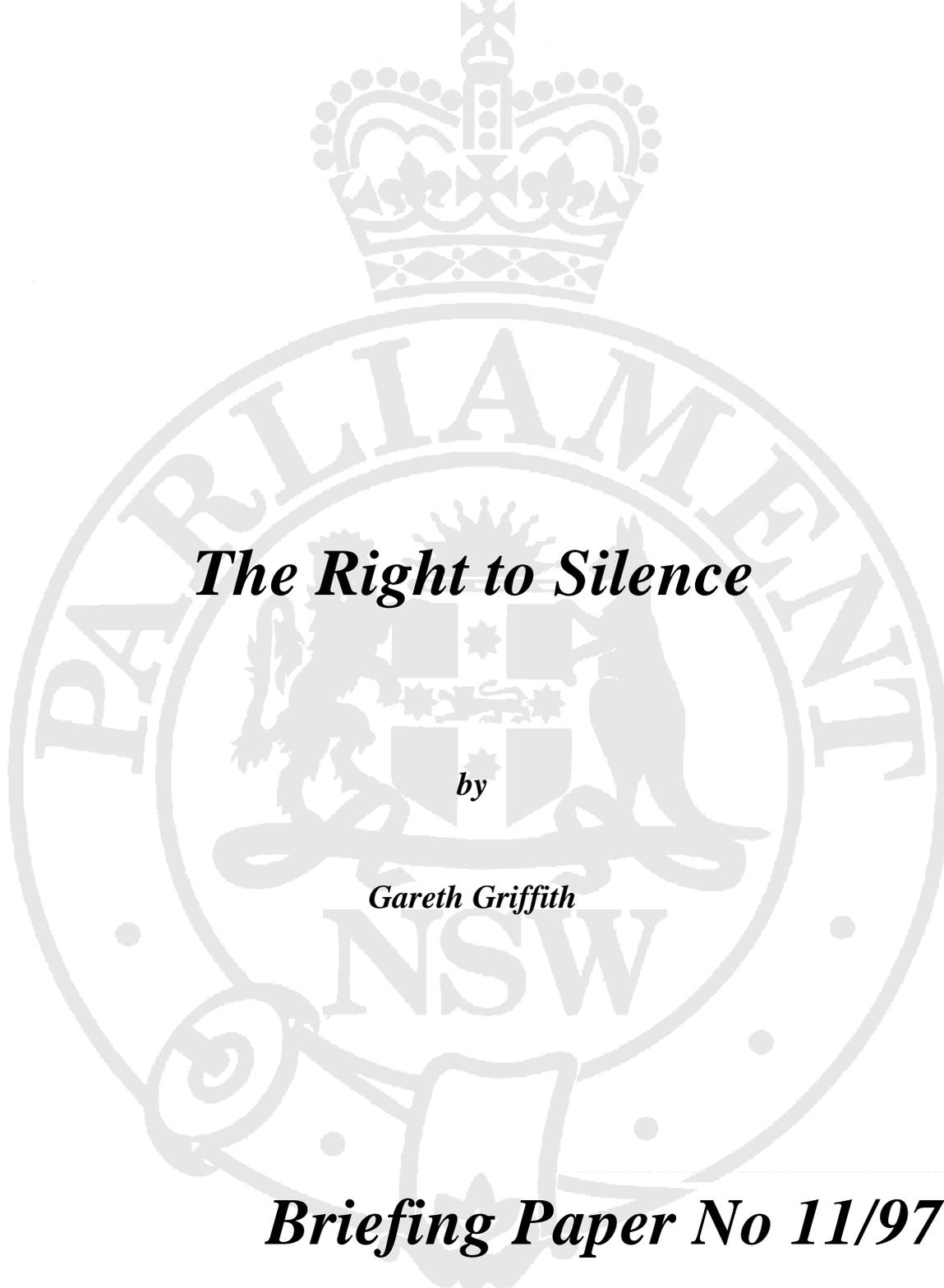


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The Right to Silence

by

Gareth Griffith

Briefing Paper No 11/97

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EXECUTIVE SUMMARY

This paper presents an overview of the debate concerning the right to silence, taking as its focus the *right to pre-trial silence in the face of police questioning*. Its main findings are as follows:

- on 28 May 1997 the NSW Police Commissioner, Mr Peter Ryan, is reported to have set out a ‘blueprint for major change in NSW’s justice system’, which included examination of the right of silence for the accused (page 5);
- on 25 June 1997 the Attorney General said that he had decided to ‘refer the wider issue of disclosure’ of a defence relied on by the accused to the NSWLRC under the general heading of a review of the right to silence (page 5);
- no major empirical studies of the right to silence have been undertaken in Australia (page 6);
- the right to silence operates in at least two distinct contexts, that is, at the police station and in the courtroom. Thus, there is silence *before* trial in the face of police questioning, as well as silence *at* trial under which an accused person cannot be compelled to plead or to give evidence (page 9);
- the right to pre-trial silence involves a *primary* right, which states that there is no legal obligation on citizens to talk to the police, as well as an incidental or *secondary* right, prohibiting the drawing of any adverse inference at trial from the exercise of silence. In this secondary sense the right extends to the situation where the accused had remained silent before the trial and later raised a defence for the first time at the trial (the ambush defence) (page 10);
- in the leading High Court case of *Petty* (1991) 173 CLR 95 the above right, both in its primary and secondary forms, was said to be a ‘fundamental rule of the common law’ (page 10);
- section 89 of the NSW *Evidence Act 1995* substantially reflects the common law position. The section refers to the silence of a person (who becomes a defendant in criminal proceedings) in response to ‘official questioning’ (page 11);
- in England and Wales the right to silence (both pre-trial and at trial) has been curtailed under the *Criminal Justice and Public Order Act 1994* (pages 22);
- crucial to the debate in England and Wales was the perception in some quarters of the changing balance between police powers and the rights of suspects as this operates under the *Police and Criminal Evidence Act 1984*. The Act incorporates a right to free legal advice (page 20);

- a new caution has been introduced in England and Wales which reflects the position that adverse inferences may now be drawn from silence (page 23);
- the key substantive issues in the debate include whether: pre-trial silence is an indication of guilt?; would altering the pre-trial right to silence place innocent suspects at greater risk of wrongful conviction?; and, conversely, would altering the right lead to the proper conviction of more guilty offenders? (page 26);
- empirical research on the right to silence is characterised by certain definitional and methodological problems (page 17 and page 28);
- as a result studies from England have produced widely varying estimates of the use by suspects of the right to pre-trial silence, ranging in one estimate from between 5% and 23 % and in another from 6% to 22% (page 29);
- several studies have suggested that there is an association between receipt of legal advice and the exercise of the right to silence (page 32);
- one study at least has suggested that professional criminals use the right to silence more than other suspects (page 33);
- however, there does not appear to be any conclusive evidence suggesting that those exercising their right to pre-trial silence gain a clear advantage in terms of the outcome of their case (page 34);
- Leng's study of the use of ambush defences found that the concerns in this regard are largely unfounded (page 35);
- arguments in favour of retaining the right to pre-trial silence can be categorised under the headings of 'symbolic retentionism' and 'instrumental retentionism'. A key argument of the latter is that the case for reform is not supported by empirical evidence (pages 35-39);
- arguments in favour of curtailing the right can be categorised under the headings of 'utilitarian abolitionism' and 'exchange abolitionism'. The former maintains that the right is used by professional criminals to avoid justice; whereas the latter focuses on exchanging the right to silence, which it sees as a largely illusory right, for real protections and safeguards for suspects (pages 39-43); and
- except in relation to alibis, at present in NSW there are no statutory requirements of advance notification of defences (page 43).

1. INTRODUCTION

On 28 May 1997 the NSW Police Commissioner, Mr Peter Ryan, is reported to have set out a 'blueprint for major change in NSW's justice system', including:

- examination of the right of silence for the accused.¹

Responding to this and other suggestions, a spokeswoman for the NSW Attorney General, Hon JW Shaw MLC, said that preliminary work had already been completed 'on referring the question of an accused person's right to silence to the NSW Law Reform Commission to see if it should remain in criminal matters'.² This was confirmed on 25 June 1997 when the Attorney General said that he had decided to 'refer the wider issue of disclosure' of a defence relied on by the accused to the NSWLRC under the general heading of a review of the right to silence.³

In other responses, the Presidents of the NSW Law Society and the NSW Bar Association, Mr Patrick Fair and Mr David Bennet QC respectively, both rejected the Police Commissioner's proposals.⁴ Mr David Bennet QC is reported to have said that abolishing an accused person's right to silence was tantamount to saying 'that we should return to the days of the Star Chamber', adding that the right to silence was 'a most basic protection of the law and its removal would mean "less sophisticated persons" might make statements they would not make if given more time to consider. He warned, 'There will be more convictions, but there will be many more unfair convictions'.⁵

On this issue, the Premier is reported to have said 'he would oppose any changes that would increase the possibility of innocent people going to jail'.⁶

This paper considers the debate concerning the right to silence: first, by explaining what is meant by the term and by looking briefly at its historical origins; secondly, by outlining the recent reforms in England and Wales under the *Criminal Justice and Public Order Act 1994* permitting inferences to be drawn from a suspect's failure to answer police questions; thirdly, by noting the key issues and questions raised in the debate; fourthly, by outlining the arguments in favour of its retention, reform or abolition; and, fifthly, by presenting an overview of the empirical research in this area. The paper also includes a separate note on so-called 'ambush defences', that is, where the accused had

¹ 'Ryan sets blueprint to purge justice system', *The Sydney Morning Herald*, 29 May 1997.

² 'Ryan plan "return to Star Chamber"', *The Sydney Morning Herald*, 30 May 1997.

³ NSWPD (Hansard proof), 25 June 1997, p 4.

⁴ 'Police reform call rejected', *The Australian*, 30 May 1997.

⁵ 'Ryan plan "return to the Star Chamber"', *The Sydney Morning Herald*, 30 May 1997.

⁶ 'Police reform call rejected', *The Australian*, 30 May 1997.

remained silent before the trial and later raised a defence for the first time at the trial.

As long ago as 1975, in its interim report on *Criminal Investigation*, the Australian Law Reform Commission reported that the whole issue of the right to silence 'has been a very controversial one for many years, and particularly since the publication of the [UK] Criminal Law Revision Committee's Eleventh Report in 1972'.⁷ Likewise, in 1995 Aronson and Hunter confirmed that the right to silence has 'aroused intense emotion, resulting in the political death of legislative proposals barely touching it'.⁸ Any proposals to curtail the right to silence in NSW are likely to be very controversial, therefore.

Since the right to silence debate got underway in the UK in the early 1970s a substantial amount of empirical work has been undertaken there concerning its use and consequences. Curiously, no major studies of a comparable nature have been undertaken in Australia,⁹ thus leaving a significant gap in our knowledge of the operation of this aspect of the criminal justice process. For this reason, this paper relies heavily on overseas empirical data, particularly from the UK.

It should be emphasised at the outset that, except for suggesting the need for local research, this paper does not make recommendations or form conclusions on any of the matters raised. A second point to make at this stage is that this paper concentrates on a particular aspect of the right to silence, namely the right to pre-trial silence in the face of police questioning. It is this issue, as opposed to the right to silence *at* trial, which has been the focus of debate in recent times.

2. WHAT IS THE RIGHT TO SILENCE?

Background: The term 'right to silence' conceals a network of ideas and practices which, broadly speaking, reflect the 'principle that, in the absence of some contrary rule of common law or legislation, all citizens are free to remain silent and to decline to provide the authorities with information'.¹⁰ At a philosophical level the right to silence may be seen as an essential component of 'the right to be let alone', free from unwarranted state intrusion into the citizen's private life, a principle grounded in the primacy of the autonomy and liberty of the individual.¹¹ At another level the right is

⁷ ALRC, Report No 2 - *Criminal Investigation*, AGPS 1975, p 64.

⁸ M Aronson and J Hunter, *Litigation: Evidence and Procedure*, Fifth Edition, Butterworths 1995, p 328. The authors present the example of the debate over the NSW Criminal Procedure (Committal Proceedings) Amendment Bill 1990, which is discussed later in this paper.

⁹ Note that a small study was carried out in the Sydney District Court in 1980 - S Odgers, 'Police interrogation and the right to silence' (1985) 59 *ALJ* 78 at 86.

¹⁰ New Zealand Law Commission, *Criminal Evidence: Police Questioning - A Discussion Paper*, September 1992, p 9. (Henceforth, NZLC Discussion Paper).

¹¹ *Ibid*, p 21.

based on the tradition of British criminal justice which, presuming the innocence of the suspected or accused person, 'requires the Crown to make its case in a criminal prosecution'.¹² For the law of evidence, therefore, the twin principles underlying the right are that 'a citizen should not be required to incriminate him or herself and that the burden of proving guilt should rest upon the prosecution'.¹³

For these purposes, it has been said that the right to silence 'consists of a cluster of different procedural rules, each related in one way or another to the protection against self-incrimination'.¹⁴ However, the right to silence is not to be equated with the privilege against self-incrimination. It has been argued that in an accusatorial system of justice such as ours silence should be regarded as a right rather than a privilege, with one commentator adding the following observation:

A suspect who remains silent in the police station and/or the courtroom may well be motivated by a desire to avoid incriminating himself. But there can also be other motives, for example, the desire to avoid incriminating others.¹⁵

Still, it remains the case that the right to silence is often traced back to the reaction against the activities of the Star Chamber in the seventeenth century in which the accused was interrogated under oath. That practice was seen to be contrary to the maxim *nemo debet prodere se ipsum*, no one may be compelled to betray himself. Wigmore sees the right as developing almost by accident from these roots.¹⁶ In fact by the close of the seventeenth century the practice of questioning the accused at trial had died out altogether. This derived, it seems, from the doctrine of the testimonial incompetence of the accused (and his spouse) which rested 'on the notion that interested persons were likely to commit perjury'.¹⁷ In this way the accused person was actually barred from giving evidence on oath in criminal cases, a practice which persisted in most

¹² ALRC Report, p 68.

