

## THE RIGHT TO SILENCE: USING AMERICAN AND EUROPEAN LAW TO PROTECT A FUNDAMENTAL RIGHT

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*In recent years, we have seen continued erosion of an individual's right to silence. The most recent attempts in the author's home country, Australia, include a current proposal to adopt the United Kingdom approach, and allow inferences to be drawn from a failure to answer questions at an early stage of investigation, in circumstances where later the person does provide an explanation. An attempt to protect the right to silence in Australia at constitutional level is challenging, because Australia is one of the few Western nations that has not seen fit to enact an express bill of rights. This article will consider whether arguments might be made that, at least in some contexts, infringement of the right to silence is, nevertheless, contrary to the requirements of the Australian Constitution.*

*Courts in other countries around the world have also recognized the right to silence in some circumstances where legislatures have attempted to limit it, and these will be considered in the Australian context, acknowledging appropriate contextual differences. Many countries are faced with the difficulty of reconciling fundamental due process principles with the need for effective investigatory powers sufficient to deal with evolving criminal threats. It will be instructive to consider how a successful balance has been accommodated in a range of jurisdictions. It is believed that the law of the author's home country could be greatly enriched by engaging with North American and European case law, as this article will seek to demonstrate. The article is considered to be of interest to those outside of Australia, to understand the difficulties in protecting fundamental human rights when an express bill of rights does not exist in the*

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*relevant country, and to consider how other ways may be found to protect such rights. In this way, this article will use Australia as the example of a country without an express bill of rights, and will consider how, in that context, fundamental human rights can practically be protected by the courts. The conclusions are considered relevant to a range of nations. Specific examples include Singapore and Malaysia, and to a lesser extent India, as will be explained.*

**Keywords:** *right to silence, due process, privilege against self-incrimination, fair trial*

## INTRODUCTION

Debate about the extent to which a person, including a person accused of a crime, has a “right” to withhold information when pressed to provide it is not new. The law has taken a number of different positions on this issue over the centuries. It is understandable that law enforcement bodies might wish to see this right abrogated since it no doubt makes their job more difficult.<sup>1</sup> Some are quick to draw a conclusion that a person would only avail themselves of a right to silence if they “have something to hide.”<sup>2</sup> It is difficult to reconcile departures from the right to silence with other fundamental doctrines of the criminal law, and the danger, as always, is that allowing departures from fundamental principles in limited cases may elicit a clamor for departure in more and more cases, until the very existence of the principle may, in some cases, itself be in doubt. Jurisdictions around the world have had to balance these competing issues and principles. As always, it is useful to see how they have done so. Care must always be taken to acknowledge the

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1. Justice Olsson of the Supreme Court of South Australia lamented that “the right to silence at trial creates problems for judicial administration and precludes effective trial management.” *To How Much Silence Ought an Accused be Entitled?* 8 J. JUD. ADMIN. 131, 132 (1999) (Justice Olsson also stated it was desirable that the privilege against self-incrimination should continue).

2. One exponent was Jeremy Bentham: “between delinquency on the one hand, and silence under enquiry on the other, there is a manifest connection; a connection too natural not to be constant and inseparable.” JOHN BOWRING, *THE WORKS OF JEREMY BENTHAM*, Vol. 7 at 446 (1838–1843); JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE*, Vol. 5 at 229–41 (1978) (criticizing the exclusion of self-incriminating evidence and reflecting utilitarian philosophy); SUSAN EASTON, *Justifications of the Right to Silence: Rights Versus Utility*, in *THE CASE FOR THE RIGHT TO SILENCE* (1998).

different constitutional and/or human rights settings in which such rulings have been made, in order to properly consider the extent to which the law of any particular country is or should be influenced by such developments.

This article is divided into five parts. Part I traces a brief history of the right in England, explains its different possible meanings and applications, as well as the various theoretical rationales that have been suggested to underpin it. Part II considers how the right has been accepted and applied in Australian case law, and Part III considers how it has been abridged by Australian statute. Part IV considers how the right has been interpreted and applied in overseas jurisdictions. Part V suggests how the right should be interpreted in Australian law in future, and in summary, the paper outlines the lessons learned from the international comparison and draws conclusions. The major focus in the article will be infringements of the right to silence at a stage prior to trial because it is contended that the need for change in the current law is greatest there, but the reasoning will also be applicable to trial proceedings.<sup>3</sup>

## I. PRELIMINARIES

### A. Brief History of the Right to Silence<sup>4</sup>

It is considered necessary to articulate this history briefly to show the longstanding and fundamental nature of the right, and how and why it came into existence. Abrogation of the right should be seen in light of the tortuous process by which the right was eventually recognized, its recognition for several centuries, and its importance in ensuring that an accused person is treated fairly and in accordance with due process. In the following paragraphs, this tortuous process is briefly sketched.

Compulsion in criminal procedure was apparent even prior to the early thirteenth century in England in forced participation in a trial by

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3. Some argue that the right to silence pretrial is even stronger than the right to silence at trial. Mirko Bagaric, *The Diminishing "Right" of Silence*, 19 SYDNEY L. REV. 366, 380 (1997).

4. I am indebted to several sources in making this brief summary: LEONARD LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* (1968); E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949); Gregory O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85(2) J. CRIM. L. & CRIMINOLOGY 402 (1994); GLANVILLE WILLIAMS, *THE PROOF OF GUILT: A STUDY OF THE ENGLISH CRIMINAL TRIAL* (1958).

compurgation, involving the saying of an oath, and trial by ordeal. A mistake in the saying of the oath indicated guilt, as did loss in the trial by ordeal. These practices fell into disuse, to be replaced by common law courts and ecclesiastical courts. The common law courts adopted an accusatorial system, whereby those accusing the person of wrongdoing attended proceedings and gave their evidence. The accused person did not provide evidence during these proceedings, and could not be compelled to do so, except in succession and family law matters. The ecclesiastical courts, which heard a broad range of matters including alleged sexual impropriety and public order type offenses, adopted an inquisitorial system. In this system, the accused person was in effect required to answer the questions put by the interrogator. Failure to do so could be taken to be guilt, in some cases punishable by life imprisonment, or contempt. The accused was not informed of the charge, their accuser(s), or the evidence used against them.

In the latter part of the sixteenth century, the English Crown became more involved in administering ecclesiastical matters, with religious violations becoming treasonable. It adopted ecclesiastical processes, including the inquisitorial system, in this context. Two particular tribunals were the infamous Court of the Star Chamber and Court of the High Commission. The bodies came to enforce not only religious, but political, orthodoxy. They used inquisitorial techniques, evidence from unknown sources, and torture to meet their objectives.

Objections to such processes began to be heard. There is a reference in 1568 to Lord Chief Justice Dyer of the Court of Common Pleas granting a writ of habeas corpus to prevent a prisoner from being required to take the oath. In this case, known as Leigh's Case, Dyer stated that no man shall be required to produce evidence against himself. Others at the time, including Morice, claimed that the use of inquisitorial techniques violated the Magna Carta, which required criminal proceedings to be governed by the law of the land as established by Parliament, not the Crown and its special courts. He claimed that Parliament had passed a law in 1534 prohibiting bishops from using inquisitorial techniques. However, the Crown did not accept that the common law and Magna Carta limited its sovereignty, a consistent theme leading up to the Glorious Revolution of 1688.

Lord Coke sought to reassert the superiority of the common law courts, to limit the jurisdiction of the Crown bodies, and to make the Crown

bodies fall into line in the procedures they used in dealing with accusations.<sup>5</sup> King James responded by dismissing Lord Coke in 1616. However, his ideas had influence. The use of inquisitorial processes in the Court of Star Chamber was limited to cases of misdemeanors, and the accused was required to be given the charge(s) against them. The Court of High Commission barred compulsion in criminal cases.

Inquisitorial type processes enjoyed something of a resurgence in the early seventeenth century under Charles I. Those who refused to answer questions were considered to have confessed to the truth of the allegations against them. However, a turning point arrived with the proceedings against Lilburne, charged with importing seditious books. At his trial in the Star Chamber, he refused to answer questions on the express basis that he may hurt himself in so doing. He was jailed for contempt and sentenced to corporal punishment. At his flogging, he apparently preached to the crowd about the injustice of what has happening to him. In 1641, Parliament ruled Lilburne's sentence to be illegal, abolished the Court of Star Chamber and Court of High Commission, and barred inquisitorial proceedings in criminal cases. In 1688, the very year of the Glorious Revolution, James II prosecuted seven bishops for defying his law preventing prosecution of nonconformists. Ironically enough, given the history of proceedings in ecclesiastical courts, one of the bishops, Sancroft, when confronted by allegations he disobeyed James II's law, claimed a right not to say anything that might incriminate him. The right to silence had become entrenched in the English common law.<sup>6</sup>

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5. One example of this occurred in Fuller's Case, where Coke limited the jurisdiction of the Crown bodies to ecclesiastical offenses only, and they were subject to having their jurisdiction limited by the common law courts. Coke stated that Magna Carta applied to the proceedings in the Crown courts and rejected the use of inquisitorial proceedings in such trials.

6. Other important historical developments occurred in 1898 with the Criminal Evidence Act, when the rules were changed to allow the accused to testify if they wished. Until then, the accused was not competent to give evidence at the trial even if they wished to do so. The *Judges' Rules*, revised in 1964, required police to administer a caution regarding the suspect's right to silence. In 1994, the British Parliament enacted the Criminal Justice and Public Order Act, allowing inferences from the failure of an accused to answer questions. The same Parliament (though differently constituted) enacted the Human Rights Act 1998 (UK), guaranteeing the right to a fair trial, which includes the privilege against self-incrimination.

The fundamental nature of the right to silence has continued to be recognized in constitutional law and human rights contexts since that time. It is expressly referred to in the Fifth Amendment to the United States Constitution,<sup>7</sup> § 14(3)(g) of the International Covenant on Civil and Political Rights,<sup>8</sup> § 8(2)(g) of the American Convention on Human Rights, § 11(c) of the Canadian Charter of Rights and Freedoms 1982, § 25(d) of the New Zealand Bill of Rights 1990, and the subnational human rights instruments in Australia.<sup>9</sup> The right is not specifically referred to in the European Convention on Human Rights, but as we will see later, it has been considered as part of the right to a fair trial, which is expressly provided for in Article 6 of that Convention. It will be seen that this recognition is particularly important in the Australian context.

## B. The Dimensions and Theoretical Basis of the “Right to Silence”

Although it is convenient to refer to the common law “right to silence,”<sup>10</sup> the risk is that this means different things to different people, and confusion may arise if it is assumed to have a common meaning. Different threads of the concept of the so-called right to silence were identified by Lord Mustill in the English case of *R v. Director of Serious Fraud Office; Ex Parte Smith*.<sup>11</sup> They include (a) 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; (b) a general immunity, possessed

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7. The Fifth Amendment includes a prohibition on a person being “compelled in any criminal case to be a witness against himself.”

8. This right (“not to be compelled to testify against himself or to confess guilt”) is in the context of a criminal charge, and is stated to be a minimum guarantee provided to each individual in full equality.

9. § 22(2)(i) of the Human Rights Act 2004 (ACT) and § 25(2)(k) of the Charter of Human Rights and Responsibilities Act 2006 (Vic); these are in the context of declaration of incompatibility schemes (only).

10. For the purposes of this article, the author will not continue to place in inverted commas (i.e., quotation marks) the phrase “right to silence” because as indicated here, it is something of an umbrella principle referring to a range of different rights. In terms of the different rights referred to in *Ex Parte Smith*, the focus in this article is particularly on rights (a)–(c), but much of the article is also applicable to rights (d)–(f) and associated rights.

