

## WHAT OF THE RIGHT TO SILENCE: STILL SUPPORTING THE PRESUMPTION OF INNOCENCE, OR A GROWING LEGAL FICTION?

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### INTRODUCTION

The right to silence is the right of a suspect to say nothing in the face of police questioning<sup>1</sup> and is justified as a protection from self-incrimination. This right is known as the ‘actual’ right to remain silent.<sup>2</sup> The right of an accused in a criminal trial to remain silent at the pre-trial stage provides a ‘particular manifestation’<sup>3</sup> of the privilege against self-incrimination such that a person who believes, on reasonable grounds, that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants, and the roles they played.<sup>4</sup>

The second tier to the right to remain silent concerns the right not to have silence used against one at trial.<sup>5</sup> Attempts to draw unfavourable inferences from silence are sometimes made at trial as silence is often equated with guilt.<sup>6</sup> An accused’s silence might be used to cast doubt on a defence raised later at the trial but not revealed to police during questioning.<sup>7</sup> The second tier to the right to silence prevents such inferences from being drawn. This aspect of the right to silence is often targeted as requiring abolition.<sup>8</sup>

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<sup>1</sup> A Palmer, *Principles of Evidence* (1998) 160.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Petty & Maiden v R* (1991) 173 CLR 95, 90.

<sup>5</sup> Palmer, above n 1, 160.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid* 161.

This article examines the current standing of the two tiers of the right to silence. It will discuss the nature of the privilege and the right, and their application both before and during criminal trials, including the treatment in legislation such as the uniform *Evidence Acts*. The approach in the United Kingdom will also be considered and compared to that of Australia. The article will then examine judicial interpretations of the pre-trial and at-trial right to silence, and the extent to which any inferences may be drawn from the accused's exercise of the right.

It is argued that the right complements various statutory provisions that declare that an accused shall not be a compellable witness, whether in his or her own defence, or for the prosecution. The right to silence and privilege against self-incrimination are based on the notion of presumption of innocence: it is for the prosecution to prove guilt. Given that it is in the interests of the accused to commit perjury, there may even be an economic logic to maintaining the right and privilege. Whatever may be written about the adversarial system, there is a fundamental efficiency and a notion of fairness embraced by the basic principle that an accused may not be compelled to incriminate him or herself by providing information. However, as this article will illustrate, judicial interpretation and legislative intervention may have subtly impinged on the accused's privilege against self-incrimination and right to remain silent without any adverse inference.

#### THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE RIGHT TO SILENCE IN THE CRIMINAL TRIAL

The right to silence continues to attract comment despite the fact that it is exercised by only a few defendants, usually in cases where the direct evidence is lacking or contradictory. Most recently it was brought to public attention and scrutiny with respect to two high profile defendants: the accused in the Jaidyn Leskie toddler murder case in Moe (the *Domaszewicz* case),<sup>9</sup> and the former High Court Judge Lionel Murphy who was accused of attempting to pervert the course of justice (the *Murphy* case).<sup>10</sup> With respect to Murphy, journalist David Marr continues to resurrect the argument that, had Murphy not exercised the ancient right to make only an unsworn statement from the dock at his second trial, thus tactically excluding cross-examination and a vast array of evidence, he would have been convicted.<sup>11</sup>

There are many that consider the right to silence to be a trick or tactic. The argument flows from the fact that once the accused makes the decision to be silent

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<sup>9</sup> *R v Domaszewicz* (unreported, Supreme Court of Victoria, Vincent J, 4 December 1998).

<sup>10</sup> It was at the second trial, conducted from 14-28 April 1986, that Justice Murphy chose to make an unsworn statement from the dock instead of giving evidence – in the words of his counsel, Ian Barker QC, choosing to ‘face the jury directly, as his judges’: David Brown *et al* ‘Re-presenting Justice Murphy: a contemporary inquisition’ (1986) 11(4) *Legal Service Bulletin*, 147, 148. The jury returned a verdict of ‘not guilty’. The first, guilty, verdict had been overturned and a new trial ordered, by the NSW Court of Criminal Appeal: (1985) 4 NSWLR 42.

<sup>11</sup> D Marr, ‘How Diamond Jim saved his mate’ *The Sydney Morning Herald*, 23 Jan 1999, 33.

(or as in *Murphy's* case, to make an unsworn statement, which was then available in New South Wales) they can evade cross-examination. A contrary argument is that the accused does not have to prove anything: the burden remains on the prosecution to prove that the accused is guilty beyond a reasonable doubt. A mass of contradictory or bungled police evidence only leads to a view that the prosecution has failed to discharge the burden. It is not an accused's duty to make the prosecution's case.

*Murphy* and *Domaszewicz* illustrate this point. In both cases there was considerable 'evidence' in the form of unreliable police tapes (in the former case) and illegal police video recordings of police interviews (in the latter case). The refusal of both accused to make sworn statements left the burden of proof entirely with the prosecution.

The content of prosecutorial evidence is, in some cases, extremely jumbled and contradictory, making it difficult to prove guilt beyond reasonable doubt. In such cases it is arguable that an accused may assist his or her case by saying nothing before and during trial. Whether the case involves a highly articulate accused or a highly inarticulate and disadvantaged accused, they might otherwise augment suspicion of their guilt if cross-examined. Thus there are compelling reasons, founded on the burden of proof, for such accused parties exercising their right to silence.

#### *What is the right to silence?*

The right of silence, which has emerged at both the pre-trial and trial stages, is underpinned by the privilege against self incrimination, and the broader notions of the rule of law espoused by the liberal tradition. The consequence of this right proposes that one cannot be required to answer a question that might tend to expose oneself to criminal conviction.<sup>12</sup> The presumption of innocence has been constructed so as to require the prosecution to prove guilt. In theory then, the criminal justice system should not tolerate methods of 'compulsory interrogation'<sup>13</sup> such as those once associated with the Star Chamber.<sup>14</sup> The right to silence is a procedural protection for the individual against the power of the State with origins in revolutionary times following the overthrow of the remains of clerical and monarchical absolutism in the middle of the 17th century.<sup>15</sup> In its modern incarnation, this right has been seen as fundamental to other evidentiary principles. Aronson and Hunter comment:

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<sup>12</sup> Henchcliffe, 'The Silent Accused at Trial - Consequences of an Accused's Failure to Give Evidence in Australia' (1996) 19 *University of Queensland Law Journal* 137.

<sup>13</sup> *Ibid* 137.

<sup>14</sup> *Ibid* 137-8.

<sup>15</sup> G Roberts, *Evidence: Proof & Practice* (1998) 178.

It is that right which provides the fundamental bases for the common law rules governing the admissibility and reception of confessional evidence.<sup>16</sup>

The civil liberties view is that the right to silence is fundamental to the principle that it is for the prosecution to prove the guilt of the accused person beyond a reasonable doubt.<sup>17</sup> Because of this obligation, an accused person must be free to remain silent in the face of his or her accusers.<sup>18</sup>

*Who has the right to silence?*

The right to silence has been described as a human right, particularly by Murphy J in the trilogy of cases *Pyneboard Pty Ltd v Trade Practices Commission*,<sup>19</sup> *Sorby v Commonwealth*<sup>20</sup> and *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs*.<sup>21</sup> More recently, in *Environmental Protection Authority v Caltex Refining Company Pty Ltd*<sup>22</sup> the High Court held that the right to silence was a reflection of the procedural requirements of the privilege against self-incrimination and was integral to the protection of the natural legal person in a criminal justice system in which inquisitorial methods have no place. Similarly, in *Pyneboard* Mason ACJ, Wilson and Dawson JJ held that this rule of the common law provided a fundamental bulwark of liberty extending beyond its apparent simple existence as a rule of evidence applicable to judicial and quasi-judicial proceedings.<sup>23</sup> However, the exclusion of corporations from its application reinforces the original purpose of the right, that being, the protection of the individual suspect from the state. It also reasserts the 'primary testimonial focus of the privilege'.<sup>24</sup>

*Where is the right most applicable and when is it excluded?*

The right to remain silent, before and during trial, could be seen as fundamental to the integrity of the privilege against incriminating oneself, or otherwise exposing oneself to a threat of penalty or liability.

The right to silence applies at common law to all the various stages of litigation.<sup>25</sup> Thus in the civil sphere it may be claimed in response to demands for discovery of documents and to interrogatories,<sup>26</sup> and it applies to demands for production of

<sup>16</sup> M Aronson and J Hunter, *Litigation* (5th ed, 1995) 326.

<sup>17</sup> K Weeks, 'Overnight cures on law and order' *The Sydney Morning Herald*, 22 Jan 1999, 12 (letter written as secretary of NSW Council for Civil Liberties and NSW Young Lawyers).

<sup>18</sup> *Ibid.*

<sup>19</sup> (1983) 152 CLR 328.

<sup>20</sup> *Ibid* 281.

<sup>21</sup> (1985) 156 CLR 385.

<sup>22</sup> (1993) 118 ALR 392.

<sup>23</sup> (1983) 152 CLR 328, 340.

<sup>24</sup> Roberts, above n 15, 179.

<sup>25</sup> *Ibid* 183.

