THE RIGHT TO SILENCE REASSESSED[1]

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THE "RIGHT TO SILENCE" IN THE INterrogatory stage of a police investigation is generally understood to involve the right of a person to refuse to answer police questions without suffering any adverse legal consequences at a subsequent trial.[2]

But, how substantial is that right? Although intellectual assent is given to the proposition that no adverse inference may be drawn from the exercise of the right to silence, the English case of *Ryan* (1966) 50 Crim. Appeal Reports 144 and the Victorian case of *R. v. Bruce* (1988) V.R. 579 confirm the proposition that the fact that an accused, having availed himself of the right, advances an explanation for his activities for the first time at the trial, may (subject to judicial discretion) be taken into account by a jury in assessing the weight to be attributed to the accused's account.

This distinction has been described by Professor Rupert Cross as "legal gibberish". I am inclined to align myself with the Professor. At the very least the distinction is so subtle and finely honed as to render the right to silence hollow.

Whether the English and Victorian gloss on the right to silence will receive the blessing of the High Court of Australia is a matter of considerable doubt. Whilst the High Court in refusing special leave to appeal in *Bruce's case* was not required to undertake an examination of the principles involved it did permit itself the tantalisingly Delphic utterance that "Insistence on the right . . . does not of itself and standing alone have any probative force at all against an accused".[3]

It is not the purpose of this paper to discuss the genesis or evolution of the right to silence. Its survival in its modern form is justified by its proponents on the basis of both principle and pragmatism. It is a matter of fundamental principle that it is the function of the Crown, representing the State, to prove the criminal charges that it brings against its citizens. It is not for the citizen to prove his innocence. Nor should a citizen be forced by his own testimony to incriminate himself. These concepts are exemplified in the right to silence.

On pragmatic grounds it is asserted that confessional evidence provided as a result of the free exercise of the right to speak or remain silent is more likely to be reliable. Further, and if I could put this compendiously, since the various arguments in favour of the right to silence are reproduced in the vast quantities of literature, the abolition of that right would have the potential to operate unjustly in respect of those persons embroiled in the criminal justice system as suspects or accused.

The right to silence has formed an integral part of the English criminal justice system, and those systems based upon it, for the last 300 years. The concept has survived despite periodic criticisms of it. Consequently it is not unreasonable to cast upon those who seek its abolition or modification the onus of justifying the necessity for change.

The present balance in the criminal justice system is, it appears to me, designed to prevent what most persons would regard as the ultimate injustice. This is not that guilty people are acquitted, but that innocent people are convicted. Assuming that the proponents of abolition or modification subscribe to the same value system, it would seem imperative that any evidentiary procedures they might postulate in substitution for the status quo do not increase the possibilities of injustice.

There is, and always will be, an uneasy tension in the administration of the criminal law between the competing public interests of convicting the guilty and protecting individual citizens from unfair, illegal or arbitrary treatment. There is ample scope for persons of goodwill to differ as to where the balance between these competing interests should be struck. Commenting on the question of balance Mr. Justice Vincent of the Victorian Supreme Court has remarked:

"The task is to recognise that the problem which exists in the community in relation to criminal behaviour is, in a sense, part of the price which is paid for freedom. It is important to understand that there is a balance to be struck between these respective interests; . . . that we are aware of the importance of that balance and do not, in any enthusiastic endeavour to prevent particular forms of anti-social behaviour, create a situation which threatens individual liberties that every man, woman and child in this community are entitled to."[4]

Is the price paid for the right to silence too great?

There is no evidence to demonstrate, at least in the superior courts where the most serious cases are tried, that the effectiveness of prosecutions is being frustrated or that the acquittal rates from the perspective of the community interest in convicting the guilty, is too high.

In support of the assertion that it is, the general increase in the crime rate is frequently called in aid. Presumably this increase is attributed (at least in part) to the exercise of the right to silence. First, because it is said to impede police investigations and secondly because it hampers the prosecution of offenders resulting in a higher than desirable acquittal rate. Furthermore, the persons being acquitted are designated as "hardened" criminals.

The suggested causal link is, at best, tenuous. Police powers (including those of interrogation) are necessarily predicated upon the commission of pre-existing crimes. Crime itself will always be with us. Its sociological, psychological and environmental causes can never be eliminated. Crime reduction may be occasioned by many factors. Not least among these are preventative activities exemplified by security devices on motor vehicles, homes and buildings, efficient screens in banks, programmes such as Neighbourhood Watch and increased police presence on the streets.

Any benefit at all in the reduction of crime deriving from the abolition of the right to silence could only be confidently asserted if it could be demonstrated, first, that such abolition would result in a significant increase in the solution of crime (i.e., charging of suspects) with a commensurate increase in the successful prosecution of criminal offences and secondly, that this process would result in the incapacitation (albeit temporarily) of active criminals and the deterrence of potential criminals from engaging in illegal activity. Even if these matters could be demonstrated one could safely assume that the impact on the crime rate would be no more than minimal.

