

**New South Wales
Law Reform Commission**

**Report
95**

The Right to Silence

July 2000

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New South Wales Law Reform Commission

To the Honourable Bob Debus MLC
Attorney General for New South Wales

Dear Attorney

The Right to Silence

We make this final Report pursuant to the reference to this Commission dated 1 August 1997.



The Hon Justice Michael Adams
Chairperson

His Honour Judge Bob Bellear, Commissioner

The Hon Justice John Dowd AO, Deputy Chairperson (until December 1999)[†]

The Hon David Hunt AO, Commissioner (until July 1999)[‡]

The Hon Justice Greg James, Commissioner

July 2000

[†] Justice Dowd has continued to participate in the finalisation of the Report as a consultant.

[‡] The Hon David Hunt AO was formerly Chief Judge at Common Law of the Supreme Court of New South Wales and became a Judge of the International Criminal Tribunal for the Former Yugoslavia on 16 November 1998. His term as a Commissioner expired in July 1999. He has also continued to participate in this Report as a consultant.

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Terms of reference

On 1 August 1997 the Attorney General, the Hon JW Shaw QC MLC, referred to the Commission a review of the law relating to the right to silence. In conducting the review, the Commission was directed to consider (but was not limited to consideration of) the following issues:

- (i) whether such a right should exist at all;
- (ii) if so, the nature of any inference that should be able to be drawn from the exercise of that right;
- (iii) the operation of s 20 of the *Evidence Act 1995* (NSW);
- (iv) whether there should be any mandatory pre-trial or pre-hearing disclosure of the nature of the defence and of the evidence in support of that defence;
- (v) if so, whether it should be possible to draw any inferences from the failure to disclose such defence or evidence, or the manner of such mandatory disclosure, or from any change in the nature of the defence or in the evidence in support of it;
- (vi) the operation of the current mandatory defence disclosure provisions, including those in relation to alibi, and pursuant to the *Evidence Act 1995* (NSW);
- (vii) whether changes to the current position with regard to prosecution pre-trial disclosure are needed; and
- (viii) any related matter.

In undertaking this reference, the Commission was directed to consider the position in other Australian jurisdictions and other common law jurisdictions throughout the world.

Participants

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division[†] for the purpose of conducting the reference. The members of the Division are:

The Hon Justice Michael Adams*
His Honour Judge Bob Bellear
The Hon Justice John Dowd (until December 1999)
The Hon David Hunt AO (until July 1999)
The Hon Justice Greg James

(* denotes Commissioner-in-Charge)

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[†] Other Division members during the early phase of this reference were the Hon Justice Virginia Bell, Mr Brent Fisse, His Honour Judge John Goldring, the Hon Justice Peter Hidden and Professor David Weisbrot.

LIST OF RECOMMENDATIONS

RECOMMENDATION 1 (page 72)

The Commission recommends that s 89 of the *Evidence Act 1995* (NSW) be retained in its current form. Legislation based on s 34, 36 and 37 of the *Criminal Justice and Public Order Act 1994* (Eng) should not be introduced in New South Wales.

RECOMMENDATION 2 (page 115)

The Commission recommends that the prosecution must be required to disclose the following material and information, in addition to the existing prosecution pre-trial disclosure requirements:

- (a) All reports of prosecution expert witnesses proposed to be called at trial. In accordance with the general rule, such reports must clearly identify the material relied on to prepare them.
 - (b) Where the defence discloses its expert evidence, whether issue is taken with any part and, if so, in what respects.
 - (c) Whether defence expert witnesses are required for cross-examination. In this event, notice within a reasonable time must be given.
 - (d) In respect of any proposed defence exhibits of which notice has been given, whether there is any issue as to provenance, authenticity or continuity.
 - (e) Where notice is given that charts, diagrams or schedules are to be tendered by the defence, whether there is any issue about either admissibility or accuracy.
 - (f) Any substantial issues of admissibility of any aspect of proposed defence evidence of which notice has been given.
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RECOMMENDATION 3 (page 116)

- (a) Where no issue is taken by the defence as to the provenance, authenticity, accuracy, admissibility or continuity of prosecution exhibits, charts, diagrams or schedules, the evidence will be prima facie admissible and may be tendered without formal proof.
- (b) Where no issue is taken by the defence as to the admissibility of expert reports disclosed by the prosecution, this evidence will be prima facie admissible and may be tendered without formal proof.
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RECOMMENDATION 4 (page 130)

The Commission recommends that notice of alibi evidence should be required at least 35 days before trial in all indictable matters tried in the Supreme and District Courts.

RECOMMENDATION 5 (page 134)

The defendant shall be required to disclose the following material and information, in writing, unless the Court otherwise orders:

- (a) In addition to the existing notice requirements for alibi evidence and substantial impairment by abnormality of mind, whether the defence, in respect of any element of the charge, proposes to raise issues in answer to the charge, eg accident, automatism, duress, insanity, intoxication, provocation, self-defence; in sexual assault cases, consent, a reasonable belief that the complainant was consenting, or that the defendant did not commit the act constituting the sexual assault alleged; in deemed supply cases, whether the illicit drug was possessed other than for the purpose of supply; in cases involving an intent to defraud, claim of right.
- (b) In any particular case, whether falling within Recommendation 5(a) or not, the trial judge or other judge charged with the responsibility for giving pre-trial directions may at any time order the defendant to disclose the general nature of the case he or she proposes to present at trial,

identifying the issues to be raised, whether by way of denial of the elements of the charge or exculpation, and stating, in general terms only, the factual basis of the case which is to be put to the jury.

- (c) All reports of defence expert witnesses proposed to be called at trial in accordance with the general rule, such reports shall clearly identify the material relied on to prepare them.
 - (d) Where the prosecution discloses its expert evidence, whether issue is taken with any part and, if so, in what respects.
 - (e) Whether prosecution expert witnesses are required for cross-examination. In this event, notice within a reasonable time shall be given.
 - (f) Where the prosecution relies on surveillance evidence (electronic or otherwise), whether strict proof is required and, if so, to what extent.
 - (g) In respect of any proposed prosecution exhibits of which notice has been given, whether there is any issue as to provenance, authenticity or continuity.
 - (h) In respect of listening device transcripts proposed by the prosecution to be used or tendered, whether they are accepted as accurate and, if not, in what respects issue is taken.
 - (i) Where notice is given that charts, diagrams or schedules are to be tendered by the prosecution, whether there is any issue about either admissibility or accuracy.
 - (j) Where it is proposed to call character witnesses, their names and addresses. The purpose of this requirement is to enable the prosecution to check on the antecedents of these witnesses. Character witnesses or other defence witnesses identified directly or indirectly by disclosures made by the defence shall not be interviewed by the prosecution without the leave of the court.
 - (k) Any issues of admissibility of any aspect of proposed prosecution evidence of which notice has been given.
 - (l) Any issues concerning the form of the indictment, severability of the charges, separate trials or applications for a “Basha” inquiry.
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RECOMMENDATION 6 (page 136)

- (a) Where no issue is taken by the prosecution as to the provenance, authenticity, accuracy, admissibility or continuity of defence exhibits, listening device transcripts, charts, diagrams or schedules, the evidence will be prima facie admissible and may be tendered without formal proof.**
 - (b) Where no issue is taken by the prosecution as to the admissibility of expert reports disclosed by the defence, this evidence will be prima facie admissible and may be tendered without formal proof.**
 - (c) Disclosures made pursuant to these requirements, are not admissions and are not admissible into evidence without leave of the judge except for the purpose of determining on the voire dire any procedural matter arising from an alleged omission to provide any required disclosure or alleged change of case.**
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RECOMMENDATION 7 (page 137)

The Commission recommends that, in appropriate cases, the court should be able to invoke the requirements outlined in Recommendations 2 and 5. The parties should also be able to apply to the judge to order compliance with Recommendation 5(a) and disclosure under Recommendation 5(b).

RECOMMENDATION 8 (page 138)

The Commission recommends that the proposed disclosure requirements be applied in the Supreme Court and District Court. The Commission also recommends the following limited disclosure requirements for the Local Courts:

- (a) The defence should be required to give notice of proposed alibi evidence a reasonable time before the hearing, subject to the imposition of a more specific time frame by a magistrate.**
 - (b) Magistrates should also be empowered to order the parties to exchange expert reports.**
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RECOMMENDATION 9 (page 139)

The Commission recommends that the court be given the power to set a time for compliance with the disclosure requirements set out in Recommendations 2 and 5.

RECOMMENDATION 10 (page 141)

The Commission recommends that judges be given a discretion to impose any of the following consequences for non-disclosure or departure from the disclosed case during the trial:

- (a) A discretion to refuse to admit material not disclosed in accordance with the requirements.
 - (b) A discretion to grant an adjournment to a party whose case would be prejudiced by material introduced by the other party which was not disclosed in accordance with the requirements.
 - (c) In jury trials, a discretion to comment to the jury or to permit counsel to comment, subject, if appropriate, to any conditions imposed by the trial judge.
 - (d) In trials without jury, the trial judge may have regard to the failure to comply with the disclosure requirements in the same way as a jury would be entitled to do so.
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RECOMMENDATION 11 (page 142)

The Commission recommends that the court should be empowered to make orders concerning the communication, use and confidentiality of material disclosed to the defence.

RECOMMENDATION 12 (page 143)

The *Criminal Procedure Act 1986 (NSW)* should be amended to insert a provision to permit the Supreme Court and the District Court to make Rules requiring disclosure as recommended and such other similar disclosure as might be appropriate in respect of other offences.

RECOMMENDATION 13 (page 144)

Judges should also be given a discretion to consider compliance with the defence disclosure duties as a mitigating factor when sentencing a defendant who is ultimately convicted.

RECOMMENDATION 14 (page 180)

The Commission recommends that, subject to Recommendation 15, the present law concerning the right to silence at trial should not change.

RECOMMENDATION 15 (page 182)

The Commission recommends that prohibition on prosecution comment in s 20(2) of the *Evidence Act 1995 (NSW)* should be removed. Prosecutors should be permitted to comment upon the fact that the defendant has not given evidence, subject to the restrictions which apply to comment by the trial judge and counsel for the defendant and any co-accused. The prosecution shall be required to apply for leave before commenting.

1. Introduction

- The Commission's reference
- The right to silence in New South Wales
- Conduct of the reference
- Structure of the Report

THE COMMISSION'S REFERENCE

1.1 On 1 August 1997 the Attorney General, the Hon JW Shaw QC MLC, referred to the Commission a review of the law relating to the right to silence. In conducting the review, the Commission was directed to consider (but was not limited to consideration of) the following issues:

- (i) whether such a right should exist at all;
- (ii) if so, the nature of any inference that should be able to be drawn from the exercise of that right;
- (iii) the operation of s 20 of the *Evidence Act 1995* (NSW);
- (iv) whether there should be any mandatory pre-trial or pre-hearing disclosure of the nature of the defence and of the evidence in support of that defence;
- (v) if so, whether it should be possible to draw any inferences from the failure to disclose such defence or evidence, or the manner of such mandatory disclosure, or from any change in the nature of the defence or in the evidence in support of it;
- (vi) the operation of the current mandatory defence disclosure provisions, including those relating to alibi, and pursuant to the *Evidence Act 1995* (NSW);
- (vii) whether changes to the current position with regard to prosecution pre-trial disclosure are needed; and
- (viii) any related matter.

1.2 The Commission was directed to consider the position in other Australian jurisdictions and in other common law jurisdictions throughout the world.

THE RIGHT TO SILENCE IN NEW SOUTH WALES

1.3 The expression “the right to silence” describes a group of rights which arise at different points in the criminal justice system. This group of rights includes:

- (1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.
- (2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.
- (3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.
- (4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.
- (5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.
- (6) A specific immunity (at least in certain circumstances ...), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.¹

1.4 The Commission's Report on the right to silence covers the suspect's right to remain silent when questioned by police, pre-trial and pre-hearing disclosure duties and the defendant's right to remain silent at the hearing or trial.

1.5 In New South Wales, suspects are entitled to remain silent when questioned by police. At the hearing or trial, the judge or jury is prohibited from drawing adverse inferences, including inferences about the defendant's guilt, or credibility as a witness, from evidence that he or she did not answer police questions.²

1.6 Pre-trial disclosure obligations differ for the prosecution and the defence in New South Wales. Police prosecutors, who conduct prosecutions in the Local Courts, are required to serve a brief of evidence on the defendant

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1. *R v Director of Serious Fraud Office; ex parte Smith* [1993] AC 1 at 30-31 per Lord Mustill, with whom the other members of the House of Lords agreed.
 2. *Evidence Act 1995* (NSW) s 89. The law in New South Wales is considered in detail in Chapter 2.

at least 14 days before Local Court hearings.³ In cases prosecuted in the District and Supreme courts by the Office of the Director of Public Prosecutions, the prosecution must disclose to the defence, as soon as practicable before the hearing or trial, all information relevant to any issue likely to arise at the hearing or trial.⁴

1.7 In trials in the District and Supreme Courts, the defence is required to notify the prosecution of proposed alibi evidence.⁵

In murder trials, the defence is also required to give notice of the intention to raise the defence of substantial impairment by abnormality of mind.⁶

1.8 In New South Wales, defendants can give evidence at their hearing or trial, but can not be compelled to do so.⁷ The court can draw unfavourable inferences where the defendant does not testify and, in jury trials, the judge, defence counsel and counsel for any co-accused can comment on the defendant's silence. There are statutory and common law restrictions on the nature of comment which the judge can make. Prosecution comment is prohibited.⁸

3. *Justices Act 1902* (NSW) s 66A-66H. The requirements for Local Court hearings are considered in detail in Chapter 3.

4. Law Society of NSW, *Solicitors' Rules*, r A66, A66A, A67; NSW Bar Council, *NSW Barristers' Rules*, r 66, 67; NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (1998) furnished pursuant to the *Director of Public Prosecutions Act 1986* (NSW) s 13 Guideline 11. The requirements for District and Supreme Court trials are considered in more detail in Chapter 3.

5. *Criminal Procedure Act 1986* (NSW) s 48 (formerly *Crimes Act 1900* (NSW) s 405A). This requirement is discussed in Chapter 3.

6. *Crimes Act 1900* (NSW) s 23A, *Criminal Procedure Act 1986* (NSW) s 49 (formerly *Crimes Act 1900* (NSW) s 405AB). This requirement is discussed in Chapter 3.

7. *Evidence Act 1995* (NSW) s 12, 17, 20. The Law in New South Wales is considered in detail in Chapter 4.

8. *Evidence Act 1995* (NSW) s 20(2); *Weissensteiner v The Queen* (1993) 178 CLR 217 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ, Gaudron and McHugh JJ dissenting. This prohibition is described in detail in Chapter 4.

CONDUCT OF THE REFERENCE

1.9 The Commission received the reference in August 1997 and commenced substantive work on the reference in October 1997.

The Commission circulated the terms of reference to victims' groups, defence lawyers, prosecutors, judges and magistrates, academic lawyers and civil liberties and human rights organisations, as well as a number of interested individuals, inviting submissions on all aspects of the review. The Commission received 60 submissions, which are listed at Appendix A. In June 1999, the Commission conducted a series of consultations with members of the legal profession, which are listed at Appendix B.

1.10 In June 1998, the Chairperson of the Law Reform Commission, Justice Michael Adams, visited England and consulted with senior members of the judiciary, legal profession and police force in that country about the practical operation of the right to silence in England, in order to gain a deeper understanding of the impact of reforms enacted in England and Wales in 1994.

1.11 In December 1998, the Commission conducted a survey of judges, magistrates, prosecutors and defence lawyers on the practical operation of pre-trial disclosure and the right to silence in New South Wales during the six month period from June to November 1998. The Commission also asked participants in the survey for their views on the effect of pre-trial disclosure and reliance on the right to silence. The results of this survey are referred to throughout this Report. The Commission also produced a Research Report which sets out the survey findings in detail.⁹

STRUCTURE OF THE REPORT

1.12 This Report is divided into four chapters. Chapter 1 sets out the Commission's terms of reference and the issues raised by the reference.

1.13 Chapter 2 examines the right to remain silent when questioned by police. This Chapter sets out the law in New South Wales and considers changes to this aspect of the right to silence introduced in Northern Ireland in 1988 and adopted in England and Wales in 1994. The Commission

9. New South Wales Law Reform Commission, *The Right to Silence and Pre-trial Disclosure in New South Wales* (Research Report 10, 2000).

recommends that the current law on the right to silence in this context should be retained.

The Commission specifically recommends that legislation based on the law in Northern Ireland, England and Wales should not be introduced in New South Wales.

1.14 Chapter 3 deals with pre-trial disclosure in the context of criminal trials. This Chapter describes the pre-trial disclosure requirements which apply to the prosecution and, to a lesser extent, the defendant in New South Wales. It examines the different pre-trial disclosure requirements which operate in other jurisdictions, including the comprehensive reciprocal disclosure regimes which have operated in England, Wales and Northern Ireland since 1997 and Victoria since September 1999.

The Commission makes a number of recommendations for increased levels of prosecution and defence pre-trial disclosure in criminal trials.

1.15 Chapter 4 examines the defendant's right to refuse to answer particular questions or refuse completely to testify at trial.

The Chapter describes the law in New South Wales, and considers the law in other jurisdictions, including changes introduced in Northern Ireland in 1988 and adopted six years later in England and Wales. The Commission recommends that the prohibition on prosecution comment on the defendant's silence at his or her trial should be removed. The Commission also specifically recommends that legislation based on the law in Northern Ireland, England and Wales should not be introduced in New South Wales.

2. The right to silence when questioned by police

- History of the right to silence when questioned by police
- The law in New South Wales
- Other jurisdictions
- Modifying the right to silence when questioned by police

2.1 In criminal trials in New South Wales, the judge or jury is prohibited from drawing inferences which are unfavourable to the defendant, including inferences about the defendant's guilt or credibility as a witness, where he or she does not answer police questions. Section 89 of the *Evidence Act 1995* (NSW) provides that an inference unfavourable to a party must not be drawn from evidence that the party failed or refused to answer questions put in the course of official questioning.

2.2 The right to silence when questioned by police is universally recognised in common law jurisdictions. However, in some countries, the tribunal of fact is permitted to draw adverse inferences where the defendant remains silent in the face of police questioning, and the judge and the prosecution can comment to the jury on the fact that the defendant remained silent.

This chapter examines the right to silence when questioned by police in New South Wales and the position in other jurisdictions. It considers the arguments for and against modifying the prohibition on adverse inferences and judicial and prosecution comment where a defendant does not answer police questions.

HISTORY OF THE RIGHT TO SILENCE WHEN QUESTIONED BY POLICE

2.3 Under investigative procedures introduced in England in the sixteenth century, constables were required to bring suspects before an examining justice for interrogation as soon as possible after arrest. The interrogation, including the suspect's refusal to answer questions, was recorded and presented as evidence at trial.¹ However, examining justices were not an organised or effectively supervised body and were prone to mistreat suspects to obtain confessions. The right to silence when questioned by police evolved

1. *1 & 2 Phillip and Mary* c 13; *2 & 3 Phillip and Mary* c 10; J Wigmore, *Evidence in Trials at Common Law* (McNaughton Rev, Little Brown, Boston, 1961) at para 2250; D Harvey, "The Right to Silence and the Presumption of Innocence" [1995] *New Zealand Law Journal* 181 at 182; S Odgers, "Police Interrogation and the Right to Silence" (1985) *59 Australian Law Journal* 78 at 83.

through the common law as a result of judicial distrust of the investigative techniques employed by examining justices.²

2.4 The first English Police Force was established in 1829 and the various provincial forces were established over the next two decades.³ In 1848 the investigative and judicial functions of the state were formally separated by legislation.⁴ The police forces were given the exclusive role of questioning suspects. In 1912, in order to clarify uncertainty arising from the varying judicial attitudes to the reliability and admissibility of police interrogation evidence,⁵ the judges of the Kings Bench issued the Judges' Rules.⁶ The Judges' Rules provided that, when a police officer decided to charge a suspect with an offence and intended to interview the person, the police officer should first caution the person that he or she was entitled to remain silent.

2.5 The caution was subsequently revised and in 1978 the Judges' Rules were formally adopted by the Home Office.⁷

The tribunal of fact was not permitted to draw adverse inferences where the defendant did not answer police questions. At trial, comment was restricted to a judicial direction that the defendant was entitled to remain silent and that the jury must not hold the defendant's silence against him or her.⁸ In *R v Leckey*, the English Court of Criminal Appeal observed:⁹

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2. M Weinberg, "The Right to Silence – Sparing the Judge From Talking Gibberish", paper presented at session 24 of the *30th Australian Legal Convention* (Melbourne, 18-21 September 1997) at 4; CR Williams, "Silence in Australia: Probative Force and Rights in the Law of Evidence" (1994) 110 *Law Quarterly Review* 629 at 630-631.
 3. Working Group on the Right to Silence, *Report of the Working Group on the Right to Silence* (London, 1989) at 8.
 4. *Summary Jurisdiction Act 1848* (11 & 12 Vict).
 5. J Wood and A Crawford, *The Right of Silence* (England, Civil Liberties Trust, London, 1989) at 7; Odgers (1985) at 83; F Neasey, "The Rights of the Accused and the Interests of the Community", paper presented at the *15th Australian Legal Convention* (Brisbane, 16-22 July 1969) at 31.
 6. *R v Voisin* [1918] 1 KB 531 at 539, footnote 3.
 7. Home Office, *Circular 89/1978* (London, 1978).
 8. Royal Commission on Criminal Justice, *Report of the Royal Commission on Criminal Justice* (London, 1993) at 50.
 9. *R v Leckey* (1943) CAR 128.

an innocent person might well, either from excessive caution or for some other reason, decline to say anything when charged and cautioned, and if it were possible to hold that out to a jury as a ground on which they might find a man guilty, it is obvious that innocent persons might be in great peril.

2.6 In *Petty v The Queen*¹⁰ Justice Gaudron pointed out that the right necessarily follows from the fundamental principle that the prosecution bears the burden of proof of the alleged crime beyond reasonable doubt and that no defendant is required (with a few exceptions) to prove his or her innocence.¹¹

2.7 The law relating to the right to silence in England and Wales was substantially modified in 1994.¹²

THE LAW IN NEW SOUTH WALES

2.8 It is not an offence for a person to refuse to answer questions, including incriminating questions, asked by persons other than investigating authorities.¹³ However, at trial, adverse inferences can be drawn from the defendant's silence where it would be reasonable to expect the defendant to have responded when questioned by other than investigating authorities. Both the judge and the prosecution can comment to the jury on the defendant's silence.¹⁴ The law relating to the right to silence when questioned by police in

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

11. *Petty v The Queen* (1991) 173 CLR 95 at 128-129.

12. *Criminal Justice and Public Order Act 1994* (Eng) s 34-38, 168; see para 2.30-2.42; Appendix C.

13. *R v Director of Serious Fraud Office; ex parte Smith* [1993] AC 1 at 30 per Lord Mustill, with whom the other members of the House of Lords agreed; I Alger, "From Star Chamber to Petty and Maiden: Police Attitudes to the Right to Silence", paper presented at session 24 of the *30th Australian Legal Conference* (Melbourne, 18-21 September 1997) at 1.

14. S Greer, "The Right to Silence: A Review of the Current Debate" (1990) 53 *Modern Law Review* 709 at 712. Circumstances which might affect the reasonableness of an adverse inference include the relationship between the defendant and the accuser, the seriousness of the accusation, the context in which the questions were asked and how specific the questions were. See for example *Parkes v The Queen* [1976] 1 WLR 1251; *R v Salahattin* [1983] 1 VR 521; *R v Alexander* [1994] 2 VR 249, 258-263.

New South Wales is governed by a combination of common law and legislation.

Evidence Act 1995 (NSW)

2.9 Section 89 of the *Evidence Act 1995* (NSW) provides:

- (1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:
 - (a) to answer one or more questions, or
 - (b) to respond to a representation, put or made to the party or other person in the course of official questioning.¹⁵
- (2) Evidence of that kind is not admissible if it can only be used to draw such an inference.
- (3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.
- (4) In this section:

“inference” includes:

 - (a) an inference of consciousness of guilt, or
 - (b) an inference relevant to a party’s credibility.

2.10 The operation of s 89(2) is illustrated by the offences of failing to disclose identity on request under the *Police Powers (Vehicles) Act 1998* (NSW). These offences are committed when a driver or owner of a vehicle fails to disclose his or her identity when requested to do so by a police officer.¹⁶ The nature of this offence makes failure to respond to requests for specific information a fact in issue in the proceedings.

15. “Official questioning” is defined as “questioning by an investigating official in connection with the investigation or the commission or possible commission of an offence”: *Evidence Act 1995* (NSW) s 3, Dictionary.

16. *Police Powers (Vehicles) Act 1998* (NSW) s 6, 7 and 8. The maximum penalty for these offences is a fine of \$5,500.00 or 12 months imprisonment or both.

2.11 Part 3.11 of the *Evidence Act 1995* (NSW), which deals with judicial discretions to exclude evidence, is also relevant in this context. Section 20 of the *Evidence Act 1995* (NSW), which deals with comment on the defendant's failure to give evidence, is dealt with in Chapter 4 of this Report.

Petty v The Queen

2.12 Section 89 of the *Evidence Act 1995* (NSW) substantially reflects the common law relating to the right to silence during police questioning.¹⁷ In *Petty v The Queen*,¹⁸ the High Court held that a person who believes on reasonable grounds that he or she is suspected of having committed a criminal offence has the right to remain silent when questioned by a person in authority about the offence. At trial, no adverse inferences can be drawn where the defendant has remained silent at the police station. Neither the judge nor the prosecution can comment to the jury on the defendant's silence, except to point out that no adverse inference can be drawn from it.

Exceptions

2.13 Evidence of police interrogation which discloses that the defendant did not answer police questions is, however, admissible at trial in certain circumstances. The New South Wales Court of Criminal Appeal has held that it is reasonably foreseeable that the defence may criticise the fairness of the conduct of the investigating police officers. The fact that the defendant was asked questions by the police is admissible to meet this anticipated criticism. As a corollary, the answers given are also admissible. Immediately after evidence of this type is given, the trial judge is required to direct the jury that the defendant is entitled to remain silent and that they must not conclude that the defendant is guilty because he or she remained silent.¹⁹ Of course, if the

17. See S Odgers, *Uniform Evidence Law* (3rd edition, Law Book Company, Sydney, 1998) at para 89.3 and 89.4.

18. *Petty v The Queen* (1991) 173 CLR 95. See also *Glennon v The Queen* (1994) 179 CLR 1; A Mason, "Fair Trial" (1995) 19 *Criminal Law Journal* 7 at 10.

19. *R v Astill* (NSW Court of Criminal Appeal, No 60754/91, 17 July 1992, unreported); *R v Reeves* (1992) 29 NSWLR 109 at 115 per Hunt CJ at CL, with whom the other members of the Court agreed; *R v Towers* (NSW Court

anticipated criticism is repudiated in a timely way, the evidence would be inadmissible under the general rule requiring relevance.

2.14 In addition, where the defendant has participated in the police interview and answered some questions but not others, in certain circumstances the whole record of interview (including the questions which the defendant refused to answer and the refusals themselves) is admissible at trial.²⁰ Selective answering of questions cannot, by itself, give rise to an inference of guilt. Section 89 of the *Evidence Act 1995* (NSW) extends to situations where the defendant has selectively answered police questions.²¹

How often suspects remain silent

2.15 Australian research indicates that most suspects do not remain silent when questioned by the police. A majority of the judges, magistrates, legal practitioners and police prosecutors surveyed by the Commission for this

of Criminal Appeal, No 60359/91, 7 June 1993, unreported) at 10 per Handley JA, with whom the other members of the Court agreed; *Yisrael v District Court* (NSW Court of Appeal, No 4011/95, 18 July 1996, unreported) at 7 per Meagher JA; *R v Mathews* (NSW Court of Criminal Appeal, No 60726/95, 28 May 1996, unreported) at 3 per Badgery-Parker J, with whom the other members of the Court agreed; *R v Keevers* (NSW Court of Criminal Appeal, No 60732/93, 26 July 1994, unreported) at 7-8 per Hunt CJ at CL, with whom the other members of the Court agreed; *Familiac v The Queen* (1994) 75

A Crim R 229 at 234 per Badgery-Parker J, with whom the other members of the Court agreed. This line of decisions of the NSW Court of Criminal Appeal was followed in Queensland in *R v Coyne* [1996] 1 Qd R 512 at 518-520.

20. *Woon v The Queen* (1964) 109 CLR 529 at 541-542 per Windeyer J; *Petty v The Queen* (1991) 173 CLR 95 at 126 per Gaudron J; *Weissensteiner v The Queen* (1993) 178 CLR 217 at 231 per Brennan and Toohey JJ. For a discussion of recent NSW decisions on this point see J White, "Silence is Golden? The Significance of Selective Answers to Police Questioning in New South Wales" (1998) 72 *Australian Law Journal* 539 at 540. See also B Hocking and L Manville, *Submission* at 12.
21. *Evidence Act 1995* (NSW) s 89(1)(a). The NSW Police Service submitted that should the use of hand held tape recorders become standard investigative procedure, it will be difficult to edit questions asked and not answered from recordings because this will leave juries with the impression that the recording has been tampered with: NSW Police Service, *Submission* at 2.

reference reported that, while suspects sometimes remained silent when questioned by police, this did not occur in the majority of cases.²² This was supported in submissions received by the Commission²³ and at a seminar on the right to silence conducted by the Commission as part of Law Week 1998.²⁴

2.16 Empirical research conducted by the New South Wales Bureau of Crime Statistics and Research in 1980 concluded that 4% of suspects subsequently charged and tried in the Sydney District Court remained silent in police interviews.²⁵ Research undertaken by the Victorian Office of the Director of Public Prosecutions in 1988 and 1989 found that suspects did not answer police questions in 7% to 9% of prosecutions.²⁶

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22. New South Wales Law Reform Commission, *The Right to Silence and Pre-trial Disclosure in New South Wales* (Research Report 10, 2000) at Tables 2.1-2.3. See also para 2.12-2.18.
 23. A Clarke, *Submission* at 1; Confidential, *Submission* at 1; B Kennedy, *Submission* at 2; Law Society of NSW, *Submission 1* at 8; Youth Justice Coalition, *Submission* at 3. See also M Aronson, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure* (AIJA, Melbourne, 1992) at 14-16.
 24. T Buddin, T Jacobsen, comments at the seminar *The Right to Silence* (New South Wales Law Reform Commission, Law Week 1998, Sydney, 12 May 1998). See also New South Wales Law Reform Commission, *Criminal Procedure – Police Powers of Detention and Investigation After Arrest* (Report 66, 1990) at para 5.10; Victoria, Scrutiny of Acts and Regulations Committee, *Inquiry into the Right to Silence – Final Report* (1999) at para 2.3.1; Law Reform Commission of Western Australia, *Review of the Civil and Criminal Justice System* (Final Report, 1999) at para 24.4.
 25. 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 Workers Group (NSW) and Legal Service Bulletin, Sydney, 1982) at 108-109, 131-136 and 140-141.
 26. J Coldrey, “The Right to Silence Reassessed” (1990) 74 *Victorian Bar News* 25 at 26-27; J Coldrey, “The Right to Silence: Should it be curtailed or abolished?” (1991) 20 *Anglo-American Law Review* 51 at 54-55.

Covert police investigations

2.17 Where a defendant declines to answer questions during official police interviews, evidence of voluntary admissions made to undercover police officers can be excluded at trial in certain circumstances. The High Court has held that where the police have used undercover officers to conduct what amounts to an interrogation, the trial judge may refuse to admit this evidence on the basis that the use of undercover police officers violated the suspect's right to choose whether or not to speak to the police.²⁷ This principle acknowledges the public interest in ensuring that the police do not adopt tactics designed to avoid the limitations on their inquisitorial functions.²⁸ However, where a defendant declines to answer police questions, but makes admissions to a person fitted with a listening device who is not a police officer, this evidence is less likely to be excluded.²⁹

Other police powers

2.18 The Commission has undertaken its examination of the right to silence in the context of police investigative powers in New South Wales. At common law, a police officer may lawfully search the body of a person under arrest if the search is reasonably believed to be necessary for the purpose of discovering a concealed weapon, or to secure or preserve evidence with respect to the offence for which the person is in custody.³⁰

2.19 These common law powers are enhanced by legislation. The *Crimes Act 1900* (NSW) provides that police officers may search any

27. *R v Swaffield* (1998) 192 CLR 159.

28. *R v Swaffield* (1998) 192 CLR 159 at 185. See also S Bronitt, "Contemporary Comment – Electronic Surveillance and Informers: Infringing the Rights to Silence and Privacy (1996) 20 *Criminal Law Journal* 144; A Palmer, "Police Deception, the Right to Silence and the Discretionary Exclusion of Confessions" (1998) 22 *Criminal Law Journal* 325; Law Society of the ACT, *Submission* at para 3.9; B Hocking and L Manville, *Submission* at para 4.3. For a discussion of the English law see B Hocking, "Communication, Conviction, Conspiracy, Community (Part 1)" (1998) 62 *Journal of Criminal Law* 483.

29. *R v Swaffield* (1998) 192 CLR 159; *R v Suckling* (NSW, Court of Criminal Appeal, No 60495-96, 12 March 1999, unreported).

30. *Leigh v Cole* (1853) 6 Cox CC 329; *Dillon v O'Brien* (1887) 16 Cox CC 245.

person in lawful custody and take anything found during the search.³¹ Police officers may take photographs, fingerprints and palm prints where such particulars are necessary for the identification of a suspect in lawful custody.³² Suspects in custody can also be required to submit to a medical examination where a police officer reasonably believes that an examination will provide evidence. The examination can include taking samples of the person's blood, saliva and hair.³³ The consent of the person in custody is not required for the exercise of these powers.³⁴

2.20 Under the *Summary Offences Act 1988* (NSW), police officers are permitted to search persons in public places and schools whom they reasonably suspect of having custody of a dangerous implement.³⁵ Since 1 July 1998, it has been an offence for a person to fail or refuse to provide their name and address to a police officer where the police officer believes on reasonable grounds that the person may be able to assist in the investigation of an alleged indictable offence, because the person was present where and when the offence allegedly occurred.³⁶

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31. *Crimes Act 1900* (NSW) s 353A(1). "Lawful custody" is defined in s 353A(3C). Where the person in custody is female and no female police officer is available to conduct the search, provision is made for the search to be conducted by a female acting on the request of a police officer: s 353A(1)(b) and s 353A(1A).
 32. *Crimes Act 1900* (NSW) s 353A(3). There are special conditions in relation to suspects who are children. See s 353AA. See also *R v Carr* [1972] 1 NSWLR 608 at 612.
 33. *Crimes Act 1900* (NSW) s 353A(2), 353A(3A).
 34. *Crimes Act 1900* (NSW) s 353A(3D). Note that provision is also made for the permitted use and destruction of samples: See s 353A(3B).
 35. *Summary Offences Act 1988* (NSW) s 28A, inserted by the *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW) s 3 and Sch 1. The section provides for both electronic and hand searches of the person, and their personal effects. The fact that the person is present in a location with a high incidence of violent crime is a factor in determining whether there are reasonable grounds for suspecting that the person has custody of a dangerous implement. Police officers must identify themselves, explain the reason for the search and warn the person that failure to submit to it is an offence. Failure to submit after two warnings or refusal or failure to produce anything detected during the search is an offence.
 36. *Crimes Act 1900* (NSW) s 563, inserted by the *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW) s 4 and Sch 2. Police

Royal Commission into the New South Wales Police Service

2.21 The Royal Commission into the New South Wales Police Service, chaired by Justice Wood, made the following recommendation in its final report:³⁷

The grant of legislative authority where a police officer has reasonable cause to suspect that a person has used computer encrypted information in connection with the commission of a criminal offence to require the user to supply the decryption key. Failure to supply the key, in absence of a lawful excuse, should be made an offence.

2.22 This recommendation was made to address the difficulties which sophisticated encryption software causes police investigating offences involving computers, in the context of child pornography and other child sex offences.

2.23 The Commission endorses this recommendation. As well as child sex, encryption software also hinders the investigation of a wide range of other offences, including drug offences, money laundering offences, insider trading offences and other forms of market manipulation. Any concern that such an offence would infringe the right to silence would adequately be met by requiring, as a prerequisite, a procedure similar to obtaining a search warrant.

Statutory abrogation

2.24 The right to silence when questioned by police has been modified in different ways by numerous statutes. For example, as discussed in paragraph 2.10 above, it is an offence for drivers and owners of vehicles to refuse to disclose their identity when requested to do so by a police officer. The amendments to the *Crimes Act 1900* (NSW) discussed in paragraph 2.20 can also be seen as an example of statutory abrogation of the right to silence. The

officers must identify themselves, explain the reason for wanting the information and warn the person that failure to provide it is an offence. See also s 27 of the *Children (Protection and Parental Responsibility) Act 1997* (NSW).

37. Royal Commission into the NSW Police Service, Hon Justice JRT Wood, *Final Report* (1997) Recommendation 97.

right to silence has also been abrogated by legislation regulating other types of investigations including, for example, bankruptcy examinations,³⁸ Royal Commissions³⁹ and investigations conducted by the Australian Securities and Investment Commission⁴⁰ and the National Crime Authority.⁴¹

Concealing serious offences

2.25 Section 316(1) of the *Crimes Act 1900* (NSW) provides that if a person has committed a serious offence and a person knows or believes that he or she has information which might assist with the apprehension, prosecution or conviction of the offender, it is a criminal offence to conceal that information from the police without a reasonable excuse. The relationship between this offence and the right to silence is not clear. There is authority that the right to silence when questioned by police prevailed over the common law offence of misprision of felony⁴² which s 316 replaced.⁴³ In December 1999, the Commission published a review of s 316 which recommended that s 316(1) be repealed.⁴⁴

OTHER JURISDICTIONS

2.26 The High Court's decision in *Petty v The Queen*, referred to in paragraph 2.12 above, applies in all Australian jurisdictions except the

38. *Bankruptcy Act 1966* (Cth) s 81(11), 81(11AA) and s 81(17).

39. *Royal Commissions Act 1902* (Cth) s 6 and 6A. The *Royal Commissions Act* does not deal with the admissibility of evidence obtained at a hearing before a Royal Commission.

40. *Australian Securities and Investment Commission Act 1989* (Cth) s 63(1), 68(3).

41. *National Crime Authority Act 1984* (Cth) s 30. For a discussion of statutory abrogation, see Aronson at 14-16.

42. *King v The Queen* [1965] 1 WLR 706; *Petty v The Queen* (1991) 173 CLR 95 at 99.

43. *Crimes Act 1900* (NSW) s 341.

44. New South Wales Law Reform Commission, *Review of Section 316 of the Crimes Act 1900 (NSW)* (Report 93, 1999) Recommendation 1, para 3.58-3.64. A minority of Commissioners also proposed that a new, more limited concealment offence be enacted.

Australian Capital Territory and in federal courts, where a statutory provision identical to s 89 of the *Evidence Act 1995* (NSW) operates.⁴⁵ In some jurisdictions, such as Canada and the United States, the right to silence when questioned by police is a constitutional right. Other common law jurisdictions, including England, Wales, Northern Ireland and Singapore, while recognising the suspect's right to remain silent, have modified the prohibitions on adverse inferences and comment.

Constitutional protection

2.27 The Canadian Charter of Rights and Freedoms states that every person has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.⁴⁶ The Supreme Court of Canada has held that this protects the right to silence when questioned by police, and includes a prohibition on adverse inferences and comment at trial.⁴⁷

2.28 In the United States, the Fifth Amendment to the Bill of Rights, added to the Federal Constitution in 1791, provides that “(n)o person shall [... nor shall] be compelled in any criminal case to be a witness against himself.” There are comparable guarantees in each of the state constitutions.⁴⁸ The United States Supreme Court has held that the Fifth Amendment guarantees the right to silence during custodial investigation as well as at trial. Silence in response to police questions cannot be used at trial to draw adverse inferences against the defendant, and adverse comment is prohibited.⁴⁹

2.29 The right to silence when questioned by police has been upheld as an incident of the right to freedom of expression provided for by the Irish Constitution.⁵⁰ Despite this, the Irish courts have upheld legislation

45. *Evidence Act 1995* (Cth) s 4 and 89.

46. *Charter of Rights and Freedoms* (Can) s 7.

47. *R v Hebert* (1990) 57 CCC (3d) 1; *R v Chambers* [1990] 2 SCR 1293.

48. And see *Constitution of India* art 20(3); *Constitution of Papua New Guinea* art 37(1); *Bill of Rights* (NZ) s 23(4).

49. *Bram v United States* 168 US 532 (1897); *Wan v United States* 266 US 1 (1924); *Miranda v Arizona* 384 US 436 (1966); *Doyle v Ohio* 426 US 610 (1976).

50. *Irish Constitution* art 40; *Heaney v Ireland* [1996] 1 IR 580 (Supreme Court); *Rock v Ireland* [1997] 3 IR 484 (Supreme Court); *Irish Times v Ireland*

permitting the tribunal of fact to draw adverse inferences at trial from the defendant's failure to answer police questions.⁵¹ However, there is little case law on these provisions and it appears that they are not widely used.⁵²

Modification to permit adverse inferences

2.30 Several common law jurisdictions have modified the right to silence, by enacting legislation which permits the tribunal of fact to draw adverse inferences at trial from the defendant's failure to provide certain information to police. These provisions empower the trial judge and the prosecution to comment to the jury on the inferences which may be drawn. In Singapore, the relevant provisions have been in force since January 1977.⁵³ The Northern Ireland provisions were enacted in November 1988.⁵⁴ Their enactment was largely justified as an anti-terrorist measure in the context of IRA training in counter-interrogation techniques and the use of "ambush" defences at trial by those accused of terrorist offences.⁵⁵ In 1994, the United Kingdom parliament also passed legislation which modified the law in England and Wales.⁵⁶ In addition, since 1987 the right to silence when questioned has been modified

(Ireland, High Court, Denham J, 2 April 1998, unreported). Compare *Heaney v Ireland* [1994] 3 IR 593 and *Rock v Ireland* (Ireland, High Court, 10 November 1995, unreported) where the High Court expressed the view that constitutional protection for the right to silence in this context was derived from the right to a fair trial provided for by art 38.1 of the *Irish Constitution*.

