# POLICING INTERROGATION AND/OR PROVING GUILT

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On October 20, 1988 the British Government announced the making of an order-in-council which substantially modified the right to silence in Northern Ireland. The *Criminal Evidence (Northern Ireland) Order* 1988 passed through the House of Lords on November 10 and is now in force. The *Order* provides that Northern Ireland courts will be permitted to draw reasonable inferences from an accused person's silence in four situations:

- where an accused remains silent during police questioning but then offers an explanation of his conduct for the first time at his trial;
- where the prosecution has established that there is a case to answer, and the accused refuses to give evidence in court;
- where an accused fails to explain to the police certain specified facts, such as substances or marks on his clothing;
- where an accused fails to account to the police for his presence at a particular place.

The Government also announced that parallel provisions will be enacted in England and Wales, although the legislative process for carrying this out will take some time - perhaps not until 1990.

This decision of the British Government came as something of a surprise. The most recent extensive study of criminal procedure in Great Britain, the 1981 Royal Commission on Criminal Procedure, had recommended retention of the right to silence in an unmodified form.[1] The Government, however, preferred to adopt the earlier 1972 recommendations of the Criminal Law Revision Committee[2] which, when first made public, ran into serious and ultimately (in the short term at least) fatal opposition from a large portion of the legal profession.

In Australia, the right to silence remains relatively untarnished. Focusing, for the purposes of this seminar, on police interrogation, it is clear that where a suspect questioned by the police has been cautioned, any failure to answer questions

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1. Royal Commission on Criminal Procedure, **Report** (Cmnd. 8092, 1981) 123
2. Criminal Law Revision Committee, Eleventh Report, **Evidence (General)** (Cmnd. 4991, 1972) 16

thereafter cannot constitute an admission.[3] A total refusal to answer questions will usually mean that the jury is not even informed of the questioning session. Certainly, selective answering of police questions even after a caution may be used to infer consciousness of guilt, particularly if some of the answers given could not have been known by the police or were untrue.[4] And there is a long line of authority to the effect that an accused person's failure to reveal a defence during police questioning may be taken into account in assessing the appropriate weight to give to that defence.[5] As for silence in response to police questions before a caution is given, the majority view seems to be that inferences are permissible[6], presumably on the basis that it is not unfair to do so where no implicit assurance has been given that silence will carry no penalty[7] But, apart from these qualifications, inferences from silence during police interrogation are prohibited.

However, in this country, as in the United Kingdom, there is no consensus as to the merits of the right to silence or, more precisely, the legitimacy of drawing adverse inferences from a suspect's silence. The 1974 *Mitchell Committee Report on Criminal Investigation in South Australia*[8] and the 1977 *Lucas Committee Report on Criminal Law in Queensland*[9] recommended that adverse inferences should be permissible. On the other hand, the 1975 *Australian Law Reform Commission Report on Criminal Investigation*[10] its 1987 *Report on Evidence*[11] and the 1978 *Norris Committee Report* in Victoria[12] recommended either retention of the existing position or even greater restrictions on the evidential use of a suspect's silence.

This conflict of opinion is likely to be reflected in the forthcoming reviews of criminal procedure in New South Wales (the *New South Wales Law Reform Commission Report on Criminal Procedure*) and the Commonwealth (the *Review of Commonwealth Criminal Law*). The *New South Wales Law Reform Commission's Discussion Paper on Police Powers of Arrest and Detention*[13] proposed retention of the right to silence, along with an appropriate warning to the suspect on arrest[14] as

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3. **Ireland** (1970) 126 CLR 321, 331
4. **Beljajev** [1984] VR 657, 662
5. **Sadaraka** [1981] 2 NSWLR 459, 462. The scope of this doctrine is rather uncertain given the recent decisions of **Beljajev** [1984] VR 657 and **King v. R.** (1986) 68 ALR 27
6. **R. v. Router** (1977) 14 ALR 365, 375 (NSWCCA); **Beljajev** [1984] VR 657, 662. But cf **Hall v. R.** [1971] 1 All ER 322, 324 (Privy Council)
7. See **Jenkins v. Anderson** 447 US 230 (1980) for the United States Supreme Court argument along these lines
8. Criminal Law and Penal Methods Reform Committee of South Australia, **Second Report, Criminal Investigation** (1974) 16-7
9. **Report of the Inquiry into the Enforcement of Criminal Law in Queensland** (1977) 150
10. Australian Law Reform Commission, **Interim Report No. 2: Criminal Investigation** (1975) para. 71-2, 156-9
11. Australian Law Reform Commission, Report No. 38, **Evidence** (1987) para. 165-9
12. **Report of the Committee Appointed to Examine the Beach Report** (1978) para 85
13. New South Wales Law Reform Commission, **DP No. 16**, (Sydney, 1987)
14. **Ibid**, para. 29, 36