In Australia there are no objective and reliable figures available, so far as I am aware, that indicate that the exercise of the right to silence has proved to be a major hindrance to crime solution.

Even if one assumes that such an exercise makes the task of the police more difficult, all this must be placed in the context of modern-day police investigatory techniques which involve sophisticated surveillance (both visual and audio), the tapping of private telephones and, in many jurisdictions, the power to obtain from persons reasonably suspected of having committed a criminal offence, real evidence in the form of bodily samples and fingerprints.

Further, there is no evidence to demonstrate, at least in the superior courts where the most serious cases are tried, that the effectiveness of prosecutions is being frustrated or that the acquittal rates, from the perspective of the community interest in convicting the guilty, are too high.

The conviction rate in the superior courts of Victoria for all completed cases in 1987/88 (excluding those terminated by the entry of a nolle prosequi) was 89%. In 1988/89 it was 88.6%. Such a conviction rate could hardly be regarded as unsatisfactory. Indeed, a criminal justice system in which a percentage of persons of this order are being acquitted is one which, arguably, is functioning adequately.

More enlightening and more pertinent to the argument are figures which focus upon those cases in which the right to silence was invoked. Accordingly, I caused a survey to be carried out by lawyers within the Office of the Director of Public Prosecutions to ascertain the number of persons who, in the superior courts of Victoria, utilised that right during 1989. This was not a precisely monitored statistical study so on the scale of lies, damned lies and statistics I am uncertain where this survey falls. However I regard the data obtained as tolerably accurate. Out of 1836 completed prosecutions the right to silence was exercised in 170 (or just over 9%) of them. In approximately 80% of the cases (or 129) convictions were obtained. (As with the total conviction rate such a figure excludes cases terminated

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by the entry of a nolle prosequi.) Whilst this percentage is lower than the conviction rate generally, it would be a mistake to infer, without additional study, that the primary cause of any acquittal was the absence of inculpatory material from the accused (even making the unwarranted assumption that all persons who exercise the right were guilty). In 85% of the prosecutions the person exercising the right to silence had prior convictions. It was not possible on this cursory analysis to determine how many of those persons might fall within the concept of hardened criminals (which I take to mean serious recidivists.)

This figure indicates that in approximately 15% of all cases persons without prior convictions sought to exercise the right to silence. The figures also disclose that 75% of persons with prior convictions (who may or may not attract the appellation of hardened criminals) did not choose to exercise the right to silence.

(The results of this survey were similar to one conducted in 1988 save that there was a 2% increase in the number of persons who exercised the right to silence, a 5% increase in the conviction rate and a 9% increase in the number of persons exercising the right to silence who had prior convictions.)

One must, of course, be cautious as to the conclusions to be drawn from the figures presented. However, they do suggest that the right to silence is utilised by a significant number of persons prosecuted in the higher courts. Further, they demonstrate that the exercise of that right provides no guarantee whatever of ultimate acquittal in the courts. The figures also indicate that it is not merely persons with criminal records who choose to remain silent and, indeed, whilst a person with a criminal record is more likely to decline to answer questions, most persons who have acquired prior convictions do, in fact, answer police questions.

(The figures provide no information as to the number of persons who exercised the right to silence spontaneously and those who did so after obtaining legal advice.)

This survey does not bear out the proposition that the exercise of the right to silence is a major impediment to successful prosecutions.

A principal assumption by those who advocate either the abolition or modification of the right to silence is that an innocent person has nothing to fear from fully and frankly answering police questions. Indeed, it is often put that there are unlikely to be any reasons for silence consistent with innocence. In my view this is a far too simplistic proposition. The Australian Law Reform Commission dealt with that argument in this way:

> *". . . there may be good reasons for silence. The theory underlying reliance on silence by a suspect to an accusation is that the 'normal' human reaction would be to deny such accusation if untrue, but the truth of this generalisation turns on a number of factors, including the circumstances in which the accusation is made, by whom it is made, and the physical and psychological state of the particular person involved. In particular there are a number of reasons for silence consistent with innocence. The suspect may wish not to disclose conduct on his or another's part which, though non-criminal, is highly embarrassing. He may wish to remain silent to protect other people. He may believe that the police will distort whatever he says, so that the best policy is to say nothing and stick rigidly to that policy. Even more significant are communication factors. People accused of crime tend to be inarticulate, poorly educated, suspicious, frightened and suggestible, arguably not able to face up to and deal with police questioning, even if that questioning is scrupulously fair. They may misunderstand the true significance of questions. People are commonly unable to sort out and state the factual aspects of their problems clearly even after time for studied reflection and discussions with friendly legal advisers . . . Doubts also exist as to the ability of the tribunal of fact to assess properly the probative value of a suspect's silence in the face of police questioning. The tribunal might not be aware of the accused's reasons for pre-trial silence, since those reasons may still apply so that he feels it necessary not to give evidence . . ."*[5]

