Northern Territory
Law Reform Committee

Report on

THE RIGHT TO SILENCE

Report No. 25

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"*THE RIGHT TO SILENCE*"

Preliminary Note

This report follows on the request of the then Attorney-General (the Hon Denis Burke) that the Law Reform Committee "inquire into and report upon whether or not the *Criminal Justice and Public Order Act* (UK) provides an appropriate model for reform of the "*right to silence*" in the criminal justice system of the Northern Territory".

A preliminary paper was prepared but further examination was deferred to allow the Committee, at the request of the present Attorney-General (the Hon Dr Peter Toyne), to prepare and deliver a separate Report on one special aspect of the "right to silence", namely the privilege against self-incrimination. This report was requested in view of some contemplated changes to the *Coroners Act* and was delivered to Dr Toyne in October 2001.

The committee resumed its consideration of other aspects of the "*right to silence*" and particularly the question of whether and how far the UK legislation could or should be adopted in the Northern Territory, and this Committee now presents its Report on those matters.

WHAT IS THE "*RIGHT TO SILENCE"*

Report 95 of the NSW Law Reform Commission *The Right to Silence* (July 2000) states that the concept "describes a group of rights which arise at different points in the criminal justice system".

(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..), possessed by accused persons undergoing trial, from having adverse comment made on

any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.

These categories are taken from the judgment of Lord Mustill in R v Director of Serious Fraud Office: ex parte Smith (1993) AC 1 at 30-31.

Davies J in his article in 74 ALJ 26 (Part 1) and 99 (Part 2) adopts the same categorisation, but he suggests that immunity "is not just an immunity from adverse comment on silence but an immunity against the drawing of an adverse inference from silence and that 6(b) is against the drawing of only some adverse inferences, and that immunities (3) and (4) should be widened into "rights not to answer questions or give evidence". He maintains, therefore, that "the modern right to silence is stated: "by restating immunities (3) and (4) as rights to remain silent and by saying that immunity (6) is an incident of those rights" (p.27).

PRESENT POSITION (AUSTRALIA)

Pre-Trial Silence

Save for some specific exceptions (e.g. failure to give name and address in traffic cases: possession of property suspected of being stolen) all State and Territory law allows pre-trial silence to police interrogation and prohibits any comment in court on accused's failure to answer. May be difference if questions partly answered. Woon 1964 109CLR 529

At-Trial Silence

SA, Qld, WA and Tasmania. Right to silence recognised. Prosecution cannot comment. Judge may but subject to restrictions.

NT: Neither prosecution nor judge may comment. *Evidence Act*, section 9(3).

The Commonwealth and NSW *Evidence Act:* Section 20 (2) of both the Commonwealth and NSW *Evidence Act* reads as follows:

> "(2) The Judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceedings, the comment must not suggest that the defendant failed to give evidence because the defendant was or believed that he was guilty of the offence concerned."

This has been recently examined in some detail by the High Court.

Azzopardi & Davis 2001, 179 ALR 349 were separate appeals but dealt with together by the High Court because they were both concerned with the interpretation of s.20(2) of the NSW *Evidence Act*.

It would appear from the judgments of the majority that the operation of the sub-section is now severely limited.

To understand the reasoning of both the majority and the dissenting judges it is necessary to go back to Weissenteiner 1993 178CLR 217.

That was a Queensland case, so s.20(2) did not apply, and it was accepted in the High Court appeal in that case that in Queensland, as in certain other states, the trial judge was at liberty, in appropriate circumstances, to comment on the failure of the accused to give evidence.

Essentially the two questions before the High Court were:

Was it an appropriate case for the trail judge to comment on the failure of the accused to give evidence?

If so, was the trial judge's comment within the permissible bounds, bearing in mind that the jury must be told that the accused was under no obligation to give evidence and his silence was not to be taken as an implied admission of guilt.

Weissenteiner had joined two other persons on a cruise in a boat owned by the other two. The two were not seen again and the High Court accepted that there was abundant evidence from which the jury might conclude they were dead. There was also evidence from which it might have been concluded that the accused had not only stolen the boat but had been involved in the deaths. The accused gave no evidence and called no witnesses. The trial judge, told the jury that the Crown had the onus of establishing the accused's guilt beyond reasonable doubt, that the accused did not have to prove anything, that he was under no obligation to give evidence and that the Crown case depended on the jury inferring guilt from a whole collection of circumstances. He then went on to say that such an inference might more safely be drawn from the proved facts when an accused elected not to give evidence of relevant facts which must be within his knowledge.

The majority of the High Court held that the judge's remarks in these circumstances were appropriate.

In Azzopardi & Davis, the majority (Gaudron, Gummow, Kirby and Hayne J.J.) made it clear that they regarded Weissenteiner as an exceptional case, even for jurisdictions in which the trial judge was allowed to comment. "It is to be emphasised that cases in which a judge may comment on the failure of an accused to offer an explanation will be both rare and exceptional. They will occur only if the evidence is capable of explanation by disclosure of additional facts known only to the accused. A comment will never be warranted merely because the accused has failed to contradict some aspect of the prosecution case: (Emphasis added).

The majority then went on to consider Azzopardi & Davis, both cases being on appeal from NSW, and in both of which the respective trial judges had made comments in reliance on s.20(2) of the NSW *Evidence Act.*

In Azzopardi the accused was charged with soliciting to murder G. At the trial P gave evidence that he had shot G with intent to murder him and that he had done so at the request of the accused. There was evidence from other witnesses that the accused had given P the gun which he used to shoot G.

