

**NEW SOUTH WALES RIGHT TO SILENCE
REFORMS: MAXIMUM ADMISSIONS,
MINIMUM SILENCE**

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I INTRODUCTION

The Right to Silence ('Right') is a fundamental individual right, that is applied to both the common law and civil law legal traditions. This paper will focus on the criminal law provisions, whereby the Right is underpinned by the common law and statutory principles of the presumption of innocence, the right to not have to testify at trial, the privilege against self-incrimination ('Privilege') and the right to a fair trial. These principles form an integral part of our criminal justice system, protecting the accused from compulsory or overbearing state interrogations, the burden of proof, not having to testify against oneself and the right to be treated fairly, equally and without prejudice.¹

Unlike Canada and the United States of America ('USA'), the Right in Australia is not constitutionally protected² and there are no foreseeable endeavours to achieve that; it is not an absolute guarantee. Despite its lack of constitutional status, the Right has been statutorily protected in two States, within the presumption of innocence principles.³ To date, these statutes have not been judicially interpreted within the criminal law context, therefore, the application and extent of protection remains unclear. In recent years, the Right was protected under the uniform evidence legislation, comprising the Commonwealth's *Uniform Evidence Act 1995* ('UEA') and the New South Wales *Evidence Act 1995* ('NSW Act') in 1995 (mirroring the UEA). The majority of the remaining states and the Northern Territory ('NT') progressively followed with identical model legislation, except Victoria, where jurisdictional amendments were incorporated.⁴

Sections 17, 20, 89 and 128 of the NSW Act protect the defendant against prejudicial judicial comment and adverse inferences drawn from the defendant's silence, when failing to answer questions or produce documents. However, in 2013, NSW acted against the COAG⁵ uniform evidence agreement, by implementing reforms to the NSW Act ('NSW Amendments'), primarily enabling a jury to draw an unfavourable inference from the defendant's silence, in serious indictable offences. These reforms were not supported by the legal fraternity, the

¹ *Evidence Act 1995* (Cth) s126G, 'Criminal proceeding has the same meaning as criminal proceedings has in Division 2 of Part 5 of Chapter 6 of the *Criminal Procedure Act 1986*'.

² *X7 v Australian Crime Commission* (2013) 298 ALR 570, [105] (Hayne and Bell JJ).

³ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 25; *Human Rights Act 2004* (ACT), s 22.

⁴ See, eg, *Evidence (National Uniform Legislation) Act 2011* [NT], *Evidence Act 2008* [Vic].

⁵ Council of Australian Governments.

NSW Police Association, the New South Wales Law Reform Commission ('NSWLRC') or the Law Society. However, the justification for the reforms was, allegedly, to close a loophole, preventing hardened criminals from hiding behind the Right to avoid conviction. These reforms were implemented in an environment where the High Court of Australia ('HCA') found an adverse inference, drawn by a jury when the Right is exercised, to be an erosion of the Right, 'render[ing] it valueless'.⁶

This paper will argue the NSW Amendments have eroded the contemporary Right in all criminal proceedings, using similar United Kingdom ('UK') reforms as a contrast. Against international and Commonwealth of Australia's ('Commonwealth') perspectives, the paper will also demonstrate how the indeterminate nature of the Right, together with the absence of constitutional backing, enhances its vulnerability, against a threat of statutory abrogation and emerging international influences. To validate these assertions, the paper will explore the deleterious impacts of the NSW Amendments on the Right, particularly on the unfavourable inferences now drawn by a jury at trial, the presumption of innocence, the burden of proof and the right not to have to testify or confess guilt. Finally, the paper will consider the wisdom of implementing the NSW Amendments and the potential impact on the harmonisation of evidence laws in Australia.

However, before these explorations are undertaken, it is important to comprehend the scope of the Right, its historical origins and its evolution in the 20th Century.

II ORIGINS

The Right was inherited in Australia from the English common law system of justice. As an acknowledgement of the Privilege, it relates to criminal responsibility and is alleged to have been well founded by the second half of the 17th Century.⁷ It arose from the common law maxim *nemo tenetur prodere seipsum*, meaning defendants are not compelled to betray themselves.⁸ Arguably, the Privilege emanated in the Star Chamber of King Henry VIII during the 17th Century, to address the power imbalance between the prosecution and the accused, whereby the accused was unprotected from self-incrimination, resulting in

⁶ *Petty v The Queen* (1991) 173 CLR 95, 99 (Mason CJ, Deane, Toohey and McHugh JJ).

⁷ *X7 v Australian Crime Commission* (2013) 298 ALR 570, [44] (French CJ and Brennan J).

⁸ Peter Butt (ed), *Concise Australian Legal Dictionary* (LexisNexis Butterworths, 3rd ed, 2004) 295.

involuntary and false confessions.⁹ Much debate ensued, over many decades, between academics and historians regarding the accuracy of these origins. In contemporary Australia, the HCA opined in *Azzopardi v The Queen*¹⁰ ('*Azzopardi*') 'the maxim did not make the privilege'.¹¹ However, this debate is beyond the scope of this paper and the author relies on the popular origins regaled by influential jurist, Sir William Blackstone, who confirmed the maxim was enlivened where the accused's 'fault was not to be wrung out of himself, but rather to be discovered by other means and other men'.¹² The extensive misuse of power under the British inquisitorial system enlivened the principle of voluntary confessions, thereby preventing the accused from acting as a witness for the prosecution, which established the Right. Later, mandatory cautions emerged in 1848,¹³ when investigative powers were vested in the police, which firmly established the common law Right.¹⁴ This legal procedure survived the transformation to the existing accusatorial system of justice under English law,¹⁵ which Australia inherited.

Traditionally, in NSW, an accused could only make an unsworn statement and could not testify. This position dramatically changed in 1891, when the defendant was granted the right to give evidence. It was closely followed by the ability to draw adverse inferences from the defendant's silence in 1893. However, in 1898, direct comment on the defendant's silence was again prohibited.¹⁶ Subsequently, the *NSW Crimes Act 1900* prohibited comment from the judge or counsel on the failure of the accused to give evidence and adverse inferences could not be drawn by the jury from silence exercised during trial and pre-trial proceedings.¹⁷

Fast forward to the 20th Century, the precarious nature of the Right provoked Lord Mustill into clarifying it as 'a disparate group of immunities',¹⁸ that are capable of being encroached by statute.¹⁹ Primarily, Lord Mustill described the immunities as applicable to all persons, releasing them from a compulsion, upon pain or punishment, to answer questions from other

⁹ Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Issues Paper 46 (2014) 74 [10.12].

¹⁰ *Azzopardi v The Queen* [2001] HCA 25, 124.

¹¹ Ibid, quoting Langbein, 'The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries', in Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) 82, 107.

¹² *Rees v Kratzmann* (1965) 114 CLR 63, 80 (Windeyer J) citing William Blackstone, *Commentaries on the Laws of England*, 1765 vol IV, 293.

¹³ *Smith v Director of Serious Fraud Office* [1992] 3 WLR 66, 31 [G].

¹⁴ New South Wales Law Reform Commission, *The Right to Silence*, Report 95 (July 2000) 11.

¹⁵ *Hammond v Commonwealth of Australia* (1982) 152 C.L.R. 188, 10 (Murphy J).

¹⁶ *Azzopardi v The Queen* [2001] HCA 25, 52.

¹⁷ *NSW Crimes Act 1900* s407(2), since repealed.

¹⁸ *Smith v Director of Serious Fraud Office* [1992] 3 WLR 66, 30 [F].

¹⁹ Ibid.

persons, including police officers and those in authority, and that adverse inferences could not be drawn from such silence at trial.²⁰ Australia subsequently adopted this 'bundle of rights' interpretation of the Right.²¹

III RIGHT OR PRIVILEGE

Although the Right and the Privilege are often used interchangeably, they are quite distinctive, with divergent limitations that apply during pre-trial and trial proceedings.²²

The Privilege operates as an immunity from answering questions or producing documents, when the use of such information may incriminate a person being questioned.²³ Importantly, the mere belief of such incrimination is not, of itself, sufficient to exclude the evidence from use. The court must decide, based on the circumstances, the evidence to be adduced and its purpose, whether a real danger of incrimination or conviction exists.²⁴

The Right encompasses the Privilege and operates from the time the suspect is charged and cautioned, through to trial proceedings. The HCA established the Right as an important element underlying the fundamental principle that the accused never has to prove his innocence.²⁵ The HCA extended the scope to incorporate more than the rights of the accused at trial, to include the rights and privileges of a suspect not charged with an offence, as well as the rights and privileges of the person between being charged and commencement of the trial.²⁶ Neither the Privilege, nor the Right, is an absolute constitutional guarantee,²⁷ however, both are statutorily protected in the uniform evidence laws.²⁸ However, a statute may exclude the Right, providing it demonstrates a clear intent, although not necessarily express words of exclusion.²⁹

²⁰ Ibid 30-1.

²¹ *Weissensteiner v The Queen* (1993) 178 CLR 217 [49].

²² Phil Kowalick, 'Silence May Be Golden No Longer', *Platypus* (online) March 2000 <<http://www.afp.gov.au/media-centre/publications/platypus/previous-editions/2000/march-2000/silence.aspx>>.

