

11 October 2021

Commissioner M Fuller
NSW Police Force

CC: Hon. Brad Hazzard, Minister for Health; Hon. David Elliott, Minister for Police

By email only

Dear Commissioner,

RE: Purported abrogation of the privilege against self-incrimination by Public Health Orders

We refer to our letter of 14 August 2021 regarding the then Public Health Orders' purportedly lawful abrogation of the common law privilege against self-incrimination by allowing Police to request responses to questions and information from members of the public.

On the Commissioner's advice we sought documents through GIPA concerning the use of police powers which purportedly abrogate the privilege. We are pleased to see that since August, at least, Police appear to have exercised restraint in issuing Penalty Infringement Notices and Court Attendance Notices for conduct which potentially involves an abrogation of the privilege.

We are also pleased to see that amendments have since been made to the Public Health Orders since we first wrote to you which mitigate the extent to which abrogation of the privilege may be used as a tool by Police in enforcing the Public Health Orders, for example in circumscribing clause 6.2 of the Public Health Order that takes effect on 11 October 2021 to require persons to only answer questions posed by contact tracers and not Police.

However, we remain concerned that Clause 6.4 compels a person to respond to a request under the Public Health Order truthfully. This ostensibly applies to requests for information and evidence made by Police, and as identified in our letter of 14 August 2021, the absence of a derivative use immunity following from the provision of truthful information or evidence remains a flaw in the Public Health Orders.

The privilege against self-incrimination is an important safeguard recognised by the common law for people who are facing criminal proceedings. In the context of a public health emergency, where truthfulness of information provided to authorities is of the utmost importance, we see that the amendment of the Orders by including a derivative use immunity would only strengthen Police's ability to obtain the information that they seek because people would not fear sanction from the criminal law if they provide incriminating information. This is particularly so when the financial penalties for breach of the Public Health Orders are disproportionately high and may serve as a barrier to people providing truthful answers to public health officials. We call for the Public Health Orders to be amended to include a derivative use immunity to protect people who provide information or evidence to Police in the course of their enforcing the Public health Orders. We further ask that any such derivative use immunity be applied

retrospectively to all instances of information and evidence that has been requested from Police pursuant to powers under all previous Public Health Orders that have been in force.

We also seek your confirmation that for the purposes of clause 6.5(1) of the Public Health Order which will take effect on 11 October 2021 information transferred to another agency because it is 'necessary to do so for the purposes of protecting the health or welfare of members of the public during the COVID-19 pandemic' would not include information transferred to Police with the purpose of issuing a Penalty Infringement Notice or Court Attendance Notice. In the event that it does, we strongly urge that the clause be amended to prohibit the transfer of information from government sector agencies to Police for the purposes of enforcement of the Public Health Order. In the context of a public health crisis where eliciting truthful information from the public for public health purposes is crucial, it only undermines the confidence of the community in the public health system if such information can be transferred to Police for enforcement purposes.

Yours sincerely,



Michelle Falstein
Secretary