The trial judge after having warned the jury in what the majority considered "unexceptionable terms" that the accused was under no obligation to give evidence, that the prosecution bore the onus of proving beyond reasonable doubt the guilt of the accused, and that the jury must not think that he decided not to give evidence because he was or believed himself to be guilty, went on to say:- "when assessing the value of the evidence presented by the Crown you are entitled to take into account the fact that the accused did not deny or contradict evidence about matters which were within his personal knowledge and of which he could have given direct evidence from his personal knowledge. This is because, members of the jury, you may think that it is logic and commonsense that, where two persons are involved in some particular thing – the complainant and/or a witness and the accused – so that there are only two persons able to give evidence about the particular thing, and where the complainant's evidence or the witness's evidence is left undenied or uncontradicted by the accused, any doubt which may have been cast upon that witness's evidence may be more readily accepted as the truth".

The majority of the High Court held that these remarks were not within the Weissenteiner ambit because "All that could be said in this case is that the accused did not give evidence contradicting evidence which had been led. This was not a case where the accused did not take the opportunity to provide some additional factual material for consideration by the jury which would explain or

contradict the case sought to be made by the prosecution. ….It follows that even without regard to the operation of s.20 of the *Evidence Act* there was a misdirection".

The appeal was allowed and a new trial ordered.

In Davis the accused was charged with three sexual offences against the nine year old daughter of a friend. The girl had stayed the night at the accused's house and alleged that the accused had sexually assaulted her, and she then walked the seven kilometres home and was found by her mother in the family car. She told the mother about the conduct of the accused and her mother noticed signs on her body consistent with a sexual assault and these signs were later confirmed by a doctor. The accused did not give evidence at the trial.

In the course of his summing up to the jury the trial judge gave the usual warnings such as in Azzopardi and then said, "Now the only effect that his failure to give evidence may have on you is this. His failure to give evidence here may affect the value or weight that you give to the evidence of some or all of the witnesses who have testified in the trial if you think the accused was in a position to himself give evidence about the matter. His failure cannot be treated as an admission. His failure to give evidence. But it may enable you to give, to help you to evaluate the weight of other evidence in the case that he has not given evidence".

Their Honours (Gaudron, Gummow, Kirby and Hayne J.J.) as in Azzopardi, concluded that this was not a case in which a "a Weissenteiner comment could have been made". They said that the case included direct evidence from the complainant, of what the applicant was alleged to have done. "This is reason enough to conclude that no Weissenteiner direction should have been given. If the complainant were accepted as a credible witness, the accused could not

have given evidence of any additional fact that might have explained or contradicted her account".

Their Honours, however, took the view in this case that the evidence was otherwise so overwhelming that, despite the misdirection, there had been no miscarriage of justice and they refused special leave to appeal.

Now it seems clear that their Honours have taken the view that whatever liberty s.20(2) of the *Evidence Act* gives the trial judge to comment on the failure of the accused to give evidence, that comment must be made strictly within Weissenteiner limits, and since they have already referred to cases in which such comments can be made as "rare and exceptional", it seems that the operation of s.20(2) will necessarily be strictly confined.

That in fact seems to be what their Honours feel should be the case with s.20(2). Their Honours examine the historic background from the times when the accused could not give evidence to the legislation which allowed the accused to be competent but not compellable to do so. That, they see as posing a dilemma for the accused that the jury may use the accused's silence in court to his or her detriment. And their Honours say "plainly that is so". It would seem that they accept s.20(2) as allowing the trial judge to correct that misconception. They say, "it follows that if an accused does not give evidence at the trial it will almost always be desirable for the judge to warn the jury that the accused's silence is not evidence against the accused, does not constitute an admission by the accused and may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt".

Later their Honours say, "Section 20(2) of the *Evidence Act* falls for consideration against this background. It is a section which regulates comments by the judge and by the prosecution. The prosecution may say nothing about the fact that the accused did not give evidence. That being so, it would indeed be surprising if

s.20(2) were to be given a construction which would permit the judge to point out to the jury that the failure of the accused to give evidence is an argument in favour of the conclusion for which the prosecution contends. If the prosecution is denied the argument, why should the judge be permitted to make it?"

Callinan J agreed generally with the majority but with some qualifications of his own. He agreed with their view that the remarks already referred to of both trial judges overstepped the bounds and were misdirections. He was very positive about s.20(2).

"In my opinion the purpose of s.20(2) is to enable a trial judge to make comments for the protection and benefit of an accused who has not given evidence and not otherwise".

Gleeson C. J. (dissenting) would seem to give s.20(2) a rather wider meaning. He comments that "the section was enacted to meet a notorious risk that juries, uninstructed will attach more significance to an accused's silence than is legitimate". But he goes on to say:

"the qualification appears to be aimed at ensuring that juries are warned not to treat an accused's silence as an admission of guilt. That would explain why it is expressed in terms related to the reason for not giving evidence. The comment must not suggest that the reason the accused decided not to give evidence was a consciousness of guilt. If the qualification is intended to prohibit any comment that explains to the jury a process of reasoning adverse to the accused, which may properly be open to them, then the prohibition is expressed in extraordinarily oblique language".

He concluded that in both cases the summings up confirmed to Weissenteiner and to s.20 of the *Evidence Act* .

He accordingly dismissed the appeal in Azzopardi and gave special leave to appeal and dismissed the appeal in Davis.

The judgment of McHugh J.(also dissenting) is of considerable interest. His interpretation of s.20(2) of the Evidence Act is in direct contradiction to the views of the majority and of Callinan J. "Protection of the "right to silence", or the immunity of an accused person from giving evidence does not require any reading down of the express power conferred on the trial judge by s.20(2) to "comment on a failure of the defendant to give evidence". The sub-section contains its own limitation: the judge's comment must not suggest guilt or a belief in guilt. It imposes no other limitation".