²³ *Sorby v Commonwealth* [1983] HCA 10 [5], citing *Lamb v Munster* (1882) 10 QBD 110.

²⁴ Ibid, citing *R v Boyles* (1861) 1 B & S 311, 329-30.

²⁵ *Petty v R* (1991) 102 ALR 129, 154 (Gaudron J).

²⁶ *X7 v Australian Crime Commission* (2013) 298 ALR 570, [105] (Hayne and Bell JJ).

²⁷ *Sorby v Commonwealth* [1983] HCA 10 [16], citing the *Australian Constitution*.

²⁸ See, eg, *Evidence Act 1995* (NSW), ss89, 128.

²⁹ *Sorby v Commonwealth* [1983] HCA 10 [5], citing *R v Associated Northern Collieries* (1910) 11 CLR 738, 748.

IV THE RIGHT IN CONTEMPORARY NSW

A *Common Law Prior to UEA*

The Right of the accused to testify in his/her own defence is a comparatively modern development.³⁰ Prior to the introduction of uniform evidence laws, the judge and counsel were statutorily prohibited from commenting on the failure of the accused to give evidence.³¹ While the law is clear on the burden of proof at trial, the following common law cases demonstrate, unequivocally, just how unsettled the law is in clarifying the scope of the Right and the associated ability to draw adverse inferences from the defendant's refusal to give evidence.

1 *Bridge v The Queen*³²

In 1964, the HCA reasserted the statutory position, finding an accused is never required to prove their innocence and silence can never shift the burden of proof to the accused. Further, it verified silence does not of itself prove anything or corroborate evidence. In contrast, the Court also established the failure of the accused to contradict under oath such evidence within the defendant's knowledge to be true or untrue, likely increased the probability of the evidence being true.³³

2 *Petty v The Queen*³⁴

In 1991, the HCA reaffirmed the prosecution's onus of proof as a vital component of the Right, that exists as a fundamental element of the criminal justice system, both during pre-trial and criminal proceedings.³⁵ The Court also found that a consciousness of guilt cannot be drawn from the mere silence of the accused or that silence at trial is even questionable because the accused failed to mention a fact.³⁶

³⁰ *Weissensteiner v The Queen* (1993) 178 CLR 217, 232 (Brennan and Toohy JJ) quoting James Fitzjames Stephen *A History of the Criminal Law of England* (1883) vol 1, 441.

³¹ *NSW Crimes Act 1900* s407(2).

³² *Bridge v The Queen* (1964) 118 CLR 600.

³³ *Ibid* 615 (Windeyer J).

³⁴ *Petty v The Queen* (1991) 173 CLR 95.

³⁵ *Ibid* 128-9 (Gaudron J).

³⁶ *Ibid* 129 (Gaudron J).

3 *Weissensteiner v The Queen*³⁷

Prior to the UEA, this 1993 case established authority on the consequences of exercising the Right and the scope of judicial comment. The accused, in this case, exercised his Right in a murder charge and the trial judge informed the jury they could safely draw an inference of guilt from the defendant's silence, on facts within his knowledge.

Weissensteiner v The Queen ('*Weissensteiner*') narrowed the *Petty v The Queen* ('*Petty*') findings, highlighting a distinction between drawing an adverse inference from the accused's silence and from silence pertaining to a fact the jury perceives to be within the knowledge of the accused. In so doing, the HCA upheld *Bridge v The Queen* ('*Bridge*'), reaffirming the defendant's failure to give evidence is not, of itself, evidence and is not an admission by conduct.

Although the Right was not altogether denied in *Weissensteiner*, the Court established exceptions to the governing principles prohibiting adverse inferences drawn by the jury, when the Right was exercised by the defendant. First, the Court determined that adverse inferences can be drawn by the jury 'when the failure of the accused to give evidence is a circumstance which may bear upon the probative value of the evidence which has been given and which the jury is required to consider'.³⁸ The Court recognised there may be genuine reasons for such silence, however, silence cannot be used to add weight to the prosecution's case,³⁹ which effectively upheld the burden of proof principles. Secondly, the Court established that a defendant's refusal to respond is sufficient for the jury to draw a consciousness of guilt, in circumstances where the suspect does not exercise the Right and *selectively* chooses to respond to questions or allegations.⁴⁰ Thirdly, the Court clarified the approach to be taken on judicial comment by drawing a distinction between a failure to give evidence and the exercise of silence. It confirmed judicial comment on the defendant's silence is permitted, even in jurisdictions where such comment on silence is prohibited. However, it clarified this by confirming that a judge's comment can never be justified by a failure of the accused to give evidence.⁴¹ Therefore, in this case, it was held that the trial judge's comment to the jury on the defendant's failure to give evidence, added weight to the

³⁷ *Weissensteiner v The Queen* (1993) 178 CLR 217.

³⁸ *Ibid* 229 (Mason CJ, Deane and Dawson JJ).

³⁹ *Ibid*.

⁴⁰ *Ibid* 231.

⁴¹ *Ibid* (Gaudron, Gummow, Kirby, Hayne and Callinan JJ).

prosecution's case.⁴² In obiter dictum, the Court acknowledged any jury will likely draw an adverse inference from silence of the accused, even when prohibited from doing so, as human reason alone will almost always adopt a consciousness of guilt in such circumstances.⁴³ This certainly puts the accused at a greater disadvantage, than if the trial judge could properly comment, particularly as unchallenged evidence is safer to accept than contradicted evidence, and doubts concerning the reliability of a witness may be more easily discounted without contradictory evidence.⁴⁴

In conclusion, *Weissensteiner* established that a jury may consider the defendant's failure to explain or contradict, as opposed to a failure to give evidence, and the trial judge is prevented from informing them they may do so. Superficially, this settled these elements of the law, until two years later, when the uniform evidence laws were implemented in the Commonwealth and NSW jurisdictions, that created further confusion.

B *1995 Uniform Evidence Legislation*

The implementation of the uniform evidence legislation in 1995, attempted to find middle ground between *Bridge* and *Weissensteiner*. Section 89 of the NSW Act primarily upheld *Bridge* and *Petty*, by prohibiting adverse inferences from the defendant's exercise of the Right. However, a subtle difference exists in s20 of the NSW Act, which enables judicial comment on the defendant's silence, providing the comment does not infer a consciousness of guilt, both during trial and pre- proceedings,⁴⁵ which is closer to *Weissensteiner*.

Noteworthy, a violation of a s20 judicial comment may result in a retrial.⁴⁶ Although a defendant is not a compellable witness,⁴⁷ even though he/she is considered a competent witness (subject to ss13 and 14),⁴⁸ judicial comment restraints are extended to the failure of the defendant's spouse, de facto partner, parent or child to give evidence.⁴⁹ However, the UEA creates an obligation on the judge to warn the jury if evidence may be unreliable, including the rationale behind the warning and the dangers of accepting such evidence and the weight attached to it. There are no specific words to be used in judicial warnings, which

⁴² Ibid 229 (Mason CJ, Deane and Dawson JJ).

⁴³ Ibid 225 (Mason CJ, Deane and Dawson JJ) quoting *R v Burdett (1820)* 106 ER 873, 898 (Abbott CJ).

⁴⁴ Ibid 225 - 227 (Mason CJ, Deane and Dawson JJ).

⁴⁵ *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW).

⁴⁶ See, eg, *Azzopardi v The Queen* 205 CLR 50.

⁴⁷ *Evidence Act 1995* (Cth) s 17.

⁴⁸ Ibid s 12.

⁴⁹ Ibid s 20(3).

is confirmed as problematical in the following cases, where judicial comment and adverse inferences became the subject of judicial interpretation.

V COMMON LAW POST UEA

The new uniform evidence legislation presented an opportunity for the judiciary to review the scope of the Right during trial and pre-trial proceedings.

A *R v OGD*⁵⁰

This 1997 appeal case was the first to consider a *Weissensteiner* adverse inference, on the accused's failure to give evidence, against the uniform NSW Act. The HCA endorsed two of the three *Weissensteiner* principles on judicial comment, namely the jury should be warned first that 'the failure of an accused person to give evidence cannot be treated as an admission, by conduct, of guilt...otherwise the right to silence would be negated',⁵¹ and secondly, that 'the failure to contradict or explain incriminating evidence, in circumstances where it would be reasonable to expect it to be in the power of an accused to do so, may make it easier to accept, or draw inferences from, evidence relied upon by the Crown.'⁵²

The HCA also confirmed of the necessity to warn a jury that there may be genuine unknown reasons why silence is exercised, even if the defendant is in a position to contradict or explain evidence.⁵³

Further, the Court found a *Jones v Dunkel*⁵⁴ warning, whereby exercise of the Right 'may lead rationally to an inference that his evidence would not help his case',⁵⁵ also applies in criminal cases, however, it warned against the high risk of invoking such a warning to juries, because there may be a very good reason why the Right was exercised.⁵⁶ Nevertheless, *R v OGD* ('*OGD*') suggested there is a place for such a warning to counsel in a *voir dire*,⁵⁷ prior

⁵⁰ *R v OGD* (1997) 45 NSWLR 744.