11. [1993] AC 1, 30–31. This passage was quoted with evident approval by Mason CJ and Toohey J in *Environment Protection Authority v. Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503 and by Gaudron ACJ, Gummow Kirby and Hayne JJ in *RPS v. The Queen* (2000) 199 CLR 620, 630.

by all persons or bodies, from being compelled on pain or punishment to answer questions the answers to which may incriminate them; (c) a specific immunity, possessed by all persons under suspicion of criminal responsibility, while 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; (d) 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; (e) a specific immunity, possessed by persons who have been charged with a criminal offense, from having questions material to the offense addressed to them by police officers or persons in a similar position of authority; and (f) a specific immunity, at least in some cases, possessed by accused persons undergoing trial, from having adverse comment made on any failure to answer questions before trial or to give evidence at the trial. For word limit reasons, the focus here will be in particular on the context of (a) to (c) above, but it is important to recognize the wider context, and much of the discussion is also relevant in that wider context.

This list could be supplemented with other strands, for example that any confession obtained from an accused be one that is given voluntarily, that the evidence used should be reliable, the court's discretion to discard the use of evidence where, in all the circumstances, it would be unfair to take it into account (including issues of prejudice), and a general public policy exclusion.<sup>12</sup> The court also has the inherent power to avoid abuse of process. Questions about the extent to which police administered a caution to the interviewee about the fact that they need not cooperate, the consequences of answering questions, and whether or not the conversation was being recorded are also relevant.<sup>13</sup>

There are obviously close links between a right to silence and the presumption of innocence.<sup>14</sup> The rationale for these kinds of rules can also be

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12. *The Queen v. Swaffield* (1998) 192 CLR 159, 188–89 (Toohey Gaudron and Gummow JJ); *R v. Tofilau* (2007) 231 CLR 396, 402 (Gleeson CJ); *Ridgeway v. The Queen* (1995) 184 CLR 19; *Bunning v. Cross* (1978) 141 CLR 54.

13. *Carr v. Western Australia* (2007) 232 CLR 138.

14. *Quinn v. Ireland* [2000] ECHR 690, [40]. Presumption of innocence is protected by Article 14(2) of the International Covenant on Civil and Political Rights and Article 11.1 of the Universal Declaration of Human Rights, Article 6(2) of the European Convention on Human Rights, § 11(d) of the Canadian Charter of Rights and Freedoms, and § 25(c) of the New Zealand Bill of Rights Act 1990.

sourced in the fact that the authorities have substantial resources at their disposal in prosecuting allegations, compared with those against whom such power might be exercised. This power imbalance can be used against the individual through pressure to conform to the questioner's way of thinking. It is contrary to the investigator's interests to afford the right to silence, so rationally it can't be expected that the right will be extended to the person questioned in the absence of a legal requirement. It reflects a libertarian perspective that interferences with personal liberty must be confined within agreed limits, that many investigations surround alleged criminal activity, and that the consequences of proving criminal behavior are often dire, including imprisonment for the accused. Respect for dignity and privacy of individuals is also reflected in the principle.<sup>15</sup> There may be entirely valid reasons for silence, other than guilt.<sup>16</sup> It rejects a utilitarian philosophy that in order to provide for a safer society, incursions on fundamental rights such as the right to silence are necessary for the greater good.

## II. AUSTRALIAN CASE LAW ON THE RIGHT TO SILENCE

The extent of Australian case law on the right to silence will now be summarized. This is necessary to point out what are considered to be the deficiencies in the existing approach. The article will then consider how various legislatures in Australia have used the less-than-watertight protection of this right to progressively erode the right in a range of contexts. Specific detail is necessary to convey the number and range of ways in which this right is being eroded by various Australian legislatures.

The High Court of Australia has declared that it is a fundamental principle that the prosecution "cannot compel the accused to assist it in

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15. Andrew Ashworth, *Self-Incrimination In European Human Rights Law—A Pregnant Pragmatism?*, 30 CARDOZO L. REV. 751, 767–69 (2008); Mike Redmayne, *Rethinking the Privilege Against Self-Incrimination*, 27(2) OXFORD J. LEGAL STUD. 209 (2007); Ian Dennis, *Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-Incrimination*, 54(2) CAMBRIDGE L.J. 342, 348–53 (1995); Hamish Stewart, *The Confessions Rule and the Charter*, 54 MCGILL L.J. 517 (2009); Simon Matters, *Anything You Don't Say May Be Given in Evidence: Protecting the Interests of Justice or Emasculating a Fundamental Right?*, 4(1) DEAKIN L. REV. 49 (1997).

16. These are well summarized in the Australian Law Reform Commission Report entitled *Criminal Investigation* (1975), ¶ 150; Dyson Heydon, *Silence as Evidence*, 1 MONASH U. L. REV. 53, 55 (1975).

any way,”<sup>17</sup> closely linked with the presumption of innocence and the onus of proof. Sometimes the Court has used the language of the “freedom to speak” and that if such a right has been impugned, evidence obtained as a result may not be admitted. This occurred in *The Queen v. Swaffield*,<sup>18</sup> where an undercover police officer obtained a confession from an accused. A majority of the Court rejected the use of the evidence. For instance, the joint reasons stated,

In the light of recent decisions in this Court, it is no great step to recognise . . . an approach which looks to the accused’s freedom to choose to speak to the police and the extent to which that freedom has been impugned. Where the freedom has been impugned the court has a discretion to reject the evidence. In deciding whether to exercise that discretion . . . the court will look at all the circumstances. Those circumstances may point to unfairness to the accused if the confession is admitted.

It is not necessary that the accused has made a conscious decision not to exercise their right to silence. This has meant that the use of police deception in order to extract damning evidence from an accused has been indirectly validated by the acceptance of the evidence gained through such a process.<sup>19</sup> Evidence derived from a public conversation between police and an accused, in circumstances where the accused was not aware that the conversation was being recorded, has been admitted.<sup>20</sup>

In *Hammond v. Commonwealth of Australia*,<sup>21</sup> the High Court was faced with provisions in some ways very similar to the Commonwealth and State legislation alluded to above. Specifically, a provision of the Royal Commissions Act 1902 (Cth) made it an offense for a witness before a Commission

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17. *Environmental Protection Authority v. Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 527 (Deane Dawson and Gaudron JJ).

18. (1998) 192 CLR 159, 202 (Toohey Gaudron and Gummow JJ); Kirby J to like effect (209).

19. *R v. Tofilau* (2007) 231 CLR 396 (confessions made to undercover police officers who pose as criminals and tell the accused that in order to join their group, they must make a full confession; whereupon the “boss” of the group will make the problem go away, involving the use of corrupt police—use of such evidence permitted by majority, Kirby J dissenting).

20. *Em v. The Queen* (2007) 232 CLR 671 (Kirby J dissenting); *Carr v. The Queen* (2007) 232 CLR 138 (accused was at the lockup, and made admissions there, not realizing that activity in that area was being recorded—evidence admissible according to the Court, Kirby J dissenting).

21. (1982) 152 CLR 188.

to refuse to answer questions put to them. There was a section of the Act precluding the use of the information provided by the witness in civil or criminal proceedings against them, apart from proceedings for a breach of the Act. The Victorian evidence legislation at the time (Evidence Act 1958 (Vic)) also made it an offense for a person present before a board appointed by the Governor to refuse to answer a question relating to the inquiry. Again, the provision restricted the use to which the information provided under such compulsion could be used. Hammond had been summoned to appear at the Commission to answer questions about an alleged conspiracy. He declined to answer them on the basis he might incriminate himself. The Commissioner directed Hammond to answer the questions. Hammond, who had been charged with conspiracy offenses shortly after the Commission had been established, successfully challenged in the High Court the validity of the Commission proceedings.

The Court enjoined the Commission proceedings. In the course of doing so, each commented adversely on the compulsive nature of the Commission proceedings and their implications for the privilege against self-incrimination. Gibbs CJ stated,

It would be necessary to find a clear expression of intention before one could conclude that the legislature intended to override so important a privilege as that against self-incrimination. . . . Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to be inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. . . . It is true that the . . . answers may not be used at the criminal trial. Nevertheless the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence.<sup>22</sup>

Murphy J claimed that the privilege against self-incrimination was so pervasive as to be unnecessary to state it in statutes that require persons to answer questions, and that it was presumed to exist unless excluded by unmistakable language.<sup>23</sup> It was necessary to prohibit the Commission from ordering Hammond to answer questions that might tend to incriminate him “to maintain the integrity of the administration of the judicial

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22. *Id.* at 197–98; Mason J agreed with the reasons of Gibbs CJ.

23. *Id.* at 200.

power of the Commonwealth.”<sup>24</sup> Similarly, Brennan J commented on the deep-rooted nature of the right, concluding that it was not to be thought that Parliament, in arming a Commission with powers, intended that the power might be exercised to deny fundamental principles in criminal justice like the privilege against self-incrimination.<sup>25</sup> Deane J said that the fact Hammond had been charged after refusing to answer questions amounted to “injustice and prejudice to the plaintiff.”<sup>26</sup>

The Commonwealth Parliament then amended the Act to expressly state that during the royal commission proceedings, a person was not entitled to refuse or fail to answer questions on the ground that the answer might incriminate him. Lamentably (in the author’s view), the High Court relented. All members of the High Court in *Sorby and Another v. Commonwealth of Australia*<sup>27</sup> validated the amending provision. The so-called “deep-rooted” right, the “cardinal principle,”<sup>28</sup> did not survive a thirty-nine-word amending provision. One interesting point of disagreement in the case concerned the application of the privilege against self-incrimination in a case such as this where, unlike in *Hammond*, the relevant person had not been charged and matters were not before the court. Four members of the Court held that the privilege could apply to executive proceedings such as the one considered here, and that it was not confined to judicial proceedings.<sup>29</sup> A majority also discarded any link between the privilege against self-incrimination and the requirements of Chapter III of the Australian Constitution.<sup>30</sup>

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24. *Id.* at 201.

25. *Id.* at 203.

26. *Id.* at 207.

27. (1983) 152 CLR 281.

28. “It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt” (Gibbs CJ (*id.* at 294), who validated the amending provision expressly taking away the privilege against self-incrimination).

29. Mason Wilson and Dawson JJ (*id.* at 309), Murphy J (311); Brennan J *contra* (321), Gibbs CJ not directly addressing this question.

30. “[T]he privilege against self-incrimination is not an integral element in the exercise of the judicial power reposed in the courts by Chapter III of the Constitution” (Mason Wilson and Dawson JJ, *id.* at 308); Gibbs CJ, “the privilege against self-incrimination is not protected by the *Constitution*” (298).

The High Court of Australia is divided on the extent to which the privilege may be claimed in nonjudicial proceedings.<sup>31</sup> In *Pyneboard Pty Ltd v. Trade Practices Commission*,<sup>32</sup> Mason ACJ Wilson and Dawson JJ stated they weren't prepared to hold that the privilege was incapable of application in nonjudicial proceedings. However, Brennan J found the privilege was confined to judicial proceedings.<sup>33</sup>

On the question of the extent to which silence can be used to draw conclusions unfavorable to the accused at trial,<sup>34</sup> the High Court has generally taken the view that the judge or prosecutor should not suggest to the jury that the accused's silence may be used as evidence of guilt.<sup>35</sup> It has reiterated that it would seldom, if ever, be reasonable to conclude that

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31. The issue was not directly addressed in *Hammond*; there is a view that a royal commission might, depending on its enabling legislation, be conducting at least a quasi-judicial function: *Lockwood v. Commonwealth of Australia* (1954) 90 CLR 177 (Fullagar J, sitting as a single judge, concluded the Royal Commission there was not in fact exercising judicial power, though its proceedings had some of the trappings of an exercise of judicial power).