well as electronic recording of interview[15] and improved access to legal advice (including a warning of the right to contact a lawyer, allowing exercise of the right if desired and extension of the duty solicitor scheme for suspects who are unable to afford the services of a lawyer)[16].

In contrast, it appears likely that the Committee established by the Federal Government to review Commonwealth Criminal Law will recommend that trial judges be permitted, in the exercise of a judicial discretion,

> to direct the jury that they might draw an inference against an accused person from the fact that he or she failed, during questioning by the police or otherwise, to answer questions or to mention some fact that would show that he or she had an alibi or had some defence to the charge.[17]

This latter proposal was advanced for consideration in the *Review Committee's Discussion Paper on Arrest and Related Matters* so that it may be premature to assume that it will be recommended in the Committee's Report. However, the thrust of the discussion of the proposal in the Discussion Paper was clearly in support. The Committee asserted that "the modern tendency of the criminal law is to allow all evidence that is logically probative, and not unfairly prejudicial, to be put before the jury".[18] Having concluded that "there are many cases in which the failure of an accused person, when questioned, to mention exculpatory circumstances upon which reliance is placed at the trial would be of strong probative value"[19] the Discussion Paper stated that the

> objection that an inarticulate or confused accused might be prejudiced by evidence of this kind ... may be met if the safeguards already suggested are provided during police questioning, if the accused's counsel at the trial performs his or her functions responsibly, and if the trial judge exercises the discretion to direct the jury that no inferences adverse to the accused should be drawn where that might work injustice[20].

The safeguards suggested earlier in the Discussion Paper were electronic recording of police questioning in the station and an arrested person's right to communicate with a legal adviser and have such an adviser present during police questioning[21].

Various other objections to this change in the law were either rejected or met by counter arguments. Given the fact that Sir Harry Gibbs, former Chief Justice

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15. Ibid para. 37
16. Ibid para. 29, 32, 33
17. Review of Commonwealth Criminal Law, DP No.3, Arrest
18. Ibid 28
19. Ibid 29
20. Ibid 30
21. Ibid 26

of Australia and member of the Review Committee, has strongly argued in favour of permitting inferences from silence during police interrogation in a lecture delivered to the Law Society of the Australia Capital Territory in June 1987[22], it seems probable that changes to the law similar to those adopted in Great Britain will be recommended for Federal and Territory Courts.

It might be argued that such a proposal is inconsistent with the trend in both Australia and the United Kingdom for enhanced scrutiny of police interrogation and enhanced protection of criminal suspects. In the last decade, the Australian High Court has developed the law in this area in a number of important directions. In *Cleland v. The Queen*[23] the High Court held that a confession could be excluded from evidence on the basis of the judicial discretion articulated earlier in *Bunning v. Cross*[24] to exclude illegally or improperly obtained evidence on public interest grounds. In *Williams v. The Queen*[25] it held that common law and statutory provisions requiring an arrested person to be taken before a magistrate "as soon as is practicable", "without delay" or "without unreasonable delay" mean that the police may not delay taking such person before the magistrate for any kind of investigatory purpose, including interrogation.

Thus, in New South Wales, if a magistrate is available and the police have had reasonable time to formulate appropriate charges, any (further) interrogation will render the detention unlawful. This will then raise the possibility of discretionary exclusion on public interest grounds of any admission made by the suspect during such unlawful detention.

More recently, a majority of the High Court held in *Carr v. The Queen*[26] that, in certain circumstances, a trial judge should give an appropriate warning to the jury of the need to exercise caution before acting on disputed police evidence of an oral confession. While the majority were not completely in agreement as to the requisite circumstances, significant factors in *Carr* were the history of the accused, the premature decision of the police that he was guilty and the absence of any independent evidence to connect him with the crime charged.