⁵¹ *Ibid* 751-2.

⁵² *Ibid*.

⁵³ *Ibid*.

⁵⁴ *Jones v Dunkel* (1959) 101 CLR 298.

⁵⁵ *Ibid* 321 (Windeyer J).

⁵⁶ *R v OGD* (1997) 45 NSWLR 744, 753.

⁵⁷ Butt, above n 8, 452 - a trial within a trial conducted in the absence of the jury to discuss such matters as the admissibility of evidence or the competency of a witness with counsel.

to jury warning, so that the judge can better understand whether such a direction be given, considering its fairness.⁵⁸

B *RPS v R*⁵⁹

This 2000 HCA case also considered judicial comment within the NSW Act, under an alleged s20 violation by the trial judge. The accused denied all allegations against him during police questioning, although he exercised his Right at trial. In directing the jury, the trial judge informed the jury the accused was not obliged to testify, however, the judge suggested the jury could 'draw a number of inferences from that failure adverse to the accused'.⁶⁰

The Court found:

It will seldom, if ever, be reasonable to conclude that an accused in a criminal trial would be expected to give evidence. The most that can be said in criminal matters is that there are some cases in which evidence (or an explanation) contradicting an apparently damning inference to be drawn from proven facts could come only from the accused. In the absence of such evidence or explanation, the jury may more readily draw the conclusion which the prosecution seeks.⁶¹

The HCA also took the opportunity to interpret the word 'suggest' in s20 of the NSW Act,⁶² which prohibits judicial comment that *suggests* an inference of guilt. The Court confirmed it should not be given a narrow application that would attract fine distinctions. Instead, it should be treated in its full operation, as a prohibition against judicial comment on the accused's failure to give evidence.⁶³ In so doing, the Court adopted and adapted *Bataillard v The King*,⁶⁴ which is a very early case finding any judicial comment to the jury 'however wrapped up', or suggested, contravenes a statutory prohibition.⁶⁵

RPS v R ('*RPS*') upheld the *OGD* principles on judicial comment and found in favour of the accused. A retrial was ordered on the basis of the trial judge's comment to the jury, suggesting the accused failed to give evidence due to a consciousness of guilt, contravened s20. Additionally, McHugh J reiterated that the preference is to comment on the failure to

⁵⁸ *R v OGD* (1997) 45 NSWLR 744, 754.

⁵⁹ *RPS v R* (2000) 199 CLR 620.

⁶⁰ *Ibid.*

⁶¹ *Ibid* 632-633 [27] (Gaudron A-CJ, Gummow, Kirby and Hayne JJ).

⁶² *Evidence Act 1995* (NSW).

⁶³ *RPS v R* (2000) 199 CLR 620, 630 (Gaudron A-CJ, Gummow, Kirby and Hayne JJ).

⁶⁴ *Bataillard v The King* (1907) 4 CLR 1282.

⁶⁵ *Ibid* 1282, 1291 (Isaac J).

give an explanation, instead of the failure to give evidence, as it is reasonable to expect a denial or contradiction from the accused.⁶⁶

C *Azzopardi v The Queen*⁶⁷

In 2001, *Azzopardi* also considered judicial comment on the accused's silence and the operation of s20.⁶⁸ In this case, the accused denied all allegations of a serious indictable offence during police questioning and refused to give evidence at the trial. The trial judge informed the jury that the accused was not obliged to testify for the prosecution, that his failure to give evidence could not be treated as an admission of guilt and his failure to give evidence may affect the weight the jury may give to the evidence from the prosecution's witnesses.⁶⁹

The HCA reaffirmed previous findings that 'an accused is presumed innocent until proven guilty; guilt must be established beyond reasonable doubt by the Crown presenting legally admissible evidence in a lawfully conducted trial; and an accused cannot be compelled to give evidence in his or her own case'.⁷⁰ Additionally, the majority determined the aforesaid *Weissensteiner* judicial comments contravened s20, suggesting 'the accused did not give evidence because the accused was, or believed he was, guilty of the offence charge'.⁷¹ Likewise, Callinan J concurred with the *RPS* interpretation of s20, stating it best to refrain from any comment on the topic.⁷² The Court further emphasised the circumstances requiring judicial comment on the defendant's silence are 'rare and exceptional', limited only to circumstances requiring an explanation of additional facts only known to the defendant.⁷³ Finally, Callinan J asserted the *Weissensteiner* principles on judicial comment, provisioning adverse inferences, 'have no application in a jurisdiction in which s 20(2) has been acted'.⁷⁴

⁶⁶ *RPS v R* (2000) 199 CLR 620, 644.

⁶⁷ *Azzopardi v The Queen* (2001) 205 CLR 50.

⁶⁸ *Evidence Act 1995* (NSW).

⁶⁹ *Azzopardi v The Queen* (2001) 205 CLR 50.

⁷⁰ *Ibid* 52.

⁷¹ *Ibid*.

⁷² *Ibid* 119 [195].

⁷³ *Ibid* 51 (Gaudron, Gummow, Kirby Hayne and Callinan JJ).

⁷⁴ *Ibid* 116 [189].

Noteworthy, *Azzopardi* also endorsed the *RPS* wide application of the word 'suggest' in s20, confirming that, otherwise, 'the opportunity to exculpate become[s] an obligation to self-incriminate'.⁷⁵

Subsequent to *Azzopardi*, the law remained relatively settled on these elements of the uniform legislation. However, the NSW government created further confusion, with the implementation of the controversial amendments in 2013, that tipped the burden of proof away from the prosecution and radically challenged the presumption of innocence.

VI 2013 NSW AMENDMENTS

NSW uniform evidence laws took a dramatic turn, when Premier O'Farrell drove reforms to the silence provisions through both Houses of Parliament in one week. These reforms took effect on 1 September 2013⁷⁶ and included the amendment of the disclosure provisions under the *Criminal Procedure Act 1986*.⁷⁷ The Premier stressed the reforms reflected the 1994 UK statutory reforms to their silence provisions⁷⁸ (UK Amendments) and highlighted the need 'to allow juries and the judiciary to draw an adverse inference against an alleged criminal who refuses to speak to investigating police, but later produces "evidence" at trial in a bid to be found not guilty'.⁷⁹ Supporting the Premier, the Attorney-General declared 'juries are smart enough to be able to apply common sense if it's clear someone has been wrongly accused of a crime'.⁸⁰ It is naive and incorrect to rely on the intelligence of a jury to determine whether a person has been wrongly accused; the jury must consider the verdict using the whole of the evidence adduced during the trial. Relying on the jury's intelligence, also suggests a dilution of the prosecution's statutory onus of proof, which is confirmed in statute⁸¹ and at common law,⁸² and the historical concept, stated by Blackstone, that '*All presumptive evidence of*

⁷⁵ Ibid 71 [56] (Gaudron, Gummow, Kirby and Hayne JJ).

⁷⁶ New South Wales Government <<http://legislation.nsw.gov.au/maintop/epub>>.

⁷⁷ *Criminal Procedure Act 1986*, s146A - enables the court or the jury to draw inferences as appear proper in circumstances whereby the accused fails to comply with the pre-trial disclosure provisions.

⁷⁸ *Criminal Justice and Public Order Act 1994* (UK).

⁷⁹ Barry O'Farrell, Premier of New South Wales, 'Crime Crackdown: "Right to Silence" Law Toughened' (Media Release, Tuesday 14 August) 2012) 1 <<http://www.premier.nsw.gov.au/sites/default/files/CRIME%20CRACKDOWN%20RIGHT%20TO%20SILENCE%20LAW%20TOUGHENED.pdf>>.

⁸⁰ Ibid.

⁸¹ *Evidence Act 1995* (NSW) s141.

⁸² *Petty v R* 102 ALR 129, 154 (Gaudron J).

felony should be admitted cautiously; for the law holds, that it is better that ten guilty persons escape than that one innocent suffer'.⁸³

Subject to age and capacity limitations,⁸⁴ the NSW Amendments permit an unfavourable inference drawn by the jury from a failure of the of the accused to give evidence, when charged with a serious indictable offence. It is conditional upon the delivery of a special caution in the presence of the accused's legal counsel and includes a prohibition against the prosecution from using the unfavourable inference as sole evidence to convict. This safeguard will generally only apply to cases built upon of circumstantial evidence. Further, the NSW Amendments establish an obligation on the accused to disclose any matter during official questioning, that may be relied upon as a defence at trial, or any matter that the suspect could have reasonably been expected to disclose.⁸⁵ This is a far reaching obligation that impacts on the statutory disclosure provisions, all of which is underpinned by adequate legal advice.

VII IMPACT OF 2013 NSW AMENDMENTS

A *Legal Advice*

Unless a special caution is given in the presence of the suspect's legal practitioner, evidence drawn from silence cannot be admitted or commented upon at trial. This recognises the impossibility of an accused person to fully comprehend the depth of the legal consequences of silence and also provides the necessary balance to ensure the accused is protected from an overbearing state, that may potentially result in a false or improperly obtained admission.