¹³ R Leng, 'The right to silence debate' from *Suspicion and Silence: The Right to Silence in Criminal Investigation*, edited by D Morgan and GM Stephenson, Blackstone Press Ltd 1994, p 18.

¹⁴ J Michael and B Emmerson, 'The right to silence' (1995) 1 *European Human Rights* 4 at 6. The Fifth Amendment to the US Constitution, which incorporates the privilege against self-incrimination in criminal cases, has been found to embody the right to silence during the period of custodial interrogation - *Miranda v Arizona* (1966) 384 US 436. For an account of the way the US courts have cut down the practical effects of the *Miranda* decision see - AAS Zuckerman, *The Principles of Criminal Evidence*, The Clarendon Press 1989, p 309.

¹⁵ S Greer, 'The right to silence: a review of the current debate' (1990) 53 *The Modern Law Review* 709 at 710.

¹⁶ *Ibid*, pp 710-711. Greer presents a useful overview of the many competing theories.

¹⁷ *Weissensteiner v The Queen* (1993) 178 CLR 217 at 232 (per Brennan and Toohey JJ).

jurisdictions up to the very end of the nineteenth century.¹⁸

The right to silence in the face of police questioning can be said to have similar philosophical roots, although its actual development needs to be linked more firmly to the establishment of the modern police force after 1829 and the passing of the English *Summary Jurisdiction Act* in 1848. That Act separated the investigative and judicial functions which until then had been combined in the magistracy.¹⁹ From these origins the right to silence at the police station developed as part of the subsequent formulation of the *Judges' Rules* which were intended to clear up uncertainty about the scope of police questioning.²⁰

A corollary of this right was the duty of investigating officers to inform a person being questioned of its existence.²¹ In this way the right to silence was reflected in the traditional caution given to suspects.²² Today this is reflected in the NSW *Commissioner's Instructions* which direct officers to caution suspects in these terms:

I am going to ask you certain questions. You are not obliged to say or do anything unless you wish to do so, but whatever you say or do may be

¹⁸ When the law of evidence was finally reformed and the accused was allowed to testify in his or her own defence, the options of making an unsworn statement or keeping silent altogether were retained. In other words, the accused became a competent but not compellable witness. The question, then, was whether comment could be made where the accused declined to give sworn evidence. *Cross on Evidence* notes that, in the case of trial by jury, several courses were open to the framers of the English *Criminal Evidence Act 1898* and its Australian equivalents, including: (i) *make no provision*, in which case comment would be available to the judge and the prosecutor, this being the approach adopted in Queensland; (ii) *prohibition by the judge or the prosecution upon the accused's failure to testify*, this being the solution adopted ultimately in Victoria and the Northern Territory; (iii) *prohibition upon comment by the prosecution only*, the option adopted in New South Wales, as well as South Australia, Western Australia, the ACT and England and Wales. Under Section 20 of the NSW *Evidence Act 1995*, therefore, the judge (but not the prosecutor) may comment on the failure of the defendant to give evidence. However, the essential rider to this states that the judge's comment 'must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned'.

¹⁹ Home Office, *Report of the Working Group on the Right to Silence*, 13 July 1989, p 8.

²⁰ S Odgers, 'Police interrogation and the right to silence' (1985) 59 *ALJ* 78 at 83. Odgers notes that, while the practice of questioning an accused at trial died out, examination by justices of the peace, not being on oath, did not infringe the rule against a person being compelled to betray him or herself. Thus, 'It continued to be ordinary practice to press a suspect to confess guilt and his refusal to answer accusations made against him invited adverse comment at trial'. However, in 1848 when justices were prohibited from questioning a person on preliminary questioning, the task of investigating crime and questioning suspects had passed to the newly-established police force.

²¹ ALRC, *Report No 26, Evidence, Volume 1*, AGPS 1985, p 426.

²² The caution was introduced in England by the *Summary Jurisdiction Act 1848*.

used in evidence. Do you understand that?²³

The right to silence before and at trial: In *R v Director of the Serious Fraud Office*²⁴ Lord Mustill listed ‘six immunities’ forming the right to silence at common law. These were summarised by Aronson and Hunter thus:

- generally speaking, it is not an offence to refuse to answer anyone’s questions;
- nor, generally speaking, is it an offence to refuse to answer questions the answers to which may be incriminating;
- specifically, it is no offence at common law for a suspect to refuse to answer a police officer’s questions;
- an accused person cannot be compelled to testify at their trial;
- once a person has been charged, police should desist from further questioning; and
- no adverse comment is permitted at the trial of an accused person for their failure to answer questions before trial, or for their failure to testify.²⁵

From this it can be seen that the right to silence operates in at least two distinct contexts, that is, at the police station and in the courtroom. Thus, there is silence *before* trial in the face of police questioning, as well as silence *at* trial. On this point, the Home Office Working Group on the right to silence, which reported in 1989, viewed the right as an amalgam of individual precedents and statutory provisions which together encompass:

- the suspect’s right not to answer questions when interviewed by the police or other law enforcement agencies;
- the right of the accused person not to be compelled to plead or to give evidence at his or her trial, or to give any indication before the trial of his or her plea or line of defence to the charge; and
- the privilege of a witness not to answer questions if to do so might incriminate him or her.²⁶

²³ NSW Commissioner’s Instructions, Instruction 37.14, valid as at 1 April 1996. The wording is slightly different where the police officer intends to record the questions.

²⁴ [1993] AC 1 at 30-31.

²⁵ M Aronson and J Hunter, *Litigation: Evidence and Procedure*, Fifth Edition, Butterworths 1995, p 328.

²⁶ Home Office, *Report of the Working Group on the Right to Silence*, 13 July 1989, p 8.

The focus of this paper is on the first of these, that is, the pre-trial right of the suspect to remain silent in the face of police interrogation and the consequences at the trial itself flowing from the exercise of that right. In other words the pre-trial right itself operates both at the police station and in the courtroom.

Defining the right to silence before trial: With this in mind it can be said that, traditionally, the right to pre-trial silence has been seen to involve a *primary* right, which states that there is no legal obligation on citizens to talk to the police, as well as a *secondary* right, prohibiting the drawing of any adverse inference at trial from the exercise of the right to silence. In *Petty v The Queen*,²⁷ Mason CJ, Deane, Toohey and McHugh JJ encapsulated this distinction in these terms:

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 which they played. That is a fundamental rule of the common law which, subject to some statutory modifications, is applied in the administration of the criminal law in this country. An incident of that right of silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right to silence or to render it valueless...That incident of the right to silence means that, in a criminal trial, it should not be suggested, either by evidence led by the Crown or by questions asked or comments made by the trial judge or the Crown Prosecutor, that an accused's exercise of the right of silence may provide a basis for inferring a consciousness of guilt.²⁸

The case also dealt with what is sometimes called 'the ambush defence' as incidental to the right to silence. Specifically, in this context the term is taken 'to mean a defence which is raised for the first time at trial and of which the police and prosecution have no prior notice'.²⁹ Of such 'ambush defences' Mason CJ, Deane, Toohey and McHugh JJ said in *Petty*:

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 to silence. Such an erosion of

²⁷ (1991) 173 CLR 95.

²⁸ *Ibid* at 99.

²⁹ R Leng, *The Right to Silence in Police Interrogation: A Study of Some of the Issues Underlying the Debate*, The Royal Commission on Criminal Justice, HMSO 1993, p 45.

the fundamental right should not be permitted.³⁰

Clearly, therefore, a judge will disallow any inference to be drawn against the accused where the accused had remained silent throughout, as well as where the accused had remained silent before the trial and later raised a defence for the first time at the trial.³¹

Perhaps it should be noted at this stage that the argument for abolishing the right to silence rarely (if ever) extends to saying that refusing to talk to the police should be an offence. Indeed, usually the case for reform or abolition is formulated in terms of the right's incidental or secondary meaning, as in the English *Criminal Justice and Public Order Act 1994* which permits the drawing of adverse inferences from silence. Of this approach the ALRC has said that if 'guilt can be inferred from silence the right to silence will be defeated'.³²

Statutory definition of the right to silence before trial: In substance, the common law, as stated in *Petty v The Queen*, finds expression in section 89 of the NSW *Evidence Act 1995* which provides:³³

- (1) In a criminal proceeding, 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, put or made to the party or other person in the course of official questioning.
- (2) Evidence of that kind is not admissible if it can only be used to draw such an inference.
- (3) Subsection (1) 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 a fact in issue in the proceedings.
- (4) In this section:

inference includes:

 - (a) an inference of consciousness of guilt, or
 - (b) an inference relevant to a party's credibility.

³⁰ Ibid at 101.

³¹ SB McNicol and D Mortimer, *Evidence*, Butterworths 1996, pp 150-153. Note that *Petty's* case did not in fact fall into either of these categories; rather, it was a case of an earlier pre-trial defence which was not withdrawn up to the time of the trial, followed by a completely inconsistent defence raised at the trial. Note, too, that prior to *Petty* a number of cases, such as *R v Ryan* (1964) 50 Cr App R 144, had allowed the judge to comment on the fact that the accused had not disclosed the defence beforehand and that this made it difficult for the prosecution to investigate the accused's defence at trial.

³² ALRC, *Report No 38, Evidence*, AGPS 1987, p 96.

³³ Note that, under section 9, the common law is preserved to the extent that it is consistent with the Act. Thus, to the extent that they are consistent with section 89, the common law rules concerning the right to silence can be read in addition to it.

Thus, in criminal proceedings the section prevents ‘unfavourable inferences’ being drawn from the exercise of the pre-trial right to silence in response to ‘official questioning’ (a term which is defined in the Dictionary to the Act). Under section 89(2), if the evidence can be legitimately used in another way, it will be admissible (subject to the exclusionary discretions in the Act).³⁴ Odgers notes that section 89(3) provides an example of the operation of the principle in section 89(2) - ‘the failure or refusal to answer questions or respond to a representation is being used not to draw any adverse inference but because the fact of that failure etc is itself a fact in issue in the proceedings’. The example he offers is that of a prosecution of a person for failing to furnish information as required by a police officer under section 174 of the ACT *Motor Traffic Act 1936*.³⁵ In effect, that section constitutes a statutory exception to the right to silence by making it an offence for certain persons to withhold information which may assist the police to identify drivers who have committed an offence under the Act. In this way failure to answer questions becomes a fact in issue in the proceedings; evidence of the failure would be admissible as a material fact.³⁶

Section 89 of the NSW *Evidence Act 1995* makes it clear that the right to silence extends to its exercise in relation to ‘one or more questions’, thus clarifying the point that the right covers ‘total or selective silence’.³⁷ In the past that had been a source of uncertainty at common law, with the ALRC stating in 1985 that ‘Partial silence has been interpreted to show “consciousness of guilt”’.³⁸

Another area of uncertainty, traditionally, has been the distinction between post-caution and pre-caution silence, with some authorities suggesting that protection of the right to silence extends only to the situation where a suspect has been cautioned by a police

³⁴ Section 90 (discretion to exclude admissions); section 135 (general discretion to exclude evidence); section 137 (exclusion of prejudicial evidence in criminal proceedings); and section 138 (discretion to exclude improperly or illegally obtained evidence).

³⁵ S Odgers, *Uniform Evidence Law*, Second Edition, The Federation Press 1997, p 152.

³⁶ According to the Explanatory Note, section 89 ‘is not concerned with the drawing of inferences from facts’.

³⁷ S Odgers, *Uniform Evidence Law*, p 151. Odgers cites *R v Matthews* (unreported, CCA NSW, 28/5/96) (directions to jury) and *Yisrael v District Court* (unreported, CA NSW, 18/7/96) (judge alone).