<sup>26</sup> *Ibid* citing *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380; *Warman v Envirotech* (1986) 67 ALJR 253; *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253; *Metroplaza v Girvan NSW (in liq)* (1992) 37 FCR 91.

documents by notice or subpoena.<sup>27</sup> It does not however apply to seizure of documents by search warrant,<sup>28</sup> or to lawful demands for the production of what may be characterised as real or physical evidence, such as samples of a suspect's body.<sup>29</sup> The majority of the High Court determined in *Pyneboard*<sup>30</sup> that the privilege against exposure to a penalty was capable of application in non-judicial proceedings<sup>31</sup> Brennan J in *Sorby* confined the privilege against self-incrimination to judicial proceedings on the basis that only those proceedings involve an obligation to testify at common law.<sup>32</sup> Statutory provisions may in any event exclude the privilege. In *Sorby*, Gibbs CJ stated: 'The privilege against self-incrimination is not protected by the Constitution, and like other rights and privileges of equal importance, it may be taken away by legislative action'.<sup>33</sup>

*The distinction between pre-trial silence & silence at trial*

A distinction has arisen between the treatment of an accused's silence prior to trial and an accused's refusal to give evidence at trial. Recent High Court cases, such as *Glennon v R*,<sup>34</sup> affirm the right to pre-trial silence but doubts have existed over whether the right to silence prevents the drawing of unfavourable inferences from a person's silence at trial. In *Petty & Maiden v R*<sup>35</sup> the High Court rejected the suggestion that, while the court could not infer consciousness of guilt from silence, it could deny credibility to a late defence or explanation because of earlier silence. The court held the latter as well as the former to be impermissible, as a 'fundamental incident of a suspect's right to pre-trial silence is that no adverse

<sup>27</sup> Ibid citing *Warman v Envirotech* (1986) 67 ALJR 253; *Controlled Consultants v Commissioner for Corporate Affairs* (1985) 156 CLR 385; *Environment Protection Authority v Caltex Refining Co* (1993) 118 ALR 392.

<sup>28</sup> Ibid citing *Controlled Consultants v Commissioner for Corporate Affairs* (1985) 156 CLR 385.

<sup>29</sup> Ibid citing *Sorby v Commonwealth* (1983) 57 ALJR 248, per Gibbs CJ 252 (152 CLR 281, 292).

<sup>30</sup> (1983) 152 CLR 328.

<sup>31</sup> *An approach that was confirmed in Police Service Board v Morris & Martin* (1985) 59 ALJR 259, which involved proceedings before the Police Disciplinary Board of Victoria. Roberts, above n 15, 183.

<sup>32</sup> (1983) 152 CLR 281, Brennan J at 316-317; Roberts, above n 15, 183.

<sup>33</sup> (1983) 152 CLR 281, 298. On 7 December 2000, Senator Vanstone, the Minister for Justice, introduced the National Crime Authority Legislation Amendment Bill which limits the privilege against self-incrimination provided to witnesses before the NCA. 'The Bill will allow an investigatory body to derive evidence from self-incriminatory evidence given by a person at a hearing, and for a prosecuting authority to use that derived evidence against the person at a later trial. In other words, a person's self-incriminatory admissions won't themselves be able to be used as evidence against that person, but will be able to be used to find other evidence that verifies those admissions or is otherwise relevant to proceedings. However, the Bill will specifically provide that once a witness has claimed that the answer to a question might tend to incriminate him or her, then any evidence that the person gives cannot be used against the person in any later trial.': Minister's Second Reading Speech, Senate Hansard 7 December 2000.

<sup>34</sup> (1994) 119 ALR 706.

<sup>35</sup> (1991) 173 CLR 95.

inference can be drawn' from exercising that right.<sup>36</sup> Mason CJ, Deane, Toohey & McHugh JJ cautioned that:

the denial of the credibility of that late defence or explanation by reason of the accused's earlier silence is just another way of drawing an adverse inference (albeit less strong than an inference of guilt) against the accused by reason of his or her exercise of the right of silence. Such an erosion of the fundamental right should not be permitted. Indeed, in a case where the positive matter of explanation or defence constitutes the real issue of the trial, to direct the jury that it was open to them to draw an adverse inference about its genuineness from the fact that the accused had not previously raised it would be to convert the right to remain silent into a source of entrapment.<sup>37</sup>

Later in *Weissensteiner v R*,<sup>38</sup> the High Court took a more pragmatic approach to silence at trial. It found that, where the prosecution had proved its case to a certain standard, the judge may direct the jury that if facts they find proved can support an inference of guilt and there are things which it would be reasonable to expect the accused would know, and would disclose if they were consistent with his or her innocence, the jury may take such silence into account, in deciding whether to draw the inference.<sup>39</sup>

It is only when the failure of the accused to give evidence is a circumstance which may bear upon the probative value of the evidence which has been given and which the jury is required to consider, that they may take it into account, and they may take it into account only for the purpose of evaluating that evidence.<sup>40</sup>

Unfavourable inferences could now be drawn from an accused's silence *at trial*. This approach was defended by Mason CJ, Deane and Dawson JJ who stated:

But it is not to deny the right [to maintain silence]; it is merely to recognise that the jury cannot, and cannot be required to, shut their eyes to the consequences of exercising the right.<sup>41</sup>

For Palmer, there is a clear rationale for the court's distinction between pre-trial and at-trial silence:

[T]he right to pre-trial silence is based on notions of what constitutes fairness in the State's methods of investigating and proving an alleged offence.<sup>42</sup>

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<sup>36</sup> A Palmer, 'Silence in Court - The Evidential Significance of an Accused Person's Failure to Testify' (1995) 18 *UNSW Law Journal* 130, 130.

<sup>37</sup> (1991) 173 CLR 95, 101.

<sup>38</sup> (1993) 178 CLR 217.

<sup>39</sup> *Ibid* per Brennan and Toohey JJ, 236.

<sup>40</sup> *Ibid* per Mason CJ, Deane and Dawson JJ, 229.

<sup>41</sup> *Ibid* 299.

<sup>42</sup> Palmer, above n 36, 140.

The same rationale does not apply to the right not to testify, since here ‘the accused is not asked to testify against himself (*sic*), but in favour of himself (*sic*)’.<sup>43</sup>

*The problem of vulnerable suspects – why should they explain themselves?*

Part of the unacknowledged difficulty with the right to silence is that the accused is clearly seeking to avoid cross-examination. However, there may be numerous reasons for an accused not wishing to give evidence at trial, especially if he or she has problems with communication.

Such communication problems can arise in both the pre-trial and trial context. This is particularly so with respect to vulnerable suspects, particularly Aboriginal people. This can be evident in the pre-trial setting, in police records of interview and in confessional statements<sup>44</sup> where, according to Coldrey<sup>45</sup> the right to silence is often not understood nor exercised.<sup>46</sup> However, it was decided in *R v Nundhirribala*<sup>47</sup> that the mere fact that an accused person is not fully aware of his or her legal rights does not necessarily mean that a confession is involuntary. This means a confession will still be a ‘free choice even though the choice is an uninformed one’.<sup>48</sup>

#### THE RIGHT TO SILENCE IN THE UNITED KINGDOM

It is useful to compare the Australian approach to silence to the approach taken in the United Kingdom. The English approach to silence has been described as ‘a formalised system’<sup>49</sup> which aims at allowing ‘commonsense implications to play an open role in the assessment of evidence’.<sup>50</sup> In England and Wales recent changes to the common law position now allow an accused’s silence to ‘be used as an item of evidence in support of the prosecution case’.<sup>51</sup> It has been said that the law of England and Wales has shifted to a position that permits silence to be ‘considered as positive evidence of guilt’.<sup>52</sup> The view stems from the recognition that even though the law has not institutionalised compulsion, and ‘there is still no directly enforceable duty on the defendant’,<sup>53</sup> in reality the changes amount to an ‘indirect obligation to give evidence’.<sup>54</sup>

<sup>43</sup> (1993) 178 CLR 217, 245 per Gaudron and McHugh JJ.

<sup>44</sup> Confessions have to be voluntarily made: *R v Aubrey* (1995) 79 A Crim R 100.

<sup>45</sup> Coldrey, ‘Aboriginals and the Criminal Courts’ in K M Hazelhurst (ed), *Ivory Scales: Black Australia & the Law* (1987) 84.

<sup>46</sup> As seen in *R v Applebee* (1995) 70 A Crim R 554 (here the accused did not understand the caution).

<sup>47</sup> (1995) 129 FLR 125 (Sup Ct NT).

<sup>48</sup> Applying *Gudabi v R* (1984) 1 FCR 187; *R v Azar* (1991) 56 A Crim R 414.

<sup>49</sup> *Murray v United Kingdom* (1996) 22 EHRR 29, 63.

<sup>50</sup> *Ibid.*

<sup>51</sup> S Nash, ‘Silence as Evidence: A Commonsense Development or A Violation of a Basic Right?’ (1997) 21 *Criminal Law Journal* 145, 148.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

It has also been said that the English law has ‘all but abolished’ the pre-trial right of silence.<sup>55</sup> This is because the law in s 34 of the *Criminal Justice and Public Order Act 1994* (UK) places an obligation on the accused to mention facts when being questioned or charged if they intend to later rely on them in their defence, when they could reasonably have been expected to raise them. Further, the Act places an obligation on the accused to account for presence of suspicious objects, substances or marks about their person at the time of arrest, and for their presence at a particular place.<sup>56</sup> So, where an accused has been warned of the possible effect of a failure to give an account when requested, and still fails to account, for ‘any object, substance or mark’ found ‘(i) on his person; or (ii) in or on his clothing or footwear; or (iii) otherwise in his possession; or (iv) in any place in which he is at the time of his arrest’ then the court or jury ‘may draw such inferences from the failure or refusal as appear proper’.<sup>57</sup> The provisions do not compel an accused to speak but may provide ‘irresistible pressure’ to do so.<sup>58</sup> In essence, the *Criminal Justice and Public Order Act* ‘introduces the general principle of allowing the drawing of adverse inferences from the silence of the accused’.<sup>59</sup>

The recent changes were partly the result of a perception that the right to silence was being employed tactically by professional criminals to evade conviction. Much of the genesis of the changes can be found in earlier reforms to the law in Northern Ireland. Unsurprisingly, those cases where most pressure has been placed on the right to silence include cases involving bombings and drug offences. These have often involved conspiracy charges (which facilitate questioning about associations) and major surveillance operations. It is difficult to imagine gathering sufficient evidence against certain types of criminal players without resort to tricks, deceptions and strategies of various types. In much the same way there is at least an argument that it is difficult to prove the guilt *or innocence* of a defendant who resolutely refuses to explain what occurred. For many, silence is a strategy, but censure of this fails to accommodate the presumption of innocence. These are the themes to English changes and they resonate through Australian law.