The UK has a similar statutory condition, with one distinction; the UK provides a 24-hour government funded duty solicitor service.⁸⁶ The NSWLRC confirmed this to be problematical in NSW, where there is no such funded legal service to support the reforms. Effectively, defence has to be revealed during police questioning and those who cannot afford, or access legal advice, are greatly disadvantaged because they will not fully comprehend the significance and consequences of remaining silent,⁸⁷ which could result in a false or misguided admission, which may not be adduced as admissible evidence. The

⁸³ Sir William Blackstone, *Commentaries on the Laws of England*, Book 4, Chapter 27, 358 (emphasis added).

⁸⁴ *Evidence Act 1995* (NSW), ss13, 89A(5).

⁸⁵ *Ibid* s 89A(1).

⁸⁶ Mike Redmayne, 'English Warnings' (2008) 30.3 *Cardozo Law Review* 1061 citing David Dixon, *Common Sense, Legal Advice and the Right of Silence*, (1999) 1053.

⁸⁷ New South Wales Law Reform Commission, *The Right to Silence*, Report 95 (July 2000) 65.

absence of adequate legal advice may threaten the long-term viability of the NSW Amendments. Initially, the government committed to trialling a unique legal telephone advice service,⁸⁸ however, this does not appear to have been implemented. Suspects must, instead, rely on the limited availability of the Legal Aid hotline, which operates only during business hours and free access is restricted.⁸⁹ The NSW Police Association has since spoken out against the reforms, deeming them unworkable, because lawyers are either not turning up for the special caution or they are giving advice via telephone consultation,⁹⁰ which is contrary to the statute; it implies the lawyer's physical presence.⁹¹ Conversely, the mandatory legal advice requirements, provide an opportunity for hardened criminals to evade the reforms, by not pursuing legal advice.⁹² Although the operation of the reforms, against the legal advice requirements, are yet to be judicially considered, the HCA previously confirmed 'the common law of Australia does not recognize the right of an accused to be provided with counsel at public expense',⁹³ which is at odds with the NSW Amendments.

However, reverting to the UK experience, where legal advice also underpins the UK Amendments, the courts are reluctant to establish that legal advice to remain silent prevents an adverse inference at trial. Further, if the defendant argues a reliance on legal advice to remain silent, the defendant risks a waiver of legal privilege, resulting in cross-examination of the legal practitioner.⁹⁴ By contrast, if the defendant merely claims to have stayed silent on the basis of advice, then privilege is not waived;⁹⁵ the defendant must hold a genuine belief in the legal advice and a genuine intention to rely on it.⁹⁶ This distinction justifies the critical need for adequate legal advice in NSW, prior to police questioning and the disclosure of information, if the reforms are to succeed.

⁸⁸ Greg Smith, Attorney-General and Minister for Justice, 'Call to Support Changes to Right to Silence' (Media Release, 12 September 2012)

<http://www.justice.nsw.gov.au/Documents/Media%20Releases/2012/120912_changes_right_to_silence.pdf

⁸⁹ Legal Aid New South Wales, *Help Over the Phone*, <<http://www.legalaid.nsw.gov.au/get-legal-help/legal-helpline>>.

⁹⁰ 'Lawyers Circumventing Right to Silence Laws, NSW Police say' *ABC News* (online), 15 October 2013

<<http://www.abc.net.au/news/2013-10-15/lawyers-circumventing-right-to-silence-laws3a-police/5022578>>.

⁹¹ *Evidence Act 1995* (NSW), s89A(2)(c).

⁹² David Hamer, 'Right to Silence Reforms in NSW' (2013) 38.2 *Alternate Law Journal* 129, 1.

⁹³ *Dietrich v The Queen* (1992) 177 CLR 292 (Mason CJ and McHugh J).

⁹⁴ Redmayne, above n 86, citing *R v Wishart* [2005] EWCA (Crim) 1337.

⁹⁵ *Ibid*, citing *R v Condron* [1997] 1 Cr App R 185.

⁹⁶ *R v Hoare* [2004] EWCA Crim 784, 1818 citing *R v Betts* [2001] 2 Cr App R 257 (Kay LJ).

B *Disclosure*

The early disclosure implications are further complicated if legal advice is absent. The statute includes a mandatory requirement for the accused to consult with legal counsel in private, before official questioning can commence, otherwise the reforms are negated.

The NSW Amendment package revised associated legislation, to enable an adverse inference, as appears proper, to be drawn when the accused fails to comply with pre-trial disclosure provisions.⁹⁷ During official questioning, the accused must now disclose those facts to be relied upon in defence at trial, or those that could reasonably have been expected to mention during questioning,⁹⁸ even if the matter has not, of itself, been raised during questioning. This creates significant benefit for the prosecution, not only as a coercion for the accused to answer questions and produce information, but particularly as an obligation to disclose more evidence, earlier in the proceedings. Disclosure implications are further complicated by the need to work up a defence much sooner than previously required; it must now occur before the trial date is set.⁹⁹ Arguably, the reforms also create an *expectation*, that the police will fully disclose their case during questioning and, consequently, the police are now questioning the beneficial impact of disclosure reforms.¹⁰⁰ Of further concern, regarding the viability of the reforms, silence may now be used as a 'bargaining chip by suspects and their legal advisers, as a means of encouraging full disclosure of the evidence against them'.¹⁰¹

Regardless of the imposition of the onerous disclosure obligations, the accused may be further prejudiced at trial, by reason of judicial comment, by exercising the Right, either during police questioning, disclosure proceedings or at trial. The potential for such a prejudicial comment to occur is exacerbated by the lack of clarity governing such complicated judicial comment.

C *Adverse Inferences and Judicial Comment*

Section 20 of the NSW Act governs judicial comment and *Azzopardi* outlines the principles for judicial warnings to the jury, when the accused fails to give evidence at trial. In doing so,

⁹⁷ *Criminal Procedure Act 1986 (NSW)*, S146A.

⁹⁸ *Evidence Act 1995 (NSW)*, s89A(1)-(9).

⁹⁹ Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Bill 2013 sch 1 item, amending *Criminal Procedure Act 1986* ss 136 - 143.

¹⁰⁰ Hamer, above n 92.

¹⁰¹ Redmayne, above n 86, citing David Dixon, *Common Sense, Legal Advice and the Right of Silence*, (1999) 1061.

Azzopardi distinguished between judicial 'comment' and 'direction', emphasising the division of functions between the judge and jury, in criminal trials:

it will almost always be desirable for the judge to warn the jury that the accused's silence in court is not evidence against the accused, does not constitute an admission by the accused, may not be used to fill gaps in the evidence tendered by the prosecution, and may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt. It by no means follows, however, that the judge should go on to comment on the way in which the jury might use the fact that the accused did not give evidence.¹⁰²

Such a comment should not be a direction. The jury decides the facts and the weight of the evidence, while the judge cannot direct the jury in its verdict deliberations. The judge may direct the jury by identifying issues and giving appropriate warnings about the relevant law and legal issues, which includes permissible rationale and the extent of care required in assessing evidence and the jury must follow such directions.

By contrast, judicial comment appending significance to the defendant's silence is a comment only and should be aligned to the aforesaid *Azzopardi* principles. The jury is free to use or discard such judicial comment and should be informed of this discretion. Conversely, if judicial comment is not forthcoming on the accused's silence, the jury may infer adverse inferences from the silence.¹⁰³ However, citing *RPS* and endorsing *Weissensteiner*, the HCA found 'the preferable course is for comment to be made in terms of a failure to offer an explanation, rather than a failure to give evidence'.¹⁰⁴

The NSW Act has limited the extent of judicial comment and removed the tension between *Weissensteiner* and *RPS*, establishing judicial comment 'will never be warranted merely because the accused has failed to contradict some aspect of the prosecution case'.¹⁰⁵ Quite rightly, it does not permit the prosecution to comment on the accused's failure to give evidence and so it follows 'If the prosecution is denied the argument, why should the judge be permitted to make it?'¹⁰⁶

Whilst these recent decisions help to clarify the extent of judicial comment and direction, it is clear that consistency is lacking, and the uncertain nature of an ill-defined Right operating

¹⁰² *Azzopardi v The Queen* (2001) 205 CLR 50, 70 [51].

¹⁰³ *Ibid* 69 70 [49]-[52].

¹⁰⁴ *Ibid* 74 [65].

¹⁰⁵ *Ibid* 75 [68].

¹⁰⁶ *Ibid* 64 (Gaudron, Gummow, Kirby and Hayne JJ).

within the NSW Amendments, merely adds to the confusion, arising from a complicated set of judicial instructions. There are no judicial determinations on the Right, following the NSW Amendments, therefore the author will overview the UK experience to contrast the overall effects.

