

LEGAL} EAGLES CLE
Continuing Legal Education for Criminal Lawyers

DAVID MORTERS, NT

SENIOR CROWN PROSECUTOR

**PRESENTED AT LEGAL EAGLES CLE CONFERENCE
HOI AN VIETNAM 5/4/2015 - 7/4/2015**

THE RIGHT TO SILENCE

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality:

(g) not to be compelled to testify against himself or to confess guilt.

So provides Article 14 of the International Covenant on Civil and Political Rights to which Australia is a signatory and which was ratified by Australia in 1980.

Of course the provision is general in its terms and provides guidance only as to how the domestic law might deal with this vexed problem of the consequences of a decision by an accused to remain silent, at time of arrest, after service of a brief of evidence or at the completion of the Crown case and what conclusion might be drawn from such election.

The reason that I have picked this topic is because it gives rise in my mind to a great deal of uncertainty as to how properly to resolve the competing arguments as to how the balance should be struck between the objectives of on the one hand delivering to a jury a comprehensive and reliable account of the facts and circumstances surrounding an

allegation whilst also ensuring that an accused receives a fair trial. I am hoping that, because the topic creates a dilemma in my mind, a consideration of the subject will be of some interest to you also.

The Right to Silence – Its Origins

So what is this “Right to Silence” and where did it all start? Well it really depends on what one means when one talks about the concept. If it is defined as a right to refuse to answer questions upon threat of punishment or death then it has its origins in legal enactments of 1641 and 1661 in England in response to a High Commission inquiry into the activities of the Star Chamber which compelled defendants to answer questions put to them by the court.¹

According to Wigmore it was largely attributable to the effort of one individual, John Lilburn, who was prosecuted for marketing seditious and heretical books. He refused to respond to questions put to him during Star Chamber interrogations on the basis that he perceived the questioners were attempting to illicit information from him so as to establish other charges against him having largely failed in their attempts at proving the offences before the court. His refusal resulting in a whipping. He pursued the matter through parliament which led to the inquiry.²

¹ GL Davies: *“The prohibition against adverse inferences from silence: A rule without reason?”* Pts 1 & II (2000) 74 ALJR 26 & 102.

² Wigmore on Evidence (1961) VIII [2250]

Accused might then have been spared the threat of physical harm, however this did not translate in practical terms into a general practice of electing not to give evidence at trial.

According to Professor Langbein:

“The fundamental safeguard for the defendant in common law proceedings was not the right to remain silent but rather the opportunity to speak. The essential purpose of the trial was to afford the accused the opportunity to reply in person to the charges against him. The defendant’s refusal to respond to the incriminating evidence against him would have been suicidal. The sources show that criminal defendants did not in fact claim any such self destructive right.”³

By 1848 an accused was required to be told in pre trial procedures that he or she was not required to answer questions but that anything that was said could be used in evidence against them.⁴ That did not translate into a right to silence as we now know it but by that stage accuseds were permitted legal representation in court. The practice had developed that the legal representative would deliver the account upon which the accused wished to rely. A lawyer could relate facts on behalf of their client and did so in most instances. As McMeekin puts it; why bark when you have a dog?⁵

³ Helmholz, Gray, Langbein, Moglen, Smith & Alschuler: *The Privilege Against Self Incrimination: Its Origins and Development* (University of Chicago Press Chicago 1997)

⁴ *Indictable Offences Act 1848*, 11 and 12 Vict c 42

⁵ McMeekin D: “*The Accused’s Right to Silence*” A paper presented to the Bundaberg Law Association Conference 29 November 2008.

By the end of the 19th century an accused was entitled to give evidence on their own behalf. Still however the expectation remained that adverse conclusions could be drawn if the accused elected not to do so. That this was not the case was met with incredulousness by Windeyer J in a NSW Supreme Court decision of *R v Kops* (1893) 14 NSWLR 150 at 165-166.

In 1912 the Judges Rules were issued which included r5 that introduced a caution which police were required to give to persons they held in custody before they questioned such persons. It took several decades, however, before the courts were prepared to recognise that, having exercised the right that had been offered, it would be then unfair for an accused if the exercise of that right could be used against them at trial.⁶

It was not until 1971 that there was acceptance that this right to silence extended beyond pre trial investigations and that no inference could be drawn from the fact that an accused chose to say nothing at his or her trial.⁷ There was criticism of the decision in 1976⁸ where it was suggested that there was a conflict with the decision in *R v Christie*⁹ which was cited as authority for the proposition that election for silence could have evidentiary value. The debate continued for several years but gradually it became accepted as part of the common law.¹⁰

⁶ *R v Naylor* [1933] 1 KB 685, *R v Leckey* [1944] 1 KB 80, *Woon v The Queen* (1964) 109 CLR 529 at 541

⁷ *Hall v The Queen* [1971] 1 WLR 298

⁸ *R v Chandler* [1976] 1 WLR 585

⁹ [1914] AC 545

¹⁰ *Parkes v The Queen* (1977) 64 Cr App R 25, *Petty & Maidment v The Queen* (1991) 173 CLR 95