32. *Pyneboard* (1983) 152 CLR 328, 341; Murphy J held it applied to judicial and non-judicial functions (*id.* at 346); *see also* *Kempley v. The King* [1944] ALR 249, 253 (Starke J) and 254 (Williams J).

33. *Pyneboard*, *id.* at 354; *see also* *Kempley*, *id.* at 251 (Latham CJ) and 253 (McTiernan J).

34. Evidence statutes generally allow a judge to comment on the defendant's failure to give evidence, but not suggest it was because the defendant is guilty: Evidence Act 1995 (Cth) § 20, Evidence Act 1995 (NSW) § 20, Evidence Act 2008 (Vic) § 20, Evidence Act 2001 (Tas) § 20, and Evidence Act 2011 (ACT) § 20. In South Australia, the prosecutor cannot make a comment about the defendant's failure to give evidence; Evidence Act 1929 (SA) § 18(1)(b)). The main focus of this article is the right to silence at a stage prior to trial, although many of the principles applicable at that time would also be applicable during trial. Comparisons between the right pretrial and during trial appear in Bagaric, *supra* note 3; Scott Henchcliffe, *The Silent Accused at Trial: Consequences of an Accused's Failure to Give Evidence in Australia*, 19 U. QUEENSLAND L.J. 137 (1997).

35. *Petty v. The Queen* (1991) 173 CLR 95, 99 (Mason CJ Deane Toohey and McHugh JJ); the Court was more equivocal in *Weissensteiner v. The Queen* (1993) 178 CLR 217, 229 ("silence in the face of an accusation when an answer might reasonably be expected can amount to an admission by conduct" (Mason CJ Deane and Dawson JJ, 229); "the failure to explain can amount to evidence" (Gaudron McHugh JJ, 245)). *See* for discussion Elizabeth Stone, *Calling a Spade a Spade: The Embarrassing Truth About the Right to Silence*, 22 CRIM. L.J. 17 (1998). Barbara Hocking & Laura Leigh Manville, *What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Fiction?*, 1 MACQUARIE L.J. 63 (2001); Henchcliffe, *supra* note 34; Bagaric, *supra* note 3; Note: RPS v R: *The Resilience of the Accused's Right to Silence*, 22 SYDNEY L. REV. 669 (2000).

an accused in a criminal trial be expected to give evidence.<sup>36</sup> As indicated earlier, the Court has recognized a broad discretion to discard evidence obtained in circumstances of general unfairness; this has included excluding evidence obtained after the person from whom it was taken indicated to authorities he did not wish to answer questions.<sup>37</sup>

In summary, the case law does not reveal that the right is strongly protected. A valid law of Parliament is effective, according to the High Court in *Sorby*, to abrogate the right. The article will now point out the ways in which various legislatures in Australia have used the situation reflected in the case law to progressively undermine the right to silence.

### III. AUSTRALIAN STATUTORY ABROGATIONS OF THE RIGHT TO SILENCE

There has been a gradual departure from the common law right to silence in a range of Australian statutes. This led the Independent National Security Legislation Monitor to comment recently that given the many examples of statutory abrogation of the right, the issue

cannot be given top priority. . . . It does seem as if the pass has been sold on statutory abrogations of this privilege.<sup>38</sup>

No doubt, the right to silence is inconvenient to law enforcement authorities who sometimes struggle to obtain the necessary evidence to back their suspicions about wrongful activity, and it makes their job much easier if suspects or witnesses become compelled to cooperate on pain of punishment, rather than remaining silent and forcing the prosecutors to prove by other means. Some utilitarian arguments press that in order to stop particular crimes, such as terrorism, unusual measures that remove fundamental rights are necessary and justified. This debate has also

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36. *RPS v. The Queen* (2000) 199 CLR 620, 632 (Gaudron ACJ, Gummow, Kirby and Hayne JJ); *cf. Weissensteiner v. The Queen* (1993) 178 CLR 217, 229: “silence in the face of an accusation when an answer might reasonably be expected can amount to an admission by conduct” (Mason CJ, Deane and Dawson JJ); *see also* Gaudron and McHugh JJ (245), referring to the possibility of failure to explain being evidence.

37. *The Queen v. Swaffield* (1998) 192 CLR 159; *R v. Belford and Bound* [2011] QCA 43; *cf. Em v. The Queen* (2007) 232 CLR 671.

38. *Annual Report* at 33 (2011) (Bret Walker SC).

occurred in the context of the use of torture to obtain information that might, for instance, thwart a terrorist attack. Questions arise about whether the end justifies the means.

There are numerous examples of Australian statutes where the common law right to silence has been abrogated at a stage prior to any trial, both terrorism related and not. It is worth setting these out in some detail, since no standard model is apparent and different issues are raised by the different approaches. This also gives us an idea of the scale of departure that has taken place; we are talking about numerous actual examples in many contexts, not isolated instances. Fears about the erosion of this fundamental right are not far-fetched or fanciful.

The most recent example in an Act occurs in the new Australian workplace health and safety model laws.<sup>39</sup> Section 171 of these Acts allows a workplace inspector to enter a workplace. The inspector can require the production of documents and answers to questions.<sup>40</sup> A person or organization not complying with the inspector's requests can be fined up to \$10,000 or \$50,000 respectively, unless they have reasonable excuse for the noncompliance.<sup>41</sup> The Acts expressly state that the privilege against self-incrimination is not available as an excuse. However, any information provided is not generally admissible as evidence against the person who provided it, unless the proceedings concern the alleged falseness of the answer or information given. A warning must be given to the person or organization about the inspector's powers under § 171, about the fact that a failure to comply with a request is punishable by fine, and that the general privilege against self-incrimination is not available as a defense.<sup>42</sup> This example is somewhat atypical, in that it occurs in a context of corporate compliance, whereas the remaining examples take place in the context of proceedings against an individual. It is fair to suggest that the need for protection of this right might be thought to be stronger in the latter context, given that a corporation may be much better informed and resourced to defend their interests in such cases, compared with an individual.

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39. Work Health and Safety Act 2011 (NSW), Work Health and Safety Act 2011 (Qld), Work Health and Safety Act 2011 (ACT), and Work Health and Safety (National Uniform Legislation) Act 2011 (NT). Other states have not yet implemented their legislation.

40. Work Health and Safety Acts, *id.* at § 171(1)(b) and (c).

41. *Id.* at § 171(6).

42. *Id.* at § 173.

In the security context, § 34L of the Australian Security Intelligence Organisation Act 1979 (Cth) requires a person to appear for questioning once a warrant is issued or direction given under the Act. Failure to appear is an offense punishable by a maximum jail term of five years. A person must not fail to give any information, record, or thing requested, if they have it.<sup>43</sup> It is specifically not a defense that the information or thing withheld would tend to incriminate the person. However, that information, record, or thing would not be admissible in evidence against the person in criminal proceedings (other than those for breach of that section). Section 23 of the Act allows an authorized person to request information from the operator or an aircraft or vessel, in the form of documents or the answering of questions, relevant to the vessel or aircraft, voyage or passengers, and so forth. The requestee must comply,<sup>44</sup> on pain of penalty,<sup>45</sup> unless they have a reasonable excuse.<sup>46</sup> There are no express limits on the use of information gleaned from such a process. The Crimes Act 1914 (Cth) contains some incursions on the privilege against self-incrimination in the security context.<sup>47</sup>

Section 30 of the Australian Crime Commission Act 2002 (Cth) also requires persons summoned to attend an examination. It is an offense not

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43. § 34L(2), (6). There is an evidential burden on the person affected to show they do not have the relevant information, record, or thing (§ 34L(3), (7)). *See also*, in the context of documents thought to relate to terrorism or other serious offenses, § 3ZQN and § 3ZQO of the Crimes Act 1914 (Cth).

44. § 23(2) of Australian Security Intelligence Organisation Act 1979 (Cth).

45. *Id.* at § 23(3).

46. *Id.* at § 23(5); similar provisions are found in § 3ZQM(4) of the Crimes Act 1914 (Cth).

47. As well as those noted above, see § 3UC of the Act, allowing police to ask an individual for their name and address, evidence of identity, and reason for being at a particular Commonwealth place. The officer must explain to the individual that the officer is authorized to make this kind of request, and that it may be an offense not to comply with the request. Failure to comply with the request is punishable by 20 penalty units (§ 3UC(2)) unless there is reasonable excuse. It may be considered to be an offense under § 149.1 of the Criminal Code 1995 (Cth), hindering a public official in the administration of their duties, which attracts a possible two-year jail term. Otherwise, that Act requires officers generally to indicate that those they wish to question have a general right to silence (§ 23F), and it reaffirms the general application of the “right to silence” (§ 23S). For discussion *see* Sarah Sorial, *The Use and Abuse of Power and Why We Need a Bill of Rights: The ASIO (Terrorism) Amendment Act 2003 (Cth) and the Case of R v Ul-Haque*, 34 *MONASH U. L. REV.* 400 (2008); Jude McCulloch & Joo-Cheong Tham, *Secret State, Transparent Subject: The Australian Security Intelligence Organisation in the Age of Terror*, 38 *AUSTRALIAN & NEW ZEALAND J. CRIMINOLOGY* 400 (2005).

to attend, or to attend but fail to answer questions or produce requested documents.<sup>48</sup> This is punishable by a maximum penalty of 200 penalty units or up to five years' imprisonment. Subsection five limits the way in which such information can be used: it is generally not admissible against the person in criminal proceedings or those involving a penalty, other than confiscation proceedings or those relating to the alleged falsity of the information given. However, that subsection is itself limited by subsection four: in relation to an answer to a question, the person answering must have stated, before they provide the information, that they believe the answer might incriminate them.<sup>49</sup> In relation to a document provided, that section is limited to cases where the relevant document contains only information relating to the person's earnings through a business, and again only when they expressly state, before they provide the information, that they believe the document might incriminate them. One limit recently confirmed by the Court is that a person who has been charged with an indictable offense, where the trial has not occurred, cannot be subject to the compulsory questioning process indicated above. This rule applies regardless of whether or not the answers obtained through such questioning can be used at the subsequent trial.<sup>50</sup> On balance, the limits on the use of incriminating information or documents against the person who provided such information or documents are few.

Various state anticorruption bodies impose similar requirements. For instance, § 75 of the Crime and Misconduct Act 2001 (Qld) allows the Chair of the Crime and Misconduct Commission to require a person to provide oral or written information relevant to a misconduct investigation that is in the person's possession, and/or to produce documents that are in the person's possession. The person must comply, and the section makes no provision for a defense to noncompliance of reasonable excuse.<sup>51</sup> Very limited protections are given to the person involved; they do not, by complying with this requirement, put themselves in jeopardy of a prosecution on the basis of privacy or secrecy breach, and they incur no civil liability with respect to the information, thing, or document provided.<sup>52</sup>

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48. § 30(2) and (3) of the Australian Crime Commission Act 2002 (Cth).

49. *Id.* at § 30(4)(c).

50. *X7 v. Australian Crime Commission* [2013] HCA 29.

51. This is punishable by up to 85 penalty units or one year's imprisonment.

52. § 75(4) of the Crime and Misconduct Act 2001 (Qld).