51. See for example the *Criminal Justice Act 1984* (Ire) s 18 and 19, upheld in *Rock v Ireland* (Ireland, Supreme Court, 19 November 1997, unreported); *Offences Against the State Act 1939* (Ire) s 52, upheld in *Heaney v Ireland* [1996] 1 IR 580 (Supreme Court). The *Criminal Justice (Drug Trafficking) Act 1996* (Ire) s 7 modifies the right to silence in a similar way. However, the constitutionality of this provision has not been challenged in the courts.
52. M Ring, "The Right to Silence: *Rock v Ireland* and Others" [1998] *Bar Review* 225.
53. *Criminal Procedure Code* (Spore) s 122(6) and 123(1), inserted by the *Criminal Procedure (Amendment) Act 1976* (Spore).
54. *Criminal Evidence (Northern Ireland) Order 1988* (Eng) art 3, 5 and 6.
55. J Michael and B Emmerson, "The Right to Silence" (1995) 1 *European Human Rights Law Review* 4 at 7.
56. *Criminal Justice and Public Order Act 1994* (Eng) s 34, 36 and 37, as amended by the *Youth Justice and Criminal Evidence Act 1999* (Eng) s 58.

in relation to the investigation and prosecution of serious and complex fraud offences in England and Wales.⁵⁷

When silence can lead to adverse inferences

2.31 Sections 34, 36 and 37 of the *Criminal Justice and Public Order Act 1994* (Eng) significantly modify the right to silence when questioned by police in England and Wales. These provisions are set out in full at Appendix “C”.

2.32 Section 34 provides that the Magistrate at committal and the court or jury at trial may draw inferences from the defendant’s failure, when questioned under caution, charged, or officially informed that he or she might be prosecuted, to mention a fact later relied on in defence which the defendant could reasonably have been expected to mention when questioned. Section 34 does not require an arrest to have been made, but the suspect must have been cautioned for this provision to apply.

2.33 Adverse inferences are also permitted under sections 36 and 37 when the defendant, after being arrested, fails or refuses to account for objects, substances or marks which the police reasonably believe are attributable to participation in an offence, or fails or refuses to account for his or her presence at a place and time which the police reasonably believe is attributable to participation in an offence.

2.34 The English Court of Appeal has held that whether or not it is proper to draw an adverse inference is a matter for the jury. In making this decision, the jury must consider the circumstances of the case, such as the time of day when the defendant was questioned by police, and the individual characteristics of the defendant, such as his or her age, experience, mental capacity, sobriety, tiredness, knowledge and personality.⁵⁸

2.35 The provisions refer to the defendant’s failure to mention facts which he or she *later relies on*. Both the Northern Ireland and English courts have held that this includes the situation where a defendant initially fails to mention the relevant fact, but discloses it later during police questioning.⁵⁹ It has also been held that to put a particular fact to a prosecution witness in

57. *Criminal Justice Act 1987* (Eng).

58. *R v Argent* [1997] 2 Cr App R 27.

59. *R v McLernon* [1992] NI 168; *Condrón v The Queen* [1997] 1 WLR 827.

cross-examination constitutes reliance on that fact, even where no defence witness gave evidence about the fact.⁶⁰

2.36 Sections 34(2A), 36(4A) and 37(3A), which provide that adverse inferences can only be drawn where the defendant was given an opportunity to consult a solicitor prior to being questioned, were inserted in 1999.

2.37 A number of cases interpreting the effect of the provisions have held that the fact that the defendant was advised by a solicitor not to answer police questions does not necessarily prevent the jury from drawing adverse inferences, although it is a factor for the jury to consider in deciding whether the defendant's silence was reasonable in the circumstances.⁶¹

60. *R v McLernon* [1992] NI 168. See also *R v Nickolson* [1998] Crim LR 61; *R v Bowers* (1998) 163 JP 33; *R v Moshaid* [1998] Crim LR 420. For a discussion of the scope of these provisions, see A Jennings, "More Resounding Silence" (1999) 149 *New Law Journal* 1180 and 1232.

61. *R v Kinsella* (Northern Ireland, Belfast Crown Court, December 1993, unreported); *R v Connolly* (Northern Ireland, Belfast Crown Court, 5 June 1992, unreported); *R v Campbell* (Northern Ireland, Court of Appeal, 29 March 1993, unreported); *R v Martin* (Northern Ireland, Court of Appeal, 7 July 1992, unreported); *R v Argent* [1997] 2 Cr App R 27; *R v Roble* [1997] Crim LR 449; *Condrón v The Queen* [1997] 1 WLR 827; *R v Kavanagh* (England, Court of Appeal, 7 February 1997, unreported); *R v Davis* [1998] Crim LR 659; *R v Daniel* [1998] 2 Cr App R 373. See also J Black, "Inferences From Silence: Redressing the Balance? (2)" [1997] *Solicitors Journal* 772; A Jennings, "More Resounding Silence" (1999) 149 *New Law Journal* 1180 at 1181; "Silence, Inferences and Legal Privilege" (Comment) (1997) 61 *Journal of Criminal Law* 193. This position has been criticised by commentators. See E Cape, "Sideline Defence Lawyers: Police Station Advice After Condrón" (1997) 1 *International Journal of Evidence and Proof* 386; I Dennis, "The Criminal Justice and Public Order Act 1994 – The Evidence Provisions" [1995] *Criminal Law Review* 4 at 14; J Jackson, "Recent Developments in Criminal Evidence" (1989) 40 *Northern Ireland Law Quarterly* 105; J Jackson, "Interpreting the Silence Provisions: The Northern Ireland Cases" [1995] *Criminal Law Review* 587 at 594; P Plowden, "Silence at the Police Station" (1998) *New Law Journal* 1598 at 1599. See also comments by Dawson J (dissenting) in *Petty v The Queen* (1991) 173 CLR 95 at 118-119; R Munday, "Inferences from Silence and European Human Rights Law [1996] *Criminal Law Review* 370 at 378-380; A Jennings, "Recent Developments in the Law Relating to the Right to

The types of adverse inferences available

2.38 In each case, the court or jury is entitled to draw “such inferences as appear proper”.⁶² In Northern Ireland, England and Wales, the relevant legislation provides that a defendant must not be convicted solely on the basis of an inference drawn from the defendant’s silence.⁶³ No other guidance as to the inferences which are permitted is provided by the legislation.

2.39 The courts in Northern Ireland were initially cautious about drawing strong adverse inferences.⁶⁴ However, in 1990, the Belfast Crown Court drew an inference from the defendant’s silence that no innocent explanation was available to him. Lord Justice Kelly applied a “common sense” test, stating that “[i]t would be improper and unwise for any court to set out bounds on whether to draw inferences or not in an individual case and the nature, extent and degree of adversity if it decides to draw inferences”.⁶⁵ It should be noted that courts in Northern Ireland sit without a jury.

2.40 Subsequently, a majority of the European Court of Human Rights upheld this approach in *Murray v United Kingdom*.⁶⁶

The Court stated that the right to silence is an inherent element of the right to a fair trial guaranteed by the European Convention, and it would be inconsistent with this right to convict a defendant solely or mainly on the basis of the defendant’s silence. However, where a situation clearly calls for

Silence” (1999)

5 *Archbold News* 5 at 6.

62. *Criminal Procedure Code* (Spore) s 123(1); *Criminal Evidence (Northern Ireland) Order 1988* (Eng) art 3, 5, 6; *Criminal Justice and Public Order Act 1994* (Eng) s 34, 36, 37.

63. *Criminal Evidence (Northern Ireland) Order 1988* (Eng) art 2(4); *Criminal Justice and Public Order Act 1994* (Eng) s 38(4).

64. J Jackson, “Curtailing the Right of Silence: Lessons From Northern Ireland” [1991] *Criminal Law Review* 404 at 410; Justice, *Right of Silence Debate: The Northern Ireland Experience* (1994) at 5, 23-25; Michael and Emmerson at 8; G Ruddell, “A Summary of Recent Judicial Decisions in Northern Ireland” in S Greer and R Morgan (eds), *The Right to Silence Debate* (Bristol and Bath Centre for Criminal Justice, Bristol, 1990) at 53-59.

65. *R v McLernon* (Northern Ireland, Belfast Crown Court, 20 December 1990, Kelly LJ) discussed in Justice at 25; and Jackson (1995) at 596; Michael and Emmerson at 8. See also *R v Martin* (Northern Ireland, Belfast Crown Court, 8 May 1991, Hutton LCJ) discussed in Justice at 26; and Jackson (1995) at 596-598. See also the decision of the Privy Council in *Haw Tua Tua v Public Prosecutor* [1982] AC 136 in relation to the Singapore provisions.

66. *Murray v United Kingdom* (1996) 22 EHRR 29 at 62 and 63.

explanation, the Court can take into account the defendant's silence in assessing the prosecution evidence.⁶⁷ Where a prima facie case exists against the defendant independently of adverse inferences from the defendant's silence, this direct evidence combined with legitimate inferences could lead a jury to be satisfied beyond reasonable doubt that the defendant is guilty.⁶⁸ Recent decisions by the English Court of Appeal have also held that the English provision is not confined to cases of alleged recent fabrication, but also covers cases where the defendant remained silent due to reluctance to be subject to further inquiry.⁶⁹

2.41 The law concerning the inferences able to be drawn from silence at trial was also modified by s 35 of the *Criminal Justice and Public Order Act 1994* (Eng). This is discussed at paragraphs 2.105-2.109 below and in detail in Chapter 4 of this Report.

67. *Murray v United Kingdom* (1996) 22 EHRR 29 at 60.

68. *Murray v United Kingdom* (1996) 22 EHRR 29 at 62. The Court held that the right to access to legal advice at the initial stages of police interrogation was of "paramount importance". The defendant had been denied access to legal advice during the first 48 hours of detention (in accordance with the *Northern Ireland (Emergency Provisions) Act 1987* (Eng) s 15). This violated his right to a fair trial: *Murray v United Kingdom* (1996) 22 EHRR 29 at 67. For a discussion of the likely approach of the ECHR to the English provisions see Munday. Note that there is no requirement in s 34 that a prima facie case exist before the section applies (this requirement is expressly stated in s 35, which allows adverse inferences to be drawn from the defendant's silence at trial). Silence in answer to police questioning may be taken into account on the question whether a prima facie case exists: s 34(2), 36(2), 37(2).

See A Jennings, "Recent Developments in the Law Relating to the Right to Silence" (1999) 5 *Archbold News* 5 at 8.

69. *R v Randall* [1998] 6 *Archbold News* 1; *R v Daniel* [1998] 2 Cr App R 373; *R v Beckles* [1999] Crim LR 148; *R v McGuinness* [1999] Crim LR 318; *R v Taylor* [1999] Crim LR 75. Compare *Condron v The Queen*, *R v Roble* and *R v Nickolson* and *R v Samuel* (England, Court of Appeal, No 97/1143/Z2, 12 May 1997, unreported). For a discussion of the types of adverse inferences available, see A Jennings, "More Resounding Silence" (1999) 149 *New Law Journal* 1180 at 1232.

2.42 The English Court of Appeal has now approved Model directions to juries in relation to the inferences which can be drawn from the defendant's silence.⁷⁰ This is discussed in detail in paragraphs 2.108 to 2.114 below.

How often suspects remain silent

2.43 Research conducted in Northern Ireland and England has produced varying statistics on the number of suspects who remain silent during police interrogation. The lowest figure reached in one research study was 3%; another study concluded that the right was exercised by over 50% of suspects.⁷¹ Studies based on police reporting have concluded considerably

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70. *Condon v The Queen* [1997] 1 WLR 827, adopting the specimen direction approved in relation to the *Criminal Justice and Public Order Act 1994* (Eng) s 35 in *R v Cowan* [1995] 4 All ER 939 at 944. See also *R v McGarry* [1998] 3 All ER 805 (Court of Appeal); *R v Reader* (England, No 97/6342/W2, 7 April 1998, unreported); *R v Khan* [1999] 2 *Archbold News* 2 (Court of Appeal); *R v Abdullah* [1999] 5 *Archbold News* 3. Compare *R v Bowden* [1999] 1 WLR 823 where Lord Bingham CJ stated at 827 that because these provisions of the *Criminal Justice and Public Order Act 1994* (Eng) restricted common law rights, they should not be construed more widely than the statutory language requires.
71. Odgers (1985) at 86-87; D Dixon, "Politics, Research and Symbolism in Criminal Justice: The Right of Silence and the Police and Criminal Evidence Act" (1991-1992) 20-21 *Anglo-American Law Review* 27 at 37-41; D Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon Press, Oxford, 1997) at 229-235 and 263-264; Dennis at 11-14; M Zander, "Abolition of the Right to Silence, 1972-1994" in D Morgan and G Stephenson (eds), *The Right to Silence in Criminal Investigations* (Blackstone Press, London, 1994) at 147-148; R Leng, "The Right to Silence Debate" in Morgan and Stephenson at 19 and 22-28; D Wolchover and A Heaton-Armstrong, "Labor's Victory and the Right to Silence — 2" (1997) 147 *New Law Journal* 1434 at 1434-1435; J Williams, "Inferences From Silence" (1997) 141 *Solicitors* 566; G Black, "The Right Defence" [1989] *Legal Action* 9 at 9; Royal Commission on Criminal Procedure at para 4.43-4.46; Greer and Morgan at 38; Royal Commission on Criminal Justice at 53-54; Justice at 7-12; D Brown, *PACE Ten Years On: A Review of the Research* (Home Office, London, 1997) at 167-186; Australian Law Reform Commission, *Criminal Investigation* (Report 2 (Interim), 1975) at para 149; NSWLRC Report 66 at para 5.13. See also T Smith, *Submission to the Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 7. Note that the research findings of Justice have been criticised: see Dennis at 13.

higher rates of silence than those that use other means of data collection, such as independent analysis of records of interview.⁷² A study which examined the effect of sections 34, 36 and 37 found no notable reduction in suspects remaining silent across all police stations included in the project.⁷³ Two studies on the right to silence when questioned by police in Singapore have concluded that suspects rarely remained silent and that modification of the right to silence did not materially induce suspects to answer police questions.⁷⁴

Serious fraud

2.44 Since 1987, a separate regime for the investigation and prosecution of serious and complex fraud offences has operated in England and Wales.⁷⁵ The Serious Fraud Office is empowered to investigate any suspected offence which it reasonably believes involves serious or complex fraud.⁷⁶ Anyone under investigation or any person reasonably believed to have information relevant to an investigation can be compelled to answer questions.⁷⁷ Non-compliance is an offence unless the person has a reasonable excuse.⁷⁸ However, witnesses are protected by an immunity which provides that their answers may only be used in evidence if they are charged with making a false statement during an investigation,⁷⁹ or if they are charged with an offence and

72. The methodology of these studies has been criticised, criticism which one of the authors has acknowledged: Dixon (1991-1992) at 40-41; Dixon (1997) at 231-233; Leng (1994) at 24-28; Brown at 170.

73. T Bucke and D Brown, *In Police Custody: Police Powers and Suspects' Rights Under the Revised PACE Codes of Practice* (Home Office, London, 1997) at 32-36. Bucke and Brown chart the change from 55% of suspects confessing prior to the changes to 58% subsequently.

74. M Yeo, "Diminishing the Right to Silence: The Singapore Experience" [1983] *Criminal Law Review* 88; A Tan, "Adverse Inferences and the Right to Silence: Re-Examining the Singapore Experience" [1997] *Criminal Law Review* 471 at 473; Greer and Morgan at 50.

75. *Criminal Justice Act 1987* (Eng). This scheme was based on the recommendations of the Fraud Trials Committee, *Report of the Fraud Trials Committee* (London, 1986) chapter 6.

76. *Criminal Justice Act 1987* (Eng) s 1(3).

77. *Criminal Justice Act 1987* (Eng) s 2(2).

78. *Criminal Justice Act 1987* (Eng) s 2(13).

79. *Criminal Justice Act 1987* (Eng) s 2(8)(a). This is an offence under s 2(14) of the Act.

give evidence at trial which is inconsistent with the answer given to the Serious Fraud Office.⁸⁰

MODIFYING THE RIGHT TO SILENCE WHEN QUESTIONED BY POLICE

Previous inquiries into the right to silence when questioned by police

Australia

2.45 The Criminal Law and Penal Methods Reform Committee of South Australia published its report on criminal investigation in 1974,⁸¹ recommending that, in deciding guilt, the tribunal of fact be entitled to draw “such inferences as seem to it to be proper” from the defendant’s silence when questioned by police.⁸²

2.46 The Australian Law Reform Commission (“ALRC”) published its interim report on the process of criminal investigation in 1975,⁸³ recommending retention of the existing law.⁸⁴ The ALRC recommended statutory recognition of the right to silence and a statutory requirement that suspects be notified of this right.⁸⁵

2.47 The Committee of Inquiry into the Enforcement of Criminal Law in Queensland published its report in 1977.⁸⁶ This Report recommended that the court or jury be permitted to draw adverse inferences at trial where the defendant failed, in the course of police interrogation, to mention a fact

80. *Criminal Justice Act 1987* (Eng) s 2(8)(b).

81. Criminal Law and Penal Methods Reform Committee of South Australia, *Criminal Investigation* (Report 2, 1974).

82. Criminal Law and Penal Methods Reform Committee of South Australia at 106-107 and see 100-102.

83. ALRC, *Criminal Investigation* (Report 2 (Interim), 1975).

84. ALRC Report 2 (Interim) at para 150 and see para 146-150.

85. ALRC Report 2 (Interim) at para 344 and see para 142 and 146-150.

86. Committee of Inquiry into the Enforcement of Criminal Law in Queensland, *Report of the Committee of Inquiry into the Enforcement of Criminal Law in Queensland* (1977).

afterwards relied on as part of the defence which the defendant could reasonably have been expected to mention when questioned.⁸⁷

2.48 The ALRC published its interim report on evidence in 1985.⁸⁸ This Report proposed

that it not be permissible to draw inferences from the silence of the suspect/accused in response to questioning by law enforcement agencies ... however, ... this approach would not prevent the court drawing negative inferences from the failure of the accused to tell the police of an alibi or defence, later advanced at trial.⁸⁹

2.49 In 1986 the Victorian Consultative Committee on Police Powers published its report on police powers of investigation and detention, which considered the right to silence as part of its examination of the framework of police powers, and recommended against allowing adverse inferences to be drawn at trial where the defendant remains silent.⁹⁰

87. Committee of Inquiry into the Enforcement of Criminal Law in Queensland at para 194 and see para 189 to 196. This recommendation was based on a recommendation made by the English Criminal Law Revision Committee, *Evidence (General)* (Report 11, London, 1972) at para 2.55.

88. Australian Law Reform Commission, *Evidence* (Report 26 (Interim), 1985).

89. ALRC Report 26 (Interim) volume 1 at para 758 and *Draft Evidence Bill* cl 76. See also volume 1 para 756 and 757.

90. Victoria, Consultative Committee on Police Powers, *Report on s 460 of the Crimes Act 1958* (1986) at 11-13.

2.50 The ALRC published its final report on evidence in 1987, recommending that no adverse inferences be permitted from the defendant's right to silence when questioned by police in any circumstances, including where the defendant failed to tell the police of a defence.⁹¹ In 1988, the New South Wales Law Reform Commission adopted this recommendation.⁹² In 1995, legislation based on the ALRC's final report on evidence was enacted by the Federal and New South Wales parliaments.⁹³ The recommendation on the right to silence when questioned by police was enacted as s 89 of these Acts.

2.51 In 1990, the New South Wales Law Reform Commission published its report on criminal procedure, recommending that no adverse inference be permitted at trial where the defendant did not answer police questions or participate in police investigations.⁹⁴

2.52 In 1992 the Australian Institute of Judicial Administration published its report on complex criminal trials.⁹⁵ This Report rejected any changes to the right to silence when questioned by police in the context of complex criminal trials.⁹⁶

2.53 In March 1999, the Victorian Scrutiny of Acts and Regulations Committee published a report on the right to silence which recommended that no change be made to the Victorian law relating to the right to silence when questioned by police.⁹⁷

2.54 The right to silence was also reviewed by the Law Reform Commission of Western Australia as part of the Commission's recent reference into the civil and criminal justice system. The Commission

91. Australian Law Reform Commission, *Evidence* (Report 38, 1987) *Draft Evidence Bill 1987* cl 78. See also para 165-169.

92. New South Wales Law Reform Commission, *Evidence* (Report 56, 1988) *Evidence Bill 1988* (NSW) cl 78. See also para 2.38.

93. *Evidence Act 1995* (Cth) and (NSW).

94. NSWLRC, *Criminal Procedure — Police Powers of Detention and Investigation After Arrest* (Report 66, 1990) Recommendation 5.1 and para 5.9-5.14.

95. M Aronson, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure* (AIJA, Melbourne, 1992).

96. Aronson at 37-38.

97. Victoria, Scrutiny of Acts and Regulations Committee, *Inquiry into the Right to Silence — Final Report* (1999) Recommendation 1.

recommended that the prohibition on adverse comment at trial concerning a defendant's silence when questioned by police be maintained.⁹⁸

United Kingdom

2.55 The Criminal Law Revision Committee ("the CLRC") published its report on evidence in 1972.⁹⁹ A majority of the CLRC proposed that the tribunal of fact be permitted to draw "such inferences from the failure as appear proper", where the defendant relied on a fact at trial which he or she did not tell the police when questioned if the defendant could reasonably have been expected to mention the fact earlier. The majority recommended that the judge be permitted to comment to the jury on the inferences available.¹⁰⁰ The CLRC recommendations were strongly opposed and not implemented.¹⁰¹

2.56 The Royal Commission on Criminal Procedure reported in 1981.¹⁰² The Commission recommended against modifying the right to silence when questioned by police.¹⁰³ A criminal justice reform package based on the Commission's report was implemented in England in 1984.¹⁰⁴ This included the introduction of a duty solicitor scheme, providing suspects with a substantive right to legal aid before and during police questioning.

98. Law Reform Commission of Western Australia, *Review of the Civil and Criminal Justice System* (Final Report, 1999) Recommendation 251. See also para 24.10-24.11.

99. Criminal Law Revision Committee, *Evidence (General)* (Report 11, London, 1972).

100. Criminal Law Revision Committee, *Draft Criminal Evidence Bill* cl 1(1) and (2) and para 28-52. The minority agreed in general with the recommendations of the majority, but recommended delaying implementation until tape recording of interviews was an established procedure: at para 52.

101. Greer (1990) at 715; Royal Commission on Criminal Procedure at para 1.27 and 1.31.

102. Royal Commission on Criminal Procedure, *Report of the Royal Commission on Criminal Procedure* (London, 1981).

103. Royal Commission on Criminal Procedure at para 4.52 and see para 4.33-4.53.

104. *Police and Criminal Evidence Act 1984* (Eng).

2.57 In November 1988, the right to silence when questioned by police in Northern Ireland was modified by an Order in Council of the English parliament based on the recommendations of the CLRC.¹⁰⁵

2.58 The Working Group on the Right to Silence published its report in 1989.¹⁰⁶ The Group recommended adopting the proposals of the CLRC, subject to several safeguards for suspects.¹⁰⁷ Before any action was taken on the Group's recommendations, the right to silence became an issue in a series of widely publicised miscarriages of justice involving terrorist offences in Northern Ireland.¹⁰⁸

2.59 The Royal Commission on Criminal Justice was established in 1991 in response to these miscarriages of justice.¹⁰⁹

The Commission published its report in 1993. A majority of the Commission rejected the recommendations of the CLRC and the Working Group on the Right to Silence, recommending that the present position be retained.¹¹⁰ Despite this, in 1994 the law was modified in England and Wales. The reforms were based on the recommendations of the CLRC.

Analysis of the case for modifying the right to silence when questioned by police

2.60 It is widely argued that the right to silence when questioned by police is exploited by offenders. Another common argument for modifying the right to silence in this context is that changing the law would improve the efficiency of police investigations. It is also argued that suspects are now adequately protected against police misconduct during interviews and that the right to silence is no longer necessary to prevent oppressive conduct. Finally,

105. *Criminal Evidence (Northern Ireland) Order 1988* (Eng) art 3. See para 2.38-2.40 for a discussion of the relevant case law.

106. Working Group on the Right to Silence, *Report of the Working Group on the Right to Silence* (London, 1989).

107. Working Group on the Right to Silence at para 126.

108. G Griffith, *The Right to Silence* (NSW Parliamentary Library Research Service Briefing Paper No 11/97, Sydney, 1997) at 21;

M Ierace, "Right to Silence - A Response to Justice G L Davies' Paper" [1999] *Bar News* (Spring) 33 at 34.

109. Royal Commission on Criminal Justice at 1.

110. Royal Commission on Criminal Justice at 54. See 50-55 for discussion.

it is argued that, despite the current law in New South Wales, juries tend to treat the defendant's silence as a matter of considerable importance, and would benefit from judicial guidance as to its actual significance. Each of these arguments is examined below.

Exploited by offenders

2.61 It is commonly argued that the right to silence when questioned by police is exploited by criminals. Several submissions argued that an innocent suspect would deny police accusations and offer an explanation for the circumstances or conduct which created the suspicion. It is argued that the fact that guilty suspects can refuse to answer police questions impedes police investigation of offences and the prosecution and conviction of offenders.¹¹¹ This argument was used to justify changing the law in Northern Ireland, England and Wales.¹¹²

2.62 Several submissions argued that misuse of the right to silence by offenders is particularly prevalent in relation to offences which are difficult to prove without admissions, including conspiracy offences, possession

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111. Police Association of New South Wales, *Submission 1* at 2-5; R Miller, *Submission* at 4; P Cloran, *Submission* at 3; G Kellner, *Submission* at 1, 2; E Whitton, *Submission* at 5-6. See also Alger at 8; G Davies, "Justice Reform: A Personal Perspective" [1996] *Bar News* (Summer) 5 at 10-11; P Faris QC, "Disclosure and Discovery in the Criminal Trial", paper presented at the *6th International Criminal Law Congress* (Melbourne, 9-13 October 1996); K Marks, "'Thinking Up' About the Right to Silence and Unsworn Statements" (1984) 58 *Law Institute Journal* 360 at 361; E Whitton, *Trial by Voodoo* (Random House, Milson's Point, 1994) chapter 4; E Whitton, "Privilege that Prevents Justice Being Done" *The Australian* (21 August 1997) at 11; CR Williams at 632; J Woods, "Judge Calls for End of 'Right to Silence'" *Courier Mail (Brisbane)* (24 April 1997) at 8; N Papps, "You Have the Right to Remain Silent — But Maybe Not for Much Longer" *Adelaide Advertiser* (21 January 1998) at 1-2; Criminal Law Revision Committee at para 21, 30-31, 156; *Sullivan v The Queen* (1967) 51 Cr App R 102 at 105 per Salmon LJ; Working Group on the Right to Silence at para 57; P Schramm, "The Right to Silence – Maintaining the Balance" [1998] *Police Journal* (January) 8.
112. Northern Ireland: United Kingdom, *Parliamentary Debates* House of Commons, 8 November 1988 volume 140 at columns 185-190. England and Wales: M Howard, speech presented at Conservative Party Annual Conference 1993 (6 October 1993); United Kingdom, *Parliamentary Debates* House of Commons, 11 January 1994, volume 235 at column 26. See also Ierace at 34; Dennis at 11; Justice at 7.

offences, sexual offences and company and insurance fraud.¹¹³ It was also argued that the right to silence is particularly misused by criminals who commit very serious offences,¹¹⁴ “experienced” offenders,¹¹⁵ offenders with access to legal advice,¹¹⁶ and people who commit complex commercial offences, serious drug offences and other organised crime.¹¹⁷

2.63 Research conducted in Australia and overseas indicates that suspects rarely remain silent when asked questions by police.¹¹⁸

It follows therefore that modifying the right to silence would be unlikely to significantly increase prosecutions or convictions. Most judges who participated in the Commission’s survey expressed the view that the defendant’s silence when questioned by police did not generally affect trial outcomes. Most defence lawyers surveyed who conducted jury trials thought that silence sometimes contributed to acquittals and sometimes to convictions. On the other hand, most prosecutors who conducted jury trials thought that silence at the police station *did* generally contribute to the acquittal of defendants.¹¹⁹

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113. B Hocking and L Manville, *Submission* at 13; P Cloran, *Submission* at 4-5; Police Association of NSW, *Submission 1* at 2-5. See also T Smith, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 6.
114. L Davies, *Submission* at 3-5. See also Whitton (1994) at 44; Working Group on the Right to Silence at para 157.
115. R Miller, *Submission* at 4; Police Association of New South Wales, *Submission 1* at 4; B Hocking and L Manville, *Submission* at 11. See also Davies at 10; Marks at 361; Criminal Law Revision Committee at para 21, 30; “Laws Welcome in Crime Fight”, *Northern Daily Leader* (12 November 1998) at 3.
116. R Miller, *Submission* at 4.
117. L Davies, *Submission* at 2; P Cloran, *Submission* at 4-5; R Miller, *Submission* at 4; B Hocking and L Manville, *Submission* at 10-11, 15. See also G Santow, “Corporate Crime: Complex Criminal Trials — Commentary” (1994) 5 *Current Issues in Criminal Justice* 280 at 284; H van Leeuwen, “AG Proposes New Rules for White-Collar Trials” *Australian Financial Review* (28 February 1998) at 8; Whitton (1994) at chapter 4.
118. See para 2.15-2.16; 2.43.
119. NSWLRC RR 10 at Table 2.6 and para 2.30-2.31. In contrast, most magistrates surveyed reported that the defendant’s silence in the police station generally contributed to a not guilty plea or a decision not to plead. Most judges and 42% of magistrates surveyed responded that they were unable to

2.64 The overseas empirical data suggests that, where a suspect does not answer police questions, this does not reduce the likelihood of the suspect being charged, pleading guilty, or being acquitted at trial. To the contrary, some research studies suggest that the likelihood of a suspect being charged and convicted increases where the suspect remains silent.¹²⁰ Anecdotal accounts indicate that there is no evidence that the English modifications to the right to silence have led to any increase in guilty pleas or convictions.¹²¹

2.65 *Serious offences.* There is no Australian research on the relationship between serious offences and the right to silence when questioned by police. While some English and Northern Ireland studies indicate that suspects subsequently charged with serious offences are more likely to remain silent than suspects generally,¹²² others have found that there is no strong relationship between silence when questioned by police and serious offences.¹²³ There is no uniform definition of what constitutes a “serious offence” for research purposes.

2.66 *“Experienced” offenders.* There is no Australian research into whether “experienced” offenders remain silent more often than offenders generally. English research which compared the exercise of the right of silence by offenders with prior convictions before and after the introduction of the provisions which modified the right to silence found that, since the right to

say what effect the defendant’s silence at the police station had on the plea, reflecting the limited information available to judges and magistrates about the reasons for pleas. See para 2.31.

120. Bucke and Brown at 34-36; Brown at 181-184; Dixon (1991-1992) at 37 and 40-41; Dixon (1997) at 230 and 232-233; Dennis at 12-14; Leng (1994) at 26-29; Zander at 148; Justice at 7-12; J Gallagher, *Submission* at 5; B Hocking and L Manville, *Submission* at 15; Greer and Morgan at 6, 14 and 67; Royal Commission on Criminal Justice at 53-54; NSWLRC Report 66 at para 5.13.
121. M F Adams, visit to the United Kingdom (June 1998). See also Victoria, Scrutiny of Acts and Regulations Committee at para 2.3.1 and 2.3.4.
122. Dennis at 11; Justice at 7; Black (1989) at 9; Dixon (1991-1992) at 40, Dixon (1997) at 231 and 235; Leng (1994) at 27; Zander at 146-147; Brown at 176; Greer and Morgan at 38; Royal Commission on Criminal Justice at 53; Bucke and Brown at 36.
123. Dixon (1991-1992) at 40; Dixon (1997) at 232. However, the methodology of this research has been criticised, criticism which has been acknowledged by the author. Justice at 8. Note that the results of this research has not been officially released by the English Government.

silence was modified in England, suspects with prior convictions are less likely to remain silent.¹²⁴ Northern Ireland research, which compared conviction rates for offenders with prior convictions before and after the law was changed, found that modification of the right to silence had little effect on conviction rates for males with prior convictions.¹²⁵

2.67 Other research studies have examined this issue by comparing the exercise of the right of silence by offenders with prior convictions with that generally exercised by suspects.

Two English studies have reported a higher incidence of silence amongst suspects with prior convictions than those without.¹²⁶

In contrast, other research suggests that suspects with prior convictions remain silent with the same frequency as other offenders,¹²⁷ and that there is no significant difference between acquittal rates of defendants with and without prior convictions who remain silent when questioned by police.¹²⁸

2.68 The Royal Commission on Criminal Justice concluded that the research evidence neither confirmed nor refuted the suggestion that the right to silence when questioned by police was used by a disproportionate number of experienced criminals.¹²⁹ Justice Smith of the Victorian Supreme Court argues that, if suspects with prior convictions remain silent more frequently, this reflects the fact that people with prior convictions are more likely to be known to the police, and therefore are more likely to be arrested and questioned than people without a criminal record.¹³⁰

124. J Williams at 566.

125. Justice at 11-12. The conviction rates for females with prior convictions did increase, but this increase was very small and occurred in the context of a significant rise in female criminality.

126. Odgers (1985) at 86-87; Dixon (1991-1992) at 37; Dixon (1997) at 229 and 235; Dennis at 11; Leng (1994) at 27; Zander at 147; Brown at 177; Greer and Morgan at 13 and 38.

127. Odgers (1985) at 86-87; Dixon (1991-1992) at 37; Dixon (1997) at 229; Greer and Morgan at 14; Black (1989) at 9; Victorian Bar, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 28; T Smith, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 6.

128. Dixon (1991-1992) at 37 and 40; Dixon (1997) at 230-231.

129. Royal Commission on Criminal Justice at 53.

130. T Smith, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 6.7. See also Victoria, Scrutiny of Acts and Regulations Committee at para 2.3.1; Leng at 27.

2.69 **Legal advice.** Most English studies have concluded that suspects with access to legal advice are more likely to say nothing during police questioning than those without legal advice.¹³¹

There is also a considerable body of research on the nature of legal advice given to suspects at police stations which indicates that suspects are not advised to remain silent as a matter of course, that advice to remain silent is often a temporary strategy, that the quality of legal advice to suspects varies considerably and that silence is not always based on legal advice.¹³²

2.70 The English research must be considered in the context of the provision of free legal advice to suspects in England under a government funded duty solicitor scheme. As a result of this scheme, approximately 34% of suspects have legal advice in the police station, either in person or by telephone.¹³³ The number of suspects who seek and obtain legal advice at police interviews has substantially increased since the introduction of reforms to the right to silence.¹³⁴ The duration of legal consultations has also increased, and there has been a rise in face-to-face consultations and a decline in telephone legal advice.¹³⁵

131. Dixon (1991-1992) at 40; Dixon (1997) at 231 and 235; Dennis at 11; Leng (1994) at 27; Zander at 147-148; Brown at 178-181; Greer and Morgan at 13 and 38; Royal Commission on Criminal Justice at 53, Bucke and Brown at 32-36. However, there is some research which suggests that the provision of legal advice during police questioning does not significantly affect the rate of exercise of the right to silence. See D Dixon, *Submission 2* at 1; Dixon (1991-1992) at 37; Dixon (1997) at 230; Black (1989) at 9; Aronson at 34-35.

132. D Dixon, *Submission 2* at 1; Dixon (1991-1992) at 42-46; Dixon (1997) at 236-258; J Baldwin, "Police Interrogation: What are the Rules of the Game?" in Morgan and Stephenson at 66-76; Justice Coldrey (1990) at 27; Justice Coldrey (1991) at 56; Brown at 179-181 and chapter 6; Greer and Morgan at 26; Aronson at 35.

133. Bucke and Brown at 19, 24. Compare Zander at 147, who concludes that about 30% of suspects receive legal advice. The rate of legal advice varies considerably between police stations: Greer and Morgan at 68. Aspects of legal advice that are widely variable between police stations also include the way in which advice is provided (eg, telephone as opposed to face-to-face contact in a separate room), and the likelihood of legal advisers attending all interviews: Bucke and Brown at 20 and 32 respectively.

134. Bucke and Brown at 33; M F Adams, visit to the United Kingdom (June 1998).

135. Bucke and Brown at 28.

2.71 There is no substantive equivalent to the English duty solicitor scheme in New South Wales and it seems most unlikely that there will be one in the foreseeable future.¹³⁶ The Commission's survey for this reference disclosed that, while some suspects who remained silent at the police station received legal advice at this stage, most did not.¹³⁷ Defence lawyers surveyed by the Commission for this reference reported that, where clients they advised before or during police questioning remained silent, they had generally advised the client to do so.¹³⁸ It was reported that a frequent reason for advising clients to remain silent at this stage was an inability to obtain adequate instructions in order to give any other advice. Many defence lawyers emphasised that their clients could not afford to pay them to attend the police station in person. Legal advice tended to be given in a brief telephone conversation immediately before the interview, with no privacy and no opportunity to assess the client's position.¹³⁹

Efficiency

2.72 Several submissions argued that modifying the right to silence would improve the efficiency of police investigations, both by increasing the number of confessions and by increasing the amount of information provided to police by suspects. Police would be able to investigate the version given by the suspect and eliminate innocent suspects from the investigation earlier. A submission from an experienced police prosecutor stated that, "if persons were compelled to answer questions in an investigation, it would probably result in less people being charged".¹⁴⁰

2.73 It is also argued that, if adverse inferences could be drawn where a suspect did not answer police questions, more offenders would plead guilty at an earlier stage of the process. It is argued that this would reduce the resources wasted where the defendant pleads guilty after the parties have prepared for trial.¹⁴¹

2.74 These submissions are essentially speculative. The English experience does not give them any support. The empirical evidence that few suspects

136. See para 2.89.

137. NSWLRC RR 10 at Table 2.4 and see para 2.19-2.23.

138. NSWLRC RR 10 at para 2.24.

139. NSWLRC RR 10 at para 2.40.

140. G Kellner, *Submission* at 2.

141. J Cramond, *Submission* at 1; G Kellner, *Submission* at 2-3; NSW Police Service, *Submission* at 1; Police Association of NSW, *Submission* at 3, 5.

actually remain silent indicates that it is unlikely that modifying the law would significantly increase the number of confessions or the amount of information given to police. The Commission's view is that, rather than enhancing efficiency, modifying the right to silence when questioned by police would be likely to reduce the efficiency of police investigations, trials and the criminal justice system in general.

2.75 *Legal representation of suspects.* As a result of the English provisions, there has been a substantial increase in the number of suspects seeking and obtaining legal advice before and during police interviews. It has become common in England and Wales for the suspect and his or her legal adviser to confer for a considerable period of time, often well over an hour, before the commencement of the formal police interview.¹⁴² One reason for this is that lawyers now have to consider much more carefully how far, in the circumstances of the case, the client should answer questions.¹⁴³ The lawyer also needs to be present during the interview itself and to be available when the suspect is charged, as the provisions allow inferences to be drawn where the defendant says nothing at this time. English solicitors who advise clients in the police station are now advised to keep full contemporaneous records of the pre-interview client conference and the police interview.¹⁴⁴ The expense of all this is considerable, paid largely out of legal aid funds.

2.76 *Police investigations.* Solicitors acting for clients during police questioning now seek far more information from the police about the nature of the case. However, the English legislation does not create a positive duty on police to disclose the whole case against the suspect prior to interview.¹⁴⁵ Some police officers reasonably consider that full disclosure might give a suspect an opportunity to tailor answers and perhaps interfere with witnesses. As investigations are often not complete at the time of arrest, satisfactory judgments about what to disclose are very difficult to make. Even where suspects do answer questions, there is widespread scepticism amongst police about the utility of what they say for the purpose of the police investigation,

142. M F Adams, visit to the United Kingdom (June 1998).

143. M F Adams, visit to the United Kingdom (June 1998).

144. See *Advising a Suspect in the Police Station* (Sweet and Maxwell, London, 1997); Black (1997(2)) at 772-773; Cape (1997). For practise management advice on this point; E Cape, "The Right to Silence: Defending at the Police Station Under the New Regime" (as at 8 August 1998) [<http://personal.quipu.com/elliott/cja/silence.html>]

145. *R v Imran* [1997] Crim LR 754 (Court of Appeal).

unless a confession is obtained. Often the answers are unverifiable. However, attempts to investigate them must be made, deflecting resources from more promising lines of inquiry.

2.77 On the other hand, answers relating to objects, substances and marks found in the suspect's possession and presence at the scene of the crime, seem to be more useful from an investigator's point of view.¹⁴⁶

2.78 It has also been suggested that the existence of the suspect's right to silence when questioned by police is a necessary incentive for police to investigate offences thoroughly, rather than relying on confession evidence.¹⁴⁷

2.79 **The trial.** The English Model Directions propose that the judge should bring to the jury's attention any reasons why adverse inferences ought not to be drawn.¹⁴⁸ However, it is not adequate for defence counsel merely to provide reasons in argument.

The defence is required to lead evidence as to the reasons for silence, including evidence of the legal adviser's reasons for advising silence (where applicable).¹⁴⁹ This could involve extensive evidence, including evidence by the defendant, his or her solicitor or both and might well significantly increase the length, complexity and cost of the trial, particularly since any evidence as to the reasons for a solicitor's advice to remain silent at the police station amounts to waiver of the defendant's legal professional privilege, with the consequence that the solicitor and the defendant can be cross-examined regarding all of the matters referred to in their evidence.¹⁵⁰

146. M F Adams, visit to the United Kingdom (June 1998).

147. D Dixon, *Submission 1* at 2; A Arfaras, *Submission* at 2; Greer (1990) at 726-727; Odgers (1985) at 85. See also T Smith, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 18-19. It has been noted that this reasoning may lead to increased police powers in relation to surveillance and forensic techniques and technology: Dixon (1991-1992) at 49; Greer and Morgan at 16, 20.