Davies comments:

“It may now be accepted that it is common law, both in England and Australia that a person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information relevant to the offence by any person in authority; and that no adverse interest may be drawn from the silence. But that is a conclusion reached without any authoritative basis in the common law, or any sustainable rationale. The only rational explanation for that conclusion, and indeed for the re-interpretation of the terms of the caution which preceded it, is a distrust by judges of the capacity of juries, if evidence of silence was placed before them and comment by judge and counsel permitted, to draw sensible inferences from that silence free of prejudice.”¹¹

The suggestion that the privilege against self incrimination as we know it, which includes a prohibition on the drawing of adverse inferences, is a firmly established rule of the common law since the seventeenth century, as was stated by Gibbs CJ in *Sorby v Commonwealth*¹² and is cited in so many of the adherents of the preservation of the rule, is perhaps a liberal interpretation of a far more modern development in the common law. In *Azzopardi v The Queen*¹³ McHugh J pulls no punches when he quite candidly states that eminent jurists such as Wigmore and Levy were ‘dead wrong’ when they expressed such views and that the development of the principle that no adverse inference should be drawn against an accused who exercises a right to silence is a rule of relatively modern origin.¹⁴

¹¹ GL Davies, *op cit* at 36.

¹² (1983) 152 CLR 281 at 292

¹³ (2001) 205 CLR 50

¹⁴ *Op cit* [118] – [135]

Having freed ourselves from the misconception that any interference with the right would be an attack on a fundamental and longstanding principle of common law, the question is now whether it should be maintained in its present form or there is scope for modification of the right to more appropriately balance the competing interests of state and individual.

Proponents of the protection of a right to silence generally base their arguments on a connection of the right with other fundamental concepts of our criminal justice system, that the burden is on the state to prove an allegation of offending by an individual. That the state has at its disposal significant resources which it can deploy against individuals. That an individual has a right to privacy and a right to personal liberty and that the proper operation of a modern liberal democracy requires that interferences with such rights be restricted.¹⁵

The converse argument is that an absolute right to silence may have had application in a system where basic rights and freedoms were limited but in the modern context, where there is universal access to education, there are obligations on authorities for full disclosure and persons have the opportunity for access to legal advice and representation, there is no sense in the preservation of a right to silence once a prima facie case has been established. "The simple fact is that the maintenance of the present rule flies in the face of common sense."¹⁶

¹⁵ See for instance Anthony Gray: "Constitutionally Heeding the Right to Silence in Australia" *Monash University Law Review* (Vol 39 No 1) 156 at 158.

¹⁶ McMeekin; *op cit* [43] – [51].

A review of the literature reveals that often the protagonists are talking about quite different concepts. Those for the maintenance of a right to silence often focus on an objection to compulsion to answer questions or an eroding of the right at the pretrial stage. Gray for instance concludes that because of the existence of power and information imbalances, the preservation of a right to silence should be maintained for both pretrial and trial stages of a prosecution and that non availability of the right at either stage would compromise its availability at the other stage.¹⁷ It is submitted however that he fails to provide any justification for the conclusion that there cannot be different rules for different parts of the process depending on what the power relationship is at the respective time. The power relationship is likely to be significantly altered as a consequence of the service of a brief of evidence and the provision of legal advice.

Those arguing for its modification are often focusing on a criticism of the conclusion reached by the High Court in *Petty & Maidment*¹⁸ and extended by the majority in *Azzopardi* that the cases in which a judge may comment on the failure of the accused to offer an explanation will be “both rare and exceptional... and never warranted merely because the accused has failed to contradict some aspect of the case for the prosecution.”¹⁹

There is a degree of disconnect between the positions for which each of the antagonists is contending. There is a degree of disingenuity in arguing that because there is unfairness at the time of arrest those same prejudices hold good at the close of the Crown case or conversely that because there is no unfairness at a point in time when the accused is fully

¹⁷ Gray; *op cit* p159

¹⁸ *Op cit*

¹⁹ Per Gaudron, Gummow, Kirby and Hayne JJ at [68]

appraised of the case against him the protection should be abandoned from the outset. A more rigorous analysis is required of the potential consequences for a change in the rule at various stages of the prosecution process and in consideration of the different factors that might apply to the particular circumstances of a matter.