#### *Who called for the changes?*

Unsurprisingly, changes to the right to silence, like those that occurred in the United Kingdom, are often prompted by police. In one view, the demand for an end to the right to silence without incurring the penalty of adverse inferences has ‘become a simplistic cliché of police rhetoric’.<sup>60</sup> According to this view, police tend to object to the right to silence because they see it as hindering criminal investigations. Police

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<sup>55</sup> M Bagaric, ‘The Diminishing “Right” of Silence’ (1997) 19 *Syd L Rev* 366, 366.

<sup>56</sup> *Criminal Justice and Public Order Act 1994* (UK) ss 36, 37.

<sup>57</sup> *Ibid.*

<sup>58</sup> Bagaric, above n 55.

<sup>59</sup> 367D Wolchover and A Heaton-Armstrong, ‘Labour’s victory and the right to silence - 1’ (26 September 1997) *New Law Journal* 1382.

<sup>60</sup> P O’Mahony, ‘The ethics of police interrogation and the Garda Síochána’ (1997) 6 *Irish Criminal Law Journal* 46, 53.

point to evasions and denials of guilty suspects as tricks and tactics.<sup>61</sup> Police argue that they should be able to confront, contradict, trick, undermine and at times pressure suspects.<sup>62</sup>

A strong criticism of the right to silence was advanced by former *Garda* (Irish Police Commissioner) Patrick Culligan, who said in *The Irish Times* in 1994 that technicalities such as this benefited the ‘cunning, professional, hardened criminal’.<sup>63</sup> However this must always be considered in light of the ever present power imbalance associated with the pre-trial interview setting, in which the refusal to cooperate is sanctioned in myriad ways.

Before the police view of the right to silence is accepted one would ask whether the right to silence lets the cunning, professional and hardened criminal go free. In major British research studies, both Professors Jackson and Leng<sup>64</sup> concluded that curtailing the right to silence had little or no apparent effect in terms of gaining the conviction of the guilty. Leng also argued that any abolition of the right to silence shifted, in a small but highly significant way, the burden of proof from the prosecution onto the accused.

#### *An English example*

*Anthony John Lee Murray & Others*<sup>65</sup> illustrates the English approach to the right of silence in the drugs context. The four appellants in the case (who included an appellant named Sheridan) were convicted of conspiracy to supply heroin on the basis of evidence gathered by police surveillance operations. Sheridan, who had given no evidence at trial and called no witnesses, appealed on two grounds. The first was that, the trial judge had failed to direct the jury properly as to how to treat Sheridan’s lies in interview. Although he dealt with the contents of the interview, the judge had not assisted the jury ‘to explain the potential reasons’ for the lies. ‘Thus, the position left to the jury was not a complete one.’<sup>66</sup> The Court of Appeal analysed the trial judge’s direction and rejected this ground. The Court said of the direction: ‘It suggests what the motivation for telling lies might have been but in the absence of any evidence from the defendant to back it up, a positive case could not be put forward by counsel, or indeed by the judge. ... [The judge] could only have put it higher with the benefit of what Sheridan himself said as to why he had told the lies.’<sup>67</sup> The Court rejected that ground.

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> R Leng, *The Right to Silence in Police Interrogation: A Study of Some of the Issues Underlying the Debate Research*, Bulletin No. 35, HMSO, London (1994); see also J D Jackson, ‘Curtailing the Right to Silence: Lessons from Northern Ireland’ (1991) *Crim L Rev* 404. Both studies are cited in O’Mahony, above n 60.

<sup>65</sup> [1997] 2 Cr App R 136.

<sup>66</sup> Ibid per Otton LJ 153.

<sup>67</sup> Ibid.

The second ground of appeal was that the trial judge had failed to put Sheridan's case to the jury after having indicated that he would do so. It was contended that no matters were put to the jury about Sheridan's lack of involvement up to a particular date, leaving the jury in an 'unsatisfactory position'.<sup>68</sup> It was argued that this omission was important 'particularly as the defendant had given no evidence, called no witnesses, had challenged little by way of cross-examination of the prosecution witnesses or of the co-accused'.<sup>69</sup> Thus it was contended that, even though the defendant did not give evidence, it was the trial judge's responsibility to assist the jury in putting the defendant's case, at least in some limited form, because of the 'lack of hard evidence'.<sup>70</sup>

However the point was taken against Sheridan precisely because of his failure to answer the prosecution's case in court. In the Court of Appeal's opinion:

No doubt if Sheridan had given evidence, the judge would have reminded the jury of that evidence as fully as he undoubtedly did in the case of [his co-accused] Murray and Morgan. There was no material omission from the rest of the evidence which assisted Sheridan. There was a strong prosecution case against him, on the narrow basis of Sheridan's participation in this criminal activity ....<sup>71</sup>

That case included his lies to dissociate himself from the others accused, and his failure to explain the presence of evidence associated with the crime, in his kitchen. 'In the absence of such an explanation, the judge [could not] be criticised for directing the jury in the manner that he did. There was no misdirection.'<sup>72</sup> So the accused's refusal to offer an explanation did not assist his defence, and allowed the jury more readily to draw the inferences advocated by the prosecution.

DEAD SILENCE, "DEAD CALM": THE HIGH COURT DOES CINEMA IN  
*WEISSENSTEINER*

In the now famous case of *Weissensteiner*<sup>73</sup> the accused took a job as a deckhand with a Danish couple and sailed off with them on their yacht. When the deckhand reappeared with the (renamed) yacht in New Guinea the Danish couple were missing. The accused gave varying explanations as to the whereabouts of the yacht's owners. When the yacht was located, the victims' belongings were still on board. The accused was charged with murder and theft. He exercised his right to remain silent and no evidence was called on his behalf. The judge observed that the onus of proof lay with the Crown and that the accused bore no onus and did not have to prove anything. The judge directed that the accused did not have to give evidence and guilt could not be inferred because the defendant chose not to give

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<sup>68</sup> Ibid 154.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> (1993) 178 CLR 95. The film 'Dead Calm' is supposed to be loosely based on the *Weissensteiner* scenario.

evidence. However, the judge stated that the result of the accused's failure to give evidence was that there was no evidence from him to refute the prosecution case.

The Queensland Court of Appeal upheld the direction of the trial judge on the grounds that the prosecution sought to establish guilt from the whole set of circumstances. The Court of Appeal upheld the trial judge's direction that in such a case an inference of guilt 'may be more safely drawn from the proven facts when an accused person elects not to give evidence of relevant facts which it can be easily perceived must be within his knowledge'.<sup>74</sup> The approach of the Court of Appeal in *Weissensteiner* was seen by some commentators as the first step to whittle away the right to silence in Australian law.<sup>75</sup>

An appeal was brought before the High Court, which upheld the decision of the Court of Appeal in a judgment which arguably confirmed that the accused's failure to exercise the right to testify can now be used as a means of inculpation'.<sup>76</sup> The principle established by the High Court was that jury direction should be given about the silence of the accused when the Crown case is circumstantial and where only the accused could provide evidence. There are two main pre-conditions to the *Weissensteiner* principle: that the prosecution must have established a case to answer and that it must be reasonable to expect the accused to provide some denial, explanation or version of events.

The *Weissensteiner* principle is aptly summarised by Dennis:<sup>77</sup>

[A] failure to answer a strong prosecution case with evidence from the accused's peculiar knowledge lends weight to the case by suggesting that there is no innocent explanation.<sup>78</sup>

For Dennis, this approach is in keeping both with common sense intuitions, and with the established rule about explanation for possession of recently stolen goods.<sup>79</sup> From this decision, 'possible hypotheses of innocence'<sup>80</sup> lose their rational support precisely because the accused fails to provide explanations only he or she can give, in a situation where there is already a substantial case against them. However, other commentators do not view the decision as kindly. Bagaric considers that while the High Court 'continued to uphold the importance of the right',<sup>81</sup> the decision 'significantly limited'<sup>82</sup> the scope of the accused's right to silence at trial. It did so

<sup>74</sup> Bagaric, above n 55, 368, citing *Weissensteiner* per Mason CJ, Deane and Dawson JJ, 223-224, quoting from the trial judge's summing up.

<sup>75</sup> T O'Gorman, 'Right to Silence' (Paper presented at the 30th Australian Legal Convention 1997).

<sup>76</sup> Palmer, above n 36, 130.

<sup>77</sup> I Dennis, 'Codification and Reform of Evidence Law in Australia' [1996] *Criminal Law Review* 477.

<sup>78</sup> *Ibid* 485.

<sup>79</sup> *Ibid* citing *Schama & Abramovitch* (1914) 84 LJKB 396; *Raviraj* (1986) 85 Cr App R 93.

<sup>80</sup> *Ibid*.

<sup>81</sup> Bagaric, above n 55, 366.

<sup>82</sup> *Ibid*.

in particular by determining that the accused's in-court silence may be used against him where the failure to give evidence is 'clearly capable'<sup>83</sup> of assisting the jury in its task of evaluation. Moreover, according to Bagaric the 'respect accorded to the right was more fanciful than real'.<sup>84</sup>

As stated above, the *Weissensteiner* principle only applies to silence at trial. The right to pre-trial silence remains unaffected.

#### *Expanding the Weissensteiner principle*

The *Weissensteiner* principle was initially thought to be clearly applicable, and limited, to prosecutions based on circumstantial evidence.<sup>85</sup> However, that limit has since been cast into doubt.