148. See para 2.108.

149. *R v Cowan* [1995] 4 All ER 939 at 946-947.

150. *Condon v The Queen* [1997] 1 WLR 827; *R v Bowden* [1999] 1 WLR 823. See also Plowden at 1599; Black (1997(2)) at 772; Cape (1997); "Silence, Inferences and Legal Privilege"; A Jennings, "More Resounding Silence" (1999) 149 *New Law Journal* 1180 at 1181-1182; A Jennings, "Recent Developments in the Law Relating to the Right to Silence" (1999) 5 *Archbold News* 5 at 6-7. The Law Society of England has amended its guidelines to

The major procedural effect is that the focus of the trial is likely to be diverted to what happened at the police station and why, rather than on the evidence which is directly relevant to the commission of the crime.¹⁵¹

2.80 *The criminal justice system.* The English experience indicates that modifying the right to silence in response to police questions would be likely to cause uncertainty in the law, and an increase in litigation. It is reasonable to expect a proliferation of appeals against conviction on the basis of errors in the trial judge's direction to the jury and a large body of possibly conflicting case law generated on the adverse inferences available and the circumstances in which adverse inferences could be drawn.¹⁵²

Trade off for other protections

2.81 Many submissions argued that the right to silence when questioned by police is redundant because suspects now are adequately protected against police misconduct.¹⁵³ The Commission's view is that, even if present systems prevent police misconduct (and this has yet to be demonstrated), this would not justify modifying the right to silence.

criminal solicitors on the content of any introductory statement in police interviews in response to this implication for legal professional privilege. Cf s 122 of the *Evidence Act 1995* (NSW).

151. This view was also expressed by Justice Coldrey (1990) at 29; Victoria, Consultative Committee on Police Powers at 12-13; Bar Council of Victoria, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 45; Victoria, Scrutiny of Acts and Regulations Committee at para 2.5.3.
152. This was also argued by the Bar Council of Victoria, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 40 and 46; Victoria, Scrutiny of Acts and Regulations Committee at para 2.5.1 and 2.7.2; A Jennings, "Recent Developments in the Law Relating to the Right to Silence" (1999) 5 *Archbold News* 5.
153. B Bright, *Submission* at 1; R Miller, *Submission* at 4; P Cloran, *Submission* at 4; Police Association of NSW, *Submission 1* at 3; Police Association of NSW, *Submission 2* at 1; NSW Police Service, *Submission* at 2; J Cramond, *Submission* at 1; L Davies, *Submission* at 6; C Bone, *Submission* at 2-4. See also Greer (1990) at 719-720; Marks at 373; *R v Alladice* (England, Court of Appeal, 12 May 1988, unreported); Criminal Law Revision Committee (minority) at para 52; Royal Commission on Criminal Procedure, (minority) at para 4.5; Criminal Law and Penal Methods Reform Committee of South Australia at 103; Greer and Morgan at 29 and 30. But compare Dixon (1991-1992) at 46-47.

2.82 **Electronic recording of police interviews.** Admissions made during police questioning in New South Wales are not generally admissible as evidence in committal proceedings and in trials for indictable offences unless they are electronically recorded.¹⁵⁴ A document prepared by the police which records oral admissions made during questioning is not admissible as evidence unless the defendant has acknowledged its accuracy by signing it.¹⁵⁵ Many submissions argued for a change to the right to silence on the basis of the additional protection provided by these requirements.¹⁵⁶

2.83 On the other hand, several submissions argued that the electronic recording requirements do not adequately protect suspects during police questioning. The requirements do not apply to summary hearings. They do not protect suspects who are questioned by police prior to arrival at a police station,¹⁵⁷ which empirical research suggests occurs frequently.¹⁵⁸

2.84 **Support persons.** Suspects in police custody are entitled to communicate with a friend, relative, guardian or independent person (for example, a Salvation Army officer or social worker) before being questioned by police and have a support person present during questioning.¹⁵⁹

2.85 Two submissions, from practitioners specialising in defence work in the Children's Court, argued that this requirement does not adequately protect

154. *Criminal Procedure Act 1986* (NSW) s 108 (formerly *Crimes Act 1900* (NSW) s 424A); *Evidence Act 1995* (NSW) s 4. The prosecution must establish a reasonable excuse, such as mechanical failure, for admissions which were not recorded to be admitted into evidence.

155. *Evidence Act 1995* (NSW) s 86.

156. C Bone, *Submission* at 2; J Cramond, *Submission* at 1; L Davies, *Submission* at 6; B Bright, *Submission* at 1-2; R Miller, *Submission* at 4; Police Association of NSW, *Submission 1*, Response 1 at 3; Police Association, *Submission 2* at 1.

157. B Kennedy, *Submission* at 2; C Levingston, *Submission* at 2.

See also Justice Coldrey (1990) at 28; Justice Coldrey (1991) at 57.

158. S Moston and G Stephenson, "Helping the Police With Their Enquiries Outside the Police Station" in Morgan and Stephenson; Greer and Morgan at 26. See also A Jennings, "More Resounding Silence" (1999) 149 *New Law Journal* 1180 at 1180; A Jennings, "Recent Developments in the Law Relating to the Right to Silence" (1999) 5 *Archbold News* 5 at 6.

159. *Crimes Act 1900* (NSW) s 356N. See R Miller, *Submission* at 4.

See also s 13 of the *Children (Criminal Proceedings) Act 1987* (NSW) which excludes admissions made by persons under 18 in the absence of an appropriate adult.

child suspects because, in practice, independent observers provide very limited assistance to juvenile suspects.¹⁶⁰ Empirical research into the role played by support persons during police interviews in the United Kingdom supports this.¹⁶¹

2.86 **Legal advice.** Suspects in police custody are also entitled to communicate with a legal practitioner prior to police questioning and have a legal practitioner present when questioned.¹⁶² Many submissions argued that the protection provided by the right to legal advice makes the right to silence redundant.¹⁶³

2.87 However, as many submissions and commentators argued, this right is largely illusory because there is no government funded duty solicitor scheme in New South Wales.¹⁶⁴ Submissions from bodies representing people with intellectual disabilities and young people during police questioning argued that these groups would not have the intellectual or financial resources to arrange their own legal advice.¹⁶⁵

160. T Dalla, *Oral Submission*; M Newton, *Oral Submission*.

161. Bucke and Brown at 12-15; R Evans, "Police Interviews with Juveniles" in Morgan and Stephenson at 84-85 and 88.

162. *Crimes Act 1900* (NSW) s 356N.

163. C Bone, *Submission* at 3; P Cloran, *Submission* at 4; L Davies, *Submission* at 6; D Dixon, *Submission 2* at 1; Ethnic Affairs Commission, *Submission 2* at 3; IDRS, *Submission* at 1, 3; Justice Action, *Submission* at 1; G Kellner, *Submission* at 3, 4; Kingsford Legal Centre, *Submission* at 3, 4; Legal Aid NSW, *Submission* at 2; Marsdens, *Submission 2* at 2; Police Association of NSW, *Submission 2* at 1-3; UTS Community Law and Legal Research Centre, *Submission* at 4; Youth Justice Coalition, *Submission* at 4. See also Criminal Law and Penal Methods Reform Committee of South Australia at 103; Greer (1990) at 720; Marks at 373; Odgers (1985) at 89, 93-94.

164. D Theiring, *Submission* at 2; D Dixon, *Submission 2* at 1; IDRS, *Submission* at 3; Law Society of the ACT, *Submission* at 7; Law Society of NSW, *Submission 1* at 7-8 and 11; C Levingston, *Submission* at 2; G Turnbull, *Submission* at 2-3; NSW Young Lawyers, *Submission* at 3; G Walsh, "The Right to Silence" (1999) 37 *Law Society Journal* (April) 40 at 43; Law Reform Commission of Western Australia at 16-17; Victoria, Scrutiny of Acts and Regulations Committee at para 2.7.1.

165. IDRS, *Submission* at 1; National Childrens and Youth Law Centre, *Submission* at 1; M Newton, *Oral Submission*; Youth Justice Coalition, *Submission* at 1. See also EAC, *Submission 2* at 4; Legal Aid NSW,

2.88 In *Murray v United Kingdom*,¹⁶⁶ the European Court of Human Rights, in upholding the Northern Ireland provisions, held that the defendant's right to a fair trial was violated because he had been denied access to a solicitor during the first 48 hours of his detention.¹⁶⁷ The Court held that access to legal advice at an early stage of police interrogation was especially important in light of the changes to the right to silence.¹⁶⁸ The Commission's view is that, without government funded access to legal advice for suspects questioned by police, the bare legal entitlement to communicate with a legal practitioner could not justify any modification to the right to silence.

2.89 In DP 41 the Commission noted that the current level of legal aid funding could not support the provision of a duty solicitor scheme to suspects, and that significant increases in the legal aid budget are unlikely to occur. Many submissions agreed with this reasoning.¹⁶⁹ The Police Association of New South Wales disagreed, arguing that the appropriate level of legal aid funding is a question for the government, and that the Commission should formulate its policy recommendations on the basis of the desirable (as opposed to the actual) level of funding.¹⁷⁰ However, the Commission considers that this is an unrealistic approach. Existing legal aid levels are unlikely to be increased for the purpose of providing free legal advice to suspects, and it is proper and necessary to emphasise the significance of this factor.

Submission at 1; UTS Community Law and Legal Research Centre, *Submission* at 4.

166. *Murray v United Kingdom* (1996) 22 EHRR 29.

167. The defendant was denied access to a solicitor during the first 48 hours of detention under the *Northern Ireland (Emergency Provisions) Act 1987* (Eng) s 15.

168. *Murray v United Kingdom* (1996) 22 EHRR 29 at 48 and 67.

169. Justice Action, *Submission* at 1; Legal Aid NSW, *Submission* at 2; Marsdens, *Submission 2* at 2; NSW Council for Civil Liberties, *Submission* at 1; UTS Community Law and Legal Research Centre, *Submission* at 4. See also D Dixon, *Submission 2* at 1; IDRS, *Submission* at 3; G Kellner, *Submission* at 5; Kingsford Legal Centre, *Submission* at 3; Law Society of the ACT, *Submission* at para 3.6; T Smith, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence*, Letter to P Ryan (7 August 1998) at para 10; Criminal Bar Association of Victoria, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 5.11; Victoria, Scrutiny of Acts and Regulations Committee at para 2.7.1.2; WALRC at 16-17.

170. Police Association of NSW, *Submission 2* at 3.

2.90 One submission suggested that the custody manager, who is currently responsible for cautioning suspects, explaining to suspects their rights while in custody and enforcing these rights, should be replaced by a full time “custody solicitor” responsible for advising all suspects when questioned.¹⁷¹ It was argued that only one “custody solicitor” would be required at the majority of police stations as most only have one machine for electronically recording police interviews. However, if electronic recording equipment is to be used in back to back interviews with different suspects, the custody solicitor would be unlikely to have sufficient time to obtain instructions and to give advice between interviews, quite apart from the need to obtain enough information from the investigating police to permit sensible advice to be given.

2.91 Suspects should be able to have an opportunity to communicate with their legal adviser in private at the police station.¹⁷² The lack of facilities for this was also criticised by defence solicitors surveyed by the Commission. Clearly, the provision of such facilities would have considerable resource implications.

2.92 **Interpreters.** A suspect is entitled to an interpreter during police questioning when the custody manager reasonably believes that he or she is unable to understand the questions asked, and where it is reasonable in the circumstances to do so.¹⁷³

2.93 Two submissions argued that this requirement does not adequately protect suspects. It was pointed out that the provision of an interpreter is contingent on the custody manager’s assessment of the suspect’s ability to communicate in English. These submissions argued that a suspect may appear reasonably fluent in English, but not communicate adequately under the stress of a police interview. The custody manager is not trained to identify this problem and may not always do so.¹⁷⁴

2.94 **Police practices and accountability.** The Police Association of New South Wales pointed out that the right to silence when questioned by police developed to protect suspects from police misconduct at a time when investigators were not an organised or effectively supervised body and

171. G Kellner, *Submission* at 4-5.

172. This view was also expressed by Kingsford Legal Centre, *Submission* at 4.

173. *Crimes Act 1900* (NSW) s 356S. See Police Association of NSW, *Submission* 2 at 1.

174. Ethnic Affairs Commission, *Submission* 2 at 1; Kingsford Legal Centre, *Submission* at 3.

mistreatment of suspects was widespread, arguing that this no longer occurred.¹⁷⁵ It was also argued that suspects are adequately protected against police misconduct by the existence of a comprehensive system for reviewing complaints against police.¹⁷⁶ Complaints against police can be made to the Police Service, the Police Integrity Commission and the Ombudsman. Complaints may also be referred to these bodies by the Minister for Police or the Independent Commission Against Corruption.¹⁷⁷

2.95 Many other submissions argued that suspects are not adequately protected against police misconduct by the existing safeguards discussed above, citing the findings of the Wood Royal Commission on the existence of extensive malpractice and corruption in the New South Wales police service.¹⁷⁸

2.96 Commentators have also argued that there is a risk that if the right to silence is modified, investigating police may choose not to record statements made by suspects or manipulate interviews by framing questions in a way that encourages suspects to remain silent, because the significance attributed

175. Police Association of NSW, *Submission 1* at 4; Police Association of NSW, *Submission 2* at 1. See also para 2.3-2.4.

176. B Bright, *Submission* at 1; Police Association of NSW, *Submission 1* at 3; Police Association of NSW, *Submission 2* at 1.

177. *Police Service Amendment (Complaints and Management Reform) Act 1998* (NSW). The Internal Affairs Command of the NSW Police Service was completely restructured following the 1997 report of the Royal Commission into the NSW Police Service: NSW Police Service, (1998) 3 *On the Record* 3.

178. A Arfaras, *Submission* at 1; Confidential, *Submission* at 1; B Kennedy, *Submission* at 2; D Dixon, *Submission 1* at 2; Kingsford Legal Centre, *Submission* at 3; Law Society of NSW, *Submission 1* at 16; Legal Aid NSW, *Submission* at 1; NSW Council for Civil Liberties, *Submission* at 1; G Turnbull, *Submission* at 3. See also T O’Gorman, “Right to Silence”, paper presented at session 24 of the *30th Australian Legal Convention* (Melbourne, 18-21 September 1997)

at 21; Royal Commission into the NSW Police Service; T Smith, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 5-6, para 8; M Chaaya, “The Right to Silence Reignited: Vulnerable Suspects, Police Questioning and Law and Order in NSW” (1998) 22 *Criminal Law Journal* 82 at 91. Dixon (1991-1992) at 31 raises this argument in the English context. According to its 1996/1997 Report, the NSW Ombudsman’s Office received 2,075 complaints against police concerning the arrest, detention, investigation and prosecution of defendants: NSW Ombudsman, *Annual Report 1996/1997* at 39.

to silence might well enhance the likelihood of conviction more than any explanation given.¹⁷⁹ Some authorities suspect that this has occasionally occurred in the United Kingdom.¹⁸⁰

2.97 The Commission's view is that the effect of the recent changes in police discipline is yet to be demonstrated and, at all events, the right to silence arises from considerations more fundamental than the risk of police misconduct. Further, an upheld complaint after conviction is poor recompense for someone whose trial has miscarried as a result of police misconduct.

2.98 **General social changes.** The right to silence developed at a time when suspects were generally very poorly educated and therefore ill equipped for interrogation. It is argued that, leaving aside juvenile offenders, the general standard of education has increased significantly since that time.¹⁸¹ However, the Commission notes that improvements in the standard of education are not uniform and that research shows that suspects are often the least educated members of society.¹⁸²

2.99 Another basic weakness of these arguments is that the provision of alternative protections such as access to legal advice and electronic recording of police interviews does not remove the many legitimate reasons which innocent suspects may have for remaining silent.¹⁸³ The Commission has previously rejected the argument that giving practical effect to common law rights such as access to legal advice justifies the abandonment of other protections such as the right to silence.¹⁸⁴

179. Dixon (1991-1992) at 36; Wood and Crawford at 25, Bar Council of Victoria, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 26 and 48.

See also B Kennedy, *Submission* at 1-2; Walsh at 44.

180. M F Adams, visit to the United Kingdom (June 1998).

181. B Bright, *Submission* at 1. See also Davies at 5.

182. This view was also expressed by Ierace at 35. For a discussion on suspects' characteristics see para 2.120-2.122.

183. This was also argued by the Ethnic Affairs Commission, *Submission 2* at 2. See also Greer (1990) at 722-723; Greer and Morgan at 12-13. See also para 2.115-2.129.

184. NSWLRC Report 66 at para 5.13. See also IDRS, *Submission* at 2; Royal Commission on Criminal Procedure at para 4.52; Victoria, Scrutiny of Acts and Regulations Committee at para 2.7.2.4.

The need to guide juries

2.100 A number of submissions argued that juries will place too much weight on the defendant's silence unless guided by judicial direction.¹⁸⁵ On the other hand, it is also argued that juries can be relied on to draw appropriate adverse inferences from the fact that the defendant did not answer police questions.¹⁸⁶ The validity of these arguments can only be assessed by speculation, since juries do not give reasons for their decisions.

2.101 The Commission accepts that it is likely that juries are generally aware that suspects do not have to answer police questions. This is consistent with the findings of empirical research conducted for the Royal Commission on Criminal Justice, which concluded that juries are aware that the defendant exercised the right to silence when questioned by police in 79%-85% of criminal trials.¹⁸⁷ It is also reasonable to suspect that juries may not always obey the trial judge's direction not to draw adverse inferences

185. L Davies, *Submission* at 2 and 5; NSW Police Service, *Submission* at 1. See also D S Shillington, *Submission* at 2. See also J Black, "Inferences From Silence: Redressing the Balance? (1)" [1997] *Solicitors Journal* 741 at 743; Justice Coldrey (1990) at 28; Davies at 10; Greer (1990) at 711; Odgers (1985) at 84 and 94; Greer and Morgan at 17; D Kurzon, "'To Speak or Not to Speak' The Comprehensibility of the Revised Police Caution (PACE)" (1996) 9 *International Journal for the Semiotics of Law* 3 at 3-4; F Vincent, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 6. It has been accepted that the following direction is an appropriate one (*Petty v The Queen* (1991) 173 CLR 95 at 117):

"The law provides that any person accused of a crime may remain silent, he may say nothing by way of explanation, and that, if he does remain silent, no inference or conclusion of guilt may be drawn from his silence. That rule of the law is to ensure that no-one will be forced to incriminate himself by feeling obliged to answer questions. You will recall that, throughout the evidence which had been given to the police officers in this trial, whenever either of these two accused were asked any questions by a police officer, those questions were preceded by a caution that he was not obliged to say anything unless he wished to ... That caution means exactly what it says. If ... [the defendant] had remained silent, if he had said nothing but not guilty, if he had not made a statement to the police in his record of interview, if he had not made a statement here in court right up to the moment when you bring back your verdict, you would be directed that no inference or conclusion of guilt can be drawn from that silence."

186. J Gallagher, *Submission* at 5. See also Justice Coldrey (1990) at 29; Justice Coldrey (1991) at 58.

187. M Zander and P Henderson, *Crown Court Study* (Royal Commission on Criminal Justice, Research Study No 19, London, 1993) at para 1.2.5. See also 2.13-2.14.

from the suspect's silence and that directions as to appropriate inferences arguably might be more fair to the defendant than simply leaving the issue to be decided in accordance with the present law.

2.102 However, this does not of itself justify permitting adverse inferences to be drawn, especially when the inferences that are rationally open are so uncertain. We consider that most jurors will readily appreciate the unfairness involved in drawing adverse inferences against a defendant who has remained silent upon the very basis that such inferences cannot be drawn. Justice Coldrey has suggested that it should be up to the defendant to decide whether to assume the risk that the jury will make inappropriate use of his or her silence before trial.¹⁸⁸

The case against modifying the right to silence when questioned by police

2.103 The regime currently operating in England, Wales, Northern Ireland and Singapore is the only system to modify the right to silence currently in operation in the common law world. The Commission's analysis of the case against modifying the right to silence when questioned by police therefore begins with a critical examination of this system. The Commission's view is that the system operating in these jurisdictions is open to criticism on several grounds. As discussed at paragraphs 2.74 to 2.80 above, this system is likely to reduce the efficiency of the criminal justice system. Moreover, the English experience suggests that provisions such as those which operate in England and Wales are likely to result in very strong unfavourable but unjustified inferences being drawn from a defendant's silence.

2.104 As is pointed out at paragraphs 2.15 to 2.129 there are many reasons, consistent with innocence, which might lead a suspect to remain silent when questioned by police. In addition, modifying the law would operate as a subtle but real form of compulsion on suspects to cooperate with investigating police, conflicting with the presumption of innocence and the fact that the prosecution bears the burden of proof, which are universally accepted as fundamental and non-negotiable principles of our criminal justice system.

188. Justice Coldrey (1990) at 29; Justice Coldrey (1991) at 58.

England and Wales

2.105 In England and Wales, the *Criminal Justice and Public Order Act 1994* provides, in substance, that where, in any proceedings against a person for an offence, evidence is given that he or she failed to mention any fact relied on in his or her defence to the investigating police, then, if that matter could reasonably have been mentioned to the officer, a court “may draw such inferences from the failure as seem proper” in determining whether there is a case to answer or whether the person is guilty of the offence charged. Failures to account for any apparently incriminating object, substance in the possession of or mark on a suspect or his or her presence at or near the scene of a crime, when questioned by a police officer may also be used by a judge or jury, when determining whether there is a case to answer or the defendant is guilty to draw a “proper inference”.¹⁸⁹ The Act also provides that the failure of the defendant to give evidence at his or her trial may be used when determining whether the defendant be guilty or otherwise “to draw such inferences as appear proper”.¹⁹⁰

2.106 This legislation commenced life as an offspring of the troubled situation in Northern Ireland in the form of the *Criminal Evidence (Northern Ireland) Order 1988*. It was brought into the law of England and Wales by the then Conservative Government despite recommendations by two Royal Commissions.¹⁹¹

2.107 The Privy Council has said, in the context of Singaporean legislation permitting inferences to be drawn from refusal to testify, that “what inferences are proper to be drawn...depend on the circumstances of the particular case, and is a question to be decided by applying ordinary common sense”.¹⁹² It is difficult to see how one could do more than infer that evidence of a not previously disclosed fact is a recent invention.¹⁹³ It has been held by the Court of Appeal that the failure to draw adverse inferences could only be justified where there was some “evidential basis for doing so or some exceptional factors in the case making that a fair course to take”.¹⁹⁴

2.108 The recommended directions, which appear to have the approval of

189. See further para 2.31-2.33 and Appendix C.

190. See Chapter 4 and Appendix C.

191. See para 2.56-2.59.

192. *Haw Tua Tua v Public Prosecutor* [1982] AC 136 at 153 (Lord Diplock).

193. This view is also expressed in commentary in *Current Law Statutes* (Sweet and Maxwell, London, 1994) volume 3 at 33-43.

194. *R v Cowan* [1995] 4 All ER 939 at 944.

the Court of Appeal,¹⁹⁵ are in the following form:

FAILURE TO MENTION FACTS TO INVESTIGATING POLICE

The defendant, as part of his defence, has relied upon ... [The prosecution case is] [He admits] that he did not mention that fact [when he was questioned under caution before being charged with the offence][when he was charged with the offence][when he was officially informed that he might be prosecuted for the offence]. The prosecution case is that in the circumstances when he was [charged][questioned][informed], he could reasonably have been expected then to mention it.

If you are sure that he did fail to mention...when he was [charged][questioned][informed], decide whether in the circumstances it was a fact which he could reasonably have been expected to mention. If it was, the law is that you may draw such inferences as appear proper from his failure to mention this matter at the time.

Failure to mention such a fact cannot, on its own, prove guilt, but depending on the circumstances, you may hold it against him when deciding whether he is guilty, that is, take it into account as some additional support for the prosecution's case. You are not bound to do so. It is for you to decide whether it is fair to do so.

There is evidence before you on the basis of which the defendant's advocate invites you not to hold it against him that he failed to mention this. That evidence is [...]. If you think that this amounts to a reason why you should not hold the defendant's failure against him, do not do so. On the other hand, if you are sure that the real reason for his failure [to mention this fact] was that he then had no innocent explanation to offer, you may hold it against him.

2.109 Of course, this is only a model and should be adjusted to suit the exigencies of the particular case, although there is, as yet, no judicial guidance as to how this might be done. The legislation itself does not specify the character of the inference which may be drawn from the defendant's failure to mention the fact later relied on or to account for the object, substance, marks or presence: it permits the drawing "of such inferences ... as appear proper". The language of the Model Direction, in permitting this failure to be held against

195. *R v Cowan* [1995] 4 All ER 939 (approved in relation to inferences available under s 35 of the Act where the defendant does not testify); *Condron v The Queen* [1997] 1 WLR 827 (approved in relation to inferences available under s 34 of the Act where the defendant does not answer police questions).

the defendant in the general sense that it provides “some additional support for the prosecution’s case” providing “it is fair to do so” appears to go much further than the statute. As we have said, the only reasonable inference that might be drawn is that the late disclosure or explanation might be a recent invention. In accordance with ordinary principles, it would also appear to be necessary to direct the jury as to the precise materiality of the disclosure or explanation in the context of the actual factual issues in the case. Moreover, as with directions on lies, we think that it would also be necessary to point out to the jury, in a case where the defendant did not give evidence, that there might be a number of reasons for the omission to mention the fact or give an explanation which would not justify drawing an adverse inference.¹⁹⁶

2.110 The terms of the Model Direction make it clear that the onus of proof is on the prosecution to establish the inculpatory reason for the relevant omission. Merely because the defendant has not explained why it occurred does not necessarily justify drawing the adverse inference. It is difficult to see, from the terms of the statute, why positive evidence supportive of an innocent explanation must be adduced for the jury not to draw such an inference, although this seems to follow from the decision of the Court of Appeal in *R v Cowan*.¹⁹⁷

2.111 The crucial question is whether an inference of guilt or of recent fabrication should rationally be drawn from the failure to make timely disclosure. The failure to make timely mention of a matter might well reflect on whether the later assertion was true. The true issue is whether or not the

196. *R v Lucas* [1981] QB 720; In *R v Edwards* (1993) 178 CLR 193 at 211, Deane, Dawson and Gaudron JJ said that the jury should be instructed that there may be reasons for the telling of a lie apart from the realisation of guilt and that a “lie may be told out of panic, to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence. The jury should be told that, if they accept that a reason of that kind is the explanation for the lie, they cannot regard it as an admission. It should be recognized that there is a risk that, if the jury are invited to consider a lie told by an accused, they will reason that he lied simply because he is guilty unless they are appropriately instructed with respect to these matters. And in many cases where there appears to be a departure from the truth it may not be possible to say that a deliberate lie has been told. The accused may be confused. He may not recollect something which, upon his memory being jolted in cross-examination, he subsequently does recollect”.

197. [1995] 4 All ER 939 (which, strictly, concerned the effect of silence at trial).

explanation for that failure was *in fact* a consciousness of guilt.¹⁹⁸ Even if the defendant acted completely unreasonably, if he or she was not motivated by a consciousness of guilt, the silence is irrelevant: it proves nothing.

2.112 The Court of Appeal has invoked the need for the application of common sense by juries to the utilisation of the provision,¹⁹⁹ but this seems to the Commission to avoid rather than solve the problems of applying the approved Model Directions.

2.113 What happened in the police station is a frequent subject of evidence. Since the jury must consider whether it is fair to use the defendant's silence adversely, it is necessary that they be given a complete picture of the relevant surrounding circumstances, concerning not only communications with the police but also the defendant's situation. This introduces a substantial area of time consuming disputation which will be almost certainly peripheral to the real issues in the case for very marginal gain. One of the concomitant problems – to name but one – is that it has to be evaluated by the jury very much second-hand. As anyone with any experience knows, even with complete candour by all parties and the best will in the world, the version of events that comes to be presented in Court is edited, not only by limits of understanding, perception and recollection but by the trial process itself, sometimes quite markedly and unrealistically and, indeed, unfairly to both the police and the defence. In many cases this does not matter, but in many it will.

2.114 Quite apart from the problems of principle raised by the English legislation, it is difficult to see how changes of this kind could be justified without the clearest demonstration of advantage to provide a counterweight to the significant expense and complexities introduced both at the investigation and the trial stage. Benefit to the legal profession is not an element of the public interest.

198. In *R v ST* (1997) 92 A Crim R 390, the New South Wales Court of Criminal Appeal held that, for a lie to amount to an admission of guilt, the only reasonable inference from the circumstances in which it was told must be that the defendant lied because he knew that, if he told the truth, he would be found guilty. Such an inference could be the only reasonable one to be drawn only where the lie related to something which directly linked the defendant with the crime with which he was charged. It would be a rare case in which it would be permissible to infer that the defendant, by telling a lie, was confessing his guilt.

199. *R v Argent* [1997] 2 Cr App R 27.

Reasons for silence consistent with innocence

2.115 Many submissions and commentators challenged the view, outlined in paragraph 2.61 above, that an innocent suspect would always deny an accusation levelled by the police and offer an explanation for the circumstances or conduct which created the suspicion.²⁰⁰ However, there are a number of considerations that might lead a person not to speak at all or unguardedly to police when he or she is suspected or accused of committing a crime. Persons in such a position might well, of course, wish immediately

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200. NSW Council for Civil Liberties, *Submission* at 3; P Cloran, *Submission* at 2; T Dalla, *Oral Submission*; G Jones, *Oral Submission*; Kingsford Legal Centre, *Submission* at 2; R Jones, *Submission* at 2; Law Society of NSW, *Submission 1* at 3-8; C Levingston, *Submission* at 2; D Guilfoyle, *Submission* at 10; J Fleming, *Submission* at 1; NSW Young Lawyers, *Submission* at 3; Marsdens, *Submission 1* at 1-3; Legal Aid NSW, *Submission* at 1; Department of Community Services, *Submission* at 2; Alger at 9; Justice Coldrey (1990) at 27-28; Dixon (1997) at 264; Dennis at 12-13; ALRC Report 2 (Interim) at para 148 and 149; ALRC Report 26 (Interim) at para 756; ALRC Report 38 at para 167; Greer (1990) at 727-728; S Greer, "The Right to Silence, Defence Disclosure and Confession Evidence" (1994) 21 *Journal of British Law and Society* 102 at 104; Jackson (1995) at 595; Odgers (1985) at 84-85; A Palmer, "Guilt and the Consciousness of Guilt: The Use of Lies, Flight and Other 'Guilty Behaviour' in the Investigation and Prosecution of Crime" (1997) 21 *University of Melbourne Law Review* 95; R Pattendon, "Inferences From Silence" [1995] *Criminal Law Review* 602 at 608-609; CR Williams at 648-650; J Williams at 566-567; Wood and Crawford at 25; Justice at 4, 15-16, 29-30; Greer and Morgan at 12 and 15-16; Royal Commission on Criminal Justice at 52 and 54; Aronson at 33; J Gallagher, *Submission* at 3; Ethnic Affairs Commission, *Submission* at 1; Victoria, Consultative Committee on Police Powers at 11-12; Ierace at 34-36; T Smith, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 4-5; F Vincent, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 3 and 5-6; Criminal Bar Association of Victoria, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 5.7; Bar Council of Victoria, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 15, 19, 20-22, 41-44; Black (1997(1)) at 741; Chaaya at 88, 91; Buddin at Law Week Seminar; Walsh at 43-44; Victoria, Scrutiny of Acts and Regulations Committee at para 2.1.

to exculpate themselves but there is no reason to suppose that all innocent persons would adopt this approach.

2.116 It is reasonable that innocent persons faced with a serious accusation might wish to consider their situations carefully before making any disclosure, especially where the circumstances appear suspicious but it cannot be assumed that they are rational and articulate. In many cases, suspects may be emotional, perhaps panicked, inarticulate, unintelligent, easily influenced, confused or frightened or a combination of these. They may be unable to do themselves justice. Such persons may be well advised to hold their peace, at least at an early stage. They may, of course, have something to hide, but that something may simply be shameful and not a crime, or it may implicate others for whom they feel responsible. The supposition that only a guilty person has a reason for not speaking freely to investigating police is an unreasonable assumption.

2.117 *Attitudes towards police.* Some suspects remain silent because they hold an extremely negative, uncooperative, fearful or distrustful attitude towards the investigating police or the police force in general. This view was also expressed by several submissions and commentators.²⁰¹

2.118 *Cultural characteristics.* Cultural characteristics may also influence whether an innocent suspect remains silent when questioned by police.²⁰² It is clear that Aboriginal suspects are more likely to answer police questions than

201. Kingsford Legal Centre, *Submission* at 2-3; UTS Community Law and Legal Research Centre, *Submission* at 2; Ethnic Affairs Commission, *Submission 2* at 2; P Cloran, *Submission* at 2; Walsh at 44; Greer (1990) at 727; Dixon (1991-1992) at 38; Law Society of NSW, *Submission 1* at 5; L Maher, *Anh hai: Young Asian Background Peoples' Perceptions and Experiences of Policing* (University of NSW, Sydney, 1997). See also *R v Kinsella* (Northern Ireland, Belfast Crown Court, December 1993, unreported) and *R v Murphy* (Northern Ireland, Belfast Crown Court, November 1993, unreported) discussed in Justice at 29-30; "Remaining Silent" (Editorial) *The Age* (25 August 1997) at 10. See also Victoria, Scrutiny of Acts and Regulations Committee at para 2.5.2.

202. Kingsford Legal Centre, *Submission* at 2-3; Law Society of NSW, *Submission 1* at 6; National Childrens and Youth Law Centre, *Submission* at 1; Youth Justice Coalition, *Submission* at 1, 3; M Newton, *Oral Submission*. See also F Vincent, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 3; Bar Council of Victoria, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 6.

the general population.²⁰³ This has led to the creation of specific rules regulating police questioning of Aborigines in several jurisdictions.²⁰⁴ Cultural factors may also lead suspects to remain silent. For example, certain cultures discourage discussion of domestic abuse and sexual assault.²⁰⁵ It was submitted that silence may be a normal and positive communication in some cultures, in a way which is not generally understood in New South Wales.²⁰⁶ The Commission accepts that some cultural factors may well affect whether a suspect remains silent when questioned by police.

2.119 **Personal characteristics.** English research indicates that women are much more likely than men to answer police questions²⁰⁷ and that juveniles are more likely than adult suspects to respond to police questions.²⁰⁸ One submission stated that a significant problem with the *Young Offenders Act 1997* (NSW), which provides for a system of warnings, cautions and youth justice conferences as alternatives to the prosecution of young offenders, is that it effectively precludes young suspects from relying on the right to silence because they are required to make admissions before being eligible to be punished under the alternative regime which the Act establishes for indictable offences.²⁰⁹

2.120 Personal characteristics such as mental disorders and illnesses, intellectual and developmental disabilities, acquired brain injuries and low intelligence make it difficult for suspects to communicate clearly with police

203. B Hocking and L Manville, *Submission* at 18; Law Society of NSW, *Submission 1* at 7; Marsdens, *Submission 1* at 2. See also Victoria, Scrutiny of Acts and Regulations Committee at para 2.5.2.

204. *Crimes Act 1914* (Cth) Part 1C; *R v Anunga* (1976) 11 ALR 41; *R v Narula* (1986) 22 A Crim R 409. There are also administrative directions which regulate police questioning of Aborigines in all jurisdictions except Victoria. For NSW, see NSW Police Service, *Commissioners' Instructions*, Instruction 11.04.

205. B Hocking and L Manville, *Submission* at 19.

206. Youth Justice Coalition, *Submission* at 3. See also Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (1997) at 505.

207. Bucke and Brown at 36; Dixon (1997) at 264. Female suspects are also less likely to request legal advice than males and are more likely to make admissions than men: Bucke and Brown at 20 and 33 respectively.

208. Bucke and Brown at 20, 33, 36; Evans at 88.

209. Youth Justice Coalition, *Submission* at 3.

when questioned.²¹⁰ The Intellectual Disability Rights Service stated in its submission that it is common practice for its solicitors to advise suspects to remain silent during police questioning because of the risk of their clients giving inaccurate answers and making false confessions.²¹¹ Although unreliable confessions may subsequently be successfully challenged, this would not adequately protect suspects who spend time on remand or in custody.

2.121 Research conducted for the Royal Commission on Criminal Justice concluded that the average IQ of suspects questioned was in the bottom 5% of the general population.²¹² Research carried out for the Commission in 1995 revealed that 23% of persons who appear in New South Wales Local Courts have either an intellectual disability or a borderline intellectual disability.²¹³

2.122 These characteristics also affect suspects' ability to understand or exercise other rights when questioned by police, including the right to a support person, to legal advice and, where required, to an interpreter. This clearly compounds the problems discussed above.

2.123 **Communication factors.** Numerous other factors also affect the ability of suspects to communicate with police. These include language skills and education levels. A suspect's ability to communicate may also be

210. T Dalla, *Oral Submission*; Ethnic Affairs Commission, *Submission 2* at 1; G Jones, *Oral Submission*; Kingsford Legal Centre, *Submission* at 1-3; Law Society of NSW, *Submission 1* at 6 and 8-9; Legal Aid NSW, *Submission* at 1; Gallagher, *Submission* at 3; IDRS, *Submission* at 1, 2; UTS Community Law and Legal Research Centre, *Submission* at 2; Marsdens, *Submission 1* at 1, 2; R Jones, *Submission* at 2. See also New South Wales Law Reform Commission, *People With an Intellectual Disability and the Criminal Justice System* (Report 80, 1996) at para 4.34-4.39 and 4.54-4.58; Ierace at 34-36; Chaaya at 91-92.

211. IDRS, *Submission* at 1.

212. G Gudjonsson, *Persons at Risk During Interviews in Police Custody: The Identification of Vulnerabilities* (Royal Commission on Criminal Justice, Research Study No 12, 1993) at 23-26.

213. New South Wales Law Reform Commission, *People With an Intellectual Disability and the Criminal Justice System: Appearances Before Local Courts* (Research Report 4, 1993) at 53.

compromised by the effects of alcohol and other drugs. A suspect who is arrested late at night is likely to be tired and disoriented.²¹⁴

2.124 **Police disclosure.** Frequently the police investigation will be developing and incomplete at the time the suspect is interviewed. The matters being put to him or her may well, therefore, be vague, confused, or wrong. The police may not reveal enough detail about the allegations to enable the suspect to answer or to warrant explanation.²¹⁵ Lack of police disclosure was the most frequent reason for advising clients to remain silent reported by defence lawyers who participated in the Commission's survey for this reference.²¹⁶ Many lawyers noted that this advice was often a temporary strategy pending disclosure by investigating police of more information. A recent study of English solicitors, advising suspects in the light of the amendments to the law in England, also concluded that this is a common reason for legal advice to remain silent.²¹⁷ The English Court of Appeal has held that the extent of police disclosure of the evidence against the suspect is a factor which the jury should consider in assessing the reasonableness of legal advice to the suspect to remain silent.²¹⁸ This exposes yet another issue that may be subject to extensive litigation at the trial.

2.125 **Protection of or fear of others.** The desire to protect others, particularly family members and friends whom the suspect knows or believes

214. This was also argued by the Ethnic Affairs Commission, *Submission 1* at 1; Ethnic Affairs Commission, *Submission 2* at 1; Kingsford Legal Centre, *Submission* at 1-3; J Gallagher, *Submission* at 3; Law Society of NSW, *Submission 1* at 7; Legal Aid NSW, *Submission* at 1; C Levingston, *Submission* at 2; UTS Community Law and Legal Research Centre, *Submission* at 2; Ethnic Affairs Commission, *Submission 2* at 1; Marsdens, *Submission 1* at 2. See also Victoria, Scrutiny of Acts and Regulations Committee at para 2.5.2.

215. This view was also expressed by Carroll and O'Dea, *Submission* at 2-3. See also Black (1989) at 9; Law Society of NSW, "Guidelines for Lawyers Advising Client Suspects at Police Stations" (30 July 1999) [<http://www.lawsocnsw.asn.au/practice/news/6.html>]; Papps at 2; Aronson at 37-38.

216. NSWLRC RR 10 at para 2.38.

217. J Williams at 566-567; Greer and Morgan at 29.

218. *R v Roble* [1997] Crim LR 449; *R v Argent* [1997] 2 Cr App R 27; *R v Kavanagh* (England, Court of Appeal, 7 February 1997, unreported). See also Cape (1997) at 395-396; A Jennings, "More Resounding Silence" (1999) 149 *New Law Journal* 1180 at 1181; Plowden at 1598.

is or may be responsible for or involved in the offences concerned, is another reason for silence which is consistent with innocence.²¹⁹ In a research study conducted for the Royal Commission on Criminal Justice at least 12% of suspects exercised the right to silence for this reason.²²⁰ Alternatively, a suspect may remain silent for fear of being labelled a police informer or for fear of reprisal by the offender.

2.126 *Other reasons.* In other situations police may ask the suspect very specific questions, about events which allegedly occurred many years ago or whilst the suspect was intoxicated or otherwise distracted, which place unrealistic demands on the suspect's memory. The suspect may feel unable to sort out the facts or fear making a mistake due to the pressure of police questioning. The suspect may reasonably want to think about the circumstances, refresh his or her memory, or obtain legal advice.

A suspect may decline to answer police questions in order to conceal conduct of which he or she is embarrassed or ashamed, to conceal illegal behaviour which is not under investigation, or merely due to shock and confusion at the allegations.²²¹

2.127 One submission argued that the defendant has the opportunity to tell the court at trial the reasons for remaining silent when questioned by police.²²² The New South Wales Police Service even argued in favour of a regime where the judge or magistrate could require the defence to explain why the defendant exercised the right to silence when questioned by police.²²³

219. This view was also expressed in "Remaining Silent" (Editorial) *The Age* (25 August 1997) at 10; Ierace at 33.

220. R Leng, *The Right to Silence in Police Interrogation: A Study of Some of the Issues Underlying the Debate* (Royal Commission on Criminal Justice, Research Study No 10, 1993) at 20. This is supported by Bucke and Brown at 36.