Amendments to the Common Law Position

The common law rules as to what can be said about an accused's election to remain silent have developed significantly since the 1970s. The position that was adopted by Melford Stevens J in the English Court of Appeal²⁰ that there can be a distinction drawn between a prohibition on the drawing of an inference from an election to remain silent in the face of official questioning but that there may be room for comment about the weight to attach to a latter expression of innocence that follows an exercise of the right to silence, has largely been rejected by subsequent authority in the UK and Australia.²¹

Absent legislative amendment, the position in Australia is that it is impermissible for the prosecution to lead evidence for the purposes of demonstrating or suggesting that an accused exercised a right to silence and neither the prosecution nor the judge can ask any questions or make any comments about an accused's election to remain silent, either at time of arrest, at committal proceedings, during the trial or at any other stage of the proceedings. For those states that have adopted the Uniform Evidence Act, s89 gives legislative effect to

²⁰ *R v Ryan* (1966) 50 Cr App R 144

²¹ *R v Sullivan* (1966) 51 A Cr App 102 at 105, *Bruce v R* (1987) 74 ALR 219 at 220, *Petty v R* (1991) 173 CLR 95 at 101, 104-105 and 128

the common law position at least with respect to questioning by an investigating official about an investigation.²²

The two bases for leading evidence as to an exercise of the right to silence are

(1) to suggest to a jury that an inference can be drawn as to the accused's guilt because the accused has elected not to say anything in his or her defence or

(2) to detract from the credibility of explanations that are provided at a later point in time, most obviously at trial in the defence case.

On 25 March 2013 amendments were made to the NSW version of the UEA which introduced s89A.²³ This provision, which is modelled on the UK *Criminal Justice and Public Order Act* 1994, allows for the drawing of unfavourable inferences about the failure by an accused to respond to any question or representation made during the course of official questioning that it could reasonably be expected the accused would mention at the time of questioning and which the accused subsequently relies on in proceedings. The provision is subject to certain limitations including that:

- a special caution was given prior to questioning;
- a legal representative is present during questioning;
- the offence the subject of the investigation carries a maximum penalty of at least five years imprisonment;
- the defendant is 18 years of age or older and is capable of understanding the special caution; and

²² See Odgers S, *Uniform Evidence Law* (10th Edition) 2012 Thomson Reuters Australia at [1.3.5680]

²³ *Evidence (Evidence of Silence) Act* 2013

- a defendant cannot be convicted solely on the evidence of failure to mention a fact that is subsequently relied upon.

The amendments were introduced to give effect to the second basis for modification of the right to silence; to affect the credibility of subsequent explanations. As was commented by the NSW Law Reform Commission in its 2000 report,

“It is difficult to see how one could do more than infer that evidence of a not previously disclosed fact is an invention.”²⁴

The arguments in support of such amendment are several. Politicians who introduced the amendment relied on the claim that a right to silence was being exploited by criminals, particularly members of criminal gangs or career professionals, and that it could be expected that persons who were innocent of the crimes that were alleged against them would be expected to provide information about their innocence in response to such allegations.²⁵

A second argument is that, by encouraging an accused to provide an explanation, it will improve the efficiency of police investigations by allowing police to concentrate on an investigation of the information that has been provided in exculpation by the accused.

²⁴ NSW Law Reform Commission’ *Report 95: The Right to Silence* July 2000

²⁵ See for instance Barry O’Farrell media release “Crime Crackdown: Right to Silence Law Toughened” 14 August 2012

A third argument is that the prohibition against the drawing of adverse inferences developed at a stage in the history of criminal investigations in Australia which was characterised by police corruption and other improper practices of investigation and prosecution. That situation has substantially changed in recent times as a consequence of reforms such as the introduction of electronic recording of interviews and the obligations on police and prosecution of full disclosure. In such circumstances it is suggested that the need for an absolute right to silence is somewhat diminished.

A fourth argument is that there is a degree of illogicality in directing a jury that they should draw no conclusion from the fact that an accused has elected not to answer allegations or has provided an explanation only at the time of trial.²⁶ The illogicality of the situation was arguably recognised by the High Court in *Weissensteiner v R*²⁷ where they adopted a more practical approach to the questions that arose from the failure of an accused to provide explanation in a particular set of circumstances. And just in case any of you are unfamiliar with that decision, the facts that presented in that case were that an accused had gone sailing from Cairns with an elderly couple and returned to port several months later without them. In the absence of an explanation from the accused about where the elderly couple had gone, the jury were told that, where information relevant to the allegation was likely within the knowledge of the accused, they could more readily draw an inference from the circumstances as to the accused's guilt than if the accused had given evidence.

A fifth argument is that it contributes significantly to greater public expense in the prosecution of criminal matters. The prosecution may be left with an obligation to prove all

²⁶ See for instance Davies GL; *op cit* at 105

²⁷ (1993) 178 CLR 217

aspects of the Crown case notwithstanding only some become relevant to the final determination where an accused elects to give evidence at the trial.²⁸

There has been much criticism of the effects of the introduction of s89A on the administration of criminal justice in NSW just as there has been similar criticism of its UK equivalent in that jurisdiction. I want to canvass some of those criticisms so as to arrive at an opinion about the desirability of its introduction in other jurisdictions such as my own where I understand that it is being seriously considered by the executive.