Privilege is mentioned as a defense, but the Act defines it in such a way, in terms of a misconduct investigation to which § 75 relates, to exclude the privilege against self-incrimination.<sup>53</sup>

The New South Wales anticorruption legislation<sup>54</sup> contains similar provisions, including a power vested in the Commission to require a public authority or public official to produce a document or documents, or statement of information.<sup>55</sup> It is an offense to fail to produce the document(s) or supply the requested information unless there is a reasonable excuse.<sup>56</sup> Statements of information, documents, and things tending to incriminate the person cannot be used in proceedings against the person, except proceedings for a breach of the Act, provided the person objects to producing them at the time. As with the Australian Crime Commission provisions, the self-incrimination protection applies only where the person expressly states at the time that they wish to avail themselves of it.

In Western Australia, the Act allows the Corruption and Crime Commission to issue a summons to a person, requiring them to attend at a certain time and to give evidence and/or produce documentation.<sup>57</sup> It is a contempt of the Commission, treated as equivalent to contempt of court, to fail to attend and give the required evidence, or to fail to produce the required document(s), without reasonable excuse.<sup>58</sup> Section 157 specifically states that claiming infringement on the privilege against self-incrimination is not a reasonable excuse for failing to produce a document or thing.<sup>59</sup>

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53. The Schedule 2 Dictionary definition of “privilege” differs according to whether the context is crime investigation, witness protection, or confiscation proceedings (in which case “privilege” does include privilege against self-incrimination), and in the context of misconduct proceedings (in which case “privilege” does not include privilege against self-incrimination).

54. Independent Commission Against Corruption Act 1988 (NSW).

55. *Id.* at §§ 21 and 22.

56. *Id.* at §§ 82 and 83.

57. § 96 of the Corruption and Crime Commission Act 2003 (Western Australia); further power appears in § 94 (to require a public authority or public official to produce a statement of information) and § 95 (to require a person to produce a record). § 94(5) contains a limited recognition of the privilege against self-incrimination, stating that information derived by a public official pursuant to that section is not admissible against that person except with respect to contempt proceedings, proceedings for a breach of that Act, or disciplinary action.

58. *Id.* at §§ 158 and § 159 of the Act.

59. It does not state, when considering whether a person has failed to attend and/or give evidence at a hearing pursuant to a § 96 summons, whether the defense there of “reasonable excuse” could include the privilege against self-incrimination.

At trial, evidence legislation provides that an accused person generally need not answer questions.<sup>60</sup> Exceptionally, in Queensland § 15(1) of the Evidence Act 1977 states that in a criminal proceeding, the accused cannot refuse to answer a question on the ground that it might incriminate them.<sup>61</sup> The Western Australian Act also provides that a witness may be compelled by the court to provide what would otherwise be incriminating evidence, if the judge issues a certificate precluding the use of the evidence against that person.<sup>62</sup> Evidence legislation also limits the extent to which the court can comment about the accused's failure to give evidence.<sup>63</sup>

There has been talk that some Australian States might adopt the approach of the United Kingdom legislation in allowing use to be made of the failure of an accused to render an explanation of events earlier in proceedings. After much controversy, legislation to effect this change, the Evidence Amendment (Evidence of Silence) Act 2013 (NSW), passed recently. The Act amends the Evidence Act 1995 (NSW) to allow courts, in hearing proceedings for serious indictable offenses, to make an inference against a person, if the person remains silent about something at the investigatory stage but then leads it at trial, in circumstances where they might reasonably have been expected to mention it to authorities at the investigatory stage.<sup>64</sup> The Act requires that the individual has been cautioned, and

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60. This is commonly expressed in terms that the accused is neither competent nor compellable as a witness for the prosecution: § 17 Evidence Act 1995 (Cth), § 17 Evidence Act 1995 (NSW), § 17 Evidence Act 2008 (Vic), § 17 Evidence Act 2001 (Tas), § 17 Evidence Act 2011 (ACT).

61. *Cf.* the Northern Territory Evidence Act, § 10 of which expressly preserves the privilege against self-incrimination.

62. § 11 of the Evidence Act 1906 (WA). The evidence regimes elsewhere do contain provision for this certificate system in relation to precluding the use of otherwise incriminating evidence against a witness who claims they wish to assert the privilege, but they are much more limited. Specifically, they do not apply in relation to the accused, where the information relates to whether they did an act, made an omission or had a state of mind relevant to a fact in issue: § 128(10) Evidence Act 1995 (Cth), Evidence Act 1995 (NSW), Evidence Act 2008 (Vic), Evidence Act 2001 (Tas), and Evidence Act 2011 (ACT).

63. § 20 Evidence Act 1995 (Cth), § 20 Evidence Act 1995 (NSW), § 20 Evidence Act 2008 (Vic), § 20 Evidence Act 2001 (Tas), and § 20 Evidence Act 2011 (ACT). In South Australia, the prosecutor may not comment on the failure of the accused to give evidence (§ 18(1)(b) Evidence Act 1929 (SA)).

64. This mirrors the changes made to United Kingdom law in 1994; however those provisions are now subject to the Human Rights Act 1998 (UK) and European Convention on Human Rights, which expressly provide for a right to a fair trial, interpreted to include

given an opportunity to obtain legal advice about the ramifications of failing to mention that fact.

In summary, the existing case law does not provide a strong protection of the right to silence. It has been recognized as an important right, but liable to being overridden by legislation. Taking this cue, various Australian Parliaments have passed statutes in different fields that abridge the right to silence. Some specifically limit the use to which information required to be given in such circumstances can be used against the person required to answer the question or provide the information; others only confer this protection when the person articulates an objection on self-incrimination grounds before providing it; others don't limit how such information can be used. Sometimes, the defense of reasonable excuse is provided as a basis for noncompliance; sometimes it is not. Sometimes, this defense may include a self-incrimination argument; sometimes not. These Acts generally do not distinguish between the provision of information by way of document and provision of information by way of oral evidence. Most of the contexts considered have involved proceedings against individuals rather than corporations. The need for protection of the right to silence is considered greater in the context of an individual.

#### **IV. HOW OTHER JURISDICTIONS HAVE APPLIED THE RIGHT TO SILENCE**

It is considered useful to see how other jurisdictions have balanced the need for law enforcement authorities to have sufficient investigatory powers to do their job and the civil liberties of individuals to not be unduly put upon by investigators. The usual rider remains: that these decisions are based on a different constitutional and human rights context than our own, and so appropriate care must be taken in transposing the results in such cases to the Australian context. From a non-Australian legal scholar perspective, it is interesting to see how other jurisdictions have interpreted the right, and to consider whether the result in one's own country would be the same if the facts of the cases discussed had occurred in one's own country.

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a right to silence, as we will see in Part III of the article. The New South Wales changes do not apply to a person under 18 or a person with a mental disability.

## A. Europe

The right to silence is not specifically referred to in the European Convention on Human Rights. However, the Court has confirmed that the right to silence and the right not to incriminate oneself are “generally recognised international standards which lie at the heart of the notion of a fair procedure” (fair trial) under Article 6 of the European Convention.<sup>65</sup> It is closely linked with the presumption of innocence.<sup>66</sup>

Article 6 is technically applicable when a person has been “charged with a criminal offence.” This has led to controversy and difference of opinion regarding the precise time at which the right to fair procedure arises. Does it only apply at the trial itself? Does it apply at an earlier preliminary stage—once a person is in police custody, once a person has literally been “charged”? Does it apply during police questioning on the street or at a residence? This issue continues to divide the courts.<sup>67</sup> However, the courts have generally given this phrase a broad interpretation, to include an investigation such as this one, preliminary to possible criminal charges later.<sup>68</sup> The test for the applicability of Article 6(1) is whether that individual’s situation has been “substantially affected” rather than literally whether they have been charged.<sup>69</sup> This case also demonstrates that it is not necessary that the person affected be liable to imprisonment for failure to comply in order to qualify for the protections.

An alternative argument is to hold, as the Court did in *Saunders*,<sup>70</sup> that although a preliminary investigation may be “inquisitorial” rather than judicial, it is the use of the evidence at the subsequent judicial proceeding—for instance, when the person questioned in the inquisitorial proceedings

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65. *Zaichenko v. Russia* [2010] ECHR 185, [38]; *Murray v. United Kingdom* [1996] ECHR 3; K.A. Cavanaugh, *Emergency Rule, Normalcy Exception: The Erosion of the Right to Silence in the United Kingdom*, 35 CORNELL INT’L L.J. 491 (2002); Mark Berger, *Europeanizing Self-Incrimination: The Right to Remain Silent in the European Court of Human Rights*, 12 COLUMBIA J. EUR. L. 339 (2006); Mike Redmayne, *English Warnings*, 30 CARDOZO L. REV. 1047 (2009); Diane Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 U.C.L.A. L. REV. 1201 (1998).

66. *Zaichenko v. Russia* [2010] ECHR 185, [38].

67. *Ambrose v. Harris* [2011] UKSC 43.

68. This point was also confirmed in *Murray v. United Kingdom* [1996] ECHR 3, [62] and *Saunders v. United Kingdom* [1996] 3 ECHR 65.

69. *Quinn v. Ireland* [2000] ECHR 690, [41].

70. *Saunders v. United Kingdom* [1996] ECHR 65.

is subsequently charged with a criminal offense—that attracts Article 6(1). This was in the course of a case challenging the use of evidence on charges of breaches of company law derived from an inquisitorial investigation by inspectors. That law required, on pain of punishment for contempt, a person summoned to answer questions posed by investigators. The privilege against self-incrimination was not a defense. The Court found that Article 6(1) had been infringed.<sup>71</sup>

The right to silence is not an absolute one, and primarily it is for national law to determine rules regarding the admissibility of evidence and its probative value.<sup>72</sup> Although a conviction could not be based solely or mainly on the accused's silence, an accused's silence may be relevant where the situation calls for an explanation from them, in assessing the strength of the prosecution case.<sup>73</sup> All circumstances must be considered in determining whether the drawing of adverse inferences from silence was compatible with Article 6(1), including in what circumstances an inference could be drawn,<sup>74</sup> the weight given to them by national courts in assessing the evidence, and the degree of compulsion involved.<sup>75</sup> The weight of the

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71. The Court also clarified that the privilege against self-incrimination did not extend to material that had an existence independent of the will of the suspect, such as breath, blood, bodily tissue or urine samples [*Saunders* at 69], and that it applied to evidence that was incriminating in either a direct or indirect way [71]. On similar facts in *Kansal v. United Kingdom* [2004] ECHR 181, involving an examination by the Official Receiver where the person was again required, on pain of fine or imprisonment, to answer questions (subject to a reasonable excuse defense), the Court found the provisions to be incompatible with Article 6(1); *Shannon v. United Kingdom* [2009] ECHR 2257.

72. *Ambrose v. Harris* [2011] UKSC 43; *Ibrahim v. United Kingdom* [2012] ECHR 978, [95].

73. *Averill v. United Kingdom* [2000] ECHR 212; *Adetoro v. United Kingdom* [2010] ECHR 609.

74. The narrower the imposition, the more likely it is to be valid; an example is a law requiring a person to identify the driver of a vehicle alleged to have been involved in illegal activity. This was upheld despite objections that it infringed the privilege against self-incrimination, because it was only a question, and it applied only in the context of a narrow range of offenses: *Her Majesty's Advocate General for Scotland v. Brown* [2000] UKPC D3; *O'Halloran and Francis v. United Kingdom* [2007] ECHR 544. There is also some suggestion in these cases that if an individual "chooses" to embark on a particular activity, such as driving, they agree to statutory rules regarding that activity, including a requirement that drivers of a vehicle identify the owner if called upon to do so, or to stop for a random breath test.

