

THE RIGHT TO SILENCE

Exceptions relevant to a criminal practitioner

EXCEPTIONS TO THE RIGHT - WHAT IS THE RIGHT TO SILENCE?

The title of this paper referring to “The Right to Silence” – is controversial in the sense that there is no single entitlement that can be pointed to. This “right” includes the privilege against self-incrimination, but encompasses broader freedoms, and is linked to the presumption of innocence, the right to a fair trial, and can be characterised as an important protection of individual liberty.

Much recent legal discussion refers to the summary of a bundle of rights set out in a UK case *Smith v Director of Serious Fraud Office* [1992] 3 All ER 456¹.

“I turn from the statues to “The right of silence”. This expression arouses strong but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin incidence and importance, and also as to the extent to which they have already been encroached upon by statute. Amongst these may be identified:

- (1) a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies;
- (2) a general immunity, possessed by all persons and bodies from being compelled on pain of punishment to answer questions the answers to which may incriminate them;
- (3) a specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind;
- (4) a specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock;
- (5) a specific immunity possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority;
- (6) a specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial,

¹ For example, this list of immunities is adopted in *Weissensteiner v R* [1993] HCA 65; (1993) 178 CLR 217; (1993) 68 A Crim R 251, *Azzopardi v R* [2001] HCA 25; 205 CLR 50; 179 ALR 349; 75 ALJR 931, *Jones v R* [2005] NSWCCA 443, The Right to Silence Report by the NSW Law Reform Commission in 2000, The Abrogation of the Privilege Against Self-Incrimination Report by the Queensland Law Reform Commission in 2004, 2006 Discussion Paper on the Right to Silence NSW Parliamentary Legislative Review Committee, 1998 Discussion Paper on The Right to Silence for the Victorian Parliament’s Scrutiny of Acts and Regulations Committee,

from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial².

Each of these immunities is of great importance, but the fact that they are all important and that they are all concerned with the protection of citizens against the abuse of powers by those investigating crimes makes it easy to assume that they are all different ways of expressing the same principle, whereas in fact they are not.”

Lord Mustill’s decision also lists four broad motives which he opines have led to the listed immunities becoming embedded in English law. To summarise:

- i. The general principle that individuals are entitled to personal liberty and privacy, but only up to a certain point. A certain degree of coercion to provide information is tolerated to enable a stable society.
- ii. A specific desire to prevent abuses of judicial interrogation which arises in situations where judges are empowered to press confessions out of those under interrogation.
- iii. The principle that it is unfair to put an accused in a position where he/she is exposed to punishment whatever he/she does – either they speak condemning themselves by their confession or are punished for refusing to speak;
- iv. A public policy to minimise the risk that an accused will be convicted on an untrue confession involuntarily extracted prior to trial – and hence the requirement that a confession is only admissible if it is accompanied by evidence that it is voluntary³.

These motives provide a link to concepts of fairness, liberty and prevention of abuses. It is this list of motives which links the dry “legal immunities” list to concrete protections from abuse of state power.

Although Lord Mustill does not claim to provide an exhaustive list of immunities that comprise the right to silence, his list seems to have been broadly adopted by judges and commentators without any further additions. For the purpose of this paper, I have simplified the list into three broad areas:

1. Right as a non-suspect to remain silent;
2. Right to silence as a suspect prior to court proceedings;
3. Rights as an accused during Court proceedings – (encompassing a right to silence and a corresponding immunity from being subject to adverse comment regarding that silence).

This area of law seems to be best understood through its exceptions. The point at which silence is not tolerated, and at which the law compels disclosure, or allows

² Lord Mustill, [1992] 3 All ER 456 at 463-464

³ See s 84 of the *Evidence Act* 1995 which provides that an admission must be excluded unless the Court is satisfied that it was not the result of violent, oppressive, inhuman or degrading conduct or the threat of such conduct.

adverse inference from silence, is the point at which the underlying immunity ceases to apply.

ORIGINS OF THE RIGHT TO SILENCE

There is significant debate around the history of this area of law. A traditional view was that the right not to incriminate oneself arose out of the abolition of the Star Chamber in England in the 17th Century⁴. The High Court has tended to follow this view of the history of the law, noting that the privilege is now embodied in Article 14(3)(g) of the International Covenant on Civil and Political Rights⁵.

Some commentators challenge this view, claiming that any rules resembling the modern day privilege against self-incrimination, or immunities making up an accused's right to silence, both predated Star Chamber⁶ and were only able to fully develop in its modern form during the 19th Century. This latter argument because:

“in the seventeenth century, an accused was not allowed legal representation in a criminal trial, but was obliged to conduct his or her own defence. The right of an accused to call witnesses to give sworn testimony on his or her behalf was also significantly restricted... Defence counsel were not generally permitted to examine witnesses until the middle of the eighteenth century or to address the jury until the beginning of the nineteenth century. It argues that it was these changes to common law criminal procedure, together with the adoption of the presumption of innocence and the requirement of proof beyond reasonable doubt, and the development of rules of criminal evidence, that were the real driving force behind the emergence of the privilege against self-incrimination”⁷

Although this “history war” would appear to have little relevance for a practitioner in the lower courts of NSW in the 21st Century, it is probably fair to assume that arguments that the right to silence is a relatively recent invention will serve to bolster moves to reduce the current protections. If it is not considered such an ancient right