Certainly the NSW Law Reform Commission came to the conclusion in its report prior to the introduction of the provision that there was no basis for change to the existing law. The Commission argued that the only basis for admission of evidence about a failure to answer questions during investigation was that the failure to make a timely disclosure might give rise to an inference of guilt or recent fabrication.²⁹ Consistent with the law in Australia, a jury is only entitled to conclude that a lie or a course of conduct can constitute an admission of guilt if the only reasonable inference attributable to such lie is that it was told because the accused knew that the truth would implicate him or her in the commission of an offence.³⁰ According to the Commission;

“Even if the defendant acted completely unreasonably, if he or she was not motivated by a consciousness of guilt, the silence is irrelevant: it proves nothing.”³¹

²⁸ See for instance K van Dijkhorst “*The Right to Silence: Is the Game Worth the Candle*” 13 November 2000 www.isrcl.org/Papers/van%20Dijkhorst.pdf

²⁹ New South Wales Law Reform Commission, *op cit* [2.111]

³⁰ *Zoneff v R* (2000) 200 CLR 234 at [16]

³¹ New South Wales Law Reform Commission, *op cit* [2.111]

The Commission report goes on to list a series of alternative explanations as to why a particular accused might elect not to provide an explanation to the police other than because of a consciousness of guilt including:

- attitudes towards police,
- cultural factors,
- personal characteristics such as gender, age, mental disability, lack of education and low cognitive ability,
- communication factors such as language differences, tiredness or the effects of drugs or alcohol,
- lack of police disclosure of the specificity of allegations and evidence establishing the defendant as a suspect;
- protection or fear of others;
- other reasons such as the effluxion of time, embarrassment about the nature of allegations or an explanation that is available; the opportunity to think about or seek advice about allegations.

There have been numerous other articles written which are critical of the NSW amendments. I will refer to some here, others are identified in the attached bibliography.

In a paper delivered on 11 February 2013,³² David Hamer focused on the complexities that the reform gave rise to in response to claims by politicians in the media that the reforms were justified as a simple matter of common sense.

One problem Hamer identifies is the complexity of the special caution that will need to be given under the new provision and the potential difficulty a defendant may have in

³² Hamer D, *NSW Right to Silence Reforms*

http://sydney.edu.au/law/news/docs_pdfs_images/2013/Feb/Hamer_Silence_Seminar_Bar_Assoc11Feb2013.pdf

understanding it. A UK study found that only 10% of suspects and 13% of the general population understood the caution fully. That part of the caution which advises that an adverse inference may be drawn from an election to remain silent was understood by only 4.2% of the general population. Further, the study found that 96.3% of the participants claimed to understand the caution when in fact they did not.³³

One can only imagine the difficulties that will present in jurisdictions such as mine where factors such as language, culture, education and affectation of mental disorder because of drug or alcohol abuse come into play. The interactions between police and suspect regularly reaches the level of high farce, all captured on video, as a police officer attempts to convince an indigenous suspect that they do in fact understand the caution that is presently required.

A second problem identified by Hamer is that the provision requires that a suspect be represented at the police station by a legal representative.³⁴ Advice over the telephone is insufficient. There is no duty lawyer system in place in Australia as there is in the UK. Anecdotal evidence suggests that a strategy being employed by defence lawyers in NSW is to advise clients by telephone that they should say nothing but refuse to attend the police station so that this condition cannot be satisfied. That defence is obliged to engage in such tactics can only reflect poorly on the system of criminal justice. It gives rise to the potential for inadequate representation of clients and allegations of improper influence by police if telephone legal advice is not followed.

There is potential for further complication if a lawyer does attend the police station to provide advice to the client and that advice is to exercise a right to silence. Hamer relates some of the consequences that may result from such advice including the erosion of the lawyer/client

³³ Fenner S, Gudjonsson G & Clare I; "Understanding of the Current Police Caution (England and Wales) Among Suspects in Police Detention" (2012) 12 *Journal of Community and Applied Social Psychology* 83

³⁴ Hamer; *op cit* [2]

relationship if the advice is called into question at trial and the possibility that a lawyer will be required to give evidence at subsequent proceedings to address the issue as to whether the receipt of legal advice was a reasonable explanation for the defendant to refuse to answer questions and therefore no adverse inference should be drawn.³⁵ Smyth identifies the consequences such advice might have for suits in negligence given the removal of immunity for out of court work done by lawyers following the introduction of the *Civil Liability Act 2002*.³⁶

One solution that the proponents of s89A have been keen to advance is for the requirement that a lawyer be physically present when the special caution is given be removed. There appears no impetus for the introduction of a duty lawyer system which underpins the amendments in the UK.