VIII UNITED KINGDOM CONTRAST

In 2005, Lord Justice Rose expressed a concern that contemporary England's strong predilection towards amending its criminal justice laws was having an adverse effect on the criminal justice system.¹⁰⁷ One such reform is the UK Amendments,¹⁰⁸ radically changing the law regarding defendant's right to exercise silence during pre-trial questioning and trial proceedings. The amendments enable the jury to draw an adverse inference from the defendant's failure to give evidence or rely on a fact in defence that was not mentioned raised by the defendant during pre-trial proceedings, or could reasonably have been expected to mention when questioned, charged or informed.¹⁰⁹ Similar to the NSW Amendments, the UK Amendments are conditional upon the opportunity to consult a solicitor prior to being questioned, charged or informed and the delivery of a caution, and the inability to convince solely on the evidence of an adverse inference taken from silence.¹¹⁰

Since the UK Amendments, the courts have confirmed that adverse inferences cannot be drawn from pre-trial silence, unless the following clear directions are given to the jury, otherwise the burden of proof is distorted:

- a. the burden of proof remains with the prosecution;
- b. the defendant retains the right to remain silent;
- c. the jury is satisfied the prosecution established on evidence there was a case to answer;
- d. the only sensible explanation for silence was that the defendant had no answer to the case against him/her, which could have withstood cross-examination;
- e. an inference from failure to give evidence does not in itself prove guilt.¹¹¹

¹⁰⁷ *R v Bradley* [2005] EWCA Crim 20 [39] cited by Susan Nash, 'Recent Developments in English Criminal Law and Procedure' (2005) 29 *Crim Law Journal* 228 228.

¹⁰⁸ *Criminal Justice and Public Order Act 1994* (UK) ss 34-37.

¹⁰⁹ *Ibid* s 34.

¹¹⁰ *Ibid* s 34(2A).

¹¹¹ *R v Cowan* [1996] QB 374 [A].

*R v Webber*¹¹² is the most recent UK authority on adverse inferences, which also established an adverse inference cannot be drawn if the defence is merely 'putting to proof' a specific proposition, if the fact is rejected by the witness. Although questions of fact do not become evidence until accepted by a witness, it still plants a seed in the mind of the jury that counsel's particular version of events is correct, even though it was not accepted as a fact by a witness and cannot be adduced as evidence.¹¹³

IX DIFFERENCES BETWEEN UK AND NSW AMENDMENTS

The fundamental difference between Australia and the UK is the system of government. England does not have a written constitution or a bill of rights and sovereignty is vested in the parliament, as a unitary system of government, to make the laws for the entire nation. Australia, however, is a constitutionally entrenched federation, comprising one Federal government and independently governed states, with legislative power to make laws distributed between the Commonwealth and the states. Therefore, unlike Australia, the UK Amendments are binding and enforceable across the entire nation.

Although the UK and NSW Amendments hold subtle differences, each fundamentally erodes the Right, by enabling adverse inferences drawn from a failure to give evidence. Whether they be *adverse inferences* or *unfavourable inferences*, each enlivens a coercion to testify, that undermines the presumption of innocence and the Privilege. Predominantly, silence in the UK for any offence is treated as suspicious.¹¹⁴

In order to understand the environment within which the NSW Amendments developed, it is important to glean an international perspective on how the Right is protected, particularly to identify any influences that may have led to the reforms.

X INTERNATIONAL PERSPECTIVE

Treaties provide an insight into the extent of protection afforded the Right in international law. A treaty or covenant is a primary source of international law,¹¹⁵ that it is binding upon its member parties, who are obliged to perform their obligations in a 'good faith' capacity.¹¹⁶

¹¹² *R v Webber* [2004] UKHL 1.

¹¹³ *Ibid* [15].

¹¹⁴ Redmayne, above n 86, 1050.

¹¹⁵ *Statute of the International Court of Justice 1945* art 38.

A *Treaties*1 *International Covenant on Civil and Political Rights ('ICCPR')*¹¹⁷

Principally, from an Australian perspective, the ICCPR recognises the inherent dignity, equality and inalienable rights, such as freedom from fear and want, as the foundation of freedom and justice. Australia ratified this treaty in 1980, entrenching its obligations into the *Human Rights Commission Act* ('AHRC Act'), by granting power to the Commissioner to monitor compliance and inquire into alleged violations, albeit without enforcement.¹¹⁸ The United Nations Human Rights Committee ('UNHRC') hears complaints of violations, however, it cannot strike down legislation.¹¹⁹ Specifically, article 14(3)(g) protects the defendant's Right in criminal proceedings, by guaranteeing the presumption of innocence and not having to confess guilt or testify against himself.¹²⁰ These rights are not absolute and can be temporarily derogated in exceptional circumstances of an officially proclaimed public emergency that threatens the life of a nation.¹²¹ The ICCPR provisions are aligned to Lord Mustill's rationale, that the immunity against testifying operates as immunity against providing information, thereby entitling the Right, as an immunity against having to confess guilt. An Australian appeal case to the UNHRC in 2006 determined a violation of the right not to confess guilt requires an act of compulsion, such as prejudicial judicial comment,¹²² whereas Australia's HCA appeal from the same matter, extended such a violation to a failure to follow fundamental criminal process.¹²³ This contrasts the inconsistency of the judicial interpretation of international obligations against domestic law. However, Australia's interpretation is consistent with the USA threshold of a fundamental procedural breach, such as police persisting in an interview with an accused after the Right has been exercised.¹²⁴

¹¹⁶ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26.

¹¹⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, (entered into force 23 March 1976) art 4 [1]-[2].

¹¹⁸ *Human Rights Commission Act 1986* (Cth), s9, sch 1.

¹¹⁹ Australian Human Rights Commission, *Fact Sheet 5: The international bill of rights* (2009) <https://www.humanrights.gov.au/sites/default/files/content/education/hr_explained/download/FS5_International.pdf>.

¹²⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, (entered into force 23 March 1976) art 14 [2], [3][g].

¹²¹ *Ibid* art 4 [1]-[2].

¹²² Human Rights Committee, *Communication No 1154/2003, 88th sess, UN Doc CCPR/C/88/D/1154/2003 (15 November 2006)* 8 [4.13] ('*Katsuno v Australia*').

¹²³ *Katsuno v R (199) 166 ALR 149, [35]*.

¹²⁴ *Michigan v Mosley* (1975) 423 US 96 (Stewart J).

Entrenchment of treaty obligations is problematical, in that they are not automatically enacted in the Australian states and territories, by reason of ratification.¹²⁵ However, the constitutional power of the Commonwealth to enter into treaties for the entire nation is a controversial argument that was nominally challenged in the renowned Australian case, *Commonwealth v Tasmania* ('*Tasmanian Dam Case*').¹²⁶ The HCA found the Commonwealth acts within its external affairs constitutional power,¹²⁷ to enact treaty obligations into domestic law for the whole nation,¹²⁸ providing the new laws are appropriate and adapted to implementing the treaty obligations¹²⁹ and the treaty is bona fide and not a contrivance for enhanced jurisdiction.¹³⁰ Consequently, the states and territories are likely restrained by these ICCPR obligations.

Noteworthy, in a further demonstration of its commitment to the preservation of human rights, the Commonwealth government established the Parliamentary Joint Committee on Human Rights ('PJCHR'), who holds responsibility for scrutinising Bills and Acts for compatibility with international human rights obligations. However, the PJCHR can only produce a statement of compatibility¹³¹ and lacks power to enforce protection of the Right.

B *Canada*

Looking to another international Commonwealth nation, the *Canadian Charter of Rights and Freedoms* ('*Charter*') protects, inter alia, the right to answer and defence, the right to counsel, and the presumption of innocence and provides an immunity against self-incrimination.¹³²

*Noble v R*¹³³ is the seminal Canadian case on the Right, where the Supreme Court ('CSC') found any Canadian court is precluded from considering the defendant's failure to give evidence, thereby protecting the Right and the presumption of innocence.¹³⁴ The CSC also confirmed the principle of voluntary confessions and the non-compellability of the accused at

¹²⁵ *Human Rights Commission Act 1986* (Cth), s5.

¹²⁶ *Commonwealth v Tasmania* (1983) 158 CLR 1.

¹²⁷ *Australian Constitution*, s51 (xxix).

¹²⁸ *Commonwealth v Tasmania* 1983) 158 CLR 1 (Murphy J).

¹²⁹ *Victoria v Commonwealth* (1996) 187 CLR 416 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

¹³⁰ Andrew Naylor, 'Australia's Treaty Making Process' (1995) 67 *Australian Law Reform Commission - Reform Journal* 3.

¹³¹ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), ss 3-5, 7.

¹³² *Canada Act 1982* (UK) c 11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*') ss7, 8, 10(b), 11(c)-(d).

¹³³ *Noble v R* [1997] 1 SCR 874.

¹³⁴ *Ibid.*

trial as constitutionally guaranteed under s11(c) of the Charter.¹³⁵ Additionally, *R v Hebert*¹³⁶ confirmed the Right at trial exists in s7 of the Charter and established that a confession is improperly obtained, and therefore inadmissible in evidence, if the Right was compromised during pre-trial proceedings.¹³⁷ Further, statutory restraints prevents a trial judge or the prosecution from commenting on the accused's silence.¹³⁸ Although the existence of the Right under the Charter, both before and during trial proceedings, is 'virtually inviolable'¹³⁹ the CSC acknowledged the impossibility of preventing a jury from applying an adverse inference to the accused's failure to testify, confirming it to be an error of law.¹⁴⁰ Clearly, the Canadian Right is protected as an absolute guarantee, under the Charter.