There may, in relation to an alleged criminal act, be various degrees of involvement, or differing mental states which could be of the utmost importance in inculpating or exculpating the suspect. Clearly (and even after the assistance of legal advice) the inadequate and inarticulate person subject to the inevitable psychological pressures that exist in a situation of interrogation within the confines of a police station may make unjustified concessions or inadvertent omis-

sions in attempting to formulate an account of his actions and the mental state which accompanied them. Nor should it be assumed that a more intellectually accomplished suspect will not encounter similar difficulties. It is, in the end, a matter of degree.

It follows that I consider the proposition that the innocent person has nothing to fear from the abolition of the right to silence as one which is not sustainable.

It cannot be gainsaid that people who choose to speak, having been cautioned, may create for themselves the same difficulties which have previously been enunciated, but this can hardly be seen as a satisfactory argument for withdrawing the capacity of choice from all suspects.

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In recent years jurisdictions such as the United Kingdom and, within Australia, the States of Victoria and South Australia and the Northern Territory have substituted for the old requirement that persons arrested be brought before a Justice of the Peace or magistrate "forthwith," or "without delay" or "as soon as practicable" (or similar expressions) provisions enabling investigating police to initially detain such persons in custody for periods varying from 4 to 24 hours or for an unspecified "reasonable time". Given the pressures upon an arrested person inherent in such extended detention, it might be argued that the capacity of such person to avail himself of the potential safeguard constituted by the right to silence is now more, rather than less, important.

The introduction in several jurisdictions of the audio or video recording of interrogations will, to some extent, enable an independent assessment to be made of the level of understanding and the psychological state of the interviewee, but such insights are essentially superficial and, save that electronic recording should ensure the existence of an accurate record of the interrogation, curtail the use of any technique of active psychological pressure, and allow an assessment of the rapport existing between interviewer and interviewee, it does not provide sufficient protection for the removal of the right to silence.

The placing of a suspect under a measure of compulsion to talk when questioned by police by means of the threat of some form of adverse inference arising from silence — which is the proposal of the abolitionists — would create a forensic nightmare. It would set the stage for confused, inaccurate, contradictory, fearful or untruthful answers and for the subsequent use of them by the prosection.

There is, however, a more fundamental legal repercussion which may flow from the adoption of this course. At present a confessional statement made out of court by an accused person cannot be admitted in evidence against him upon his trial unless it is shown to have been voluntarily made. This means substantially that the confession has been made in the exercise of a free choice. If a person speaks because he is overborne or as a result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure it cannot be voluntary. Neither is a confession voluntary if it is preceded by an inducement held out by a person in authority such as a police officer. An inducement may take the form (inter alia) of some fear of prejudice held out by the person in authority.[6]

It would seem to me that a warning by an investigating police officer that a failure to answer questions may lead to consequences adverse to a suspect might in some instances come close, at least in its practical effect, to infringing aspects of the common law criteria of voluntariness.

A further argument advanced by the protagonists of change is that the present case law in the United Kingdom and Victoria which, whilst prohibiting any adverse inference from the exercise of a right to silence nonetheless enables a jury to consider the failure of an accused to provide police with an immediate explanation, in assessing the credibility of any later account proffered by him, constitutes an absurdly fine distinction for juries to confront. As I have already indicated I have no doubt that this is so. The most rational solution, however, lies not in eliminating the right to silence, but in proscribing the attack on the credit of an accused who has utilised it. Finally, it is said that it would be in the accused's own interests to have the right to silence abolished since juries faced with its exercise do, in fact, react adversely to an accused. This is so since silence in the face of accusations of wrong-doing is not the normal re-

sponse of innocent people in real-life situations. The assumptions here are two-fold, first, that juries, in determining guilt, act in defiance of judicial direction and secondly, that they draw no distinction between a person exercising an accepted legal right in the unusual situation of interrogation within a police station and the responses of individuals to allegations made by their peers in a community setting.

Even if both these assumptions were justified (and I await empirical evidence of their validity) it may be argued that it is the province of the suspect (perhaps in consultation with his legal representatives) to determine whether he will assume the risk claimed to be inherent in his silence.

Apart from canvassing the arguments against the abolition of the right to silence, it is pertinent to consider the practical effects upon the criminal trial of its elimination.