221. These reasons were also identified by Marsdens, *Submission 1* at 1-2; IDRS, *Submission* at 2; P Cloran, *Submission* at 2; UTS Community Law and Legal Research Centre, *Submission* at 2.

See also Walsh at 42 and 44; Black (1989) at 9; ALRC Report 2 (Interim) at para 148; *R v Burr* (1988) 37 A Crim R 220 at 223; *R v Kinsella* (Northern Ireland, Belfast Crown Court, December 1993, unreported) discussed in Justice at 29-30. In *R v Kinsella*, the defendant argued that he remained silent when questioned because he did not want to reveal to police that he was working illegally as a taxi driver. The Court drew adverse inferences.

222. K Rogers, *Submission* at 2; Walsh at 44.

223. NSW Police Service, *Submission* at 2.

Such a requirement would involve abolition rather than modification of the right of silence and is not justified.

2.128 Many of the reasons for remaining silent when questioned by police are also relevant to the decision not to give evidence at trial.²²⁴ In addition, many of the reasons for silence discussed above involve complex considerations which may not be readily understood by juries in the absence of expert psychological or sociological evidence. Conversely, some of these reasons may pre-dispose a jury to over-empathising with the defendant. It must be borne in mind that the trial is about the guilt or otherwise of the defendant; what did or did not occur at the police station is very much a secondary issue.

2.129 Finally, as Justice Smith of the Supreme Court of Victoria has pointed out, to draw adverse inferences from silence on police questioning in the absence of explanation by the defendant places him or her under considerable pressure to give evidence at trial in order to provide an explanation for exercising the right to silence when questioned by police:²²⁵

[T]he accused would probably be forced to get into the witness box and, if the suspect be your typical suspect, would be no match for a reasonably competent prosecutor even if he or she be innocent. This may be an unstated aim of those who would argue for change – that is, in effect, to compel accused persons to give evidence.

Fundamental principles

2.130 The principles that defendants are presumed innocent until proven guilty and that the burden of proving the guilt of defendants rests on the prosecution are fundamental to the criminal justice system. Many submissions argued that modifying the right to silence when questioned by police would undermine these principles. It was argued that if remaining silent carried a risk of having adverse consequences for the suspect at trial, suspects would feel pressured or compelled to co-operate with the police investigation.²²⁶ This argument was submitted to the European Court of Human

224. See Chapter 4.

225. T Smith, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 19; see also 11. See para 2.130-2.133.

226. Legal Aid NSW, *Submission* at 1; B Kennedy, *Submission* at 1; Youth Justice Coalition, *Submission* at 1; UTS Community Law and Legal Research Centre, *Submission* at 1-3; Kingsford Legal Centre, *Submission* at 4; R Jones,

Rights by Amnesty International in *Murray v United Kingdom* and was accepted by the minority of the Court. The Commission considers this argument to be a powerful one.

2.131 The current caution given to suspects in New South Wales is:²²⁷

You are not obliged to say or do anything unless you wish to do so, but whatever you say or do may be used in evidence. Do you understand?

2.132 The Commission received a number of submissions which argued that many suspects cannot understand the caution, and are likely to interpret it as pressuring or threatening.²²⁸ Modifying the consequences of remaining silent when questioned would, of course, require changes to this caution. The Law Society of New South Wales suggested that it would be difficult to devise a caution to reflect the modified position and which suspects would be able to understand.²²⁹ In England and Wales, the revised caution states:²³⁰

Submission at 1; IDRS, *Submission* at 3; Marsdens, *Submission 1* at 2; Marsdens, *Submission 2* at 3; NSW Council for Civil Liberties, *Submission* at 3; G Turnbull, *Submission* at 4; D Guilfoyle, *Submission* at 2-3; J Fleming, *Submission* at 1; J Gallagher, *Submission* at 2, 3 and 5; A Arafas, *Submission* at 2. See also B Hocking and L Manville, *Submission* at 15 and 20. See also F Vincent, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 2. See also Dixon (1997) at 228; Justice Coldrey (1990) at 25, 28 and 30; Dennis at 10-11; Harvey at 183-184; Odgers (1985) at 85; Pattendon at 602; J Williams at 567; Wood and Crawford at 2, 3, 20; Royal Commission on Criminal Procedure at para 4.50, 4.51, 4.66; Royal Commission on Criminal Justice at 52-55; ALRC, Report 2 (Interim) at para 148; ALRC, Report 26 (Interim) at para 756; Greer (1990) at 725; Justice at 13-15; Victoria, Consultative Committee on Police Powers at 13; Ierace at 33, 34; Criminal Bar Association of Victoria, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 2.3, 2.4 and 5.8; Bar Council of Victoria, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 15, 24, 52-54; Chaaya at 84 and 91. Contra Odgers (1985) at 85; Jacobsen at Law Week Seminar.

227. NSW Police Service, *Commissioner's Instructions*, Instruction 37.14.

228. M Asprey, *Submission* at 1; J Eades, *Submission* at 2; G Jones, *Oral Submission*; Marsdens, *Submission 2* at 4. See also Basten at 92.

229. Law Society of NSW, *Submission 1* at 2.

230. *Archbold Criminal Pleading, Evidence and Practice* (London, 1997) at 1385.

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.

2.133 Research which examined the way ordinary members of the public interpreted this caution concluded that 60% of people felt that the caution was pressuring or threatening. 80% of people felt that the second sentence of the caution, when read alone, had this effect.²³¹ Research undertaken in Northern Ireland indicates that defence lawyers overwhelmingly believe that suspects do not comprehend the caution introduced in 1988 to accompany the Northern Ireland provisions, most reporting that suspects believed the caution meant that there was an obligation to answer any question put by the police.²³²

International law

2.134 Many submissions emphasised the need to ensure that the law relating to the right to silence when questioned by police is consistent with Australia's human rights obligations under the *International Covenant on Civil and Political Rights* and the *United Nations Convention on the Rights of a Child*.²³³ Both these instruments recognise the right not to be compelled to confess guilt as an aspect of the right to a fair trial.²³⁴

2.135 However, there is no internationally accepted prohibition on drawing adverse inferences at trial from a suspect's silence at the police station. As discussed in paragraph 2.40 above, the European Court of Human Rights has upheld provision of the Northern Ireland regime which allows adverse

231. E Shepherd, "The Police Caution: Comprehension and Perception in the General Population" (1995) 4 *Expert Evidence* 60; Munday at 379.

232. Justice at 14. See also Victoria, Scrutiny of Acts and Regulations Committee at para 2.7.3.

233. D Guilfoyle, *Submission* at 1-2; Justice Action, *Submission* at 1; NSW Council for Civil Liberties, *Submission* at 1-4; NSW Young Lawyers, *Submission* at 1-2; B Kennedy, *Submission* at 1; Youth Justice Coalition, *Submission* at 1; UTS Community Law and Legal Research Centre, *Submission* at 1, 2; Law Society of NSW, *Submission 2* at 5; Law Society of the ACT, *Submission* at para 2.1-2.3; IDRS, *Submission* at 3. See also T Smith, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 2.

234. *International Covenant on Civil and Political Rights* art 14(3)(g); *United Nations Convention on the Rights of a Child* art 40.2(b)(iv).

inferences to be drawn, holding that the provision is not inconsistent with the right to a fair trial guaranteed by the *European Convention on Human Rights*.²³⁵

The Commission's recommendation

2.136 The Commission received 60 submissions as part of this review. A number of submissions favoured permitting adverse inferences to be drawn at trial where the defendant does not answer police questions (several submissions that favoured this alternative emphasised that their position was conditional on increased protections for suspects).²³⁶ It was also argued that defence evidence which was not disclosed during police questioning should be excluded at trial,²³⁷ and that refusing to answer police questions should be made an offence.²³⁸

2.137 The Commission opposes modifying the existing law by imposing penal sanctions on suspects who do not answer police questions. The Commission also considers that it would be unjust if suspects who remained silent at this stage were penalised at their trial by the exclusion of defence evidence.

2.138 For the reasons discussed above, the Commission has concluded that it is not appropriate to qualify the right to silence in the way provided by the

235. It has been argued that it cannot be automatically assumed that this decision guarantees the validity of the equivalent English provisions. Munday argues that it cannot necessarily be assumed that the European Court of Human Rights would take the same approach to the English provisions as it did to the Northern Ireland provisions. See also A Jennings, "Recent Developments in the Law Relating to the Right to Silence" (1999) 5 *Archbold News* 5 at 8; A Jennings, "More Resounding Silence" (1999) 149 *New Law Journal* 1232 at 1233.

236. C Bone, *Submission* at 2-3; B Bright, *Submission* at 1-2; C Corns, *Submission* at 3; T Cleary, *Submission* at 1; P Cloran, *Submission* at 4-5; J Cramond, *Submission* at 1; L Davies, *Submission* at 4-5; E Elms, *Submission* at 1; R Miller, *Submission* at 4; NSW Police Service, *Submission* at 1; Police Association of NSW, *Submission 1* at 3, 4 and 6; Police Association of NSW, *Submission 2* at 3; K Rogers, *Submission* at 1; D Shillington, *Submission* at 1; M Tedeschi, *Submission* at 1-2.

237. Police Association of NSW, *Submission 1* at 6.

238. Police Association of NSW, *Submission 1*, Response 2, (10 March 1998) at 4; G Kellner, *Submission* at 1-2 and 6.

English and Singapore legislation. The Commission considers the right to silence is an important corollary of the fundamental requirement that the prosecution bears the onus of proof, and a necessary protection for suspects. Its modification along the lines provided for in the England and Wales and Singapore would, in the Commission's view, undermine fundamental principles concerning the appropriate relationship between the powers of the State on the one hand and the liberty of the citizen on the other, exacerbated by its tendency to substitute trial in the police station for trial by a court of law. There are also logical and practical objections to the English provisions. An examination of the empirical data, moreover, does not support the argument that the right to silence is widely exploited by guilty suspects, as distinct from innocent ones, or the argument that it impedes the prosecution or conviction of offenders.

2.139 There is in this State an additional practical problem with importing the English law. A fundamental requirement of fairness in any obligation imposed to reveal a defence when questioned by police is that legal advice be available to suspects to ensure that they understood the significance of the caution and the consequences of silence. This has been acknowledged in the United Kingdom.²³⁹ Provision of duty solicitors to give the necessary advice is impossible within presently available legal aid funding. Significant increases in legal aid funding appear to be unlikely and, in the Commission's view, could not be justified (on financial grounds alone) unless there were significant advantages that can clearly be demonstrated for the effectiveness of investigations and the administration of justice.

Recommendation 1

The Commission recommends that s 89 of the *Evidence Act 1995* (NSW) be retained in its current form. Legislation based on s 34, 36 and 37 of the *Criminal Justice and Public Order Act 1994* (Eng) should not be introduced in New South Wales.

239. See para 2.36; 2.88.

3. ■ Pre-trial disclosure

- Pre-trial disclosure in New South Wales
- Pre-trial disclosure in other jurisdictions
- Reform of pre-trial disclosure

3.1 Pre-trial disclosure in New South Wales is regulated by a combination of common law rules, legislation, guidelines issued by the Director of Public Prosecutions, rules issued by the Bar Association and the Law Society and standard practice directions issued by the Supreme Court of New South Wales. Other jurisdictions have implemented statutory regimes requiring extensive pre-trial disclosure by the prosecution and the defence, with a range of sanctions for non-compliance. This chapter examines the existing law in New South Wales, the position in other jurisdictions both in Australia and overseas, the policy arguments for and against pre-trial disclosure and the options for reform. It includes the Commission's recommendations for reform of pre-trial disclosure in New South Wales.

PRE-TRIAL DISCLOSURE IN NEW SOUTH WALES

Common law

3.2 There is no general common law right to discovery by either party in criminal trials in Australia, although courts have a discretion to require disclosure on the ground of fairness, and in particular cases non-disclosure can amount to a miscarriage of justice.¹

3.3 At common law the prosecution is required to disclose its intention to call a witness at trial who was not called at the committal,

1. *Maddison v Goldrick* [1976] 1 NSWLR 651; *R v Saleam* (1989) 16 NSWLR 14; *R v Wesley* (1990) Tas R 256; *Sobh v Police Force of Victoria* (1994) 1 VR 41; *Carter v Hayes* (1994) 16 SASR 451; *Jamieson v The Queen* (1993) 177 CLR 574 (prosecution did not disclose to defence that prosecution witness had been granted a limited immunity. On the facts, the trial had not miscarried); *R v CPK* (NSW Court of Criminal Appeal, No 60330/94, 21 June 1995, unreported) (prosecution failure to disclose psychiatric reports to defence resulted in miscarriage of justice); *Carew v Carone* (1991) 5 WAR 1 (prosecution failure to disclose identity of witness to defence did not result in a miscarriage of justice on the facts); *Clarkson v DPP* [1990] VR 745. For a discussion of the circumstances in which the courts will order disclosure and when non-disclosure amounts to a miscarriage of justice, see J Hunter and K Cronin, *Evidence, Advocacy and Ethical Practice* (Butterworths, Sydney, 1995) at 190.

and to give the defence a copy of the relevant witness statement.² The prosecution is not generally required to provide the defence with copies of statements of persons whom the prosecution does not intend to call as witnesses (even if the statements could provide the defence with relevant evidence), although it is considered good practice to do so.³ A decision by the prosecution not to call a particular person as a witness can constitute a ground for setting aside a conviction if it gives rise to a miscarriage of justice.⁴

3.4 The High Court has emphasised that, at common law, a defendant has no obligation to disclose information about the defence to the Crown until the trial.⁵

Disclosure by police to the prosecution

3.5 One of the critical sources of pre-trial disclosure in New South Wales is a document issued by the New South Wales Office of the Director of Public Prosecutions, the DPP Prosecution Guidelines.⁶ The DPP Prosecution Guidelines provide that, in all matters prosecuted by the Office of the Director of Public Prosecutions, investigating police must disclose to the prosecutor all material and information in their possession relevant to the proof of the charge (the brief of evidence).⁷

2. *R v Pearson* [1953] QWN 18; *R v Devenish* [1969] VR 737 at 739 per the Full Court; *In Re Van Beelan* (1974) 9 SASR 163 at 248-249 per the Full Court; *R v Russell-Smith* (1981) 51 FLR 42; *R v Utanis* (1982) 29 SASR 592.
3. *R v Lawless* (1979) 142 CLR 659. Contra *In Re Van Beelan* (1974) 9 SASR 163 at 248-249 per the Full Court; *R v Perry (No 1)* (1981) 27 SASR 166; *R v Easom* (1981) 28 SASR 134 at 148 per Wells J, Full Court; *Gouldham v The Queen* [1970] WAR 119 at 122 per Virtue SPJ; at 133 per Wickham J.
4. *R v Apostilides* (1984) 154 CLR 563 at 575; *R v Kneebone* [1999] NSWCCA 279.
5. *Petty v The Queen* (1991) 173 CLR 95 at 108 per Brennan J.
6. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (March 1998) furnished pursuant to the *Director of Public Prosecutions Act 1986* (NSW) s 13 (“DPP Prosecution Guidelines”).
7. DPP Prosecution Guidelines, Guideline 11 and Appendix D; NSW Police Service, *Commissioner’s Instructions*, (“Commissioner’s Instructions”) Instruction 92.07.

Police are also required to identify, in the form of a written certificate, all other material and information of which they are aware which might be relevant to either the prosecution or the defence.⁸

3.6 Compliance with the DPP Prosecution Guidelines requires both initial and continuing assessment by investigating police of what is required to be disclosed. Disclosure of material which is identified by police as sensitive is referred to senior prosecutors and police officers for consideration.⁹ Breach of these requirements can be a ground for disciplinary action.

3.7 A majority of the judges, magistrates, legal practitioners and police prosecutors surveyed by the Commission for this reference reported a high level of compliance by investigating police with these requirements.¹⁰ However, the New South Wales Director of Public Prosecutions, Mr Nicholas Cowdery QC, has commented:¹¹

All too often the required certificate is not provided; and even when obtained (as often emerges later and usually during the hearing) is inaccurate. Investigators in many cases still do not disclose all relevant material known to them, sometimes through incompetence or guile or a mixture of both – the old attitude of winning at all costs dies hard in some quarters – and sometimes because the relevance is not immediately apparent.

This latter problem is more likely to arise with limited testing of the prosecution case at committal.¹²

8. DPP Prosecution Guidelines, Appendix D; Commissioner's Instructions, Instruction 92.05

9. DPP Prosecution Guidelines, Appendix D; Commissioner's Instructions, Instruction 92.05. For a discussion of police disclosure obligations by the current NSW Director of Public Prosecutions, see N Cowdery, "Pre-trial Disclosure by the Prosecution to the Defence", paper presented at the conference *Human Rights and the Criminal Process: Is the Right of an Accused to a Fair Trial Being Eroded?* (Strasbourg, 15-16 May 1997).

10. New South Wales Law Reform Commission, *The Right to Silence and Pre-trial Disclosure in New South Wales* (Research Report 10, 2000) at Table 3.3. See also Table 3.1 and para 3.7-3.14.

11. Cowdery at 4.

12. See para 3.9-3.11.

Prosecution disclosure

Service of briefs

3.8 The other most important component of pre-trial disclosure in New South Wales is the requirement under the *Justices Act 1902* (NSW) that the prosecution serve a brief of evidence on the defence.¹³ This requirement applies in respect of most summary offences and indictable offences triable summarily.¹⁴ The brief of evidence consists of all prosecution witness statements, exhibits and all other documents relevant to the prosecution. The brief must be served at least 14 days before the hearing.¹⁵ Where proposed prosecution evidence is not served on the defence in accordance with these requirements, the Court can grant an adjournment¹⁶ or refuse to admit the evidence.¹⁷

Committal hearings

3.9 The committal hearing is a process where a magistrate examines the prosecution evidence and determines whether there is sufficient evidence to commit a defendant to trial in a superior court.¹⁸ Although the main purpose of committals is to act as a filtering process to identify and dispose of weak prosecution cases, it also provides an opportunity for the parties to identify and confine the issues to be dealt with at trial.¹⁹

3.10 Paper committals were first introduced in New South Wales in 1983. In 1987 they were made compulsory, subject to provision for cross-examination of witnesses where ordered by the magistrate. In

13. *Justices Act 1902* (NSW) s 66A(1) and see s 51B, 66A-66H, as amended by the *Justices Amendment (Briefs of Evidence) Act 1997* (NSW) s 3 and Sch 3; *Justices (General) Regulation 1993* (NSW) cl 13A-13C.

14. The Local Courts can exempt the prosecution from complying with this requirement in exceptional circumstances: *Justices Act 1902* (NSW) s 66E.

15. *Justices Act 1902* (NSW) s 66B(2).

16. *Justices Act 1902* (NSW) s 66G.

17. *Justices Act 1902* (NSW) s 66F.

18. *Justices Act 1902* (NSW) Part 4 Division 1 Subdivision 7.

19. Committals Review Committee, *Report of the Committals Review Committee* (New South Wales Attorney General's Department, Criminal Law Review Division, 1999) at para 3.1-3.3.

1992, further changes were made to the committal process with the inclusion of s 48EA in the *Justices Act 1902* (NSW). Section 48EA (now repealed) required that the court be satisfied that special reasons exist before consenting to hear oral evidence by an alleged victim of a violent crime at a committal hearing.

3.11 In 1996, s 48EA was repealed and replaced with s 48E. Section 48E also provides that the court be satisfied that special reasons exist before consenting to hear oral evidence by an alleged victim of a violent crime at a committal hearing.²⁰ In addition, under s 48E, substantial reasons in the interests of justice must be established before a witness other than a victim in an offence of violence is required to attend to give oral evidence during a committal hearing.²¹ The circumstances in which cross-examination of witnesses should be permitted under s 48E have been the subject of considerable judicial consideration.²² However, in practice s 48E is now more liberally construed and cross-examinations are more often permitted than earlier.

Barristers' and Solicitors' Rules

3.12 The New South Wales Barristers' Rules and the Law Society of New South Wales Solicitors' Rules (together "the Rules") require prosecutors to disclose to the defence as soon as practicable all material which might be relevant to the guilt or innocence of the defendant, including the names and means of locating potential witnesses.²³ Prosecutors who reasonably believe that proposed evidence may have been illegally or improperly obtained must promptly inform the defence and make a copy of the evidence

20. *Justices Act 1902* (NSW) s 48E(2)(a), inserted by the *Justices Amendment (Committals) Act 1996* (NSW).

21. *Justices Act 1902* (NSW) s 48E(2)(b).

22. *R v Kennedy* (1997) 94 A Crim R 341; *Losurdo v DPP* (New South Wales, Supreme Court, 10 March 1998, Hidden J, unreported); *Hanna v Kearney* (New South Wales, Supreme Court, No 30046/98, 28 May 1998, Studdert J, unreported); *DPP v Tanswell* (New South Wales, Court of Criminal Appeal, 2 October 1998, unreported); *Leahy v Price* (New South Wales, Supreme Court, No 11756/98, 28 September 1998, Adams J, unreported). For an evaluation of these amendments, see Committals Review Committee.

23. Law Society of NSW, *Solicitors' Rules* ("Solicitors' Rules") r A66; NSW Bar Council, *NSW Barristers' Rules* ("Barristers' Rules") r 66.

available to the defence.²⁴ Disclosure is not required, or can be restricted, where it would seriously threaten the administration of justice, or a person's safety.²⁵ In some cases, disclosure of particular evidence may be confined to the defendant's legal representatives.

3.13 The Rules do not include a mechanism for the parties to resolve disputes about prosecution disclosure, or empower the courts to impose sanctions for non-compliance. To enforce the Rules, an aggrieved person must lodge a complaint with the Office of the Legal Services Commissioner, the Law Society of New South Wales or the New South Wales Bar Association.²⁶ There is, however, no reason why the trial or appellate court could not investigate the consequences of a breach of the Rules in order to determine whether it has affected the fairness of the trial.²⁷

DPP Prosecution Guidelines

3.14 The DPP Prosecution Guidelines also provide that prosecutors must disclose to the defence all facts and circumstances and the identity of all witnesses reasonably to be regarded as relevant to any issue likely to arise at trial.²⁸ This extends to the disclosure of any statement by a witness that may be inconsistent with the witness's

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24. Solicitors' Rules, r A67; Barristers' Rules, r 67. Under r A67 of the Solicitors' Rules, prosecutors must also inform the defence of the reasons for believing that the evidence may have been obtained illegally or improperly.
 25. Solicitors' Rules, r A66; Barristers' Rules, r 66. The Solicitors' Rules provide that disclosure is not required where the prosecutor reasonably believes that the threat could not be avoided by conditional disclosure such as obtaining an undertaking from defence counsel not to disclose the material to the defendant or any other person: r A66. Prosecutors must also consider whether non-disclosure could prejudice the defence and whether the charge to which the material relates should be withdrawn or replaced with a lesser charge: r A66A.
 26. The Office of the Legal Services Commissioner's Annual Report for 1996-1997 includes a detailed breakdown of complaints against legal practitioners. There is no reference to complaints against prosecution counsel for non-compliance with disclosure requirements. There are no reported decisions of the Legal Services Tribunal dealing with this.
 27. *R v Kneebone* [1999] NSWCCA 279.
 28. DPP Prosecution Guidelines, Guideline 11. For a discussion of the scope of this obligation, see Cowdery at 5-7.

intended evidence.²⁹ Tactical considerations are not to be taken into account in assessing what material will be disclosed to the defence.³⁰ Where the prosecution intends to lead evidence which appears on reasonable grounds to have been illegally or improperly obtained, the prosecutor must inform the defendant within a reasonable time.³¹

3.15 The overriding interests of justice may require withholding of information, which requires the approval of the Director or Deputy Director of Public Prosecutions.³² This power is rarely exercised.³³ Prosecutors should not disclose sensitive material to the defence without first consulting with the police officer in charge of the case.³⁴

3.16 The DPP Prosecution Guidelines operate subject to law and to the Barristers' Rules and the Solicitors' Rules.³⁵ They do not have statutory force and do not empower the courts to impose sanctions for non-compliance. The Supreme Court of New South Wales has held that decisions of prosecuting authorities on the conduct of prosecutions are not reviewable by the courts.³⁶

3.17 A majority of the participants in the survey conducted by the Commission for this reference reported that prosecutors almost always complied with these pre-trial disclosure duties.³⁷

Subpoenas

3.18 The defence can subpoena the prosecution to disclose material, including witness statements, which has a bona fide evidentiary purpose in relation to the investigation and prosecution of the

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29. DPP Prosecution Guidelines, Guideline 11.
 30. DPP Prosecution Guidelines, Guideline 11.
 31. DPP Prosecution Guidelines, Guideline 14.
 32. DPP Prosecution Guidelines, Guideline 11.
 33. N Cowdery, comments at the seminar *The Right to Silence* (New South Wales Law Reform Commission, Law Week 1998, Sydney, 12 May 1998).
 34. DPP Prosecution Guidelines, Guideline 7.
 35. DPP Prosecution Guidelines, Introduction.
 36. *M v DPP* (New South Wales, Supreme Court, No 30015/96, Dunford J, 6 March 1996, unreported).
 37. NSWLRC RR 10 at Table 3.5. See also Table 3.1 and para 3.7-3.10 and 3.18-3.21.

charge.³⁸ In deciding whether to uphold a subpoena, the test is whether it is “on the cards” that the documents would materially assist the defence.³⁹ Subpoenas cannot be used to achieve one-sided discovery against the police or as a delay tactic.⁴⁰ Thus the procedure is limited in that it can only be used where the defence is aware of the existence or potential existence of particular material which has not been disclosed.

In New South Wales, legal aid is not generally available to finance preparation for or the conduct of committal proceedings.⁴¹ This also significantly limits defence resources for pursuing disclosure via subpoenas.

Defence disclosure

Alibi evidence

3.19 The common law rule that there is no right to discovery in criminal trials is modified by statutory disclosure requirements in relation to alibi evidence in trials for indictable offences.⁴² The defence is required to give written notice to the Director of Public Prosecutions of particulars of intended alibi evidence, including the names and addresses of proposed witnesses or, where the defence does not have this information, information which might assist the prosecution to locate the witness. Notice is required within 10 days of the committal. This is a continuing obligation.

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38. *Alistair v The Queen* (1984) 154 CLR 404; *R v Saleam* (1989) 16 NSWLR 14. For a discussion of subpoenas see Hunter and Cronin at 190-200.
 39. *R v Saleam* (1989) 16 NSWLR 14 at 17-18 per Hunt J, with whom the other members of the Court agreed; *Attorney General (New South Wales) v Stuart* (1994) 34 NSWLR 667 at 681 and 682-684 per Hunt CJ at CL with whom Studdert J agreed.
 40. *R v Saleam* (1989) 16 NSWLR 14 at 17 and 19 per Hunt J, with whom the other members of the Court agreed; *Attorney General (New South Wales) v Stuart* (1994) 34 NSWLR 667 at 681 per Hunt CJ at CL with whom Studdert J agreed.
 41. Hunter and Cronin at 190. Legal aid is available in this situation in murder cases.
 42. *Criminal Procedure Act 1986* (NSW) s 48 (formerly *Crimes Act 1900* (NSW) s 405A).

3.20 If this requirement is not satisfied, the proposed alibi evidence cannot be introduced without the leave of the court. Leave is by no means automatically granted, and the New South Wales Court of Criminal Appeal has declined to interfere in a number of cases where leave has been refused.⁴³ The Court of Criminal Appeal has also held that, where the defence does not comply with this requirement until the last available opportunity, the prosecution is entitled to cross-examine the defendant about this delay.⁴⁴ The Commission's research suggests that, while alibi notices are generally given, the time frame for this requirement is not always met.⁴⁵

Substantial impairment by abnormality of mind

3.21 In murder trials, the defence is required to notify the Director of Public Prosecutions of the defendant's intention to raise the partial defence of substantial impairment by abnormality of mind, including the names and addresses of proposed witnesses on this issue and particulars of their evidence.⁴⁶ Notice must be given at least 35 days before trial.⁴⁷ If these requirements are not satisfied, the defence can only lead the relevant evidence with the leave of the court.⁴⁸ The Commission's research for this reference indicated that this requirement was always complied with in the small number of cases in which it applied.⁴⁹

43. *R v Trad* (New South Wales, Court of Criminal Appeal, No 60734/94, 19 February 1996, unreported) at 32-33; *R v Visser* (New South Wales, Court of Criminal Appeal, No 322/94, 21 November 1985, unreported) at 3-5.

44. *Lattouf v The Queen* (1980) 2 A Crim R 65 at 73-74 per Street CJ, with whom Moffit P and Cantor J agreed. There is English authority that, where the English version of this requirement is not complied with, the proper course is to permit the defence to provide late notice and to grant the prosecution an adjournment to enable the alibi to be investigated: *R v Cooper* (1979) 69 Cr App R 229.

45. NSWLRC RR 10 at para 3.40-3.43.

46. *Crimes Act 1900* (NSW) s 23A, *Criminal Procedure Act 1986* (NSW) s 49 (formerly *Crimes Act 1900* (NSW) s 405AB).

47. *Crimes (General) Regulations 1995* (NSW) reg 4A.

48. *Criminal Procedure Act 1986* (NSW) s 49(1) (formerly *Crimes Act 1900* (NSW) s 405AB(1)).

49. NSWLRC RR 10 at para 3.44.

Defence opening address

3.22 Defence counsel are able to address the jury at the beginning of the trial, immediately after the prosecution opening address.⁵⁰ The Commission has considered whether this should be made compulsory,⁵¹ but it is not persuaded that this is an appropriate time for compulsory defence disclosure. If disclosure is to improve the process, it must occur before the trial commences.

Reciprocal disclosure by the prosecution and the defence

Expert evidence

3.23 There is no requirement for pre-trial disclosure of expert evidence in criminal trials, except in relation to expert evidence about the defence of substantial impairment by abnormality of mind.⁵² However, a party who seeks to lead expert evidence using the certificate procedure under the *Evidence Act 1995* (NSW) is required to disclose the evidence to the other party 21 days before the hearing.⁵³

Tendency, coincidence and first-hand hearsay evidence

3.24 If either party intends to lead evidence of tendency or coincidence, or first-hand hearsay evidence, that party must generally give advance notice of that intention.⁵⁴

Supreme Court Practice Directions

3.25 In all Supreme Court trials, the Crown is required to disclose a statement of the Crown case, a list of prosecution witnesses and all

50. *Criminal Procedure Act 1986* (NSW) s 97 (formerly *Crimes Act 1900* (NSW) s 405).

51. See the *Crimes (Criminal Trials) Act 1999* (Vic) s 8, 13 and 14. The Law Reform Commission of Western Australia has recently recommended the introduction of compulsory defence opening addresses: Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System* (Final Report, 1999) Recommendation 318 and see discussion at para 29.20-29.21.

52. See para 3.21.

53. *Evidence Act 1995* (NSW) s 177.

54. *Evidence Act 1995* (NSW) s 67, 97, 98.

witness statements before the arraignment.⁵⁵ At the arraignment, the defence should inform the Court which facts asserted by the Crown are agreed, which facts are in issue, and which prosecution witnesses the defence intends to cross-examine.⁵⁶ This practice note has not been effective in procuring disclosure. Although the Crown usually complies, it is effectively ignored by the defence in almost all trials. Having regard to the lack of sanctions and the character of the privilege of silence, this is not surprising. It is the experience of most Supreme Court judges that the more competent and experienced counsel are in any event likely to provide a high level of informal disclosure.

PRE-TRIAL DISCLOSURE IN OTHER JURISDICTIONS

3.26 The common law rule that there is no right to discovery in criminal trials, and the subpoena process described in paragraph 3.18, apply in all Australian jurisdictions. All Australian Directors of Public Prosecutions have issued guidelines dealing with disclosure by police to prosecutors and by prosecutors to the defence, and all jurisdictions in Australia have introduced statutory defence disclosure requirements relating to particular types of evidence. In Victoria and especially the United Kingdom, comprehensive and reciprocal statutory pre-trial disclosure requirements have been enacted.

Australia

Victoria

3.27 **Reciprocal disclosure regime.** The *Crimes (Criminal Trials) Act 1999* (Vic), which commenced operation on 1 September 1999,⁵⁷ establishes a number of new pre-trial procedures for the Victorian County and Supreme Courts.⁵⁸ Under this Act, the presentment must

55. Supreme Court of NSW, *Supreme Court Practice Note 103* (1998) 44 NSWLR 184.

56. Supreme Court of NSW, *Supreme Court Practice Note 103* (1998) 44 NSWLR 184. There is no equivalent practice direction in the District Court.

57. *Crimes (Criminal Trials) Act 1999* (Vic) s 2.

58. *Crimes (Criminal Trials) Act 1999* (Vic) s 3.

be filed in all cases.⁵⁹ The prosecutor is required to file and serve a summary of the prosecution opening address, together with a notice of pre-trial admissions, at least 28 days before trial.⁶⁰

3.28 The defence is required to file and serve a defence response to these documents. The defence response must identify the acts, facts, matters and circumstances in the summary of prosecution opening with which issue is taken and the basis on which issues is taken, as well as what evidence identified in the prosecution notice of pre-trial admissions is agreed to be admitted without further proof, what evidence is in issue and on what basis issue is taken.⁶¹ The defence is also required to file and serve copies of expert witness statements at least 14 days before trial.⁶² Where either party intends to raise a question of law, the party must notify the court of this at least 14 days before trial.⁶³ There is provision for the Court to resolve such questions on the basis of written submissions, where all parties agree.⁶⁴

3.29 Evidence which was not disclosed as required under this Act, or which involves a substantial departure from the disclosed case, can be introduced at trial, but the leave of the court is required.⁶⁵ The trial judge, and, with the leave of the court, the other party, can comment to the jury on non-disclosure or departure from the disclosed case.⁶⁶ The Court may make costs orders for non-disclosure, departure from the disclosed case or where a party has unreasonably prolonged the

59. *Crimes (Criminal Trials) Act 1999* (Vic) s 4. In general, the presentment must be filed at least 14 days before the first directions hearing. In trials for sexual offences, the presentment must be filed at least 28 days before trial.

60. *Crimes (Criminal Trials) Act 1999* (Vic) s 6. This is not required where there has been a properly recorded post-committal conference.

61. *Crimes (Criminal Trials) Act 1999* (Vic) s 7.

62. *Crimes (Criminal Trials) Act 1999* (Vic) s 9.

63. *Crimes (Criminal Trials) Act 1999* (Vic) s 10(1).

64. *Crimes (Criminal Trials) Act 1999* (Vic) s 10. The Court is also empowered, but not required, to hold directions hearings designed to increase the capacity for judicial management of the trial process: see s 5.

65. *Crimes (Criminal Trials) Act 1999* (Vic) s 15.

66. *Crimes (Criminal Trials) Act 1999* (Vic) s 16(1). The trial judge's discretion to allow a party to comment is regulated, as is the nature of comment permitted: s 16(2) and (3).

trial, including orders against a party or a party's legal practitioner.⁶⁷ The Act also provides that the court can institute professional complaints against legal practitioners for non-disclosure.⁶⁸

3.30 The trial judge can order that copies of the summary of the prosecution opening and the defence response, and the parties' opening and closing speeches themselves, be given to the jury to help the jury understand the issues.⁶⁹

3.31 The *Crimes (Criminal Trials) Act 1999* (Vic) repeals an earlier, more extensive, reciprocal disclosure regime.⁷⁰ The previous regime, which was not widely used, had been criticised by judges and commentators.⁷¹ One submission argued that inadequate funding of both the Victorian Office of Public Prosecutions and Legal Aid, the inexperience of legal practitioners and the combative culture of the legal profession are responsible for the problems with the previous Victorian regime.⁷²

3.32 ***Alibi evidence.*** The defence is also required to disclose alibi evidence.⁷³ Notice must be given during the committal or in writing to the Director of Public Prosecutions on the day the defendant is committed for trial, or, if no committal is held, on the day the presentment is served on the defendant. The particulars required are

67. *Crimes (Criminal Trials) Act 1999* (Vic) s 24-27.

68. *Crimes (Criminal Trials) Act 1999* (Vic) s 28.

69. *Crimes (Criminal Trials) Act 1999* (Vic) s 19.

70. *Crimes (Criminal Trials) Act 1993* (Vic). *R v Garner* [1994] 1 VR 400 at 403, 405; *R v Smith* [1995] 1 VR 10 at 36.

71. *R v Garner* [1994] 1 VR 400 at 403, 405; *R v Smith* [1995] 1 VR 10 at 36; Victoria, Scrutiny of Acts and Regulations Committee, *Inquiry into the Right to Silence* (Final Report, 1999) Recommendation 7 and para 2.4; C Corns, *Anatomy of Long Criminal Trials* (AIJA, Melbourne, 1997) at 62-65; K Mack and S Roach Anleu, *Pleading Guilty: Issues and Practices* (AIJA, Melbourne, 1995) at 125; M Pedley, "The Problems with Court Rules and Procedure in Criminal Cases – A Prosecution Perspective" paper presented at the conference *Reform of Court Rules and Procedures in Criminal Cases* (AIJA, Brisbane, 3-4 July 1999).

72. C Corns, *Submission* at 2.

73. *Crimes Act 1958* (Vic) s 399A and 399B; *Crimes (Criminal Trials) Act 1993* (Vic) s 11(3)(c).

similar to those required in New South Wales.⁷⁴

If notice is not given, the evidence cannot be introduced without the leave of the court.⁷⁵ Police and the prosecution are prohibited from communicating with proposed defence alibi witnesses in relation to the case, except in the presence and with the consent of the defendant's legal representative. Contravention of this requirement constitutes contempt.⁷⁶

3.33 *Pegasus Two initiative.* A Supreme Court of Victoria criminal list practice direction provides for a pre-trial hearing, known as a "Pegasus Two Hearing", before the commencement of every criminal trial.⁷⁷ At the Pegasus Two Hearing, the parties exchange an agreed list of prosecution witnesses, a chronology of agreed facts, a list of issues to be resolved prior to the empanelment of the jury and an agreed statement of the legal elements of the charges and issues. The defence is also required to provide a statement of the matters admitted by the defendant.

The practice direction notes that realistic preparation for trials will require that the counsel who actually appear at the trials attend the Pegasus Two Hearing.

Western Australia

3.34 *Court of Petty Sessions Pilot.* A pilot prosecution pre-trial disclosure regime is currently operating for summary prosecutions in the Perth Court of Petty Sessions. The Law Reform Commission of Western Australia, in its recently completed review of the criminal and civil justice system, noted that it received a number of submissions commenting on the success of this pilot.⁷⁸

3.35 *Alibi evidence.* In criminal trials for indictable offences, the defence is required to disclose alibi evidence.⁷⁹ Fewer particulars are required in Western Australia than in New South Wales and other

74. See para 3.19.

75. *Crimes Act 1958* (Vic) s 399A.

76. *Crimes Act 1958* (Vic) s 399B.

77. Supreme Court of Victoria, *Pegasus Two Initiative* (Criminal List Practice Direction, 3 August 1998).

78. Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System* (Final Report, 1999) at para 24.13.

79. *Criminal Code* (WA) s 636A.

Australian jurisdictions.⁸⁰ Disclosure is required at least 10 days before trial. If this requirement is not satisfied, the court may adjourn the trial to enable the prosecution to investigate the alibi or discharge the jury.

3.36 *Draft Criminal Practice Rules.* Western Australia also has draft Criminal Practice Rules which establish a pre-trial disclosure regime for indictable offences. Under the draft Rules, the prosecution is required to file and serve a statement summarising the facts and legal propositions it proposes to rely on and copies of statements of all proposed prosecution witnesses. Where witnesses have not given statements, their identity and relevance to the prosecution case must be disclosed.

The prosecution is also required to disclose its documentary evidence and provide the defence with a copy of the criminal history of the defendant. Disclosure of these matters is required to be disclosed as soon as is practicable.⁸¹

3.37 The draft Rules require the defendant to file and serve a statement disclosing any admissions, the defence attitude to the facts and law disclosed by the prosecution, any objections to the admissibility of documentary evidence and particular grounds upon which the defendant contends that he or she is not guilty. This statement must be filed and served within 28 days of filing and service of the prosecution disclosure statement.⁸² The defendant is also required to file and serve, as soon as practicable, copies of expert witness reports and documentary evidence.⁸³ The Law Reform Commission of Western Australia has recommended that the Rules be incorporated into a statutory pre-trial disclosure regime.⁸⁴

80. See para 3.19.

81. Western Australia, *Draft Criminal Practice Rules*, Order 6(1).

82. Western Australia, *Draft Criminal Practice Rules*, Order 6(2).

83. Western Australia, *Draft Criminal Practice Rules*, Order 6(3).

The Draft Rules provide for the judge to comment to the jury on non-disclosure.

84. See para 3.74-3.82.

Northern Territory, South Australia, Tasmania, Australian Capital Territory

3.38 Defence disclosure requirements also apply in respect of alibi evidence in trials for indictable offences in these jurisdictions.⁸⁵ The defence is required to give written notice of particulars of intended alibi evidence to the Director of Public Prosecutions.

The particulars required are similar to those required in New South Wales.⁸⁶ The period within which disclosure is required in these jurisdictions varies. The Territories require disclosure within 14 days of the committal. In South Australia, disclosure is required within seven days of the committal. In Tasmania, disclosure is required within seven days of receiving notice of the requirement.⁸⁷ In the Territories and Tasmania, if this requirement is not satisfied, the alibi evidence cannot be introduced without the leave of the court. In South Australia, non-compliance can be the subject of comment to the jury.

Queensland

3.39 In criminal trials for indictable offences, the defence is required to disclose intended alibi evidence in the form of written notice of particulars of the alibi given to the Director of Public Prosecutions.⁸⁸ The particulars required are similar to those required in New South Wales.⁸⁹ Disclosure is required within 14 days of committal. If this requirement is not satisfied, the proposed alibi evidence cannot be introduced without the leave of the court.

