The 20th Century Inquisition

by JENNY BLOKLAND*

When His Honour Mr Justice Nader said that practice manuals of Spanish Dominican Inquisitors would be in great demand if available today, he was not being purely tongue in check.
His Honour was addressing the 1991 dinner of the Criminal Law Association of the Northern Territory, attended by 55 CLANT members and friends.
In speaking to the topic of the twentieth century inquisition Mr Justice Nader referred to popular fascination with the vague concept of "organised crime."
He noted the increasing use of Royal Commissions and other forms of inquiry such as the New South Wales Independent Commission Against Corruption (ICAC), to deal with this class of criminality.
He queried whether this style of investiglation would gradually come to be used for all types of crime as, so far, it appeared to be limited to official corruption cases.
One of the consequences of the extended use of bodies such as ICAC was the gradual removal of the right against self incrimination.

His Honour explained that witnesses before ICAC were forced to answer questions notwithstanding that the answers tended to incriminate them.
The point was made that although this may be acceptable to the public in cases of official corruption, there may be different attitudes expressed in ordinary criminal cases.
He said that if lawyers wanted to keep the ancient right against self incrimination, they must develop arguments to justify its retention.
His Honour argued that politicians were attracted to suggestions such as turning committals into preliminary hearings incorporating the questioning of suspects or, alternatively, allowing judges to comment on the refusal of a suspect to answer questions.

His Honour's moral was as follows:
"If you as an association have a position on the matter I believe you should be rationally prepared to justify it and argue for it.
"I urge you to set seriously about considering these questions and many more which the limits of a casual occasion such as this prevent me from elaborating.

"Legislators will not be influenced by expressions of horror unsupported by cogent and compelling reasoning; reasoning which is not merely cogent but which the legislator will regard as seen to be cogent by the electorate.
"Emotion will be no substitute for research and reason.
"The righteous gasp of the lawyer is as low as a journalist in the public estimation.
"If you believe that the removal of the right to silence by statute, no matter how strong the associated safe guards, is contrary to important principle, prepare to justify your belief.
"Perhaps you will argue that there is some fundamental moral right against compulsory self incrimination that the law should recognise.

"If so, that proposition should be refined and expressed persuasively.
"Perhaps you will argue more pragmatically that there is, in fact, no system of compulsory interrogation, no matter how carefully devised, capable of providing reasonable protection to individuals against unjust harassment and conviction.
"Perhaps you will contend, with evidence to support it, that modern detection techniques, especially electronic, render any interfering with the right to silence redundant.
"But if practicing lawyers are not involved in the debate, the ancient rights may be lost by default.
"And that certainly is not the way in which they should be lost," His Honour said.
Perhaps *Balance* is a proper medium for lawyers in the Northern Territory to begin the type of reasoned exchange which His Honour has challenged us to have.

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