In *R v Van Wyk*<sup>86</sup> the Queensland Court of Appeal held, in a unanimous decision, that comments on the silence of an accused at trial are just as appropriate in direct evidence cases provided 'the silence is logically probative in evaluating the evidence'.<sup>87</sup> However, the contrary view prevailed in *R v Kanaveilomani*<sup>88</sup> where the same Court, albeit differently constituted, found many reasons<sup>89</sup> not to allow comments on how the accused's silence at trial could be used to evaluate other evidence.<sup>90</sup> In *Kanaveilomani* Macrossan CJ said that a *Weissensteiner* direction should be given only where inferences from circumstantial evidence have to be considered and where relevant facts can be regarded as peculiarly within the accused's knowledge. Since *Kanaveilomani* the Queensland Court of Appeal has had the opportunity to consider the issue again and the majority has taken the view that the *Van Wyk* approach is correct.<sup>91</sup>

#### THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE DISTINCTION BETWEEN DOCUMENTARY AND ORAL TESTIMONY

The claim of privilege against self-incrimination is now being raised in civil cases. This leads to a related issue: what of documentary evidence and the privilege against self-incrimination? It is generally accepted that the common law privilege against self-incrimination applies to both documentary and oral testimony. There is

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<sup>83</sup> Ibid 370.

<sup>84</sup> Ibid 366.

<sup>85</sup> O'Gorman, above n 75, citing *Kanaveilomani* (1994) 72 A Crim R 492, 500 and 501, per Davies JA.

<sup>86</sup> Unreported, Queensland Court of Appeal, 16 December 1993.

<sup>87</sup> Henchiffe, above n 12, 149.

<sup>88</sup> (1994) 72 A Crim R 492, 497-8 per Macrossan CJ.

<sup>89</sup> These included fears that it might force the accused to give evidence, that it might divert the jury from appropriately scrutinising the evidence, and that it might induce the jury to overlook the burden of proof lying upon the prosecution.

<sup>90</sup> The appellant had been convicted of rape and indecent assault, and did not give evidence at the trial. Both parties had been drinking heavily and there were no other witnesses.

<sup>91</sup> *R v Demeter* (1995) 77 A Crim R 462.

no general legislative adoption of the privilege for documentary evidence. Most States have adopted the privilege by statute with respect to oral testimony.<sup>92</sup>

In *Environment Protection Authority v Caltex Refining Co Pty Ltd*<sup>93</sup> the respondent corporation sought to rely on the privilege against self-incrimination, in order to avoid being compelled to produce certain records, for which the appellant authority had issued a statutory notice. A majority of the High Court held that the corporation was not entitled to rely on the privilege. Mason CJ and Toohey J quoted with approval Wigmore's statement that economic crimes (unlike common law crimes) are usually not even discoverable without access to business records. 'In the case of corporations, their books and documents constitute the best evidence of their business transactions and activities.'<sup>94</sup> They pointed to the inconsistency in making the privilege available to corporations 'when officers of the corporation are bound to testify against the corporation unless they are able to claim the privilege personally'.<sup>95</sup> Extending the privilege to corporations would greatly restrict the documentary evidence available to the court,<sup>96</sup> and effectively make a corporation's liability to criminal sanction unenforceable in many cases.<sup>97</sup>

After considering the background to, and purpose of the privilege, Mason CJ and Toohey J concluded that it was:

in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them. In respect of natural persons, a fair state-individual balance requires such protection; however, in respect of corporations, the privilege is not required to maintain an appropriate state-individual balance. Nor is the privilege so fundamental that the denial of its availability to corporations in relation to the production of documents would undermine the foundations of our accusatorial system of criminal justice.<sup>98</sup>

Some States have embodied the *Caltex* principle in legislation.<sup>99</sup> Queensland retains the privilege with respect to criminal proceedings but abolishes certain privileges with respect to being compelled to answer any question or produce any document in civil proceedings.<sup>100</sup>

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<sup>92</sup> For example, the *Evidence Act 1977* (Qld), s 10; the *Evidence Act 1958* (Vic), ss 29–30; the *Evidence Act 1971* (ACT), s 57; the *Evidence Act 1906* (WA), ss 11–13; the *Evidence Act 1910* (Tas), ss 87–9. The *Evidence Act 1995* (NSW), s 128 extends the privilege to 'evidence'.

<sup>93</sup> (1993) 118 ALR 392.

<sup>94</sup> Ibid per Mason CJ and Toohey J, 409.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid per Brennan, 418.

<sup>98</sup> Ibid per Mason CJ and Toohey J, 411–412.

<sup>99</sup> For example, *Evidence Act 1995* (NSW), s 187; *Evidence Act 1995* (Cth), s 187; *Corporations Law*, s 1316A.

<sup>100</sup> *Evidence Act 1977* (Qld), s 14.

## THE EVIDENCE ACTS, THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE RIGHT TO SILENCE

Australia now has an evidence 'template' provided by the *Evidence Act 1995* (Cth) and reproduced in the comparable New South Wales statute. With respect to the right to silence, and the privilege against self-incrimination these laws mainly reproduce the common law position. However unlike the common law there is scope for overriding even a valid claim of privilege where it is claimed by a witness. Under s 128(5) the court may require a witness to give evidence in circumstances where the answer is potentially incriminating. However, by giving the witness a certificate (s 128(6)) and ensuring that the evidence may not be used in other proceeding against the witness (s 128(7)), the privilege against self-incrimination is complied with.<sup>101</sup>

*Pre-Trial Silence*

In Dennis's view the uniform evidence law 'largely restates'<sup>102</sup> the common law formulation of the right to pre-trial silence. In s 89, the law deals with silence at the pre-trial investigation stage. This 'preserves' the common law rule.<sup>103</sup> Under s 89, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused (a) to answer one or more questions; or (b) to respond to a representation where those questions or representations were put or made to the party or other person in the course of official questioning.<sup>104</sup> Secondly, the section provides that evidence of that kind is not admissible if the only use for that evidence is to draw such an inference.<sup>105</sup> Finally, s 89 does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is in fact in issue in the proceeding.<sup>106</sup> In the section, 'inference' includes (a) an inference of consciousness of guilt; or (b) an inference relevant to a party's credibility.<sup>107</sup>

Odgers has observed that s 89 is limited to the silence of a person (who becomes a criminal defendant) in response to official questioning. As such, silence in other circumstances may be treated as an admission under s 81 of the new law. For Odgers, because committal proceedings may not fall within the definition of 'official questioning', the present common law protections in this area 'have arguably been circumscribed, almost certainly unintentionally'.<sup>108</sup> This is because the statutory formulation 'substantially reflects the existing common law position'<sup>109</sup> but at common law it had been held that the right to remain silent applied to the

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<sup>101</sup> Palmer, above n 1, 311.

<sup>102</sup> Dennis, above n 77, 484.

<sup>103</sup> Palmer, above n 1, 161.

<sup>104</sup> *Evidence Act 1995* (Cth), s 89(1).

<sup>105</sup> *Evidence Act 1995* (Cth), s 89(2).

<sup>106</sup> *Evidence Act 1995* (Cth), s 89(3).

<sup>107</sup> *Evidence Act 1995* (Cth), s 89(4).

<sup>108</sup> S Odgers, *Uniform Evidence Law* (1995) 145.

<sup>109</sup> *Ibid* citing *Petty v R* (1991) 173 CLR 95.

conduct of a committal proceeding, and that silence maintained in such proceedings provided no basis for any inference against an accused.<sup>110</sup> Odgers suggests that the present common law protection might arguably continue to operate ‘since the drawing of inferences is not a question of admissibility’.<sup>111</sup>

#### *At-Trial Silence*

The statute deals with silence at trial in s 20. This section provides for comment by a judge or co-accused on the failure of a defendant, or the defendant’s spouse, de facto spouse, child or parent, to testify. However the judicial comment must not attribute that failure to provide evidence, to guilt or belief in guilt.<sup>112</sup> The prosecution may not comment at all. These confines upon judicial comment are consistent with the majority approach in *Weissensteiner* to the law: failure to give evidence is not ‘an admission of guilt by conduct’.<sup>113</sup>

The majority of the High Court in that case drew a clear distinction:

between drawing an inference of guilt merely from silence and drawing an inference otherwise available more safely simply because the accused has not supported any hypothesis which is consistent with innocence from facts which the jury perceives to be within his or her knowledge.<sup>114</sup>

As in *Weissensteiner*, the *Evidence Act* requires that three pre-conditions be met before the accused’s silence at-trial be commented upon. The prosecution case must attain a threshold of sufficiency; the accused must be in possession of some aspect of knowledge of the charge peculiar to him/her; and it must be reasonable that the accused would provide his/her version of events if innocent. The statute, by institutionalising the majority approach in *Weissensteiner*, has said that an accused’s silence at trial may have some limited significance, in that it may be used to evaluate other evidence.<sup>115</sup> There is a fundamental requirement that the prosecution case must have passed a threshold proof level. This may seem somewhat superfluous since these are the cases that proceed past committal to trial only because they have passed a ‘likely’ proof threshold.

Dennis has raised a particular problem with the operation of s 20. We may accept that the *Weissensteiner* principle is not inconsistent with the presumption of innocence, but equally it allows that silence may weaken a defence. Since the common law does permit inferences where the accused raises a defence peculiarly within their knowledge, that they subsequently fail to support from the witness box and they fail to submit to cross-examination, then a distinction has in fact emerged

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<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> S 20(2); see discussion in P Blazey-Ayoub, P Conomos, J Doris, *Concise Evidence Law* (1996) 20.

<sup>113</sup> (1993) 178 CLR 217 at 229.

<sup>114</sup> (1993) 178 CLR 217 at 229, per Mason C J, Deane and Dawson JJ.