³⁸ ALRC, *Report No 26, Interim - Evidence, Volume 1*, AGPS 1985, p 428. The ALRC noted in this regard (Volume 2 at 187): ‘It is not clear whether it is possible to draw inferences against an accused from his selective refusal to answer police questions (or silence in the face of particular questions)’. Subsequently, the position was clarified in several jurisdictions. In NSW the Court of Criminal Appeal held in *R v Towers* (unreported, CA NSW, 7/6/93) that the direction that the jury could infer consciousness of guilt from selective answers was erroneous. *R v McNamara* (1987) VR 855 was followed.

officer.³⁹ Presumably, that distinction would not be relevant under section 89 where the reference is to silence in the face of ‘official questioning’, a term which is defined to mean ‘questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence’.⁴⁰

It has been suggested that the 1964 decision of the High Court in *Woon*⁴¹ may have been the source of some past confusion in this area of the law.⁴² Aronson and Hunter explain that in that case the High Court held that the accused’s ‘evasive and selective answers could be taken against him, not as indicating a tacit conscious or unconscious acceptance of the truth of any *particular* accusation being put to him in each question, but as indicating an *overall* acceptance of guilt of the crime charged’.⁴³ It is said by Aronson and Hunter that this approach can be ‘used to make significant inroads upon the right to silence’. They state, too, that in subsequent High Court cases (including *Petty*) *Woon* has been discussed in a way indicating that it is still good law. Does section 89 of the NSW *Evidence Act 1995* overcome *Woon*? Aronson and Hunter say that, under that section, silence *alone* can no longer count as evidence but that ‘a suspect’s body language or conduct in some other respect (running away from an interrogator, for example) can still be taken into consideration’.⁴⁴

Legal complexities: In *Glennon v R*⁴⁵ the High Court confirmed its view that the pre-trial right to silence of suspects is a fundamental common law right. In that case the Court held that the trial judge’s direction to the jury was defective and that it violated the principles laid down in *Petty*. The trial judge had told the jury that they were not to use

³⁹ ALRC, *Report No 26, Interim - Evidence, Volume 2*, AGPS 1985, p 187. Writing in 1985, the ALRC stated that ‘the exact legal position in England and Australia is uncertain. The English Court of Appeal in *R v Chandler* [1976] 1 WLR 585 refused to follow the Privy Council, allowing inferences to be drawn from silence (before a caution), on the basis that the policeman involved and the appellant were on equal terms (a solicitor being present). A number of Australian cases suggest that it is possible to draw inferences from silence before a police caution. But Chief Justice Bray in *Forrest v Normandale* (1973) 5 SASR 524 expressly followed the Privy Council, as did Justice Campbell in *R v Starr* [1969] QWN 23, refusing to distinguish between cases where a caution has and has not been given’.

⁴⁰ Odgers notes that committal proceedings do not fall within the definition of ‘official questioning’, with the result that ‘the present common law protections in this area have arguably been circumscribed, almost certainly unintentionally, by the Act’. He adds the qualification that the present common law protections may continue to operate since the drawing of inferences is not a question of admissibility - S Odgers, *Uniform Evidence Law*, Second Edition, p 151.

⁴¹ (1964) 109 CLR 529.

⁴² *R v Tolmie* (unreported, CA NSW, 14/7/93). It was suggested that up until the case of *Towers*, which clarified the law concerning the drawing of inferences from selective silence, ‘there were some common misapprehensions as to the effect of *Woon*...’.

⁴³ M Aronson and J Hunter, *Litigation: Evidence and Procedure*, Butterworths 1995, p 337.

⁴⁴ *Ibid.*

⁴⁵ (1994) 119 ALR 706.

the defendant's exercise of the right to silence against him, but then added the 'erroneous' qualification that 'in testing the veracity of the defence...you are entitled to have regard to the fact that it was not revealed to the police'.

Petty and *Glennon* can be viewed as belonging to the High Court's redefinition in recent years of the essential elements of a fair trial. As such, they can be read alongside decisions on police interrogation and the right to counsel in such cases as *Williams*⁴⁶ and *Dietrich*⁴⁷ respectively. Contrasting this approach with that of the English courts, Associate Professor David Dixon has noted that the High Court has 'been more concerned to defend the right than English counterparts'.⁴⁸ Indeed, the former Chief Justice, Sir Anthony Mason has stated that, while the right to silence 'often comes under criticism when consideration is given to reform of the criminal law', it is nonetheless 'firmly entrenched in our common law'.⁴⁹

However, in some ways the precise application of the right by the courts remains complex and even controversial. The case of *Weissensteiner v The Queen*⁵⁰ is relevant to the right to silence at trial (not to pre-trial silence in the face of police interrogation). Yet, it suggests the difficulties involved and indicates that the High Court's commitment to the right to silence generally is not absolute in nature. Thus, in *Weissensteiner* the Court held that the silence of the accused may bear upon the probative value of the evidence led by the Crown, particularly in cases in which the accused has not supported any hypothesis which is consistent with innocence from facts which are perceived to be within his or her knowledge. Of this decision, Sir Anthony Mason said, 'This is not to deny the right to maintain silence; it is merely to recognise that the jury cannot shut their eyes to the consequences of exercising the right'.⁵¹

It can be noted, too, that in *R v Reeves*⁵² the NSW Court of Criminal Appeal arrived at what has been described as a 'strictly literal and surprising interpretation' of the High

⁴⁶ (1986) 161 CLR 278.

⁴⁷ (1992) 177 CLR 292.

⁴⁸ D Dixon, *Law in Policing: Legal Regulation and Police Practices*, Clarendon Press, forthcoming 1997, p 259.

⁴⁹ Sir A Mason, 'Fair trial' (1995) 19 *Criminal Law Journal* 7 at 10. Note that the privilege against self-incrimination is not available to corporations - *Environment Protection Authority v Caltex* (1993) 178 CLR 477.

⁵⁰ (1993) 178 CLR 217. The case involved the murder of two persons and the theft of a yacht owned by one of them. The alleged victims had disappeared while the accused had remained alone on the yacht. At the trial the accused remained silent and no other evidence was called by the defence. The prosecution's case was wholly circumstantial in nature.

⁵¹ Sir A Mason, 'Fair trial' (1995) 19 *Criminal Law Journal* 7 at 10.

⁵² (1992) 29 NSWLR 109.

Court's view,⁵³ with Hunt CJ stating that the *Petty* case:

did *not* lay down any rule of universal application that evidence may not be given of questions asked and of the answers given where that evidence discloses that the accused has exercised his right of silence.⁵⁴

Hunt CJ continued:

The High Court did say in *Petty v The Queen*...that the Crown should not lead evidence that, when charged, an accused person made no reply, but that is because, by reason of the legal processes involved, there could never be any relevance of that fact to any issue in the case. However, the fact that the investigating police officers put the prosecution's version of the facts to the accused and gave him this opportunity to answer them and to give his own account of the events in question falls into a different category.⁵⁵

For Hunt CJ, the fact that certain questions were asked of the accused, thus providing an opportunity to respond to the allegations against him or her, should usually be admissible to meet in part the anticipated criticism of the fairness of the conduct of the investigating police officers. Once the questions are found to be admissible, so too must the answers, even where this discloses that the accused exercised his or her right to silence - 'for otherwise a very misleading impression may be conveyed, and one which would usually be detrimental to the accused'.⁵⁶ It should be noted in this regard that, in *Reeves* the court held that where the evidence of the accused's behaviour shows only that he or she was exercising their right to silence, then the jury should be instructed immediately to make no adverse inference.⁵⁷

⁵³ J Moore, 'Case and comment - Reeves' (1995) 19 *Criminal Law Journal* 237.

⁵⁴ (1992) 29 NSWLR 109 at 114-115. In the case the Crown Prosecutor asked during the examination-in-chief of one of the investigating police officers: 'Q - Do you tell the court that later, at about eleven thirty that evening in the company again of Detective Roberts, you saw the accused and were you present when Detective Roberts asked questions of the accused?; A - Yes, I was present; Q - And it's suffice [sic] to say that the accused would say nothing relative to the incident at the flats at 191 Derby Street?; A - Yes, that's right sir'.

⁵⁵ Ibid at 115.

⁵⁶ Ibid.

⁵⁷ Aronson and Hunter, *Litigation: Evidence and Procedure*, Fifth Edition, p 337. On the issue of the judge's direction to the jury, the Fifth Australian Edition of *Cross on Evidence* states that the law 'remains far from settled' and that it varies from one jurisdiction to another. It seems that in NSW, following *R v Sadaraka* (1981) 2 NSWLR 459, there is no rule of law requiring the jury to be directed that the exercise of the pre-trial right to silence does not entitle it to draw any adverse inferences concerning the accused, though the judge is obliged to ensure that the jury is not left under a misapprehension - JD Heydon, *Cross on Evidence*, Fifth Australian Edition, Butterworths 1996, p 1006.

At least one commentator has argued that *Reeves* was wrongly decided, an argument which boils down to the 'fact that an accused person exercised his right to remain silent when questioned by police cannot be used by the jury in any permissible way. Consequently, it is irrelevant. Irrelevant evidence is inadmissible'.⁵⁸

On the other hand, the NSW Court of Criminal Appeal has cited *Reeves* with approval on several occasions.⁵⁹ Having done so in *Yisrael v District Court*, Meagher JA commented, 'It is clear that evidence of the entire police interview is admissible, including questions that the accused refused or failed to answer'. With reference to the 1964 decision of the High Court in *Woon*,⁶⁰ Meagher JA then made this distinction: 'The point is that there is a difference between, first, the tribunal of fact examining a record of interview in its entirety and considering all of the accused's reactions, including failures to respond, in their context and, secondly, finding the offence proved on the basis of the accused's decision to refuse to answer certain questions'.⁶¹ Again, the question must be asked if this implies that *Woon* is still good law? The nub of the decision in *Yisrael*, as in *Reeves*, seems to be that examination of the record of police interview may be permitted but that, having regard to *Petty* as well as section 89 of the *NSW Evidence Act 1995*, it can no longer provide any basis for inferring a consciousness of guilt.

In any event, it can be said that, while areas of complexity and uncertainty remain, the

⁵⁸ J Moore, 'Case and comment - Reeves' (1995) 19 *Criminal Law Journal* 237 at 239; the same view is expressed in M Findlay, S Odgers and S Yeo, *Australian Criminal Justice*, Oxford University Press 1994, p 62 (Fn 115). Query what, if any, impact section 89 of the *NSW Evidence Act 1995* would have on *Reeves*, bearing in mind that the specific prohibition is only against drawing 'unfavourable' inferences from a failure or refusal to respond to a question(s) or representation.

⁵⁹ *R v Towers* (unreported, CA NSW, 7 June 1993); *Yisrael v District Court* (unreported, CCA NSW, 28/5/96).

⁶⁰ (1964) 109 CLR 529.

⁶¹ *Yisrael v District Court* (unreported, CA NSW, 18/7/96). In this case the accused responded to particular police questions with the answer 'no comment'. He was found guilty at first instance and the case then went on appeal to the District Court. There the judge made considerable reference to the accused's exercise of silence and upheld the original finding of guilt. It then went on appeal to the Supreme Court where it was claimed that to infer a consciousness of guilt from silence amounted to a jurisdictional error or, alternatively, that a writ of certiorari should be available on the basis that the decision in the District Court amounted to an error on the face of the record. In the Supreme Court, all three justices held that no adverse inferences may be drawn from silence (be it selective or total) and that the trial Judge misdirected himself. Meagher JA said (on the basis of *Woon* and citing *Reeves* and *Towers*) it was 'open for the trial Judge to examine the record of interview, giving consideration to the fact that the claimant had failed to respond to certain questions'. However, the trial Judge had stepped beyond that point and 'gave undue and prejudicial weight to the claimant's decision to exercise his right to silence'. For Meagher JA this amounted to jurisdictional error; but for the majority (Sheller and Powell JJA) the misdirection was within jurisdiction and the decision of the District Court was upheld.

right to pre-trial silence has been bolstered and clarified in recent years both by the decision in *Petty* and by the new evidence legislation. At the very least, the scope for courts to abrogate or dilute that right is now heavily circumscribed.

Pre-trial silence in legal and empirical analysis: From the above discussion it can be seen that the right to pre-trial silence is a legal doctrine which involves certain difficulties and complexities in terms of interpretation and application by the courts. At the same time the doctrine needs to be understood from a rather different perspective, namely, that of the empirical analysis of the practical world of police investigation. While these courtroom and police station contexts of the doctrine are obviously connected, forming as they do the two ends of the same process, for analytical purposes they can offer differing perspectives on a range of questions and problems.

One point that is made in this regard is that, whereas the courtroom view of the right is based on legalistic notions of due process operating in the context of an adversarial system of criminal justice, the police station reality studied by empirical analysis may be very different, with the whole process owing far more to compromise and negotiation.⁶²

Defining pre-trial 'silence' for empirical analysis: More important for the moment, however, is the distinctive definitional debate which is found in the empirical studies. Certainly, defining pre-trial 'silence' at the police station for this purpose has proved to be a complex undertaking. It is said that studies differ markedly in this respect and, consequently, in their estimates of the frequency of 'silence' in police interviews. The main difference, according to David Brown of the Home Office, has been the way in which 'selective non-response to questions has been categorised', so much so that a strong 'health warning' is needed where refusal to answer *some* questions is included as an exercise of the right to silence without further explanation. In an overview of the literature, Brown notes among other things that: studies generally have not categorised 'ambush defences' as the exercise of silence (where a suspect fails to mention a matter on which he/she subsequently relies in his/her defence); some studies have treated evasive replies as silence, although a trial court would not do so; and some studies have treated denials of involvement in an offence without further explanation as an exercise of the right to silence, whereas in other studies it is not clear how such responses are treated.⁶³

An interesting account of the definitional problems involved in the study of the exercise of the right to silence is found in Robert Leng's work on behalf of the 1993 Royal Commission on Criminal Justice (UK). In that study the extent of reliance on the right to silence during police interviews was calculated by identifying cases in which:

⁶² D Dixon, *Law in Policing: Legal Regulation and Political Practices*, Clarendon Press, forthcoming 1997, p 265.

⁶³ D Brown, *PACE Ten Years On: A Review of the Research*, Home Office Research and Statistics Directorate, 1997, pp 168-169.