Dixon and Cowdery focus on the processes that are already in place which require defence disclosure in arguing that s89A is an unnecessary and complicating addition to the criminal justice process.³⁷ They point to the long list of disclosure obligations that are placed on defence in NSW under the *Defence Disclosure Act 2013*. These obligations include disclosure of:

- the nature of the accused person's defence, including particular defences to be relied upon,
- the facts about which the defence takes issue,
- any statement of alibi (an obligation that has existed since well before the new Act),
- any statement alleging mental impairment,

³⁵ *Ibid* [6]

³⁶ Smyth DT; *the Attack on the Right to Silence. An English Method in the Antipodes. Should We Worry?* http://criminalcle.net.au/attachments/The_Attack_On_The_Right_to_Silence_DANIEL_SMYTH.pdf April 2013

³⁷ Dixon D and Cowdery N; "Silence Rights" in (2013) 17(1) *Australian Institute of Legal Research* 23

- any expert report that an accused intends to rely upon at trial,
- any intention to put the prosecution to proof on continuity, surveillance activities, authenticity of documentary evidence or challenges to the indictment.³⁸

The authors concede that the consequences of failure to comply with disclosure obligations are uncertain given the courts have a wide discretion as to how they deal with a breach.

They argue that the debate that occurred in the public arena over s89A took no real account of the mechanisms in place to prevent ‘trial by ambush’ but instead focused on a panicked sense of imbalance that was not supported by empirical evidence. That assertion is supported by statistics reported in the NSW Law Reform Commission Report that in 1980 only 4% of suspects charged and tried in the Sydney District Court remained silent in police interviews and in only 7 to 9% of cases in 1988 and 1989, suspects in matters prosecuted by the Victorian DPP had failed to answer questions.³⁹ Of course these statistics are open to the same criticisms of all statistics and there is no study that I have been able to find that provides more detailed information about the percentage of suspects that participate in interviews, their rates of charging or conviction. Suffice to say the NSW government did not rely on statistical information as the basis for its amendments but rather an appeal to “common sense”; a rhetorical argument that is difficult to argue against.

Dixon and Cowdery refer to the complexities that flow from the amendments as evidenced by a series of decisions in the UK and the retrograde effect of encouraging greater reliance by police on the interview process rather than the focus that has developed on the investigation of objective information as a consequence of developments in the criminal law over the past several decades as negative aspects of the amendments. They conclude that the negative aspects significantly outweigh the true attributes of the new provision when it is

³⁸ *Ibid*, 24-25

³⁹ NSW Law Reform Commission; *op cit* [2.16]

accepted that many of the arguments in support of the amendments fail to recognise that the problems identified have been dealt with in other ways.

Chu⁴⁰ focuses on the experience of the UK courts to similar amendments in that jurisdiction. He quotes a 1999 report on the changes as concluding that:-

“it is surely beyond argument that the demands on the judge and jury of the complex edifice of statutory mechanisms introduced by s34 are enormous in proportion to the evidential gains they permit.”⁴¹

Chu refers to several English authorities including *R v B*⁴² in which the Court of Appeal described the legislation as a notorious minefield of complexity and *R v Brizzolari*⁴³ in which the court delivered a message to prosecutors that, because of the complexity of the provision, they should not exhort the court to reliance on s34 unless the merits of the individual case require that it should be done.

Hamer⁴⁴ makes a similar point about the complexity of a direction required which he notes stretches to ten pages with commentary in the UK Crown Court Benchbook. He notes a quote from the court in *Bresa*⁴⁵ that:

⁴⁰ Chu V; Tinkering with the Right to Silence: The Evidence Amendment (Evidence of Silence) Act 2013(NSW) [2013] 17 *University of Western Sydney Law Review* 25

⁴¹ *Ibid*; 38

⁴² (2003) EWCA Crim 3080 at [20]

⁴³ (2004) EWCA Crim 310 at [57]

⁴⁴ Hamer D; *op cit* at [9]

⁴⁵ [2005] EWCA Crim 1414

“even in the simplest and most straight forward of cases it seems to require a direction of such length and detail that it seems to promote the adverse inference question to a height it does not merit.”

Neither of the principal online commentaries on evidence law in Australia cite any authorities relating to the application of s89A. I am not sure what the experience has been of the operation of the provision by defence and prosecution in NSW. Perhaps its complexity is a factor in it not being the subject of judicial interpretation to date.

The criticisms of s89A are in my opinion well justified. The potential consequence of applying pressure to suspects to participate in an interview at the time an allegation of criminal conduct is first levelled, at a police station and in circumstances where it is unlikely that the suspect will have a proper appreciation of the case that has been amassed against him or her cannot help but give rise to unfairness. That will particularly be the case for suspects who are disadvantaged through language difficulties, cognitive abilities, cultural differences and the like.

Gray⁴⁶ provides a poignant example. A person is accused of murder. The person has killed another. The person is in a mentally precarious state. The person refuses to answer. The requirements of s89A are otherwise satisfied. The person killed because he was sexually abused by the person whom he killed. There might be a whole range of reasons why the person does not raise this fact at the time he is being interviewed by police. Those reasons might have as much basis in common sense as the expectation that the person would immediately tell the police of the reasons for the killing. Is there fairness in the drawing of inferences in those circumstances?

⁴⁶ Gray Anthony; “Constitutionally Heeding the Right to Silence in Australia” *Monash Law Review* No 39 Vol 1 at 156

The complications for lawyers in providing appropriate advice in such circumstances are apparent and the complexities in application of such provision have been demonstrated by the experiences of the UK courts.