<sup>115</sup> Henchiffe, above n 12, 142.

in Australian law. It is between uses of silence at trial: it can be used to weaken a defence but not as evidence of guilt or consciousness of guilt. This is notwithstanding the fact that the High Court rejected such a distinction in *Petty & Maiden*.<sup>116</sup> Dennis maintains that s 20 implicitly recognises, in permitting some comment on silence, that the procedural context to the trial is different from the pre-trial investigation stage. However, the section ‘tries to create a halfway house between refusing silence any evidential effect and allowing it to give rise to a direct inference of guilt’.<sup>117</sup>

#### *Clarification Provided in OGD?*

In *OGD*<sup>118</sup> the appellant had been convicted on 10 charges of homosexual intercourse with a male under 18 years of age, and one charge of sexual intercourse without consent. The complainant on all charges was the appellant’s nephew. Consent was a defence only in relation to the sexual intercourse without consent charge, which was the last in time and followed a history of apparently consensual sexual activity between the appellant and the complainant. The trial judge gave a *Jones v Dunkel*<sup>119</sup> direction to the jury. *Jones v Dunkel* was a civil action for negligence. One of the defendants/respondents, the allegedly negligent driver, did not give evidence. The jury found for the defendants. The plaintiff’s appeal to the High Court succeeded. At trial, the judge had told the jury that responsibility for the defendant’s not giving evidence lay with his counsel. Windeyer J considered that the way the judge emphasised this point could lead the jury to think that:

silence somehow lost significance because it was on his counsel’s advice that he was silent. It did not. The true inference in the circumstances was that counsel, ... thought the defendants were more likely to succeed if he kept [H] out of the box.<sup>120</sup>

Menzies J outlined what he considered to be a proper direction in the circumstances:

[It] should have made three things clear: (i) that the absence of the defendant ... as a witness cannot be used to make up any deficiency of evidence; (ii) that evidence which might have been contradicted by the defendant can be accepted the more readily if the defendant fails to give evidence; (iii) that where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference.<sup>121</sup>

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<sup>116</sup> *Petty & Maiden v R* (1991) 173 CLR 95.

<sup>117</sup> Dennis, above n 77, 485–6.

<sup>118</sup> (1997) 98 A Crim R 151.

<sup>119</sup> (1959) 101 CLR 298.

<sup>120</sup> *Ibid* per Windeyer J, 322.

<sup>121</sup> *Ibid* per Menzies J, 312.

The appellant in *OGD* submitted that this direction contravened s 20 of the *Evidence Act 1995* (NSW) and was both factually wrong and legally inappropriate.

An appeal was allowed on several bases. First, on the basis that the failure of an accused person to give evidence cannot be treated as an admission, by conduct, of guilt. If it were otherwise, the legal right to silence would be negated. If anything at all is to be said about a failure to give evidence, this first principle should be explained to the jury. In so deciding the Court applied *Weissensteiner*. Secondly, again applying *Weissensteiner*, the Court considered it commonly appropriate to instruct a jury that a failure to contradict or explain incriminating evidence, in circumstances where it would be reasonable to expect it to be in the power of an accused to do so, may make it easier to accept, or draw inferences from evidence relied on by the Crown. Thirdly, the Court considered that it is ordinarily necessary to warn a jury that there may be reasons, unknown to them, why an accused person, even if otherwise in a position to contradict or explain evidence, remains silent. Fourthly, the present case was considered a good example of circumstances that demonstrate a need for caution in directions on silence. It was possible that the appellant had an answer to the charge that would have involved him in making admissions in relation to the other charges. The explanation for the failure of the appellant to give evidence might have been that he was faced with a dilemma to which he responded by saying nothing. The direction invited the jury to consider the appellant's failure to give evidence globally. In many cases, of which the present was an instance, such an approach is considered both dangerous and unfair. In so determining, the Court discussed *Jones v Dunkel*<sup>122</sup> and *Buckland*.<sup>123</sup> Finally, the Court said that it will often be prudent for a trial judge, before giving directions which include a *Jones v Dunkel* direction to raise with counsel, in the absence of the jury, the question whether such a direction should be given. That would give counsel an opportunity to suggest to the judge possible reasons for the accused's silence, (or the failure to call a witness) which may not have occurred to the judge, and to debate the fairness of the direction. The trial judge had directed the jury concerning the significance of the failure of the appellant to give evidence in terms of their entitlement to take into account the fact that the accused elected not to deny or contradict evidence about matters that were within his personal knowledge, and of which he could have given direct evidence from his personal knowledge.<sup>124</sup> Gleeson CJ reiterated that the failure of a person to give evidence 'cannot be treated as an admission, by conduct, of guilt'.<sup>125</sup>

#### *Jones v Dunkel: Confined to Civil Trials?*

*Jones v Dunkel* involved a civil action. Gleeson CJ observed in *OGD* that the reasoning in the judgments actually referred to both civil and criminal cases. However, 'strong warnings have been given of the risks involved in applying *Jones*

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<sup>122</sup> (1959) 101 CLR 298.

<sup>123</sup> [1977] 2 NSWLR 452.

<sup>124</sup> Cited in (1997) 98 A Crim R 151, 156.

<sup>125</sup> (1997) 98 A Crim R 151, 157 per Gleeson CJ.

*v Dunkel* in criminal trials'.<sup>126</sup> Sperling J took up this issue with the observation that for the purposes of directing a jury as to how to go about its task, the principle that the absent witness cannot be used to fill in gaps in the Crown's case 'does not arise'.<sup>127</sup> Sperling J went on to point out that the case had gone to the jury which presupposes that there was evidence on which the jury would be entitled to find the accused guilty. The jury is 'directed on that basis'.<sup>128</sup> What actually arises here is 'an example of the limitations which the law imposes on ordinary processes of reasoning'.<sup>129</sup> So, where evidence is led which is capable of establishing guilt and, where the accused can reasonably be supposed to know the true facts, and where there is no apparent explanation for not answering the evidence that has been led, it would not be unreasonable – 'as an exercise in ordinary processes of reasoning'<sup>130</sup> – to find guilt simply because of the accused's silence.

However this would be inconsistent with the legal principle concerning onus of proof, and with 'more emphatic expressions of that principle to be found in the criminal law',<sup>131</sup> such as, the accused is innocent until proven guilty, and, that the accused has a right to silence. It follows that 'ordinary reasoning yields to legal principle in this instance'.<sup>132</sup> The central point is that:

The jury must not pass over an evaluation of the evidence called in the proceedings and find the accused guilty merely on the basis of the accused's election not to give evidence, no matter how eloquent the accused's silence may be.<sup>133</sup>

In other words, the accused's election not to give evidence must not be seen as an admission of guilt. But Sperling J thought that, whereas to a lawyer this means an accused's silence is not to be used as independent evidence of guilt 'such a formulation would [not] be intelligible to a jury'.<sup>134</sup>

Sperling J referred to what he termed 'an uneasy compromise' between the principle that the Crown alone bears the onus of proof, the accused having a right to remain silent, and commonsense reasoning which may dictate that an accused's refusal to contradict or deny evidence indicates guilt:

I think it would be best if trial judges were to take juries into their confidence by saying that this is indeed a compromise, between what and why. Juries would then know that the trial judge is talking about a limitation which the law places on ordinary processes of reasoning. There would be the opportunity for explaining the policy behind the limitation and the need for such a compromise. In this way, juries

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<sup>126</sup> Ibid 159.

<sup>127</sup> Ibid 161.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid citing the majority in *Weissensteiner* at 223-224, 254-255.

<sup>134</sup> Ibid 162.

could be encouraged to have confidence in the fairness of the compromise rather than resist it, which would be the natural reaction.<sup>135</sup>

*The Change From the Common Law: Overriding the Privilege Against Self-Incrimination*

It was noted earlier that at common law there is no principle enabling the courts to override a valid claim of privilege. The court 'must simply do without the evidence'.<sup>136</sup> However the uniform evidence legislation takes a different path. A witness can voluntarily exchange the protection that the privilege provides, for the protection of a 'use-immunity' certificate.<sup>137</sup> If the court considers that the 'interests of justice require the witness to give the evidence,' the issue of a use-immunity certificate allows the court to substitute one form of protection available to the witness for another.<sup>138</sup> By this route, a court can order a witness to answer incriminating questions.<sup>139</sup> The Commonwealth Act also allows a certificate granted under a prescribed State or Territory law<sup>140</sup> to have the same effect as one granted under s 128 of the Commonwealth Act.<sup>141</sup> Similar provisions are found in Western Australia and Tasmania.<sup>142</sup>

A difficulty with the uniform evidence legislation is that it offers no guidance as to the criteria to be considered by the court when deciding whether the interests of justice require that the witness give the evidence. Palmer posits that this will presumably:

turn on the importance of the evidence, whether it is possible to obtain the evidence other than from the witness, the likelihood of proceedings being instituted against the witness, and the seriousness of the offence in respect of which the witness will be forced to incriminate him or herself.<sup>143</sup>

Once a certificate is granted, the evidence given by the person for which the certificate was granted and evidence of any information, document or thing obtained as a direct or indirect consequence of the person's having given evidence, cannot be used against the person in proceedings under Australian law.<sup>144</sup> So what the certificate confers has been characterised as both 'direct-use' and 'derivative-

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<sup>135</sup>

Ibid.

<sup>136</sup>

Palmer, above n 1, 311.

<sup>137</sup>

Ibid citing *Evidence Act 1995* (NSW), s 128(2).

<sup>138</sup>

Ibid citing *Evidence Act 1995* (NSW), s 128(5), but noting that this section does not apply if the offence or civil penalty arises under the law of a foreign country.

<sup>139</sup>

Ibid.

<sup>140</sup>

For example s 128 of the New South Wales Act.

<sup>141</sup>

*Evidence Act 1995* (Cth), s 128(10).