75. *Sorokins and Sorokina v. Latvia* [2013] ECHR 457, [110]; *Murray v. United Kingdom* [1996] ECHR 3, [47]; *Adetoro v. United Kingdom* [2010] ECHR 609, [49]; *Tabbakh v. United Kingdom* [2012] ECHR 407, [26]. The degree of compulsion involved

public interest in the investigation and punishment of the relevant offense, and the existence of any safeguards in the procedure, have also been considered.<sup>76</sup> Prosecutor arguments that departures from the privilege against self-incrimination are justified or proportionate to dealing with threats to national security and terrorism have not convinced the court.<sup>77</sup> Proportionality between the alleged justification for the imposition and the extent of interference with the right to silence will be considered.<sup>78</sup> The privilege extends to indirect as well as direct incrimination.<sup>79</sup>

Whether the person had access to legal advice at the time they chose to remain silent is also relevant. Specifically, the court has confirmed it is perfectly understandable that a person may choose not to answer police questions when their legal adviser is not present.<sup>80</sup> It is also understandable that a person has relied on advice from their legal representative not to answer questions asked,<sup>81</sup> and summing up directions should not overlook this.<sup>82</sup> Where a lawyer was not present, infringement of the right to silence will mean the defense was “irretrievably prejudiced.”<sup>83</sup>

## B. North America<sup>84</sup>

The Fifth Amendment to the United States Constitution states that in a criminal case, no person shall be compelled to be a witness against

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was particularly important in *Jalloh v. Germany* [2006] ECHR 721, where the accused was held down while drugs were administered to him in order that he would regurgitate contents of his system, suspected to include illegal drugs. The court found that such a procedure did infringe the accused’s privilege against self-incrimination.

76. *Jalloh v. Germany* [2006] ECHR 721, [117]. Ashworth suggests that where the privilege against self-incrimination is abrogated, the penalty should take into account that fact. Ashworth, *supra* note 15, at 770.

77. *Quinn v. Ireland* [2000] ECHR 690, [57-58]; *Tabbakh v. United Kingdom* [2012] ECHR 407.

78. *Her Majesty’s Advocate General for Scotland v. Brown* [2000] UKPC D3.

79. *Zaichenko v. Russi* [2010] ECHR 185, [54].

80. *Averil v. United Kingdom* [2000] ECHR 212, [49]. This does not mean, of course, that an assertion of a right to silence when a person’s legal representative is present is unacceptable.

81. *Condrón v. United Kingdom* [2000] ECHR 191 (there because the person being questioned was apparently under the influence of drugs at the time).

82. *Beckles v. United Kingdom* [2002] ECHR 661.

83. *Zaichenko v. Russia* [2010] ECHR 185, [37].

84. This discussion should not be taken to imply that the author believes the United States approach is perfect. Specifically, given the difficulties in determining whether

themselves.<sup>85</sup> In the United States, the right to silence was emphatically asserted in the celebrated decision of *Miranda v. Arizona*.<sup>86</sup> Chief Justice Warren noted:

The privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values. . . . All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a fair state-individual balance, to require the government to shoulder the entire load, to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. In sum, the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will.<sup>87</sup>

In this case, a majority of the Court held that the Constitution required someone under “custodial investigation”<sup>88</sup> to be warned, prior to questioning, that they had a right to remain silent, that any statement made may be used in evidence against them, and that they had a right to legal representation, either retained or appointed.<sup>89</sup> The Court referred to the privilege against self-incrimination as the “essential mainstay of our adversary system.”<sup>90</sup> The Court went further than previous cases in positively requiring the investigating authority to inform the person affected of those

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someone is under “custodial investigation,” the author questions whether *Miranda* should be applicable to any questions asked by police of individuals; the level of awareness of the individual being asked to waive their rights is arguably too low, and the requirement that the person must articulate their wish to remain silent can be questioned, as can the different treatment of testimony and so-called physical evidence, as can the supposed need for a public safety exception and the constitutionality of existing statutory exceptions. A detailed consideration of these weaknesses is considered to be beyond the scope of this article, but it is acknowledged here that there are problems with the existing *Miranda* jurisprudence.

85. The protection applies at both federal and state level: *Dickerson v. United States*, 530 US 428 (2000).

86. *Miranda*, 384 US 436 (1966).

87. *Id.* at 460.

88. This means questioning by a law enforcement officials after a person was taken into custody or otherwise deprived of their freedom in any significant way (*id.* at 444).

89. *Id.*

90. *Id.* at 460.

rights. It did this because otherwise, inquiring regarding what an individual person did or did not know about their rights in any given case would be speculative. It was necessary to counteract the pressure that the person detained for questioning would typically be under.<sup>91</sup>

The U.S. Supreme Court has struck down as being inconsistent with the privilege a comment by the trial judge that the jury could take into account a failure of the defendant to deny or explain evidence or facts that they could reasonably be expected to deny or explain.<sup>92</sup> The privilege applies in any proceedings, civil or criminal, investigatory or adjudicatory.<sup>93</sup> In determining what level of immunity from prosecution might be sufficient to be consistent with Fifth Amendment requirements, the Court initially took a very broad view, stating that the person subjected to the questioning would have to be given absolute immunity against future prosecution for the offense to which the question relates<sup>94</sup>; subsequently it has been deemed sufficient that the person asked the question not have the information they supplied, or information derived from information they supplied, be used against them in a subsequent proceeding.<sup>95</sup> The person detained needs to express that they wish to remain silent and/or do not wish to talk with authorities; a failure to express anything is not enough to render further police questioning unconstitutional.<sup>96</sup> A distinction has been made between testimony, for which the protection is available, and “real or physical evidence”; as a result, it is not a breach of the Fifth Amendment to extract physical evidence, such as blood from the accused, without their consent.<sup>97</sup> However, sometimes the privilege has extended to protect a person from having to produce private papers.<sup>98</sup>

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91. *Id.* at 469.

92. *Griffin v. California* 380 US 609 (1965).

93. *McCarthy v. Arndstein* 266 US 34, 40 (1924).

94. *Counselman v. Hitchcock* 142 US 547, 586 (1892).

95. *Kastigar v. United States* 406 US 441, 460 (1972). The prosecution would bear the burden of establishing that the evidence they proposed to use in a subsequent proceeding against the person questioned was derived from a legitimate source wholly independent of the compelled testimony. Further, use and derivative use immunity is sufficient; it does not matter that the person questioned might suffer personal odium or disgrace from having to answer the questions (*Brown v. Walker* 161 US 591, 1896).

96. *Berghuis v. Van Chester Thompkins* 130 S.Ct. 2250 (2010), but precise words are not required: *Quinn v. United States* 349 US 155 (1955).

97. *Schmerber v. California* 384 US 757 (1966)

98. *Boyd v. United States* 116 US 616 (1886); *United States v. Hubbell* 530 US 27 (2000). There is a vast literature on the United States jurisprudence; a sample includes Ronald Allan

In contrast to Europe where, as indicated, arguments that an exception to the right to silence in the context of terrorism have not been accepted,<sup>99</sup> the Burger Court in *New York v. Quarles* recognized an exception to *Miranda* requirements where public safety considerations outweighed the right of the person questioned to remain silent.<sup>100</sup> Much of the recent controversy surrounding *Miranda* has been in the context of investigation and prosecution of possible terrorist offenses, and whether the *Quarles* exception should be applied in such situations,<sup>101</sup> whether a new exception is called for,<sup>102</sup> or whether *Miranda* should be applied in its original form, regardless of the context of the particular crime being investigated.<sup>103</sup>

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& Kristin Mace, *The Self-Incrimination Clause Explained and its Future Predicted*, 94(2) J. CRIM. L. & CRIMINOLOGY 243 (2004); Harvey Gee, *In Order to Be Silent, You Must First Speak: The Supreme Court Extends Davis's Clarity Requirement to the Right to Remain Silent in Berghuis v Thompkins*, 44 JOHN MARSHALL L. REV. 423 (2011); Michael Pardo, *Self-Incrimination and the Epistemology of Testimony*, 30 CARDOZO L. REV. 1023 (2009); Daniel Seidman & Alex Stein, *The Right to Silence Helps the Innocent: A Game Theoretical Analysis of the Fifth Amendment Privilege*, 114 HARVARD L. REV. 430 (2000).

99. *Quinn v. Ireland* [2000] ECHR 690, [57-58], *Tabbakh v. United Kingdom* [2012] ECHR 407.

100. *Quarles*, 467 US 649, 655-56 (1984).

101. An example is *United States v. Khalil* 214 F.3d 111 (2000), where the Second Circuit allowed statements of the accused to be admitted in the context of alleged terrorism offenses, despite their being made prior to a *Miranda* warning; Joanna Wright, *Mirandizing Terrorists? An Empirical Analysis of the Public Safety Exception*, 111 COLUMBIA L. REV. 1296 (2011). In H.Res 1413, a member of the U.S. House of Representatives proposes a resolution stating that investigations of alleged terrorism offenses may fall within the *Quarles* exception to *Miranda*, such that the warning would not be necessary. (111th Congress, introduced May 27, 2010). A similar proposal appeared in the Questioning of Terrorism Suspects Act 2010 (HR 5934, 111th Congress), though this proposal was not enacted. The latter proposal also included a "suggestion" that the results of overseas questioning not be rendered inadmissible due to failure to observe *Miranda* requirements, provided the confession was voluntary and reliable. Obviously, the United States observes a strict separation of powers, and it is doubtful that such a statement would influence the Court one way or the other on this issue.

102. Mark Godsey, *Miranda's Final Frontier—The International Arena: A Critical Analysis of United States v Bin Laden, and a Proposal for a New Miranda Exception Abroad*, 51 DUKE L.J. 1703 (2002). The Enemy Belligerent Interrogation Detention and Prosecution Act 2010 calls for an exception to *Miranda* where "high-value" enemy detainees are being questioned. This proposal has not yet been enacted.

103. Amos Guiora, *Relearning Lessons of History: Miranda and Counterterrorism*, 71 LOUISIANA L. REV. 1147 (2011); for example, in *United States v. Moussaoui* 365 F.3d 292 (2004), the Court of Appeals (Fourth Circuit) affirmed the supremacy of Fifth Amendment

Exceptions have been legislated.<sup>104</sup> The Supreme Court has often insisted, even in the context of alleged terrorism offenses, that due process be accorded to those involved.<sup>105</sup> As the joint reasoning in *Hamdi* noted,

It is during our most challenging and uncertain moments that our nation's commitment to due process is most severely tested, and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.<sup>106</sup>

In this light, the constitutional validity of the 2010 Act is open to some doubt.

In Canada, the right to silence is implicit in § 7 of the Canadian Charter of Rights and Freedoms as being one of the principles of fundamental justice,<sup>107</sup> as well as specifically in §§ 11(c) and 13. The Supreme Court has called the right to silence the “chief” right of the accused.<sup>108</sup> The Court has emphasized the core of the right as requiring that a detained person choose whether or not to make a statement to authorities.<sup>109</sup> It can be

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rights over government claims that evidence should not be revealed, contrary to general due process expectations.

104. § 1040 of the National Defense Authorization Act for Fiscal Year 2010 prohibits the giving of a *Miranda* warning to a foreign national captured or detained outside the United States as an enemy combatant. The constitutional validity of this section is not known, given that the Supreme Court has found that the *Miranda* warning is a constitutional requirement (*Dickerson v. United States* 530 US 428 (2000)) and that such rights have been extended in court decisions to interrogations outside the United States (*United States v. Bin Laden* 132 F. Supp. 2d 168 (S.D.N.Y. 2001)).