He then reviews the history of the common law with regard to the concept of the right to silence. A summary of his conclusions does not do justice to a careful argument and it is only intended here to give the bare outlines. In summary His Honour concludes that recent historical research has shown that the self-incrimination protection originated from the European inquisitorial procedure and that it did not become firmly established as a principle of the criminal law until the mid-19th century or later, as a consequence of counsel being increasingly permitted to appear for the accused. Before that, the accused though not on oath, could speak to the court and in fact his protection "lay in his right to speak not in the right to silence". After the enactment of the *Criminal Evidence Act* (allowing the accused to give evidence if he so wished) judges until recently frequently commented on the failure of the accused to give evidence.

McHugh J. asserts that "the history of the common law shows that there is no general right to silence at common law. Where the so-called right exists, it is an incident of various immunities. It describes a consequence of the immunity from compulsory testimony that an accused person enjoys ….. Nothing in the history of the common law, therefore gives any ground for concluding that the immunity from compulsory criminal testimony carried with it an incidental right to silence

which would necessarily be infringed if trial judges could comment on the accused's failure to explain or deny evidence".

His Honour's conclusion is this:

"In my opinion, the comments of the trial judges were in accordance with the law, as it has long been laid down in England and Australia and with what the legislature in NSW intended. If anything, the terms of s.20(2) have strengthened the power of the trial judge to comment on the failure of the accused to give evidence".

He would have dismissed the appeal in Azzopardi and granted leave to appeal and dismissed the appeal in Davis.

His Honour's views are thus in conflict with the views of the majority of the judges save for Gleeson C J. His Honour's position is however supported particularly by Davies J of the Federal Court in his article in 74 ALJ 26 which is headed "The prohibition against adverse inferences from silence – a rule without a reason". Davies J concludes that only legislation can cure a situation which in his view has an erroneous historic base, does not reflect underlying community values and where "the reality mocks the rule".

WHAT DID PARLIAMENT INTEND?

Lest it be thought that the majority in Azzopardi were not reflecting the intention of the legislature, one should turn to the NSW parliamentary debates when the Bill containing what became s.20(2) of the NSW *Evidence Act* was presented.

In introducing the Evidence (Consequential and Other Provisions) Bill to the NSW Legislative Council on 24/5/95, the A-G (Hon J W Shaw) had this to say:

"Like the 1991 Bill, this legislation is based largely on the recommendations of the Australian Law Reform Commission in its 1987 report and the antecedents to that report. In particular, the policy framework established by the ALRC has continued to provide the guiding principles which have governed the reforms contained in the Evidence Bill". (Hansard – LC- 24/5/95 – p.113). Later he said:

"Clause 20 permits comment by the judge on the failure by the defendant to give evidence in a criminal proceeding for an indictable offence. The comment must not suggest that the defendant failed to give evidence because the defendant was guilty. The clause does not affect the High Court's statement of the law, made in Weissenteiner v The Queen on the use that may be made of a defendant's failure to give evidence." (Hansard – LC – 24/5/95 – p.114)

Turning to the ALRAC Report No. 38 of 1987, which is the report to which the A-G was referring, at paragraph 71 the Commission discusses an interim proposal that the judge may comment on the failure of the accused to give evidence but the prosecution may not, and at paragraph 73 the Commission adopted that proposal as a recommendation. (In fact, as the Commission acknowledged, some States already had the provision.)

In discussing the (interim) proposal the Commission cited the remarks of Lord Parker in R v Bathurst (1986) 2QB99 that:

"The accepted form of comment is to inform the jury that, of course, he (the accused) is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that while the jury have been deprived of the opportunity of hearing his story tested in cross-examination the one thing they must not do is to assume that he is guilty because he has not gone into the witness box."

At paragraph 73 the ALRC stated:

"It is very easy, in commenting on the failure of the accused to give evidence, to leave the impression that there is an onus of proof on the accused and that his silence points to his guilt. Great care is required."

It does not appear therefore that the views of the majority of the High Court in Azzopardi were in any way contrary to the intention of the legislature and, indeed, their remarks seem to run closely parallel with the views expressed by the ALRC in the 1987 Report. The majority were reflecting what they and most lawyers practising in criminal law regarded as the traditional approach. This was reiterated in the Report of the NSW Law Reform Committee of July 2000.

A DIFFERENT VIEW

The approach of McHugh J in Azzopardi and of Davies J in the ALJ are more recent and indicate a very different way of looking at the question. In effect they consider that what might be called the "orthodox" view as expressed in such cases as Bathurst is the result of a number of misconceptions which have led courts down the wrong track and can now only be corrected by going back to the starting gate and examining first principles. Davies J submits that:

"The law should reflect underlying community values. In erecting an immunity from adverse inferences from silence, in effect the right to silence, the common law has departed from these values. In immunity (6) there is a conflict between the law and the ordinary understanding of the community". Later, he says:

"To conclude that jurors today cannot be trusted to draw only sensible inferences from silence is unduly paternalistic. If they cannot be so trusted what is the point of the jury system?"

RECAP – AUSTRALIA

The position in Australia seems clear. Subject to some minority murmurs;

(a) the Australian Law Reform Commission and the NSW Law Reform Commission recommend;
(b) the Commonwealth and New South Wales legislate;
(c) the other States and Territories accept; and
(d) the High Court (by majority) interprets.

That the right to silence in its widest form prevails throughout Australia in the sense accepted by the courts over the last 200 years and specifically:-

1. Neither the prosecutor nor the judge can comment adversely on the failure of the accused to answer if questioned at the time of arrest or after.