⁴ *The privilege against self-incrimination is part of our legal heritage where it became rooted as a response to the horrors of the Star Chamber. (See Quinn v. United States (1955 349 US 155 (99 LawEd 964)). In the United States it is entrenched as part of the Federal Bill of Rights. In Australia it is part of the common law of human rights. The privilege is so pervasive and applicable in so many areas that, like natural justice, it has generally been considered unnecessary to express the privilege in statutes which require persons to answer questions. Murphy J in Hammond v Commonwealth [1982] HCA 42; (1982) 152 CLR 188 (6 August 1982). See also Sorby and Another v The Commonwealth of Australia and Others (1983) 152 CLR 281 per Brennan J at 317.*

⁵ See *Environment Protection Authority v Caltex Refining Co Pty Ltd*; McHugh J at 543 and Mason CJ and Toohey J at 498-499

⁶ “This early influence of the *ius commune* in the English legal history, predating the Court of High Commission and The Star Chamber, is said to undermine the traditional theory of the privilege” referring to *Langbein JH*, “The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries” in Hemholz RH et al *The Privilege against Self-Incrimination: Its Origins and Development* (1997) – referenced by the 2004 Report (No 59) of the Queensland Law Reform Commission – The Abrogation of the Privilege Against Self-Incrimination, p 9.

⁷ 2004 Report (No 59) of the Queensland Law Reform Commission – The Abrogation of the Privilege Against Self-Incrimination, p 10-11.

then it may be viewed as a less of a fundamental right that is not to be treated as sacrosanct⁸.

Since there is actually no single right, rather a bundle of immunities, encompassed in the concept, and both court rules and policing have evolved greatly over the centuries, one can only assume that there is no single moment or era when the right can be said to have originated or consolidated.

Despite conflicting views around developments of the right to silence and specifically the privilege against self-incrimination, there appears to be a common thread to all sides of the history war. Regardless of the timing, commentators tend to agree that the right to silence has arisen as a protection of a relatively disempowered individual against abuses by the state, whether in its judicial or executive form.

In light of the ever-expanding capabilities of digital technology, police surveillance and investigation methods, the relative disempowerment of individuals does not look like disappearing any time soon. In particular, the political developments in the last decade around terrorism, victims rights and increasing debate regarding “balancing” the rights of the individual against the interests of the broader community keeps these issues very much relevant.

From a practitioner’s perspective, encroachments upon the right to silence approach from multiple directions. Legislation in recent years has included regular incursions into common law protections, but there are also several examples of less direct areas of law and practice which serve to re-examine and undermine previously assumed freedoms. Developments in the UK have also served as a dramatic example of an alternative regime.

1. RIGHT AS A NON-SUSPECT TO REMAIN SILENT

This area of immunity from enforceable disclosure is the most difficult area to crystallise into a single theoretical right. In terms of the Judiciary, it could be defined as the right not to have anything to do with courts unless one is subpoenaed to court, and there called to give evidence (or produce documents).

In terms of the Executive wing of the government, this right could be defined as the general principle that one can live quietly, privately and free from the compulsion to provide information to the state.

Assuming a citizen engages in any of the usual activities of 21st century life, there are countless examples of obligations to make declaration to various authorities. Lodging tax returns; enrolling to vote; registering births, cars and companion animals are examples of well-entrenched obligations to provide information to the state. These legislative requirements only become relevant to a criminal law practitioner if a client

⁸ “The origins of the right to silence and the privilege against self-incrimination are not entirely clear. They are also controversial because – to put it crudely – the more ancient the right and the privilege are, the stronger the case for their retention appears to be.” The Right to Silence: An Examination of the Issues Chapter 2 – The Origins of the Right to Silence, 1998 Discussion Paper on The Right to Silence for the Victorian Parliament’s Scrutiny of Acts and Regulations Committee

is alleged to have failed to disclose, and it is the non-payment of the registration fee that usually causes the offence, rather than any civil libertarian desire for privacy.

WITNESSES TO CRIMINAL OFFENCES

More relevantly for the criminal practitioner, a citizen's right to silence is significantly diminished if they happen to be a witness. It is in the context of these kinds of compelled disclosure that the privilege against self-incrimination gains importance.

- Requirement to disclose information which might be of material assistance

Section 316 of the *Crimes Act* 1900 - Concealing a serious indictable offence:
(1) If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.

Note: section 4 definition of serious indictable offence means an indictable offence that is punishable by imprisonment for life or for a term or 5 years or more.

Interestingly for practitioners, subsection 316(4)⁹ provides that the Attorney General *can* approve a prosecution against a person whose knowledge or belief was formed (or the relevant information was obtained) by a person practising or following a profession or vocation prescribed by the regulations. Clause 6 of the *Crimes (General) Regulation 2005* prescribes the professions including: *legal practitioner, medical practitioner, psychologist, nurse, social worker, clergy.*

The NSW Law Reform Commission released a report in 2000 recommending the abolition of section 316. It noted: "*under the present law a domestic violence victim would commit the offence if she did not notify the police when she was threatened or assaulted by her husband... the offence may also interfere with or inhibit important research... University researchers have also found that the fact that their research may involve concealing offences prevented them from gaining approval for research projects from university ethics committees... A person who did not report the theft of a chocolate bar would be guilty of concealing a serious offence.*"¹⁰.