C *United States of America*

Looking to the Right in the USA, the Fifth Amendment protects against self-incrimination, entitling the Right, also as a constitutional guarantee. The Fifth Amendment is invoked by the accused against giving evidence.¹⁴¹

In *Miranda v Arizona*, the Supreme Court ('USSC') endorsed the defendant's right not to testify and extended the application of the Fifth Amendment to include pre-trial proceedings. It also acknowledged the intimidating environment of official questioning, by establishing proper cautioning of the accused,¹⁴² before police questioning commences. Known as the *Miranda warnings*, they include the Right and the right to have an attorney present during questioning (a government-appointed attorney if the suspect cannot afford one).¹⁴³ The Court maintained the principle of voluntary confessions, confirming statements made during police questioning, without a *Miranda warning*, are inadmissible, as a violation of the Fifth Amendment 'privilege against self-incrimination'.¹⁴⁴ Once the Right is exercised, police interrogation must desist and any further statement taken 'is a product of compulsion' and

¹³⁵ Ibid [72] (Sopinka J).

¹³⁶ *R v Hebert* [1990] 2 SCR 151.

¹³⁷ Ibid (McLachlan; Dickson CJC, Lamer, La Forest, L'Heureux-Dube, Gonthier and Cory JJ concurring).

¹³⁸ *Canada Evidence Act* SC 1985, s 4(6).

¹³⁹ Elizabeth Stone, 'Calling a Spade a Spade: the Embarrassing Truth about the Right to Silence' (1998) 22 *Criminal Law Journal* 19, 17.

¹⁴⁰ *Noble v R* [1997] 1 SCR 874 (Sopinka J).

¹⁴¹ *United States Constitution* amend V. 'No person shall be held to answer for a capital, or otherwise infamous crime...nor shall any person... be compelled in any criminal case to be a witness against himself, nor be deprived of f life, liberty, or property, withou due process of law'; *Miranda v Arizona* (1966) 384 US 444.

¹⁴² *Miranda v Arizona* (1996) 384 US 436, 445 (Warren CJ).

¹⁴³ < http://www.law.cornell.edu/wex/fifth_amendment>.

¹⁴⁴ *Miranda v Arizona* (1996) 384 US 436 (Warren CJ)

likely to be excluded from evidence.¹⁴⁵ Noteworthy, this 'product of compulsion' is consistent with the aforesaid UNHRC findings in the *Katsuno v Australia* case.¹⁴⁶ Finally, adverse inferences drawn from silence are absolutely prohibited in the US,¹⁴⁷ acknowledging there can be a genuine reason, other than guilt, as to why the Right is exercised, and drawing an adverse inference offends the Constitution.¹⁴⁸ This clearly demonstrates the protection afforded the Right in the USA, as a clearly defined absolute constitutional guarantee.

D *New Zealand*

Moving to Australia's neighbours, the third and fourth of Lord Mustill's immunities, that safeguard the Right during official questioning and at trial, are protected in statute in New Zealand, by not having to testify or confess guilt.¹⁴⁹ The Right is further protected in the *Evidence Act 2006*, with no obligation to answer questions and adverse inferences from the defendant's silence, either pre- trial or at trial, are prohibited.¹⁵⁰ Similar to Australia, the judge may comment on the defendant's silence,¹⁵¹ however, such comment cannot infer guilt.¹⁵² A seminal NZ Appeal case, *Trompert v Police*,¹⁵³ followed *Weissensteiner*, establishing an adverse inference from silence can be drawn when the defendant would be expected to have knowledge. NZ holds a similar statutory position to Australia in protecting the Right, meaning it is vulnerable to statutory change, similar to the NSW Amendments.

XI GENUINE NEED FOR REFORM?

After exploring the harmful effects of the NSW Amendments to the Right, also confirmed in the UK experience, the obvious question must be asked. Was there a genuine need for the NSW Amendments? Premier O'Farrell embarked upon these changes not long after his landslide victory in the 2011 election. The community is more likely to accept such changes to a fundamental human right if it is perceived, on balance, the need is outweighed by the community interest in maintaining law and order.

¹⁴⁵ *Michigan v Mosley* (1975) 423 US 96 (Stewart J).

¹⁴⁶ Human Rights Committee, *Communication No 1154/2003*, 88th sess, UN Doc CCPR/C/88/D/1154/2003 (15 November 2006) 8 [4.13] ('*Katsuno v Australia*').

¹⁴⁷ Hamer, 'The privilege of silence and the persistent risk of self-incrimination: Part 1', above n 92, 162.

¹⁴⁸ *Griffin v California* (1965) 380 US 609 (Douglas J).

¹⁴⁹ *Bill of Rights Act 1990* (NZ), ss23(4), 25(d).

¹⁵⁰ *Evidence Act 2006* (NZ), s32.

¹⁵¹ *Ibid* s 33.

¹⁵² *Ibid* s 32.

¹⁵³ *Trompert v Police* [1985] 1 NZLR 357.

Accurate empirical research on the impact of such reforms is difficult to obtain, given its subjective complex nature and the substantial assumptions potentially made during interview of the sample suspects.¹⁵⁴ Research conducted by the NSWLRC, surveying judiciary and legal professionals, confirmed 'suspects remained silent when questioned by police...[however] this did not occur in the majority of cases'.¹⁵⁵ Further, the NSWLRC reported empirical research conducted by the NSW Bureau of Crime Statistics and Research in 1980 concluded only '4% of suspects subsequently charged and tried in Sydney District Court remained silent in police interviews'.¹⁵⁶ Additionally, the NSWLRC confirmed research undertaken by the Victoria Office of the Director of Public Prosecutions ('DPP') in 1988 and 1989 found that 'suspects did not answer police questions in 7% to 9% of prosecutions'.¹⁵⁷ Although this research is dated, the NSW Law Society confirmed it was not aware of more recent domestic research that proposes a change in law that would achieve the NSW Government's desired outcome.¹⁵⁸

Reverting to the UK experience, empirical research was conducted on the impact of the UK Amendments between 1995 and 1996, not long after the amendments were enacted, therefore not accurately reflecting the current appeal position. Nevertheless, it did conclude the UK Amendments 'did not have a major impact because there was no discernible increase in the conviction rate or the rate of guilty pleas'.¹⁵⁹ More recent UK research from the UK Crown Prosecution Service confirms the conviction rate for contested trials in the Crown Court remains stagnant - 57 percent in 1998. While the conviction rate rose in 2006 to 64 percent, it dropped again to 59 percent in 2007, which was moderately due to an increase in the number of defendants pleading guilty (guilty pleas may increase the number of acquittals if the case is weak). Alternative UK research confirmed a decline in the conviction rate from 77 percent in 2000, to 69 percent in 2007, against an increase in guilty pleas.¹⁶⁰ Noteworthy, the NSW Attorney-General is currently reviewing the position regarding encouragement of

¹⁵⁴ Lynsey Blayden, 'Right to Silence' (Issues Backgrounder Research Paper No 4, NSW Parliamentary Research Service, Parliament NSW, 2012) 10 [4.1].

¹⁵⁵ New South Wales Law Reform Commission, *The Right to Silence*, Report No 95 (July 2000) 16.

¹⁵⁶ Ibid, quoting N. Stevenson, 'Criminal Cases in the NSW District Court: A Pilot Study' in J Basten, M Richardson, C Ronalds and G Zdenkowski (eds), *The Criminal Injustice System* (Australian Legal Eorkers Group (NSW) and Legal Service Bulletin, Sydney, 1982) 108-109, 131-136, 14--141.

¹⁵⁷ Ibid, quoting J Coldrey, 'The Right to Silence Reassessed' (1990) 74 *Victorial Bar News* 25, 26-7; J Coldrey, 'The Right to Silence: Should it be curtailed or abolished?' (1991) 20 *Anglo-American Law Review* 51, 54-5.

¹⁵⁸ Justin Dowd, 'Right to silence change is bad law', *The Australian*, 17 August 2012. <<https://www.lawsociety.com.au/about/news/643979>>.

¹⁵⁹ Redmayne, above n 86, 1081, citing Tom Bucke et al, *The Right of Silence: The Impact f the Criminal Justice and Public Order Act 1994* (Home Office Research Study No 199, 2000) 65.

¹⁶⁰ Redmayne, above n 86, 1082.

early guilty pleas, however, this NSWLRC Report is not yet publicly available for comment.¹⁶¹

This vague research suggests little value can be safely applied to the impact of the UK silence provisions at trial.¹⁶² This conclusion was drawn by the NSWLRC in 2000, when it recommended to the Attorney-General that the UK Amendments not be transported to s89 of the NSW Act because 'the empirical data...does not support the argument that the right to silence is widely exploited by guilty suspects, as distinct from innocent ones, or...that it impedes the prosecution or conviction of offenders'.¹⁶³ There may be very good reason why an accused remains silent, either through fear, confusion, illness or protecting a family member. Consequently, silence does not necessarily equate to guilt, and it is, therefore, difficult to justify the Premiers' rationale, aside from 'talk[ing] tough on law and order'.¹⁶⁴

However, this focus on uniformity across Australia promoted widespread parliamentary reviews on the Right.