2. At trial, and if the accused does not give evidence.
   (a) the prosecutor cannot comment on that fact.
   (b) In certain jurisdictions, neither can the judge.
   (c) In those jurisdictions in which the judge is permitted to comment, -- the comment, with one exception, must be in favour of the accused in the sense of warning the jury that the failure of the accused to give evidence cannot be taken by them as inferring or suggesting that the accused was thereby guilty or had a guilty mind.
   (d) The exceptional case (and the emphasis on the adjective), is where the evidence is capable of explanation by disclosure of additional facts known to the accused.

In view of the above summary the prospect of any alteration to this position in any Australian State or Territory seems remote at present.

SHOULD THERE BE CHANGE?

Specific provisions of the *Criminal Justice and Public Order Act* (1994) of the UK are not in accord with the Australian position. The divergence is either significant or not. If the latter, then nothing need be done to cure a distinction without a difference. If the former, we must necessarily re-examine the Australian scene, if only to assure ourselves that we remain on the right track from which, sadly, others have strayed.

Davies J. and McHugh J. have criticised the present position in Australia as lacking a historical basis and being contrary to common sense. In doing this they have emphasised that there is no attack on the right to silence if by that is meant the right to remain silent at trial or if previously questioned, but it is their contention that those undoubted rights should not be extended to include an immunity from comments made about those actions. Opponents of any change say that, if the right to comment is allowed, the right to remain silent is effectively destroyed. They maintain that one is so dependent on the other as to be inextricably intertwined.

BACK TO BASICS

Before examining and comparing the position in the UK with that in Australia it may be useful to reflect what approach would be taken by an ordinary reasonable citizen if he or she were asked to look at the question untrammeled by centuries of judicial interpretation overlaying the original concepts. In other words is there a common sense view as to what rights or protections a person should have if interviewed by police or presented for trial, and what comments could or should properly and fairly be made if a person failed to answer when questioned about a

particular matter or failed to give evidence when brought to trial charged with a specific offence.

How would an ordinary citizen look at it? Some might argue that it is not for this committee to usurp the views of the ordinary citizen. If so the common law has long been at fault. Juries, i.e. members of community, are daily determining whether the actions of plaintiff or defendant in a particular situation correspond to the actions of a reasonable person in that situation; and whether the foreseeability of a person in that situation was the reasonable foreseeability of an ordinary reasonable person. And judges, frequently called upon for this task in the absence of a jury, are never heard to complain that from their lofty position in the empyrean it is difficult to descend to the views of the common herd. No set of rules is prescribed for this exercise, and the common law accepts that definition destroys, i.e. to define reasonable doubt is immediately to create unreasonable doubt, and to define common sense is to defy common sense. This committee is therefore in as good a position as a jury and in a better position than a judge (since it has no higher standards to subjugate) to predict what would happen if the right to silence were examined ab initio.

Assume therefore that a body of Australian citizens is asked to draw up rules in this area.

They are to be bound by no earlier precedents or rules but to use the common sense of the ordinary Australian.

This committee believes it would not be too difficult to predict the result.

1. The right to stay silent under questioning by any one, (in authority or otherwise) would be totally accepted. This would not depend on a knowledge of the history of the Court of High Commission in England or the behaviour of Spanish Inquisitional tribunals or of any courts where a

failure to answer invokes penalties or an automatic assumption of guilt. Our group of citizens are not historians. The decision would be based simply on the proposition that every Australian has a right to privacy and independence and can tell any officious enquirer to jump in the lake. There would be a clear perception that any other course would lead to tyranny.

2. A person on trial for a criminal offence must have the right to be heard, and if he wishes to do this by giving evidence he must be able to do so. This can plainly be justified in the highest levels of jurisprudence, but in Australian terms, can be translated into the “fair go” principle.

3. Such a person must have the equal right to choose not to give evidence. To force a person to give evidence if he does not wish to do so is plainly unfair and repellent, and, in any event ineffective without the use of the rack. It necessarily follows that to presume guilt solely from failure to give evidence is unfair because it negates the right which has previously been acknowledged.

4. Nevertheless, except in cases of infancy, insanity or duress, a person must take responsibility for his actions or decisions. Freedom of choice in a democracy entails freedom of others to examine or criticise the choice. This is an extensively used freedom in Australia where the decision or lack of decision of every football referee, cricket umpire, public servant or politician is frankly and vigorously debated. To expect that an Australian jury will not act similarly in a courtroom is to close one’s eyes to reality.

   (Somewhat paradoxically this is recognised even by some who oppose any alteration of the present rules. The argument is, yes, the jury will query why the defendant has not given an explanation but it is still better to leave things as they are. The NSW Law Reform Report 95 and p.94

concedes, “It is also reasonable to suspect that juries may not always obey the trial judges’ directions not to draw adverse inferences from the suspect’s silence,” but concludes that on the whole the status quo should remain. However, it does little for the majesty of the law to accept that a jury may well do what it is specifically told not to do.)

5. From the characteristically robust and direct view point of the average Australian it would defy common sense that, if a person chooses a course of action, he should then demand that no one should question that course of action or draw inferences from it.

Specifically, if a person refuses to answer questions that is his right; but, like any other decision freely made, there is the right of others to ask why. This is not oppressive. There are many perfectly acceptable explanations for remaining silent. Nervousness, indignation, doubts that one will be properly reported, incomprehension, desire for advice, fear, illness, incapacity to express oneself clearly, embarrassment etc. In any ordinary situation it would be considered strange if a person who might reasonably be expected to know something of the situation chose to say nothing (his right) but then claimed that his right to say nothing prohibited others from saying anything. Is it rather more correct to expect that silence without later explanation, or an explanation which is unconvincing should be part of the broad picture that people in everyday life and in everyday incidents take into account in assessing what has actually occurred? And should not juries be in the same position and expected to react as other members of the community would in like circumstances? The suggestion that to allow comment on silence is to deny the right to silence is unconvincing. The reason for silence can be given in explanation and the jury may assess that as part of the body of evidence before them. They will be well aware of confused behaviour under stress, but still consistent with innocence; and equally properly suspicious of no explanation or an

unconvincing one. Neither of this will necessarily be conclusive and the jury will still be bound to consider whether the case has been proved beyond reasonable doubt.

