ERISP[7] in which the accused has provided a detailed account of the relevant events.[8]

The UK Legislation

Justice Davies pointed to the UK experience as a suitable model, where the right was removed in Northern Ireland in 1988[9] and in England and Wales in 1994.[10]

Under the UK legislation[11], 'an adverse inference may be drawn if the accused failed to mention to investigating police any fact relied on in his or her defence which he or she could reasonably have been expected to mention.' Similar provisions apply to a failure by the accused to account to police for his or her presence at the scene of a crime or possession of an item or mark which police consider is attributable to his or her participation in an offence.[12]

'As the critics would have it, having been denied the option of the dock statement, the accused should now be discouraged from hiding behind the veil of silence.'

If the accused declines to give evidence, the jury may be invited to draw an adverse inference from the accused's silence[13]. The UK Court of Appeal has approved the following jury direction where the accused fails to give evidence:

> If the only sensible explanation for his decision not to give evidence is that he has no answer to the case against him, or none that could have stood up to cross-examination, then it would be open to you to hold against him his failure to give evidence.[14]

One would have thought that the UK criminal justice system was a flawed model for the removal of protections of the accused. It has been discredited by the revelation that since the 1970's a number of people have served lengthy sentences following on wrongful convictions; the 'Guildford Four' (15 years), the 'Birmingham Six' (16 years), Judith Ward (17 years),[15] and most recently, the 'Bridgewater Three' (18 years). The ensuing public outcry prompted the government in June 1991 to establish the Royal Commission on Criminal Justice (the 'Royal Commission').

The catalyst for the UK government legislating against the right of silence was its concern about the conviction rate of terrorist suspects in Northern Ireland. As one commentator has observed: '[it] was prompted primarily by the need to encourage those who were suspected of terrorist activity to answer questions when there was not enough evidence to convict them.'[16] It followed on the suspension in Northern Ireland of trial by jury for a number of offences. The order passed through parliament within a month of the government stating its intention, hardly suggesting the careful political debate one would expect when curtailing a long-standing (once thought inalienable) right.

The government delayed extending the legislation beyond Northern Ireland until after the Royal Commission examined the issue, which it had included as a term of reference. As had its predecessor, the Royal Commission on Criminal Procedure in 1981, the Royal Commission recommended against any change to the right of silence.[17] In spite of this recommendation, the government extended the abolition to England and Wales.

The legislation was not entirely without precedent; similar legislation had been enacted in Singapore in 1976.[18]

Consideration of the Arguments for Abolition

Implicit in the advocacy of abolition is a 'presumption of guilt' behind silence; that only a guilty accused would avoid the witness box. Justice Davies referred to Jeremy Bentham's observations[19], that he imagined an innocent person would wish to give evidence.[20] Bentham is often invoked by those who advocate abolition[21] but he was writing in support of the notion of the accused giving evidence at a time when the accused was not permitted to give evidence at all and had no right of counsel.[22] It is speculative to assume Bentham thought that, given the opportunity, a failure to give evidence should count against the accused.[23]

There are many reasons why a suspect may decline to answer questions. As JD Heydon and Mark Ockeiton have observed:

> A man may be silent in the face of an accusation for many reasons other than guilt. He may not have heard or understood what was said; he may not consider the charge to have been addressed to him; he may be silent because he is attempting to work out the meaning of an ambiguous statement. The accusation may be so sudden as to make him silent through confusion, as where he has just woken up. He may fear misreporting of any reply he makes; he may be shocked into silence by a false but serious charge; he may contemptuously consider it beneath his dignity to begin a debate about baseless and dishonourable accusations. He may not answer because he lacks knowledge of the matter in question. He may fear that to protest too much will be taken as a sign of guilt. He may believe he has a right of silence of which he wishes to avail

himself, perhaps because he thinks an early disclosure of his defence will enable the other side to interfere with his witnesses. He may be silent because he wishes to protect others or to avoid disclosing discreditable but irrelevant facts about himself or others. Further, human reactions vary so much; the guilty may deny guilt strongly while the innocent remain silent.[24]

There are also many reasons, other than an apprehension of guilt, why defence counsel advise their client against giving evidence and, other than a consciousness of guilt, why accused persons decline to do so.

For instance, research carried out by the Royal Commission suggested that in at least 12% of cases where the suspect exercised the right, the motive was the protection of others.[25] The only way the accused could explain to the jury his or her silence at interrogation would be to forego the right to silence at the trial, enter the witness box and be subjected to cross-examination generally. The onus would have shifted. The accused would be on the back foot, having to explain his or her silence rather than solely address the evidence offered by the Crown.