Exactly how section 316 fits with the privilege against self-incrimination seems unclear. A person who is a co-offender or accessory would probably be entitled to

⁹ Section 316(4): A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course or practising or following a profession, calling or vocation prescribed by the regulations for the purpose of this subsection.

¹⁰ Media release, Law Reform Commission of NSW, 14 January 2000;

claim privilege as a reasonable excuse¹¹. In situations where providing the relevant information pursuant to section 316 would require self-incrimination regarding an entirely unconnected criminal offence, particularly a much less serious offence, there is limited authority to suggest the privilege would not constitute a reasonable excuse¹².

- Requirement to disclose identity

Section 11 of the *Law Enforcement (Powers and Responsibilities) Act 2002 (LEPR):*

A police officer may request a person whose identity is unknown to the officer to disclose his or her identity if the officer suspects on reasonable grounds that the person may be able to assist in the investigation of an alleged indictable offence because the person was at or near the place where the alleged indictable offence occurred, whether before, when or soon after it occurred.

Note: section 3 definition of indictable offence includes indictable offences which may be dealt with other than on indictment. Also note: Section 19 of LEPR provides that, when requesting the identity of a person under sections 11, 13A or 14, a police officer may request that person to provide proof of his or her identity. Section 12 provides the maximum penalty for failing to disclose identity is 2 penalty units.

- Non-suspect who is suspected of being subject to an AVO

A person who is not necessarily a suspect, but may be subject to an AVO must also disclose their identity. There is no requirement of any alleged breach of that AVO to invoke the compulsory disclosure:

Section 13A of LEPR:

A police officer may request a person whose identity is unknown to the officer to disclose his or her identity if the officer suspects on reasonable grounds that an apprehended violence order has been made against the person. *Section 13B provides the maximum penalty for failing to disclose identity is 2 penalty units.*

¹¹ "Several authorities, including the High Court decision of *Petty v The Queen* [(1991) 173 CLR 95 at 99] make it clear that a person who concealed information about a serious offence by failing to answer police questions about his or her involvement in the offence, or a related offence, did not commit the common law offence of misprision of felony. These authorities held that reliance on the right to silence constituted a reasonable excuse for committing the common law offence. However, other authority suggests that self-incrimination would not always excuse concealment of an offence at common law, particularly where there is a gross discrepancy between the magnitude of the concealed offence and the apprehended prosecution or where the offence in respect of which the privilege against self-incrimination is claimed is completely unrelated to the concealed offence. There is no case law on the relationship between the right to silence and s 316, although the Commission considers that the comments of the High Court in *Petty v The Queen* would be followed." NSW Law Reform Commission Report 93 (1999) *Review of Section 316 of the Crimes Act 1900* (NSW).

¹² *R v Lovegrove I*(1983) 33 SASR 332 at 342.

MOTOR VEHICLES

If a person is sufficiently adventurous as to own a motor vehicle, drive it, or find themselves to be a passenger in a motor vehicle, the right to silence is highly conditional upon a police officer's reasonable suspicions about that motor vehicle.

Section 14 of **LEPR** provides:

(1) A police officer who suspects on reasonable grounds that a vehicle is being, or was, or may have been used in or in connection with an indictable offence may make any one or more of the following requests:

(a) a request that the driver disclose his or her identity and the identity of any driver of, or passenger in or on, the vehicle at or about the time the vehicle was or may have been so used or at or about the time the vehicle last stopped before the request was made or a direction was given under this Division to stop the vehicle,

(b) a request that any passenger in or on the vehicle disclose his or her identity and the identity of the driver of, or any other passenger in or on, the vehicle at or about the time the vehicle was or may have been so used or at or about the time the vehicle last stopped before the request was made or a direction was given under this Division to stop the vehicle,

(c) a request that any owner of the vehicle (who was or was not the driver or a passenger) disclose the identity of the driver of, and any passenger in or on, the vehicle at or about the time the vehicle was or may have been so used or at or about the time the vehicle last stopped before the request was made or a direction was given under this Division to stop the vehicle,

Sections 15, 16 and 17 further require that if the person being compelled to provide the information does not know the full and correct identity, they must disclose "such information about the person's identity (such as any alias used by the person or the general location of his or her residential address) as is known. Maximum penalties for failing to provide one's own identity, known driver or passenger identities, or for providing false or misleading information (section 18) are all the same at 50 penalty units or 12 months imprisonment, or both.

Sections 171-173 of the *Road Transport (General) Act 2005* provides that police officers can require production of drivers licence of driver, person accompanying a learner driver, or identity of the driver at the time the driver of that motor vehicle is alleged to have committed an offence under the road transport legislation.

- Motor vehicles – Crashes

Road Rule 287 sets out the duties of a driver involved in a crash¹³. The general rule is that the driver must stop at the scene and give: their name and address; name and

¹³ "crash" includes: (a) a collision between 2 or more [vehicles](#), or (b) any other accident or incident involving a [vehicle](#) in which a person is killed or injured, property is damaged, or an animal in someone's charge is killed or injured, Dictionary of *Road Rules* 2008

address of the owner of the vehicle; vehicle's registration number; and any other information necessary to identify the vehicle to any other driver involved, anyone who was injured (or their representative) and to the owner of any property that was damaged (unless the property is a damaged car, when the information may be provided to the driver or their representative).