Working from first principles therefore there may be a strong argument for modification of the present rules; and this is the path taken both in the UK and Singapore. But it must be emphasised that, whether or not one agrees with the variations now to be discussed, the prevailing climate of legal opinion in Australia is presently strongly against any change.

RETHINK IN THE UNITED KINGDOM

In 1994 the Westminster parliament passed the *Criminal Justice and Public Order Act* (UK) which came into force in April 1995.

It was a comprehensive Act dealing with many situations but, for present purposes, the relevant sections are sections 34-39. These sections were subsequently amended in some details but not in any way to vary the significance of the intent of what was originally expressed.

In summary, these sections provide:

(a) That, if an accused person is questioned under caution by police, or charged with an offence, or officially informed that he might be prosecuted for an offence, fails to mention a fact “which in the circumstances existing at the time the accused could reasonably have been expected to mention”, the court or jury “may draw such inferences from the failure as appear proper” (s.34).

(b) (Subject to certain exceptions), if an accused does not give evidence, or refuses without good cause to answer any question, the court or jury may

"draw such inferences as appear proper". But the accused is not thereby rendered compellable to give evidence (s.35).

(c) When a person under arrest is questioned by a constable who reasonably believes that the presence of some "object, substance or mark" in the vicinity of the person may be attributable to the participation of the person arrested in the commission of a specified offence and the person fails or refuses to answer, the court or jury may "draw such inferences from the failure or refusal as appear proper" (s.36).

(d) Where a constable reasonably believes that the presence of an arrested person at a specific place and time may be attributable to that person's participation in an offence and the constable requests him to account for that presence and the person fails or refuses to do so, the court or jury may "draw such inferences from the failure or refusal a appear proper" (s.37).

(e) No finding (particularly of conviction or case to answer) can be based "solely" on an inference to be drawn from failure or refusal to answer or give evidence (s.38).

(f) Sections 34 to 38 may apply to the armed forces if the Secretary of the State so orders (s.39).

These sections do not interfere with the "right to silence" insofar as that expression means the right to refuse to answer questions and the right to elect not to give evidence. They do interfere with the "right to silence" if, by that expression, is meant the right to be protected and be immune from any comment by a prosecutor or a judge on the failure of the accused to answer questions before trial or to give evidence at the trial. The court or jury is entitled to draw such inferences from the failure to answer questions or the failure to give evidence "as appear proper".

If the prohibition against drawing adverse inferences from silence is, as Davies J. calls it, a "rule without reason", then the parliament of the land from whence the rule originally sprung has now agreed with him provided that the "adverse" inference is the "proper" inference.

Examination of the second reading debate of the Bill in the House of Commons makes it quite clear that the government of the day intended that result and not merely the limited power of comment which was intended by the legislature of NSW. In introducing the Bill in the House of Commons the Secretary of State for the Home Department (Mr Michael Howard) had this to say:-

> *"Part III also contains our proposals on the so-called right to silence. The provisions will allow a court to draw proper inferences from a suspect's refusal to answer police questions in circumstances which cry out for an innocent explanation, if there is one, or from a defendant's refusal to give evidence in court. That does not mean that a suspect or defendant will be compelled to speak under threat of a criminal penalty. Defendants can still remain silent if they choose. In future, the judge and jury will be able to weigh up why the defendant decided to stay silent and the jury will be able to drawn reasonable inferences from that silence. In short, it is not about the right to silence, it is about the right to comment on that silence".*

Interestingly enough, the then Leader of the Opposition (Mr Blair), while firmly opposing any interference with the right to remain silent under questioning and opposing the suggestion that comment should be allowed, nevertheless seems to have accepted that in some circumstances comment could and should be made if an accused raised previously undisclosed defences after a full disclosure of the prosecution's case. He said:-

> *"The right to silence covers two entirely different situations. The first is where a prosecution case is disclosed, the accused knows exactly what is being alleged and its significance and is acting with qualified legal advice. There is justifiable concern that entirely new facts or defences could be raised at trial and, as it is described, the prosecution ambushed. There is a huge dispute about the prevalence of that, but let us assume it happens. I do not believe it is inconsistent with civil liberties to allow that lack of disclosure to be properly commented on, but that is a million miles away from the other type of case. That is, before charges are brought, when the person is being questioned – he may not understand the significance of what he is asked and may not be legally represented – he fails to mention a fact that is later relevant. Under the Government proposals, even if that fact were subsequently disclosed before the trial so that there was no question of ambush, the failure could be used to draw inferences of guilt. Any reasonable person could see that that approach is open to potential injustice".*

Another speaker referred to *"the absurdity that someone caught almost red-handed or with marks or substances on him which require some explanation has nothing to say and, at the express direction of the judge, is protected from any adverse conclusion that may be drawn from his silence"*. He added, *"After all there is no great deal about making an adverse comment about a defendant's silence. If there is a legitimate reason for that silence the defendant can explain it when he gives evidence. The defence counsel can explain it. The judge will have to remind the jury of that explanation when he sums up. The jury may well accept that explanation".*

There was a great deal of discussion on the point but the above passage succinctly sums up what was said in support of the bill and was echoed in various ways by other members. In some of the debates there seems to remain the confusion between the right to silence and the right to comment, and one

member thought that the Bill deprived the accused of "one of the traditional safeguards of liberty – the right not to incriminate himself or herself". On the whole, however, the suggested amendments seem to have been understood for what they were, and the opposition was based on a fear of infringement of personal liberties and concern about interfering with a well-established rule. These are perfectly proper concerns but at least in part they were met by a member who had been a practising lawyer with experience in the field of criminal law:-