105. *Boumediene v. Bush* 553 US 723 (2008); *Rasul v. Bush* 542 US 466 (2004); *Hamdi v. Rumsfeld* 542 US 507 (2004).

106. *Hamdi v. Rumsfeld* 542 US 507, 532 (Rehnquist CJ, O'Connor, Kennedy and Breyer JJ, in conclusions with which Souter and Ginsburg JJ concurred). *Miranda* requirements are also applied with respect to interrogations by American officers of non-Americans abroad: *United States v. Bin Laden* 132 F. Supp. 2d 168 (S.D.N.Y. 2001).

107. *R v. Hebert* [1990] 2 S.C.R. 151.

108. *R v. Hebert* [1990] 2 S.C.R. 151 at 29 (Dickson CJ Lamer, LaForest, L'Heureux-Dube, Gonthier, Cory and McLachlin JJ). It reflects the common law rules of voluntariness and the privilege against self-incrimination.

109. In that case, the accused's appeal was allowed. He had been arrested and charged with robbery. At the police station, he indicated he did not wish to make a statement. Subsequently, police placed an undercover police officer in the accused's cell. The accused made admissions to the undercover officer, which formed most of the basis of the case against him. The Supreme Court held that the use of the evidence was contrary to Charter requirements.

consistent with such a requirement that police are persistent with their questioning, even after the accused has indicated they don't wish to answer questions.<sup>110</sup> The Court has confirmed the application of the rule at a time prior to the court hearing.<sup>111</sup>

The Court considered the compatibility of antitrust law provisions requiring a corporation and some of its officers to attend a hearing with the right to silence in *Thomson Newspapers Limited v. Canada*.<sup>112</sup> A person who refused to attend such a hearing could be punished for an offense against the Act. Evidence obtained through such a process was not generally admissible against that person in subsequent proceedings.

The case is not entirely satisfactory as a precedent, since only five judges sat. However, of these, two found that the proceedings were inconsistent with the right to silence provided for in the Charter, and a third judge found against the accused because he had apparently challenged the wrong section. In so doing, that third judge found it "could be argued" that the section was inconsistent with § 7 of the Charter, violating a fundamental principle of justice, and he suggested that at most, he might declare invalid the power to punish a "silent" interrogee for contempt.<sup>113</sup> Having acknowledged this, then, dissentient Wilson J found that the right to silence applied to the antitrust proceedings, although technically it was an investigatory rather than prosecutorial step.<sup>114</sup> To do otherwise would render the protection vulnerable. The fact that the provision did not allow the prosecutor to generally use the evidence obtained through such inquiry

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110. *R v. Singh* [2007] 3 S.C.R. 405, where the accused eventually made admissions to police, after stating on eighteen previous occasions that he did not wish to answer questions. A bare majority of the Court found the right to silence had not been infringed: McLachlin CJ, Bastarache, Deschamps, Charron and Rothstein JJ, Binnie, LeBel, Fish and Abella JJ dissenting.

111. *R v. Hebert* [1990] 2 S.C.R. 151, at 27: "the relationship between the privilege against self-incrimination and the right to silence at the investigatory phase is equally clear. The protection conferred by a legal system which grants the accused immunity from incriminating himself at trial but offers no protection with respect to pre-trial statements would be illusory" (Dickson CJ Lamer, LaForest, L'Heureux-Dube, Gonthier, Cory and McLachlin JJ); to like effect Wilson J (at 43-44) and Sopinka J (at 54, stating that the right to remain silent must arise when the coercive power of the state is imposed on the individual, including pretrial procedures).

112. [1990] 1 S.C.R. 425.

113. Lamer J, *id.* at 24. (That judge did not eventually do so, for other reasons).

114. *Id.* at 40.

against the person who provided the information was not sufficient, because it could be used to obtain other evidence, which could then incriminate that person and be used against them.<sup>115</sup> Sopinka J agreed with these findings, and would also have found the antitrust provisions invalid. However, he drew a distinction between the compelling of oral testimony and the compelling of documentary evidence, finding the former invalid, but the latter valid.<sup>116</sup> The right to silence should not be limited to cases where police were asking the questions; the underlying principle was that it was meant to protect against state investigators—often, but not limited to, police.<sup>117</sup>

### C. Other International Contexts

Article 14(3)(g) of the International Covenant on Civil and Political Rights (ICCPR) provides that in the determination of any criminal charge, the accused cannot be compelled to testify against themselves.<sup>118</sup> The right is not expressly referred to in the Universal Declaration of Human Rights or the African Charter on Human and People’s Rights, though other articles in these documents may be taken as referring to the privilege against self-incrimination.<sup>119</sup>

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115. *Id.* at 62.

116. *Id.* at 169.

117. *Id.* at 175. Of the majority, LaForest J did not think the right to silence should apply to the antitrust proceedings, since they were inquisitorial in nature rather than judicial (114) and did not involve the determination of criminal liability. LaForest J was satisfied with the provisions limiting the use to which such evidence could be put against the person providing the information (118) (as was L’Heureux-Dube (155)). He was concerned with the derivative use argument raised by the dissenters, but found the solution to this in the general discretion reposed in the trial judge to exclude evidence on the basis of prejudice or policy (131).

118. The 2012 Report of the Human Rights Committee reports specific breaches of § 14(3)(g) by Libya and Tajikistan. The Committee has reminded signatories that under the requirements of Article 14(3)(g) and others, deriving evidence from compulsion is “wholly unacceptable”: General Comment 13 (1984) ¶ 14; UNHRC Communication No. 588/1994, *Johnson v. Jamaica*; Communication No. 253/1987, *Kelly v. Jamaica*; Communication No. 330/1988, *Berry v. Jamaica*. In General Comment 29 (2001) ¶ 11, it notes that presumption of innocence is “fundamental” to the requirement that a trial be fair; *see also* General Comment 32 (2007) ¶ 30.

119. Universal Declaration Article 7 (equality), 10 (fair hearing), and 11 (presumption of innocence); African Charter Article 3 (equality) and 7 (presumption of innocence). The right is expressly enshrined in § 35(1)(c) of the South African Constitution; *see Ferreira v. Levin, Vryenhoek v. Powell* [1996] 3LRC 527.

A good country to consider by way of example of application of the ICCPR approach is India, a signatory to the Covenant. Section 20 of that country's Constitution is cast in very similar terms to Article 14(3)(g) of the ICCPR. Section 20 has generally been interpreted in a broad manner. The Indian Supreme Court has rejected arguments that the protection should be limited to oral testimony, extending it to orders for the production of documents. It has also extended the protection outside of the court room, to include investigatory procedures leading up to trial. However, the Court has provided law enforcement authorities with loopholes, because it has confined the protection to cases where the person being asked questions was truly an "accused" at the relevant time, in the sense. An "accused" here is someone against whom a formal accusation has been made. The fact that the person may become an accused after the questioning takes place does not necessarily mean they were an "accused" at the time of questioning.<sup>120</sup> The Court has confined Article 20 to "criminal proceedings," so that proceedings other than criminal proceedings do not necessarily attract Article 20 protection.<sup>121</sup>

In an important recent case, the Court considered the application of Article 20 in the context of police use of scientific techniques such as narcoanalysis, polygraph testing, and a brain electrical activation profile test to assist with investigation of crime. On occasions, such tests are used by police against an individual without that individual's consent. The court embraced the distinction in United States jurisprudence between "personal testimony," relying on an act of will of an individual, and physical evidence, such as body fluid samples, the former attracting constitutional protection but the latter not necessarily. Applying this distinction in this case, it found that the use of the above techniques could only be with the consent of the person involved; forced use of these techniques could, depending on other factors, infringe Article 20 protections.<sup>122</sup>

Of real relevance to this article is that the Court went on to consider whether the use of such techniques might infringe the right to due process enshrined in Article 21 of the Indian Constitution. It did so in recognition

120. *State of Bombay v. Kathi Kalu Oghad* [1961] INSC 233.

121. *Selvi v. State of Karnataka* [2010] INSC 340. The Court has also introduced an objective aspect to the right, finding that the refusal to answer a question based on belief that it might incriminate the questionee must have some kind of reasonable basis, and cannot be far-fetched or fanciful: *Satpathy v. Dani (P.L)*[1978] INSC 82.

122. *Selvi v. State of Karnataka* [2010] INSC 340.

of the limitations of the application of Article 20, specifically action against an “accused” and in the context of “criminal process.” The Court recognized that if either of these criteria were not met, Article 20 would not apply, so considered the possible application of Article 21, the broad due process protection. It specifically found that nonconsensual use of these techniques would violate due process, and the use of the results of such questioning would violate the right to a fair trial.

Another category of countries is characterized by references to some fundamental liberties in the Constitution, but not (expressly) the right to silence. Examples here include Singapore and Malaysia; the Constitution of both countries contain an express reference to general rights like equal protection, but not specifically the right to silence or presumption of innocence. Though Singaporean statutes expressly allow inferences to be drawn from silence,<sup>123</sup> there has been some recognition in recent Singaporean decisions of the right of an accused to a fair trial.<sup>124</sup> It is possible that, in future, a Singaporean court might hold that the drawing of inferences from silence is not consistent, or may not be consistent, with the right to a fair trial.<sup>125</sup>

This brief outline of the international jurisprudence supports the discussion of the history of the right in showing the fundamental nature of the right to silence in various common law jurisdictions, courts’ (general) rejection of the idea that a failure to give evidence can be used to draw inferences, the precise scope of the right, that the person must articulate that they wish to exercise the right, its application in so-called extreme contexts such as terrorism, and in Europe, that the right to silence has been expressly connected with the right to a fair trial. This is particularly important to the Australian context where, as will be seen in the following part, our courts have recognized a constitutional right to fair trial or fair procedure. Through this means, it can be argued that the Australian Constitution recognizes a right to silence as part of the right to a fair trial. This is a novel argument that to the author’s knowledge has not been developed elsewhere, so it is considered worthy of extended treatment.

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123. *Public Prosecutor v. Chee Cheong Hin Constance* [2006] SGHC 9.

124. *Goh Kah Heng v. Public Prosecutor and Another Criminal Motion* [2009] SGHC 61.

125. This is of course dependant on other factors beyond the scope of this article, including the independence of the judiciary. The author is not aware of any cases that have taken this step to date.

## V. THE CONSTITUTIONAL PROTECTION OF THE RIGHT TO A FAIR TRIAL OR FAIR PROCEDURE IN AUSTRALIA

How then can the right to silence be more strongly protected in Australia? This article has indicated the High Court of Australia's view that properly worded legislation will have the effect of overriding such a fundamental right. Do constitutional mechanisms exist to protect the right in a stronger way, and can the international materials alluded to above be utilized to support a stronger protection of the right in Australia at the constitutional level? The argument now to be developed is that the High Court has already recognized the right to a fair trial and to fair procedure. Further, it has insisted on a strict separation of powers and denied the legislature the constitutional power to require courts to act in a nonjudicial manner. It is submitted that through either of these arguments, or through a combination of the two, an Australian court could more strongly protect the right to silence.

Five members of the High Court of Australia in the landmark decision of *Dietrich v. The Queen*<sup>126</sup> found that the right to a fair trial was fundamental to the Australian legal system.<sup>127</sup> Some of them based this right on the implicit requirements of Chapter III of the Constitution, which established the judicial branch of government.<sup>128</sup> Members of the Court also

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126. *Dietrich v. The Queen* (1992) 177 CLR 292, at 311 (Mason CJ and McHugh J), 326 (Deane J), 353 (Toohey J), and 362 (Gaudron J); see also *Jago v. District Court (NSW)* (1989) 168 CLR 23, per Mason CJ (29), Deane J (56), Toohey J (72) and Gaudron J (75).