Subrule 287(3) provides that in certain crashes the driver must provide to the police "*an explanation of the circumstances of the crash*". This explanation is required when there is a crash in which: anyone is killed or injured in the crash; or details of identity haven't been given to one of the drivers, injured parties, or owners of damaged property; or a vehicle is towed or carried away by another vehicle; or if the police officer asks for any of the required particulars.

The details must be given to other parties "*within the required time, and if practicable, at the scene of the crash*" and to police "*within the required time*" which is 24 hours. The maximum penalty for failure to comply is 20 penalty units (and the general discretion to disqualify pursuant to section 187 of the *Road Transport (General) Act 2005*).

JUDICIAL PROCEEDINGS – SUBPOENAS, RIGHT TO SILENCE AND SELF-INCRIMINATION

Assuming a non-suspect is required to give evidence at court, then a subpoena, a common law instrument (as adopted in legislation), compels that person to attend at court and either give oral evidence and/or produce documents. To the extent that the rules of evidence are complied with, a subpoena negates the right to silence¹⁴. This is one of the few manifestations of judicial power which can commonly affect non-suspects or non-parties to litigation, particularly with respect to criminal proceedings. The origin of the word is from the Latin "*sub*" and "*poena*" literally meaning "under pain, punishment or penalty". It is also worth noting that section 36 of the *Evidence Act 1995* provides that a court may order any person present at a hearing to give evidence or produce documents (as long as they are compellable) even if a subpoena had not been served.

Section 12 of the *Evidence Act* provides that every person is competent to give evidence and compellable to give evidence (except as otherwise provided by the *Evidence Act*). Assuming there are no other barriers to competence or compellability (such as impaired capacity, spousal or other privilege), then a witness must answer all questions put to them. It is beyond the scope of this paper to discuss all kinds of privilege which may be claimed. In keeping with the theme of "general" rights to

¹⁴ Section 229 of the *Criminal Procedure Act 1986* provides that a party who requested, or issued, a subpoena may apply to the court for the issue of a warrant and the Court may grant the warrant if satisfied that the person has failed to comply, it was issued and served properly, and no just or reasonable excuse has been offered for the failure to comply. Section 231 of the *Criminal Procedure Act 1986* provides that a person who is at court answering a subpoena, or subject to bail (after arrest on a warrant for failing to comply with a subpoena), or brought before court under a warrant: the court may order that person be detained in a correctional centre for a period not exceeding 7 days if that person refuses to take an oath, or be examined on oath, or to answer an questions or produce a document. Note also that such refusal would prima facie constitute contempt (in the face) of court.

silence, the focus here, with respect to non-suspects (or non-defendants), is the privilege against self-incrimination.

The relevant provision in NSW proceedings regarding self-incrimination by a witness in court proceedings is Section 128 of the *Evidence Act*.

128 Privilege in respect of self-incrimination in other proceedings

- (1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness:
 - (a) has committed an offence against or arising under an Australian law or a law of a foreign country, or
 - (b) is liable to a civil penalty.
- (2) The court must determine whether or not there are reasonable grounds for the objection.
- (3) If the court determines that there are reasonable grounds for the objection, the court is to inform the witness:
 - (a) that the witness need not give the evidence unless required by the court to do so under subsection (4), and
 - (b) that the court will give a certificate under this section if:
 - (i) the witness willingly gives the evidence without being required to do so under subsection (4), or
 - (ii) the witness gives the evidence after being required to do so under subsection (4), and
 - (c) of the effect of such a certificate.
- (4) The court may require the witness to give the evidence if the court is satisfied that:
 - (a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, and
 - (b) the interests of justice require that the witness give the evidence.
- (5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the court must cause the witness to be given a certificate under this section in respect of the evidence.
- (6) The court is also to cause a witness to be given a certificate under this section if:
 - (a) the objection has been overruled, and
 - (b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.
- (7) In any proceeding in a NSW court or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence:
 - (a) evidence given by a person in respect of which a certificate under this section has been given, and
 - (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence, cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

Note: This subsection differs from section 128 (7) of the Commonwealth Act. The Commonwealth provision refers to an “Australian Court” instead of a “NSW court”.

(8) Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

(9) If a defendant in a criminal proceeding for an offence is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the defendant for the same offence or a trial of the defendant for an offence arising out of the same facts that gave rise to that offence.

(10) In a criminal proceeding, this section does not apply in relation to the giving of evidence by a defendant, being evidence that the defendant:

- (a) did an act the doing of which is a fact in issue, or
- (b) had a state of mind the existence of which is a fact in issue.

(11) A reference in this section to doing an act includes a reference to failing to act.

Note:

1 Bodies corporate cannot claim this privilege. See section 187.

2 Clause 3 of Part 2 of the Dictionary sets out what is a civil penalty.

3 The Commonwealth Act includes subsections to give effect to certificates in relation to self-incriminating evidence under the NSW Act in proceedings in federal and ACT courts and in prosecutions for Commonwealth and ACT offences.

4 Subsections (8) and (9) were inserted as a response to the decision of the High Court of Australia in *Cornwell v The Queen*[2007] HCA 12 (22 March 2007).

Section 132 provides that the Court must satisfy itself that a witness is aware of the effect of s 128 if “*it appears to the court that a witness or a party may have grounds for making an application or objection under a provision of this Part*”.