3.40 If either the prosecution or the defence intends to lead expert evidence at trial, they are required to give the other party written

85. *Criminal Code* (NT) s 331; *Criminal Code* (Tas) s 368A; *Criminal Procedure Act 1986* (NSW) s 111 (as it applies in the ACT) (formerly *Crimes Act 1900* (NSW) s 406); *Criminal Law Consolidation Act 1935* (SA) s 285C. In South Australia, disclosure is not required where the substance of the alibi was disclosed at the committal.

86. See para 3.19.

87. Except for the offence of maintaining a relationship with a minor, where notice must be given after committal but before the close of the prosecution case at trial.

88. *Criminal Code* (Qld) s 590A. Note that the *Criminal Code* (Qld) s 458 inserted provisions in respect of notice of alibi into the *Evidence Act 1977* (Qld). Part 7A s 129A-F of the *Evidence Act 1995* (Qld) were never proclaimed, however, and were subsequently omitted by the *Criminal Law Amendment Act 1997* (Qld) s 121.

89. See para 3.19.

notice of the name and finding or opinion of the expert, followed by a copy of the expert report, as soon as practicable before the trial.⁹⁰

England, Wales, Northern Ireland

Reciprocal disclosure regime

3.41 All alleged offences charged in England, Wales and Northern Ireland into which an investigation has commenced since 1 April 1997 are subject to a reciprocal pre-trial disclosure regime established by the *Criminal Procedure and Investigations Act 1996* (Eng) (“the CPIA”).⁹¹ The CPIA expressly excludes the previous common law rules relating to pre-trial disclosure.⁹² Commentators have argued that the prosecution disclosure requirements under the Act are less onerous than the previous common law requirements.⁹³

3.42 ***Disclosure by police to prosecution.*** The CPIA provides for a Code of Practice which regulates disclosure by investigating police to prosecutors of information and material obtained during criminal investigations.⁹⁴ The Code of Practice requires investigating police to

90. *Criminal Code* (Qld) s 590B.

91. *Criminal Procedure and Investigations Act 1996* (Eng) (“CPIA”) s 1. The provisions of the CPIA are modified in their application to Northern Ireland: see s 79 and Sch 4. For a discussion of the CPIA see D Corker, “Maximising Disclosure” (1997) 147 *New Law Journal* 885, 961 and 1063; N Purnell, “A Brief Guide to Part 1 of the Criminal Procedure and Investigations Act 1996” (1997) 1 *Archbold News* 4; J Sprack, “The Criminal Procedure and Investigations Act 1996: (1) The Duty of Disclosure” [1997] *Criminal Law Review* 308; A Edwards, “The Criminal Procedure and Investigations Act 1996: (2) The Procedural Aspects” [1997] *Criminal Law Review* 321.

92. CPIA s 21. For a discussion of the previous common law rules see M Aronson and J Hunter, *Litigation, Evidence and Procedure* (6th ed, Butterworths, Sydney, 1998) at para 14.74-14.77.

93. See Sprack at 309-310; Cowdery at 8-9; Association of Chief Police Officers, *Criminal Procedure and Investigations Act 1996 – A Guide to the Disclosure of Unused Material* (1996) at 1-2; S Sharpe, “Disclosure, Immunity and Fair Trials” (1999) 63 *Journal of Criminal Law* 67. See also *R v DPP; ex parte Lee* [1999] 2 All ER 737.

94. CPIA s 23 and 24. For a discussion of the Code of Practice and defence strategies in response to it, see Corker.

pursue all reasonable lines of inquiry, including those which point away from the suspect. A series of ongoing obligations are imposed on investigating police to record, retain and disclose to prosecutors all information and other material which may be relevant to the investigation, including, in the form of a schedule, material which will not form part of the prosecution case. "Sensitive material", which the police consider should not be disclosed to the defence, must also be identified in a separate schedule.

3.43 Primary prosecution disclosure. The CPIA imposes a continuing duty on prosecutors to disclose any material to the defence which it does not intend to use at trial and which the prosecution considers might undermine the prosecution case (a subjective test) ("primary prosecution disclosure").⁹⁵

The prosecution can apply to the court for an order exempting it from primary prosecution disclosure on public interest grounds.⁹⁶ Primary prosecution disclosure is required as soon as reasonably practical.⁹⁷ In relation to indictable offences, primary prosecution disclosure is required after the defendant has been committed to trial.⁹⁸ However, there is authority that some prosecution disclosure may be required before then.⁹⁹

3.44 Defence disclosure. In trials for indictable offences, where the prosecution provides primary disclosure, the defence is required to disclose the general nature of the defence and the aspects of the prosecution case which the defence will dispute, giving reasons.¹⁰⁰ If

95. CPIA s 3, 4, 9. For a discussion of the scope of this requirement, see Corker.

96. CPIA s 3(6). Material intercepted under a warrant under the *Interception of Communications Act 1985* (Eng) is also exempted from disclosure: s 3(7). For a discussion of the scope of public interest immunity in this context see Corker at 962; Edwards.

97. CPIA s 3(8), 12 and 13.

98. CPIA s 1(2)(a).

99. *R v DPP; ex parte Lee* [1999] 2 All ER 737 (QBD).

100. CPIA s 5(6). For a discussion of the scope of the defence disclosure requirements, see Sprack at 311-312. Corker at 961-962 and 1063-1064; Edwards at 328.

the defence involves alibi evidence, particulars are required.¹⁰¹ Defence disclosure must be supplied within 14 days of the defence receiving primary prosecution disclosure, although the defence can apply to the court for an extension of this time limit.¹⁰² Voluntary defence disclosure can also be given for summary offences and offences tried in the Youth Court.¹⁰³

3.45 Secondary prosecution disclosure. Defence disclosure under the CPIA triggers a further prosecution duty to disclose any additional undisclosed material which might reasonably be expected to assist the case disclosed in the defence statement (an objective test) (“secondary prosecution disclosure”).¹⁰⁴ As with primary prosecution disclosure, the prosecution can apply to the court for an order exempting it from secondary prosecution disclosure on public interest grounds.¹⁰⁵ Secondary disclosure is required as soon as reasonably practicable.¹⁰⁶ The prosecution’s disclosure duties continue until the conclusion of the trial.¹⁰⁷

3.46 The CPIA requires the defence to treat material disclosed by the prosecution confidentially. Contravention of this requirement constitutes contempt of court.¹⁰⁸ The court is also empowered to resolve disputes about the adequacy of prosecution disclosure,¹⁰⁹

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101. CPIA s 5(7). Note that s 74 and 80 of the CPIA repeal the previous alibi evidence disclosure requirements in the *Criminal Justice Act 1967* (Eng) s 11.
 102. CPIA s 5, 12; *Criminal Procedure and Investigations Act 1996* (*Defence Disclosure Time Limits*) *Regulations 1997* (Eng) reg 2-5. For a discussion of the practical implications of the right to apply for an extension, see Corker at 961; Edwards at 326-327.
 103. CPIA s 6. For a discussion of the position in summary cases where the defence elects not to invoke the CPIA, see Sprack at 318.
 104. CPIA s 7. Note that this is an objective test, in contrast to the subjective test which applies in relation to primary prosecution disclosure.
 105. CPIA s 7.
 106. CPIA s 3(8), 12, and 13.
 107. CPIA s 9. See also *DPP v Metten* [1999] EWJ 566; Corker at 962.
 108. CPIA s 17, 18.
 109. CPIA s 8. However, the defence can only challenge primary prosecution disclosure after it has complied with the defence disclosure requirements. For a discussion of the defence’s right to challenge the adequacy of prosecution disclosure see Corker at 962.

disclosure of sensitive prosecution material¹¹⁰ and public interest immunity.¹¹¹

3.47 The court may stay the trial where it considers that the defendant has been denied a fair trial as a result of non-disclosure.¹¹² While not conclusively excluding the possibility of granting a stay, the English High Court of Justice has so far been unwilling to do so, emphasising that late prosecution disclosure does not on its own constitute an abuse of process unless it involves such delay that the defendant is denied a fair trial.¹¹³

No doubt other remedies, such as adjournment or orders for production, will be appropriate in many cases.

3.48 Where the defence breaches its disclosure duties,¹¹⁴ the court, or (with the leave of the court) the prosecution, is permitted to comment to the jury, and the jury is permitted to draw such adverse inferences as it considers appropriate.¹¹⁵ There is no limit on the type of comment permitted. However, a defendant cannot be convicted solely on the basis of non-compliance.¹¹⁶

110. CPIA s 3(6) (primary prosecution disclosure), s 7(5) (secondary prosecution disclosure), s 8(5) (secondary disclosure pursuant to a court order), s 9(8) (continuing disclosure). The defence can apply for a review of decisions on the disclosure of sensitive material: s 14 and the court is specifically required to keep under review decisions on the disclosure of sensitive material: s 15. Third parties can also apply to be heard on applications for the disclosure of sensitive material in certain circumstances: s 16. See Edwards at 327.

111. CPIA s 14, 15.

112. CPIA s 10. See Edwards at 327.

113. *R v Stratford Justices* [1999] EWJ 356; *DPP v Metten* [1999] EWJ 566.

114. CPIA s 11 provides that failing to give a defence statement, failing to do so within the time limit, nominating inconsistent defences, and departing from the disclosed defence case are all breaches of the defence disclosure requirements.

115. CPIA s 11.

116. CPIA s 23. For a discussion of these sanctions, see Sprack at 312-313; Edwards at 328.

3.49 One submission reported that this regime was generally supported by the vast majority of criminal barristers in England and Wales.¹¹⁷ The practical effect of the regime is not yet clear, and there is little relevant case law.

3.50 **Expert evidence.** If either the prosecution or the defence intends to lead expert evidence at trial, they are required to disclose in writing the finding or opinion of the expert as soon as practicable, and, if requested to do so, give the other party copies of expert reports.¹¹⁸ The leave of the court is required in order to admit expert evidence where notice is not given.¹¹⁹

Serious, complex or long cases

3.51 **Serious fraud office.** The investigation and prosecution of serious and complex fraud offences in England and Wales is undertaken by the Serious Fraud Office.¹²⁰ In Northern Ireland, serious and complex fraud offences can be taken over by the Crown Court.¹²¹ In each case, the court can order the prosecution to disclose the principal prosecution facts and legal propositions, witness statements and exhibits. If the prosecution complies, the judge can order the defence to disclose the general nature of the defence, statements of law, the principal aspects of the prosecution case which the defence disputes, and any objections taken by the defence.¹²²

3.52 The court, or (with the leave of the court) a party, can comment to the jury on non-disclosure or departure from the disclosed case and

117. The Hon DK Malcolm AC, Chief Justice of the Supreme Court of Western Australia, *Submission* at 5.

118. *Crown Court (Advance Notice of Expert Evidence) Rules 1987* (Eng) r 3, as amended by the *Crown Court (Advance Notice of Expert Evidence) (Amendment) Rules 1997* (Eng) r 3; *Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997* (Eng) r 3.

In summary trials in the Magistrates' Courts, disclosure is required as soon as practicable after the defendant has pleaded.

119. *Crown Court (Advance Notice of Expert Evidence) Rules 1987* (Eng) r 3; *Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997* (Eng) r 5.

120. *Criminal Justice Act 1987* (Eng) s 9.

121. *Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988* (Eng) art 3.

122. *Criminal Justice Act 1987* (Eng) s 9. *Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988* (Eng) art 8.

the jury can draw such inferences as it considers proper.¹²³ The Serious Fraud Office has argued that these sanctions are inadequate.¹²⁴ Commentators have concluded that there are significant problems with the regime which are similar to the problems identified with the Victorian pre-trial disclosure regime which existed prior to 1 September 1999.¹²⁵

3.53 **CPIA.** The CPIA also includes a pre-trial disclosure procedure for long or complex cases, which can be invoked by either party or the Court.¹²⁶ The trial judge can order the prosecution to disclose a summary of the prosecution evidence and the inferences the prosecution will argue should be drawn from the evidence. The trial judge can also order the prosecution to provide further explanatory material and further and better particulars.¹²⁷ The defence disclosure requirements under this system are similar to the general CPIA defence disclosure provisions.¹²⁸

United States

3.54 The United States introduced limited prosecution disclosure obligations in 1946, when Rule 16 of the Federal Court Rules of

123. *Criminal Justice Act 1987* (Eng) s 10; *Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988* (Eng) art 9.

124. G Santow, "Corporate Crime: Complex Criminal Trials — Commentary" (1994) 5 *Current Issues in Criminal Justice* 280 at 287; M Aronson, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure* (AIJA, Melbourne, 1992) at 40.

125. Corns at 55-56; Aronson at 40; Mack and Roach Anleu (1995) at 124-125; Director of Public Prosecutions (Cth), *Annual Report* (1992-1993) at 92; Santow at 287; M Hill, "The Seduction of the Fix — Reforming Court Process for Law Enforcement — New Directions" paper presented at the Conference *Reform of Court Rules and Procedures in Criminal Cases* (AIJA, Brisbane, 3-4 July 1998) at 143. See para 3.31.

126. CPIA s 28-34.

127. CPIA s 31(4) and (5).

128. CPIA s 31(6) and (7). For a discussion of this system, see Corker at 1064; Edwards at 322.

Criminal Procedure was passed.¹²⁹ Since then, the Supreme Court has expanded these requirements, holding that due process required the prosecution to disclose “evidence favourable to an accused ... where the evidence is material whether to guilt or to punishment”.¹³⁰ Subsequent Supreme Court decisions have gradually limited the effect of this doctrine.¹³¹ Prosecution disclosure requirements are also limited by legislation which prevents the defence from obtaining information on Crown witness lists and witness statements before trial.¹³²

3.55 The Fifth Amendment privilege against self incrimination has long restricted the prosecution’s ability to obtain defence pre-trial disclosure. However, the decision of the Supreme Court in *Williams v Florida*,¹³³ that alibi notice requirements are consistent with the Fifth Amendment, paved the way for expansion of defence disclosure obligations.¹³⁴

3.56 The American Bar Association now supports reciprocal disclosure, and is credited as a major influence on the growth of reciprocal disclosure regimes at the state level.¹³⁵ These regimes differ from jurisdiction to jurisdiction. For example, in Michigan and New Jersey, a full reciprocal disclosure regime is enforced by way of rules of court.¹³⁶ In contrast, the Oklahoma regime is purely common law.¹³⁷

129. M Esqueda, “Reciprocal Criminal Discovery Rule” (1997) 74 *University of Detroit Mercy Law Review* 317 at 324.

130. *Brady v Maryland* 373 US 83 (1963) at 87.

131. See L Sarokin and W Zuckerman, “Presumed Innocent?” (1991) 43 *Rutgers Law Review* 1089 at 1105-1106.

132. *The Jencks Act* 18 USC s 3500(a) (1988).

133. *Williams v Florida* 300 US 78 (1970).

134. Esqueda at 325.

135. Esqueda at 326.

136. See *New Jersey Rules Governing Criminal Practice* r 3.13, discussed in Sarokin and Zuckerman at 1108-1109; *Michigan Court Rules* r 6.021 discussed in Esqueda at 327.

137. *Allen v District Court* 803 P 2d 1164 (1990), discussed in R Uphoff, “Criminal Discovery in Oklahoma: A Call for Legislative Action” (1993) 46 *Oklahoma Law Review* 381.

Canada

3.57 The Canadian Supreme Court has held that alibi notice requirements are consistent with the *Canadian Charter of Rights and Freedoms*.¹³⁸ Unlike the United States, in Canada this exception has been strictly limited, and there are no broader defence disclosure requirements. The Supreme Court has, however, held that the Crown is required to disclose all relevant evidence, including inculpatory and exculpatory evidence to the defence as part of the right to a fair trial.¹³⁹

REFORM OF PRE-TRIAL DISCLOSURE

3.58 In DP 41 the Commission raised three alternative options for reform of defence disclosure. Option one involved defence disclosure of expert evidence. The second option required disclosure of defence expert evidence and certain defences.

The third option was for disclosure of expert evidence and the general nature of the issues which the defence intended to raise at trial.

Submissions

3.59 The majority of submissions received during the course of this reference focussed on the right to silence during police questioning. Most submissions did not deal with pre-trial disclosure. No submissions opposed the introduction of a legislative prosecution pre-trial disclosure regime.¹⁴⁰ Many submissions favoured the introduction

138. *R v Cleghorn* [1995] 3 SCR 175.

139. *R v Stinchcombe* [1991] 3 SCR 326; *R v Cook* [1997] 1 SCR 1113; *R v Dixon* [1998] 1 SCR 244; *R v Chaplin* [1995] 1 SCR 727; *R v Carosella* [1997] 1 SCR 80.

140. The submissions which supported statutory prosecution pre-trial disclosure requirements were: Law Society of NSW, *Submission 2* at 1; NSW Bar Association, *Submission* at para 2; Youth Justice Centre, *Submission* at 4; C Corns, *Submission* at 2; J Fleming, *Submission* at 1.

of additional defence pre-trial disclosure requirements.¹⁴¹ There was support for all three options for defence disclosure raised in DP 41 in May 1998. Other submissions favoured compulsory pre-trial disclosure of all statutory defences; tighter notice requirements for alibi evidence; defence disclosure of the nature of the defence and the evidence in support of the defence; restricting defence disclosure to complex cases and the defence disclosure requirements under the *Crimes (Criminal Trials) Act 1993* (Vic). Other submissions opposed any change to the existing legal requirements for defence disclosure.¹⁴²

Previous inquiries and proposals for reform

Australia

3.60 The Commission's Discussion Paper on Criminal Procedure, published in 1986, included proposals for mandatory pre-trial disclosure by the prosecution and mutual disclosure of expert evidence.¹⁴³ The Commission proposed that defence disclosure should be encouraged (but not compelled) by allowing the prosecution

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141. Australian Securities Commission, *Submission* at 2; B Bright, *Submission* at 2; C Corns, *Submission* at 2; J Cramond, *Submission* at 1-2; A Clarke, *Submission* at 2; T Cleary, *Submission* at 2; E Elms, *Submission* at 2; B Kennedy, *Submission* at 2; Law Society of NSW, *Submission 2* at 2; The Hon DK Malcolm AC, Chief Justice of the Supreme Court of Western Australia, *Submission* at 3-4; Marsdens, *Submission 2* at 3; R Miller, *Submission* at 4; NSW Police Service, *Submission* at 2; Police Association of NSW, *Submission 1* at 6; Police Association of NSW, *Submission 2* at 3; K Rogers, *Submission* at 2; D Shillington, *Submission* at 1-2; M Tedeschi, *Submission* at 3; C Levingston, *Submission* at 2; G Jones, *Oral Submission*; Carroll and O'Dea, *Submission* at 3; J Fleming, *Submission* at 3.
142. A Arafas, *Submission* at 3; R Jones, *Submission* at 2; J Gallagher, *Submission* at 6; Justice Action, *Submission* at 1-2; Marsdens, *Submission 1* at 3; Mt Druitt Community Legal Centre, *Submission* at 1-2; NSW Bar Association, *Submission* at 1; NSW Council for Civil Liberties, *Submission* at 3; UTS Community Law and Legal Research Centre, *Submission* at 5; Youth Justice Coalition, *Submission* at 4-5; S Doumit, *Oral Submission*; NSW Young Lawyers, *Submission* at 5.
143. New South Wales Law Reform Commission, *Criminal Procedure – Procedure from Charge to Trial: A General Proposal for Reform* (DP 13, 1986) at para 19, 33, 44, 68, 69, 72.

to reply to defence evidence which could have been disclosed before the trial without prejudice to the defendant.¹⁴⁴

3.61 In a 1989 discussion paper on reforms to the criminal justice system, the New South Wales Attorney General's Department proposed that all defendants should be required to indicate the general nature of the defence and the areas of the prosecution case which the defence intended to dispute at trial.¹⁴⁵

3.62 In 1992, Aronson, in a report on managing complex criminal trials for the Australian Institute of Judicial Administration, recommended the introduction of mandatory reciprocal disclosure duties.¹⁴⁶

3.63 In a 1993 report to the New South Wales Government on complex criminal trials, Mr John Nader QC recommended that the prosecution should be required to disclose the full prosecution case, including all prosecution facts and statements of law, a summary of all prosecution circumstantial evidence, the identity of all prosecution witnesses, and copies of all witness statements.¹⁴⁷ This proposal did not extend to disclosure of relevant material which the prosecution did not intend to rely on at trial.¹⁴⁸

Nader recommended defence disclosure of any positive defence and defence legal principles, as well as a defence response to the facts and statements of law disclosed by the prosecution.¹⁴⁹ The Nader

144. NSWLRC DP 13 at para 74.

145. NSW Attorney General's Department, *Discussion Paper on Reforms to the Criminal Justice System* (1989) at 51-56. Judicial comment and adverse inferences would be available for non-compliance with this requirement.

146. Aronson at 39, 41.

147. J Nader, *Submission to the Honourable Attorney General Concerning Complex Criminal Trials* (1993) at 37-39.

148. Nader at 37-39. Where the prosecution departed from its disclosed case, the trial judge and defence counsel would be permitted to comment to the jury (at 44). The prosecution would be permitted to reopen its case in the case of defence departure (at 44). The recommended sanctions for non-compliance by the defence included costs orders (at 52-53) and judicial and prosecution comment (at 44). The judge would also be empowered to award sentencing discounts where defence disclosure reduced the issues (at 48).

149. Nader at 40-42.

report also recommended compulsory disclosure of expert evidence by both parties.¹⁵⁰

3.64 In a 1995 report on guilty pleas for the Australian Institute of Judicial Administration, Mack and Roach Anleu also recommended the introduction of compulsory prosecution disclosure of all information relevant to the charge, including information which the prosecution did not intend to use, inconsistent witness statements and information only relevant to the credibility of witnesses.¹⁵¹ Mack and Roach Anleu rejected the imposition of additional defence disclosure duties in ordinary criminal matters, but left open the question of defence disclosure in complex white collar or financial cases.¹⁵²

3.65 In 1997, Corns published a report on long criminal trials for the AIJA which recommended reciprocal pre-trial disclosure in accordance with the provisions of the *Crimes (Criminal Trials) Act 1993* (Vic) in all long and complex criminal cases. Corns also considered requiring the prosecution to produce a schedule of facts cross-referenced to the evidence, to which the defendant would be required to respond.¹⁵³

United Kingdom

3.66 The Working Group on the Right to Silence, which published its report in 1989, recommended a pilot reciprocal pre-trial disclosure in complex Crown Court cases identified as suitable by a judge.¹⁵⁴ The prosecution would be required to disclose the principal facts and statements of law of its case, the identity of its witnesses and its exhibits.¹⁵⁵ The defence would be required to disclose the general

150. Nader at 42.

151. Mack and Roach Anleu (1995) Recommendation 11 and see 87-91. The Report recommended that the requirements for prosecution disclosure be continuing, that the prosecution should be required to verify compliance with the requirements, that the courts be empowered to resolve disputes about prosecution disclosure and that provision be made for restricted disclosure on the basis of public interest immunity. See also Recommendations 3 and 14.

152. Mack and Roach-Anleu (1995) Recommendation 19 and see 124-126.

153. Corns at para 6.2.1-6.2.4.

154. Working Group on the Right to Silence, *Report of the Working Group on the Right to Silence* (London, 1989) at para 102.

155. Working Group on the Right to Silence at para 103 and see para 104-105.

nature of its case, legal principles and the matters on which the prosecution intends to take issue with the prosecution.¹⁵⁶

Proposal by the Premier and Attorney General of New South Wales

3.67 In January 1999, the Premier and the Attorney General released a joint proposal for defence pre-trial disclosure to be made “a reasonable period” before the commencement of the trial.¹⁵⁷

The Attorney General subsequently indicated that the position of unrepresented defendants would be taken into account in implementing any defence pre-trial disclosure duties.¹⁵⁸

3.68 Under the Government’s proposal, defendants who intended to plead self defence, provocation, lack of intent, accident or duress would be required to disclose this (in addition to the requirements for alibi evidence and evidence of substantial impairment by abnormality of mind).

3.69 Under this proposal, the defendant would be required to disclose the reports of all proposed expert witnesses. The defendant would also be required to disclose whether issue is taken with any prosecution expert evidence, and if so, in what way. In addition, the defence would be required to disclose the identities and addresses of character witnesses, and which prosecution witnesses were required in relation to surveillance evidence.

3.70 The defendant would be required to disclose any issues as to continuity in respect of prosecution exhibits and whether the defence intended to dispute the admissibility of any prosecution evidence, particularly surveillance evidence and charts, diagrams and schedules. Where the admissibility or accuracy of prosecution exhibits, listening device transcripts, charts, diagrams or schedules

156. Working Group on the Right to Silence at para 106 and see para 107-108. The Working Group recommended at para 110 that the trial judge and the prosecution should be permitted to comment to the jury and that the jury be able to draw adverse inferences where the defence did not comply with this requirement.

157. Joint Statement from the Premier of NSW, Mr Bob Carr, and the Attorney General, Mr Jeff Shaw QC, *Overhaul of Criminal Trial Process – Defence Required to Outline its Case Before Trial* (10 January 1999).

158. J Shaw, “Justice Can be Faster and Fairer” *The Australian* (21 January 1999) at 11.

was not disputed, these would be prima facie admissible and could be tendered without formal proof. The defendant would also be able (but not compelled) to disclose exhibits, documents, diagrams, transcripts and schedules and require the prosecution to disclose whether it objects to their admissibility or accuracy. Where the prosecution did not object, these would also be prima facie admissible without formal proof.

3.71 The defence would be required to disclose issues concerning the form of the indictment, the severability of charges and separate trials.¹⁵⁹

Law Council of Australia proposal

3.72 The Law Council has also formulated principles for reform of pre-trial criminal procedure. The Law Council argues that obligations should be imposed on investigating authorities to pursue all reasonable lines of inquiry and to retain and disclose to the prosecution all material which may be relevant to the investigation.¹⁶⁰ The principles provide for prosecution pre-trial disclosure of all prosecution evidence.¹⁶¹ The Council also proposes compulsory prosecution disclosure, a reasonable time before trial, of all material which may be relevant, and further prosecution disclosure in response to defence disclosure, where this occurs.¹⁶² Defence pre-trial disclosure would not be compulsory but would be encouraged by empowering the trial judge to take defence disclosure into account in

159. Carr and Shaw. The trial judge would have a discretion to refuse to admit defence evidence not disclosed in accordance with these requirements. See also J Shaw, "Justice Can be Faster and Fairer" *The Australian* (21 January 1999) at 11; F Hampel, "Put Legal Rights Before Rhetoric" *The Australian* (21 January 1999) at 11; J Shaw, "Justice Made Quicker and Simpler" *Sydney Morning Herald* (13 January 1999) at 11; "Justice Will be Served" (Editorial) *Sydney Morning Herald* (19 January 1999) at 12; A Bernoth, "Carr 'Puts Fair Trials at Risk'" *Sydney Morning Herald* (11 January 1999) at 5.

160. Law Council of Australia, *Draft Principles for the Reform of Pre-trial Criminal Procedure* (1999) at 4-5.

161. Law Council of Australia at 2-3. The Law Council proposes at 3 that evidence which is not disclosed by the prosecution should not be admitted except in exceptional circumstances.

162. Law Council of Australia at 5.

consideration of costs awards to defendants who are acquitted and as a mitigating circumstance in sentencing proceedings.¹⁶³

National Legal Aid/Directors of Public Prosecution Best Practice Model for the Determination of Indictable Offences

3.73 National Legal Aid and the various Directors of Public Prosecution support compulsory disclosure by police to the prosecution, and by the prosecution to the defence, of all material relevant to the guilt or innocence of the defendant, including further prosecution disclosure in response to defence disclosure.¹⁶⁴ The Best Practice Model also favours defence disclosure. At the listing mention, the defendant would be required to disclose which prosecution witnesses were not required, which prosecution facts the defence admits and the essence of the defence.¹⁶⁵

Law Reform Commission of Western Australia

3.74 In October 1999, the Law Reform Commission of Western Australia published a report on the criminal and civil justice system in Western Australia.¹⁶⁶ This Report includes a number of pre-trial disclosure recommendations. The Commission recommended the introduction of statutory disclosure requirements for the police to the prosecution, along the lines of the requirements in the Western Australia Office of the Director of Public Prosecutions Prosecution Guidelines.¹⁶⁷

3.75 The Commission also recommended that the prosecution should be required, by statute, to provide disclosure to the defence. The prosecution disclosure recommendations are also based on the Prosecution Guidelines, as well as the draft Criminal Practice Rules

163. Law Council of Australia at 5.

164. National Legal Aid / Australian Directors of Public Prosecution, *Best Practice Model for the Determination of Indictable Charges* (1999) at 2 and 4.

165. National Legal Aid / Australian Directors of Public Prosecution at 3-4. It is proposed that defence disclosure be taken into account at sentencing.

166. Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System* (Final Report, 1999).

167. WALRC, Recommendation 252(1). See discussion at para 24.12-24.14; Western Australia Office of the Director of Public Prosecutions, *Prosecution Guidelines* (1993).

discussed at paragraphs 3.36 to 3.37. In all cases, the prosecution would be required to provide “initial disclosure”, consisting of a simply expressed statement of the material facts and law, the defendant’s criminal record and any confessional material. This would be required to be disclosed with the complaint, before the defendant’s first court appearance.¹⁶⁸

The extent of disclosure would be at the discretion of the prosecution, and should be determined by the seriousness of the offence, particularly whether imprisonment was a potential outcome.¹⁶⁹ Disclosure would be facilitated by the Commission’s proposed system for electronic exchange of information.¹⁷⁰

3.76 In all cases where imprisonment was a potential consequence of conviction, the prosecution would also be required to disclose copies of all expert witness statements and expert reports. This requirement, known as “full prosecution disclosure”, would only be required where the defendant did not plead guilty after initial prosecution disclosure.¹⁷¹ Finally, the Commission also discussed the need for further prosecution disclosure in response to defence disclosure, although no formal recommendation for this was made.¹⁷²

3.77 The Commission recommended that the courts should be empowered to rule that non-disclosure by the prosecution resulted in a miscarriage of justice or a wrongful conviction.¹⁷³

3.78 The Commission recommended that the requirement that the defence give notice of proposed alibi evidence should apply to all offences. The Commission also recommended that the defence should be required to disclose statements of expert witnesses.¹⁷⁴ Where full prosecution disclosure occurred (effectively, only in cases where imprisonment was a possible sentence), the defence would be required to disclose the factual elements of the offence or particular proposition of law identified by the prosecution upon which it may be

168. WALRC, Recommendation 280 and 282. See discussion at para 27.11-27.13 and 27.19-27.21.

169. WALRC, Recommendation 286.

170. WALRC, Recommendation 281.

171. WALRC, Recommendation 287. See discussion at para 27.21.

172. WALRC at para 24.21.

173. WALRC, Recommendation 252(2).

174. WALRC, Recommendation 253(1).

contended that guilt may not be proved, the documents disclosed by the prosecution to which objection will be taken, specifying the grounds, and any particular ground upon which it may contend that guilt will not be proved.¹⁷⁵ Again, these requirements are based on the draft Criminal Practice Rules.

3.79 The Commission recommended that where the defence failed to provide disclosure, the trial judge and, with leave, the prosecution, should be permitted to make adverse comment, and the prosecution should be permitted to re-open its case.¹⁷⁶

The Commission noted that special consideration should be given to the position of self-represented defendants when determining whether to impose sanctions for non-compliance with the defence disclosure requirements.¹⁷⁷

3.80 The Commission also recommended that, where non-disclosure by either the prosecution or the defence was the responsibility of party's legal representative, the court should be able to make a finding of professional misconduct.¹⁷⁸

3.81 The Commission recommended that the courts be empowered to excuse compliance with these disclosure requirements where good reason was given.¹⁷⁹

3.82 The Commission also recommended that pre-trial negotiations between the prosecution and the defence should be formalised. One of the purposes of this would be to facilitate voluntary disclosure of witness statements (other than expert witness statements) by the defence, voluntary notice of what prosecution witnesses the defence required to attend in person and any possible admissions.¹⁸⁰

Federal Government Working Group

3.83 A Federal Government Working Group on reform to the criminal justice system, established by the Standing Committee of Attorneys General, has also made a number of recommendations for pre-trial

175. WALRC, Recommendation 253(2). See discussion at para 24.15-24.20.

176. WALRC, Recommendation 253(4).

177. WALRC, Recommendation 253.

178. WALRC, Recommendation 254. See discussion at para 24.14.

179. Recommendation 289. See discussion at para 27.24.

180. WALRC, Recommendations 257, 259 and see Chapter 25.

disclosure.¹⁸¹ The Working Group recommended the introduction of statutory prosecution pre-trial disclosure, based on the Commonwealth Office of the Director of Public Prosecutions Prosecution Guidelines, and extending to investigators as well as prosecutors. The Working Party recommended that the prosecution should be required to file and serve a case statement, outlining the acts, facts, matters and circumstances relied on by the prosecution, and, where appropriate, to disclose how the prosecution case will be presented, as well as a notice of pre-trial admissions.¹⁸²

3.84 The Working Group recommended that the defence should be required to indicate which aspects of the prosecution case the defendant agrees to admit without further proof, which prosecution evidence is in issue, and to give notice of any additional matters in respect of which the defendant is willing to make admissions or dispose with formal proof. The defendant would be required to disclose whether he or she intended to rely on the defences of self defence, substantial impairment of mental responsibility, automatism, claim of right, duress or intoxication. The defence would be required to disclose copies of expert witness reports. Notices would also be required in relation to whether the defence required prosecution witnesses to be called regarding surveillance evidence, any issues as to continuity of exhibits, whether the accuracy of listening device transcripts is in issue and whether the admissibility or accuracy of charts, diagrams and schedules is in issue.¹⁸³

181. Standing Committee of Attorneys-General, Federal Government Working Group on Criminal Trial Procedure, *Report* (1999).

182. Federal Government Working Group on Criminal Trial Procedure, Recommendations 1-6, 12, 29. The Working Party recommends that the prosecution be required to obtain the leave of the court in order to lead evidence which was not disclosed in accordance with these requirements.

183. Federal Government Working Group on Criminal Trial Procedure, Recommendations 27, 30. The Working Group recommends that the defendant should be required to obtain leave to lead evidence not disclosed in accordance with these requirements. The trial judge should also be empowered to restrict the cross-examination of prosecution witnesses in relation to defences which the defendant did not identify as required. The Working Party also favoured sentencing discounts for defendants who provided full disclosure.

Arguments for reform of prosecution pre-trial disclosure

Fair trial

3.85 The Law Council submitted that the risk that inadequate disclosure will lead to unfair trials is one compelling reason for compulsory police and prosecution pre-trial disclosure.¹⁸⁴

The Commission agrees that thorough disclosure is necessary for the defendant to decide how to plead. The defendant should understand the facts alleged by the prosecution and the case which he or she would be required to meet.¹⁸⁵ This aspect of police and prosecution pre-trial disclosure is especially important because the majority of criminal charges are resolved by guilty pleas (65% of persons charged in Local Court appearances and 67% of persons charged in the District and Supreme Courts).¹⁸⁶

3.86 A fair trial also requires that defence be informed of all material available to the prosecution, whether or not it is formally admissible, which may be of assistance to the defence, including that which the prosecution does not intend to use as part of its case. It is often difficult for the defence to discover the existence of, or obtain access to, this type of material unless the prosecution is specifically compelled to disclose it.¹⁸⁷ This is illustrated by the significant and

184. Law Council of Australia at 2, 4-5.

185. This view was also expressed by C Corns, *Submission* at 2; New South Wales Law Reform Commission, *Criminal Procedure: Procedure from Charge to Trial 1- Specific Problems and Proposals* (Discussion Paper 14, 1987) at 95.

186. New South Wales, Bureau of Crime Statistics and Research, "NSW Criminal Court Statistics" (as at 23 April 1999) [<http://www.lawlink.nsw.gov.au/bocsar/courtstat.html>]. See also K Mack and S Roach Anleu, "Reform of Pre-trial Criminal Procedure: Guilty Pleas" (1998) 22 *Criminal Law Journal* 263 at 264 and 270; Royal Commission on Criminal Procedure, *Report of the Royal Commission on Criminal Procedure* (London, 1981) at para 8.12.

187. See also Royal Commission on Criminal Procedure at para 8.18; NSWLRC DP 14 at paras 4.2, 4.6, 4.7, 4.58, 4.59, 4.65, 4.66; "Disclosure and Disequilibrium" (Editorial) [1995] *Criminal Law Review* 585 at 586; Mack and Roach Anleu (1995) at 90; A Zuckerman, "Bias and Suggestibility: Is There an Alternative to the Right to Silence?" in D Morgan and G Stephenson (eds), *Suspicion and Silence: The Right to Silence in Criminal Investigations* (Blackstone Press, London, 1994)

highly publicised miscarriages of justice revealed in England since the early 1990s, which resulted from non-disclosure by the prosecution of material which was inconsistent with the prosecution case.¹⁸⁸

3.87 The New South Wales Director of Public Prosecutions, Mr Nicholas Cowdery QC, has acknowledged that the role of the prosecutor and the organs of the criminal justice system associated with the prosecutor is to assist the court to arrive at the truth and to do justice according to law. Mr Cowdery has noted that all material in the possession of the prosecutor, including material which is inconsistent with the prosecution case, remains public property for the purpose of achieving this goal.¹⁸⁹

3.88 It has also been argued that, as a rule, the police and prosecution have access to superior financial resources and investigations expertise than defendants.¹⁹⁰ The Commission has previously recommended compulsory prosecution pre-trial disclosure on the basis that it addresses this inequality of resources to some extent.¹⁹¹ On the other hand, some proponents of a mutual compulsory pre-trial disclosure regime justify compulsory prosecution pre-trial disclosure on the basis of reciprocity. It is argued that compulsory prosecution pre-trial disclosure would encourage voluntary defence pre-trial disclosure,¹⁹² or that compulsory defence disclosure requirements are far more likely to work in practice if the requirements also apply to the prosecution.¹⁹³ The Commission's view is that this approach is not appropriate. The crucial question is not

at 118; P O'Connor, "Prosecution Disclosure: Principle, Practice and Justice" [1992] *Criminal Law Review* 464 at 473; Law Society of the ACT, *Submission* at para 4.1.

188. See also O'Connor at 464. In the case of Rendell, who had been convicted of murder but was pardoned following an Inquiry under s 475 of the *Crimes Act 1900* (NSW), vital ballistics tests which supported the defence case were concealed both from the Crown and the defence.

189. Cowdery at 3.

190. WALRC at para 24.16.

191. NSWLRC DP 14 at para 4.66. This view was also expressed by C Levingston, *Submission* at 3. See also O'Connor at 464; Mack and Roach Anleu (1995) at 87; *McIlkenny v The Queen* (1991) 93 Cr App R 287 at 312; Law Council of Australia at 2; Sprack at 319.

192. Royal Commission on Criminal Procedure at para 8.23.

193. Working Group on the Right to Silence at para 93.

equality of disclosure between the parties, but rather the public interest in ensuring that the trial is a fair one.

3.89 The International Covenant on Civil and Political Rights (“the Covenant”) does not refer to prosecution pre-trial disclosure. The Covenant does guarantee persons accused of criminal offences the right to a fair trial.¹⁹⁴ This guarantee expressly includes the right to adequate time and facilities for the preparation of the defence.¹⁹⁵ It has been argued that this includes an implied right to full prosecution pre-trial disclosure.¹⁹⁶ The Covenant is not part of the domestic law of New South Wales¹⁹⁷ but its provisions may nevertheless be of persuasive assistance to courts when expressing the common law.¹⁹⁸ The New South Wales Director of Public Prosecutions has also acknowledged that the right to full prosecution pre-trial disclosure is an incident of the right to a fair trial.¹⁹⁹

Efficiency

3.90 Another convincing reason for prosecution pre-trial disclosure is that it improves the efficiency of the criminal justice system.²⁰⁰ Pre-trial disclosure enhances plea discussions and identifies charges to which the defendant might plead, increasing the number of defendants who

194. *International Covenant on Civil and Political Rights* art 14.

195. *International Covenant on Civil and Political Rights* art 14(3)(b).

196. S Bronitt and M Ayres, “The Administration of Criminal Justice and Human Rights Law: A Legal Practitioner’s Guide” in D Kinley (ed), *Human Rights in Australian Law: Practice and Potential* (Federation Press, Sydney, 1998) at 8; Law Society of the ACT, *Submission* at 4.

197. *Dietrich v The Queen* (1992) 177 CLR 292 at 305, 321, 348, 359-360.

198. *Dietrich v The Queen* (1992) 177 CLR 292 at 321, 348-349.

199. Cowdery at 3 in relation to the *European Convention on Human Rights* art 6.

200. This reason was also relied on by the Working Group on the Right to Silence at para 93; Royal Commission on Criminal Justice, *Report of the Royal Commission on Criminal Justice* (London, 1993) at 97; NSWLRC DP 14 at para 4.6, 4.60, 4.62-4.64; Mack and Roach Anleu (1995) at 87, 111-112; *Crimes (Criminal Trials) Act 1993* (Vic) s 1; Nader at 37-38; Mack and Roach Anleu (1998) at 264-265; Cowdery at 3. See also National Legal Aid/Australian Directors of Public Prosecution Best Practice Model for Determination of Indictable Charges at 3, which discusses the need for early involvement by both prosecution and defence counsel with authority to make decisions and obtain instructions for the resolution of the charge.

plead guilty and encouraging guilty pleas at an earlier stage. According to research conducted by Mack and Roach Anleu for the Australian Institute of Judicial Administration, most people plead guilty because they are given persuasive legal advice that the prosecution case is strong.²⁰¹ Properly conducted committal proceedings, which are not a mere rehearsal for the trial, are a significant element of this process. Early identification of guilty pleas also improves the accuracy of court lists, reduces time wasted by all parties preparing for trial, minimises time wasted by all parties on unnecessary court attendances and also reduces wasted court time.

3.91 Prosecution disclosure also has important efficiency consequences where charges proceed to trial. It leads to earlier and improved identification of the issues, facilitating more efficient trial preparation for both parties. This in turn shortens trials and minimises the number of adjournments sought by and granted to the defence in response to unexpected evidence. The number of defence witnesses required is also reduced.

