THE PRIVILEGE AGAINST SELF-INCRIMINATION AND CRIMINAL JUSTICE

The privilege against self-incrimination is often represented in the case law of England and Wales as a principle of fundamental importance in the law of criminal procedure and evidence. A logical implication of recognising a privilege against self-incrimination should be that a person is not compellable, on pain of a criminal sanction, to provide information that could reasonably lead to, or increase the likelihood of, her or his prosecution for a criminal offence. Yet there are statutory provisions in England and Wales making it a criminal offence not to provide particular information that, if provided, could be used in a subsequent prosecution of the person providing it. This book examines the operation of the privilege against self-incrimination in criminal proceedings in England and Wales, paying particular attention to the influence of the European Convention on Human Rights and the Human Rights Act 1998. Among the questions addressed are how the privilege might be justified, and whether its scope is clarified sufficiently in the relevant case law (does the privilege apply, for example, to pre-existing material?). Consideration is given where appropriate to the treatment of aspects of the privilege in Australia, Canada, India, New Zealand, the USA and elsewhere.

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The Privilege Against Self-Incrimination and Criminal Justice

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To my family

Preface

The law of England and Wales, in common with that of other jurisdictions, purports to recognise a privilege against self-incrimination. Much has been published over the years on the overlapping, and larger, topic of the right to silence, and this trend looks set to continue. In comparison, the volume of contemporary literature focusing specifically on issues arising from instances of legal compulsion to provide potentially self-incriminatory information to officials has been considerably smaller. This literature does not include a book-length treatment of the operation of the privilege against self-incrimination in criminal proceedings in England and Wales. It is hoped that the present book will fill the gap and, in doing so, will highlight the doctrinal and theoretical issues that are of particular contemporary concern.

While I hope that the reader will find in it an adequate coverage of the relevant law of England and Wales, this book is not intended to be a comprehensive work of reference and it is not my aim to provide a detailed treatment of all key doctrinal principles. I have often allowed quotations of particular judicial or academic observations to 'speak for themselves', in order to convey accurately their thrust and flavour and, quite regularly, the confusion inherent in them. I hope too that such a strategy may on occasion enable practitioners' attention to be drawn readily to useful material which they will not otherwise have easily uncovered. The references to the academic literature that appear in the footnotes (and in the bibliography) may be used as a starting point for further reading. Throughout the book, consideration is given, where it is felt that it would be enlightening to do so, to the treatment of particular aspects of the privilege against self-incrimination in other jurisdictions. The bulk of the research and writing was completed between late March and early June 2013, and I generally stopped collecting new material, both primary and secondary, after late May 2013. I hope therefore that the law as stated in the book is generally up to date as at the spring of 2013, but every effort has been made to incorporate consideration of anything that has come to hand since then.

In relation to two matters of case citation on which practice is not uniform, I have followed the recommendations made in the fourth edition (Oxford, Hart Publishing, 2012) of the *Oxford Standard for the Citation of Legal Authorities* ('OSCOLA'). The first recommendation is this: 'Give the year of judgment (not publication) in round brackets when the volumes of the law report series are independently numbered, so that the year of

publication is not needed to find the volume' (page 14). The second is this: 'In some specialist law reports, cases are given case numbers which run consecutively through the volumes, rather than page numbers. . . . In such cases, follow the citation method used by the series in question' (page 18). Thus, for example, *O'Halloran and Francis v UK*, decided in 2007 and reported in 2008 in volume 46 of the European Human Rights Reports as case number 21, commencing at page 397, is cited as '(2007) 46 EHRR 21' rather than as '(2007) 46 EHRR 397' (as on Lexis), '(2008) 46 EHRR 21' (as on Westlaw) or '(2008) 46 EHRR 397'.

It has been a great pleasure working with Hart Publishing, and I am especially grateful to Richard Hart, Rachel Turner and Tom Adams for their courteous professionalism and patience. I am also indebted to a large number of other individuals for their (sometimes unwitting) assistance with this project. Within the legal academy I have received comments from, or benefited from more general discussions with, a good number of specialists in criminal procedure and evidence, including Andrew Ashworth, Ian Dennis, Sue Easton, Dimitrios Giannoulopoulos, Richard Glover, Jill Hunter, John Jackson, Roger Leng, Jenny McEwan, Susan Nash, David Ormerod, Abenaa Owusu-Bempah, Mike Redmayne, Andy Roberts, Paul Roberts, Jonathan Rogers, Jennie Temkin and Simon Young. I presented some of my earlier and more tentative ideas on the privilege against self-incrimination at the University of Nottingham (in February 2010 and September 2010, at two different events), at the University of New South Wales (in April 2010) and at City University London (in February 2013), and I am grateful for the comments that I received from the participants at these various events. The (linked) April 2010 and September 2010 events culminated in the publication of my essay, '"Give Us What You Have" – Information, Compulsion and the Privilege against Self-Incrimination as a Human Right', as a chapter in P Roberts and J Hunter (eds), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford, Hart Publishing, 2012) 239–58. Writing the present book has provided me with the opportunity of developing and refining some of the ideas and themes explored originally in that chapter. I must also acknowledge my gratitude to my family as well as to the friends who, over the past several months, have gently and tactfully inquired about the progress of my work, especially Annelies, Mark K, Mark W, Mary, Neil, Sharmila and Vijay. Their support and cheerful encouragement are much appreciated.

AL-T Choo
London
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