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- the suspect refused to answer all substantial questions;
 - the suspect answered some questions but persisted in refusing to answer some substantial questions relating to his or her own involvement;
 - the suspect denied the offence and did not disclose any ground of defence, having been given a reasonable opportunity to do so, where such a defence was later raised in court or indicated in pre-trial negotiations;⁶⁴ and
 - the suspect denied the offence but failed or refused to give an explanation for a particular incriminating fact, where he was clearly invited to give such an explanation.⁶⁵

On the other hand, the same study discounted the following circumstances for the purpose of calculating the extent of reliance on the right to silence:

- where suspects initially refused to answer some questions but answered all substantial questions before the termination of the interview or interviews;
- where the suspect refused to answer questions substantially the same as earlier questions which he or she had already answered; and
- where the suspect answered questions relating to his own involvement but refused to answer questions relating to the involvement of others.⁶⁶

Another account of the definitional difficulties involved for empirical research is offered by David Dixon. He notes that it can be misleading to describe the silence of a suspect

⁶⁴ R Leng, *The Right to Silence in Police Interrogation*, The Royal Commission on Criminal Justice, HMSO 1993, p 15. Leng notes that the suspect was considered to have exercised the right to silence only where the defence raised in court depended upon either, evidence which the defendant had a reasonable opportunity to mention to the police, or on some positive assertion (eg that the defendant had been under duress) which had not previously been made by the defendant. Cases were not included in the study where the defence in court was based on simple denial, consistent with denial at interview, coupled with testing the prosecution case.

⁶⁵ Ibid. Leng explains that the term 'particular incriminating fact' was taken to mean either: a situation in which the accused was found in possession of an incriminating object (for example, a firearm or suspected stolen goods); or where an incriminating substance (for example blood) or mark (a bruise or rip, for instance) was found on the suspect's person or clothing; or a situation in which the accused was found near the scene of a suspected crime. This approach was consistent with that adopted under the Criminal Evidence (Northern Ireland) Order 1988 and, subsequent to Leng's study, in the English *Criminal Justice and Public Order Act 1994*. However, Leng acknowledged that it is questionable whether all cases in this category would necessarily involve an exercise of the right to silence, as for example where a suspect 'vigorously denied knowledge' of an incriminating mark on his or her clothing.

⁶⁶ Ibid, p 16.

as an exercise of a right when a range of subjective factors may be at issue, such as a simple inability to respond to police questioning 'for reasons of fear, vulnerability etc'. Dixon continues:

Indeed, it could be argued that an exercise of the right to silence can only be identified retrospectively, ie when a court refused to allow inferences to be drawn from a defendant's silence (or police or prosecutor abandoned a case in the expectation of such a refusal). What researchers study are, at best, attempts to exercise the right to silence, and these...can only be identified by subjective criteria.⁶⁷

Note that section 89 of the NSW *Evidence Act 1995* prohibits the drawing of an adverse inference where the accused (or another person) '*failed* or refused' to respond to a question(s) or representation. It would seem, therefore, to extend beyond the exercise of a positive right to pre-trial silence by way of a refusal to answer questions. This is because the section also covers the situation of a *failure* to respond which, as Dixon points out, may be due to subjective reasons not connected with the exercise of a right.

The question of reform: For the High Court the right to pre-trial silence is a fundamental common law right, the key elements of which have found statutory expression in the NSW *Evidence Act 1995*. However, there are other perspectives on the issue. For some the pre-trial right to silence is a weak right and though 'much acclaimed' it has been of little value to suspects in the police station.⁶⁸ For most people, it is said, the mental pressures generated by police interrogation and the fear that silence will be construed as an admission of guilt make it difficult for a suspect to insist on exercising the right in practice.⁶⁹

For its part the ALRC, in its 1987 report on *Evidence*, 'strongly supported' the approach that no adverse inferences should be permitted to be drawn from the exercise of the accused's pre-trial right to silence.⁷⁰ This contrasted with the conclusion it had reached two years earlier in its interim report where it had said that 'the court should not be prevented from drawing negative inferences from the failure of the accused to tell the police of an alibi or defence later advanced at the trial'.⁷¹ In 1974 the South Australian Criminal Law and Penal Methods Reform Committee had arrived at the same view, thus

⁶⁷ D Dixon, *Law in Policing: Legal Regulation and Political Practices*, Clarendon Press, Forthcoming 1997, p 262.

⁶⁸ AAS Zuckerman, 'The inevitable demise of the right to silence', *New Law Journal*, 5 August 1994, p 1104.

⁶⁹ AAS Zuckerman, *The Principles of Criminal Evidence*, Clarendon Press 1989, p 306.

⁷⁰ ALRC, *Report No 38, Evidence*, AGPS 1987, p97.

⁷¹ ALRC, *Report No 26, Interim - Evidence, Volume 1*, AGPS 1985, p li.

suggesting both the longevity and complexity of the debate at issue.⁷²

⁷² Criminal Law and Penal Methods Reform Committee of South Australia, Second Report, *Criminal Investigation*, Adelaide 1974, pp 100-107. The Committee recommended that a suspect should be cautioned that, if charged, 'an inference adverse to him may be drawn from his failure to answer any questions or from his failure to disclose at that stage any matter which may be material to his defence to the charge'. However, the Committee further recommended that the drawing of adverse inferences should only apply to questioning after the suspect had been cautioned.

3. THE RIGHT TO SILENCE IN ENGLAND AND WALES

Background to reform: In England and Wales the right to silence was curtailed under the *Criminal Justice and Public Order Act 1994*. This was the culmination of a long process of debate and agitation, reaching back to the early 1970s. Its starting point was the 1972 report of the Criminal Law Revision Committee (CLRC) which recommended that the law be amended to allow a court or jury to draw adverse inferences against an accused person if he or she had failed during the course of investigation to mention any fact later relied on by way of defence at committal proceedings or trial. In other words, counsel and trial judges would be permitted to draw inferences, including inferences of guilt from the suspect's exercise of his or her right to pre-trial silence. The adoption of a new caution was also recommended. Roger Leng explains that 'The effect of the proposed caution would be to advise the suspect that if he intended to rely upon a defence he should mention it at that stage. He would further be warned that if he were to hold back his defence until court, it would be less likely to be believed and that this might have a bad effect on his case in general'.⁷³ Silence at trial would also have been affected under these proposals, arising from the CLRC's recommendation that it should be possible to draw inferences against an accused person who had declined to give evidence in the face of a *prima facie* case against him.

In two public lectures in the early 1970s the Commissioner of Metropolitan Police, Sir Robert Mark, echoed the views of the CLRC when he stated the police case for altering the right to silence. He asserted that 'only a small proportion of those acquitted by juries are likely to be innocent in the true sense of the word' and that it was the professional criminal who was 'the very man likely to escape society's protective net'.⁷⁴

The debate came to life again in the 1980s, initially under the rubric of the Royal Commission on Criminal Procedure and, afterwards, in the light of the reform of police powers introduced under the *Police and Criminal Evidence Act 1984 (PACE)*. The Royal Commission's 1981 report laid the foundations for that Act and its majority recommendation was for retaining the right to silence in the face of police questioning. On the other hand, the minority took the view that it was right to expect reasonable questions to be answered by suspects before they were charged.

In the event, the right to silence was maintained at this stage but the debate was ignited again when, in 1987, the then Home Secretary, Douglas Hurd, raised the need for reform in his Police Foundation speech of that year. Crucial to the debate now was the perception in some quarters of the changing balance between police powers and the rights of the suspect as this operated under *PACE*. In effect, the trade-off here was that the police were granted more powers to question suspects, on one side, but that suspects had a right to free legal advice, on the other. One concern was that the process of criminal investigation was frustrated under this scheme in which lawyers advised their

⁷³ R Leng, *The Right to Silence in Police Interrogation*, p 2.

⁷⁴ Cited in ALRC, *Report No 2, Interim - Criminal Investigation*, AGPS 1975, p 68.

clients to remain silent.

Mr Hurd's speech was followed by the establishment of the Home Office Working Group on the Right to Silence in 1988, the role of which was to advise the Government as to the best means of removing the protection which the law gave to the accused person who ambushed the prosecution. However, before the Working Group's report was published, as a result of concerns about the high level of terrorism and racketeering the right to silence had been abolished for all offences in Northern Ireland, further to the Criminal Evidence (Northern Ireland) Order 1988. The Order enabled the courts to draw whatever inferences appear proper from the accused's silence in four sets of circumstances:

- if he/she fails to mention during questioning or upon charge any fact on which he/she later relies in his/her defence;
- if he/she refuses to be sworn or to answer any questions at trial;
- if he/she fails to explain to the police any objects, substance or marks upon his/her person or clothing or in his/her possession at the time of arrest; or
- if he/she fails to account for his/her presence at a particular place when arrested.⁷⁵

When the Home Office Working Group reported in 1989, with some modifications it supported the 1972 recommendations of the CLRC. In effect, the proposal was narrower in scope to that operating at the time in Northern Ireland in that it would not have permitted inferences to be drawn from an accused person's failure to account for any objects, substance or marks upon his/her person or clothing or in his/her possession at the time of arrest.

In another twist to the story, before any action could be taken on the Working Group's recommendations, the right to silence became an issue in certain miscarriages of justice cases, including the Guildford Four case. Instead of implementing the proposed reforms, in 1991, on the day that the Birmingham Six had their convictions quashed, the Government established the Royal Commission on Criminal Procedure which was asked to look again at the question of the right to silence. The Royal Commission reported in 1993, with the majority recommending no change to the pre-trial right of silence, stating:

The majority of us...believe that the possibility of an increase in the convictions of the guilty is outweighed by the risk that the extra pressure on suspects to talk in the police station and the adverse inferences invited if they do not may result in more convictions of the innocent.⁷⁶

⁷⁵ Home Office, *Report of the Working Group on the Right of Silence*, 13 July 1989, pp 21-25.

⁷⁶ The Royal Commission on Criminal Justice, *Report*, Cm 2263, HMSO July 1993, p 54.

The English Criminal Justice and Public Order Act 1994: Against this advice, the British Government passed legislation in 1994 curtailing both the right to pre-trial silence and silence at trial, a decision described by Professor Michael Zander (who was a member of the Royal Commission on Criminal Justice) as verging on ‘the unconstitutional’.⁷⁷ Moreover, the legislative scheme adopted by the Government was based on the broader Northern Ireland model, as against the narrower approach preferred by the Home Office Working Group.

In summary, the *Criminal Justice and Public Order Act 1994* provides that a court may draw such inferences as appear proper to it in circumstances where the accused:

- fails, either during questioning under caution or on being charged, to mention any fact relied on in his/her defence, such fact being one which, in circumstances existing at the time, the accused could reasonably have been expected to mention (section 34);
- fails to account to police for the presence (or in the case of clothing or footwear, the condition) of objects, substances or marks on his/her person or in his/her possession or on the premises where the accused was found (section 36);
- fails to account for his/her presence at a particular place at around the time that the crime was committed, where a constable reasonably believes that the presence may be attributable to the participation of the accused in the commission of the offence (section 37);
- fails to give evidence or to answer questions at trial (section 35(3)).

Under section 35(3), therefore, the right to silence *at* trial is compromised, at least in the secondary sense that its exercise may result in the drawing of an adverse inference. However, the Act attempts to salvage the primary right to silence at trial by expressly preserving the accused’s right not to testify (section 35(4)). To that extent the right to silence is untouched.⁷⁸ The qualification is that the Act ‘indirectly puts pressure on the

⁷⁷ M Zander, ‘Abolition of the Right to Silence, 1972-1994’ from *Suspicion and Silence: The Right to Silence in Criminal Investigations*, edited by D Morgan and GM Stephenson, Blackstone Press Ltd 1994, pp 145-146. Zander states that the issue is ‘exceptional’ in this regard, being one ‘of fundamental principle on which opinion is sharply divided’. In formal terms there was no requirement for the Government to adopt the view of the Royal Commission, arrived at by a majority of 8 to 3. However, for Zander it is ‘quintessentially the kind of issue on which the view of a Royal Commission is valuable’.

⁷⁸ It has been said that the Act restricts rather than ‘formally abrogates’ any common law rule relating to the evidential effect of silence - I Dennis, ‘The Criminal Justice and Public Order Act 1994: The evidence provisions’ (1995) *Criminal Law Review* 4. See also - S Nash, ‘Silence as evidence: a commonsense development or a violation of a basic right?’ (1997) 21 *Criminal Law Journal* 145.

suspect to speak to the police and later to give evidence'.⁷⁹

Of section 34 of the Act it has been said that this allows for more than just the rejection of a late defence, for non-disclosure may be used as evidence of guilt or of a consciousness of guilt. Rosemary Pattenden has commented in this respect, 'Silence becomes an evidential ply-filler for cracks in the wall of incriminating evidence which the prosecution has built around the accused'. She adds that, as far as sections 34, 36 and 37 are concerned (the sections dealing with the right to pre-trial silence), the accused's silence 'can be treated as one of a number of items of evidence upon which the Crown relies to establish a *prima facie* case and at the end of the trial it may augment the prosecution's case'.⁸⁰ Of section 35 (silence at the trial) Pattenden states, 'the prosecution must adduce sufficient evidence for a strong *prima facie* case independently of any inferences arising from the accused's failure to give evidence: once this is done the accused's absence from the witness box may enable the prosecution to overcome any shortfall in the case'.⁸¹

The new caution: Complementing the above changes, a new caution has been introduced in England and Wales which states: 'You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence'. Critics have said that this has transformed the caution 'from warning to threat'.⁸²

The European Court of Human Rights and the right to silence: It remains the case that the 1994 Act leaves it to the courts to decide when it is proper to draw adverse inferences in any of the circumstances set out in sections 34-37.⁸³ A key issue, then, is how will the courts exercise their discretion in this regard? Of interest in this context is the decision of the European Court of Human Rights in *Murray v United Kingdom*.⁸⁴ The case involved the exercise by the trial judge of his discretion to draw adverse inferences from the exercise of the right to silence under the Criminal Evidence (Northern Ireland) Order 1988. Murray was arrested on 7 January 1990 in a house in which a Provisional

⁷⁹ R Pattenden, 'Inferences from silence' (1995) *Criminal Law Review* 602.