These decisions arguably reflect the High Court's concern to discourage impropriety and illegality during police interrogation, to strictly limit the time available for interrogation and to discourage police use of "verbals". On the last point, Justice Deane emphasised in *Carr* that there would be no question of a judicial warning as to the potential unreliability of an oral admission where the making of the

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22. Sir Harry Gibbs, "The Powers of the Police to Question and Search", A.C.T. Law Society, Sir Richard Blackburn Lecture, 11 June 1987
23. (1982) 151 CLR 1
24. (1978) 141 CLR 54
25. (1986) 66 ALR 385
26. (1988) 62 ALJ 568

admission is supported by video or audio tapes, by some written verification by the accused, or by the evidence of some non-police witness.[27]

Such a judicial hint as to the evidentiary benefits of electronic recording of police interrogations gives encouragement to a process which has been urged by numerous law reform commissions but only glacially implemented around Australia. Nevertheless, it is clear that electronic recording is inevitable. A number of State Governments, including Victoria and Queensland, are at last moving to introduce such systems. It is only a matter of time before the New South Wales Government succumbs to pressure to do the same.

In the United Kingdom, similar developments have been taking place during the last few years. In 1984 the Home Office began field trials of audio recording in five police areas and it is expected that it will become standard police practice by 1991.[28] Also in 1984, the *Police and Criminal Evidence Act* introduced a code dealing with many areas of police investigation, including interrogation. In the present context, the most significant elements of PACE are strictly defined periods for interrogation, a carefully defined right to legal advice[29], and a judicial discretion to exclude evidence obtained in breach of these provisions.[30] In the financial year 1986/1987 the British Government made available a sum in excess of 20 million pounds to cover solicitor's costs for providing free legal advice to suspects at police stations.[31]

In these circumstances, it is perhaps not entirely surprising that the British Government has decided to modify the right to silence and that moves to do the same are likely in Australia. As police interrogation is opened to judicial and public scrutiny by electronic recording, limits are placed on the period of interrogation, and the right to a lawyer (who will usually advise silence) is strengthened, then some form of reaction is inevitable.

The difficulties facing the police in the United Kingdom were highlighted by the release of videotapes showing the responses of alleged members of para-military groups in Northern Ireland to interrogation. Acting on the advice of their lawyers

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27. (1988) 62 ALJ 568, 677
28. See O'Donnell, J. "Tape Recording of Police Interviews" (1988) 42 **Law Society Gazette** 21
29. PACE s.58 provides a suspect in police custody with a statutory right to legal advice which can only be delayed in certain very limited circumstances. The code of practice provides that a person who is arrested and in police custody must be informed of his or her right to consult a solicitor and must be given a written notice setting out this right
30. PACE s.78 provides that a court may exclude evidence "if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it"
31. Lockley, A., Hillyard, S. and Hiley E., "Advising a Suspect in the Police Station: The New Regime" (1985) **Law Society Gazette** 3048

they would invariably decline to answer questions, sometimes going so far as to climb under the table in the interview room in order to clearly indicate their refusal to co-operate. Just under half of all those detained for questioning in connection with serious crimes in Northern Ireland refuse to answer any questions at all.[32]

If some reaction to this state of affairs seems understandable, the issue is whether modification of the right to silence can be justified on grounds other than some general desire to maintain a rough balance between the interests of the police and criminal defendants. It may be helpful to summarise the major arguments for and against the right to silence and the permissibility of inferences from silence:

■ The right to silence developed out of the excesses of the Star Chamber and Royal Commission in sixteenth century England, where suspects were obliged to answer questions on oath and torture was used to extract confessions. It is a mark of a civilized system of criminal procedure.It may be argued in response that the right is an historical anachronism - the justifications for its developments are no longer applicable and there is no prospect of their return. Moreover, the requirement that any admission must have been voluntarily made to be admissible means that the right to silence is unnecessary as a protection against the more extreme forms of abuse. Further, analysis of the early history of the right indicates that there was no prohibition on inferences from silence. Questioning by justices of the peace continued - there was no right on the part of the suspect to refuse to be questioned and the result of the examination, including any refusal to answer questions, could be disclosed at trial.[33]