> *"Before working in the criminal justice system I would have defended the right to silence. In my many years as a criminal lawyer, however, I have advised many hundreds of clients under questioning and I cannot recall a single instance when an innocent man or woman exercised that right. It is not a cliché to say that innocence demands the right to speak. It is guilt and a guilty conscience that demands the right to silence".*

One point was raised by several speakers and it is a point that was also immediately raised when the matter was first discussed among members of this Territory Law Reform Committee. The knee-jerk advice of every lawyer, at least before receiving more detailed instructions from the client, is "*don't say anything to the police*". Why, then, could this not be the overall, comprehensive answer to any later comment on one's earlier silence?. "*I was acting on legal advice*". Could this not also be the answer to any comment on failure to give evidence?

As the editors of the All England Reports Annual Review of 1999 remark, if accused persons are to be immune from adverse inferences if a lawyer advised them to remain silent, "This would drive a coach and horses through what the legislation is trying to achieve". (p.191).

The solution suggested in the parliamentary debates was to cast a much wider responsibility on lawyers in advising their clients on this aspect. As one member put it,

> *"We must place all lawyers under an obligation, when they tell their clients that they need not say anything, to tell their clients also, that, if they do not speak, the jury will be able to form such view of their refusal to speak as seems appropriate to them".*

This in fact seems to be the approach the courts subsequently took after the legislation was passed. Thus, rather than becoming the blanket (and legitimate) excuse for silence in court or out, that one acted on lawyer's advice, that matter is now merely an element in the presentation of the case, i.e. could the defendant's decision give rise to an adverse inference in the circumstances? Acting on lawyer's advice excuses the defendant no more and no less than other decisions taken on his behalf by the lawyer, e.g. what witnesses to call, what questions to ask in cross-examination or what points to emphasise to the court. It does of course add to the lawyer's responsibility but perhaps there are greater burdens than deciding what is basically a question of common sense.

That a defendant could not hide behind the shield of a solicitor's advice was established in R v Condron (1977) 1 WLR827. In that case the defendants, on their solicitor's advice had refused to answer questions from the police. The dependants were heroin users and their solicitor considered that they were unfit to be interviewed. The police doctor, however, considered that they were fit.

The trial judge rejected a submission that, since their solicitor had bona fide advised the defendants not to answer, no adverse inference could be drawn. The judge directed the jury that it was a matter for them to decide whether any adverse inferences could be drawn against the defendants.

The jury convicted. The appeal to the Court of Criminal Appeal was dismissed. Stuart-Smith L.J., delivering the judgment of the court said:-

> *"…it is not so much the advice given by the solicitor, as the reason why the defendant chose not to answer questions that is important. That is a question of fact which may be very much in issue".*

The leading case relating to the legislation itself is Murray v United Kingdom (1996) 22 EHRR 29, although this case did not deal with the *Criminal Justice and Public Order Act* of 1994 but with earlier legislation resulting in the Criminal Evidence (Northern Ireland) Order 1988. Articles 3, 4 and 6 of that Order though not precisely similar to sections 34, 35 and 37 of the *Criminal Justice and Public Order Act* are substantially the same and the decision in Murray v United Kingdom clearly fits and is applicable to those sections.

The case came before the European Court of Human Rights on appeal from the decision of the House of Lords (Murray v DPP (1993) 97 Cr App. R. 151) affirming the decision of the Court of Appeal in Northern Ireland 1992, which in turn affirmed the decision of the trial judge, the Lord Chief Justice of Northern Ireland 1991.

The trial before the Lord Chief Justice had been by judge alone. Upon arrest the accused had been cautioned in a form which contained a warning that adverse inferences could be drawn at his trial if he elected to remain silent and not answer police questions. The accused did not answer police questions and did not give evidence at his trial. On finding the accused guilty the judge informed him that he had drawn adverse inferences from the fact that he had not answered police questions and that he had not given evidence at his trial.

The European Court of Human Rights, while careful to emphasise the fact that it was dealing with the particular facts of this case, made (by majority) the following findings and observations.

1. The right to remain silent and the privilege against self-incrimination are generally recognised international standards.

2. These standards are not absolute. Therefore, while it would be incompatible to base a conviction solely or mainly on the accused's silence or refusal to answer questions or to give evidence himself, where a situation clearly calls for an explanation, the accused's silence can be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. All the circumstances of the case have to be taken into consideration.

3. There were safeguards built into the order (e.g. the Criminal Evidence (Northern Ireland) Order 1988) and there was no compulsion to give evidence in that his insistence in maintaining his silence did not amount to a criminal offence or contempt of court. Neither is silence in itself regarded as an indication of guilt.

4. Therefore, having regard to the circumstances of the particular case, it was common sense that an explanation from the accused was reasonable and therefore the drawing of inferences was not unfair.

The decision therefore seems to assure that *The Criminal Justice and Public Order Act* 1994 (UK) stands now in no hazard of being found invalid either within the common law of the United Kingdom or within the European convention of Human Rights.

But the European Court of Human Rights did import into the statute one condition which was not part of the statute's terms. The court (by majority) determined that the accused's human rights had been violated because he had not had access to a lawyer during the first 48 hours of his police detention. Hence it is now accepted by the courts of the UK that the Act will have little or no application if the accused has not speedily had the opportunity for access to a lawyer after his arrest. Sections 34 (2A), 36(4A) and 37(3A) were added in 1999 and provide that adverse inferences can only be drawn where the defendant was given an opportunity to consult a solicitor prior to being questioned. And see also s.58 of the *Youth Justice and Criminal Evidence Act* (UK) 1999.