127. *Id.*, see Mason CJ and McHugh (298), Deane J (326), Toohey J (353), and Gaudron J (362); these concepts would be encapsulated by the American concept of due process, but the Australian courts are yet to formally accept that the notion of due process is or should be considered to be implicit in Australia's constitutional arrangements; Fiona Wheeler, *Due Process, Judicial Power and Chapter III in the New High Court*, 32 FED. L. REV. 205 (2004); Janet Hope, *A Constitutional Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System*, 24 FED. L. REV. 173 (1996).

128. *Dietrich v. The Queen* (1992) 177 CLR 272, see Deane J (326) and Gaudron J (362). My reading of the joint judgment of Mason CJ and McHugh J, and that of Toohey J (these being the other judges who accepted the notion of a fair trial) does not disclose the basis on which they found such a right (311); at that page, Mason CJ and McHugh J they merely assert it "for the above reasons." They did in their reasons refer to international materials concerning the right to a fair trial, including the International Covenant on Civil and Political Rights and Canadian Charter of Rights and Freedoms. None of these judges disagreed with the express view of Deane and Gaudron JJ that the right to a fair trial was constitutionally entrenched.

alluded to the Court's inherent power to stay proceedings to prevent what would otherwise be an abuse of process.<sup>129</sup> This was in the course of rejecting an argument that an accused had a right to publicly funded legal representation; however, the Court found that unless exceptional circumstances existed, a court should generally adjourn proceedings against an accused charged with a serious offense who, through no fault of their own, was not able to obtain legal representation, until legal representation was available.<sup>130</sup> This would usually be necessary to ensure the accused obtained a fair trial.

In reaching this conclusion, members of the High Court referred liberally to international materials in determining the content of a fair trial, including Article 14 of the International Covenant on Civil and Political Rights<sup>131</sup> and American Bill of Rights case law on the meaning of a fair trial.<sup>132</sup> There is ample precedent for international materials being used to help interpret the requirements of the Australian Constitution. A leading example appears in the judgment of Kirby J in *Al-Kateb v. Godwin*:

The complete isolation of constitutional law from the dynamic impact of international law is neither possible nor desirable today. That is why national courts, and especially national constitutional courts such as this, have a duty, so far as possible, to interpret their constitutional texts in a way that is generally harmonious with the basic principles of international law, including as that law states human rights and fundamental freedoms.<sup>133</sup>

It may be conceded that since the *Dietrich* decision, there have not been any High Court cases that have applied the express concept of the right to

129. *Id.*, see Mason CJ and McHugh J (298).

130. *Id.*, see Mason CJ and McHugh J (315), Deane J (337), and Toohey J (356–57).

131. *Id.* at 300 (Mason CJ and McHugh JJ) and 360 (Toohey J)

132. Including the Sixth and Fourteenth Amendments, see *id.* at 302 (Mason CJ and McHugh J), 333 (Deane J), 359 (Toohey J), and 370–71 (Gaudron J).

133. *Al-Kateb v. Godwin* (2004) 219 CLR 562, 624. Recent examples where the High Court has made extensive use of international materials in interpreting constitutional requirements include *Betfair Pty Ltd v. Western Australia* (2008) 234 CLR 318 and *Roach v. Electoral Commissioner* (2007) 233 CLR 162; there is a significant academic jurisprudence—a sample includes HILARY CHARLESWORTH, MADELINE CHIAM, DEVIKA HOVELL, & GEORGE WILLIAMS, *NO COUNTRY IS AN ISLAND* (2006); Hilary Charlesworth, Madeline Chiam, Devika Hovell, & George Williams, *Deep Anxieties: Australia and the International Legal Order* 25(4) SYDNEY L. REV. 424 (2003); Hilary Charlesworth, *Dangerous Liaisons: Globalisation and Australian Public Law*, 20 ADEL. L. REV. 57 (1998).

a fair trial, at least in those terms. In response, however, firstly, the decision has never been overruled. Secondly, since the *Dietrich* decision, we have seen a substantial jurisprudence develop on Chapter III of the Australian Constitution, and in particular the need for the judiciary to be, and be seen to be, independent of the other arms of government, that public confidence in the independence of the judiciary not be undermined, and that courts not be given powers that would require or allow it to engage in activities contrary to traditional notions of judicial process.<sup>134</sup> Although these decisions are not expressly based on notions of a fair trial *per se*, the reasoning is often highly analogous to fair trial reasoning.<sup>135</sup> In other words, a court asked or required to act in ways antithetical to the judicial process is being asked to conduct an unfair trial. So, while it is conceded that the High Court has not applied the *Dietrich* principle expressly in subsequent cases, it is argued that in the development of the so-called *Kable* principle,<sup>136</sup> a close analogy is apparent in at least some of the applications of the *Kable* doctrine, such that it is considered that the principle that the Constitution enshrines a right to a fair trial remains current law.

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134. Examples include *Kable v. Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Totani v. South Australia* (2010) 242 CLR 1; and *International Finance Trust Co Ltd v. New South Wales Crime Commission* (2009) 240 CLR 319.

135. For example, in the *International Finance Trust* decision, Gummow and Bell JJ, in striking down the provisions on the so-called *Kable* principle, discuss how the Court is conscripted for a process requiring mandatory ex parte sequestration of property upon mere suspicion, no requirement of full disclosure, and a reverse onus. While they use this in applying the *Kable* principle and determine the provisions to be offensive to it and unconstitutional, similar reasoning may apply in the different context here.

136. This is the principle that a court must not be given powers that would cause an outsider to consider that the court's independence was being compromised, or undermine public confidence in the judiciary as a repository of judicial power. The precise facts involved a law allowing a court to order an offender (named in the enabling legislation) to be incarcerated for a further period beyond his originally allotted sentence, if the court was satisfied that he was more likely than not to re-offend. Ordinary rules of evidence were not applicable, and the legislation confirmed that in making its decision, the most important factor for the court to consider was the need for community protection. By a majority of 4–2, the High Court struck out the legislation as being constitutionally invalid, contrary to the separation of powers for which Chapter III of the Australian Constitution provided (*Kable v. Director of Public Prosecutions (NSW)* (1996) 189 CLR 51). It is interesting to consider whether U.S. or European jurisprudence would benefit from the development of something like the *Kable* principle, though the need for such a doctrine in those jurisdictions may be lessened by the existence of human rights recognition at constitutional and international convention levels.

Perhaps the best example of this argument appears in the recent High Court decision in *Wainohu v. New South Wales*.<sup>137</sup> There French CJ and Kiefel J refer to procedural fairness as being a defining characteristic of a court.<sup>138</sup> Gummow, Hayne, Crennan, and Bell JJ expressly agreed with comments by Gaudron J in an earlier case<sup>139</sup> that confidence in judicial officers depended on their acting in accordance with “fair and proper procedures.”<sup>140</sup> Heydon J assumed these statements were correct, for the purposes of argument.<sup>141</sup>

Other examples of this appear in *International Finance Trust* where the High Court determined the regime to be offensive to the so-called *Kable* principle discussed above. For instance, Gummow and Bell JJ pointed to the conscription of the judiciary into mandatory *ex parte* sequestration of property, lack of full disclosure, and a reverse onus. They concluded this involved the court in an activity “repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia.”<sup>142</sup> Another way of expressing this would have been to say that these features of the proceedings meant that the proceeding was not a “fair” one; in other words, the result and the reasoning is similar to what would have occurred if the *Dietrich* notion of a fair trial had have been applied.

In another in this line of cases, *Totani*, French CJ repeatedly used the word “fair” in considering the requirements of the system of courts for which Chapter III provides.<sup>143</sup> He indicated that fairness was a defining

137. *Wainohu v. New South Wales* (2011) 243 CLR 181.

138. *Id.* at 208.

139. *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 22: “the effective resolution of controversies which call for the exercise of the judicial power of the Commonwealth depends on public confidence in the court in which that power is vested. And public confidence depends on . . . their acting openly, impartially and in accordance with fair and proper procedures.”

140. *Wainohu*, *supra* note 137, at 225.

141. *Id.* at 240; *see recently Assistant Commissioner Condon v. Pompano Pty Ltd* (2013) 87 ALJR 458, where Gageler J found that the Australian Constitution mandated procedural fairness as an “immutable characteristic” of all Australian courts.

142. *International Finance Trust* (2010) 240 CLR 319, 367.

143. *Totani*, (2010) 242 CLR 1, 43. Interestingly, that judge has also indicated some reservation about importing the concept of “due process” into Australian constitutional law (*International Finance Trust* (2009) 240 CLR 319, 353). What is not known is whether there is a large substantive difference between “fair” and “due process.” In the absence of the Fifth Amendment, it is submitted an American scholar would likely argue against abrogation of the right to silence on the basis of due process.

characteristic of courts.<sup>144</sup> His judgment in *International Finance Trust* similarly refers to requirements of “fairness,” in invalidating as contrary to Chapter III of the Constitution, provisions requiring substantial departure from typical judicial process.<sup>145</sup>

It is argued here that part of the constitutional right to a fair trial/fair process that the High Court of Australia first recognized in *Dietrich*, and which appears in cases like *Wainohu*, *Totani*, and *International Finance Trust*, is the right to silence. This does not seem to be a radical proposition, given that: the European Court has said that the right to silence is fundamental to a fair trial required by Article 6 of the European Convention<sup>146</sup>; the Canadian Supreme Court has found that it is part of “fundamental justice” required by § 7 of the Canadian Charter of Rights and Freedoms<sup>147</sup>; the United States Supreme Court has declared it to be an “essential mainstay” of the adversarial system<sup>148</sup> to which Australia also adheres; it is given as an example of a fair trial right in the South African Constitution<sup>149</sup>; the Indian Supreme Court recently included it within the right to a fair trial and due process<sup>150</sup>; and the High Court of Australia has itself declared it to be a deep-rooted right and cardinal principle. Further, in the famous United States case in which the right was emphatically asserted, *Miranda v. Arizona*, the court linked the right with the right to counsel. The High Court has accepted that the right to a fair trial will usually require counsel. In *Dietrich*, Mason CJ and McHugh JJ expressly referred

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144. *Totani*, *id.* at 43 (“courts of the states continue to bear the defining characteristics of courts, and in particular . . . fairness”), 45 (referring to “fairness” as an essential characteristic of courts), 47 (referring to “procedural fairness” as being central to the judicial function); in the Full Court of South Australia decision in *Totani*, Bleby J, with whom Kelly J agreed, referred in his reasons for invalidating the legislation the fact that the control order regime denied “the right to a fair hearing” ((2009) 105 SASR 244, 283). In *Royal Aquarium and Summer and Winter Garden Society Ltd v. Parkinson* [1892] 1 QB 431, Fry LJ spoke of fairness as characteristic of proceedings in courts (at 447); see also *Nicholas v. The Queen* (1998) 193 CLR 173, 208–209 (Gaudron J).

145. *International Financial Trust* (2009) 240 CLR 319, 338 (explaining that the section was invalid because it “restricts the application of procedural fairness in the judicial process”), 354 (“procedural fairness lies at the heart of the judicial function”).

146. *Murray v. United Kingdom* [1996] ECHR 3.

147. *R v. Hebert* [1990] 2 S.C.R. 151.

148. *Miranda v. United States* 384 US 436 (1966) (Warren CJ, for the majority).

