



## Privilege against self-incrimination

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The law provides a privilege (immunity) against providing information or documents which may be self-incriminating. This, alongside the right to remain silent, ensures that an accused person cannot be compelled to give evidence leading to his or her own conviction.

### How does privilege work in criminal law?

A claim of privilege can be made in response to some order or direction legally compelling a person to answer a question or produce a document.

If the person reasonably thinks that answering the question or producing the document could expose them to civil penalty or [a criminal conviction](#), they can assert their right to privilege against self-incrimination.

### Are there exemptions to the claim of privilege?

An assertion of privilege against self-incrimination ordinarily exempts the person from having to answer the question or produce the documents. However, legislation increasingly provides avenues for investigative authorities (for example, the Australian Taxation Office) to compel the production of information and documents despite a claim of privilege.

Usually, where the legislation requires that information or documents be given despite a claim of privilege, the evidence obtained cannot be used as evidence against the person who asserted the privilege. It may, however, be useful information that enables investigators to dig further and obtain other evidence which is admissible.

### Examples of claiming privilege against self-incrimination

- Elizabeth is meeting her friend Jack on a street corner. She witnesses a hit and run car accident. Elizabeth reports what she saw to the police and is later called as a witness to give evidence in court against the driver. However, Elizabeth's friend Jack is a pirate who supplies rum for freeze-dried food (an act of piracy under section 79 and 80 of the Queensland Criminal Code punishable by life imprisonment). Elizabeth was meeting him on the street corner in order to trade supplies. If, when Elizabeth is called to give evidence about the hit and run, she is asked what she was doing on the street corner at the time of the hit and run, she could properly assert privilege and refuse to answer the question.
- Bruce, a director of a company engaged in litigation with a creditor, is issued a subpoena to produce documents evidencing transactions between him and the company. The documents show that Bruce has been purchasing martial-arts weapons via the company for which he does not possess a licence (an offence under the *Weapons Act 1990* (Qld)). Bruce could assert privilege in response to the subpoena and not produce the documents.
- Following Bruce's claim of privilege, he is investigated by the [Australian Securities and Investments Commission \(ASIC\)](#). ASIC suspects that Bruce has been failing to discharge his duties in the best interests of the corporation of which he is a director. They assert he is diverting much of the corporation's resources to personal expenses and hobbies. ASIC issues Bruce a notice to attend a compulsory examination. ASIC's governing legislation provides that Bruce can assert privilege in response to a question put to him in examination, but must still answer the question. The answers he gives cannot be used against him in any subsequent criminal or civil penalty proceeding but can be used to assist ASIC with further investigation into the matter.

## Is it an offence to refuse to supply information when ordered or directed to do so?

Under some legislation, it is an offence not to provide information or documents upon receipt of a compulsory notice. There may be an exception to the offence for not providing the information or documents because of a genuine claim of privilege. Particular care needs to be taken though to ensure the claim of privilege is valid. A baseless or overly broad claim of privilege could lead to a prosecution for failing to provide the information or documents.

## Privilege during workplace investigations

A particular difficulty arises in [workplace investigations that involve conduct that could amount to a criminal offence](#). Despite an employee having a claim of privilege, an employer may still be able to take disciplinary or management action against the employee for failing to answer questions when given a reasonable direction to do so.

## If I claim privilege, does it suggest I'm guilty?

A common misconception is that claiming privilege implies that the person is guilty. This is not necessarily the case, because the privilege can apply where the person has a genuine apprehension of prosecution despite having an innocent explanation.

This could arise even where the person might think that a prosecutor would be misguided or proceed on a misapprehension (although the risk of prosecution must still be real). Despite this, it is fair to say that an investigating agency met with a claim of privilege will likely treat the response with suspicion. Importantly, however, any suspicion of guilt due to a claim of privilege does not amount to evidence.

The person asserting the privilege bears the onus of substantiating the basis for the claim of privilege. This creates obvious difficulties when proving the basis for the privilege could actually reveal the incriminating information. Special care needs to be taken to ensure that sufficient information is given to establish the claim of privilege whilst preserving the secrecy of the information being protected.

## Get help from a criminal lawyer

Any person facing a situation where they are required to provide answers, information or documents which could expose them to self-incrimination (and/or a penalty), should [seek legal advice as soon as possible](#) and before responding.

### Contacting Gilshenan &Luton

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