The Criminal Justice and Public Order Act 1994 (UK) has now been in force since April 1995. So far as this Committee can ascertain there has been no significant agitation for reversion to pre 1995 and, insofar as the present government was in opposition when the Act was passed, it does not seem to have considered that it is now necessary to repeal the Act and particularly sections 34-39.

THE SINGAPORE EXPERIENCE

The Criminal Procedure Code of the Republic of Singapore was amended by the *Criminal Procedure (Amendment) Act* 1976 which came into force on 1 January 1977. These amendments are essentially similar to the UK *Criminal Justice and Public Order Act* but, obviously, pre-date it by some 18 years. As with the UK Act, there seem to be no moves afoot for repeal and no public dissatisfaction with the provisions.

It may be useful therefore to examine the operation of the legislation in Singapore over the last quarter of a century.

In an article in 1997 Criminal Law Review 471, Alan Khee-Jin Tan, of the Faculty of Law, National University of Singapore set out the position as he saw it to that date.

In his view, there seemed at first and for some years thereafter, to be no inclination in the courts to draw adverse inferences either from silence under police questioning (though he comments that silence under police questioning was rare even before the legislation and remains so) and silence at trial.

However from 1992 onwards, (and he cites two cases which mark the turning point), – he says:-

> *"What did become evident subsequently was that, in the aftermath of the two cases, the prosecution began using the accused persons' silence against them more regularly. Since then, a series of cases has appeared in which adverse inferences have been explicitly drawn by the courts in response to accused persons' refusal to volunteer information, both during pre-trial police questioning and at trial".*

Mr Tan places this in the context of a public and judicial attitude in Singapore to these situations which may be different from that in the UK and Australia.

He quotes the words of Lee Kuan Yew:-

> *"In English doctrine, the rights of the individual must be the paramount consideration. We shook ourselves free from the confines of English norms which did not accord with the customs and values of Singapore society. In criminal law legislation, our priority is the security and well-being of law-abiding citizens rather than the rights of the criminal to be protected from incriminating evidence".*

This is reflected in the words of Yong Hung How CJ of Singapore in 1995:-

> "*The content of our substantive legal rules sets limits on the types of acceptable behaviour which would appear unduly restrictive to some other societies. Such societies may also take issue with the judiciary expressly recognising the element of public interest when deciding appropriate sentences to punish criminal behaviour and by not allowing the particular circumstances of the individual offender to have paramount overriding importance. However, it is the content of our rules and the deterrent value of the punishments that are the reasons for the public confidence and respect for our legal institutions and the safety of the society we live in".*
>
> (The Chairman of this Law Reform Committee of the Northern Territory recently asked Mr Tan whether, in view of the fact that his article was written in 1997, there had been any observable change of approach of the Singapore courts since then. Mr Tan informed the Chairman that, in his view, the position remained as it was in 1997. This Committee records its gratitude to Mr Tan for his courtesy and assistance.)

How far the underlying principles upon which the legislative changes are based may differ in the UK and in Singapore may be a subject for philosophical discussion but may not make much difference to the way the changes are applied at common law. Permitting a court to draw adverse inferences from silence in proper circumstances cannot dispense with the necessity to ensure that the inference drawn <u>is</u> the proper inference, that the burden of proof remains on the prosecution to prove the case beyond reasonable doubt, and that mere silence without more cannot be proof of guilt.

Some might regard it as ominous that courts might ultimately take the road to Singapore. Others will maintain that to be a desirable route. The real point for the purpose of this Report is that in both the UK and Singapore the changes in

the legislation seem to have been seen as rational, and there appears no public outcry against them or any groundswell for repeal.

Those who regard the UK legislation as a proper realisation of the real position would no doubt now urge the Australian States and Territories to do likewise. However, as previously pointed out, the present climate of political or legal opinion seems to be against any such reversal of the status quo in Australia. It would seem that any change, if it comes, would be somewhat far in the future.

The latest examination of the "*right to silence*" is from the NSW Law Reform Commission (Report 95 of July 2000) which firmly rejects any alteration to the present position. The Commission examined the legislative changes in the UK and Singapore and concluded:-

"2.138 for the reasons discussed above, the Commission has concluded that it is not appropriate to qualify the right to silence in the way provided by the English and Singapore legislation. The Commission considers 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 along the lines provided for in the England and Wales and Singapore (sic) would, in the Commission's view, undermine fundamental principles concerning the appropriate relationship between the powers of the State on the one hand and the liberty of the citizen on the other, exacerbated by its tendancy to substitute trial in the police station for trial by a court of law. There are also logical and practical objections to the English provisions. An examination of the empirical data, moreover, does not support the argument that the right to silence is widely exploited by guilty suspects, as distinct from innocent ones, or the argument that it impedes the prosecution or conviction of offenders".

The NSW Law Reform Commission therefore recommended that the UK legislation should not be introduced in New South Wales.

However, it is appropriate to observe that the European Court of Human Rights in Murray v DPP previously cited, did not seem to consider that the sort of "fundamental principles" mentioned in the citation above were infringed by the UK Act, save for the opportunity for legal advice, which was subsequently corrected by later amendments. Obviously much will depend over the next decade on the way in which the UK Act is seen to be administered.

A SENSE OF PROPORTION

While there is no doubt that the Singapore and UK legislation makes significant changes to a presently accepted position it must be remembered that the changes will affect a relatively small proportion of criminal cases. This is because, as the NSW Law Reform Commission Report points out (pp. 16, 17), that most suspects do not remain silent when questioned by the police. The Commission reports:- ":2.16 Empirical research conducted by the NSW Bureau of Crime Statistics and Research in 1980 concluded that 4% of suspects subsequently charged and tried in the Sydney District Court remained silent in police interviews. Research undertaken by the Victorian Office of the Director of Public Prosecution in 1988 and 1989 found that suspects did not answer police questions in 7% to 9% of prosecutions".