3.92 It has been suggested that prosecution disclosure actually creates inefficiency in the criminal justice system by imposing additional preparation costs on prosecuting authorities and by consuming additional court resources in resolving disclosure disputes.²⁰² There is no empirical research on the impact of the existing regimes in other jurisdictions. However, a majority of participants in the Commission's survey for this reference considered that police and prosecution pre-trial disclosure generally improved efficiency.²⁰³ It is clear that police prosecutors and the Office of the Director of Public Prosecutions require adequate resources in order to properly meet their disclosure obligations.²⁰⁴ The Commission considers that this is an important issue which must be resolved if any system of pre-trial disclosure is to be effective.

201. Mack and Roach-Anleu (1998) at 264-265.

202. Corns at 53-54; Aronson at 61.

203. NSWLRC RR 10 at Table 3.4 and 3.6. See para 3.15-3.17 and 3.21-3.36.

204. This was also emphasised by C Corns, *Submission* at 2.

Arguments against prosecution pre-trial disclosure

Reasons for non-compliance

3.93 One cogent objection to compulsory prosecution pre-trial disclosure is that it is open to misuse by the defence. It is arguable that early disclosure of the substance of the prosecution case gives the defence an opportunity to tailor its case to meet the disclosed prosecution case, by fabricating evidence, procuring perjured testimony, and intimidating prosecution witnesses.²⁰⁵ It is also argued that compulsory prosecution pre-trial disclosure rules can be, or are, misused by the defence to force the prosecution to comb through large amounts of material as a tactic to delay trials, or simply in order to conduct a fishing expedition for potential defence evidence or lines of argument.²⁰⁶

3.94 It is also fairly argued that disclosure of certain sensitive prosecution material which reveals the identity of undercover police officers or informants, may endanger their safety or jeopardise the effectiveness of police investigations.²⁰⁷ In particular cases, the defence may insist on full prosecution disclosure in the hope that the prosecution will be induced to withdraw the charges rather than have to disclose particular material.²⁰⁸

3.95 Various measures can be taken to minimise these risks. The current Barristers' and Solicitors' Rules and DPP Prosecution Guidelines provide that prosecutors can decline or limit disclosure which is not in the interests of justice in a particular case. For example, the names of police officers or informants can be withheld while the substance of their evidence can be disclosed. The defendant and his or her legal advisers can be required to treat

205. NSWLRC DP 14 at para 4.70; O'Connor at 471. (This argument is not relevant in relation to material which the prosecution does not intend to use as evidence.)

206. "Disclosure and Disequilibrium" at 589; *R v Saleam* (1989) 16 NSWLR 14 at 17, 19.

207. Royal Commission on Criminal Justice at 93; NSWLRC DP 14 at para 4.70; Committee of Inquiry into the Enforcement of Criminal Law in Queensland, *Report of the Committee of Inquiry into the Enforcement of Criminal Law in Queensland* (1977) at para 300-301; "Disclosure and Disequilibrium" at 585; Santow at 285.

208. Royal Commission on Criminal Justice at 93; Cowdery at 6.

prosecution material confidentially. In particular circumstances, access to sensitive material may be restricted to the defendant's legal representatives, although the Commission acknowledges that this would hinder the ability of defendants to properly instruct their legal representatives.²⁰⁹

3.96 Prosecutors can be required to notify the defence of the non-disclosure of particular material, and the court can be given jurisdiction to hear challenges by the defence to non-disclosure. The Commission notes that the misuse of prosecution disclosure by fabricating evidence, procuring perjured testimony and interfering with prosecution witnesses are already criminal offences in themselves.²¹⁰ However, there is always a risk that this type of material may be misused, even where protective measures are in place.²¹¹

The Commission's view

3.97 The Commission is satisfied that there is a high level of compliance by prosecutors with the current professional guidelines relating to pre-trial disclosure. However, the Commission's research and consultations indicate that prosecution disclosure is not always complete. This is usually the responsibility of investigating police rather than prosecutors.

3.98 The Commission's view is that these duties require more formal recognition in legislation, including reinforcement with appropriate, enforceable sanctions for non-compliance. The Commission therefore recommends the introduction of a number of statutory prosecution disclosure requirements for Supreme and District Court trials. These requirements would not apply to all prosecutions, but rather the courts would be able to invoke them where appropriate. The parties would

209. See also NSWLRC DP 14 at para 4.70; Mack and Roach Anleu (1995) at 112; "Disclosure and Disequilibrium" at 585; Committee of Inquiry into the Enforcement of Criminal Law in Queensland at para 300-301.

210. *Crimes Act 1900* (NSW) Part 7 s 314-326.

211. The Royal Commission on Criminal Justice also acknowledged this at 93.

also be able to apply to the court for an order for statutory disclosure. The timetable for compliance would be set by the court in each case.

3.99 It must, of course, be kept in mind that the course of criminal trials is fluid, changing as new facts and issues arise, which can completely change the context of the evidence before the court. This is especially so where witnesses have not given evidence at committal proceedings. In some cases, it is not possible for prosecutors to predict before the commencement of the trial that particular evidence may be relevant or whether a witness will come up to proof. These uncertainties do not, however, justify reducing the duty of the prosecution to make full disclosure of its case. A material omission or change may well affect the significance of an alleged inadequacy of defence disclosure.

The court has an ample discretion to deal with these matters.

Recommendation 2

The Commission recommends that the prosecution must be required to disclose the following material and information, in addition to the existing prosecution pre-trial disclosure requirements:

- (a) All reports of prosecution expert witnesses proposed to be called at trial. In accordance with the general rule, such reports must clearly identify the material relied on to prepare them.**
- (b) Where the defence discloses its expert evidence, whether issue is taken with any part and, if so, in what respects.**
- (c) Whether defence expert witnesses are required for cross-examination. In this event, notice within a reasonable time must be given.**
- (d) In respect of any proposed defence exhibits of which notice has been given, whether there is any issue as to provenance, authenticity or continuity.**

- (e) Where notice is given that charts, diagrams or schedules are to be tendered by the defence, whether there is any issue about either admissibility or accuracy.
 - (f) Any substantial issues of admissibility of any aspect of proposed defence evidence of which notice has been given.
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Recommendation 3

- (a) Where no issue is taken by the defence as to the provenance, authenticity, accuracy, admissibility or continuity of prosecution exhibits, charts, diagrams or schedules, the evidence will be prima facie admissible and may be tendered without formal proof.
 - (b) Where no issue is taken by the defence as to the admissibility of expert reports disclosed by the prosecution, this evidence will be prima facie admissible and may be tendered without formal proof.
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Arguments for reform of defence pre-trial disclosure

Fair trial

3.100 One of the most common arguments for introducing defence pre-trial disclosure requirements is that it will address the problem of defendants “ambushing” the prosecution at trial with defences which the prosecution was not able to anticipate or investigate, leading to the acquittal of guilty persons.²¹²

212. *R v Alladice* (England, Court of Appeal, 12 May 1988, unreported); Police Association of New South Wales, *Submission 1* at 4; E Elms, *Submission* at 2; B Kennedy, *Submission* at 2; L Davies, *Submission* at 4, NSWLRC DP 14 at para 5.11; Royal Commission on Criminal Procedure at para 8.22; Royal Commission on Criminal Justice at 97;

The Working Group on the Right to Silence concluded that in a “significant number” of cases defence pre-trial disclosure would have prevented ambush defences.²¹³

3.101 There is no agreement as to the meaning of the term “ambush defence”. Leng defines “ambush defence” as a defence raised for the first time in court, based on evidence which could have been disclosed to police during interrogation, where the late disclosure of the defence hampered the investigation or prosecution of the offence, and the defendant benefited from the extra preparation time gained from delayed disclosure.²¹⁴ English research suggests that the incidence of defences raised for the first time at trial which succeed is between 1.5% and 5%.²¹⁵

G Davies, “Justice Reform: A Personal Perspective” [1996] *Bar News* (Summer) 5 at 11; Cowdery at 2 and 7; “Justice Will be Served” (Editorial) *Sydney Morning Herald* (19 January 1999) at 12; J Shaw, “Justice Can be Fairer and Faster” *The Australian* (21 January 1999) at 11; M Pedley, “The Problems with Court Rules and Procedure in Criminal Cases – A Prosecution Perspective”, Paper presented at the conference *Reform of Court Rules and Procedures in Criminal Cases* (AIJA, Brisbane, 3-4 July 1999); N Vass, “Carr to Ban Courtroom ‘Ambush’” *Sunday Telegraph* (10 January 1999) at 3; “New Procedures in Criminal Trials” *The Advocate* (12 January 1999) at 4; P Faris QC, “Disclosure and Discovery in the Criminal Trial” paper presented at the *6th International Criminal Law Congress* (Melbourne, 9-13 October 1996). One submission argued that the defence was entitled to surprise the prosecution at trial: Mt Druitt Community Legal Centre, *Submission* at 2 and one submission argued that while defence disclosure assists the credibility of the defence, the defendant should be entitled to choose whether to disclose the defence case: R Jones, *Submission* at 2.

213. Working Group on the Right to Silence at para 101 and see para 20 and 93.
214. R Leng, “The Right to Silence Debate” in D Morgan and G Stephenson (eds), *The Right to Silence in Criminal Investigations* (Blackstone Press, London, 1994) at 29.
215. Leng at 28-30; D Dixon, “Politics, Research and Symbolism in Criminal Justice: The Right of Silence and the Police and Criminal Evidence Act” (1991-1992) 20-21 *Anglo-American Law Review* 27 at 37; D Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon Press, Oxford, 1997) at 234; I Dennis, “The Criminal Justice and Public Order Act 1994 – The Evidence Provisions” [1995]

This research also suggests that a defendant who raises an “ambush” defence as defined by Leng is more likely to be convicted than acquitted.²¹⁶ In one study, every defendant who adopted an ambush defence was convicted.²¹⁷

3.102 The Commission’s preferred definition of “ambush” defence is a defence, raised for the first time at trial, which could not reasonably have been anticipated by a competent and experienced prosecutor. The Commission’s view is that such defences only arise infrequently. Frequently, the likely or potential defences are obvious from the nature of the prosecution case itself. This was supported by several submissions.²¹⁸ The majority of judges, magistrates, legal practitioners and police prosecutors surveyed by the Commission reported that defences with these characteristics rarely arose.²¹⁹ Participants considered that, where such defences did occur, they did not contribute to an acquittal in most cases.²²⁰

3.103 The Commission, however, is of the view that it is unreasonable and wasteful of limited resources that the prosecution should have to prepare against all foreseeable eventualities and conduct an unnecessarily elaborate and unwieldy prosecution against the possibility of a foreseen defence which does not, in the event, arise. The mere fact that a particular defence might reasonably be

Criminal Law Review 4 at 12-14; D Brown, *PACE Ten Years On: A Review of the Research* (Home Office, London, 1997) at 184-185.

216. Dixon (1997) at 233; Dennis at 12-14; Leng at 30.

217. Dixon (1997) at 233; Dennis at 12-14; Leng at 30. It has been suggested that this reflects the lack of credibility such defences have in the view of the court or jury: see Royal Commission on Criminal Procedure at para 8.20; NSWLRC DP 14 at para 5.13, 5.44. However, under the present law, the court or jury is unlikely to become aware of the fact that a defence was raised for the first time at trial, because the Crown is not permitted to lead evidence of this: *Petty v The Queen* (1991) 173 CLR 95.

218. T Dalla, *Oral Submission*; Law Society of NSW, *Submission 1* at 8 and 13-15; *Submission 2* at 2; NSW Young Lawyers, *Submission* at 5; UTS Community Law and Legal Research Centre, *Submission* at 6. See also Victoria, Scrutiny of Acts and Regulations Committee at para 2.3.3; M Ierace, “A Response to Justice Davies’ Paper [1999] *Bar News* (Spring) 33 at 39.

219. NSWLRC RR 10 at Tables 3.10 and 3.11. See para 3.64-3.67.

220. NSWLRC RR 10 at Table 3.12. See para 3.68-3.69.

anticipated does not mean that the defendant should not be required to make the disclosures which we recommend, including, where appropriate, a defence which might well be foreseeable, so that the prosecution can focus on the factual issues that will *actually* be in dispute.

3.104 Moreover, the Commission considers that it is not a legitimate consequence of the right to silence that a defendant can run opportunistic and spurious defences which take advantage of some matter against which, in the result, the prosecution failed to guard. It may be worth noting in this context, however, as is made clear in Chapter Four of this Report, the Commission is not suggesting that there should be any qualification of the fundamental principle that it is the responsibility of the Crown to prove the defendant's guilt beyond reasonable doubt.

The Commission's view is that its recommendations do not do so.

3.105 Submissions from judges and magistrates argued that defence disclosure would facilitate the determination of objections to the admissibility of particular evidence on the grounds of relevance.²²¹ This view was also expressed by members of the magistracy during consultations, and by a number of judges and magistrates who participated in the survey conducted by the Commission for this reference. The Commission's view is that, for the purpose of ruling on questions of admissibility, the trial judge will often need information about the defence case in order to determine the relevance of evidence. Research conducted on juries in New Zealand²²² shows that juries were greatly assisted in understanding the evidence if they were informed at an early stage of the issues in the trial.²²³ This can often only be effectively done if the issues in the trial have been ascertained by some kind of pre-trial procedure.

221. K Rogers, *Submission* at 2; The Hon DK Malcolm AC, Chief Justice of the Supreme Court of Western Australia, *Submission* at 4.

222. New Zealand, Law Commission, *Juries in Criminal Trials* (Preliminary Paper 37, 1999) vol 2.

223. Adverse comments were made by jurors on the lack of any statement by way of opening the defence case and some jurors responded to the lack of a clearly articulated defence case by assuming that the defendant was guilty and that counsel's efforts should not be taken too seriously: NZ Law Commission at para 2.29-2.42.

3.106 The New South Wales Police Service and the Police Association of New South Wales argued that, since significant prosecution disclosure obligations exist under legislation, guidelines and rules, defence disclosure should be introduced in order to place the parties on a more level playing field.²²⁴ However, this argument does not address the question of what level of defence disclosure is appropriate. Moreover, this raises in a pointed way the limited nature of the resources available to the defence because of extreme restrictions on, and delays in considering applications for, legal aid.

Efficiency

3.107 Another argument raised in many submissions and by judges and commentators is that defence pre-trial disclosure, like disclosure by the police and prosecution, would improve the efficiency of the criminal justice system, which is struggling to cope with the volume of work coming before it. It would motivate both the prosecution and the defence to evaluate the strength of the charge at an earlier time, leading to earlier and increased guilty pleas, pleas to lesser charges and withdrawal of charges. Early and improved identification of issues would improve the efficiency of prosecution preparation for trial and avoid wasting resources on anticipating, investigating and disproving matters which are not ultimately in issue. It would also shorten trials, minimise the incidence of adjournments to allow the prosecution to prepare for unexpected defence evidence and reduce the number of prosecution witnesses called whose evidence was not contested by the defence.²²⁵ A majority of participants in the Commission's research

224. NSW Police Service, *Submission* at 2; Police Association of NSW, *Submission 2* at 3-4. See also B Bright, *Submission* at 2; A Bernoth, "Carr 'Puts Fair Trials at Risk'" *Sydney Morning Herald* (11 January 1999) at 5; Davies at 11.

225. J Cramond, *Submission* at 1; A Arafas, *Submission* at 3; NSW Police Service, *Submission* at 2; Police Association of NSW, *Submission 2* at 3; C Corns, *Submission* at 2; DS Shillington, *Submission* at 1; The Hon DK Malcolm AC, Chief Justice of the Supreme Court of Western Australia, *Submission* at 3-4; B Bright, *Submission* at 2; B Kennedy, *Submission* at 2; Royal Commission on Criminal Procedure at para 8.12; Working Group on the Right to Silence at para 108; Royal Commission on Criminal Justice at 97; NSWLRC DP 14 at para 4.2, 4.6, 4.60, 4.62-4.64, 5.10-5.14; Mack and Roach Anleu (1995) at 87, 122; Corns at 112-113; *Crimes (Criminal Trials) Act 1993* (Vic) s 1; Pedley; Fraud Trials Committee, *Report of*

for this reference reported that, although voluntary defence disclosure was infrequent in New South Wales, where it occurred it generally improved efficiency.²²⁶

3.108 However, other submissions argued that police would be less likely to conduct a thorough initial investigation of their own initiative if they knew they could rely on defence disclosure at a later stage.²²⁷ The Commission does not accept that the introduction of mandatory defence disclosure requirements would result in less thorough initial investigations by police. If the defendant is obliged to disclose information about his or her defence after the committal and only a short time before trial, the improvement will be in relation to the trial, rather than the investigation which will not be affected. Other submissions and commentators have argued that the efficiency gains produced by compulsory defence disclosure requirements would be outweighed by the resources consumed in complying with any requirements and the additional litigation produced in determining disclosure disputes.²²⁸ It is reasonable to consider that there is a risk

the Fraud Trials Committee (London, 1986) at para 6.72; Faris QC; J Fife-Yeomans, "Accused 'Should Disclose Defence'" *The Australian* (24 March 1998) at 6; J Fife-Yeomans, "Lawyers Agree Silence no Longer Golden in Courtroom" *The Australian* (25 March 1998) at 4; Cowdery at 7-8; National Legal Aid/Australian Directors of Public Prosecution Best Practice Model for the Determination of Indictable Charges at 1; "Justice Will be Served" (Editorial) *Sydney Morning Herald* (19 January 1999) at 12; K Lyall, "Courts to Fast-track Criminal Trials" *The Australian* (3 August 1998) at 5; C Milburn, "Judges Told to Shorten Long Trials" *The Age* (27 June 1998) at 3; "Criminal Trial Reform Offers Benefits for All" (Editorial) *The Australian* (19 June 1998) at 12; L Olsson, "To How Much Silence Ought an Accused be Entitled?" (1999) 8 *Journal of Judicial Administration* 131.

226. NSWLRC RR 10 at Tables 3.7, 3.8 and 3.9. See discussion at para 3.45-3.59.

227. A Arafas, *Submission* at 3. It has also been argued that police do not tend to investigate alibi evidence disclosed to them in accordance with the existing requirements, and that wider defence disclosure requirements would not produce efficiency gains because it is unlikely that the police would investigate any other information disclosed to them: see NSW Council for Civil Liberties, *Submission* at 3.

228. Law Society of New South Wales, *Submission 2* at 2; Youth Justice Coalition, *Submission* at 4-5. See also WALRC at 34-35.

of this occurring, although it does not appear to have been the experience in the United Kingdom.

Arguments against defence pre-trial disclosure

Fundamental principle

3.109 Numerous submissions argued that imposing any compulsory disclosure requirements on the defence would infringe several fundamental principles of the criminal justice system.²²⁹

It is argued that requiring the defendant to disclose information about the defence case before trial would undermine the presumption of innocence and would operate in practice as a form of compulsion to assist the prosecution, infringing the burden of proof and the right to silence.²³⁰ Several submissions also argued that compulsory defence disclosure requirements would breach the right to a fair trial under the

229. S Doumit, *Oral Submission*; J Fleming, *Submission* at 2; Mt Druitt Community Legal Centre, *Submission* at 1-2; Marsdens, *Submission 1* at 3; Justice Action, *Submission* at 1; NSW Council for Civil Liberties, *Submission* at 1 and 3; Youth Justice Coalition, *Submission* at 4 and 6; UTS Community Law and Legal Research Centre, *Submission* at 1, 5 and 6; Law Society of NSW, *Submission 2* at 2; A Arafas, *Submission* at 3. See also Law Council of Australia Draft Principles for the Reform of Pre-trial Criminal Procedure at 1-2 and 7-8; Legal Aid Victoria, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 2-3; F Hampel, "Put Legal Rights Before Rhetoric" *The Australian* (21 January 1999) at 11; "Lawyers Slam Defence Move" *Daily Telegraph* (13 January 1999) at 5.

230. S Greer, "The Right to Silence, Defence Disclosure and Confession Evidence" (1994) 21 *Journal of British Law and Society* 102 at 107 and 109; T O'Gorman, "Right to Silence" paper presented at session 24 of the 30th Australian Legal Convention (Melbourne, 18-21 September 1997) at 24; Mack and Roach Anleu (1995) at 125; Corns at 112-113; G Black, "The Right Defence" [1989] *Legal Action* 9; S Greer and R Morgan (eds), *The Right to Silence Debate* (Bristol and Bath Centre for Criminal Justice, 1990) at 16 and 20; R Sallman, *Report on Criminal Trials* (AIJA, Melbourne, 1985) at para 4.101; Mack and Roach Anleu (1998) at 272-273; NSWLRC DP 14 at para 4.69, 5.1, 5.15, 5.42; *R v Ling* (1996) 90 A Crim R 376.

International Covenant on Civil and Political Rights.²³¹ Although it is a matter of degree, the Commission considers that these submissions go too far.²³²

3.110 There are many cases in which the substantial defence (and reasonably so) is that the facts adduced by the prosecution do not prove the defendant's guilt of the offence charged beyond reasonable doubt and where there otherwise is no positive defence. However, the right to silence should not be used to provide an opportunity to a defendant to create a spurious defence in response to the way in which the prosecution case ultimately unfolds.

3.111 The Royal Commission on Criminal Justice rejected the argument that compulsory defence pre-trial disclosure infringes these fundamental principles, concluding that pre-trial defence disclosure was similar to advancing a defence at trial, except for the timing.²³³ The Commission considers that this is a reasonable view, depending on the extent of the disclosure required. At the stage when defence disclosure would be required as part of a pre-trial procedure under the Commission's recommendations, the defendant would be aware of the whole of the prosecution case as a result of the police and prosecution pre-trial disclosure duties. It should be borne in mind, however, that in the absence of full committal proceedings there will remain some degree of speculation as to the precise content of the prosecution case.

3.112 The Commission has recommended that these duties be codified, specified and reinforced with sanctions for non-compliance. The defendant will have had adequate time to reflect on his or her position and obtain appropriate legal advice (assuming legal aid to have been provided) before being required to provide disclosure.

231. Justice Action, *Submission* at 1; NSW Council for Civil Liberties, *Submission* at 1 and 3; UTS Community Law and Legal Research Centre, *Submission* at 1 and 5. See also S Sharpe, "Article 6 and the Disclosure of Evidence in Criminal Trials [1999] *Criminal Law Review* 273.

232. See the decision of the High Court in *McKinney v The Queen* (1991) 171 CLR 468, where Dawson J at 488 observed that a fair trial is one which is fair to both sides.

233. Royal Commission on Criminal Justice at 97-98. See also Corns, *Submission* at 2; Cowdery at 7-8; WALRC at 31.

Disclosure would occur in the context of judicial supervision. The position of the defendant at this stage is completely different to the position of the suspect when questioned by police.

Lawyer's duty to client

3.113 The Law Society makes the point that in many cases comprehensive defence pre-trial disclosure cannot properly occur. Often the defence does not have the opportunity to cross-examine prosecution witnesses at the committal hearing and, since the overwhelming majority of cases now proceed as paper committals, it is often not possible to evaluate the prosecution case satisfactorily until it is presented at the trial. Therefore, it is argued that it very difficult for defence lawyers responsibly to provide pre-trial disclosure of the defence case which would involve abandoning any particular issue. For example, oral evidence given by prosecution witnesses at trial may materially differ from the witness statements included in the brief served on the defendant. Similarly, it is not always possible to determine the credibility of prosecution witnesses or cogency of their evidence from an examination of their witness statements.²³⁴

3.114 Whilst the Commission considers that this problem can be a very real one in some cases, the situation will vary from case to case, and the Commission's recommendations assume that appropriate adjustments can be made. The problem is likely to arise only in the relatively rare case where, for example, an issue of fact, not in the defendant's own knowledge, is thought to be established by apparently cogent evidence but, in the result, it is not. The defendant should be able to point to the failure and to rely on the weakness (if it be one) of the Crown case in that respect, even if, in some respects, this "defence" has not been raised. It would be otherwise where the defendant took no issue as to a matter which was within his own knowledge: to change the defence would then be an example, almost certainly, of the opportunistic raising of a spurious defence. The essence of the procedure is its focus on practical and realistic communication.

234. S Doumit, *Oral Submission*; J Fleming, *Submission* at 2; Law Society of NSW, *Submission 2* at 4. See also NSW Council for Civil Liberties, *Submission* at 1; O'Gorman at 25.

Limits on prosecution contact with disclosed witnesses

3.115 Whilst it is not recommended that the defence must identify proposed witnesses, except for those called as to character and experts, it may be that the disclosures that are required will enable other defence witnesses to be identified by the prosecution. Being contacted and questioned by police is itself an intimidating experience for many potential defence witnesses, including timid, uncertain or uncooperative potential defence witnesses, and potential witnesses with a criminal history, particularly if on bail or parole. Contact by investigating police may make such people feel extremely vulnerable and discourage them from giving evidence for the defence, even if this is not the intention of the investigating police.

3.116 The Commission notes that the misuse of defence disclosure by fabricating evidence and interfering with defence witnesses are criminal offences.²³⁵ However, it is acknowledged that, while suspicions may exist, it is extremely difficult to prove these offences. Also, prosecuting these offences after the fact does not assist in securing a fair trial for the defendant.²³⁶ One option for addressing these risks, adopted in Victoria in relation to alibi evidence, is to prohibit police and prosecutors from communicating with proposed defence witnesses before the trial in relation to the case, except in the presence and with the consent of the defendant's legal advisers. Contact otherwise than in compliance with that requirement in Victoria constitutes contempt.²³⁷

The Commission considers that a more appropriate approach is to provide that the prosecution must seek leave of the Court before contacting witnesses who may be identified by the disclosure process.

Reasons for non-disclosure or departure from disclosed case

3.117 As a number of submissions noted, there may be reasons for departure from the disclosed defence at trial which are not the responsibility of the defendant, including errors by the defendant's legal representatives, late briefing of counsel, different advice received by new solicitors or counsel, and changes to the defence case in response to adjustments to the Crown case. The defendant may be remanded in custody in a distant Corrections Centre, making

235. *Crimes Act 1900* (NSW) Part 7 s 314-326.

236. The UTS Community Law and Legal Research Centre, *Submission at 6* also made this point.

237. See para 3.32.

it difficult for the lawyer to conduct conferences necessary to obtain the information required to be disclosed.²³⁸ The Commission accepts that it would be unfair to impose sanctions on the defence for non-disclosure in these circumstances. This could be addressed by permitting the defence to depart from its disclosed case with the leave of the court. The application for leave should be required to be made upon evidence given in the absence of the jury.

3.118 The Commission's proposal for defence disclosure of expert evidence²³⁹ was also criticised in submissions. It was argued that defence lawyers often delay obtaining expert reports until the last possible opportunity before trial in order to ensure that the material covered is up to date and to avoid the expense of obtaining a supplementary report. It is reasonable that reports cannot be obtained until the Crown case on the relevant issue is fully exposed. However, where the defence proposes to rely on expert evidence that is not in response to expert evidence proposed to be led by the prosecution, there is no reason for delay. In other situations, the decision to lead evidence might not be made until the close of the prosecution case at trial. Forensic experts may not be able to produce reports any sooner due to their own work pressures. In cases where the defence strategy changes during the course of the trial, expert material disclosed to the prosecution may not ultimately be relied on and disclosure may harm the defence case.²⁴⁰ Late briefing of counsel can also cause difficulties. Again, if the reason for departure is legitimate, leave would be granted to do so and any comment would be unfair.

3.119 These arguments do not persuade the Commission that the Commission's proposal requiring pre-trial disclosure of expert evidence is inappropriate. Rather, they highlight the need for trial judges to take into account the circumstances of the case and, also, having taken those circumstances into account, to ensure that the defence complies with the time set for compliance with the disclosure required.

238. Marsdens, *Submission 1* at 3; Law Society of NSW, *Submission 2* at 3. See also Royal Commission on Criminal Justice at 100; Mack and Roach Anleu (1995) at 125.

239. New South Wales Law Reform Commission, *The Right to Silence* (Discussion Paper 41, 1998) at para 4.82.

240. Law Society of NSW, *Submission 2* at 2 and 3; Youth Justice Coalition, *Submission* at 5.

Resources

3.120 Numerous submissions argued that compulsory defence pre-trial disclosure would impose an unacceptable burden on defence resources, or amplify the effects of the existing imbalance of resources available to the prosecution and the defence.²⁴¹

The Law Society argued that defence disclosure could not occur until legal aid was secured. Legal aid is not currently available for committal proceedings. The Court of Criminal Appeal has held that, where a defendant exhausts his or her private funds on legal representation at the committal, this affects his or her application to have the trial postponed relying on *Dietrich v The Queen*. Defendants funding their own defence would need to have secured representation and entered into a costs agreement with their legal advisers before disclosure could occur.

3.121 In all cases, trial defence counsel would have to be properly briefed at an early stage to allow adequate opportunity to review the brief and confer with the defendant. Both the Crown and defence counsel require an opportunity to consider the possibility of accepting a plea to lesser charges.²⁴² Legal Aid New South Wales currently pays for only two pre-trial conferences for Supreme and District Court trials. The rates are \$91.00 per conference for solicitors, \$101.00 for junior

241. A Arfaras, *Submission* at 3; C Corns, *Submission* at 2; S Doumit, *Oral Submission*; J Fleming, *Submission* at 1; Youth Justice Coalition, *Submission* at 4-6; UTS Community Law and Legal Research Centre, *Submission* at 5; Law Society of NSW, *Submission 2* at 2-4; Justice Action, *Submission* at 1; NSW Council for Civil Liberties, *Submission* at 1. But contra B Hocking and L Manville, *Submission* at 20, who suggest that it is arguable that following *Dietrich* there is a degree of equality between the prosecution and the defence. See also Working Group on the Right to Silence at para 92, 102; Royal Commission on Criminal Justice, dissent by Zander at 222-223; NSWLRC DP 41 at para 4.67; Mack and Roach Anleu (1995) at 125; P Gibson, "Government's False Conviction" *Daily Telegraph* (14 January 1999) at 12; T Nyman, "Changes in Trials will be Hardest on the Vulnerable" *Sydney Morning Herald* (12 January 1999) at 11.

242. C Corns, *Submission* at 2; Law Society of NSW, *Submission 1* at 12; *Submission 2* at 1. One submission suggested that the introduction of a custody solicitor scheme at the police station would also assist the pre-trial disclosure process: G Kellner, *Submission* at 6.

counsel and \$146.00 for senior counsel.²⁴³ These fees were increased for the first time since 1994 as of 1 July 2000.

3.122 The Commission accepts that satisfactory defence disclosure regime would require timely and adequate legal representation of defendants before trial. The significant additional burden of compliance with disclosure obligations could not be adequately undertaken having regard to the present level of legal aid funding. No pre-trial defence disclosure requirements could work in practice unless legal aid covered pre-trial conferences and preparation time. The issue of funding compliance with defence disclosure requirements must be resolved if real, as opposed to theoretical, advances in efficiency are to occur. In the Commission's view, it is likely that the provision of additional legal aid resources to fund defence disclosure duties will ultimately save costs in relation to trials. If the cost to the community of even one day's hearing could be saved in even a small proportion of cases, considerable increases in legal aid fees could easily be justified.

3.123 Several submissions argued that it would be impossible for most unrepresented defendants to fairly and fully comply with compulsory defence pre-trial disclosure.²⁴⁴ The Commission accepts that any defence disclosure regime would need to be modified by the trial judge in its application to unrepresented defendants.

Sanctions

3.124 Compulsory defence pre-trial disclosure is also criticised on the basis that it is likely to be ineffective. It is argued that judges are generally reluctant to impose sanctions for non-compliance with the limited existing requirements, and that there is no reason to expect

243. Legal Aid Commission, *Scale of Fees in Criminal Matters* (July 2000).

244. S Doumit, *Oral Submission*; J Fleming, *Submission* at 1; Youth Justice Coalition, *Submission* at 4-5; Law Society of NSW, *Submission 2* at 1; Justice Action, *Submission* at 1; NSW Council for Civil Liberties, *Submission* at 1; B Bright, *Submission* at 2; UTS Community Law and Legal Research Centre, *Submission* at 6; J Gallagher, *Submission* at 6. See also Corns at 63; Santow at 286; WALRC at 35.

that a general disclosure regime would be more rigorously enforced by the judiciary.²⁴⁵

3.125 As with prosecution disclosure requirements, due to the fluid nature of criminal trials, it will not always be possible for defence lawyers to anticipate before a trial starts that particular evidence may be relevant.²⁴⁶ However, the Commission is satisfied that this can be met by making the consequences of non-disclosure by the defence subject to the judicial discretion applying also to prosecution non-disclosure. The Commission is satisfied that leave should be required to admit evidence not disclosed as required, even though it will only be in rare cases that leave would be refused. Most usually, the appropriate response to non-disclosure would be to grant the prosecution an adjournment and, if necessary, discharge the jury, with *possible* bail consequences for the defendant. If the non-disclosure occurred for reasons of tactical advantage alone, it might well be that comment should be permitted.

The Commission's view

Disclosure of alibi evidence

3.126 The most common reason for non-compliance with the time frame for the alibi notice requirement given by defence lawyers who participated in the Commission's survey was that they had not been instructed by their client by the time notice was required.²⁴⁷ This recommendation ties the notice requirement to the trial date, rather than the committal, when it is more likely that the defendant will be legally represented.

Recommendation 4

The Commission recommends that notice of alibi evidence should be required at least 35 days before

245. Royal Commission on Criminal Justice, dissent by Zander at 222-223; Greer (1994) at 107 and 109; Mack and Roach Anleu (1995) at 125; NSWLRC DP 14 at para 5.40; Corns at 53-55; Aronson at 61.

246. Youth Justice Coalition, *Submission* at 5; Marsdens, *Submission 1* at 3; J Gallagher, *Submission* at 6.

247. NSWLRC RR 10 at para 3.40-3.43.

trial in all indictable matters tried in the Supreme and District Courts.

Other defence disclosure requirements

3.127 The Commission recommends the introduction of a number of defence disclosure requirements for trials in the Supreme and District Courts. These duties would not apply in all cases. Rather, the court would be able to invoke them in appropriate cases, and the parties would also be able to apply for an order for statutory disclosure where appropriate. The timetable for compliance would be set by the court.

3.128 The principal justification for these recommendations is the argument that the due administration of justice does not justify permitting defendants simply to put the Crown to proof of its case, where there is no real reason to dispute much of it, and having the right to raise issues for the first time during the trial itself when the Crown will have either no opportunity or only an inadequate opportunity to investigate those issues. The prosecution case is frequently more complicated and unwieldy than it would be if the actual issues are disclosed at the pre trial stage. The Commission's recommendations focus on the scope for improving the efficiency of the presentation of the prosecution case, by identifying and confining the issues in order to avoid unnecessary multiplication of prosecution witnesses and evidence.

3.129 The Commission's proposals fall into three categories. The first is the requirement to disclose matters conventionally (but not strictly accurately) described as "defences". These disclosures must be made in every case to which they apply. There is a practical difficulty that arises as to disclosure of the line of defence that the defendant committed the relevant act by accident. It is somewhat anomalous to require the defendant to disclose this matter, since the prosecution bears the onus of proving both voluntariness and causation, in substance, disproving accident. However, this is exactly what happens with the existing alibi notice requirement, and the Commission is satisfied that the requirement is acceptable in this context.

3.130 The same argument applies by analogy to the other matters which are not "defences" strictly so called, such as consent in sexual assault cases, where the course of the Crown case may well

substantially differ from what it might otherwise comprise if consent is not in issue²⁴⁸ and where it is obviously desirable to minimise distress or embarrassment to a complainant from unnecessary questioning by either prosecution or defence.

The recommendation is aimed not only at preventing the litigation of spurious defences, but also at ensuring that the issues in the trial are clearly identified, to avoid the calling of unnecessary evidence and the agitation of false issues.

3.131 The second category is the recommendation that, in particular cases, the defence may be required to state in general terms the case intended to be presented as to why he or she is not guilty, identify those aspects of the Crown case which are in issue and indicate in general terms the factual nature of the case to be made in respect of each of those aspects. The defendant should not be obliged to disclose the specific non-expert evidence which the defence intends to adduce. Disclosures are not to be taken, for the purposes of the trial, to be admissions of any facts. The proposed sanctions for non-compliance are discussed at paragraphs 3.142-3.147.

3.132 This requirement is aimed at the same objects as the first category but will be applied only in those cases where the first category of disclosure is inapplicable or insufficient, in the particular circumstances, to achieve them. It is of no real assistance to the prosecution to know, for example, that a defendant charged with murder intends to raise provocation – an issue which, when raised on the evidence, the prosecution must exclude beyond reasonable doubt in circumstances where usually the defendant is the only witness who remains alive able to describe what occurred – unless it is told in general terms the nature of the acts of the deceased which are claimed to have provoked the defendant.

3.133 In the event of a failure to comply with either form of required disclosure, a number of sanctions may be applied, including adverse comment to the jury where the trial judge is positively satisfied that such a course is fair and appropriate. Although the second requirement is, to some degree, stated in general terms, the Commission is of the view that, as it will be applied on a case by case basis, and the judge ordering the disclosure will have to specify clearly the extent of disclosure required, there can be no justifiable basis for

248. See, for example, *R v BD* (1997) 92 A Crim R 168.

subsequent dispute as to the defendant's obligations as to create unfair prejudice should the proposed sanctions be applied for non compliance.

3.134 The third category may be described as machinery provisions designed to deal efficiently and fairly with expert evidence and unwieldy material of which, often, only part is both relevant and disputed.

3.135 Under the Victorian regime, the court has the power to order that the jury be given copies of the disclosure documents for the purpose of helping them to understand the issues.²⁴⁹ However, the Commission's view is that there is a risk that this could lead to documents being drafted for the purpose of presentation to the jury, rather than for the purpose of identifying and confining the issues to be determined at the trial. Any such documents would ordinarily be admissible by consent. The Commission considers that this is sufficient to enable such documents to be given to the jury in appropriate cases.

3.136 The Commission emphasises that the primary means of both prosecution and defence disclosure in all cases should be voluntary, informal disclosure. The existence of a clear regime of pre-trial disclosure will facilitate this process, which will obviously be most efficiently and cheaply undertaken without intervention by a court. However, compulsory powers are also necessary to ensure compliance as a last resort. The Commission notes that defence disclosure should always be based on a thorough understanding of the prosecution case. The Commission also favours a requirement that an assigned prosecutor have responsibility for the conduct of every case from preparation to verdict, facilitating informal communication between the parties.

249. See para 3.30.

3.137 The Commission's recommendations constitute far less an incursion upon the right to silence than that which Parliament has permitted by questioning under compulsory powers by various special investigative bodies. The Commission does not support the application of those powers to ordinary criminal cases at any stage of the proceedings. The position of the defendant at this stage could not be more removed from that which he or she is in when being interrogated by the police. At this later stage, there is no legitimate prejudice suffered by the defendant in requiring pre-trial disclosure of the defence. The only advantage which will be lost is that of surprise.

Recommendation 5

The defendant shall be required to disclose the following material and information, in writing, unless the Court otherwise orders:

- (a) In addition to the existing notice requirements for alibi evidence and substantial impairment by abnormality of mind, whether the defence, in respect of any element of the charge, proposes to raise issues in answer to the charge, eg accident, automatism, duress, insanity, intoxication, provocation, self-defence; in sexual assault cases, consent, a reasonable belief that the complainant was consenting, or that the defendant did not commit the act constituting the sexual assault alleged; in deemed supply cases, whether the illicit drug was possessed other than for the purpose of supply; in cases involving an intent to defraud, claim of right.**
- (b) In any particular case, whether falling within Recommendation 5(a) or not, the trial judge or other judge charged with the responsibility for giving pre-trial directions may at any time order the defendant to disclose the general nature of the case he or she proposes to present at trial, identifying the issues to be raised, whether by way of denial of the elements of the charge or**

exculpation, and stating, in general terms only, the factual basis of the case which is to be put to the jury.

- (c) All reports of defence expert witnesses proposed to be called at trial in accordance with the general rule, such reports shall clearly identify the material relied on to prepare them.**
- (d) Where the prosecution discloses its expert evidence, whether issue is taken with any part and, if so, in what respects.**
- (e) Whether prosecution expert witnesses are required for cross-examination. In this event, notice within a reasonable time shall be given.**
- (f) Where the prosecution relies on surveillance evidence (electronic or otherwise), whether strict proof is required and, if so, to what extent.**
- (g) In respect of any proposed prosecution exhibits of which notice has been given, whether there is any issue as to provenance, authenticity or continuity.**
- (h) In respect of listening device transcripts proposed by the prosecution to be used or tendered, whether they are accepted as accurate and, if not, in what respects issue is taken.**
- (i) Where notice is given that charts, diagrams or schedules are to be tendered by the prosecution, whether there is any issue about either admissibility or accuracy.**
- (j) Where it is proposed to call character witnesses, their names and addresses. The purpose of this requirement is to enable the prosecution to check on the antecedents of these witnesses. Character witnesses or other defence witnesses identified directly or indirectly by disclosures made by the**

defence shall not be interviewed by the prosecution without the leave of the court.

- (k) Any issues of admissibility of any aspect of proposed prosecution evidence of which notice has been given.**
 - (l) Any issues concerning the form of the indictment, severability of the charges, separate trials or applications for a “Basha” inquiry.²⁵⁰**
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Recommendation 6

- (a) Where no issue is taken by the prosecution as to the provenance, authenticity, accuracy, admissibility or continuity of defence exhibits, listening device transcripts, charts, diagrams or schedules, the evidence will be prima facie admissible and may be tendered without formal proof.**
 - (b) Where no issue is taken by the prosecution as to the admissibility of expert reports disclosed by the defence, this evidence will be prima facie admissible and may be tendered without formal proof.**
 - (c) Disclosures made pursuant to these requirements, are not admissions and are not admissible into evidence without leave of the judge except for the purpose of determining on the *voire dire* any procedural matter arising from an alleged omission to provide any required disclosure or alleged change of case.**
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250. *R v Basha* (1989) 39 A Crim R 337; *R v Sandford* (1994) 33 NSWLR 172 at 180-181.