<sup>142</sup>

Palmer above n 1, 311, citing *Evidence Act 1906* (WA), s 13; *Evidence Act 1910* (Tas), s 87.

<sup>143</sup>

Ibid

<sup>144</sup>

*Evidence Act 1995* (Cth) s 128(7).

use' immunity<sup>145</sup> and the latter should render inadmissible any evidence discovered as a result of the witness's testimony.<sup>146</sup>

*The Evidence Act 1995 (NSW), Adverse Inferences & the Accused's Silence*

Section 89(1)(a) of the *Evidence Act 1995* (NSW) prevents adverse inferences being drawn against accused persons by reason of their failure or refusal to answer one or more questions put or made to them 'in the course of official questioning'. This section provides a 'parallel'<sup>147</sup> to High Court dicta in *Petty & Maiden*<sup>148</sup> in which the existence of the accused's right to remain silent was affirmed as a 'fundamental rule of the common law'.<sup>149</sup> The *Evidence Act 1995* (NSW) provides that in a criminal proceeding, an unfavourable inference is not to be drawn from the fact that a person failed to answer questions or failed to respond to a representation put or made in the course of official questioning. There has already been debate about this. The New South Wales Law Reform Commission in Discussion Paper No 1 on the right to remain silent looked at the right to silence when questioned by police, the pre-trial disclosure obligations of prosecution and defence and the right to silence at trial. The paper reaches 'no firm conclusions'.<sup>150</sup> The Commission found that the right to silence is only exercised in about seven per cent of cases tried on indictment.<sup>151</sup> Figures as to silence during police interrogation are considered 'more rubbery' but figures for England and Northern Ireland are accepted as suggesting that in fact the right is exercised in less than half the interrogations.<sup>152</sup>

OTHER STATUTORY PROVISIONS THROUGHOUT AUSTRALIA

The right to silence aspect to the law of evidence varies across Australia. It has been noted that the *Evidence Acts* (Cth, NSW) permit judicial comment on in-court silence. In Victoria and the Northern Territory neither prosecutor nor judge may comment on an exercise of the right to silence at trial. There have been moves in Victoria to change the situation there and permit judicial comment along the lines of the uniform evidence legislation. Such a move was recommended by the Victorian Scrutiny of Acts and Regulations Committee Report, Review of the *Evidence Act 1958* (Vic).<sup>153</sup> What will be at issue once comment is permitted is, of course, the precise form that the comment may take.

<sup>145</sup> Palmer above n 1, 311.

<sup>146</sup> Ibid.

<sup>147</sup> J White, 'Silence is Golden? The Significance of Selective Answers to Police Questioning in New South Wales' (1998) 72 *ALJ* 539, 539.

<sup>148</sup> (1991) 173 CLR 95.

<sup>149</sup> Ibid per Mason CJ and 99 per Deane, Toohey and McHugh, JJ.

<sup>150</sup> 'Current Issues' (1998) 72 *ALJ* 580, 580.

<sup>151</sup> Ibid 582.

<sup>152</sup> Ibid.

<sup>153</sup> 1996, Melbourne Government Printer.

*The Connection with Disclosure*

Throughout Australia there are laws that compel disclosure in the proceedings at hand. The 1997 Criminal Code amendments in Queensland establish a scheme that relates to specified offences. Section 644A removes the privilege against self-incrimination for witnesses in relation to bribery and judicial and official corruption offences. However any incriminating statement is not admissible in evidence against the witness other than in those proceedings, or in a proceeding for perjury in relation to that statement. Section 92 of the *Police Powers & Responsibilities Act 1998* (Qld) confirms the general common law right to silence of an accused in Queensland.

CASES WHERE COURTS HAVE DRAWN INFERENCES: AN OVERVIEW OF THE PRINCIPLES

There is considerable evidence of a judicial willingness, in both England and Australia, to accept that the failure of the appellants to give evidence makes it 'safer to draw inferences adverse to them'.<sup>154</sup> The full court of the Tasmanian Supreme Court in *Kelly v O'Sullivan*<sup>155</sup> had to consider the appropriate test for review of a summary conviction by a Magistrate and the effect of the accused's failure to give evidence at trial. The Magistrate had considered the fact that the accused did not give evidence: 'That of course is not evidence but I can more confidently draw inferences from the evidence [than] I otherwise could if the prosecution evidence was contradicted'.<sup>156</sup> The full court found that the magistrate had not erred in deciding that inferences about the truth of the prosecution's evidence could more confidently be drawn in such circumstances, than if that evidence had been contradicted by the accused. Slicer J distinguished between a judge commenting on an accused's exercising the common law and statutory right to refuse to give evidence, and commenting on a failure to provide an account of some material fact or event which was within the accused's personal knowledge:

In such a case it is permissible to advise a jury that they might use the absence of such an account as part of their inferential process of assessing guilt or innocence from the failure of the accused to give evidence of relevant facts which could be perceived to be within his or her knowledge.<sup>157</sup>

This approach was considered by Slicer J to be consistent with that taken by the English Court of Appeal in *Martinez-Tobon*<sup>158</sup> although a 'more stringent' approach<sup>159</sup> was taken in the Canadian decision in *François*.<sup>160</sup>

<sup>154</sup> *Cornelius* (1988) 34 A Crim R 49 Other Australian cases include *Karounos* (1995) 77 A Crim R 473; English cases include *Murray v DPP* [1993] 97 Cr App R 151 and *R v Cowan* [1995] 4 All ER 939.

<sup>155</sup> (1995) 80 A Crim R 5.

<sup>156</sup> *Ibid* at 18. In Tasmania the right to remain silent during the course of a criminal trial is recognised by the *Evidence Act 1910* (Tas), s 85(4).

<sup>157</sup> (1995) 80 A Crim R 5, 18.

<sup>158</sup> (1994) 98 Cr App R 375.

The Queensland Court of Appeal in *R v Coyne*<sup>161</sup> took the view that, while evidence of an accused person's refusal to answer questions put to him or her by a police officer is admissible, a judge should direct the jury that no adverse inference may be drawn against an accused because of his or her refusal to answer questions. More recently, the same court confronted the meaning of 'silence' in the context of a claim that the accused failed to volunteer his defence to the police at the scene of a crime. In *R v Vannatter*<sup>162</sup> the Appeal Court had to decide whether the trial judge's summing up allowed adverse inferences to be drawn about the accused's silence prior to trial. The accused had failed to volunteer his version of events to police, shortly after he was caught. The accused had been caught by a security guard at night emerging from a locked, men's changeroom where a window had been smashed. The security guard alleged that the accused admitted to him when questioned, that he had smashed a window. The accused later claimed to have said someone else had smashed the window. Shortly afterwards, in front of a policeman, he did not contradict the security guard's version of events and said nothing. At trial, the prosecution's cross-examination suggested that previous silence about a defence raised at the trial allowed an inference that the defence was a new invention or was suspect. Defence counsel should have objected to the line of questioning, but did not. The failure of the trial judge to direct the jury that no adverse inference should be drawn from that evidence was one of the grounds of appeal. The Court of Appeal found that the jury may have formed the idea, from the passages of cross-examination, that the accused's failure to volunteer his defence to the police officer at the scene allowed for an inference of guilt. And while the trial judge had not directed that any such adverse inference could be drawn, the idea was reinforced by his Honour's summing up in relation to what was said to the police officer 'in the presence of the accused and the accused did not then say anything about it or demur to it'.<sup>163</sup>

Pincus JA appeared to interpret Queensland law as similar to English, in that the accused is entitled to *Weissensteiner* protection, provided he does not advance at trial, a story conflicting with one he has previously told.<sup>164</sup> It was also observed by Pincus JA that the effect of *Weissensteiner* and *Petty* is to leave the right to silence at trial 'less vigorously protected' than its exercise before trial.<sup>165</sup> Pincus JA refers to a necessary limitation on normal reasoning in order to protect the right to silence, similar to the 'uneasy compromise' of Sperling J.<sup>166</sup>

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<sup>159</sup> (1995) 80 A Crim R 5, 20.

<sup>160</sup> (1994) 91 CCC (3 d) 289.

<sup>161</sup> [1996] 1 Qd R 512.

<sup>162</sup> [1999] QCA 104.

<sup>163</sup> *Ibid* per de Jersey CJ and Davies J, 13; Pincus JA, 3.

<sup>164</sup> *Ibid* per Pincus JA, 6.

<sup>165</sup> *Ibid* per Pincus JA, 7.

<sup>166</sup> See above n 124.

The line of reasoning which commonsense might have suggested to the jury, that if the appellant's story was true, he would have mentioned it to the police, would have been reinforced by the judge's direction.<sup>167</sup>

*A distinction between comprehensive refusal & selective refusal?*

In some circumstances an accused will not comprehensively refuse to answer questions but will make some responses to police questioning. In *R v Vannatter*<sup>168</sup> Pincus JA said that in this situation the accused is still entitled to the advantage of the principle in *Petty & Maiden*, so long as he or she does not advance a story at trial conflicting with one previously told.<sup>169</sup>

This may not be the position in NSW where it has been said that where the accused fails to exercise the right to silence and responds to police questioning, responses may be used against him or her at trial.<sup>170</sup> Additionally, in cases where an accused responds selectively to police questions (answering some and not others) the selective silence of the accused may be used as the basis for consciousness of guilt.<sup>171</sup> White cites a number of recent cases that indicate that 'although the common law formally provides the same protection to selective answers as it does to comprehensive refusal to answer questions, such protection is illusory'.<sup>172</sup>

According to White:

a line of authority has developed which, while purporting to prohibit adverse inferences from being drawn against the accused who selectively answers questions, provides the very conditions by which such inferences may be drawn by a jury.<sup>173</sup>

While the courts pay lip-service to the idea that evidence of selectivity cannot be equated with consciousness of guilt, 'if consciousness of guilt can be traced to the selectivity in the manner in which questions are answered, it follows that the jury should consider which questions were answered, and which questions were not'.<sup>174</sup>

The effect of the *Evidence Act* on selective silence is difficult to judge. White points out that recent decisions in New South Wales lack consistency, but indicates more recently authority suggests that the accused's selectivity may be an inference upon which the Crown may be entitled to rely.<sup>175</sup> However, Palmer has observed that this is an aspect of the common law that was arguably overturned by s 89(1)(a) of the uniform evidence legislation. This section stipulates that no adverse inference may

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<sup>167</sup> Ibid per Pincus JA, 7.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid per Pincus JA at 5, citing *Glennon* (1994) 179 CLR 1.