I am of the opinion that the amendment is flawed for much the same reasons as a blanket prohibition on the drawing of inferences is flawed. Neither gives recognition to the complexities that might come to bear on a decision whether or not to choose to provide an explanation and at what time it might be appropriate to provide such explanation. Both are inflexible responses to circumstances that will vary widely from case to case.

Recommendations for Reform

What is advocated is a more flexible approach to a determination as to what comment if any should be made by a judge instructing a jury about an accused's election to say nothing in response to allegations that have been levelled against him or her.

I am sure many of you will disagree with any proposal that in any circumstances an inference should be drawn from the exercise of the right to silence. I can hear the call to arms, "It is the Crown which brings the charges, it is for the Crown to prove the charges." As Gray puts it:-

"Consistent with the presumption of innocence, with liberal values, and in recognition of the power that government has over the individual, it is for the government to prove the truth of an accusation it makes. An individual should not be required to assist the government to make its case, on pain of punishment."⁴⁷

⁴⁷ Gray Anthony; *op cit* at 187

That's powerful rhetoric but is there a case for its amelioration in certain circumstances? Is it any more compelling than an assertion of the reality that the community has an expectation that those who are innocent will say so; the expectation that an accused will respond to his or her accusers. What about the rights of victims? What about the burden that is placed on the investigative process because investigators are required to disprove all possible explanations consistent with innocence rather than a specific explanation which is advanced by an accused?

To quote van Dijkhorst:

“Initially one baulks at the idea of punishing an accused for his refusal to co-operate. But that flows from the right to silence which we have given him. Absent the right, there is no legitimate reason for his refusal to state his case...Those that argue that thus the accused would be required to convict himself forget the presumption of innocence and deem him guilty *a priori*. The law deems him not guilty and expects an exculpatory explanation if there is one. If it happens that there is no answer to the charge, so be it. The truth will be out and that is the object.”⁴⁸

The prohibition against the drawing of inferences against a person who elects to exercise a right to silence has not existed since time immemorial but rather developed during a period where there were justifiable concerns about the practices adopted by police in their dealings with suspects. A number of key initiatives, most significantly the requirement that suspect interviews be recorded, have made the activities of the police far more transparent the evidence obtained from such interactions far more reliable. I am not saying that these changes justify the drawing of adverse inferences from a failure to speak with police at this early point in time, just that they are one factor in questioning the applicability of the blanket rule that no inference should be drawn.

⁴⁸ K van Dijkhorst; *op cit* p50

Similarly, the principles that underlie the standard direction emerged at a time when disclosure of the evidence that had been collected against an individual was far less extensive than what it is today. Most jurisdictions (mine excluded) have introduced extensive disclosure laws into their criminal practice legislation. The common law now recognises that the prosecution owes a duty to disclose all relevant or potentially relevant material and a failure to disclose in accordance with that duty may constitute an unfairness to an accused which will result in the quashing of any conviction.⁴⁹ With the way technology is developing it is likely we are not far off the introduction of systems of automatic disclosure where police download information that has been collected on their database and defence are given an electronic key to access the material contained in the relevant file. Thank goodness the responsibility will be removed from the prosecutor.

These are but two examples of the change in the nature of the relationship between accused and accuser which place the accused in a far superior position of knowledge and power than was the situation when cases such as *Petty & Maidment* were decided.

In addition, strict adherence to the rule set down in *Petty and Maidment* arguably results in inequitable outcomes across different offending groups. Those that are most capable of protecting their interests, the educated, the criminally experienced, persons with resources to afford legal representation, are more likely to exercise a right to silence yet arguably it is those very same groups of persons that are best able to provide responses to allegations that are put. Although there is no empirical evidence to confirm the supposition⁵⁰ it is a fair assumption that it is the most vulnerable that are more likely to participate in interviews with police. There is a degree of inequity in the fact that those that are least capable of protecting

⁴⁹ *Mallard v The Queen* (2005) 224 CLR 125 at [17]

⁵⁰ NSW Law Reform Commission; *op cit* [2.60] – [2.71]

their rights suffer the consequences whilst those with greater acumen or resources are more effectively protected. Newbury comments:-

“The perverse result is that fewer admissions and confessions are obtained from the non-vulnerable group, leading to a lesser risk of conviction and gaol. This creates the potential for skewing of convictions and custodial sentences towards the vulnerable group.”⁵¹

Similarly, a distinction is drawn between a refusal to talk to a person in authority and a refusal to talk or respond generally. In *R v Alexander*⁵² the court accepted that an adverse inference could be drawn from a person’s election to refuse to answer a question put by an acquaintance in circumstances where an answer would be expected. In *Petty & Maidment* the High Court was careful to restrict the principle to questions put by persons in authority thus arguably preserving the exception accepted in *Alexander*.⁵³

The argument that the prohibition on drawing inferences from silence protects the vulnerable from police manipulation is also without merit in modern times of recorded interviews and where a large body of authority has built up to ensure the exclusion of inculpatory statements that are obtained by arguably improper questioning. In fact the existence of the prohibition provides an incentive for authorities to use tactics to encourage a person to participate in an interview rather than placing the incentive on the individuals themselves to freely and voluntarily choose.