Scope

3.138 The exercise of the discretion to order disclosure would depend on a range of factors including the timing of the trial, whether the defendant was on bail or in custody and the adequacy of legal aid, the adequacy of police and prosecution disclosure, including the extent of disclosure at the committal hearing, the nature of the evidence, for example, where it depends on the availability of overseas witnesses.

3.139 In relation to Recommendation 5(b), the crucial question will be whether the orders for disclosure being sought, which will need to be directed to the particular case, are necessary or desirable in order to ensure a fair trial in which the Crown is sufficiently seized of the real issues to enable its case to be efficiently undertaken. If the case is otherwise within Recommendation 5(a), the judge will need to be satisfied that the disclosure required under that paragraph is inadequate in the circumstances of the case.

Recommendation 7

The Commission recommends that, in appropriate cases, the court should be able to invoke the requirements outlined in Recommendations 2 and 5. The parties should also be able to apply to the judge to order compliance with Recommendation 5(a) and disclosure under Recommendation 5(b).

Relevant jurisdictions

3.140 The Commission does not favour extending the full range of disclosure requirements outlined in Recommendations 2 and 5 to the Local Courts. The Commission considers that, given the nature of summary proceedings, it would not be cost effective to provide for the imposition of these formal disclosure requirements in this jurisdiction. However, the Commission again emphasises the importance of informal, voluntary defence disclosure in the Local Courts. The procedures recommended will require amendment of s 48 of the

*Criminal Procedure Act 1986 (NSW)*²⁵¹, which applies presently to notices of alibi in trials on indictment, and to the *Justices Act 1902 (NSW)*.

Recommendation 8

The Commission recommends that the proposed disclosure requirements be applied in the Supreme Court and District Court. The Commission also recommends the following limited disclosure requirements for the Local Courts:

- (a) The defence should be required to give notice of proposed alibi evidence a reasonable time before the hearing, subject to the imposition of a more specific time frame by a magistrate.**
 - (b) Magistrates should also be empowered to order the parties to exchange expert reports.**
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Timetable

3.141 The Commission envisages that, at some appropriate time well before the trial, the Office of the Director of Public Prosecutions would provide its disclosure and would require the defence to provide disclosure by a specified date, failing which disclosure orders would be sought. There is no reason why the defence could not also take this initiative.

251. Formerly *Crimes Act 1900 (NSW)* s 405A.

Recommendation 9

The Commission recommends that the court be given the power to set a time for compliance with the disclosure requirements set out in Recommendations 2 and 5.

Consequences of non-compliance with the disclosure duties

3.142 The Commission recommends that judges should be given a discretion to impose a number of sanctions for non-disclosure or departure from the disclosed case. These sanctions include refusal to admit material not disclosed in accordance with the requirements and the granting of adjournments to a party whose case would otherwise be prejudiced. In jury trials, the judge and, with leave, counsel would be permitted to comment on non-compliance with the disclosure duties.

3.143 The comment should not suggest any reversal of the onus of proof or that the failure to make the required disclosure was that the defendant was or believed that he or she was guilty of the offence. For reasons which are given in Chapter 4 of this Report, in the context of comment on the failure of a defendant to give evidence, a judge should be able to grant leave in an appropriate case for the prosecution to make appropriate submissions to the jury about a failure to make a timely disclosure or a variation in the case actually presented and that disclosed. The requirement of leave is to ensure that the circumstances both of the pre-trial proceedings and of the trial itself, including any variation in the Crown case from that foreshadowed, are evaluated to ensure that it is fair to permit comment to be made and to limit that comment to appropriate language.

3.144 The nature of permitted comment would depend on the circumstances. Where the defence changed its case, comment inviting the jury to draw an inference adverse to the credibility or reliability of the evidence may well be justified in an appropriate case.

Such comment has always been permitted²⁵² and is, in principle, no different from any comment which might be made in relation to a prior inconsistent statement.²⁵³ Where the defence raises inconsistent defences, the nature of permitted comment would fall into the same category.

3.145 However, the situation where the defence raises at trial a hitherto undisclosed defence is more difficult. The Commission considers that the proper approach, where the judge is satisfied that it is fair in all the circumstances to do so, is to permit the jury to consider the late disclosure of the defence in evaluating its weight. Fairness will require that the judge to ensure, at the pre-trial stage, that there is clear understanding by the parties as to the extent of the disclosure required and not to permit comment on a failure to disclose or a suggested change of case unless the judge is positively satisfied that there has been a substantial omission or change and that such a comment is justified.

Even where comment is permitted, the significance of the non-disclosure or change of case is a matter for the jury to evaluate and it might be appropriate to instruct the jury that there may have been good reasons for non-disclosure or change and give examples of such reasons.²⁵⁴

3.146 If it were proposed to comment to the jury about non-compliance, an appropriate evidentiary ground for so doing would need to be laid. Any determination of the relevance of such evidence (for example, by cross-examination of the defendant) would in the ordinary course require a determination of whether in the circumstances it is fair to permit that line of inquiry. Such a determination would always occur in the absence of the jury unless, perhaps, it is relevant to some issue in the case other than the nature of the comment which may be made.

3.147 The extent of legal representation of the defendant before the trial is a factor which the judge should take into account in determining how to exercise this discretion in the case of

252. See *Petty v The Queen* (1991) 173 CLR 95 at 101-102 per Mason CJ, Deane, Toohey, McHugh JJ.

253. See the discussion in Chapter 4 of this Report of *Weissensteiner v The Queen* (1993) 178 CLR 217.

254. *RPS v The Queen* [2000] HCA 3 at para 15.

non-compliance by the defence. Another relevant factor is the extent to which the prosecution case presented at the trial differed from that disclosed. For example, where prosecution witnesses did not adhere to their witness statements, or unexpected prosecution witnesses came forward during the course of the trial, it may well be unfair in the particular circumstances to impose a sanction on the defendant for departing from the disclosed defence case.

Recommendation 10

The Commission recommends that judges be given a discretion to impose any of the following consequences for non-disclosure or departure from the disclosed case during the trial:

- (a) A discretion to refuse to admit material not disclosed in accordance with the requirements.²⁵⁵**
 - (b) A discretion to grant an adjournment to a party whose case would be prejudiced by material introduced by the other party which was not disclosed in accordance with the requirements.**
 - (c) In jury trials, a discretion to comment to the jury or to permit counsel to comment, subject, if appropriate, to any conditions imposed by the trial judge.**
 - (d) In trials without jury, the trial judge may have regard to the failure to comply with the disclosure requirements in the same way as a jury would be entitled to do so.**
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255. This power is analogous to the sanction for non-compliance with the alibi notice requirement provided for by s 48 of the *Criminal Procedure Act 1986* (NSW) (formerly s 405A of the *Crimes Act 1900* (NSW)). The circumstances in which this sanction will be invoked have been the subject of judicial consideration. See para 3.20.

Restricted use of information disclosed to the defence

3.148 The English pre-trial disclosure regime includes restrictions on the use of information disclosed to the defence.

The defendant is required to obtain a court order granting permission to use or disclose material for any other purpose.

The Commission's view is that most such material should be freely available, without any restrictions on its use which is why this recommendation adopts the reverse position to that which applies in England and Wales. In general, where the prosecution is concerned to restrict the use which may be made of particular material to be disclosed to the defence, this should be indicated to the defence immediately before or when the material is actually disclosed. The role of the court should be to determine disputes where agreement cannot be reached between the parties.

3.149 This aspect of the English system also includes provision for interested third parties to apply to the court for a right to be heard in proceedings to resolve the permitted use of particular material. The Commission's view is that a formal provision to this effect will not be necessary so long as prosecutors remain sensitive to the interests of third parties, as is currently the practice in relation to subpoenas.

3.150 The Commission's view is that it is not necessary to enact specific procedures or court powers for this situation. Courts already have adequate powers to restrict publication of proceedings or evidence, and, in relation to very sensitive material, the practice already adopted for disputes about public interest immunity might well be an appropriate model for hearings to determine disputes about the permitted use of disclosed material.

Recommendation 11

The Commission recommends that the court should be empowered to make orders concerning the communication, use and confidentiality of material disclosed to the defence.

Procedural considerations

3.151 Having regard to the qualifications of the right to silence which the pre-trial disclosures effect, they require legislative authority for their implementation. Appropriate provisions can be inserted in the *Criminal Procedure Act 1986* (NSW). The Commission considers that the appropriate form of detailed implementation, authorised by statute, would be by Rules of Court. This will enable adjustments to be more readily made as the need arises, for example, in response to changes in or refinements of the elements of offences, the creation of new offences, or changes in related procedures. The Commission has made recommendations concerning the elements of particular offences. It may be that experience will suggest disclosure of defence issues involving other offences. There should be a power to extend the requirements of disclosure to those offences.

Recommendation 12

The *Criminal Procedure Act 1986* (NSW) should be amended to insert a provision to permit the Supreme Court and the District Court to make Rules requiring disclosure as recommended and such other similar disclosure as might be appropriate in respect of other offences.

Disclosure as a mitigating factor

3.152 The *Crimes (Sentencing Procedure) Act 1999* (NSW) already provides that a plea of guilty must be taken into account as a mitigating factor in sentencing convicted persons.²⁵⁶ This reflects the long established common law view of the relevance of a guilty plea to sentence. Although a plea will, in most cases, be taken to indicate contrition, its use as a mitigating factor is not confined to this consideration. A plea of guilty may also be taken into account as an independent factor, as mitigation for the cooperation of the defendant

256. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22 (formerly *Crimes Act 1900* (NSW) s 439).

in saving the time and cost of a trial. The Supreme Court of New South Wales has said that the leniency thus afforded is based on “purely utilitarian considerations ... in order to encourage early pleas of guilty so that the criminal list is more expeditiously disposed of and so that other cases, in which there is a genuine issue to be determined, will be brought on for hearing without delay”.²⁵⁷

3.153 The Commission considers that the same utilitarian consideration applies to the conduct of trials. It is important to note that, whilst cooperation may be taken into account in mitigation, the failure to cooperate is not an aggravating factor. This reflects the sentencing principles relating to pleas of guilty.

Recommendation 13

Judges should also be given a discretion to consider compliance with the defence disclosure duties as a mitigating factor when sentencing a defendant who is ultimately convicted.

257. *R v Winchester* (1992) 58 A Crim R 345 at 350.

4 ● The right to silence at trial

- History of the right to silence at trial
- The law in New South Wales
- Other jurisdictions
- Reform of the right to silence at trial

4.1 In New South Wales, the defendant has the right to decide whether to testify at trial. The judge and any party other than the prosecution may comment to the jury if the defendant does not give evidence, although there are restrictions on the nature of comment which is permitted. Comment by the prosecution is expressly prohibited.

4.2 Although the right to silence at trial is recognised in all common law countries, the law in relation to comment on the fact that the defendant did not give evidence varies, both within Australia, and overseas. Some jurisdictions prohibit comment by both the judge and the prosecution. Other jurisdictions specifically permit the jury to draw very strong adverse inferences, and also permit the trial judge and the prosecution to comment. This chapter examines the right to silence at trial in New South Wales and the position in other jurisdictions. It considers the arguments for and against modifying the right to silence at trial, and includes the Commission's recommendations.

HISTORY OF THE RIGHT TO SILENCE AT TRIAL

4.3 The defendant at common law was always considered incompetent to give evidence at trial. During the late sixteenth century, the English Courts of Star Chamber and High Commission developed the practice of compelling suspects to take an oath known as the "ex-officio oath" and, without formal accusation, to answer questions put by both the judge and the prosecutor. Failure to either take the oath or answer questions attracted severe sanctions, including torture. This practice was subsequently held to be unlawful and these bodies were abolished.¹

1. J Wigmore, *Evidence in Trials at Common Law* (McNaughton Rev, Little Brown, Boston, 1961) at para 2250; I Alger, "From Star Chamber to Petty and Maiden: Police Attitudes to the Right to Silence" paper presented at session 24 of the *30th Australian Legal Convention* (Melbourne, 18-21 September 1997) at para 9; M Weinberg, "The Right to Silence – Sparing the Judge From Talking Gibberish" paper presented at session 24 of the *30th Australian Legal Convention* (Melbourne, 18-21 September 1997) at 3-4; T O'Gorman, "Right to Silence" paper presented at session 24 of the *30th Australian Legal Convention* (Melbourne, 18-21 September 1997) at 1; K Marks, "'Thinking Up' About the Right of Silence and Unsworn Statements" (1984) 58 *Law Institute Journal* 360 at

4.4 The practice of permitting the defendant to make an unsworn statement at trial was developed by the judiciary in the nineteenth century as a way of enabling defendants to say something in their defence.² This practice was recognised as a statutory right in 1883.³

4.5 The competence of defendants to testify in their own defence was established for summary offences in 1882.⁴ This was extended to indictable offences in 1891.⁵ The right to remain silent at trial was expressly preserved.⁶ Palmer has commented that, in light of these historical developments, “it might be more accurate to talk of the accused having a right to testify, rather than a right to not testify”.⁷

4.6 In 1893, the Full Bench of the Supreme Court of New South Wales held that the trial judge was permitted to direct the jury to draw adverse inferences from the fact that the defendant did not give evidence at trial.⁸ In 1898, judicial comment on the exercise of the right to silence at trial was

370-371; J Wood and A Crawford, *The Right to Silence* (Civil Liberties Trust, London, 1989) at 5-6; CR Williams, “Silence in Australia: Probative Force and Rights in the Law of Evidence” (1994) 110 *Law Quarterly Review* 629 at 629-630; Justice Evidence Committee, *The Accused as a Witness* (London, 1968) at 1; S Greer, “The Right to Silence: A Review of the Current Debate” (1990) 53 *Modern Law Review* 709 at 710 and 711; J Michael and B Emmerson, “The Right to Silence” (1995) 1 *European Human Rights Law Review* 4 at 5; S Odgers, “Police Interrogation and the Right to Silence” (1985) 59 *Australian Law Journal* 78 at 83.

2. Marks at 372; S Nash, “Silence as Evidence: A Commonsense Development of a Violation of a Basic Right?” (1997) 21 *Criminal Law Journal* 145; Criminal Law Revision Committee, *Evidence (General)* (Report 11, London, 1972) at para 102; New South Wales Law Reform Commission, *Criminal Procedure: Unsworn Statements of Accused Persons* (Report 45, 1985) at para 2.34.
3. *Criminal Law Amendment Act 1882* (NSW) (46 Vic No 17) s 470. This was re-enacted in 1900 by s 405(1) of the *Crimes Act 1900* (NSW).
4. *Evidence in Summary Convictions Act 1882* (NSW) (46 Vic No 3) s 1.
5. *Criminal Law and Evidence Amendment Act 1891* (NSW) (55 Vic No 5).
6. *Criminal Law and Evidence Amendment Act 1891* (NSW) (55 Vic No 5) s 6.
7. A Palmer, “Silence in Court – the Evidential Significance of an Accused Person’s Failure to Testify” (1995) 18 *University of New South Wales Law Journal* 130 at 137.
8. *R v Kops* (1893) 14 LR (NSW) 150.

prohibited by statute.⁹

In *Bataillard v The King*,¹⁰ Justice Isaacs summed up the developments as follows:

A new opportunity had been afforded to a prisoner to establish his innocence if he could. But reasons other than a sense of guilt, such as timidity, weakness, a dread of confusion or of cross-examination, or even the knowledge of a previous conviction, certainly in a summary proceeding, and perhaps in the case of a trial for an indictable offence, might easily prevent the accused person from availing himself of the new means permitted by law. Hence the legislature determined to prevent the enactment, if not used by the prisoner, from being employed as a means of inculcation.

4.7 Also in 1898, the competence of defendants to testify in their own defence was established in England.¹¹ The trial judge was permitted to comment if the defendant elected not to give evidence, but prosecutors were not.¹² The right to make an unsworn statement at trial was also expressly preserved.¹³

9. *Accused Person's Evidence Act 1898* (NSW) s 1; later replaced by s 407 of the *Crimes Act 1900* (NSW).

10. (1907) 4 CLR 1282 at 1290.

11. *Criminal Evidence Act 1898* (Imp) (61 & 62 Vict) s 1.

12. *Criminal Evidence Act 1898* (Imp) (61 & 62 Vict) s 1(b). For a discussion of the type of judicial comment which occurred in practice, see S Nash at 146; contra Michael and Emmerson at 5-6.

13. *Criminal Evidence Act 1898* (Imp) (61 & 62 Vict) s 1(h).

4.8 The right to make an unsworn statement at trial was abolished in New South Wales in 1994, although the right still exists in some residual trials.¹⁴ Unsworn statements have now been abolished in all Australian jurisdictions.

4.9 The *Evidence Act 1995* (NSW) reintroduced some limited permitted comment at trial on the fact that the defendant elected not to testify. Section 20 provides that the trial judge, and any party other than the prosecutor, may comment on the inferences the jury may draw from the fact that the defendant elected not to testify. Any suggestion that the defendant did so because of a belief of guilt is prohibited.¹⁵ This is consistent with the common law approach to comment.¹⁶

THE LAW IN NEW SOUTH WALES

Evidence Act 1995 (NSW)

4.10 In criminal trials in New South Wales, the defendant is not competent to give evidence for the prosecution¹⁷ and is a competent, but not compellable, defence witness.¹⁸

4.11 The *Evidence Act 1995* (NSW) s 20 regulates the comment which can be made when a defendant on trial for an indictable offence does not testify. Section 20 provides as follows:

Comment on failure to give evidence

- (1) This section applies only in a criminal proceeding for an indictable offence.

14. *Criminal Procedure Act 1986* (NSW) s 95 (formerly *Crimes Act 1900* (NSW) s 404A).

15. *Evidence Act 1995* (NSW) s 20. See para 4.11-4.13.

16. *Weissensteiner v The Queen* (1993) 178 CLR 217; *RPS v The Queen* [2000] HCA 3. See para 4.14-4.17.

17. *Evidence Act 1995* (NSW) s 17(2).

18. *Evidence Act 1995* (NSW) s 12, 17, 20.

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

...

- (5) If:
- (a) 2 or more persons are being tried together for an indictable offence; and
 - (b) comment is made by any of those persons on the failure of any of those persons to give evidence,

the judge may, in addition to commenting on the failure to give evidence, comment on any comment of a kind referred to in paragraph (b).

4.12 Under s 20, the trial judge and any party except the prosecutor is permitted to comment to the jury on the defendant's election not to testify, but must not suggest that the defendant failed to give evidence because he or she was guilty.

4.13 Despite the prohibition on prosecution comment, there is authority that, in the course of the final prosecution address to the jury, the prosecution is entitled to refer to the judicial comment on the fact that the defendant did not give evidence. However, the prosecution must not imply that it adopts the judge's comment. A high degree of caution is required by the prosecution in this situation.¹⁹

Common law

4.14 In *Weissensteiner v The Queen*, in which the prosecution relied on circumstantial evidence, the High Court upheld a direction by a trial judge that an inference of guilt could more safely be drawn by a jury if the defendant elected not to give evidence about facts which must be within his

19. *R v Milat* (NSW, Supreme Court, No 70114/1994, Hunt CJ at CL, 22 April 1996, unreported).

knowledge.²⁰

The majority held that adverse inferences may be drawn from a defendant's election not to testify where the evidence establishes a prima facie case, the defendant could reasonably have been expected to testify, and the election not to do so is clearly capable of assisting the evaluation of the evidence before the court.²¹

The Court distinguished the High Court's decision in *Petty v The Queen*,²² which was decided two years earlier, on the basis that the facts in *Weissensteiner v The Queen* concerned silence at trial, rather than silence before trial.²³

4.15 The majority noted that the fact that a defendant elected not to testify is not, of itself, evidence of an implied admission of guilt. It cannot fill in gaps in the prosecution case. The judge should explain that the defendant is entitled to remain silent, and that there may be reasons for doing so which are not related to guilt. The judge may give examples of possible reasons.²⁴

20. *Weissensteiner v The Queen* (1993) 178 CLR 217 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ, Gaudron and McHugh JJ dissenting. See also *R v Buckland* [1977] 2 NSWLR 452 (CCA); *Browne v The Queen* (1987) 30 A Crim R 278 (NSW CCA); *R v Clough* (1992) 28 NSWLR 396 (CCA). For commentary on *Weissensteiner* see A Mason, "Fair Trial" (1995) 19 *Criminal Law Journal* 7 at 10; E Stone, "Calling a Spade a Spade: The Embarrassing Truth About the Right to Silence" (1998) 22 *Criminal Law Journal* 17 at 21-24; Weinberg at para 49-63.

21. *Weissensteiner v The Queen* (1993) 178 CLR 217 per Mason CJ, Deane and Dawson JJ at 228-231. See also Palmer at 133-134 and 144-150.

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

23. At 228 per Mason CJ, Deane and Dawson JJ; at 231 per Brennan and Toohey JJ.

24. *Weissensteiner v The Queen* (1993) 178 CLR 217 at 227-229 per Mason CJ, Deane and Dawson JJ and at 235-236 per Brennan and Toohey JJ; *R v OGD* (1998) 45 NSWLR 744 at 753 per Gleeson CJ, with whom the other members of the Court agreed. See also Palmer at 133; Stone at 22. The minority judges in *Weissensteiner v The Queen*, Gaudron and McHugh JJ, held at 244-245 that adverse inferences could be drawn from a defendant's failure to explain facts at the first reasonable opportunity.

They held that this conduct can itself amount to evidence that the defendant is guilty. For discussion of the minority view see Palmer at 135-138 and Stone at 23-24.

4.16 The High Court's decision in *Weissensteiner v The Queen* arose out of a murder trial in Queensland, where there is no prohibition on comment on the election of a defendant not to testify. However, the prerequisites for comment established by the High Court are consistent with s 20 of the *Evidence Act 1995* (NSW) and must be considered in addition to the limit on comment expressly stated in s 20.²⁵

4.17 In *RPS v The Queen*²⁶ the complainant gave direct evidence of the defendant's guilt. The defendant elected not to testify at his trial. A majority of the High Court held that a *Weissensteiner* direction should not have been given in these circumstances, since this had the effect of suggesting guilt from silence, and hence breached s 20 of the *Evidence Act 1995* (NSW). The Court held that a *Weissensteiner* direction may be appropriate in cases where an otherwise damning inference was uncontradicted by evidence or an explanation that could only come from the defendant. However, where the prosecution case depended upon direct evidence, the question was whether that evidence was accepted beyond reasonable doubt and no increased likelihood of proof arose from the defendant's silence, for which there might be a number of explanations, including the opinion that the evidence adduced does not prove the charges. To hold otherwise is in effect to suggest that the defendant is bound to give evidence.²⁷

25. S Odgers, *Uniform Evidence Law* (3rd ed, Law Book Company, Sydney, 1998) at para 20.8; Palmer at 134; T Smith, *Submission to the Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 14.

26. *RPS v The Queen* [2000] HCA 3.

27. *RPS v The Queen* [2000] HCA 3 at para 27-34.

4.18 In *R v OGD*,²⁸ the New South Wales Court of Criminal Appeal suggested that, as a practical matter, it will often be appropriate for the trial judge to raise with defence counsel, in the absence of the jury, the question of whether the jury should be given a direction about the fact that the defendant has elected not to testify. This gives defence counsel an opportunity to suggest to the judge possible reasons for the defendant's silence which would make it unfair to draw an adverse inference, and debate the fairness of the direction in the particular circumstances of the case.²⁹

4.19 A defendant facing multiple charges may have an answer to one charge which would involve making admissions in relation to other charges. In this situation, the trial judge should draw a distinction between the different charges and direct the jury that the significance of the defendant's election not to testify may differ for the different charges.³⁰

How often defendants remain silent at trial

4.20 Most judges, magistrates, legal practitioners and police prosecutors surveyed by the Commission reported that defendants almost never elected not to testify at trial.³¹

28. (1998) 45 NSWLR 744 (disapproved as to another matter in *RPS v The Queen* [2000] HCA 3 at para 30).

29. *R v OGD* (1998) 45 NSWLR 744 at 753 per Gleeson CJ, with whom the other members of the Court agreed.

30. *R v OGD* (1998) 45 NSWLR 744 at 754 per Gleeson CJ. The defendant in this case was charged with ten counts of having intercourse with a person under the age of consent and one count of rape. The New South Wales Court of Criminal Appeal held that evidence of a long relationship between the defendant and the victim meant that "(i)t was quite possible that he had an answer to one of the charges but not to the others": at 753 per Gleeson CJ. The significance of this matter was referred to in *RPS v The Queen* [2000] HCA 3 at para 34.

31. New South Wales Law Reform Commission, *The Right to Silence and Pre-trial Disclosure in New South Wales* (Research Report 10, 2000) at Table 4.1 and para 4.4-4.5.

OTHER JURISDICTIONS

Australia

4.21 In Federal trials and trials conducted in the Australian Capital Territory, the law regulating comment where the defendant elects not to testify is identical to the position in New South Wales.³² In South Australia, Western Australia and Tasmania, the right to silence at trial is expressly recognised in legislation.³³ In these jurisdictions, as in New South Wales, the prosecution is expressly prohibited from commenting to the jury on the fact that the defendant did not give evidence.³⁴ However, unlike New South Wales, there is no statutory regulation of comment by the trial judge in these states. Judicial comment is regulated by the common law.³⁵ In Victoria and the Northern Territory, the right to silence at trial is also expressly provided for by legislation.³⁶ In these states, neither the judge nor the prosecutor is permitted to comment where the defendant elects not to testify.³⁷ Queensland has no statutory regulation of the right to silence at trial. Judicial comment is regulated solely by the common law in this jurisdiction.³⁸

4.22 All common law countries recognise the right to silence at trial. In some jurisdictions, including Canada and the United States, the right to silence at trial is a constitutional right. On the other hand, the adverse inferences available at trial in Singapore, Northern Ireland, England and Wales when a defendant has not answered police questions, are also available when the defendant does not give evidence.

32. *Evidence Act 1995* (Cth) s 4, 17, 20.

33. *Evidence Act 1929* (SA) s 18(1)I; *Evidence Act 1910* (Tas) s 85(1)(a); *Evidence Act 1906* (WA) s 8(1).

34. *Evidence Act 1929* (SA) s 18(1)II; *Evidence Act 1910* (Tas) s 85(1)(c); *Evidence Act 1906* (WA) s 8(1)(c).

35. The leading case is *Weissensteiner v The Queen* (1993) 178 CLR 217. See para 4.14-4.16.

36. *Evidence Act 1939* (NT) s 9; *Crimes Act 1958* (Vic) s 399(1).

37. *Evidence Act 1939* (NT) s 9(3); *Crimes Act 1958* (Vic) s 399(3).

38. *Weissensteiner v The Queen* (1993) 178 CLR 217. See para 4.14-4.16.

Canada

4.23 The *Canadian Charter of Rights and Freedoms* (“the Charter”) provides that any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence.³⁹ The Charter also states that every person has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice,⁴⁰ and it codifies the common law presumption of innocence and the right to a fair trial.⁴¹ The *Canada Evidence Act* prohibits the trial judge and the prosecution from commenting on the defendant’s silence at trial.⁴²

4.24 The Supreme Court of Canada has held that the defendant’s silence at trial should not be used against him or her in building the prosecution case. The trial judge is entitled to comment that the prosecution’s evidence on a particular point was not contradicted by the defendant. This must be accompanied by a direction to the jury not to speculate about possible contradictory evidence which was not led.⁴³

England, Wales

4.25 Several common law jurisdictions have modified the right to silence at trial, by enacting legislation which permits the tribunal of fact to draw adverse inferences where the defendant fails to answer specific questions or to give evidence at trial. In these jurisdictions, the trial judge and the prosecution are permitted to comment to the jury on the inferences which may be drawn in this situation. In Singapore, the relevant provision has been

39. *Charter of Rights and Freedoms* (Can) s 11(c). See also United States, *Bill of Rights*, Fifth Amendment; *Constitution of India* art 20(3); *Constitution of Papua New Guinea* art 37(1); *Bill of Rights* (NZ) s 23(4) and *Crimes Act 1961* (NZ) s 366(1).

40. *Charter of Rights and Freedoms* (Can) s 7.

41. *Charter of Rights and Freedoms* (Can) s 11(d).

42. *Canada Evidence Act* s 4(6).

43. *R v Noble* [1997] 1 SCR 874 at 933 per Sopinka J, with whom L’Heureux-Dube, Cory, Iacobucci and Major JJ concurred. Contrast the dissenting judgment of Lamer CJ, with whom La Forest and Gonthier JJ concurred on the main issue, at 890. The minority reached the same position as the majority of the High Court in *Weissensteiner*. See also *Stone* at 34.

in force since January 1977.⁴⁴ The Northern Ireland provisions were enacted in November 1988.⁴⁵ Section 35 of the *Criminal Justice and Public Order Act 1994* (Eng) modifies the right to silence at trial in England and Wales. This section is set out in full at Appendix “C”.

4.26 The adverse inferences that can be drawn from the defendant’s silence under these provisions are not limited to specific inferences from specific facts but may include, as a matter of common sense, an inference that the defendant is guilty of the offence charged where the evidence clearly calls for an explanation which the defendant ought to be in a position to give.⁴⁶

4.27 The English Court of Appeal has held that the failure to draw adverse inferences under s 35 of the *Criminal Justice and Public Order Act 1994* (Eng) could only be justified where there was some “evidential basis for doing so or some exceptional factors in the case making that a fair course to take”.⁴⁷ Section 35 provides that, if a defendant is under fourteen years of age or it is otherwise “undesirable” for him to give evidence, the adverse inferences which would otherwise be available cannot be drawn.

4.28 The fact that the defendant participated in a police interview or, alternatively, the fact that he or she was not interviewed by police, is not a basis for the trial judge refusing to comment on the inferences which the jury may draw from the defendant’s failure to give evidence.⁴⁸

44. *Criminal Procedure Code* (Spore) s 196, inserted by the *Criminal Procedure (Amendment) Act 1976* (Spore).

45. *Criminal Evidence (Northern Ireland) Order 1988* (Eng) art 2, 4.

46. *Murray v United Kingdom* [1994] 1 WLR 1 (House of Lords); *Murray v United Kingdom* (1996) 22 EHRR 29.

47. *R v Cowan* [1995] 4 All ER 939 at 944.

48. *Hamil v The Queen* (England, Court of Appeal, March 1991, unreported) discussed in Justice, *Right of Silence Debate: The Northern Ireland Experience* (1994) at 35; *R v Napper* (1997) 161 JP 16; and *R v Gallen* (Northern Ireland, November 1993, unreported) discussed in Justice at 35. See also S Nash and S Solley, “Limitations on the Right to Silence and Abuse of Process” (1997) 61 *Journal of Criminal Law* 95 at 97.

4.29 The English Court of Appeal has approved Model Directions to juries in relation to the inferences available from the defendant's failure to give evidence.⁴⁹ It is in the following terms:

DEFENDANT'S TOTAL OR PARTIAL SILENCE AT TRIAL

The defendant has not given evidence. That is his right. He is entitled to remain silent and require the prosecution to prove its case. You must not assume he is guilty just because he has not given evidence because failure to give evidence cannot, on its own, prove guilt. However, as he has been told, depending on the circumstances, you may take into account his failure to give evidence when deciding on your verdict.

1. In the first place when considering the evidence as it is now, you may bear in mind that there is no evidence from the defendant himself which in any way undermines or contradicts or explains the evidence put before you by the prosecution.

[The defendant did answer questions in interview, and he now seeks to rely on those answers, which are of course evidence in the case – evidence of what he said then. It is a matter for you to decide what weight you should give to them, but you are entitled to bear in mind that those answers were not given here before you, they were not given on oath and the prosecution has had no opportunity to test them before you in cross-examination.]

49. *R v Cowan* [1995] 4 All ER 939 at 944-945; *Condon v The Queen* [1997] 1 WLR 827. See also J Black, "Inferences From Silence: Redressing the Balance? (2)" [1997] *Solicitors Journal* 772 at 772.

2. In the second place, if you think in all the circumstances it is right to do so, you are entitled, when deciding whether the defendant is guilty of the offence(s) charged, to draw such inferences from his failure to give evidence as you think proper.

[There is evidence before you on the basis of which the defendant's advocate invites you not to hold it against the defendant that he has not given evidence. The evidence is (here set out the evidence). If you think that this amounts to a reason why you should not hold it against the defendant that he has not given evidence, do not hold his silence against him. If, on the other hand, it does not in your judgement provide an adequate explanation for his absence from the witness box, then you may, if you think it right, hold his failure to give evidence against him.]

What inference can you properly draw from the defendant's decision not to give evidence? If, and only if, you conclude that there is a case for him to meet, you may think that if he had an answer to it he would have gone into the witness box to tell you what it is.

If, in your judgment, the only sensible reason for his decision not to give evidence is that he had no explanation or answer to give, 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, that is take it into account as some additional support for the prosecution's case. You are not bound to do so. It is for you to decide whether it is fair to do so.

4.30 The defendant is informed in the presence of the jury, where there is one, according to the Model Directions specified by the Judicial Studies Board:

You have heard the evidence against you. Now is the time for you to make your defence. You may give evidence on oath, and be cross-examined like any other witness. If you do not give evidence or, having been sworn, without good cause refuse to answer any question the jury may draw such inferences as appear proper. *That means they may hold it against you.* (EMPHASIS ADDED.)

4.31 This statement is made pursuant to the requirement in s 35 that the court should satisfy itself, in the presence of the jury where there is one, that the defendant is aware, when the prosecution has closed its case, that he or she can give evidence and the court or the jury may draw “such inferences as appear proper” from the failure to give evidence or to answer any question without good cause.

4.32 The Model Directions were said by the Court of Appeal to be “in general terms a sound guide”, and it was pointed out that it might “be necessary to adapt or add to it in the particular circumstances of an individual case”.⁵⁰ The court also said a judge might, in some circumstances, think it right to direct or advise a jury against drawing an adverse inference. The court added that, as the discretion was untrammelled, both as to whether to draw an adverse inference and as to its nature, extent and degree, it should not set out the bounds of either⁵¹ and did not think it wise to give examples. Accordingly, it appears that directions complying with the Model Directions will suffice unless the case is an exceptional one.

4.33 The European Court of Human Rights has upheld the validity of the legislation modifying the right to silence at trial in Northern Ireland. In *Murray v United Kingdom*, the Court, by a majority of 14 to 5, upheld the decision of a trial judge in Northern Ireland to draw strong unfavourable inferences from the defendant’s failure to give evidence.⁵² The majority held that the strong adverse inferences drawn by the trial judge did not necessarily deprive the defendant of a fair trial as guaranteed by article 6 of the *European Convention on Human Rights*.

The statute was merely a “formalised system which aims at allowing commonsense implications to play an open role in the assessment of the evidence”.⁵³ It appears that more defendants in England and Wales give evidence at their trial since s 35 of the *Criminal Justice and Public Order Act 1994* (Eng) was enacted.⁵⁴

50. *R v Cowan* [1995] 4 All ER 939 at 944-946.

51. Citing *R v McClernon* [1990] 10 NIJB 91 at 102, a Northern Ireland Case, where judges sit without juries in criminal trials.

52. *Murray v United Kingdom* (1996) 22 EHRR 29.

53. *Murray v United Kingdom* (1996) 22 EHRR 29 at 63.

54. M F Adams, visit to the United Kingdom (June 1998).

REFORM OF THE RIGHT TO SILENCE AT TRIAL

Previous inquiries into the right to silence at trial

Australia

4.34 The Australian Law Reform Commission (“ALRC”) published its interim report on evidence in 1985.⁵⁵ The Interim Report recommended permitting restricted judicial comment on the defendant’s silence at trial. It recommended that trial judges be prohibited from suggesting that the defendant elected not to testify because he or she was guilty of the offence concerned.

The ALRC recommended that the prosecution be prohibited from commenting to the jury on the defendant’s silence.⁵⁶ Two years later, the ALRC published its final report on evidence, reiterating these recommendations.⁵⁷ The ALRC’s recommendations were adopted in New South Wales in 1995.⁵⁸

4.35 In 1985, the New South Wales Law Reform Commission published a report on unsworn statements, which recommended that the trial judge be prohibited from commenting upon the defendant’s election not to testify.⁵⁹ This Report recommended that the prosecutor be permitted to comment, subject to leave, where this was raised by the defendant or any co-accused in the presence of the jury.⁶⁰ The Commission’s report on evidence was published in 1988.⁶¹ The Commission recommended that if the defence raised the fact of the defendant’s election not to testify as an issue in the trial, the prosecution, but not the trial judge, should be permitted to comment to the jury on the adverse inferences which the jury could draw. The Commission also recommended preserving the trial judge’s power to comment on

55. Australian Law Reform Commission, *Evidence* (Report 26 (Interim), 1985).

56. ALRC Report 26 (Interim) *Draft Evidence Bill* cl 17 (7). See also volume 1 at para 194-199, 258-260, 551-553, 555-558.

57. ALRC, *Evidence* (Report 38, 1987) *Draft Evidence Bill 1987* cl 23. See also para 69-73.

58. See para 4.11.

59. NSWLRC Report 45 at para 4.68.

60. NSWLRC Report 45 at para 4.77.

61. New South Wales Law Reform Commission, *Evidence* (Report 56, 1988).

prejudicial material introduced by the prosecution by way of comment on the defendant's silence.⁶²

4.36 In March 1999, the Victorian Scrutiny of Acts and Regulations Committee published a report on the right to silence which recommended that the existing Victorian law governing the right to silence at trial be repealed and replaced with a provision based on s 20(2) of the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW).⁶³

4.37 The Law Reform Commission of Western Australia recently reviewed the right to silence at trial. The Commission recommended the introduction of legislation to clarify the nature of comment permitted where the defendant does not testify, and that the power to comment be extended to the prosecution.⁶⁴

United Kingdom

4.38 The Justice Evidence Committee ("JEC") published its report on the defendant as a witness in 1968.⁶⁵ The JEC proposed that the prosecution be permitted to comment to the jury on the defendant's election not to give evidence.⁶⁶ The JEC criticised the "undue moderation" of some trial judges in their jury directions and proposed a more forthright approach to judicial comment.⁶⁷ The JEC also proposed that the defendant should be informed of the right to give evidence by the trial judge, in the presence of the jury.⁶⁸

4.39 The Criminal Law Revision Committee ("CLRC") published its report on evidence in 1972.⁶⁹ The CLRC recommended that, if the defendant refused to give evidence at trial or refused without good cause to answer any question, the court or jury again be permitted to "draw

62. NSWLRC Report 56 *Evidence Bill 1988* cl 23 and para 2.32.

63. Victoria, Scrutiny of Acts and Regulations Committee, *Inquiry Into the Right to Silence* (Final Report, 1999) Recommendation 4.

64. Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System* (Final Report, 1999) Recommendation 255 and see para 24.23 and 24.24.

65. Justice Evidence Committee, *The Accused as a Witness* (London, 1968).

66. Justice Evidence Committee at 4-5.

67. Justice Evidence Committee at 4-5.

68. Justice Evidence Committee at 5.

69. Criminal Law Revision Committee, *Evidence (General)* (Report 11, London, 1972).

such inferences from the refusal as appear proper".⁷⁰ It recommended that both the prosecution and the trial judge be permitted to comment to the jury on the inferences available.⁷¹ The CLRC also recommended that before the presentation of the defence case at trial, the trial judge call on the defendant to give evidence and explain the consequences of failure to do so.⁷² The CLRC recommendations were strongly opposed and not implemented.⁷³

4.40 The Royal Commission on Criminal Procedure reported in 1981.⁷⁴ The Commission, with one dissident, recommended against modifying the right to silence at trial.⁷⁵

4.41 The Working Group on the Right to Silence published its report in 1989.⁷⁶ The Group recommended that the prosecution be permitted to comment to the jury on the significance of the defendant's failure to give evidence to the same extent that judicial comment was at that time permitted at common law.

The Group also adopted the recommendation of the CLRC that judges make more frequent and robust use of their right to comment.⁷⁷ In respect of summary trials, the Group recommended that magistrates should direct themselves as to the significance of the defendant's failure to testify.⁷⁸

4.42 The Royal Commission on Criminal Justice published its report in 1993.⁷⁹ A majority of the Commission rejected the recommendations of the

70. Criminal Law Revision Committee, *Draft Criminal Evidence Bill* cl 5. See also para 108-113.

71. Criminal Law Revision Committee at para 110.

72. Criminal Law Revision Committee, *Draft Criminal Evidence Bill* cl 5(2). See also para 112-113.

73. Greer at 715; Royal Commission on Criminal Procedure, *Report of the Royal Commission on Criminal Procedure* (London, 1981) at para 1.27 and 1.31.

74. Royal Commission on Criminal Procedure, *Report of the Royal Commission on Criminal Procedure* (London, 1981).

75. Royal Commission on Criminal Procedure at para 4.66. See also para 4.63-4.65.

76. Working Group on the Right to Silence, *Report of the Working Group on the Right to Silence* (London, 1989).

77. Working Group on the Right to Silence at para 114. See also para 113 and 115.

78. Working Group on the Right to Silence at para 116.

79. Royal Commission on Criminal Justice, *Report of the Royal Commission on Criminal Justice* (London, 1993).

CLRC and the Working Group on the Right to Silence, recommending that the existing law not be modified.⁸⁰

Discussion of the legislation in England and Wales

4.43 The Commission's view of s 35 of the *Criminal Justice and Public Order Act 1994* (Eng) focuses essentially on three considerations. The first concerns the procedures by which the jury is invited to consider drawing such inferences from the defendant's election not to testify at his or her trial in England and Wales.

The second relates to the reasonableness of drawing adverse inferences in all cases where the defendant elects not to testify. Finally, the third consideration concerns the appropriate significance of the principles that defendants should not be required to incriminate themselves and the prosecution bears the onus of proving guilt beyond reasonable doubt.