<sup>170</sup> Palmer, above n 1, 162.

<sup>171</sup> Ibid.

<sup>172</sup> White, above n 147, 539.

<sup>173</sup> Ibid 539-540.

<sup>174</sup> Ibid 540, citing in particular the High Court in *Woon v R* (1964) 109 CLR 529.

<sup>175</sup> Ibid 541, citing *R v Astill* (Court of Criminal Appeal, unreported, 17 July 1992); *R v Lawson* (unreported, Court of Criminal Appeal, March 1993); *R v Towers* (unreported, Court of Criminal Appeal, 2 Aug 1993).

be drawn from the fact that the accused refused or failed to ‘answer one or more questions’.<sup>176</sup>

WE HAVE WAYS TO MAKE YOU TALK: LINKS WITH TECHNOLOGY AND STING OPERATIONS

A related issue is the effect on the right to silence of evidence from electronic surveillance and informers and police ‘sting’ operations. There have been claims that use of such methods by police has subverted the right. In England, the courts have tended to downplay the accused’s exercise of the right to remain silent, and concentrate on the interaction between the regime laid down by the *Police and Criminal Evidence Act 1984* (UK) and the actions of police.

The police tend to view the ‘sting’ operation as an effective way of catching criminals. In *Pfennig*,<sup>177</sup> the accused had refused to answer when questioned by police. They arranged for a prisoner to befriend him in order to get his admission to the offence. Cox J, in the South Australian Supreme Court,<sup>178</sup> found on a voir dire that the police tactic of insinuating an informer to get the accused to make disclosures, where he had previously exercised his right to remain silent, was improper. Any admissions obtained by the police ‘agent’ in this way, breached his exercise of the right to silence and was not admissible. However, admissions made to other prisoners, were not involuntary, in the absence of violence or hostility directed towards him in order to elicit admissions. The decision and subsequent appeals, as far as the High Court, in fact turned on the reception of propensity or similar fact evidence.

In *R v Davidson & Moyle*<sup>179</sup> the accused were taped making admissions to a friend, of their involvement in murder. Previously, they had lied when questioned by police, but subsequently made further admissions to police when the tapes were played to them. None of the appeal judges found the police conduct in this case improper. As the defendants had not relied on the right to silence (in contrast to *Pfennig*), admitting the evidence was not unfair or against the public interest. Davidson advanced an argument that he had been tricked into surrendering his ‘right to lie’ (which ‘right’ he had been exercising when first questioned by police). Pincus JA dismissed this, saying that:

The nature of these submissions was dictated by the circumstance that at no stage did Davidson choose to rely on a right of silence; given an appropriate warning, he discussed the murder freely with the police although – as now appears – what he said was untruthful. As far as I am aware there is no authority that the law positively protects a suspect’s right to lie.<sup>180</sup>

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<sup>176</sup> Palmer, above n 1, 163.

<sup>177</sup> *Pfennig v R* (1995) 182 CLR 461.

<sup>178</sup> (1992) 57 SASR 507.

<sup>179</sup> (1996) 2 Qd R 505.

<sup>180</sup> *Ibid* 512.

In *O'Neill*,<sup>181</sup> the Queensland Court of Criminal Appeal had to deal with a situation where police procured a friend of the accused to engage in conversation so as to obtain and record inculpatory admissions. The appeal was dismissed. No member of the court appeared to consider it necessarily improper to use deception in law enforcement activities to detect, investigate or prevent crime. It follows that evidence obtained in the course of, or through, such activities, will not necessarily be excluded. However, for Fitzgerald P the conduct infringed the accused's privilege against self-incrimination, since she had been deliberately tricked into surrendering her right to silence. In his view, the implicit misrepresentation that the informer sought her confidence as a friend and not as a police agent, made it highly unfair to the appellant to receive evidence of her recorded statements. Fitzgerald P would have allowed the appeal and found that the trial judge erred in allowing the evidence. Pincus JA and Dowsett J viewed the true purpose of the police caution as to ensure voluntariness and prevent unfairness. In such a case, where the accused was admitting guilt to a friend, the warning was unnecessary. Bronitt<sup>182</sup> claims that *O'Neill* would have failed if the key evidence obtained through the participant surveillance had been excluded.

The High Court recently considered secretly-taped confessional evidence in *Swaffield*.<sup>183</sup> The accused was taped by an undercover police officer working on a drugs investigation, who elicited admissions about an unrelated offence of arson, with which the accused had been charged two years earlier. At the earlier time he had refused to answer questions and had been discharged at committal, the police not having tendered any evidence. The High Court agreed with the Queensland Court of Appeal's conclusion that the trial judge 'was clearly wrong in failing to give sufficient weight to the protection of the appellant's right to silence, and as a result of that error his discretion miscarried'.<sup>184</sup>

That is, the accused was entitled to be cautioned by any police officer before being questioned about that offence. Brennan CJ continued:

... But it would be a mistake to assume that there is some general "right to silence" wider than or different from the privilege that any person enjoys not to answer questions asked of him about an alleged offence by persons in authority, his entitlement to be treated in a lawful and proper manner by persons in authority engaged in investigating an offence and the immunity from the drawing of adverse inferences from his refusal to answer questions about the offence asked by persons in authority. ... [The] Constable went outside the investigation .... [and] deliberately sought admissions relating to the arson which Swaffield had previously refused to make to the police, as he was entitled to do.

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<sup>181</sup> (1995) 81 A Crim R 458.

<sup>182</sup> See S Bronnitt, 'Contemporary Comment - Electronic Surveillance and Informers: Infringing the Rights to Silence and Privacy' (1996) 20 *Criminal Law Journal* 144 and S Bronnitt, 'Electronic Surveillance, Human Rights and Criminal Justice' (1997) 3 *Australian Journal of Human Rights* 183.

<sup>183</sup> (1998) 192 CLR 159.

<sup>184</sup> *Ibid* per Brennan CJ, 185.

There is a public interest in ensuring that the police do not adopt tactics that are designed simply to avoid the limitations on their inquisitorial functions that the courts regard as appropriate in a free society.<sup>185</sup>

And per Toohey, Gaudron & Gummow, speaking of the discretion to exclude evidence when it would be unfair to the accused to allow it:

In the light of recent decisions of this Court, it is no great step to recognise ... an approach which looks to the accused's freedom to choose to speak to the police and the extent to which that freedom has been impugned. Where the freedom has been impugned the court has a discretion to reject the evidence. In deciding whether to exercise that discretion, which is a discretion to exclude not to admit, the court will look at all the circumstances. Those circumstances may point to unfairness to the accused if the confession is admitted. There may be no unfairness involved but the court may consider that, having regard to the means by which the confession was elicited, the evidence has been obtained at a price which is unacceptable having regard to prevailing community standards.<sup>186</sup>

This applied under common law and under s 90 of the uniform evidence legislation (where 'unfairness' is not defined, but reflects the policy discretion behind the common law).

*O'Neill* and *Swaffield* have been reconciled in *R v Wackerow*,<sup>187</sup> where the Queensland Court of Appeal allowed for the admissibility of a taped conversation between a child complainant and her alleged abuser, her de facto father. The Court decided that the 'peculiar features' present in *Swaffield*, concerning police deception which transgressed the accused's previously asserted right to silence, were absent here, and *O'Neill* and *Davidson & Moyle* applied.

Some commentators also view the increasing use of DNA saliva swabs, such as the recent mass DNA testing in Wee Waa in northwestern New South Wales, as invasive and in conflict with the privilege against self-incrimination.<sup>188</sup> This is particularly the case where a failure to submit to a test allows an inference of guilt to be drawn. It has also been suggested that the use of DNA evidence to establish paternity of a child in proceedings under Australia's *Family Law Act 1975* similarly offends against this fundamental privilege.<sup>189</sup> Again, the drawing of adverse inferences consequent upon silence is the issue, a point illustrated by *G v H*<sup>190</sup> where there was a reference to facts within the accused's own knowledge where the father refused to submit to paternity testing. For Brennan and McHugh JJ the issue could be resolved by noting the absence of conclusive evidence which G could have

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<sup>185</sup>

Ibid.

<sup>186</sup>

Ibid 202.

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(1998) 1 Qd R 197.

<sup>188</sup>

C Puplick, 'Trial by acid test' *The Australian*, 9 September 1999.

<sup>189</sup>

See B A Hocking, H McCallum, A Smith and C Butler, 'DNA, Human Rights and the Criminal Justice System' (1997) 3 *AJHR* 208.

<sup>190</sup>

(1994) 181 CLR 387.

provided. This allowed the inference of his paternity to be drawn with more confidence.<sup>191</sup>

A further technological advancement not yet considered by the High Court, is the status of the polygraph test. While the results of polygraph examinations were held inadmissible in New South Wales in *Raymond George Murray*,<sup>192</sup> the issue remains as to whether the failure to submit to such a test, in both the criminal and civil fields, offends the privilege if inferences may be drawn. As some commentators have argued,<sup>193</sup> difficulties arise when the victim of criminal activity feels that it is they who are silenced in many of these circumstances. It might be recalled that, whereas once there were civil liberties arguments about breathalyser evidence, it is now accepted that this and other ‘physical’ evidence do not pose the same threat of incrimination as is possible with methods of police questioning and oral testimony.