⁵¹ Newbury Michael; *Historical Child Sexual Abuse Investigations: A Case for Law Reform (2014)* 26 *Current Issues in Criminal Justice* 43

⁵² [1994] 2 VR 249 adopting *Parkes v R* [1976] 1 WLR 1251

⁵³ At 99 and 107.

A further argument is the cost that can result from an accused's election to remain silent. Van Dijkhorst provides a number of examples from South African courts about the expense incurred in prosecutions because of reliance on the right.⁵⁴

In the Vermaas case for instance, a qualified attorney was accused of committing 160 instances of fraud. The facts were complicated and, in the absence of any admissions by the accused, the prosecution was required to prove all aspects notwithstanding there was virtually no challenge to any of the evidence that was led throughout the trial. The trial was completed five and a half years after it first commenced and the cost for the prosecution alone was in the vicinity of \$600,000.

A simple example from my own jurisdiction in recent times comes to mind. A police officer was alleged to have accessed child pornography in his own time from the police computer library in the unit in which he worked. The accused exercised his right to silence. The Crown was put to proof in relation to all aspects of the accessing of the material which caused the trial to continue over several weeks. At the end of the Crown case the accused gave evidence in which he admitted that he had accessed the material but did so for legitimate reasons. The jury was hung. How much simpler, shorter and less expensive that trial would have been if that information had been conveyed by the accused prior to commencement of the trial.

Bagaric identifies the decision of *Weissensteiner v R*⁵⁵ as an instance where the courts have recognised that in certain circumstances there should be a relaxation of the rule that no inferences can be drawn from silence. He summarises:-

⁵⁴ K van Dijkhorst; *op cit* p37-45

⁵⁵ (1993) 178 CLR 217

“Thus the wash-up of *Weissensteiner* is that where the accused fails to give evidence, in certain circumstances, exercise of the right to silence effectively constitutes an item of circumstantial evidence against an accused, and in such circumstances judicial comment that an inference of guilt can more safely be drawn is permissible.”⁵⁶

The High Court couched its judgement in terms which suggested that the decision did not impinge on the right to silence but, as Bagaric effectively argues, the decision had that exact effect and was in stark contrast to the decision in *Petty & Maidment* that an incident of the right to silence is that no adverse inference can be drawn against an accused person by reason of his failure to answer questions or provide information.⁵⁷

Bararic argues that it would have been far more logical for the majority in *Weissensteiner* to accept that the decision did impinge on an individual’s right to silence but that such consequence was justified in circumstances where there was competition with other rights, in this case “the community’s interest in convicting the guilty in some circumstances, including where there is a prima facie case against the accused who must have knowledge of the relevant facts...”⁵⁸

What flows from a recognition of the true effect of *Weissensteiner* is that there will be some instances in which it is appropriate for a jury to draw conclusions about an accused’s election to exercise a right to silence. To give a direction to a jury to the contrary when such circumstances prevail is to ignore generally held principles about human behaviour, that a person who is confronted with a false allegation which provide information in conflict with such allegation. As Newbury comments:-

⁵⁶ Bagaric M; “The Diminishing Right of Silence” [1997] 19(3) *Sydney Law Review* 336

⁵⁷ (1991) 173 CLR 95 at 99

⁵⁸ Bagaric M; *op cit* at 8

“Such a direction is founded on the questionable presumption that jurors will understand and pay regard to judicial directions, even though research has shown that the interpretation of complicated legal directions is ‘potentially challenging for jury members. The possibility that jurors may regard silence as incriminating, even when directed not to, erodes its value, both to the innocent and guilty suspects alike.”⁵⁹

Or as McMeekin candidly puts it:⁶⁰

“The reality of life is that if the facts cry out for explanation then no matter what a judge says any juror is going to ask themselves why the accused chose not to explain the facts.”

Conclusion

The underlying rationale behind an argument that there should be a relaxation of the principle that no inference should be drawn from an exercise of the right to silence is that, rather than treating the principle as some sort of sacrosanct and indelible human right, which given its relatively recent history of development it is clearly not, it is better to view it in terms of a piece of circumstantial evidence from which an inference may be drawn where no other reasonable explanation is suggested. That is the way in which our system of criminal justice consistently deals with inferential evidence.

Where, at a police station, an indigenous person with limited formal education and ability with the English language, is cautioned and on the advice of his lawyer elects to remain silent then there are clearly explanations for such conduct and a jury should be told that no inference should be drawn from that exercise of the right.