THE SPECIAL POSITION IN THE NORTHERN TERRITORY

If there is to be any move in any Australian State or Territory towards adoption of the UK Act, the Northern Territory would be the last place in which the experiment should be tried. This is not to suggest that the Northern Territory should ever be backward in bold or imaginative legislation. Indeed, it would be the hope of this committee that our parliament would outstrip sub-Capricornian parliaments in this respect. But against this specific legislation there stands a

barrier set up by experienced and respected judges some 25 years ago, and for good and sufficient reasons, pertaining to the special nature of the Territory community. These are the Anunga Rules, propounded in 1976 (11 ALR 412) by Forster J. (as he then was) with the concurrence and approval of the other two judges then on the Supreme Court. The Rules recognise the unique position of the Territory in having a far higher proportion of Aboriginal citizens than in any other State or Territory, and a recognition that, for many of these citizens, the English language is either unfamiliar or at least difficult to fit into the concepts of their own language.

The Rules have been consistently observed and applied by all judges of the Supreme Court of the Northern Territory since 1976.

The Rules are "general guidelines for the conduct of police officers when interrogating Aboriginal persons".

In summary the Rules are:-

1. An interpreter should be present.
2. A "prisoner's friend" should be present.
3. Care should be taken in administering the caution.
4. Care should be taken in formulating questions, so that as far a possible, the answer which is wanted or expected is not suggested in any way.
5. Even when an apparently frank and free confession has been obtained, police should continue to investigate the matter.
6. Prisoner's physical comforts to be catered for.
7. No interrogation of any prisoner disabled by illness, drunkenness or tiredness, and interrogations should not be unreasonably long.
8. If sought, reasonable steps should be taken to obtain legal assistance for the prisoner.

9. Substitute clothing to be provided if prisoners clothing taken for forensic purposes

In setting out these rules Forster J. was careful to disarm any criticism that they would be seen as over-patronising to Aboriginal people.

He said:-

> "*It may be thought by some that these guidelines are unduly paternal and therefore offensive to Aboriginal people. It may be thought by others that they are unduly favourable to Aboriginal people. The truth of the matter is that they are designed simply to remove or obviate some of the disadvantages from which Aboriginal people suffer in their dealings with police."*

It may well be that, nowadays, a person of Aboriginal descent, well integrated into urban society, may find it offensive to be treated as if he or she had only limited knowledge of the rights of an ordinary citizen. There may also come a time, as His Honour rather foreshadowed in his judgment, that these rules should cease to be seen as applying only to one specific group in society and should be extended to cover all persons whose grasp of the English language is poor or who may, for various reasons, be thought incapable of understanding ordinary police procedures. But the important point is that, if a large group of citizens are seen as requiring special help and care in questioning, then it becomes difficult and risky to comment adversely on any failure to answer during that questioning; since any adverse inference suggested may just as rationally be explained as arising from that disadvantaged position for which the Anunga rules provides protection and special consideration. Equally, the failure of the defendant to give evidence at trial would still see him cloaked in that protection as a member of a group entitled to special care and understanding and against whom it would be unfair to draw any adverse inference.

Since the Aboriginal population of the Northern Territory comprises at least one quarter of the population it is obvious that a significant group is involved; certainly significant enough to make it extremely difficult to differentiate between that group and the rest of the population in the sense of passing an Act similar to the UK *Criminal Justice and Public Order Act* and then providing that it applies only to non-Aboriginals.

Leaving aside the problem of defining an Aboriginal for the purpose of the Act, and the semantic gyrations which a judge would need to instruct a jury where one defendant was Aboriginal and the other non-Aboriginal, the basic objection would be that any such differentiated legislation would certainly be seen as offensively paternalistic to the group in whose favour the differentiation was made.

A further reason for discouraging the presentation of such legislation in the Northern Territory is based on practical financial considerations. Assuming the Territory parliament were the first to enact such legislation there would be no doubt that it would be subject to at least one, and more likely, several, challenges to its validity, its precise meaning and its constitutionality. Such challenges would invariably end up in the High Court accompanied not only by counsel for the Territory and the appellant, but also no doubt, by a galaxy of legal talent seeking to intervene on behalf of various States or interested parties. The subsequent expense for the Territory would be enormous, and while this committee has no desire to discourage legislative pioneering, there may be better causes for the Territory than to lead the way in an expedition which may well prove to have the same frustrations and expenses as that undertaken by Messrs Bourke and Wills.. The more populous (and wealthier) States would have greater reason to consider the legislation and do not face the problems which the Anunga rules pose for the Territory.

CONCLUSION

In an ideal world no doubt the rationale of the UK *Criminal Justice and Public Order Act* would lead inevitably to similar legislation in Australia. That has not happened and, for the reasons already given, is not likely to happen immediately in any Australian State. It may be that eventually, and if the UK legislation is seen to be successful, or at least not the cause of any injustice, some State will take the initiative and face the inevitable legal challenges. If the challenges are overcome other States might follow. Ultimately the Territory might then do likewise, but, for the reasons already given, this is a situation where the Territory should not lead and would be wise to wait.

RECOMMENDATION

This Committee believes that it can create a record with the shortest recommendation ever recorded by any Law Reform Agency in Australia or elsewhere.

The task given this Committee was to consider the rationale of the UK *Criminal Justice and Public Order Act* and the question essentially asked was whether it was expedient for the Northern Territory parliament to adopt it or some variant of it.

To that question this Committee records the following and only recommendation:

No.