⁸⁰ Ibid, p 607.

⁸¹ Ibid, p 611. Pattenden notes that the application of these provisions entails three overlapping stages for the courts. The courts must consider: (i) whether inferences can be drawn from silence; (ii) whether inferences should be drawn from silence; and (iii) if a decision to draw inferences is taken, 'what their nature, extent and degree of adversity...may be' (at p 603).

⁸² D Dixon, *Law in Policing: Legal Regulation and Political Practices*, forthcoming Clarendon Press 1997, p 228.

⁸³ For a discussion of recent cases see - S Nash, 'Silence as evidence: a commonsense development or a violation of a basic right?' (1997) 21 *Criminal Law Journal* 145.

⁸⁴ (1996) 22 EHRR 29; *The Times*, 9 February 1996.

IRA informer had been held captive. The trial judge drew adverse inferences from the fact that Murray failed to offer an explanation for his presence at the house and had remained silent during the trial. Thus, the right to silence pre-trial and at trial were a t issue.

The European Court of Human Rights had decided in *Funke v France*⁸⁵ that the general fair trial guarantee in Article 6 (1) of the European Convention on Human Rights implicitly protected the right to silence and the privilege against self-incrimination.⁸⁶ That interpretation was confirmed in *Saunders v UK*,⁸⁷ a case concerning the powers of Department of Trade and Industry investigators under the UK *Companies Act 1985*.⁸⁸ The Court is reported to have stressed ‘that the right not to incriminate oneself, like the right to silence, was a generally recognised international standard which lay at the heart of the notion of fair procedure under Article 6 of the Convention’.⁸⁹ However, the Court had also accepted in *Funke* that ‘the right may not be unqualified’,⁹⁰ this being the key issue in the later case of *Murray*.

In *Murray* the Court found that the right to silence was not absolute in nature. It accepted, at one extreme, that a conviction could not be based ‘solely or mainly on the accused’s silence’ but said that, at the other end of the spectrum, the right should not prevent the accused’s silence, ‘in situations which clearly called for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution’. In appropriate circumstances, therefore, silence could be taken into account in assessing the weight of other evidence. *Murray* was a case in point. Here the Court noted that the drawing of adverse inferences from silence could involve ‘indirect pressure to give evidence’ but added that, on the other side, the scheme under the 1988 Order was subject to an important series of safeguards, including the issuing of appropriate warnings concerning the legal effects of maintaining silence. It cited with approval the view of the House of Lords that the prosecutor had first to establish a prima facie case against the accused and concluded that, against that background, that the drawing of reasonable inferences did not have the effect of shifting the burden of proof from the prosecution to the defence so as to infringe the principle of the presumption of

⁸⁵ (1993) 16 EHRR 297.

⁸⁶ Article 6(1) of the Convention provides: ‘In the determination of...any criminal charge against him, everyone is entitled to a fair...hearing...by an independent and impartial tribunal...’.

⁸⁷ *The Times*, 18 December 1996.

⁸⁸ Ernest Saunders, Guinness chairman during the Distillers’ takeover bid, complained that the use at his criminal trial of transcripts of interviews with the Department’s inspectors violated Article 6 of the Convention.

⁸⁹ *The Times*, 18 December 1996.

⁹⁰ J Michael and B Emmerson, ‘The right to silence’ (1995) 1 *European Human Rights Law Review* 1 at 12.

innocence.⁹¹

The sting in the tail of the Court's decision was that it then went on to consider the question of the accused's access to a lawyer, notably 'at the initial stages of police interrogation'. Again, it did not suggest that the requirement was absolute, the question being whether the restrictions on the availability of legal advice, 'in the light of the entirety of the proceedings, had deprived the accused of a fair hearing'. In *Murray* the Court decided that the denial of access to a lawyer during the first 48 hours of the accused's police detention was in breach of Article 6.⁹²

The direct implications of *Murray* are limited to Northern Ireland. This is because the detention of suspects in England and Wales is regulated under the *Police and Criminal Evidence Act 1994* which incorporates a right to legal advice.⁹³ However, Dixon poses the question:

What...of the suspect who does not request legal advice or who is questioned before a legal adviser arrives? *A fortiori*, what of the suspect who refuses to answer or inadequately answers questions outside the police station?...*Murray* seems to suggest that inferences should only be drawn from silence by a suspect who has received legal advice.⁹⁴

While that may overstate the position somewhat, it does suggest that the European Court of Human Rights will scrutinise very carefully those situations where adverse inferences have been drawn from the exercise of the right to silence in circumstances where legal advice was not available as of right.

Australian comparisons: Drawing implications for Australia from overseas experience is always a difficult undertaking. Having regard to the *Murray* decision under the European Convention and the High Court's ruling in *Petty*, Dixon suggests that 'In both Australia and Europe, future discussion of the right to silence will have a significant constitutional context'.⁹⁵ Yet, it remains the case that the High Court's decisions in this field are based on a common law view of a fair trial which, presumably, could be set

⁹¹ (1996) 22 EHRR 29 at 42-47.

⁹² Ibid at 47-48. Specifically, Article 6, paragraph 1 of the Convention, taken in conjunction with paragraph 3(c).

⁹³ Section 58. The right relates to 'A person arrested and held in custody in a police station or other premises...'.

⁹⁴ D Dixon, *Law in Policing: Legal Regulation and Political Practices*, forthcoming Clarendon Press, 1997, p 259.

⁹⁵ Ibid. Note that Britain's new Labour Government has said it will incorporate the European Convention on Human Rights into domestic law - 'The European Convention on Human Rights' (July 1997) *The Criminal Law Review* 461.

aside by State legislation.⁹⁶

A further point to make is that, in contrast to the situation in England and Wales, a right to legal advice is present in NSW and other Australian jurisdictions. Suspects have no substantial rights to legal advice. Moreover, that right is not a feature of the recent legislative reform introducing a regulated scheme in relation to police powers of detention after arrest. However, that Act does expressly provide that it would not affect the right to remain silent.⁹⁷

In any event, the points of comparison and difference need to be borne in mind when reference is made to overseas evidence and experience.

4. KEY ISSUES AND QUESTIONS IN THE DEBATE

The various accounts concerning the pre-trial right to silence have defined the substantive issues and key questions involved in the debate in different ways. For example, the New Zealand Law Commission defined three main threshold questions which correspond to the principal justification for the right to silence generally:

- is the right of silence an essential corollary of the presumption of innocence?
- does the right to silence protect the guilty or the innocent?
- does the right of silence protect against unwarranted State intrusion into private lives?⁹⁸

Further to the specific question of whether the right protects the innocent or the guilty, David Morgan and Geoffrey M Stephenson say that the substantive issues in the debate are whether:

- pre-trial silence is an indication of guilt?
- would altering the pre-trial right to silence place innocent suspects at greater risk of wrongful conviction?

⁹⁶ Query whether this could be affected by the decision in *Kable* (1996) 138 ALR 577. The decision barred State courts that exercise federal judicial power from being invested with functions which are incompatible with that power. The possible implications of the case for implied due process rights, including such criminal due process rights as the privilege against self-incrimination, are noted in - G Griffith, *The Kable case: implications for New South Wales*, NSW Parliamentary Library, Briefing Paper No 27/1996.

⁹⁷ Crimes Amendment (Detention after Arrest) Bill 1997 (proposed section 356B (2)). The Bill was passed by both Houses of the NSW Parliament on 27 June 1997. For a detailed commentary on the Bill see - G Griffith, *Police Powers of Detention after Arrest*, NSW Parliamentary Library Briefing Paper No 8/1997.

⁹⁸ NZLC Discussion Paper, p 13.

- conversely, would altering the right lead to the proper conviction of more guilty offenders?⁹⁹

In terms of the debate in England in recent years, as well as the empirical research which has accompanied it, a key issue has been the relationship between legal advice and the exercise of the right to silence. As noted, the right to free legal advice is a feature of the regulated scheme under the *Police and Criminal Evidence Act 1984*. This has led researchers to ask such questions as: in what circumstances do legal advisers recommend silence, and does legal advice to suspects inevitably constitute a hindrance to investigating officers?¹⁰⁰

In fact the legal advice issue has also found its way into the contemporary Australian debate,¹⁰¹ with the qualification of course that the statutory position as regards the availability of effective legal advice is quite different with respect to England and the various Australian jurisdictions. One viewpoint is that, if the introduction of a full right to legal assistance did result in a significant increase in the exercise of the right to silence, this would be against the public interest.¹⁰²

A further key issue, which has been touched upon already, refers to the relationship between the primary meaning of the right to silence in the face of police investigation and its incidental or secondary meanings. In particular, the question is asked whether the drawing of adverse inferences from silence, or the requirement to disclose a defence later relied on at trial, would have the effect of undermining the primary right not to talk to the police. As the European Court of Human Rights suggested in *Murray*, this could involve 'indirect pressure' to give evidence.¹⁰³ As noted, a similar if more forthright view was taken by the High Court in *Petty*.

One other important question concerns the identity of the protagonists in the debate - the individuals and organisations arguing for change and those against. From an English perspective, the Royal Commission on Criminal Justice reported in this regard that amending the right to silence was strongly supported by the police service, the Crown Prosecution Service and the majority of judges who gave evidence before the Commission. On the other side, change was opposed by the Bar Council, the Law

⁹⁹ D Morgan and GM Stephenson eds, *Suspicion and Silence: The Right to Silence in Criminal Investigation*, Blackstone Press Ltd 1994, p 7.

¹⁰⁰ D Dixon, 'Politics, research and symbolism in criminal justice: the right to silence and the Police and Criminal Evidence Act' (1991) 20 *Anglo-American Law Review* 27 at 42.

¹⁰¹ M Findlay, S Odgers and S Yeo, *Australian Criminal Justice*, Oxford University Press 1994, p 64.

¹⁰² *Ibid*, p 63.

¹⁰³ (1996) 22 EHRR 29 at 45. As discussed, in *Murray* the drawing of adverse inferences was not held to be in breach of the European Convention in an absolute sense.

Society and the Criminal Bar Association.¹⁰⁴

From this it can be said that, in some quarters at least, there is a tendency to view the right to silence debate as something of a question of balance, that is, between police powers on one side and individual rights on the other. In particular, the tendency is to construct the issue in terms of a trade-off between powers and rights, so that, as police powers are seen to be curtailed by the introduction of a right to legal advice for example, it is argued that the consequent imbalance needs to be corrected by such measures as the abolition of the right to silence. Whether that is an appropriate approach to the matter is a key question in itself. One result is that the right comes to be used as a football in a political debate, an issue which is considered in the next section of this paper. A better approach may be to determine, on the basis of sound empirical evidence, whether the right to silence serves a useful purpose or not and to act (or refrain from acting) accordingly. But, then, it is likely that empirical evidence alone will not answer all the issues at stake here. Almost inevitably the debate must return at the end to the big questions of principle and policy.

A related question is that the emphasis on statistical evidence - the numbers game - can encourage what Roger Leng calls 'the simplistic argument' that the more people use the right to silence, the stronger the case for abolition.¹⁰⁵ The suggestion seems to be in some quarters that the right is fine so long as hardly anyone actually uses it. In effect that raises the question as to whether the right to silence is in the public interest, which again returns the debate to matters of principle and policy.

Moreover, should a special case be made for the pre-trial right to silence in this regard? Suzanne McNicoll has suggested as much, arguing that there is a 'marginally stronger case for protecting the suspect's pre-trial right of silence than the right of silence at the trial because by the time the trial begins, the accused knows he or she has a case to answer, is in no danger of undue police pressure and would probably have had the benefit of legal advice'.¹⁰⁶

Often, in the High Court and beyond, the right to silence is taken to be an indispensable mark of an adversarial and accusatorial legal system, as opposed to an inquisitorial one. Is this a helpful approach, ask Aronson and Hunter? Does it suggest a failure to articulate the 'policy and practical reasons' for and against the right in question?¹⁰⁷ With this comment the debate takes on its widest implications, reaching both the question of the appropriateness of certain forms of legal reasoning, as well as the nature of the criminal justice system itself.

¹⁰⁴ Royal Commission on Criminal Justice, *Report*, Cm 2263, July 1993, p 50 and p 52.

¹⁰⁵ R Leng, 'The right to silence debate' from *Suspicion and Silence* edited by D Morgan and GM Stephenson, p 22.

¹⁰⁶ SB McNicoll and D Mortimer, *Evidence*, p 150.

¹⁰⁷ M Aronson and J Hunter, *Litigation: Evidence and Procedure*, Fifth Edition, p 332.