⁵⁹ Newbury M; *op cit* at 48

⁶⁰ McMeekin D; *op cit* at 21

Where, on the other hand, a company CEO with post graduate qualifications and a detailed knowledge of the business that she operates, is confronted at trial with allegations of deceptive conduct, having been served a full copy of the brief of evidence and received the best legal advice money can buy, elects not to get in the witness box and confront the allegations that are levelled against her, the same test should not apply. Or more exasperating, gets in the witness box and provides an explanation not previously disclosed that, if it had been disclosed, would have avoided the necessity for the prosecution to lead five weeks, five months or five years worth of evidence.

Between these two examples are a wide range of scenarios each of which will demand a different assessment as to what if any direction should be given about an accused's election to remain silent, either pretrial or at the trial.

It is the judge in any trial that is in the best position, having received evidence about the circumstances, to decide whether a discretion should be exercised to direct that an inference can be drawn, or that a neutral position be adopted and no direction given at all, or that the jury be directed against drawing such inferences because of the circumstances that prevail in the particular matter. If a jury were directed that they could draw inferences then it would be for them to decide, after alternative explanations have been placed into the mix,⁶¹ whether to draw the inference.

To conclude, although I do not agree with Jeremy Bentham that that the right to silence is:-

“one of the most pernicious and irrational notions that ever found its way into the human mind.”⁶²

⁶¹ McMeekin D; *op cit* [49]

⁶² Bentham J *Rationale of Judicial Evidence Specially Applied to English Practice (Volume V)* 1827 Hunt and Clarke

I see merit in the argument advanced by Davies that there is an apparent incongruence between a blanket prohibition on the drawing of inferences and community expectations that an accused would respond if innocent. The law should reflect community values and expectations. The most effective way to achieve that objective is to entrust in the judge the discretionary power, guided by a statutory framework, to give appropriate directions about both pretrial and at trial silence based on the circumstances that prevail and rely on juries to draw sensible conclusions based on the evidence and the directions that they are given.

-----oOOo-----

BIBLIOGRAPHY

Averre KH, "The Watering Down of the Right to Silence" www.criminalcle.net.au/attachments/Watering_Down_The_Right_to_Silence.pdf

Bagaric M; "The Diminishing Right of Silence" [1997] 19(3) *Sydney Law Review* 336

Boulton Phillip, "The Attack on the Right to Silence" (2013) www.criminalcle.net.au/attachments/Right_to_SilenceFebruary2013_Boulton_SC.pdf

Chaaya Michael, "The Right to Silence Reignited: Vulnerable Suspects, Police Questioning and Law and Order in New South Wales" (1998) 22 *Criminal Law Journal* 82
Law Book Company Australia

Chu V; Tinkering with the Right to Silence: The Evidence Amendment (Evidence of Silence) Act 2013(NSW) [2013] 17 *University of Western Sydney Law Review* 25

GL Davies: "The prohibition against adverse inferences from silence: A rule without reason?" Pts 1 & II (2000) 74 *ALJR* 26 & 102.

K van Dijkhorst "The Right to Silence: Is the Game Worth the Candle" 13 November 2000 www.isrcl.org/Papers/van%20Dijkhorst.pdf

Dixon D and Cowdery N; "Silence Rights" in (2013) 17(1) *Australian Institute of Legal Research* 23

Fenner S, Gudjonsson G & Clare I; "Understanding of the Current Police Caution (England and Wales) Among Suspects in Police Detention" (2012) 12 *Journal of Community and Applied Social Psychology* 83

Anthony Gray: "Constitutionally Heeding the Right to Silence in Australia" *Monash University Law Review* (Vol 39 No 1) 156

Hamer D, *NSW Right to Silence Reforms* (2013) http://sydney.edu.au/law/news/docs_pdfs_images/2013/Feb/Hamer_Silence_Seminar_Bar_Assoc11Feb_2013.pdf

Harris J, *The Modified Right to Silence: the Experience from England and Wales* (2012) www.criminalcle.net.au/attachments/The_Modified_Right_to_Silence_pdf.pdf

Helmholz, Gray, Langbein, Moglen, Smith & Alschuler: *The Privilege Against Self Incrimination: Its Origins and Development* (University of Chicago Press Chicago 1997)

Lambert Rosie, "The Right to Silence: Exceptions Relevant to a Criminal Practitioner" (2010) www.criminalcle.net.au/attachments/Rights_to_Silence_paper.pdf

McMeekin D: "The Accused's Right to Silence" A paper presented to the Bundaberg Law Association Conference 29 November 2008

Newbury Michael; Historical Child Sexual Abuse Investigations: A Case for Law Reform (2014) 26 *Current Issues in Criminal Justice* 43

NSW Law Reform Commission' *Report 95: The Right to Silence* July 2000

Odgers S, *Uniform Evidence Law* (10th Edition) 2012 Thomson Reuters Australia

Smyth DT; *the Attack on the Right to Silence. An English Method in the Antipodes. Should We Worry?*

http://criminalcle.net.au/attachments/The_Attack_On_The_Right_to_Silence_DANIEL_SMYTH.pdf April 2013

JH Wigmore & JT McNaughton; *Wigmore on Evidence* (1961) VIII [2250] Little Brown, Boston USA.