#### RECENT CHANGES TO THE PRE-TRIAL DISCLOSURE AREA IN NSW

The NSW Government recently announced a pre-trial disclosure proposal that reflects changes in perceptions and operation of the right to silence.<sup>194</sup> The changes would require both defence and prosecution to disclose their cases and evidence before trial. Such legislative proposals have the potential to modify the right to remain silent, since current limits on pre-trial disclosure enjoyed by defendants (as well as the prosecution) in criminal cases, along with the pre-trial and at-trial rights to silence, make up the ‘the bundle of rights associated with the presumption of innocence, the right to silence and the protection against self-incrimination’.<sup>195</sup> Since the prosecution bears the onus of proving guilt, a defendant does not have to disclose what defences he or she will raise at trial (apart from notifying an alibi defence). This is appropriate, given the inequality of power and resources between the prosecution and most of those accused of criminal offences, particularly where an accused has no legal representation.

<sup>191</sup> Ibid 391.

<sup>192</sup> (1982) 7 A Crim R 48.

<sup>193</sup> See Hocking, *et al*, above n 189, 237.

<sup>194</sup> See *Criminal Procedure (Pre-Trial Disclosure) Bill 2000* (NSW) and draft *Criminal Procedure Amendment (Pre-Trial Disclosure) Regulation 2000* (NSW), both available on the NSW Parliament’s website <<http://www.parliament.nsw.gov.au/prod/web/PHWeb.nsf/Bills?OpenFrameSet>> (visited 6 Dec 2000). For an outline of the legislation, refer to NSW Parliamentary Library’s Background Briefing Paper 12/2000, an executive summary of which is on the Parliamentary Library’s website at <<http://www.parliament.nsw.gov.au/prod/web/PHWebContent.nsf/PHPages/ResearchBf122000?OpenDocument>> (visited 6 Dec 2000). Under the new s 47E(4) a judge may not suggest that an accused’s failure to comply with pre-trial disclosure indicates guilt, however the court may refuse to admit evidence from a party who has not disclosed it according to the disclosure requirements: s 47E(1). Any statement made under pre-trial disclosure does not constitute an admission by the accused: s 47E(6).

<sup>195</sup> NSW Parliamentary Library Briefing Paper 12/2000 Pre-Trial Defence Disclosure: Background to the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000; Chapter 3.

The justification for pre-trial disclosure, in the Law Consumers' Association's view, is that where compulsion is applied, as in the case of the Wood Royal Commission, it can be 'singularly successful'<sup>196</sup> in making those wrongly accused speak up to clear themselves. Such developments are highly relevant in the light of observations in *Adelaide Steamship v Spalvins*<sup>197</sup> to the effect that the privilege originated as an exception to testimonial compulsion at trial, but that its significant application in modern legal practice is found in pre-trial procedure. We have confirmed that in Australia two streams of information are emerging: pre-trial and at-trial. Yet as noted above, Pincus JA in *Vannatter* questioned the logic behind the more vigorous protection provided for the latter and not the former.

#### CONCLUSION

Across the jurisdictions, throughout the law, we are inundated with information and with claims for more information.<sup>198</sup> Legal issues around availability and accuracy of information are the legal issues of the future. This paper has canvassed some of the legal issues pertinent to the increasing obligation to provide information in our law where a right of silence persists. With respect to an accused party, the central problem is whether we can place obligations upon the accused in a system with presumption of innocence as its cornerstone. Citing several cases<sup>199</sup> to support the proposition, Mason CJ, Deane and Dawson JJ observed in *Weissensteiner* that it had never really been doubted that when a party (not confined to a party in the adversarial system) to litigation fails to accept an opportunity to place before the court evidence of facts within their knowledge which, if they exist at all, would explain or contradict the evidence against that party, then the court may more readily accept that evidence.<sup>200</sup> However any silence on the part of the accused is not meant to be used to 'fill any gaps in the prosecution case'.<sup>201</sup>

As to England, the European Court of Human Rights suggested in *Murray* that the law of the United Kingdom was not in essence very different from that in other European countries.<sup>202</sup> In Australia, which inherited so many aspects of English law,<sup>203</sup> the law in this area is also changing but in the right to silence context,

<sup>196</sup> M Burgess, *The Sydney Morning Herald*, 22 January 1999, 12 (letter to the paper as President of the Law Consumers Association).

<sup>197</sup> (1998) 81 FCR 360.

<sup>198</sup> See generally B A Hocking, *Liability for Negligent Words* (1999).

<sup>199</sup> *R v Burdett* (1820) B & Ald 95, 161–2; *R v Kops* (1893) 14 LR (NSW) 150; *Kops v R* [1894] AC 650; *Morgan v Babcock & Wilcox Ltd* (1929) 43 CLR 163; *Tumahole Bereng v R* [1949] AC 253; *May v O'Sullivan* (1955) 92 CLR 654, 658–9; *Bridge v R* (1964) 118 CLR 600, 615.

<sup>200</sup> (1993) 178 CLR 217, 227–8.

<sup>201</sup> Henchiffe, above n 12, 143.

<sup>202</sup> *Murray v United Kingdom* (1996) 22 EHRR 29, 46.

<sup>203</sup> Thus comment by the trial judge on an accused's failure to testify was precluded through the *Crimes Act 1900* (NSW), the *Evidence Act 1939* (NT), the *Evidence Act 1929* (SA), the *Evidence Act 1910* (Tas), the *Crimes Act 1958* (Vic), the *Evidence Act 1906* (WA) but not through the *Evidence Act 1977* (Qld). Following *Weissensteiner* which went to the High Court from the Queensland Court of Appeal the 'extent of the restriction' in the other States was interpreted. See Nash, above n 51, 150.

appears less judgmental. The most recent changes to Australian law are found in the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW), which do permit judicial comment upon the failure of a defendant to provide evidence. These laws are more generous to the defendant in that the comment may not suggest that the failure to give evidence was due to the defendant either being guilty or believing that he or she was guilty of the offence. These laws retain a general prohibition on prosecution comment.<sup>204</sup> Although the two pre-conditions from *Weissensteiner* are now Australian law, some inferences may be made with respect to cases of both direct and circumstantial evidence, where there is a strong prosecution case and factors peculiarly within the knowledge of the accused. There is considerable evidence of judicial willingness, in both England and Australia, to accept that where the Crown case is strong, the failure of the appellants to give evidence makes it 'safer to draw inferences adverse to them'.<sup>205</sup> Rather than being characterised as placing obligations on the accused, the High Court says this allows the accused to testify in his or her favour. This suggests an attempt at being sporting to the accused. Yet its effect is that a failure to provide a different view of events at trial impacts adversely on the accused. It also may mean that where the court is impressed by the cumulative strength of evidence, inferences of guilt from silence may be considered appropriate.

The High Court has insisted upon a distinction between pre-trial and at-trial silence, because it sees this as a form of protection against unfair or intimidatory investigatory practices. There are degrees of rights between the citizen suspect and citizen accused. A clear right of pre-trial silence discourages the ill treatment of a suspect and the production of dubious confessions. This is consistent with the original purpose of the privilege, which was to protect the poor, weak and ill-educated. The High Court has recently expressed views about the modern justification for the privilege in terms of human rights. This involves the protection of the individual from being confronted with the 'cruel trilemma of punishment for refusal to testify, punishment for truthful testimony or perjury (and the consequential possibility of punishment)'.<sup>206</sup> In the words of Brennan J in *Caltex*<sup>207</sup> 207 it is not a shield against conviction but a shield against conviction wrung out of the mouth of the offender.

However, there is considerable latitude afforded to police, in both England and Australia, in their pursuit of evidence gathering, even when that latitude places pressure upon the right to silence. Changes to the right to silence under Australian law fail to account for the over-representation of the indigenous population in the criminal justice system. In the United Kingdom, incursions on the right to silence can be seen most adversely in the Northern Ireland situation. From the Australian perspective, the legal system must confront the adverse consequences for vulnerable and disadvantaged groups, of infringing on defendants' rights. On the other hand,

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<sup>204</sup> Nash, above n 51, 151.

<sup>205</sup> *Cornelius* (1988) 34 A Crim R 49 at 118.

<sup>206</sup> *Caltex* (1993) 118 ALR 392, 404 per Brennan J.

<sup>207</sup> *Ibid.*

victims of crime cry out for a remedy, and a voice in the system that tries or deals with alleged perpetrators of crime. The community must acknowledge that there are, both, a group of victims and a group of accused. Limiting rights, for example by allowing adverse inferences to be drawn when an accused exercises the right to silence may not, ultimately, benefit either group.

The uniform evidence legislation suffers from a particular deficiency, for while it prohibits particular commentary, it does not actually 'create obligations to guide the jury in a particular manner'.<sup>208</sup> Hunter and Cronin suggest that the law could have looked to the area of sexual assault for guidance. In sexual assault cases most States require a judge to inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault.<sup>209</sup> So it could be with an accused who exercises the right to silence. Guidance could be provided for judicial commentary as to the type of considerations that an accused must weigh when determining whether or not to testify.<sup>210</sup> Such a commentary could explain that an accused's desire not to testify is consistent with an innocent person's desire to avoid the impression of guilt through being slow, overawed or nervous.<sup>211</sup> The decision in *OGD*<sup>212</sup> appears to be a step in this direction. The emphasis on the need for caution in directions on silence may pave the way for greater recognition of the dilemmas faced by some accused, and their right to silence in what has become known as the 'information age'.

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<sup>208</sup> K Hunter and K Cronin, *Evidence, Advocacy and Ethical Practice: a criminal commentary* (1995) 266.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*

<sup>212</sup> (1997) 98 A Crim R 151.