As for the application of section 128, the *Evidence Act* provides no guidance as to what might constitute “reasonable grounds”. Reasonable grounds would need to be established on the balance of probabilities (s 142 of the *Evidence Act* – matters regarding the admissibility of evidence). In *R v Bikic* [2001] NSWCCA 537, Giles JA said “*it seems to me to be a matter of commonsense that reasonable grounds for an objection must pay regard to whether or not the witness can be placed in jeopardy by giving the particular evidence*”¹⁵.

Similarly, the *Evidence Act* provides no guidance as to circumstances in which “the interests of justice” will require that the witness give the evidence. Both *Odgers*¹⁶ and the JIRS Benchbook entry states that “*some assistance*” may be obtained from section 130(5) in determining what factors may be taken into account in determining whether “the interests of justice” require the witness to give evidence¹⁷. Section 130

¹⁵ As referred to in the JIRS entry on section 128.

¹⁶ Stephen Odgers, *Uniform Evidence Law*, Eighth Edition, 2009, at p 636

¹⁷ Section 130(5): Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters:

(a) the importance of the information or the document in the proceeding,

(b) if the proceeding is a criminal proceeding-whether the party seeking to adduce evidence of the information or document is a defendant or the prosecutor,

(c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding,

(d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication,

relates to the exclusion of evidence of Matters of State and refers to a balancing of whether the public interest of admitting the information outweighs the public interest of maintaining secrecy. Several cases have considered “interests of justice” in section 128 and these are clearly referred to by *Odgers*¹⁸, but overall this does not seem an area of law with an abundance of judicial consideration.

2. RIGHT AS A SUSPECT TO REMAIN SILENT – PRIOR TO COURT PROCEEDINGS

Section 11 of LEPR would encompass the power of police to require a suspect to provide their identity. There are plenty of excellent papers available regarding the requirements of LEPR for police in dealing with suspects - this paper will not go into detail regarding those provisions, and possible exclusion of admissions because of a failure to comply with those (or other, such as section 13 of the *Children’s (Criminal Procedure) Act 1987*) procedural requirements. Similarly, the provisions of the *Crimes (Forensic Procedures) Act 2000* are excellently explained in papers elsewhere and it is unnecessary to detail that legislative exception to the privilege against self-incrimination here in this paper.

SECTION 89 OF THE EVIDENCE ACT 1995

Section 89 of the *Evidence Act* is the main substantive legal protection for silence of a suspect (as opposed to the procedural requirements such as the provisions of LEPR) during investigation of the offence. It provides:

89 Evidence of silence

(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 by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.

(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 proceeding.

(e) whether the substance of the information or document has already been published,
(f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is a defendant-whether the direction is to be made subject to the condition that the prosecution be stayed.

¹⁸ Stephen Odgers, *Uniform Evidence Law*, Eighth Edition, 2009, at p 636-638

(4) In this section:
"inference" includes:

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

Section 89 is largely reflective of the common law position set out in *Petty v The Queen* (1991) 173 CLR 95, although the section only applies during "official questioning" as defined in the Dictionary to the Act, whereas the principle in *Petty* is of general application: *R v Anderson* [2002] NSWCCA 141.¹⁹

Petty includes some inspiring quotes about the right of an accused to remain silent, and protection from adverse inference serving an essential component of that right:

*"Indeed in a case where the positive matter of explanation or defence constitutes the real issue of the trial, to direct the jury that it was open to them to draw an adverse inference about its genuineness from the fact that the accused had not previously raised it would be to convert the right to remain silent into a source of entrapment."*²⁰

*"Although ordinary experience allows that an inference may be drawn to the effect that an explanation is false simply because it was not given when an earlier opportunity arose, that reasoning process has no place in a criminal trial. It is fundamental to our system of criminal justice that it is for the prosecution to establish guilt beyond reasonable doubt. The corollary of that – and it is equally fundamental – is that, insanity and statutory exceptions apart, it is never for an accused person to prove his innocence... Therein lies an important aspect of the right to silence, which right also encompasses the privilege against incrimination."*²¹

Although s 89 excludes evidence solely related previous silence of the accused, subsection 89(2) and (3) allows for the situation whereby information regarding the silence of the accused may be admitted for another purpose. There is authority for the requirement that when such evidence is admitted, the judge must then direct the jury that evidence of silence cannot be used as the basis for an adverse inference:

In *R v Reeves* (1992) 29 NSWLR 109 Hunt CJ at CL said (at 115):

"However, where such evidence is given which discloses that the accused has exercised his right of silence, a direction should invariably be given – as soon as the evidence is given and, if necessary, again in the summing up – to make it clear to the jury that the accused had a fundamental right to remain silent and that his exercise of that right must not lead to any conclusion by them that he was guilty: R v Astill (Court of Criminal Appeal, 17 July 1992, unreported) at 9. It would usually be appropriate also to remind the jury that (if it be the fact) the accused had specifically been cautioned by the police that he was not

¹⁹ *R v Coe* [2002] NSWCCA 385

²⁰ Mason CJ, Deane, Toohey and McHugh JJ, *Petty v The Queen* [(1991) 173 CLR 95

²¹ Gaudron J (dissenting but still relevant on the broad issue). *Petty v The Queen* [(1991) 173 CLR 95

obliged to answer any questions, so as to avoid any suggestion of a familiarity by the accused with criminal investigation procedures."²²

COVERT SURVEILLANCE OF SUSPECTS AND THE RIGHT TO SILENCE

This area of law is potentially an entire paper in itself – the admissibility of admissions obtained through covert surveillance methods. In line with this paper's theme of "silence", as opposed to excluding improperly obtained admissions, this paper will not discuss the specific implications around covert recording of suspect's conversations. Suffice to say that police cannot simply circumvent the requirements for cautioning suspects, but lawfully recorded admissions obtained of "undirected" conversations will tend to be admissible²³.