> What the initial advocates of a right to silence proclaimed was that they could not be required to respond to incriminating questions in the absence of due accusation. The moral right not to supply the initial evidence against oneself is much more basic than any right not to respond to inquiry following substantial evidence.[34]

A different response is that the right to silence can continue to exist even though adverse inferences are permissible, just as "an offender has no less the right to buy an airline ticket to Spain, even if, in the circumstances of the case, that gives rise to the inference that he was planning to flee the country."[35]

■ Permitting inferences would, in practice, compel a suspect to speak and, in many cases, self-incriminate. Such compulsion is cruel and inconsistent with the respect which the state should accord to the dignity and integrity of its citizens. But it may be argued that compelled incrimination is not necessarily cruel since the law often compels people to speak in situations that force upon them various other kinds

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32. Lord Lyell, Parliamentary Under-Secretary of State, Northern Ireland Office, House of Lords, 10/11/88
33. See Morgan, "The Privilege against Self-Incrimination" (1949) 34 **Minnesota Law Review** 1, 14, 18, 22-23
34. K. Greenawalt, "Silence as a Moral and Constitutional Right" (1981) 23 **William and Mary Law Review** 15, 41-2
35. Review of Commonwealth Criminal Law, **DP No.3, op.cit.**, 30

of difficult choices, for example, compelling an immunized witness to testify against people who have threatened to kill him or his children. Further, drawing inferences from silence does not in fact compel a suspect to speak nor to self-incriminate. It does compel a choice between speaking or remaining silent. While the silence may be incriminating, he has a choice when speaking to make an admission or deny guilt. The latter option is not self-incriminatory. On the other hand, if "compulsion" includes anything which imposes some pressure on a suspect to speak, it must be conceded that permitting inferences constitutes compulsion to speak. But the reality of police interrogation is that some degree of pressure to speak is deemed permissible. Nor is drawing inferences obviously cruel or inhumane. In everyday social affairs, we do not regard it as morally unacceptable to draw inferences from silence in the face of an accusation, as long as there is sufficient grounds to justify the accusation. Inferences would be the natural consequences of the choice to remain silent and, while undoubtedly affecting the choice whether to speak or not, the right to silence should not be seen as a right to be released from all the normal influences to respond to accusations.

■ The right to silence, including the prohibition on inferences from silence, ensures a zone of privacy for each citizen in dealings with the state. However, the present law does not protect a suspect from compulsory disclosure of physical evidence, as distinct from testimonial evidence. Nor does the privilege against self-incrimination operate under existing law if an immunity from prosecution is granted - although this makes no difference in privacy terms. Furthermore, an individual's interest in privacy is not automatically entitled to override any competing interest, including legitimate state interests. A claim that the loss of privacy created by compelled speaking will always outweigh the state interest in criminal law enforcement is hardly self-evident.

■ Permitting inferences would, in practice, make it essential for the defence at trial to demonstrate why an inference of guilt should not be drawn - thereby effectively shifting the burden of proof. A response is that such a change in the law would simply allow some evidence deriving from the accused, like a confession, a blood sample or a fingerprint, to be used to satisfy the prosecution burden.

■ There may be good reasons for silence (that is, reasons consistent with innocence of the crime being investigated). Such reasons might include a reluctance to answer questions until the suspect knows precisely the substance of the allegations and the evidence for them; a desire not to disclose embarrassing, though non-criminal, conduct; a wish to protect others; a concern to avoid the possibility of creating an (incorrect) impression of guilt due to stress and communication difficulties. Thus the probative value of the evidence would be variable and a tribunal of fact would have great difficulty in accurately assessing such value. In response it may be asserted that legitimate reasons for silence would be rare and, to the extent that they were present, could be largely overcome by changes in pre-trial procedure. It might be provided, for example, that no inferences could be drawn if the suspect had not been informed of the allegations and evidence against him or he had not received legal advice (and continuing legal assistance). Furthermore, whether it was reasonable for the suspect to remain silent could be properly canvassed at trial and

appropriate explanations given by the defence. As in many other areas of circumstantial evidence, the possibility that the jury may draw the wrong inference is not a sufficient reason to exclude the evidence. Lastly, under the present law, a jury tends not to be given a full warning of the variable probative value of silence. In some cases nothing is said of it. In these circumstances the jury may draw inferences more extensive than if inferences were permitted and the jury received judicial assistance in assessing probative value.