5. AN OVERVIEW OF EMPIRICAL FINDINGS CONCERNING THE RIGHT TO PRE-TRIAL SILENCE

Definitional and methodological problems: It should be emphasised that research on the right to silence is characterised by certain definitional and methodological problems. Some of the definitional issues have been discussed already. The general point to make is that it was only in those studies carried out on behalf of the Royal Commission on Criminal Justice, notably in the work of Roger Leng on one side and Mike McConville and Jacqueline Hodgson on the other, that ‘silence’ came to be understood as a problematic concept requiring very precise definition. As noted, Leng arrived at a more restrictive definition of significant silence, one that excluded refusals to answer questions not relevant to the investigation, as well as those cases where a suspect answers particular questions, having initially refused to do so. In relation to this more restrictive approach to definition, Leng suggested that most of the 1993 studies would have ‘overestimated the extent of silence’.¹⁰⁸

One methodological problem noted by David Brown in a paper prepared for the Home Office in 1997¹⁰⁹ concerns the reliability of much of the data used in some studies, notably those depending on police officers to record and return information. Brown notes that ‘the highest estimates of silence have generally come from studies where police interviewing officers have been the source of information’.¹¹⁰ The size and representativeness of the sample of cases used in studies is another important issue discussed by Brown, as is the fact that the research spans a considerable time period in which legal and other developments may have influenced the behaviour of suspects in police interviews. His argument is that research has not been conducted against a ‘static background’.¹¹¹ Obviously, in the English context the landmark developments are those associated with the introduction of *PACE*.

Five questions: While bearing such considerations in mind, it can be said that empirical studies in England and Wales have concentrated on five key issues. These are: (i) how often is the right to silence exercised? (ii) has the introduction of free legal assistance increased the use of the right to silence? (iii) who exercises the right to silence? (iv) do those exercising the right gain a clear advantage in terms of the outcome of their case? and (v) how prevalent is the use of ambush defences?

How often is the right to silence exercised? Studies have produced widely varying estimates of the use by suspects of the right to silence in police interviews. According

¹⁰⁸ R Leng, ‘The right to silence debate’ from *Suspicion and Silence* edited by D Morgan and GM Stephenson, p 24.

¹⁰⁹ D Brown, *PACE ten years on: a review of the research*, Home Office 1997, pp 167-186.

¹¹⁰ *Ibid*, p 182. Brown’s concern is that, at the time the studies were conducted, ‘the police may well have had a vested interest in exaggerating the extent of silence in order to secure legal curtailment of the right [to silence]’.

¹¹¹ *Ibid*, p 171.

to Brown, this is a result of ‘differences in their methods, geographical coverage, definition of “silence” and the date when they were conducted’.¹¹² Likewise, Roger Leng observed in 1994 that estimates have varied in the more authoritative studies between 5 per cent and 23 per cent; Leng suggests that the variation ‘reflects differences in sampling and methodology rather than divergences in practice’.¹¹³ Almost inevitably the contrasting results have been the subject of considerable controversy and academic comment.

Most studies have found that the right is exercised in relatively few cases, although (as discussed below) the proportion may have increased in recent years. For example, in 1979 Zander examined the case papers for a sample of 282 cases tried at the Old Bailey and found that 12 defendants (4 per cent) had relied on the right to silence. Of these 9 were convicted. Other pre-*PACE* studies tended to confirm this result. In 1980 Baldwin and McConville examined the case papers for 1000 cases heard in the Birmingham Crown Court and 476 cases drawn from various Crown Court centres in London. They found that no statement was made by the accused in 3.8 per cent of the Birmingham sample and 6.5 per cent of the London sample. Mitchell’s 1983 study of 400 cases tried at Worcester Crown Court arrived at a similar result, with 4.3 per cent of defendants exercising the right to silence.¹¹⁴ As Brown states, the value of such studies is limited by the fact that they all related to ‘particular sub-groups of suspects’.¹¹⁵ To this Leng adds the warning comment that in the Baldwin and McConville study, for example, the figures could not be said to represent the extent of silence in the two samples, ‘since they include cases where no interview took place and exclude cases in which the defendant was silent in relation to some questions only’.¹¹⁶

Another pre-*PACE* study by Softley in 1980 for the Royal Commission on Criminal Procedure, drawing on interviews with 187 suspects at four police stations, found that 4 per cent refused to answer all questions ‘of substance’ and 8 per cent refused to answer some questions, making a total of 12 per cent exercising their right to silence. In a study conducted in the same year, this time based on 60 suspects at Brighton police station, Irving found that 8 per cent refused to answer questions at all or refused to answer all questions of substance.¹¹⁷ In anticipation of *PACE* the Home Office conducted field trials in 1984-85 primarily designed to assess the impact of tape recording on interviews with

¹¹² Ibid, p 185.

¹¹³ R Leng, ‘The right to silence debate’ from *Suspicion and Silence* edited by D Morgan and GM Stephenson, p 23.

¹¹⁴ R Leng, *The Right to Silence in Police Interrogation*, pp 10-11. Leng presents an overview of the research conducted before 1993.

¹¹⁵ D Brown, *PACE Ten Years On*, p 171.

¹¹⁶ R Leng, *The Right to Silence in Police Interrogation*, p 11.

¹¹⁷ D Brown, *PACE Ten Years On*, p 171.

suspects. These trials found that in the three areas under study no evidence resulted from the interview in 4 per cent, 3 per cent and 2 per cent of cases respectively.¹¹⁸

As for the use of the right to silence since the introduction of *PACE*, David Brown states that estimates have ranged from 6 per cent up to 22 per cent.¹¹⁹ At the lower end of the spectrum is Leng's work for the Royal Commission on Criminal Justice which found that suspects relied on the right in 4.5 per cent of cases in which interviews were held; in a further 1.3 per cent, the suspect was silent at some stage of the interview but did not ultimately rely on the right.¹²⁰ The Royal Commission itself adopted estimates that silence is exercised by between 6 and 10 per cent of suspects in the provinces and between 14 and 16 per cent in the Metropolitan district, figures which were used in support of retaining the pre-trial right to silence.¹²¹

At the higher end of the spectrum are the two studies relied on by the Home Office Working Group in 1989 in support of curtailing the right to pre-trial silence. The first, based on 10 Metropolitan Police divisions in 1987, was conducted by Superintendent Tom Williamson and its key conclusion was that 23 per cent of interviewees exercised their right to silence in one form or another. The second was carried out by the West Yorkshire Police in 1988 and it concluded that 12.3 per cent of interviewees exercised their right to silence in one form or another. However, both studies have been the subject of considerable criticism, the force of which has been acknowledged by Williamson.¹²² Subsequently, in a more rigorous study Williamson and others reported a 'silence rate' of 16 per cent in interrogations by detectives.¹²³

Also at the higher end of the spectrum is the 1993 study conducted by the Association of Chief Police Officers (ACPO). The study was based on 8 forces in the South East of England returning data on 3,633 suspects. It found that 10 per cent of suspects refused to answer all questions and 12 per cent refused to answer some questions, although it is

¹¹⁸ R Leng, *The Right to Silence in Police Interrogation*, p 11.

¹¹⁹ D Brown, *PACE Ten Years On*, p 172.

¹²⁰ R Leng, *The Right to Silence in Police Interrogation*, p 20.

¹²¹ The Royal Commission on Criminal Justice, *Report*, Cm 2263, p 53. The Commission noted that the use of the right may be higher in more serious cases which go for trial at the Crown Court.

¹²² R Leng, *The Right to Silence in Police Interrogation*, pp 12-13. For example, the studies gave a misleading impression of the number of suspects relying on silence because the sample consisted of individual interviews rather than all interviews conducted with the suspect during a single period of detention.

¹²³ D Dixon, *Law in Policing: Legal Regulation and Political Practices*, p 233. Leng comments that the findings of Moston, Stephenson and Williamson are 'difficult to interpret', in part because it is not clear that the questionnaire used in the study was designed in order to really identify genuine silence cases: R Leng, *The Right to Silence in Police Interrogation*, p 14.

not known whether this includes temporary, incidental or nominal refusals.¹²⁴ Similar conclusions were arrived at in a study carried out in late 1993 and early 1994 by Phillips and Brown which used data from a sample of over 2000 cases from ten police stations. In the study, police officers completed a pro forma for each case in which they carried out interviews, providing details of the extent and nature of refusals to answer questions. They found that 10 per cent of suspects refused to answer all questions and 13 per cent refused to answer some questions. At the two stations sampled in the Metropolitan Police, an average of 32 per cent of suspects refused to answer some or all questions.¹²⁵ On this basis, and having regard to the fact that suspects are now more aware of their rights, Brown has stated that 'The implication is that more suspects are now exercising their right of silence than at the time the other post-PACE studies were undertaken'. To this Brown adds:

Another reason for believing that silence is now exercised more often is that the ACPO and Phillips and Brown figure for refusal to answer *all* questions is at 10 per cent, considerably higher than all previous estimates. It is reasonable to suggest that there is less scope for error or differences of interpretation by those collecting data in relation to a complete refusal to answer questions.¹²⁶

Dixon has endorsed that conclusion, noting that Brown 'appears justified in suggesting that silence has increased since the early post-PACE studies as suspects have become more aware of their rights'.¹²⁷

Has the introduction of free legal assistance increased the use of the right to silence?

This is an interesting but complicated issue which has received considerable attention in England in recent years. The issue has also found its way into the Australian debate and this is in the absence of a right to free legal advice in this country. It is explained later in the paper that in Australia a version of exchange abolitionism has been formulated by Stephen Odgers who proposed a 'compromise' approach in which inferences from silence could only be drawn if a 'lawyer representing the suspect was present during interrogation and the police had reasonable grounds for questioning the suspect'.¹²⁸

In his overview of the research Brown states that since the introduction of *PACE* several studies have suggested that there is an association between receipt of legal advice and

¹²⁴ D Brown, *PACE Ten Years On*, p 174. Brown notes that the ACPO figures must be treated with 'some caution because there is insufficient information available about the study to assess the soundness of its methods' (p 175).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*, p 175.

¹²⁷ D Dixon, *Law in Policing: Legal Regulation and Political Practices*, p 235 (Fn 15).

¹²⁸ S Odgers, 'Police interrogation and the right to silence' (1985) 59 *ALJ* 78.

the exercise of the right to silence. Again the figures vary, with the 1993 ACPO study at the higher end of the scale, finding that no less than 57 per cent of those legally advised compared to 13 per cent of those not advised refused to answer some or all questions. Phillips and Brown arrived at a similar conclusion in 1994, with 39 per cent of suspects receiving legal advice refusing to answer some or all questions, compared with 12 per cent of suspects not advised by a lawyer. More modest results were reported by McConville and Hodgson in their work for the Royal Commission on Criminal Justice. They looked only at those cases in which suspects received legal advice and found that, of these, 30 per cent exercised their right to silence. Further down the scale again is the work of Moston and Stephenson from 1993 which found figures of 10 per cent for those receiving legal advice and 3 per cent for those who were not advised.¹²⁹

In the midst of these numbers some commentators have queried the ‘common sense’ view which assumes that suspects allowed access to legal advice will almost inevitably be advised not to answer police questions. For example, Dixon takes issue with that view by examining the activities of legal advisers at police stations and their effects on the way suspects respond to police questions. Without attempting to reproduce the detail of Dixon’s analysis, his argument can be encapsulated thus:

First, contrary to what ‘common sense’ tells us, advice to remain silent is not given as a matter of course when legal advisers attend police stations. Secondly, when such advice is given, any consequential silence may be a temporary, negotiating or sanctioning tactic rather than an entrenched position. Thirdly, silence may not be the result of legal advice.¹³⁰

Who exercises their right to silence? As noted, a long-running issue in the right to silence debate is whether the right is used primarily by professional criminals. This concern was particularly pronounced in the ACPO study cited above which purported to show that 47 per cent of suspects with five or more convictions exercise the right to silence, as against 15 per cent of suspects with no criminal record.¹³¹ Brown explains that the ACPO study also ties together the themes of criminal professionalism and crime seriousness by relating the rate of silence both to the number of previous convictions and the type of offence: ‘It was found that those with previous convictions were more likely to exercise their right of silence in serious offences. For example, those with five or more convictions remained silent in over 47 per cent of serious offences compared with 35 per cent of other offences’.¹³² The conclusion of the ACPO study was that the right to silence is, in reality, ‘a protection for hardened criminals’.

¹²⁹ D Brown, *PACE Ten Years On*, p 179.

¹³⁰ D Dixon, *Law in Policing: Legal Regulation and Political Practices*, p 236.

¹³¹ R Leng, ‘The right to silence debate’ from *Suspicion and Silence* edited by D Morgan and GM Stephenson, p 27.

¹³² D Brown, *PACE Ten Years On*, p 177.

It should be noted that Brown is not able to compare the ACPO findings with those of any other study, thus making their reliability hard to assess. Also, of these findings Leng has commented:

those with criminal records are far more likely to be arrested than other citizens and are the most likely to be arrested in circumstances where there is no objective evidence to link them to the offence. It is perhaps no surprise that the group of suspects who are most susceptible to repeated unjustified arrests are those most likely to exercise their right to silence.¹³³

Further, it may be reasonable to assume that, if the use of silence is more widespread in England and Wales in recent years and if this is indeed due to suspects becoming aware of their right under *PACE*, then the gap between the use of silence by professional criminals, on one side, and suspects generally, on the other, should become narrower. This is because professional criminals can be presumed to know their rights already, whereas other suspects are learning of theirs as the *PACE* regime develops.

