege, and against self-incrimination or the presumption of innocence. As desirable and important as it is for there to be awareness and transparency of the extent of legislative encroachments, it is particularly difficult to analyse that extent. This is due to a combination of factors, including that the principle of legality may be defeated by necessary, not express, implication, the use of ambiguous headings and inconsistent drafting techniques. These encroachments on fundamental common law rights in NSW directly impact upon the identity of all lawyers.

50 See for instance: *Cemeteries and Crematoria Act 2013*, s 136; *Environmental Planning and Assessment Act 1979*, s 119S; *Fisheries Management Act 1994*, s 258B; *Game and Feral Animal Control Act 2002*, s 48; *Gaming and Liquor Administration Act 2007*, s 35; and *Health Care Complaints Act 1993*, s 37A. See also *Contaminated Land Management Act 1997*, s 90; and *Crime Commission Act 2012*, s 39A.

51 See for instance *Animal Research Act 1985*, s 56; *Energy and Utilities Administration Act 1987*, s 41; *Entertainment Industry Act 2013*, s 34; *Environmental Planning and Assessment Act 1979*, s 148; *Home Building Act 1989*, s 121; *Mental Health Act 2007*, s 189; *Property, Stock and Business Agents Act 2002*, s 219; and *Protection of the Environment Operations Act 1997*, s 319.

52 See for instance *Fisheries Management Act 1994*, s 283A(4); and *Betting and Racing Act 1998*, s 36A.

53 Part 2A, Div 5, s 26ZG.

54 Part 2A, Div 6, s 26ZQ.

55 See for instance *Casino Control Regulation 2009*, Sch 6 Pt 6 s 113(4); and *National Parks and Wildlife Act 1974*, s 117(4).

56 *Local Government Act 1993*, s 685.

57 Bail Amendment Bill 2015 (assented to 5 November 2015; not in force at time of publication).