Justice Davies stated: 'At present the so-called right to silence, it seems to me, remains a sanctuary for the sophisticated or practised offender.'[26] This impression was not supported by the findings of the Royal Commission, which examined this issue and concluded:

> The research evidence neither confirms nor refutes the suggestion that, though [the right of silence] may be exercised in only a minority of cases, that minority includes a disproportionate number of experienced criminals who exploit the system in order to obtain an acquittal.[27]

Another argument sometimes advanced in support of abolition is that it would require the suspect to disclose his or her defence, so that the prosecution could not be ambushed at trial. Surely though, this is a rarity; in the overwhelming proportion of trials the prosecution has more than a fair idea as to what in general terms will be advanced by the defence, and is not disadvantaged. The Royal Commission research suggests that at most 5% of cases involved a defence which might be regarded as ambush.[28]

Warming to his agenda, Justice Davies posed that we could go beyond the UK model:

> I wonder even whether we should go further than this. Why should not a judge, in some cases in which an accused declines to give evidence, nevertheless ask him or her some questions. The accused could not, of course, be compelled to answer them but shouldn't the jury be able to draw such inferences as are proper from the failure to do so?[29]

What would remain of the impartiality of the bench, if the trial judge was to take up the cudgels of the prosecution and question the accused, against his or her will, in the dock? This proposal has a distinct resonance with the inquisitorial Court of the Star Chamber, whose practices prompted the generic right against self-incrimination in the first place.[30]

Intellectual Disability

Justice Davies justified his proposal in light of the increased educational level in the community,[31] and said: '[The right of silence] no longer serves, if it ever did, the interests of the weak, the confused or the nervous who are the least likely to have the presence of mind to assert the right.'[32]

The UK provision allows comment if the accused who fails to give evidence is aged 14 or over, unless in the opinion of the trial judge 'the physical or mental condition of the accused makes it undesirable for him to give evidence.'[33] There is no similar legislative restriction to the use to be made of the failure of the accused to respond to police questioning.

Improvements in the education standards in modern times are not uniform, and those who are tried before the court are often not only the least educated, but also the least intelligent. Research carried out for the NSW Law Reform Commission in 1995 revealed that 23% of persons who appear in NSW Local Courts have either an intellectual disability or borderline intellectual disability (IQ below 79).[34] As surprising as this first seems, research conducted by the UK Royal Commission, in which psychologists tested 156 suspects in two police stations, found that the average IQ was 82 - within the bottom 5% of the population – and 51% had an IQ below 79.[35] In spite of the findings, only two of the 156 had been recognised by the police as having an intellectual disability. As the authors of the report observed: '...there is no doubt that by observation alone over a short period of time, proper identification of mild mental handicap, even by trained clinicians, is a very difficult task.'[36]

'There are also many reasons, other than an apprehension of guilt, why defense counsel advise their client against giving evidence and, other than a conciousness of guilt, why accused persons decline to do so...'

If the right to silence is affected in the manner proposed, a new caution must be devised to inform a

suspect of the consequences of failing to answer questions. However, research suggests that people with an intellectual disability have considerable difficulty in understanding our current caution, let alone a more complex one.[37] Criminal barristers are familiar with the difficulties that many young people, aboriginal people and people for whom English is a second language have in understanding the present caution.

The caution devised in the UK is:

> You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.

Not surprisingly there are reports suggesting that many members of the general population in the UK believe it means that they have to answer police questions.[38]

In amending the operation of the criminal justice system our standard for the education, age, intelligence and cultural background of the user must bear some relationship to the statistical indications of that profile. There is not much point in having a system which requires an educational or intelligence level far beyond that which a significant proportion of defendants possess. An understanding of the caution, and beyond that the perilous position in which the accused would be placed when interviewed by police if there was a radically curtailed right to silence, is fundamental.

Conclusion

An implicit presumption behind these proposed reforms is that there is something which sets apart the modern age from those past dark eras in which the present rules were formed, and that consequent to our enlightenment and present educational standards, the old protections are no longer needed; no accused will ever again be prejudiced by police interrogation or cross-examination on their sworn evidence.

However concern for the vulnerable suspect was pivotal in the recommendation of the Royal Commission to not abolish or erode the right to silence:

> The majority of us ... believe that the possibility of an increase in the convictions of the guilty is outweighed by the risk that the extra pressure on suspects to talk in the police station and the adverse inferences invited if they do not may result in more convictions of the innocent... It is the less experienced and more vulnerable suspects against whom the threat of adverse comment would be likely to be more damaging.[39]

There are simpler and fairer ways to improve our criminal justice system. Reducing delay is the single most urgently required reform, which would impact positively on both the prosecution and defence, and also on victims of crime. The Supreme Court is increasingly reluctant to deny bail to defendants who would otherwise be on remand for extended periods, which then results in the trial losing priority. As time passes the memories of both prosecution and defence witnesses fade and become open to attack on that ground alone. Delay has particular relevance to trials where the memories of prosecution witnesses are critical, such as in relation to identification evidence, and in child sexual assault trials.