149. § 35(3)(h) of the South African Constitution.

150. *Selvi v. State of Karnataka* [2010] INSC 340.

with evident approval to Article 14 of the International Covenant on Civil and Political Rights in elaborating on the requirements of a fair trial. Article 14(3)(g) refers expressly to the privilege against self-incrimination, requiring that a person not be compelled to testify against themselves or to confess guilt, as one of the minimum guarantees in a criminal proceeding.

The Australian Independent National Security Legislation Monitor recently expressly alluded to the issue of the possible inconsistency between the abrogation of the privilege against self-incrimination in Australian law and international law:

It is a large question, that ought not simply go by assumption, whether these provisions (abolition of privilege against self-incrimination provisions) are consistent with Australia's international human rights obligations.<sup>151</sup>

The Report adds that because such abrogations are given effect to frequently in Australia,

This issue cannot be given top priority. It does seem as if the pass has been sold on statutory abrogations of this privilege.<sup>152</sup>

This author does not “buy the pass” and submits that the Australian High Court should not buy the pass. The fact that Parliaments have “pushed the envelope” in this regard does not make it constitutionally valid or consistent with international law. The American courts have been instructive in this regard, upholding fundamental human rights principles even in the extreme context of terrorism. It is submitted that an Australian court should take a similar perspective.

The author has emphasized here what might be considered to be quite a noncontentious point because there is no Australian authority that has established that the right to silence is protected by the right to a fair trial established by the Australian Constitution.<sup>153</sup> Indeed, there are precedents

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151. BRET WALKER, INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR ANNUAL REPORT 33 (2011). Earlier in the report, Walker claims that to suggest that such abrogations against the privilege against self-incrimination were in principle inappropriate would be “absurd” (27). With respect, the author disagrees.

152. *Id.* at 33.

153. The only reference (oblique, at that) in any judgment to this appears in the decision of Kirby J (dissenting) in *Carr v. Western Australia* (2007) 232 CLR 138, 172, where he refers to the need for the prosecution to prove its case. He suggests that this requirement “may even be implied in the assumption about fair trial in the federal *Constitution*.” There are obviously very close links between the presumption of innocence and the privilege against

to the contrary. Australian precedents to which this article has previously alluded have indicated that although the court will presume that an act is not intended to alter fundamental common law rights like the privilege against self-incrimination, if the intention of the legislature is clear enough, the right would have to yield to the legislature's will. The decisions in *Hammond* and *Sorby* are clear evidence of that philosophy in this context. However, such cases were decided before the High Court's decision in *Dietrich* recognizing a constitutional right to a fair trial, and it is submitted that their ongoing correctness must for that reason be in doubt. They are not considered to be a bar to the argument pressed here.

The suggestion is that the Australian legislation alluded to in Part II of this article must, to the extent that it infringes the right to silence, be closely scrutinized to assess compatibility with the right to a fair trial/fair procedure. It is conceded that this right is not absolute, so some interferences with the right to silence may be acceptable.<sup>154</sup> The sophisticated approach taken by the European Court is worth considering here, taking into account a number of issues in weighing the right to silence against competing values.<sup>155</sup>

It may be objected that in each of the Australian Acts referred to earlier, the demand for information occurs at an investigatory or preliminary stage of proceedings, such that the right to silence is not applicable, because it applies (constitutionally) to a "trial." There are two answers to this; the first

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self-incrimination. However, the author has not found a case where Kirby J specifically stated that the privilege against self-incrimination was part of the right to a fair trial provided for in the Constitution.

154. The Australian courts may like to consider whether there should be separate treatment for oral testimony and physical records, as occurs in the United States in particular and to some extent in Europe, and (relatedly) whether it is relevant to take into account whether the information had an existence independent of the person being asked to provide it. Examples would include evidence derived from body tissue, urine, blood, breath etc. Similarly, information with little or no potential to incriminate the person, such as their name and address, might be lawfully demanded by police.

155. As earlier discussed, these include the circumstances in which the implication could be drawn, the weight given to the evidence, degree of compulsion, public interest in the investigation and prosecution of those kinds of cases including proportionality, safeguards built into the procedure, whether the activity the subject of the questioning was an activity that the person chose voluntarily to participate in and so may have acquiesced in a limiting of their rights in that limited context, whether the person was legally represented at the hearing, and perhaps, that the penalty for breach specifically takes into account the fact that a fundamental right was taken away.

is to say that at least some Australian judges,<sup>156</sup> as well as overseas courts,<sup>157</sup> have found that the right does extend to the investigatory stage, since it is sufficiently proximate to possible subsequent criminal proceedings that would involve a “trial.” The second is to say, just as the Supreme Court of India has, that whereas the questioning might be permitted and those proceedings not stayed *per se*, the actual use of the information obtained as a result of “forced” answering at any subsequent proceeding could be challenged on the basis that the use of such evidence would infringe the right to a fair trial.<sup>158</sup>

As indicated, the Australian Acts differ in the extent to which the information gained by such proceedings may be used against the person. However, even those that offer the strongest protection to the use of that information don’t forbid the use of information derived from the information provided, as the United States Supreme Court has required.<sup>159</sup> It is difficult to justify requirements in some of the Australian Acts that, for the use immunity to apply, the person being questioned must actually assert their objection to the information being provided on self-incrimination grounds prior to handing over the information.<sup>160</sup> This assumes a level of knowledge of the law, and an ability and willingness to assert rights in a difficult situation, that seems unrealistic, especially when there is no guarantee that a lawyer acting for the person will be present.

To the extent that the Acts under question expressly deny the applicability of the privilege against self-incrimination, this is not thought to bar a court finding that admission of such evidence would infringe a constitutional right to a fair trial/fair procedure. Legislation must yield to the Constitution in the event of incompatibility. The High Court of Australia has struck down on several recent occasions process created by statute that

156. *Pyneboard v. Trade Practices Commission* (1983) 152 CLR 328, Mason ACJ, Wilson Dawson JJ (341), and Murphy (346); Brennan J disagreeing.

157. *Murray v. United Kingdom* [1996] ECHR 3; *Funke v. France* [1993] ECHR 7; *Thomson Newspapers Ltd v. Canada* [1990] S.C.R. 425; *Miranda v. Arizona* 384 US 436 (1966); *Selvi v. State of Karnataka* [2010] INSC 340 (Europe, Canada, United States, India).

158. The Indian Supreme Court found in *Selvi v. State of Karnataka* [2010] INSC 340 that use of information derived from a person involuntarily using processes such as polygraphs conflicted with the right to a fair trial.

159. *Kastigar v. United States* 406 US 441 (1972).

160. This differs from the United States position, which requires merely that the person being questioned assert their wish to remain silent.

the Court deemed to be an unfair one, on the basis that this was contrary to the requirements of Chapter III of the Constitution, asking or requiring the court to act in a nonjudicial manner, and undermining public confidence in the judiciary and the separation of powers for which the Constitution provides.<sup>161</sup>

## SUMMARY OF LESSONS LEARNED AND CONCLUSION

The lessons learned from a consideration of the international materials, and their implications for other countries including my own, can be summarized here in advance of the conclusion:

- The right to silence is a fundamental human right of longstanding origin, recognized by a range of national and international human rights instruments.
- There is an inherent tension between the desire of law enforcement authorities to have sufficient powers at their disposal to investigate crime to make society as safe as possible, and fundamental human rights, such as the right to silence. Utilitarianism competes with liberalism in this context.
- Jurisdictions such as the United States and Europe have generally asserted the primacy of the individual's right to silence over other interests, though the right is not absolute, as a key component of the right to a fair trial/fair process and as reinforcing presumption of innocence.
- Courts must not be invited to draw adverse inferences from an accused's right to silence.
- The right should not be narrowly drawn, and should extend to preliminary investigatory procedures, as well as court proceedings, and to both civil and criminal proceedings.
- Arguably, narrowing concepts such as requiring that the person questioned be under "custodial investigation" (United States) or that the person be an "accused" (India) should be abandoned.
- Limits on the use to which compelled testimony may be put need to be carefully drawn, including derivative use.

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161. *Wainohu v. New South Wales* (2011) 243 CLR 181; *South Australia v. Totani* (2010) 242 CLR 1; *International Finance Trust Company Limited v. New South Wales Crime Commission* (2009) 240 CLR 319.

- Courts might insist that the person questioned demonstrate by some means that they understand the warning they have been given, perhaps by explaining the warning back to the investigator in their own words (which is recorded).
- No exceptions should exist to the rule where public safety is involved, or involving enemy belligerents; such exceptions may be seen to be contrary to the rule of law.
- There is doubt whether the existing distinction between testimony and so-called physical evidence can or should be maintained.
- The individual questioned should not be required to articulate their wish to remain silent.
- Arguably, the person's belief that the information requested would incriminate them should not be subject to an objective test.
- Australian courts have recognized the right to a fair trial, as international courts have, but so far they have not expressly linked fair trial to right to silence, as other countries have done. This step should be taken.
- Other countries without an express bill of rights, with a bill of rights but not expressly including right to silence (Singapore and Malaysia), or with an express right to silence but limited to certain situations (India) could use the concept of fair trial/fair process to constitutionally enshrine a right to silence in a broad range of cases.

The absence of an express bill of rights has meant that Australian legislatures continue to impinge on the right to silence, a right with a long heritage and which was only recognized after many centuries of competing philosophy. The rationale for the retention of the right to silence is as applicable today as it ever was, and the fundamental nature of such a right is reinforced in case law in Europe and North America, and in some countries that adhere to the ICCPR. Consistent with the presumption of innocence, with liberal values, and in recognition of the power that government has over the individual, it is for the government to prove the truth of an accusation they make, and an individual should not be required to assist the government to make its case, on pain of punishment. Yet this is what current Australian provisions do at the pretrial stage. However, in countries like Australia, in the absence of an express bill of rights, this is a tough argument to make.

This article has argued that the right to silence should be recognized as part of the right to a fair trial/fair procedure, and recognized as a constitutional requirement by the Australian High Court in *Dietrich* and more recently in

*Wainohu* and others, and that this right should extend to pretrial proceedings to give it substance. Existing limits on the use to which compelled evidence may be put in later proceedings fall short of what is acceptable, bearing in mind the standards created by the American courts. The European Courts have reinforced the right, albeit not absolute, of a person to not provide information to authorities, as part of the fundamental right to a fair trial. A more nuanced approach to the right in Australia is favored, taking into account the kinds of factors to which the European courts have alluded, in assessing the extent of the right in a given case. However, the existence of the right cannot be made to depend, as some of the Australian Acts suggest, on whether the person affected happens to mention it before providing the information. This protects only those who are extremely well informed of their rights, or those with a quick-minded legal representative, and compromises those who are most vulnerable.

Australia (and other nations without an express bill of rights, or without a specific constitutional protection of the right to silence) should take America's lead (recent legislation aside) and refuse to accept arguments that denial of fundamental rights becomes okay when dealing with extreme offenses like terrorism. There is an interminable slippery slope problem with such an approach. The American position is not perfect, and improvements have been suggested in terms of ensuring that the person questioned does in fact understand the rights they are waiving, extending the circumstances in which the warning must be given, and not requiring the person to articulate their wish to avail themselves of the right. Legislative directions that a court could take into account the failure to speak at an earlier occasion when an explanation might reasonably have been called for, when the person later decides to speak, apparent in current United Kingdom law and in a proposed Australian law, should similarly not be countenanced. The American courts have shown leadership in finding that such provisions cannot be reconciled with the fundamental right to silence nor with the need for the accuser to prove the truth of their accusation at the required standard.