XII REFORM REVIEWS

Various independent law reform agencies have inquired into the future existence of the Right, however, their powers are limited to merely reporting to their respective Parliament. The aforesaid combined 2005 Report did not recommend changes to the silence provisions.¹⁶⁵ While the 2000 NSWLRC Report recommended the removal of the prohibition of prosecution comment in s 20(2), it stated the remaining law regarding the Right should not change.¹⁶⁶ Further, the 2002 Northern Territory Law Reform Commission ('NTLRC') Report responded with resounding opposition to any changes based on the UK Amendments.¹⁶⁷ Moreover, the NSW Parliamentary Legislation Review Committee inquired into the Right in 2006, advising the Parliament that the 'overwhelming majority of the submissions noted the importance of maintaining the right to silence'.¹⁶⁸

¹⁶¹ New South Wales Law Reform Commission, *Encouraging appropriate early guilty pleas*, Report No 141 (2014).

¹⁶² Redmayne, above n 86, citing Crown Prosecution Service, *Annual Report and Accounts Annual Report* (2007-08); Ministry of Justice, *Judicial and Court Statistics* (2007), 123-25.

¹⁶³ New South Wales Law Reform Commission, above n 14, 65.

¹⁶⁴ Hamer, above n 92.

¹⁶⁵ Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) 29 [10.1].

¹⁶⁶ New South Wales Law Reform Commission, above n 14, 181 [Recommendations 14 - 15].

¹⁶⁷ Northern Territory Law Reform Committee, *Report on the Right to Silence*, Report No 25 (2002) 5, 20.

¹⁶⁸ Legislation Review Committee, Parliament of New South Wales, *The Right to Silence*, Responses to the Discussion Paper(2006) 10.

These reviews demonstrate a strong opposition to further reforms to the laws of silence, within the uniform evidence states, following the implementation of the UEA. This advice was subsequently ignored by the NSW Premier in driving the NSW Amendments, which posed a distinct threat to harmonisation of laws in Australia.

XIII THREAT TO UNIFORMITY

The Council of Australian Governments ('COAG') is underpinned by numerous Councils, with one such Council being the Law Crime and Community Safety Council, that replaced the former Standing Committee of Attorneys-General ('SCAG').¹⁶⁹ In 1991, SCAG gave in-principle approval to uniform evidence laws, based on the NSW and Commonwealth Bills. Although the respective *Uniform Evidence Acts* followed in 1995, NSW since amended its legislation in 1997 and 2002, thereby diminishing the concept of uniformity.¹⁷⁰ NSW later supported the SCAG decision to adopt model uniform evidence legislation, based on the recommendations of the Australian, Victorian and NSW Law Reform Commissions' combined Final Report in 2005.¹⁷¹ The participating states and territories progressively followed with their own legislation based on the model bill.

Importantly, the 2005 Report strongly criticised attempts to introduce non-uniform provisions into the uniform evidence Acts, stating 'there is little incentive for jurisdictions to maintain uniformity on other existing provisions, and the overarching purpose of the Acts will be lost'.¹⁷² It also recommended the adoption of a multi-lateral Inter-governmental Agreement ('IGA'), requiring SCAG approval of amendments, in advance of their implementation. Although, an IGA was not created, the official Communiqué confirms there were no proposed changes to the silence provisions. Against this bi-partisan commitment to national uniformity, it is difficult to ascertain the rationale behind the NSW Amendments, unless it was politically driven. It borders on an arrogance (or is it a naivety), that effectively undermined the concept of uniformity and highlights the urgent need for an IGA, similar to the National Partnership Agreement on Legal Assistance Services.¹⁷³

¹⁶⁹ Council of Attorneys-General, <<https://www.coag.gov.au>>.

¹⁷⁰ Stephen Odgers, *Uniform Evidence Law* (Lawbook Co, 11th ed, 2014) 2-3.

¹⁷¹ Law Crime and Community Safety Council, *Uniform Evidence Laws, (16 December 2014)* NSW Government, <http://www.lccsc.gov.au/sclj/archive/former_sclj/projects/uniform_evidence_laws.html>.

¹⁷² Australian Law Reform Commission, above n 165, 698 [20.81].

¹⁷³ Law, Crime and Community Safety Council, Council of Australian Governments, *Communiqué 3 October (2014) 1*. <<http://www.lccsc.gov.au/agdbasev7wr/sclj/lccsc%204%20july%202014%20communiqué.pdf>>.

XIV STATUTORY ABROGATION

A *Compulsory Examinations*

The NSW Amendments are but a small sample of the extent of statutory abrogation of the Right, which was affirmed by Lord Mustill, providing it includes a clear intent and uses unambiguous terms.¹⁷⁴ This is settled law in Australia¹⁷⁵ and was extended in *Pyneboard* to include non-judicial proceedings,¹⁷⁶ such as statutory or administrative examinations. Importantly, the HCA clarified the statutory compulsory examination of a person does not offend the constitutional right to trial by jury.¹⁷⁷ Compulsory examinations exist within many areas of executive government throughout Australia, such as non-judicial appeal tribunals,¹⁷⁸ public administration integrity commissions, such as the Independent Commission Against Corruption ('ICAC') in NSW, and numerous regulatory functions, such as taxation laws. In some tribunals, such as ICAC, information obtained under such examinations may be referred to the relevant DPP, with a recommendation that criminal charges be considered.

At times, the need for compelling information obtained under compulsory examination can be an expected community response. For example, in NSW, a notifiable accident in an underground coal mine triggers a wide-ranging investigation, without adherence to the rules of evidence.¹⁷⁹ Such examinations include compulsory production of documents and responses to questions, purposive to identifying the cause. However, such evidence cannot be later used against the person being questioned in a criminal proceeding, if the person objected at the time of questioning or was not warned of the potential for self-incrimination.¹⁸⁰

Statutory abrogation is demonstrated in the UEA, itself, whereby it abolishes the Right as a defence for bodies corporate against providing information in certain jurisdictions.¹⁸¹

¹⁷⁴ *Smith v Director of Serious Fraud Office* [1992] 3 WLR 66, 30 [F].

¹⁷⁵ See, eg, *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11] citing *Potter v Minahan* (1908) 7 CLR 277.

¹⁷⁶ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, (Mason ACJ, Wilson and Dawson JJ).

¹⁷⁷ *Sorby v Commonwealth* [1983] HCA 10 [16].

¹⁷⁸ See, eg, *Administrative Appeals Tribunal conferred under the Administrative Appeals Tribunal Act 1975* (Cth).

¹⁷⁹ *Work Health and Safety (Mines) Act 2013*, s56.

¹⁸⁰ *Ibid* s 58.

¹⁸¹ *Uniform Evidence Act 1995* (Cth), s187.

Some jurisdictions take a hard line in conducting compulsory examinations, particularly when a person is not charged with an offence. For example, the Commonwealth Australian Securities and Investment Commission's ('ASIC') statute¹⁸² expressly denies a person under examination the defence of self-incrimination, if they refuse to give information, sign a record or produce a document.¹⁸³ It has been long recognised by the judiciary that some administrative examinations have the potential to prejudice the fair trial of a person examined.¹⁸⁴

A balance test is recommended to determine whether the public interest in compelling the information outweighs the public interest in protecting the Right. The Queensland Law Reform Commission ('QLRC') confirmed this approach in 2004, recommending the weight of the evidence be evaluated by determining whether:

- a. an alternate lawful method of obtaining the evidence is available;
- b. there are procedural safeguards in place to protect against self-incrimination;
- c. the information already exists;
- d. the abrogation is no more than is necessary; and
- e. an immunity exists against the use of compelled information.¹⁸⁵

This pragmatic approach to determining whether a compulsory examination ought to be implemented in statute is but one example of how the Right can be protected from further statutory abrogation.

B *Use of Incriminating Evidence from Compulsory Examinations*

The use of incriminating information obtained during compulsory examinations has been challenged in the HCA¹⁸⁶ and more recently described by French CJ as a 'direct use immunity'.¹⁸⁷

¹⁸² *Australian Securities and Investments Commission Act 2001* (Cth).

¹⁸³ *Ibid* s 68.

¹⁸⁴ *X7 v Australian Crime Commission* (2013) 298 ALR 570, 589 [53].

¹⁸⁵ Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-Incrimination*, Report No 59 (2004) 55 [6.59].

¹⁸⁶ See, eg, *Hammond v The Commonwealth* (1982) 152 CLR 188, 189 (Gibbs CJ, Mason, Murphy, Brennan and Deane JJ).

¹⁸⁷ *Lee v New South Wales Crime Commission* (2013) 302 ALR 363 [2].