Reducing delay is a reform which, happily, is seen universally to serve the interests of justice.

1 The Hon Justice GL Davies (Judge of the Court of Appeal, Qld): "Justice Reform: A Personal Perspective". *NSW Bar News* Summer 1996 page 5 at 5.10.
2 Reference by the Victorian AG on 13.11.97 to the Scrutiny of Acts and Regulations Committee.
3 A current reference to the Law Reform Commission of Western Australia.
4 for instance Bernard Robertson in "The Right to Silence Considered" (1991) 21 *Victoria University of Wellington Law Review* 139 at 140.8; *R* v *Cowan* [1 9961 QB 373 at 378.G per Lord Taylor delivering the judgment of the Court
5 At 99.3 per Mason CJ, Deane, Toohey & McHugh JJ
6 See section 20 of the *Evidence Act 1995*. Section 407 of the Crimes Act, which forbade judicial and prosecutorial comment, was repealed at the same time as the NSW *Evidence Act* commenced. For a consideration of the effect of section 20 on Weissensteiner, see OGD (1997) 98 *ACR* 151 (NSW CCA) per Gleeson CJ (Grove & Sperling JJ agreeing) at 157-8.
7 ERISP: "electronically recorded interview of a suspected person."
8 Per Wood CJ at CL (Spigelman CJ & McInerney J agreeing) at page 19.
9 Criminal Evidence (Northern Ireland) Order 1988.
10 The *Criminal Justice and Public Order Act, 1994*, which came into force on 10 April 1995.
11 ibid, section 34. The adverse inference is available for the determination of whether to commit to trial and whether there is a prima facie case, as well as for the ultimate determination of whether the accused is guilty.
12 ibid, sections 36 and 37.
13 ibid, section 35.
14 From a specimen direction suggested by the Judicial Studies Board, and adopted by the Court of Appeal in *R* v *Cowan* ibid per Lord Taylor delivering the judgment of the Court. Similarly the Court approved a jury direction in respect of a failure to appropriately inform the police in *R* v *Condron* [1977] 1 Cr. App. R. 185 per judgment of the Court at 193D, 195A.
15 See *R* v *Ward* (1993) 96 Cr App R 1
16 J.D. Jackson "Curtailing the Right of Silence: Lessons from Northern Ireland" [1991] Crim LR 404 at 404.1 0.
17 The Report of the RCCJ, July 1993, Chap. 4, paras. 23-4 .
18 Meng Heong Yeo; *'Diminishing the Right to Silence: The Singapore Experience'*. [1983] Crim LR 89.
19 Davies J at page 10.3
20 D.J. Galligan; "The Right to Silence Reconsidered" *Current Legal Problems*, vol. 41 (1988), 69 at page 70.3.
21 Ibid 70.4
22 The accused became a competent witness under the *Criminal Evidence Act, 1898*
23 Jeremy Bentham, *Rationale of Judicial Evidence* ed. J.S. Mill, (1827), Vol. 1, Book 11, Pps. 446448; 589-591.
24 Page 144.5 JD Heydon & Mark Ockeiton *Evidence Cases and Materials* Butterworths 4th Edn 1996
25 "The Right to Silence in Police Interrogation: A Study of some of the Issues Underlying the Debate" (RCCJ Research Study No 10, 1993), p. 20.
26 Davies J, ibid. at page 11.2.
27 Royal Commission Report, Chapter 4 paragraph 17
28 RCCJ Research Study No 1 0 at p. 58.
29 Davies J, ibid. at page 10.9.
30 Professor Leonard W. Levy; *Origins of the Fifth Amendment*, Oxford University Press 1969.
31 Davies J, ibid. at page 5.8.
32 Davies J, ibid. at page 11.3.
33 The *Criminal Justice and Public Order Act, 1994*, section 35 (1) (b)
34 NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Research Report No. 4, page 53.
35 RCCJ Research Study No 12 at p. 24.3.
36 RCCJ Research Study No 12 at p. 26.5.
37 NSW Law Reform Commission, People with an Intellectual Disability and the Criminal Justice System, Research Report No. 3, page 50.
38 *The Independent* newspaper, 3.1.96 page 14 referring to research by Dr. Eric Shepherd.
39 RCCJ Report, paras 4.22 & 4.23.