Do those exercising the right gain a clear advantage in terms of the outcome of their case? If it is the case that professional criminals use 'silence' disproportionately, then the related question must be whether those exercising the right gain an advantage in terms of the outcome of their case. Reviewing the evidence in 1994 Professor Michael Zander offered the following conclusions:

- what determines whether a suspect is charged is mainly the strength of the prosecution's evidence;
- to the extent that silence in the police station has any impact on the police decision to charge, it makes a charge more rather than less likely;
- the great majority of defendants in both the Crown Court and the magistrates' court plead guilty, which from this point of view makes it academic whether they were silent in the police station; and
- suspects who are silent in the police station and who plead not guilty are found guilty about as often as suspects who were not silent in the police station.¹³⁴

On the same theme, Brown's overview in 1997 arrived at the following conclusions:

- police decisions whether to take no further action are largely unrelated to whether suspects have exercised their right of silence.

¹³³ R Leng, 'The right to silence debate' from *Suspicion and Silence* edited by D Morgan and GM Stephenson, p 27.

¹³⁴ M Zander, 'Abolition of the right to silence, 1972-1994' from *Suspicion and Silence* edited by D Morgan and GM Stephenson, p 148.

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- those who exercise that right are more likely to be charged than cautioned.
 - there appears to be no link between the use of silence and the decisions of the Crown Prosecution Service to discontinue cases.
 - those who plead not guilty at court are more likely to have refused to answer police questions than those who plead guilty; and
 - those pleading not guilty who have exercised their right of silence are less likely to be acquitted than other defendants.¹³⁵

When looking at what prompts suspects to remain silent, Brown suggests that the best explanation may be offered by Dixon who has characterised most instances of silence ‘either as an antagonistic refusal to co-operate by those hostile to the police or as an attempt to protect accomplices, but rarely as a reasoned strategy based on legal advice’.¹³⁶

How prevalent is the use of ambush defences? The leading research in this area was that conducted by Leng in 1993 on behalf of the Royal Commission on Criminal Justice. Leng defined the term ‘ambush defence’ to mean a defence which is raised for the first time at trial and of which the police or prosecution had no prior notice. He explains the concern that, by reserving his or her defence until trial, ‘the defendant gained an unnecessary and unfair advantage by depriving the police of the opportunity to investigate it and thereby disabling the prosecution from effectively refuting the defence in court’.¹³⁷ However, Leng found such concerns to be largely unfounded.

His study was based on 113 cases, of which 34 resulted in guilty verdicts on one or more charges after trial. In 54 cases the charges were dropped by the prosecution. In total there were 59 contested trials, resulting in 25 acquittals and 34 findings of guilt. Of these, there was only one clear case of an ambush defence, plus two other cases in which the prosecution claimed that there had been an ambush but this was contested by the defence. The problem, Leng concluded, was not so much one of ‘ambush defence’ but of ‘unanticipated defences’ not amounting to an ‘ambush’. As Brown explains:

Such defences sometimes involve challenges on points of law or procedure and, by their nature, are raised for the first time at court. Other defences are unanticipated because defendants are either not given an opportunity to raise them during interview or do so, but no attempt is made to investigate them further or no reference is made in the record of

¹³⁵ D Brown, *PACE Ten Years On*, p 186.

¹³⁶ *Ibid*, p 181.

¹³⁷ R Leng, *The Right to Silence in Police Interrogation*, p 45.

interview passed to the CPS [Crown Prosecution Service]. Leng argues that this problem is endemic in an adversarial system in which the police see their role as being to construct a case for the prosecution.¹³⁸

6. *ARGUMENTS IN FAVOUR OF RETAINING THE RIGHT TO PRE-TRIAL SILENCE*

Symbolic retentionism: From a philosophical standpoint the arguments in favour of retaining the right to silence in the face of police questioning have been categorised by Steven Greer as ‘symbolic retentionism’ or ‘instrumental retentionism’. Greer explains:

Symbolic retentionists would argue that the right to silence is of little real value to suspects but that it ought nonetheless to be retained because of its symbolic significance. *Instrumental retentionists*, on the other hand, maintain that the right to silence is a vital part of an accusatorial criminal justice process because it assists in the prevention of wrongful convictions.¹³⁹

Those who argue the case for symbolic retentionism do not suggest that the right to silence is only of symbolic importance. Indeed the more typical view of Dixon and others is that more empirical evidence is needed before a verdict for or against the right to silence is reached. In the meantime such commentators point out that, in the English context at least, ‘The right to silence is politically symbolic as the territory upon which the police seek to regain the political ground lost in PACE. It is therefore crucial as an issue which symbolizes police autonomy and professionalism’.¹⁴⁰ Greer expands on this line of reasoning in these terms:

The police have tended to regard PACE as implicitly criticising previous police activities and more broadly police professionalism, and as having imposed largely unwelcome constraints upon investigations. It is therefore no coincidence that their hostility towards the right to silence, based on prejudice and anecdote rather than systematic empirical evidence, has been the driving force in the abolitionist movement. The right of silence provides the territory upon which the police seek to regain the political ground lost in PACE.¹⁴¹

¹³⁸ D Brown, *PACE Ten Years On*, p 185.

¹³⁹ S Greer, ‘The right to silence: a review of the current debate’ (1990) 53 *The Modern Law Review* 709 at 719.

¹⁴⁰ D Dixon, ‘Politics, research and symbolism in criminal justice: the right to silence and the Police and Criminal Evidence Act’ (1991) 20 *Anglo-American Law Review* 27 at 34.

¹⁴¹ S Greer, ‘The right to silence: a review of the current debate’ (1990) 53 *The Modern Law Review* 709 at 724.

Instrumental retentionism: From the standpoint of instrumental retentionism, the major arguments include:

- ***the case for reform is not supported by empirical evidence:*** Against those who claim that the right to silence is abused or that it constitutes a significant problem for the criminal justice system, it is said that the evidence does not support such contentions. In fact it is said that most studies show that the right to pre-trial silence is invoked only in a minority of cases. Summing up its overview of the empirical evidence, the Royal Commission on Criminal Justice commented in its 1993 report: ‘There is no evidence which shows conclusively that silence is used disproportionately by professional criminals. Nor is there evidence to support the belief that silence in the police station leads to improved chances of acquittal. Most of those who are silent in the police station either plead guilty later or are subsequently found guilty’.¹⁴² While acknowledging the frustration felt by many police officers in this regard, the majority of the Commission doubted whether the possibility of adverse comment at trial would make the difference which the police suppose.¹⁴³
- ***there are several reasons for silence which are consistent with innocence.*** That much was conceded by the English Criminal Law Revision Committee in its 1972 report where it stated: ‘For example, the accused may be shocked by the accusation and unable at first to remember some fact which would clear him. Again, to mention an exculpatory fact might reveal something embarrassing to the accused.... Or he may wish to protect a member of his family’.¹⁴⁴ This view was restated by the ALRC in its 1985 report which added that the suspect may ‘believe that the investigating officer will distort whatever he says, so that the best policy is to say nothing and to stick rigidly to that policy’. In more general terms, in its overview of the debate the ALRC commented: ‘The theory underlying reliance on silence by a suspect to an accusation is that the normal human reaction would be to deny such accusation if untrue. But the truth of this generalisation turns on a number of factors, including the circumstances in which the accusation is made, by whom it is made, and the physical and psychological state of the suspect involved’.¹⁴⁵ It may be sensible to say nothing in circumstances where people are under stress, as they would be in the police station, and where ‘they probably do not know the full details of the case against them, have not had time to give careful thought to what happened, and are likely

¹⁴² The Royal Commission on Criminal Justice, *Report*, Cm 2263, July 1993, p 54.

¹⁴³ *Ibid.*

¹⁴⁴ Cited with approval in - ALRC, *Report No 2, Interim - Criminal Investigation*, AGPS 1975, p 65.

¹⁴⁵ ALRC, *Report No 26, Interim - Evidence, Volume 1*, AGPS 1985, pp 426-427.

to be disorientated'.¹⁴⁶

- vulnerable persons may be put at risk:*** The point is often made that many people accused of crime are not strong, intelligent or articulate and would be, therefore, in a particularly vulnerable position should they be threatened with adverse comment simply because they refused to answer police questions. These communication problems may even exist where the police questioning is 'scrupulously fair'.¹⁴⁷ In its 1993 report the UK Royal Commission on Criminal Justice note that members of ethnic or other minority groups may have particular reasons for concern in this respect. The Commission went on to say: 'It is now well established that certain people, including some who are not mentally ill or handicapped, will confess to offences they did not commit whether or not there has been impropriety on the part of the police. The threat of adverse comment at trial may increase the risk of vulnerable suspects making false confessions'.¹⁴⁸ On the same theme, Gisli Gudjonsson, Reader in Forensic Psychology at the University of London, has said: 'Abolishing the right to silence increases the complexity of decision making required by detainees. Considering that many detainees are of low intelligence this may place some at increased disadvantage in not being able to make informed decisions'.¹⁴⁹
- to draw adverse inferences from silence will force suspects to speak:*** One argument, noted by the European Court of Human Rights in *Murray*, is that the threat of drawing adverse inferences from silence could involve 'indirect pressure' on the suspect to give evidence.¹⁵⁰ The ALRC reported the related contention that 'While this may not be by itself a bad thing, the danger is that it will encourage officers to use techniques of psychological pressure upon the suspect. It is seen as naive to think that use of some of these techniques will not grow if official restraints against any interference with the suspect's free will to speak or not were removed'.¹⁵¹
- thus, to draw adverse inferences from silence will undermine the right to silence:*** In *Petty* the High Court put the argument in the strongest terms, stating that to draw adverse inferences 'would be to erode the right to silence or to

¹⁴⁶ D Feldman, *Civil Liberties and Human Rights in England and Wales*, Clarendon Press 1993, p 251.

¹⁴⁷ Ibid, p 427.

¹⁴⁸ The Royal Commission on Criminal Justice, *Report*, Cm 2263, July 1993, p 52.

¹⁴⁹ GM Gudjonsson, 'Psychological vulnerability: suspects at risk' from *Suspicion and Silence: The Right to Silence in Criminal Investigations* edited by D Morgan and GM Stephenson, p 104.

¹⁵⁰ (1996) 22 EHRR 29 at 44.

¹⁵¹ ALRC, *Report No 26, Interim - Evidence, Volume 1*, AGPS 1985, p 426.

render it valueless'.¹⁵²

- ***silence will be used to fill in the gaps in the incriminating evidence presented by the prosecution:*** In its 1993 the Royal Commission on Criminal Justice put it in these terms: 'If the right not to answer police questions were removed, adverse comment at the trial would enable a prosecution case which was otherwise too weak to secure a conviction to be strengthened in the minds of the jury by the implication that the defendant's silence automatically supported it'.¹⁵³
- ***in this the burden of proof would be weakened:*** This is especially the case, it is said, because any alterations to the right to silence will have their greatest impact where the prosecution's case is at its weakest, that is, in the absence of good forensic evidence, or reliable confessions or testimony from other witnesses. Greer contends that the advance disclosure of the defence case would weaken the prosecution's burden of proof still further. Of the Home Office Working Group's proposals, he states: 'What they in fact threaten is the penalisation of the defence if alterations are made to its case subsequent to pre-trial disclosure, but with no corresponding sanctions available against the prosecution'.¹⁵⁴
- ***the determination of guilt or innocence would be shifted from the courtroom to the police station:*** Leng and others argue that another consequence of altering the pre-trial right to silence would be to 'lend a new significance to police interviews since they would be a potential source of evidence whether or not the suspect answered or was silent'.¹⁵⁵ In this way increasing emphasis would be placed on the interview as the major technique of evidence collection and the police station itself would become the forum for deciding guilt or innocence. A related argument is that the police already rely too heavily on interrogation and confessions to obtain a conviction and that modifying the right to silence would only exacerbate that tendency.¹⁵⁶ On the other hand, the right to silence provides an incentive for other evidence to be sought by the police and subsequently adduced at trial.
- ***innocent suspects would be placed at greater risk of wrongful conviction :*** Those in favour of retaining the right to silence as it stands at present need not deny the possibility that it may assist some guilty persons to avoid conviction. For them the more telling argument is that altering the right to silence would

¹⁵² (1991) 173 CLR 95 at 99.

¹⁵³ The Royal Commission on Criminal Justice, *Report*, Cm 2263, July 1993, p 52.

¹⁵⁴ S Greer, 'The right to silence: a review of the current debate' (1990) 53 *The Modern Law Review* 709 at 725.

¹⁵⁵ R Leng, 'The right to silence debate' from *Suspicion and Silence: The Right to Silence in Criminal Investigation* edited by D Morgan and GM Stephenson, p 22.