POLICE INTERVIEWS: THE UK SITUATION

In England and Wales, the *Criminal Justice and Public Order Act 1994* (CJPO Act) provides that a court may draw adverse inference from a failure to mention any fact relied on in a defence, if that matter could reasonably have been mentioned to the investigating police officer.

Section 34: Effect of accused's failure to mention facts when questioned or charged

(1) Where, in any proceedings against a person for an offence, evidence is given that the accused:

(a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

Being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

(2) Where this subsection applies:

(a) a magistrate's court...

(d) the court or jury, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure as appear proper.

Subsection (2A) provides that the above provisions do not apply if the person had not have the opportunity to consult a solicitor prior to being questioned, charged or informed as mentioned in (1).

²²As extracted in *R v Bilal SKAF, REGINA v Mohammed SKAF* [2004] NSWCCA 37 (6 May 2004)

²³"On the basis of the court's finding in *Swaffield*, it appears legal tricks and deceptive tactics may be employed by the police as long as that strategy does not involve deceiving the person out of the right to silence" D Craig, *The Right to Silence and Undercover Operations*, Platypus Magazine, 72, Sept 2001. (referring to *Swaffield v R*; *Pavic v R* (1998) 192 CLR 159.

The official police caution that accompanies this legislation is along the lines of:

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.

Sections 36 and 37 of the CJPO Act prescribe specific circumstances which the accused's failure "to account for" might be used as a basis for adverse inference. Section 36 provides for "such inferences from the failure as appear proper" for failing or refusing to account for objects, substances or marks on the person, clothing or footwear, otherwise in possession, or in any place in which present at the time of arrest. Section 37 provides for "such inferences from the failure as appear proper" for failing or refusing to account for being found in a place, and the presence of the person at that time may be attributable to the person's participation in the commission of the offence.

In 2000, the NSW Law Reform Commission examined whether NSW should adopt the UK changes regarding adverse inferences flowing from silence to police²⁴. The report was critical of the UK regime, noting that there are many reasons for silence consistent with innocence, and that the right to silence is an *"important corollary of the fundamental requirement that the prosecution bears the onus of proof, and a necessary protection for suspects. Its modification... would undermine fundamental principles concerning the appropriate relationship between the power of the State on the one hand and the liberty of the citizen on the other, exacerbated by its tendency to substitute trial in the police station for trial by a court of law"* The Report also recommends against adopting the UK regime because of the absence of a funded duty solicitor scheme for suspects at police stations, and because the required significant increases in legal aid funding, to provide for such a scheme here, are not likely.

TERRORISM POWERS

This area of state power can be summarised by saying: "all-bets-are-off". NSW police have some extra power to require a person to disclose their identity²⁵ but the powers available to ASIO are very broad²⁶. A suspect or non-suspect may be subject to questioning warrants during which ASIO has power to compel disclosure. It is beyond the scope of this paper to delve into the details of anti-terrorism legislation and there are several excellent papers available on this topic.

²⁴ The Right to Silence Report 95 by the NSW Law Reform Commission 2000

²⁵ Section 16 of the *Terrorism (Police Powers) Act 2002* provides that "A police officer may request a person whose identity is unknown to the officer to disclose his or her identity" if the officer reasonably suspects that the person is subject to an "authorisation" as a "target", or in a vehicle which is a "target". The "authorisation" of "targets" in that Act invokes other special powers, including "preventative detention".

²⁶ Division 3 of the *Australian Security Intelligence Organisation Act 1979* provides for extensive special powers relating to terrorism offences. Section 34L provides for a maximum penalty of five years imprisonment for failure to disclose information, as well as placing an evidential burden on a defendant to show that they did not have the information.

3. RIGHTS TO SILENCE AS AN ACCUSED DURING COURT PROCEEDINGS

Consistent with the presumption of innocence, section 155 of the *Criminal Procedure Act* 1986 provides that a literal “silence” by an accused has the same effect as a not guilty plea.²⁷ Similarly consistent with the presumption of innocence and the privilege against self-incrimination, section 17 of the *Evidence Act* provides that a defendant is not competent to give evidence as a witness for the prosecution, and is not compellable to give evidence for or against an associated defendant, unless the associated defendant is being tried separately.

SECTION 20 OF THE EVIDENCE ACT

Section 20 of the Evidence Act is the main substantive legal protection for silence of an accused person at trial:

Section 20 Comment on failure to give evidence

- (1) This section applies only in a criminal proceeding for an indictable offence.
- (2) The judge or any party (other than the prosecution) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the 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.
- (3) The judge or any party (other than the prosecutor) may comment on the failure to give evidence by a person who, at the time of the failure, was:
 - (a) the defendant’s spouse or de facto partner; or
 - (b) a parent or child of the defendant.
- (4) However, unless the comment is made by another defendant in the proceeding, a comment of a kind referred to in subsection (3) must not suggest that the spouse, de facto partner, parent or child failed to give evidence because:
 - (a) the defendant was guilty of the offence concerned; or
 - (b) the spouse, de facto partner, parent or child believed that the defendant was guilty of the offence concerned.
- (5) If:
 - (a) 2 or more persons are being tried together for an indictable offence; and
 - (b) comment is made by any of those persons on the failure of any of those persons or of the spouse or de facto partner, or a parent or child, of any of those persons to give evidence;the judge may, in addition to commenting on the failure to give evidence, comment on any comment of a kind referred to in paragraph (b).