■ The right to silence is exercised only by a small minority of suspects. Studies in Australia, Great Britain and the United States have regularly demonstrated that roughly 5% of suspects refuse to answer questions.[36] Therefore permitting inferences will do little to change the present situation since there will only be a very small number of cases where an accused person pleads not guilty, has remained silent and attempts for the first time to offer a defence at trial which could have been offered earlier. One response is that the right is discriminatory in practice since it is exercised predominantly by suspects who have prior experience with the legal system or have received legal advice. Indeed, it might be argued that these people are the ones who least need the protection offered by the right.[37] Another response is that the numbers of suspects who exercise the right to silence is climbing - as access to lawyers and electronic recording of interrogation becomes more common.

■ Even if inferences were permissible, silence would still probably be the best course for the guilty person being questioned by the police. Therefore, there would probably not be a significant increase in the number of suspects answering questions. A counter argument is that, even if no more suspects answered questions, an additional item of probative evidence would be admitted in the trial to prove guilt.

■ In order to obtain convictions the police already rely too heavily on interrogation and confessions, rather than searching for physical evidence or independent witnesses. Permitting inferences will only exacerbate that tendency. But there is no evidence that the police rely too heavily on interrogation since in many cases physical evidence or independent witnesses are not available. Furthermore, permitting inferences from silence may well reduce the temptation on the police to pressure a suspect to speak and confess.

■ Allowing increased pressure on a suspect to speak by permitting inferences from silence will encourage the use by the police of other forms of pressure (particularly, varied techniques of psychological pressure). One response might be that the reverse is true - the police will no longer be frustrated at their failure to

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36. Odgers, S. J., "Police Interrogation and the Right to Silence" (1985) 59 ALJ 78, 86;Ayling, C.J. "Comment - Corroborating Confessions: An Empirical Analysis of Legal Safeguards against False Confessions" [1984] **Wisconsin Law Review**

37. See Odgers, **op.cit.**, 86-7. In the United States, most suspects who refuse to speak were people with prior criminal convictions or members of the middle class advised by lawyers. See Wald,S. **et al**, "Project, Interrogations in New Haven: The Impact of Miranda" (1967) 76 **Yale Law Journal** 1519, 1577, 1644; and Griffiths and Ayres, "A Postscript to the Miranda Project: Interrogation of Draft Protestors" (1967) 77 **Yale Law Journal** 300, 312, 318

obtain evidence from the suspect (either in the form of admissions or potential inferences from silence) and will therefore have less desire to increase the pressure to incriminate (or to fabricate an admission).

■ Permitting inferences may unduly lengthen and complicate trials because of the need to investigate such questions as what the suspect did not say, who he did not say it to, why he did not say it, whether any explanation is reasonable, whether he said it at some later time, and so on. A response is that at least some of these problems would be met by electronic recording of the interrogation. Nevertheless, it is clear that such a change in the law would generate a numbers of practical problems. The issue is whether the benefits outweigh this cost.

■ Permitting inferences from silence might symbolize for many citizens an indifference to individual privacy and liberty far out of proportion to its actual benefits. Public suspicion of confessions obtained behind closed doors would be increased. On the other hand, one might assert that prohibiting inferences lowers popular esteem for the law since it is likely to be seen by the public merely as a shield for the guilty, on the assumption that invocation of the right to silence is tantamount to a confession of guilt.

It is not possible in the space available here to consider each of these arguments in detail. What is worth considering is the central argument of the Review of Commonwealth Criminal Law Discussion Paper - that the question is essentially one of deciding whether permitting inferences is "unfairly prejudicial" to the accused. This, it is suggested, oversimplifies the issue.

The only prejudice which could operate in these circumstances is the danger that the tribunal of fact will too readily infer the guilt of the accused from his silence. In different terms, it refers to the danger that the tribunal of fact will not properly consider any legitimate reasons for silence. While this is undoubtedly a concern it ignores at least one important consideration - the degree of pressure which the police (and thus the state) can legitimately bring to bear on a suspect to answer questions, and to answer them in a way which the police consider acceptable.