4.44 A useful starting point is the warning addressed to the defendant in the presence of the jury, as required by the Model Directions, that informs the defendant as to the possible risks of remaining silent, including the risk that the jury "might hold it against" him or her (set out at paragraph 4.29). What the jury might make of this is conjectural but its threatening character is unmistakable and its impact likely to be considerable. It is not, therefore, the fact of the silence alone which justifies a "proper" inference to be drawn. Rather, that silence, *despite the warning*, suggests to the jury that the defendant's silence at trial is, of itself, significant additional material tending to prove guilt. The warning effects a marked change in procedure, focussing the trial on whether the defendant has a defence rather than, as hitherto, whether the Crown has proved its case beyond reasonable doubt.

4.45 The need to instruct the jury as to the precise significance of the defendant's silence in the particular circumstances of the case is not adverted to in the Model Directions. Thus, paragraph 1 invites the jury to bear in mind that there is no evidence from the defendant that undermines, contradicts or explains evidence adduced by the prosecution. However, there is no requirement to explain what the significance of the omission might be by reference to the evidence in the case, drawing the distinction, for example, between matters of which the defendant may have personal knowledge and

80. Royal Commission on Criminal Justice at 56. See also 55 and 57.

those about which he can only comment. Much of the prosecution case might be unpersuasive or doubtful, or contradicted or qualified by other evidence, perhaps called by the defence. Especially in light of the reasons that a defendant might have for not giving evidence apart from any possible consciousness of guilt (which must be speculative), the prosecution case might not gain much from the defendant's silence. Evaluations of this kind are often not simple, and common sense will often replace rather than inform careful analysis.

4.46 Paragraph 2 of the Model Directions invites the jury to draw such inferences which it might "think proper" from the defendant's silence at trial, but it gives no guidance as to what those inferences might appropriately be, including, especially, possibly innocent explanations. It seems to the Commission that, unless there are careful directions from the trial judge, a jury will be likely to give too much significance to the fact that a defendant has elected not to testify. In Australia, the High Court has enunciated the appropriate content of directions where a defendant has elected not to give evidence.⁸¹

4.47 A conclusion that the defendant has no answer to or explanation for the prosecution case will usually be tantamount to concluding that he or she is guilty. However, there is a very important distinction between, on the one hand, taking into account the fact that the defendant *gives* no answer or explanation and, on the other hand, inferring that the defendant *has* no answer or explanation. The difference is more marked when regard is had to the speculative character of the inference. The latter reasoning, which appears to be that required or, at least, permitted by the English legislation, makes very substantial inroads into the presumption of innocence.

4.48 An example of how far reaching the legislation is may be found in *R v Friend*,⁸² where the Court of Appeal upheld a trial judge's ruling that it was not "undesirable" within the meaning of s 35 that a fifteen year old boy with a mental age of between nine and ten should give evidence and his directions to the jury that they were entitled to draw adverse inferences from his election not to testify. The Court of Appeal held that there were no exceptional circumstances making it fair to direct or advise the jury against

81. *Weissensteiner v The Queen* (1993) CLR 217 at 237-238, per Brennan and Toohey JJ, approved by the majority in *RPS v The Queen* [2000] HCA 3 at para 35; *RPS v The Queen* [2000] HCA 3 at para 15. See para 4.14-4.17.

82. [1997] 2 All ER 1011.

drawing adverse inferences, not only as to specific facts but also as to guilt: in deciding not to give evidence, the defendant took the risk of the consequences of so doing. In Australia, the question how, in the circumstances, more could be inferred from the defendant's silence than that his lawyers thought it unwise for him to give evidence would be a very significant one.

The Commission considers that to permit any adverse inference to be drawn in such circumstances would be inappropriate.

4.49 There are a number of reasons that might lead an innocent person to elect not to testify, which are discussed at paragraphs 4.65 to 4.73. The Judicial Studies Board comments that the “judge should stop a defence counsel, if necessary during his final speech, from seeking to give such reasons”, a reference to the Lord Chief Justice’s remarks in *R v Cowan*⁸³ to the effect that counsel, in the absence of evidence, could not hypothesise about the reasons for silence. However, s 35 is clearly an invitation (indeed, perhaps, a direction) to the jury to attempt to determine the defendant’s reasons for electing not to testify. In the nature of the case, the defendant’s reasons cannot be before them. An appeal to common sense⁸⁴ simply disguises the invocation of an irresolvable forensic dilemma. If there be a legitimate explanation for not giving evidence, and the defendant is the only one who can give it, then how can he or she give it without giving evidence? Even in the absence of evidence, it might be reasonable to infer that the defendant might fear that the jury would disbelieve him or her because of personal attributes having little or nothing to do as a matter of objective rationality with guilt. This could well be a reasonable judgment. Common professional experience suggests that such cases are not infrequent. Australian authority would require some directions from the judge to the effect that there might be innocent explanations for the election to remain silent at trial.⁸⁵

4.50 The Commission concludes that the practical result of the English legislation is that the right to silence remains only in the sense that it cannot be the cause of direct punishment⁸⁶. The choice in most cases will be between testifying or having guilt inferred from electing not to do so. The prosecution needs only to prove a case requiring explanation from the defendant and it can then hope to prove guilt out of his or her mouth. This undermines the requirement that the prosecution must prove its case beyond reasonable doubt as well as the privilege against self-incrimination.

4.51 It is important to appreciate that the Commission’s objections to the English scheme do not depend upon merely logical or technical issues but reflect its view of the importance of the fundamental rules of criminal procedure as elements of the rule of law.

83. [1995] 4 All ER 939 at 943-944.

84. *Murray v United Kingdom* [1994] 1 WLR 1 at 5.

85. See para 4.13-4.18, 4.62.

86. *Criminal Justice and Public Order Act 1994* (Eng) s 35(4); cf *R v Cowan* [1995] 4 All ER 939 at 942.

The case for drawing adverse inferences from silence at trial

4.52 Proponents of the English position argue that the current restrictions on permitted inferences should be removed because the fact that the defendant has elected not to testify is, of itself, evidence of guilt. Other arguments in favour of permitting some adverse comment are that juries are likely to draw adverse inferences from the defendant's silence at all events and thus would benefit from guidance on this issue, and that there are significant distinctions between silence in response to police questions and silence at trial.

Relevant evidence

4.53 The principal argument for modifying or removing the existing restrictions on the nature of adverse inferences permitted to be drawn from the defendant's election not to testify is that the defendant's silence is of itself relevant evidence indicative of guilt. It is argued that an innocent person would take the opportunity at trial to express his or her innocence and to contest the prosecution evidence.⁸⁷ Others go further, arguing that the right to remain silent at trial is exploited by guilty defendants to secure an acquittal, and that modifying the law would result in more convictions.⁸⁸

4.54 The Commission's research indicates that defendants rarely elect not to testify.⁸⁹ It follows therefore, that modifying the right to silence at trial would be unlikely to significantly increase convictions. Most judges and legal practitioners who participated in the Commission's survey responded that they were unable to say how the fact that the defendant elected not to give evidence generally affected the outcome of the trial.⁹⁰ Of those participants who did have a view on this issue, most prosecutors reported that silence at trial generally contributed to acquittals, while most defence lawyers reported that silence sometimes contributed to acquittals and sometimes contributed to convictions, and equal numbers of judges reported that silence generally did

87. C Corns, *Submission* at 3. See also Marks at 361, 372-373; Stone at 18-20; Williams at 632-636, 640-641, 652. Contra Palmer at 138.

88. T Cleary, *Submission* at 1; E Whitton, *Submission* at 5-6. See also G Davies, "Justice Reform: A Personal Perspective" [1996] *New South Wales Bar Association News* (Summer) 5 at 10-11; Justice Evidence Committee at 3-5; Criminal Law Revision Committee at para 14, 30-31; Alger at para 31.

89. See para 4.20.

90. NSWLRC RR 10 at Table 4.5 and para 4.19.

not affect the outcome of the case, and that it generally contributed to convictions.⁹¹

4.55 Relevance, by itself, does not mean that evidence should be admitted, especially where it is unfair to do so. Not only must the risk of unfair prejudice to the defendant be considered but also the application of fundamental rules of criminal jurisprudence, such as the presumption of innocence and the privilege against self incrimination.⁹²

4.56 Even if the defendant's silence is relevant in some way, precisely what might reasonably be inferred from it is unclear in light of the range of possible reasons that the defendant might have for not giving evidence. The possible inference that defendants might be forced to admit incriminating facts if they gave evidence, and that this explains their silence, is but one amongst a number of perhaps equally likely explanations. Even if it were the most likely explanation, its selection must involve inappropriate speculation.

4.57 The procedure in England and Wales seeks to deal with this difficulty, in part, by the warning to the defendant in the presence of the jury that if he or she remains silent, in effect they may be taken to admit their guilt. As is pointed out at paragraphs 4.43 to 4.51, this procedure virtually compels the defendant to give evidence. Moreover, it is obvious that the true reason why the defendant elected not to testify may be subject to considerable doubt. Hence the justice, as well as the rationality, of drawing the adverse inference that the defendant is guilty must be questioned.

4.58 It is important to consider this question in a practical way, bearing in mind the wide range of differing personal attributes (amongst others, maturity, education, intelligence, life experience, relationships and emotions) of defendants, the unpredictable circumstances in which criminal charges arise, the course of the investigation, the relationships between protagonists and the like. There is no typical defendant. Crimes and trials can only be regarded as typical by ignoring important details. Accordingly, generalisations about what an innocent person might or might not do in the trial context are necessarily mere assumptions and can give no sensible guidance about what to make of the silence of a particular defendant in a

91. NSWLRC RR 10 at Table 4.5 and para 4.20-4.21.

92. See para 4.47 and 4.50.

particular trial, especially when there is no explanation from the defendant as to why he or she has decided against testifying.

4.59 The defendant might think that the prosecution case does not come up to proof; if there are multiple charges and the defendant has a complete answer to some but not all, he or she might well be advised to remain silent, especially if the prosecution case is a weak one.⁹³ Experienced practitioners know that the perils of giving evidence, including especially cross-examination, are very real and may be extremely prejudicial even where the defendant is innocent. This is especially so where the prosecution is not a strong one, when the defendant may well be advised that he or she would be best served by not giving evidence and leaving it to the good sense of the jury to acquit.

The need to guide juries

4.60 It is argued that comment on the inferences which can be drawn where the defendant does not testify is essential because juries will place too much weight on this unless guided by judicial direction.⁹⁴ On the other hand, it has been suggested that juries hesitate to draw any inferences from the defendant's silence without receiving judicial guidance.⁹⁵ The validity of these arguments can only be assessed by speculation, since juries are not required to give reasons for their decisions.

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93. *RPS v The Queen* [2000] HCA 3 at para 33-34 per Gaudron ACJ, Gummow, Kirby and Hayne JJ.
94. Police Association of NSW, *Submission 2* at 4. See also T Smith, *Submission to Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 1-2, 16; Victorian Bar, *Submission to Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 60, 70; *Weissensteiner v The Queen* (1993) 178 CLR 217 at 224-225 per Mason CJ, Deane and Dawson JJ and at 234 per Brennan and Toohey JJ; Williams at 652; ALRC Report 26 (Interim) at para 258; Alger at para 29; J Black, "Inferences From Silence: Redressing the Balance? (1)" [1997] *Solicitors Journal* 741 at 743; D Heydon QC, "Silence as Evidence" (1974) 1 *Monash University Law Review* 53; Weinberg at para 56; Williams at 640; Royal Commission on Criminal Procedure at para 4.66; Victoria, *Scrutiny of Acts and Regulations Committee* at para 3.3. Smith J of the Supreme Court of Victoria, gives examples of trials where the jury has asked the judge whether any, and if so, what, significance they should attach to the fact that the defendant has not testified: T Smith, *Submission to the Scrutiny of Acts and Regulations Committee, Victoria* at 16.
95. D Harvey, "The Right to Silence and the Presumption of Innocence" [1995] *New Zealand Law Journal* 181 at 186.

4.61 The Commission accepts that juries in New South Wales are generally aware that the defendant is entitled to testify at his or her trial. In accordance with the general rules governing directions to juries, especially where evidence may be unfairly prejudicial or otherwise should be treated with caution, there appear to be compelling reasons for requiring directions to be given.

4.62 An appropriate correct direction would have the following elements: the facts from which an inference of guilt may be drawn must be clearly identified; the omitted facts or explanation should be specified; those facts must be easily perceived to be within the defendant's knowledge; the jury must not conclude that the defendant declined to give evidence because he or she is guilty; there are many reasons why a defendant may not want to give evidence and the jury should not speculate about them; and the use to which silence may be put must be restricted to the strengthening of an inference of guilt from the facts proved.⁹⁶

Differences between silence when questioned by police and silence at trial

4.63 There are several significant differences between the questioning of suspects by police and the defendant's opportunity to testify at trial. At trial, the defendant is aware of the charge, the prosecution has established a prima facie case, and the whole prosecution case has been disclosed to and tested by the defendant. This is to be contrasted with the situation where a suspect remains silent when questioned by police who are still gathering evidence about the case, without necessarily knowing details of other prosecution evidence. At trial the defendant has had an opportunity to consider his or her defence and obtain legal advice. In this situation the defendant is less likely to be vulnerable due to shock, confusion and inadequate preparation for questions than in the pre-trial context.⁹⁷ Finally, the election not to testify is made in a public forum, in the presence of the jury and an impartial trial

96. *Weissensteiner v The Queen* (1993) 178 CLR 217 at 237-238, per Brennan and Toohey JJ, approved by the majority in *RPS v The Queen* [2000] HCA 3 at para 15, 35.

97. This view has also been expressed by I Dennis, "The Criminal Justice and Public Order Act – The Evidence Provisions" [1995] *Criminal Law Review* 4 at 18; Palmer at 142-143; Royal Commission on Criminal Procedure at para 4.64; Stone at 22-23; M Aronson, "Complex Criminal Trials: The AIJA Report" (1992) 66 *Australian Law Journal* 825 at 827-828.

judge. Therefore, silence at trial is less likely to be misreported or misinterpreted than in a police interrogation.

The case against drawing adverse inferences from silence at trial

4.64 There are a number of arguments against permitting any comment on the fact that the defendant has remained silent at the hearing or trial. These include the argument that there are many reasons for not testifying which are consistent with innocence, and the concern that comment (either in general and even if appropriately restricted) would undermine the burden of proof and the presumption of innocence.

Reasons for silence consistent with innocence

4.65 Several submissions challenged the argument that an innocent defendant would naturally elect to give evidence, arguing that there are many valid reasons for remaining silent at trial which are consistent with innocence. In general, it can be accepted that jurors will be reasonable, open-minded and unbiased, but any realistic assessment must consider that probably they will also have a wide range of human foibles, sympathies, antipathies, education and intelligence. A defendant could reasonably feel that, although innocent, a jury might unfairly form an adverse view of his or her veracity or character, especially if the defence involved or disclosed some conduct which was disgraceful or questionable.

4.66 ***Personal characteristics, communication factors.*** Defence counsel may advise a defendant to remain silent at trial because he or she would or might have difficulty understanding questions, or perform badly as a witness, due to difficulties communicating (especially if they do not have a good understanding of English), or personal characteristics.⁹⁸ For example, the

98. Ethnic Affairs Commission, *Submission 1* at 1; *Submission 2* at 2; D Guilfoyle, *Submission* at 10. See also Justice at 21; G Nash, "The Right to Silence" (1994) 91 *Victorian Bar News* 62 at 62; Palmer at 141; Stone at 22, Williams at 636 and 637-638; T Smith, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 2; Victorian Bar, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 14, 15, 58, 62; Law Institute of Victoria, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 2.1.2; Criminal Bar

National Children's and Youth Law Centre stated that defence lawyers will often advise children facing charges not to testify because of concerns about their ability to perform as a witness, particularly under aggressive cross-examination.⁹⁹ An adult client may appropriately be advised against testifying for similar reasons. The Commission's research indicated that the most frequent reason defence lawyers advised clients against testifying at their trial was concern that the defendant, for reasons not related to guilt or innocence, would perform badly as a witness.¹⁰⁰

4.67 Hostility, confusion and evasiveness are all ordinary human characteristics and responses to the extremely stressful experiences of being on trial. An innocent defendant may well respond in one or more of these ways when giving evidence, with the risk that the jury will misinterpret these responses. A number of defence counsel who participated in the Commission's survey indicated that they had advised clients against giving evidence for this reason.

4.68 The Commission's research indicated that a number of defence lawyers also advised their clients against testifying out of concern about the psychological impact on their client of giving evidence, particularly cross-examination.¹⁰¹

4.69 **Tactical considerations.** There may also be valid tactical reasons for advising the defendant not to give evidence where he or she provided a detailed statement to police, especially where the interview is videoed, or where the prosecution case is very weak.¹⁰² This was a common reason cited

Association, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 6.11.

99. National Childrens and Youth Law Centre, *Submission* at 2; Youth Justice Coalition, *Submission* at 6. See also Marsdens, *Submission 2* at 5; NSW Young Lawyers, *Submission* at 6. See also Victorian Bar, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 58. Compare *R v Friend*, discussed at para 4.48. See S Sharpe, "Vulnerable Defendants and Inferences from Silence" (1997) 147 *New Law Journal* 842 at 842-843.

100. NSWLRC RR 10 at para 4.23.

101. NSWLRC RR 10 at para 4.25.

102. This view was also expressed by the Criminal Bar Association, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 6.11.

by defence lawyers who participated in the Commission's research for advising their clients not to testify.¹⁰³

4.70 The defendant may be advised against testifying to avoid cross-examination on prior convictions or questioning in relation to other outstanding charges.¹⁰⁴ A number of defence lawyers surveyed by the Commission reported this as a reason for advising clients against testifying.¹⁰⁵ The defendant may also decline to give evidence, or give unsatisfactory evidence, due to fear of repercussions against him or herself, family or associates.¹⁰⁶ The defendant may not remember the events in issue,¹⁰⁷ or memory may be unreliable and the failure or confusion of recollection thus be unfairly incriminating.

103. NSWLRC RR 10 at para 4.24.

104. See also T Smith, *Submission to Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 2; Law Institute of Victoria, *Submission to Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 2.1.2. See also S Nash at 146; Williams at 637. The English Court of Appeal has held that avoidance of cross-examination in relation to prior convictions is not sufficient reason to decline to comment on the defendant's failure to give evidence: *R v Cowan* [1995] 4 All ER 939 at 944. However, note that the *Evidence Act 1995* (NSW) s 103, 104 provide considerable protection to the defendant from cross-examination on any negative aspect of character or misconduct on the basis that it is relevant to credibility.

105. NSWLRC RR 10 at para 4.27.

106. See *R v Barkley* (Northern Ireland, November 1992) discussed in Nash and Solley at 96; R Pattendon, "Inferences From Silence" [1995] *Criminal Law Review* 602 at 607; J Jackson, "Interpreting the Silence Provisions: The Northern Ireland Cases" [1995] *Criminal Law Review* 587 at 601; Greer at 710 and 727; Justice at 21; S Nash at 146; Williams at 637-638; Royal Commission on Criminal Justice at 56; Victorian Bar, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 58; Law Institute of Victoria, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 2.1.2; Criminal Bar Association, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 6.11; NSWLRC RR 10 at para 4.28.

107. See also D Birch, "Commentary on Napper" [1996] *Criminal Law Review* 591 at 593.

4.71 ***Abolition of unsworn evidence.*** Until 1994, defendants in New South Wales had the option of giving unsworn evidence at trial.¹⁰⁸ A defendant who elected to give unsworn evidence could not be cross-examined. This protected the defendant from revelation of prior convictions. Unsworn evidence was also advised for defendants who were assessed as being likely to perform badly as witnesses and to protect vulnerable defendants from harm caused by hostile cross-examination.

4.72 Several submissions and commentators have argued that the importance of the right to silence has increased in New South Wales since the abolition of the option of giving unsworn evidence. It is argued that, if a defendant was able to give unsworn evidence, many of the reasons for electing not to testify would be alleviated.¹⁰⁹ Palmer argues that, although defendants testify in their own defence, in the absence of any right to give unsworn evidence, testifying will inevitably expose a defendant to cross-examination, the object of which is clearly to obtain incriminating information.¹¹⁰ The Victorian Court of Appeal has also suggested that there is a need for further consideration of the application of *Weissensteiner v The*

108. The right to give unsworn evidence was abolished in NSW by s 404A of the *Crimes Act 1900* (NSW), inserted by the *Crimes Legislation (Unsworn Evidence) Amendment Act 1994* (NSW) s 3 and Sch 1. This applied to any person charged with an offence on or after 10 June 1994: s 13.

109. T Smith, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 2, 13-14; Marsdens, *Submission 1* at 4; Victoria Legal Aid, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 5; Law Institute of Victoria, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 2.2.4; Stone at 22. See also Palmer at 141. The Commission's empirical research suggested that defendants who had the option of giving unsworn evidence were less likely to remain silent at trial than defendants generally. However, this conclusion could only tentatively be reached due to the small number of cases within the survey period where the option of giving unsworn evidence was available to the defendant: NSWLRC RR 10 at para 4.6-4.9.

110. Palmer at 141 and 143. See also T Smith, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 2-3.

*Queen*¹¹¹ to cases where the defendant does not have the option of giving unsworn evidence.¹¹²

4.73 In 1985, the Commission recommended that unsworn statements be retained.¹¹³ More recently, the Commission recommended that the option of giving evidence not subject to cross-examination be reintroduced for defendants with an intellectual disability.¹¹⁴

Fundamental principles

4.74 Several submissions argued that modifying the right to silence at trial would undermine the principles that the defendant is presumed innocent until proven guilty and that the prosecution carries the burden of proof, which are fundamental to the criminal justice system. It was argued that this would, in practice, lead to defendants feeling a sense of pressure or compulsion to testify, in order to avoid such comment and inferences.¹¹⁵ Another submission

111. (1993) 178 CLR 217. See para 4.14-4.16.

112. *R v Mora* (Vic, Court of Appeal, No 0189/95, 30 May 1996, unreported) at 2-4. See also Victorian Bar, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 67.

113. NSWLRC Report 45 at para 4.16.

114. New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* (Report 80, 1996) at paras 7.28 and 7.29. There is a strong view amongst the majority of Commissioners on this reference that the right to give unsworn evidence should still exist in New South Wales.

115. Ethnic Affairs Commission, *Submission 2* at 2; J Fleming, *Submission* at 4; J Gallagher, *Submission* at 3, 5 and 6; D Guilfoyle, *Submission* at 2; Marsdens, *Submission* at 5; National Childrens and Youth Law Centre, *Submission* at 2; NSW Young Lawyers, *Submission* at 6; J Gallagher, *Submission* at 3 and 5-6; L Davies, *Submission* at 6. See also *Kanaveilomani v The Queen* [1995] 2 Qd R 642 at 509; N Blake, "The Case for Retention" in S Greer and R Morgan (eds), *The Right to Silence Debate* (Bristol and Bath Centre for Criminal Justice, 1990) 18 at 20; "The Right to Silence" (1998) 176 *Civil Liberty* 18; J Jackson, "The Right of Silence: Judicial Responses to Parliamentary Encroachment" (1994) 57 *Modern Law Review* 270 at 273 and 277; Jackson (1995) at 600; Greer at 725; Justice at 5, 6, 19-22; G Nash at 62; S Nash at 148, 151; Pattendon at 611; G Singh, "Right to Silence" (1997) 45 *On the Record* 2; Royal Commission on Criminal Procedure at para 4.35, 4.64 and 4.66; ALRC Report 38 at para 74; T Smith, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 14; Criminal Bar

criticised the existing position, arguing that the inferences which can be drawn under s 20 of the *Evidence Act 1995* (NSW) and *Weissensteiner v The Queen*¹¹⁶ also undermine these fundamental principles.¹¹⁷

4.75 Not all submissions or commentators accept this.¹¹⁸

The Commission's view is that the restrictions on the nature of comment which now apply as a consequence of the decision of the High Court in *RPS v The Queen*¹¹⁹ ensure that the adverse inferences which may properly be drawn are not inconsistent with these fundamental principles.

4.76 Several submissions argued that international law prevents New South Wales from modifying the right to silence at trial to allow increased comment by the trial judge, or any comment by the prosecution.¹²⁰ However, there is no internationally accepted prohibition on the drawing of adverse inferences from the silence of the defendant at trial. As discussed in paragraph 4.33, the European Court of Human Rights has upheld the Northern Ireland provision which modifies the right to silence at trial, holding that the

Association of Victoria, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 6.4.

116. (1993) 178 CLR 217. See para 4.14-4.16.

117. D Guilfoyle, *Submission* at 57. See also *Victorian Bar, Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 13, 15, 65, 66; Victoria Legal Aid, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 5; Law Institute of Victoria, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 2.2.1.

118. T Cleary, *Submission* at 2. See also Davies at 10; Dennis at 10, 18; Stone at 18-20; Weinberg at para 11; Williams at 637.

119. [2000] HCA 3. See para 4.17.

120. Intellectual Disability Rights Service, *Submission* at 2-3; B Kennedy, *Submission* at 1; Justice Action, *Submission* at 1; NSW Council for Civil Liberties, *Submission* at 1-2; NSW Young Lawyers, *Submission* at 7; UTS Community Law and Legal Research Centre, *Submission* at 1 and 2. See also D Guilfoyle, *Submission* at 1-2; Law Society of NSW, *Submission 2* at 5; Youth Justice Coalition, *Submission* at 1. See also "The Right to Silence" (1998) 176 *Civil Liberty* 18; Criminal Bar Association, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 6.6 and 6.7; Michael and Emmerson at 10-19; S Nash at 149-150.

legislation was not inconsistent with the *European Convention on Human Rights*.¹²¹

The Commission's recommendation

4.77 Most submissions received as part of this review which addressed the right to silence at trial argued against any change to the existing law.¹²² Several submissions argued that neither the trial judge nor the parties should be permitted to comment on the fact that the defendant elected not to testify.¹²³ Only one submission argued in favour of the English position.¹²⁴

121. It has been argued that it cannot be automatically assumed that this decision guarantees the validity of the equivalent English provision: R Munday, "Inferences from Silence and European Human Rights Law" [1996] *Criminal Law Review* 370 at 383.

See also Black at 742; S Nash at 149-150; Singh at 2. Compare O'Gorman at 8. The unsuccessful challenge to the Northern Ireland provision was based on the application of the fair trial guarantee under the European Convention, which does not apply in New South Wales. Australia is, however, a signatory to the *International Covenant on Civil and Political Rights* and the *United Nations Convention on the Rights of the Child*. These conventions also protect the right not to be compelled to testify against oneself at trial: *International Covenant on Civil and Political Rights* art 14(3)(g) and *United Nations Convention on the Rights of the Child* art 40(2)(b)(iv). See also the *Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia* r 42(a).

122. A Arafas, *Submission* at 3; B Bright, *Submission* at 2; P Cloran, *Submission* at 1; Ethnic Affairs Commission, *Submission 2* at 2; J Fleming, *Submission* at 4; J Gallagher, *Submission* at 3-6; B Hocking and L Manville, *Submission* at 20; Justice Action, *Submission* at 2; Law Society of NSW, *Submission 2* at 5; Marsdens, *Submission 1* at 3; *Submission 2* at 5; Mt Druitt Community Legal Centre, *Submission* at 1; National Childrens and Youth Law Centre, *Submission* at 2; Youth Justice Coalition, *Submission* at 6; NSW Bar Association, *Submission* at para 4; G Turnbull, *Submission* at 1-4; NSW Young Lawyers, *Submission* at 6; Law Society of the ACT, *Submission* at para 3.6; T Smith, *Submission to the Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 2, 4.

123. NSW Council for Civil Liberties, *Submission* at 3-4; UTS Community Law and Legal Research Centre, *Submission* at 4; D Guilfoyle, *Submission* at 12.

124. E Whitton, *Submission* at 5-6.

4.78 One submission argued that defendants should be treated as compellable witnesses at trial.¹²⁵ The Commission is of the view that this is not only inconsistent with the basic principle that the prosecution must prove the case it brings against the subject but would represent a potentially oppressive removal of the presumption of innocence.

4.79 The opportunity of a defendant to give evidence at trial is different from the opportunity to respond to police questioning in a number of significant respects.¹²⁶ The Commission's view is that these differences justify the limited which the judge is entitled to make when a defendant elects not to testify at his or her trial.

4.80 The Commission considers that the English provisions and the Model Directions, are not only unacceptably imprecise and based on unjustified suppositions but are, in principle, wrong. They are fundamentally inconsistent with the requirement, cognate to the presumption of innocence, that the prosecution bears the burden of proving the charge it brings against an accused citizen.

Recommendation 14

The Commission recommends that, subject to Recommendation 15, the present law concerning the right to silence at trial should not change.

Prosecution comment

4.81 As has been mentioned,¹²⁷ s 20 of the *Evidence Act 1995* (NSW) provides that the judge, but not the prosecutor, may comment on the election of the defendant not to give evidence.

A number of submissions argued that the prosecutor, as well as the trial judge, should be permitted to comment to the jury on the inferences which

125. Police Association of NSW, *Submission 1* (Response 4) at 6.

126. See para 4.36.

127. See para 4.11-4.12.

can be drawn in this situation.¹²⁸ This option was specifically raised by the Commission in DP 41.¹²⁹

4.82 The danger of the current position is that the jury may interpret the judicial direction as an indication that the judge has an opinion adverse to the defendant and, at all events, give the issue undue significance. There is also a degree of unfairness in not permitting the prosecution to comment on matters which might well be the subject of submissions to the jury by the defence, in anticipation of comments from the judge.¹³⁰ The Commission is of the view that the prosecutor should be permitted to make an appropriate comment to the jury. The issue would thus simply form part of each party's case rather than a matter raised by the judge alone. The judge's directions would then be received in their right sense as providing guidance on the appropriate legal principles as they applied to that issue.

4.83 One submission argued that changing the law would require an amendment to s 20 of the *Evidence Act 1995* (NSW), which would introduce a lack of uniformity between the Commonwealth and New South Wales *Evidence Acts*.¹³¹ The Commission acknowledges that its recommendation to extend the power to comment to prosecutors would create a lack of uniformity. However, as the Act applies only to the Commonwealth, New South Wales, the Australian Capital Territory and the Northern Territory, this consideration is not as significant as it might otherwise be.

4.84 The Commission recommends that the prosecution's application for leave to comment on the defendant's silence at trial should be made in the absence of the jury. Leave may be granted subject to conditions on the content of the proposed prosecution comment. This would ensure that due consideration was given to the possible reasons for the defendant's silence consistent with innocence discussed in paragraphs 4.63 to 4.73 and the

128. A Clarke, *Submission* at 2; T Cleary, *Submission* at 1; L Davies, *Submission* at 6-7; R Miller, *Submission* at 3; Police Association of NSW, *Submission 2* at 4; S Shillington, *Submission* at 1; M Tedeschi, *Submission* at 2.

129. New South Wales Law Reform Commission, *The Right to Silence* (Discussion Paper 41, 1998) at para 5.41.

130. M Tedeschi QC, *Submission* at 2. T Cleary, *Submission* at 1; R Miller, *Submission* at 3; DS Shillington, *Submission* at 1; M Tedeschi QC, *Submission* at 2. See also Justice Evidence Committee at 4-5. See also Criminal Law Revision Committee at para 110; Working Group on the Right to Silence at para 114.

131. Law Society of NSW, *Submission 2* at 5.

The right to silence

fundamental principles discussed in paragraphs 4.74 to 4.76. Judicial supervision of the proposed prosecution comment would also provide protection against comment which went beyond that permitted by s 20 of the *Evidence Act 1995* (NSW).

4.85 The Commission envisages that applications for prosecution comment would ordinarily be granted, unless there were exceptional factors in the case. The fact that the defendant was not represented would be a relevant consideration for the trial judge in determining whether to grant leave.

Recommendation 15

The Commission recommends that prohibition on prosecution comment in s 20(2) of the *Evidence Act 1995* (NSW) should be removed. Prosecutors should be permitted to comment upon the fact that the defendant has not given evidence, subject to the restrictions which apply to comment by the trial judge and counsel for the defendant and any co-accused. The prosecution shall be required to apply for leave before commenting.

**APPENDIX A:
SUBMISSIONS RECEIVED**

Arfaras, Mr A (2 December 1997)
Asprey, Ms M (13 August 1998)
Australian Securities Commission (24 December 1997)
Bone, Magistrate C (6 January 1998)
Bright, Magistrate B (6 January 1998)
Carroll & O'Dea (17 December 1998)
Clarke, Magistrate A (6 January 1998)
Cleary, Magistrate T (6 January 1998)
Cloran, Magistrate P (6 January 1998)
Confidential (5 February 1999)
Corns, Dr C (14 November 1997)
Cramond, Chief Magistrate JMA (10 November 1997)
Dalla, Mr T (9 March 1999) (Oral submission)
Davies, Mr L (30 December 1997)
Department of Community Services, New South Wales
(1 December 1997)
Dixon, Dr D (12 November 1997) ("Submission 1")
Dixon, Dr D (20 November 1997) ("Submission 2")
Doumit, Mr S (13 September 1998) (Oral submission)
Eades, Mr J (10 February 1999)
Elms, Magistrate E (6 January 1998)
Ethnic Affairs Commission (30 December 1997) ("Submission 1")

Ethnic Affairs Commission (3 September 1998) ("Submission 2")

Fleming, Magistrate J (8 September 1998)

Gallagher, Mr J (18 December 1997)

Guilfoyle, Mr D (20 November 1998)

Hocking, Ms B and Manville, Ms L (5 February 1998)

Intellectual Disability Rights Service (26 November 1997)

Jones, Mr G (15 January 1999) (Oral submission)

Jones, Mr R (10 November 1997)

Justice Action (11 September 1998)

Kellner, Mr G (24 August 1998)

Kennedy, Magistrate B (6 January 1998)

Kingsford Legal Centre (25 September 1998)

Law Society of the Australian Capital Territory (19 March 1998)

Law Society of NSW (2 June 1998) ("Submission 1")

Law Society of NSW (28 August 1998) ("Submission 2")

Legal Aid New South Wales (17 November 1997)

Levingston, Mr C (25 January 1999)

Malcolm AC, The Hon Chief Justice DK (11 November 1997)

Marsdens Attorneys, Solicitors and Barristers (10 November 1997) ("Submission 1")

Marsdens Attorneys, Solicitors and Barristers (27 July 1998) ("Submission 2")

Miller QC, Mr R, Director of Public Prosecutions, Queensland (25 November 1997)

Mt Druitt & Area Community Legal Centre (20 October 1997)
National Children's and Youth Law Centre (21 November 1997)
New South Wales Bar Association (21 October 1998)
New South Wales Council for Civil Liberties (29 August 1998)
New South Wales Police Service (23 February 1998)
New South Wales Young Lawyers (15 September 1998)
Newton, Mr M (24 December 1998) (Oral submission)
Police Association of New South Wales (10 March 1998)
("Submission 1")
Police Association of New South Wales (31 August 1998)
("Submission 2")
Rogers, Magistrate K (10 November 1997)
Shillington, Judge DS (12 December 1997)
Smith, The Hon Justice T (20 September 1997)
Tedeschi QC, Mr M (10 November 1997)
Turnbull, Mr G (27 January 1999)
UTS Community Law and Legal Research Centre
(28 August 1998)
Whitton, Mr E (25 February 1998)
Youth Justice Coalition (30 September 1998)

**APPENDIX B:
CONSULTATIONS (June 1998)**

District Court, New South Wales (Judges)

Legal Aid, New South Wales

Local Courts, New South Wales (Magistrates)

Office of the Director of Public Prosecutions, New South Wales

Police Prosecutors, New South Wales Police Service

APPENDIX C: CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994 (ENGLAND) (Sections 34-38)

Section 34: Effect of accused's failure to mention facts when questioned or charged

- (1) Where, in any proceedings against a person for an offence, evidence is given that the accused:
- (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
 - (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.

- (2) Where this subsection applies:
- (a) a magistrates' court inquiring into the offence as examining justices;
 - (b) a judge, in deciding whether to grant an application made by the accused under:
 - (i) section 6 of the *Criminal Justice Act 1987* (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or
 - (ii) paragraph 5 of Schedule 6 to the *Criminal Justice Act 1991* (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);
 - (c) the court, in determining whether there is a case to answer; and
 - (d) the court or jury, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure as appear proper.

- (2A) Where the accused was at an authorised place of detention at the time of the failure, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed as mentioned in subsection (1) above.
- (3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

- (4) This section applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in subsection (1) above "officially informed" means informed by a constable or any such person.
- (5) This section does not:
 - (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relation to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or
 - (b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.
- (6) This section does not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this section.
- (7) (Repealed)

Section 35: Effect of accused's silence at trial

- (1) At the trial of any person who has attained the age of fourteen years for an offence, subsections (2) and (3) below apply unless:
 - (a) the accused's guilt is not in issue; or
 - (b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.
- (2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.
- (3) Where this subsection applies, the court or the jury, in determining whether the accused is guilty of the offence charged, may draw such

inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

- (4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.
- (5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless:
 - (a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or
 - (b) the court in the exercise of its general discretion excuses him from answering it.
- (6) Where the age of any person is material for the purposes of subsection (1) above, his age shall for those purposes be taken to be that which appears to the court to be his age.
- (7) This section applies:
 - (a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this section;
 - (b) in relation to proceedings in a magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after the commencement of this section.

Section 36: Effect of accused's failure or refusal to account for objects, substances or marks

- (1) Where:
 - (a) a person is arrested by a constable, and there is:
 - (i) on his person; or
 - (ii) in or on his clothing or footwear; or
 - (iii) otherwise in his possession; or
 - (iv) in any place in which he is at the time of his arrest, any object, substance or mark, or there is any mark on any such object; and
 - (b) that or another constable investigating the case reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offence specified by the constable; and
 - (c) the constable informs the person arrested that he so believes, and

requests him to account for the presence of the object, substance or mark; and

(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence so specified, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies:

- (a) a magistrates' court inquiring into the offence as examining justices;
- (b) a judge, in deciding whether to grant an application made by the accused under:
 - (i) section 6 of the *Criminal Justice Act 1987* (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or
 - (ii) paragraph 5 of Schedule 6 to the *Criminal Justice Act 1991* (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);
- (c) the court, in determining whether there is a case to answer; and
- (d) the court or jury, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure or refusal as appear proper.

(3) Subsections (1) and (2) above apply to the condition of clothing or footwear as they apply to a substance or mark thereon.

(4) Subsections (1) and (2) above do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in subsection (1)(c) above what the effect of this section would be if he failed or refused to comply with the request.

- (4A) Where the accused was at an authorised place of detention at the time of the failure, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to the request being made.
- (5) This section applies in relation to officers or customs and excise as it applies in relation to constables.
- (6) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this section.
- (7) This section does not apply in relation to a failure or refusal which occurred before the commencement of this section.
- (8) (Repealed)

Section 37: Effect of accused's failure or refusal to account for presence at a particular place

- (1) Where:
 - (a) a person arrested by a constable was found by him at a place at or about the time the offence for which he was arrested is alleged to have been committed; and
 - (b) that or another constable investigating the offence reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence; and
 - (c) the constable informs the person that he so believes, and requests him to account for that presence; and
 - (d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of those matters is given, subsection (2) below applies.

- (2) Where this subsection applies:
 - (a) a magistrates' court inquiring into the offence as examining justices;
 - (b) a judge, in deciding whether to grant an application made by the accused under:
 - (i) section 6 of the *Criminal Justice Act 1987* (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or
 - (ii) paragraph 5 of Schedule 6 to the *Criminal Justice Act 1991*

(application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);

- (c) the court, in determining whether there is a case to answer; and
- (d) the court or jury, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure or refusal as appear proper.

- (3) Subsections (1) and (2) do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in subsection (1)(c) above what the effect of this section would be if he failed or refused to comply with the request.

- (3A) Where the accused was at an authorised place of detention at the time of the failure, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to the request being made.

- (4) This section applies in relation to officers of customs and excise as it applies in relation to constables.

- (5) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for his presence at a place which could properly be drawn apart from this section.

- (6) This section does not apply in relation to a failure or refusal which occurred before the commencement of this section.

- (7) (Repealed)

Section 38: Interpretation and savings for sections 34, 35, 36 and 37

- (1) In sections 34, 35, 36 and 37 of this Act:
 - “legal representative” means an authorised advocate or authorised litigator, as defined by section 119(1) of the Courts and Legal Services Act 1990; and
 - “place” includes any building or part of a building, any vehicle, vessel, aircraft or hovercraft and any other place whatsoever.

- (2) In sections 34(2), 35(3), 36(2) and 37(2), references to an offence charged include references to any other offence of which the accused could lawfully be convicted on that charge.
- (3) A person shall not have the proceedings against him transferred to the Crown Court for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in section 34(2), 35(3), 36(2) or 37(2).
- (4) A judge shall not refuse to grant such an application as is mentioned in section 34(2)(b), 36(2)(b) and 37(2)(b) solely on an inference drawn from such a failure as is mentioned in section 34(2), 36(2) or 37(2).
- (5) Nothing in sections 34, 35, 36 or 37 prejudices the operation of a provision of any enactment which provides (in whatever words) that any answer of evidence given by a person in specified circumstances shall not be admissible in evidence against him or some other person in any proceedings or class of proceedings (however described, and whether civil or criminal).

In this subsection, the reference to giving evidence is a reference to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

- (6) Nothing in sections 34, 35, 36 or 37 prejudices any power of a court, in any proceedings, to exclude evidence (whether by preventing questions being put or otherwise) at its discretion.

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Evidence Act 1995	
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s 17	4.21
s 20	4.21, 4.36
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National Crime Authority Act 1984	
s 30	2.24
Royal Commissions Act 1902	
s 62.24	
s 6A.....	2.24

New South Wales

Children (Criminal Proceedings) Act 1987	
s 13	2.84
Children (Protection and Parental Responsibility) Act 1997	
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s 353A.....	2.19

Crimes Act 1900 (continued)

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s 563	2.20
Part 7, s 314-3.26	3.98

Criminal Procedure Act 1986

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s 49	1.7, 3.21
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Director of Public Prosecutions Act 1986

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Evidence Act 1995

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s 17	1.8, 4.10, 4.21
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s 67	3.24
s 86	2.82
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Western Australia

Criminal Code

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