²⁷ Section 155 of the *Criminal Procedure Act* 1986 (Refusal to plead): If an accused person who is arraigned stands mute, or will not answer directly to the indictment, the court may order a plea of “not guilty” to be entered on behalf of the accused person, and the plea so entered has the same effect as if the accused person had actually pleaded “not guilty”.

Azzopardi v The Queen [2001] HCA 25 is the leading case regarding judicial comment on a defendant's silence at trial:

*"It is, therefore, clear beyond doubt that the fact that an accused does not give evidence at trial is not of itself evidence against the accused. It is not an admission of guilt by conduct; it cannot fill in any gaps in the prosecution case; it cannot be used as a make-weight in considering whether the prosecution has proved the accusation beyond reasonable doubt"*²⁸

Azzopardi also clarifies the decision of *Weissensteiner v The Queen* [1993] HCA 65²⁹ (which allowed adverse comment about uncontradicted circumstantial evidence) as being relevant only where the ability to contradict lies *peculiarly* within the knowledge of the accused. *RPS v The Queen*³⁰ had already emphasised the highly unusual factual circumstances of *Weissensteiner* which involved the unexplained disappearance of people from a boat whilst on a voyage with the accused. *Azzopardi*:

*"There may be cases involving circumstances such that the reasoning in Weissensteiner will justify some comment. However, that will be so only if there is a basis for concluding that, if there are additional facts which would explain or contradict the inference which the prosecution seeks to have the jury draw, and they are facts which (if they exist) would be peculiarly within the knowledge of the accused, that a comment on the accused's failure to provide evidence of those facts may be made. The facts which it is suggested could have been, but were not, revealed by evidence from the accused must be additional to those already given in evidence by the witnesses who were called. The fact that the accused could have contradicted evidence already given will not suffice"*³¹

The protection of section 20 extends to there being very strict rules around how any comment is to be framed, but does not constitute an absolute "no-go" area for judges (or particularly co-accused) regarding silence at trial.

The NSW Law Reform Commission, in its 2000 report, recommends that section 20 be amended to enable the prosecutor to comment upon the fact that the defendant has not given evidence, "*subject to restrictions which apply to comment by the trial judge and counsel for the defendant and any co-accused. The prosecution shall be required to apply for leave before commenting*"³².

²⁸ *Azzopardi v The Queen* [2001] HCA 25; 205 CLR 50; 179 ALR 349; 75 ALJR 931, majority decision, as extracted in *Odgers Uniform Evidence Law*, Eighth Edition, page 74.

²⁹ *Weissensteiner v R* [1993] HCA 65; (1993) 178 CLR 217; (1993) 68 A Crim R 251

³⁰ *RPS v R* (2000) 199 CLR 620.

³¹ *Azzopardi v The Queen* [2001] HCA 25; 205 CLR 50; 179 ALR 349; 75 ALJR 931, majority decision, as extracted in *Odgers Uniform Evidence Law*, Eighth Edition, page 75.

³² The Right to Silence Report 95 by the NSW Law Reform Commission 2000, p 180-182

SILENCE AT TRIAL: THE UK SITUATION

Section 35 of the *Criminal Justice and Public Order Act 1994* (CJPO Act):

Section 35: Effect of accused's silence at trial

(1) At the trial of any person who has attained the age of fourteen years for an offence, subsections (2) and (3) below apply unless:

- (a) the accused's guilt is not in issue; or
- (b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;

but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.

(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court, or the jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

...

In its 2000 Report, the NSW Law Reform Commission³³ also considered whether to adopt a UK-style modification of the right to silence at trial. Again, the Report raised concerns about there being reasons for silence consistent with innocence, and that such a change would undermine the principles that the defendant is presumed innocent until proven guilty and that the prosecution carries the burden of proof.

THE RIGHT TO SILENCE AT COURT: PRE-TRIAL DISCLOSURE REQUIREMENTS

The right of an accused to remain silent whilst being questioned, and at trial, are reasonably settled areas of law, as discussed above within the context of discussion about sections 20 and 89 of the *Evidence Act*.

There seems to be a large area of "contested territory" regarding disclosure by the defence between commencement of court proceedings and the actual trial or hearing. Mostly in the name of "efficiency", there is ever-increasing pressure upon legal representatives of defendants to disclose to the court and the prosecution which parts

³³ The Right to Silence Report 95 by the NSW Law Reform Commission in 2000

of the prosecution case are being disputed, and what evidence is likely to be called by the defence.