In *X7 v Australian Crime Commission*, the HCA considered the conduct of a compulsory examination by the Australian Crime Commission ('ACC') and whether the use of evidence, obtained under examination of a person charged with a Commonwealth indictable offence under the uniform *Corporations Act*,¹⁸⁸ could be used to convict the person in subsequent criminal proceedings, when the subject matter was the same in both proceedings.¹⁸⁹ The plaintiff declined to answer the examiner's questions and the Court ruled the ACC was not authorised to require a person charged with a Commonwealth indictable offence to answer questions about the subject matter of the charged offence during regulatory examinations, effectively upholding the Right when statutorily abrogated. This finding also limited the power of the ACC, confirming its function did not extend to exercising the Commonwealth's judicial power, which is constitutionally entrenched.¹⁹⁰

Although the common law has restrained the use of incriminating information obtained during compulsory examinations, it is doubtful the systemic practice of compulsory examinations, that curtail the Right, will diminish, largely because of the powers conferred by Parliamentary sovereignty. However, only a clear and concise statutory abrogation will be respectfully interpreted by the judiciary.¹⁹¹

Of significant relevance to the question of the extent of statutory abrogation is the recent information obtained from a limited 12-month snapshot of independent research that confirmed 14 Commonwealth statutory provisions before the Parliament offended the Right.¹⁹²

XV 'FREEDOMS INQUIRY'¹⁹³

The emerging Commonwealth 'Freedoms Inquiry' ('Inquiry'), is underway by the ALRC to consider whether, inter alia, Commonwealth legislation encroaches on the Right and whether such encroachments are justified. The ALRC is not due to report back to the Parliament until December 2015, therefore, it is impossible to extrapolate any meaningful outcome, until at least the submissions are disseminated later in the year. Nevertheless, given the common law endorsement of statutory encroachment of the Right, the Inquiry is unlikely to radically

¹⁸⁸ *Corporations Act 2001* (Cth).

¹⁸⁹ *X7 v Australian Crime Commission* (2013) 298 ALR 570, 612-614.

¹⁹⁰ *Australian Constitution ch III*.

¹⁹¹ *Lee v New South Wales Crime Commission* (2013) 302 ALR 363 [3] (French CJ).

¹⁹² Simon Breheny and Morgan Begg, 'The state of fundamental legal rights in Australia: An audit of federal law' (Research Paper, Institute of Public Affairs, December 2014) 2.

¹⁹³ Australian Law Reform Commission, above n 9.

change this approach. Encroachments that are 'reasonable, necessary and proportionate' will likely be justifiable, while those that simplify the prosecution task of proving a case are likely to be considered unjustifiable, due to their limitation on the presumption of innocence and the creation of a *reverse burden* of proof, on the accused.¹⁹⁴ At this stage, the Inquiry holds no real significance for the examination of the NSW Amendments, except to demonstrate the widespread existence of statutory abrogation of the Right and the need for the Inquiry to uphold its legal status. Correspondingly, if the Inquiry confirms the legitimacy of the Right, it could provide the ideal opportunity for the Commonwealth to bring pressure to bear on NSW, via COAG, to repeal its reforms to the uniform evidence laws.

XVI CONCLUSION

The Right is not a clearly defined legal principle and parliaments and courts have grappled with this issue, circumventing and reinventing it over a protracted period. Its intrinsic nature in criminal proceedings affords protection to the accused against abuses of state power, that potentially result in confessions achieved under threat of pain or punishment, and asserts a freedom to choose whether to speak or testify and the right to be treated fairly and without prejudice. It is not constitutionally protected in Australia and, therefore, holds no absolute guarantee.

From 1995, the Right was statutorily protected in most Australian jurisdictions in criminal proceedings, under the uniform evidence law, which resulted in greater certainty. However, the 2013 NSW Amendments have eroded the Right, by permitting unfavourable inferences, drawn from the accused's failure to give evidence, in an environment where the HCA confirmed such inferences a distinct erosion, that diminishes its value. Although not required to testify at trial, the NSW Amendments create an entrapment for the accused, who is now exposed to pain or punishment, either by speaking or remaining silent; this is a direct contrast to Lord Mustill's immunities, that are applied in Australia's common law. Consequently, maintaining silence will likely generate inculpatory evidence, because an unfavourable inference is now permitted. Moreover, the NSW Amendments are merely 'dressing up' a threat or coercion for the accused to testify and will almost certainly unknowingly harm a defence, with or without legal advice, and this specifically undermines the presumption of innocence, the Privilege and the Right. There is nothing preventing the

¹⁹⁴ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guidance Note 2: Offence provisions, civil penalties and human rights* (2014) 2.

jury from being unduly influenced by the defendant's exercise of the Right, thereby weakening the potential for an innocent verdict. It must always be remembered that an unfavourable inference drawn from the defendant's failure to give evidence does not prove guilt.

The true value of the judicial restraint against an inference of guilt is questionable. The reforms create a significant burden on the trial judge to ensure the jury is given clear and concise directions, without inferring or suggesting a consciousness of guilt; such a violation may result in a miscarriage of justice. As a consequence, judicial comment has become onerous and complex, and no matter how diluted, the comments will be prejudicially interpreted by the jury, when weighing the probative value of the evidence against the accused. In practice, once the matter is raised, by human reason alone, the jury cannot shut their mind to an unfavourable inference drawn from the defendant's failure to give evidence, regardless of how it is presented and merely because it is prohibited. It does not follow that a failure to speak constitutes evidence of fact against the accused; there may be a genuine reason for the defendant's silence.

Although the NSW Amendments are yet to be judicially considered, the UK experience demonstrates the Right is no longer a right to remain silent. Unfavourable inferences undermine the presumption of innocence and create a *reverse burden* of proof, which the UK courts have confirmed - the prosecution's case should stand independently of unfavourable inferences. Domestic and UK research make it difficult to justify the NSW Amendments, with no reliable evidence confirming a reduction in conviction rates to weigh against the erosion of the Right - the balance has been tipped away from the accused for political expediency.

The Right in NSW is no longer akin to ICCPR obligations, which recognises the Right as a foundation of freedom and justice. Unfavourable inferences and the high risk of misguided prejudicial judicial comment on the defendant's silence will increase the risk of an ICCPR violation. However, the ICCPR does not provide absolute protection to the Right and presents an unlikely avenue of appeal for most, particularly given the uncertain outcome and cost constraints. Constitutional protection of the Right removes the uncertainty and facilitates a clear and consistent judicial interpretation of statutes. In countries where the Right is not constitutionally protected, such as New Zealand, the precarious nature of the Right leaves it vulnerable to further statutory erosion, to the extent demonstrated within the

UK and NSW Amendments. Similarly, the remaining Australian states and territories are vulnerable to the UK influences, although the majority have resisted so far.

Statutory abrogation should be no more than is absolutely necessary to achieve a specific objective. If the Right is to co-exist with compulsory examinations, the 'direct use immunity' must be strictly applied, if consequential criminal proceedings occur. Further, the statutory abrogation balance test, proposed by the QLRC in 2004, must be implemented to realign the focus of the executive governments, if the common law Right is to be protected. While the Freedoms Inquiry is the ideal mechanism to reign in unjustifiable statutory abrogation, it will not likely achieve that outcome, largely due to the Commonwealth's significant investment in, and normalisation of, compulsory examinations. The singular focus of the Inquiry does not extend its tentacles beyond Commonwealth statutes, therefore eliminating an opportunity to repeal the NSW Amendments, unless the opportunity can be used to assert influence via COAG. Decades of COAG effort went into harmonising the evidence law and, although promoting the ideology of harmonisation, NSW effectively severed the code of uniformity by implementing the 2013 reforms. This is not the first time NSW has legislated outside of a COAG agreement; the COAG obligations should be honoured and the reforms repealed. For its part, COAG must give clarity to jurisdictional implementation constraints, by way of an IGA, to identify essential provisions that cannot be changed, without consensus. In the absence of such constraints, states will continue to legislate their own amendments because, notwithstanding Constitutional express powers, the Commonwealth cannot enforce legislation upon the states. Ideally, genuine uniformity, such as the *Corporations Act 2001*, can only be achieved if the states abrogate their powers to the Commonwealth for a particular purpose, however, this enlivens the contentious debate on the decline in state sovereignty - a topic for another paper.

Regardless of how they are dressed up, the NSW Amendments are an erosion of a long-standing common law human right. Although the spotlight is on human rights in Australia, the Human Rights Commissioner has a considerable task in overseeing compliance with international obligations, albeit unenforceable. There is a strong need for vigilance and assertive influence by the Commissioner to retain the common law status of the human Right, for all vulnerable people, that is aligned to international standards - the 'one size fits all' NSW model will not achieve that objective.

Conversely, if the NSW Amendments are not repealed, modifications are at least required to

make them workable. The special caution requires clarity to clearly and succinctly explain the deleterious effect of silence and the likely harm to a defence from unfavourable inferences drawn from such silence. The words currently used do not extend this far, particularly for vulnerable people - everyone is vulnerable once they enter the criminal justice system.

Finally, contrasting the UK Amendments highlights a fundamental flaw in the operation of the NSW Amendments. Correspondingly, the NSW Amendments are conditional upon the accused having access to a legal practitioner, who must be in attendance during the delivery of the special caution, otherwise, the reforms in s89A cannot be applied. In the UK, the government provides a free 24-hour legal service, whereas in NSW, access to a free legal services is restricted and only operates during business hours. The ramifications are such that a court could strike down the NSW Amendments, if the legal advice provisions are not met and the special caution is delivered regardless. Principally, official questioning during pre-trial proceedings must cease, if a legal practitioner is not present to witness the special caution, thereby negating the original intent of an over-zealous Parliament.

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