If an inference were to be drawn from an accused's refusal to answer questions put by police, a veritable "Pandora's Box" of issues would arise for consideration at trial. In such circumstances the accused must be given the opportunity to rebut any adverse inference and this could result in a host of witnesses being called to give evidence on the accused's general background and behaviour including expert evidence of the accused's psychological make-up and the relevance of that to interrogation by police. It may be that this material could be adduced during the course of a *voir dire* as a pre-emptive strike, as well as in the course of the trial itself.

The potential exists therefore for a number of cases to become very complicated and the length of time taken by both the trial and pre-trial process may be significantly increased. Such a result would run counter to the current aim of shortening criminal trials to ensure that justice is both swift and attained at a reasonable cost to the community. Those who advocate change are obliged to define what it is they mean by the term "adverse inference". Is the failure to answer police questions to be effectively regarded as a direct admission of guilt? Is it, on the other hand, to be regarded simply as a factor which may be taken into account in assessing the credibility of a version of events proffered by an accused at his trial?

Will the refusal to answer questions corroborate, for example, evidence of non-consent by a complainant in a rape trial or the unsworn evidence of a child witness? Will the effect of the inference be such as to create a *prima facie* Crown case where without it there was none? The answers to these questions have far-reaching implications for the operation of our criminal justice system.

I offer one example to illustrate the potential difficulties. Two accused are alleged to be joint participants in an armed robbery where the sole evidence available to the Crown is that of purported identification. The first accused upon being questioned by police offers an alibi, the second, after caution, declines to answer police questions. At the trial the second accused gives evidence revealing, for the first time, his alibi. Will the effect of the adverse inference be to strengthen the Crown case against the second accused and if so to what extent? Assume that the alibis are identical — both the accused and their families were enjoying a barbecue. Would considerations of fairness to the first accused require an order for separate trials? (If nothing else this would double the cost and the ordeal of participating witnesses.)

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It is sometimes argued that to permit the drawing of an adverse inference from a refusal to answer police questions offends against the principle that the burden of proving the guilt of an accused is on the prosecution. It is a matter of strict logic that the ultimate onus remains unaffected by the proposed change. The potential effect of the proposal, however, is more insidious. Its introduction will assist the Crown in its endeavours to construct an edifice of guilt, by providing it with an evidentiary building block which may be fatally flawed.

I have thus far directed my remarks to the abolition of the right to silence, although some commentators suggest procedures for modifying the right.[7] One model proposed envisages the presence of a lawyer during an interrogation. Apart from initial advice, the lawyer's presence, it is asserted, will guarantee fair treatment of a suspect and, more importantly, it is envisaged that a lawyer would help clarify questions and answers which may arguably be ambiguous. Whilst the suspect would be under no compulsion, legal or psychological, to speak, the pro-

ponents of this innovation envisage a jury being informed of the silence of a suspect and reasonable adverse inferences being drawn from that silence.

The practical difficulties of such a proposal include the availability of lawyers at odd hours and in geographically distant locations and the financial cost. Further, one may doubt the enthusiasm of lawyers to adopt this new role or that of investigating police to accept it.

Moreover, in the age of the tape recorder and video a suspect may well be worse off with a lawyer present, particularly if the lawyer involved is inexperienced, lacking in competence or has failed (perhaps through time constraints) to thoroughly grasp the legal and factual situation facing the client.

In short I do not see this proposed restructure of the right to silence as either workable or necessarily desirable.

In modern times the principle of the right to silence has the important functions of excluding the potential for erroneous inferences to be drawn against accused persons, ensuring that material that could cloud the real issues in a case is not placed before the jury, and in containing the length of criminal trials. Of equal if not greater importance is the fact that the right renders it more likely that confessional evidence will be both voluntarily provided and reliable.

The proponents of change have yet to discharge the burden of justification cast upon them. They have not demonstrated that the effects of reform would enhance the operation of criminal justice or, at the very least, would not increase the risk of injustice. The right to silence should be retained.

END NOTES

[1] This paper is a truncated and updated version of "The Right to Silence. Should it be Curtailed or Abolished?" delivered to the Society for the Reform of the Criminal Law (Sydney, March 1989).

[2] The precise ambit of the right is unclear and varies between jurisdictions. See *R. v. Beljajev* 1984 V.R. 657, *R. v. Bruce* 1989 V.R. 579; *Hall v. R.* 1971 1 All E.R. 322 and *R. v. Salhattin* 1983 1 V.R. 521.

[3] *Bruce v R* (Unreported 9/9/88).

[4] "Focusing on Police" *Law Institute Journal* (Victoria), July 1987, p. 708.

[5] Australian Law Reform Commission: Criminal Investigation (1975) para. 150.

[6] *McDermott v. R.* (1948) 76 C.L.R. 501. See also Brennan J. in *Collins v. R.* (1980) 31 A.L.R. 257.

[7] "Police Interrogation and the Right to Silence" Stephen Odgers. Vol. 59 *Australian Law Journal*, p. 78.