Two clear burdens of defence disclosure relate to alibi (when a matter is being dealt with on indictment)³⁴, and where a claim of substantial impairment of the mind is being raised in a murder trial³⁵

As pointed out by then Senior Public Defender (now DC Judge) Nicholson SC, in his paper in 2000³⁶, the notice provisions of the *Evidence Act* serve as a “highway of defence disclosure”:

“Thus where the defence seek to adduce evidence of the contents of a foreign document; [s 48, 49]; adduce evidence of the contents of 2 or more documents in form of a summary, [s 50]; adduce hearsay oral or documentary evidence of a precious representation where the maker is not available [s 65(8), 67]; adduce hearsay evidence of reputation as to relationship and age, [s 73(1) and (2)]; adduce evidence of tendency (character, reputation or conduct of a person to prove tendency), [s 97]; adduce evidence of coincidence (the improbability of two or more events occurring coincidentally), [s 98]; notice must be given by the defence. The prosecution is able to evaluate by the terms of the notice at least some of the issues the defence will be relying upon. This may commend to a prosecutor areas for further investigation by the police.”

Nicholson SC then refers to the 2000 “Pre-Trial Disclosure” Bill³⁷ and notes that it is modest compared to the comprehensive disclosure recommendations in the NSW Law Reform Commission report of 2000.

The humble listing advice, as required by Local Court Practice Note 7 of 2007 constitutes a form of compelled defence disclosure. Whether or not witness statements may be tendered, or required for cross-examination, and the number of defence witnesses expected to be called, are matters that could conceivably provide

³⁴ Section 150 of the *Criminal Procedure Act* 1986 - Notice of alibi:

(1) This section applies only to trials on indictment.

(2) An accused person may not, without the leave of the court, adduce evidence in support of an alibi unless, before the end of the prescribed period, he or she gives notice of particulars of the alibi to the Director of Public Prosecutions and files a copy of the notice with the court...

"prescribed period" means the period commencing at the time of the accused person's committal for trial and ending 42 days before the trial is listed for hearing.

³⁵ Section 151 of the *Criminal Procedure Act* 1986 - Notice of intention to adduce evidence of substantial mental impairment:

(1) On a trial for murder, the accused person must not, without the leave of the court, adduce evidence tending to prove a contention of substantial mental impairment unless the accused person gives notice, as prescribed by the regulations, of his or her intention to raise that contention to the Director of Public Prosecutions and files a copy of the notice with the court. Regulation 23 of the *Criminal Procedure Regulation* 2005 requires the form of notice and that notice be served on the DPP at least 35 days before the date on which the trial is listed to commence.

³⁶ *The 'Right' to Silence – Only Half a Right*, A paper by District Court Judge John Nicholson SC when he held the position of Senior Public Defender, 18 October 2000, published on Public Defenders Office internet site.

³⁷ *Criminal Procedure Amendment (Pre-Trial Disclosure) Bill* 2000

advance notice to the prosecution of the likely defence, and constitute an improper waiver of legal client privilege.

Many a practitioner has been confronted by a list magistrate or Judge asking “is the drug in issue?”, or “what’s the issue at trial?”. These efficiency-minded judicial officers are not generally impressed with “that’s none of your business, your honour” as a reply.

Criminal Case Conferencing legislation, and recent pre-trial disclosure amendments to the *Criminal Procedure Act*³⁸ both serve to increase the pressure on practitioners to reveal instructions and possible defences prior to the trial commencing. Nicholson SC points out that any information gleaned by the prosecution from defence disclosure is likely to be viewed as “open-season” for further investigation by police and pre-trial disclosure ultimately serves as a substantive (but non-explicit) infringement of the right to silence of a suspect³⁹.

INQUISITORIAL FORUMS AND THE RIGHT TO SILENCE

Coronial inquests, Royal Commissions, the Independent Commission Against Corruption, the Police Integrity Commission, Crime Commissions and Special Commissions of Inquiry are all areas of inquisitorial practice where legislation has explicitly overridden the privilege against self-incrimination. It is beyond the scope of this paper to discuss the specific workings of these forums. All of these require witnesses to attend and give evidence or produce documents with varying degrees of penalty for refusing. Each legislation takes a different approach to the privilege against self-incrimination, and the use which may be made of any incriminating material that is compelled to be disclosed.

CONCLUSION

The right to silence is an elusive creature of murky origins. It exists in different forms at different stages of a citizen’s interface with the exercise of state power. A person could theoretically pass their lives without ever having to declare any kind of information to any person or institution. However, if a person is to have any sort of a normal existence then there are a plethora of situations whereby that person is lawfully required to provide information to the State, and most of those disclosures occur well beyond the concern of a criminal practitioner.

For a criminal lawyer, the right to silence - this “disparate group of immunities” - is best characterised as the right of suspects to refrain from being their own accuser, and

³⁸ *Criminal Procedure Amendment (Case Management) Act* 2009 No 112 became operational on 1 February 2010.

³⁹ “...any incursion into the right to silence during the litigation stage of a criminal matter, permits the prosecution to orchestrate with some precision the continuing investigation of the crime. From a purist’s point of view, one less than desirable implication is that the prosecution advocates may become investigators, whether they like it or not.” *The ‘Right’ to Silence – Only Half a Right*, A paper by District Court Judge John Nicholson SC when he held the position of Senior Public Defender, 18 October 2000, published on Public Defenders Office internet site.

from assisting in their own prosecution in any way. The practical experience of criminal lawyers is more complicated. Legislative and procedural pressures to disclose information arise at different stages of the criminal justice process. When advising clients that they have “a right to silence” it is advisable to add some form of disclaimer: “you have the right to silence *except* in certain situations you are required to provide certain information to police, or to a court, or to a Commission, or to ASIO...”.

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May 2010