¹⁵⁶ ALRC, *Report No 26, Interim - Evidence, Volume 1*, AGPS 1985, p 427.

increase the potential for the miscarriage of justice. Thus, in closing its review of the empirical evidence the Royal Commission on Criminal Justice concluded: 'it is possible that some defendants who are silent and who are now acquitted might rightly or wrongly be convicted if the prosecution and the judge were permitted to suggest to the jury that silence can amount to supporting evidence of guilt'. The majority of the Commission was of the view that, 'the possibility of an increase in the convictions of the guilty is outweighed by the risk that the extra pressure on suspects to talk in the police station and the adverse inference invited if they do not may result in more convictions of the innocent'.¹⁵⁷

7. **ARGUMENTS IN FAVOUR OF AMENDING THE RIGHT TO PRE-TRIAL SILENCE**

Utilitarian abolitionism and exchange abolitionism: The arguments in favour of amending the pre-trial right to silence have been categorised by Steven Greer as 'utilitarian abolitionism' and 'exchange abolitionism'. Of the two, exchange abolitionism may be the more significant for the contemporary debate. Unlike its utilitarian counterpart, which in its pure form would abolish the right to silence outright without replacing it with other safeguards, exchange abolitionism would argue for abolishing the right to silence in exchange for certain rights for suspects and accused persons. As Greer states, in the English context the main right argued for is the right to have a legal adviser present at police interviews.¹⁵⁸ As noted, in Australia that version of exchange abolitionism has been formulated by Stephen Odgers who proposed a 'compromise' approach in which inferences from silence could only be drawn if a 'lawyer representing the suspect was present during interrogation and the police had reasonable grounds for questioning the suspect'.¹⁵⁹

Another view is that of AAS Zuckerman's, a notable contributor to the debate in the UK. He would only accept that silence may be held against a suspect if he or she has been fully informed about what evidence the police have. Zuckerman comments, in the context of a largely critical review of the 1994 statutory changes in England and Wales, that 'by allowing inferences only from silence that follows the provision of adequate information to the suspect, the courts could ensure that the process of interchange in the police station, the give and take, is gradual and mutual'. His view is that the curtailment of the right to silence has 'created an opportunity to introduce fairness into the interrogation of suspects, where none existed before'. According to Zuckerman, the 1994 reforms in England did not seize that opportunity.¹⁶⁰ Nonetheless, the case is made

¹⁵⁷ The Royal Commission on Criminal Justice, *Report*, Cm 2263, July 1993, p 54.

¹⁵⁸ S Greer, 'The right to silence: a review of the current debate' (1990) 53 *The Modern Law Review* 709 at 719.

¹⁵⁹ S Odgers, 'Police interrogation and the right to silence' (1985) 59 *ALJ* 78.

¹⁶⁰ AAS Zuckerman, 'The inevitable demise of the right to silence', *New Law Journal*, 5 August 1994, pp 1104-1105.

for real protections as opposed to reliance on a largely illusory and fragile right.

However, it may be the case that exchange abolitionism is more significant for academic commentators than it is for the police and other contributors to the debate. As noted, it is said that part of the police argument in England on behalf of abolition centred on the right to legal advice under *PACE* and the need for a corresponding increase in police powers, an argument which is motivated by both symbolic and practical considerations.¹⁶¹ In any event, the more general point to make is that different and sometimes competing perspectives may be found within the case for the abolition or reform of the right to silence.

The arguments of the CLRC and the Home Office Working Group: The arguments for modifying the right to silence along the lines recommended by the 1972 Criminal Law Revision Committee (CLRC) and the Home Office Working Group seventeen years later have been identified as follows:¹⁶²

- ***it is natural to defend oneself against an allegation made by a person in authority:*** Failure to do so is therefore suggestive of guilt, in the absence of some explanation. In Bentham's famous aphorism, 'Innocence claims the right of speaking, as guilt invokes the privilege of silence'.¹⁶³
- ***professional criminals use silence to avoid justice:*** A significant number of criminals avoid being charged or, if charged, avoid conviction by remaining silent at interview. The police are thereby deprived of the investigative opportunities presented by interview.
- ***professional criminals use ambush defences to avoid justice:*** A significant number of criminals escape conviction by not disclosing their defence to the police and then ambushing the court at trial by producing a new defence which the prosecution is in no position to refute. Conversely, it is an advantage to the police and the prosecution that any defence is raised in the course of interview, thereby permitting the defence to be tested at interview and allowing for further investigations to confirm or refute any defence raised.
- ***the innocent suspect is adequately protected by legal safeguards:*** Under the regulated regime established under *PACE*, modifying the right to silence would

¹⁶¹ D Brown, *PACE ten years on: a review of the research*, Home Office 1997, p 167.

¹⁶² This account is based on the overview set out in R Leng, *The Right to Silence in Police Interrogation: A study of Some of the Issues Underlying the Debate*, HMSO 1993, pp 4-5.

¹⁶³ Note that Bentham was speaking only of silence at trial and not of pre-trial silence. The famous remark from the 1825 *Treatise on Evidence* reads - 'If all criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it. Innocence claims the right of speaking, as guilt invokes the privilege of silence'.

carry no substantial risks for the innocent suspect who is adequately protected by other safeguards, notably the access to legal advice in the police station.

- ***otherwise recalcitrant suspects would be encouraged to assist the police in their enquiries:*** If a new caution were introduced, informing suspects that if they do not answer police questions they would be less likely to be believed and that it could have a bad effect on their case, then suspects who would otherwise exercise their right to silence would be more likely to answer police questions and disclose any defence they wished to raise. A more efficient system of criminal justice would thus be achieved.

Other arguments: Further arguments in favour of amending the right to silence can be said to include:

- ***it is in the public interest that suspects answer police questions:*** Thus, while assuming the introduction of a full right to legal assistance, Findlay, Odgers and Yeo argue, ‘It is in the public interest that a suspect answer police questions, provide any explanations and, where guilty, confess. Just because some suspects choose to say nothing does not mean we should establish a system which encourages every suspect to do the same. There can be little doubt that the right to silence, in its various manifestations, has served important functions in civilizing questioning of individuals by the state. But if there are other ways to achieve these goals without incurring the disadvantages, we should consider modification of the right’.¹⁶⁴ The assumption here is that there is a duty to help the police in solving crimes and it may be that, with proper safeguards, the public interest in an efficient system of criminal justice might best be served by a scheme which lends encouragement to that duty.
- ***the right to silence is a weak right that is rarely used:*** Research shows that, at least in the absence of a right to legal advice, the right to silence is usually waived. For example, a small study carried out in the Sydney District Court in 1980 found that 96 per cent of accused persons made confessions or damaging statements when interviewed by the police.¹⁶⁵ Zuckerman has described the right to silence as a ‘largely illusory protection’.¹⁶⁶
- ***those who exercise the right at all tend to be the very people who need it least:*** The right to silence can be said to discriminate unfairly in favour of the more intelligent, the emotionally strong as well as those more conversant with the

¹⁶⁴ M Findlay, S Odgers and S Yeo, *Australian Criminal Justice*, Oxford University Press 1994, p 63.

¹⁶⁵ S Odgers, ‘Police interrogation and the right to silence’ (1985) 59 *ALJ* 78 at 86. However, the sample may be biased since it contained only those subsequently charged.

¹⁶⁶ AAS Zuckerman, ‘The inevitable demise of the right to silence’, *New Law Journal*, 5 August 1994, p 1104.

processes of official questioning. Use of the right by professional criminals is often targeted for criticism in this regard. A colourful example is the statement by the former Metropolitan Police Commissioner, Sir Robert Mark, to the effect that the right to silence ‘might have been designed by the criminals for their especial benefit and that of their professional advisers. It has done more to obscure the truth and facilitate crime than anything else in this century’.¹⁶⁷

- ***abolition would rationalise the law and excuse the courts from drawing absurdly fine distinctions:*** Back in 1973 Professor Cross put the argument in the strongest terms, stating that ‘it would spare the judge from talking gibberish to the jury, the conscientious magistrate from directing himself in imbecile terms and the writer on the law of evidence from drawing distinctions absurd enough to bring a blush to the most hardened academic face’.¹⁶⁸
- ***legitimate reasons for silence will be appreciated:*** In its review of the case for and against the right to silence, the ALRC explained this argument in these terms: ‘If an accused person does have a good reason for remaining silent, it is argued that the fact finder will be able to take that reason into account when considering what inference to draw. Communication problems, for example, deriving from confusion, fear or lack of memory at the time of questioning are, it is suggested, precisely the matters that a jury is well equipped to understand and evaluate’.¹⁶⁹
- ***reasonable inferences should be available:*** Again this argument was reviewed by the ALRC which expressed it in these terms: ‘If an inference is reasonable, the fact finder [the jury] ought to be able to draw it. All the behaviour of someone who is confronted with a charge should be available for the fact finder to consider’.¹⁷⁰ A corollary of this is that the drawing of adverse inferences from silence would not be an automatic process; it would be a matter for the discretion of the court and the judgment of the jury.

8 ***NOTE ON AMBUSH DEFENCES AND THE ISSUE OF PRE-TRIAL DISCLOSURE BY THE DEFENDANT***

On 25 June 1997 the Attorney General said that he had decided to ‘refer the wider issue of disclosure’ of a defence relied on by the accused to the NSWLRC under the general

¹⁶⁷ R Mark, *Policing a Perplexed Society*, Allen and Unwin 1977, p 39.

¹⁶⁸ R Cross, ‘The Evidence Report: sense or nonsense - a very wicked animal defends the Eleventh Report of the Criminal Law Revision Committee’ [1973] *Criminal Law Review* 329 at 332-341. The distinction referred to was that the lateness of an accused’s defence could reduce its credibility or weight but could not be taken as an indication of guilt.

¹⁶⁹ ALRC, *Report No 26, Interim - Evidence, Volume 1*, AGPS 1985, p 429.

¹⁷⁰ *Ibid.*

heading of a review of the right to silence.¹⁷¹

This is likely to prove a controversial issue. Aronson and Hunter commented in this regard on the ‘intense emotion’ surrounding the debate over the NSW Criminal Procedure (Committal Proceedings) Amendment Bill 1990 which, in their view, barely touched on the question of the right to silence. They explain that the ‘Bill would have let all prosecution witness statements go through the committal hearing stage in purely documentary form unless the defendant gave a broad indication of why he or she wanted to cross examine their makers. That was tantamount to putting pressure on the defence to reveal their hand, to speak rather than remain silent’.¹⁷²

The situation at present in NSW is that, under section 405A of the *Crimes Act 1900*, on a trial on indictment the defendant must give notice of any alibi; otherwise he or she can only adduce evidence in support of the alibi by leave of the Court. That apart, however, there are no statutory requirements of advance notification of defences.¹⁷³

Two points can be reiterated at this stage. One is that in *Petty* the High Court dealt with ‘the ambush defence’ as an incident of the right to silence, with Mason CJ, Deane, Toohey and McHugh JJ stating:

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 to silence. Such an erosion of the fundamental right should not be permitted.¹⁷⁴

A second point is that there does not appear to be any relevant empirical evidence relating to ambush defences for any Australian jurisdiction. Only Leng’s study in England it seems has dealt with the matter in any detail and then, as noted above, it indicated that the ‘common perception that ambush defences pose a significant problem for the criminal justice system may be erroneous’.¹⁷⁵

The wider issue of defence disclosure in criminal matters is dealt with in some detail in the NSW Parliamentary Library’s Briefing Paper No 31/1996, *Dealing With Court*

¹⁷¹ NSWPD (Hansard proof), 27 June 1997, p 4.

¹⁷² M Aronson and J Hunter, *Litigation: Evidence and Procedure*, Fifth Edition, Butterworths 1995, p 328. The Bill, which was designed to replace committals with preliminary hearings, was in fact criticised for a number of reasons, including the argument that it would increase court delays and expense. See H Figgis, *Reform of the Committal Process in New South Wales*, NSW Parliamentary Library Briefing Paper No 23/1996.

¹⁷³ Aronson and Hunter, *Litigation: Evidence and Procedure*, Fifth Edition, p 333.

¹⁷⁴ (1991) 173 CLR 95 at 101.

¹⁷⁵ R Leng, *The Right to Silence in Police Interrogation*, p 58.

Delays in New South Wales, by Honor Figgis.

9 CONCLUSIONS

It has been said that points of comparison and difference need to be borne in mind when reference is made to overseas evidence and experience. For this reason a recurring theme of this paper has been the need for reliable local research on the issues raised in the right to silence debate. However, this comes with the warning, which is often posted in the literature, that the debate itself should not degenerate into a sterile numbers game, but that it should be seen to be guided by considerations of policy and principle. Roger Leng has suggested in this regard that any statistical evidence should be looked upon as a neutral factor: if the right to silence is a good thing then high figures are correspondingly good; if the right is a bad thing then high figures indicate a problem. He continues:

This approach refocuses the debate on the central question: whether or not the right to silence is a good thing. In turn this question can be broken down into three key issues: (a) whether as a matter of fact silence is indicative of guilt; (b) whether (as the civil libertarians argue) silence provides a necessary

safeguard for the suspect; and (c) whether (as the police argue) abolition of the right would lead to the proper conviction of more guilty offenders.¹⁷⁶

However, the relevant issues may not stop there, for the debate can be seen to have far wider repercussions. In particular, there are questions concerning the indispensability of the right to silence to our adversarial system of justice and, drawing a larger circle still, there is the issue of the viability and value of that system itself. There is then the further consideration that the police station reality studied by empirical analysis may present a very different picture of the criminal justice system to that found in legal texts, a picture in which compromise and negotiation is the norm. If this paper suggests anything, it is that the right to pre-trial silence involves a bundle of difficult issues, requiring careful scrutiny.

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R Leng, 'The right to silence debate' from *Suspicion and Silence* edited by D Morgan and GM Stephenson, p 23.