One might respond that it is not appropriate for the rules of evidence to attempt to regulate police interrogation, reflecting the traditional English view that police impropriety should be dealt with directly rather than by evidentiary exclusion unless the impropriety impairs the reliability of the evidence. But such an approach has been rejected in Australia, as in most of the Common Law world. The *Bunning v. Cross* discretion, for example, manifests a judicial concern not just with questions of prejudice and unfairness to an accused but also wider issues of public policy.

More specifically, the evidentiary rule that a confession will not be admitted into evidence unless the prosecution proves that it was voluntarily made[38] manifests a clear concern to impose a limit on the amount of pressure which the police may put on a suspect. Of course, the requirement that a confession or admission be "voluntary" does not mean that it has to have been volunteered. Some kinds of pressure are permissible, such as putting the suspect in a bare room, surrounded by strangers, unable to leave, afraid that the police already have enough evidence to convict him. The dilemma is where to draw the line.

It may be helpful in this context to see the right to silence, or more particularly the prohibition on inferences from silence, less as a fundamental right, one of the essential elements of any civilized criminal procedure, and more as a way of limiting the pressures which the state can bring to bear on a suspect to speak, and to confess. Viewed in this light, it has served a number of legitimate instrumental purposes:

- it has sought to discourage the use by the police of unacceptable methods of interrogation;
- it informs the suspect that the police are legally obligated not to compel him to speak or to confess, thereby reducing the pressures on him.

Further, as the Review of Commonwealth Criminal Law Discussion Paper noted:

- it permits the suspect to avoid answering questions when, because of communication difficulties, he may create a misleading impression of guilt;
- it permits the suspect to avoid answering questions when there is any other legitimate reason for his remaining silent.

Now, it is arguable that these goals may be met in the future by other mechanisms, thereby casting into doubt any continued prohibition on inferences from silence during police interrogation. Not only will electronic recording of police interrogation, for example, prevent fabrication of confessions, it will also provide some safeguard against unacceptable methods of interrogation. Of course, it will not preclude use of such methods before recording begins but it is likely that the recording will provide some evidence of their earlier use, particularly if videotaping is adopted.

The presence during interrogation of a lawyer acting for the suspect will also have a number of consequences. Apart from the fact that the lawyer will be another witness to the interrogation other than the police and the suspect, the presence of a lawyer is likely to ameliorate most communication problems. The lawyer will help the suspect to understand the allegations made against him and the evidence which the police possess. The lawyer will help the suspect to understand the questions asked by the police and assist him in resolving any ambiguity in his responses. The lawyer will

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38. **Lee** (1950) 82 CLR 133.

put the ignorant and inarticulate suspect in the same position as the knowledgeable and articulate one.

Perhaps more important, the presence of a lawyer will significantly reduce the significance of the various pressures which the police can bring to bear on the suspect to confess to his alleged crimes. As noted earlier, some of the more direct and obvious pressures are in fact prohibited by the legal system - violence, coercion, threats, inducements. But there are many forms of psychological pressure which are for the most part tolerated, or ignored, by the courts. It is not possible to cover all these techniques in the space available - they were discussed in detail in an article by me in the February 1985 issue of the Australian Law Journal.[39] They include the carefully patterned application of social approval and disapproval, use of authority figures, manipulation of the suspect's self-esteem, control of the information provided to the suspect, the utilization and intensification of stress. As an American writer concluded in 1984, "the social science literature indicates that ... subtle coercion is the most effective coercion".[40]

Even if there is no overt use of these techniques, such factors as the physical conditions of the interrogation environment, disparity in status between suspect and interrogator, close physical proximity which infringes socially required personal space, absence of tension relieving props and activities, the simple fact of loss of liberty, ensure that the suspect is under enormous pressure to confess. Cautioning will usually make little difference, as studies of the *Miranda* warnings in the United States have demonstrated - it is likely to be accompanied by some sort of "hedging" to imply that actual invocation of the right would be unwise.[41]

However, studies of social pressure demonstrate that the effectiveness of external pressures can be substantially reduced by the presence of a third party who is seen by the suspect as an ally. If the ally is well-informed and trusted, and present at a fairly early stage, then such pressures will be largely ineffective. This suggests that the presence of a suspect's lawyer during his interrogation will minimise the effectiveness of police pressures to confess.

Indeed it is likely that there will be a very significant increase in the number of suspects who invoke the right to silence. The reason, of course, is that any competent lawyer will usually advise the suspect to say nothing - given the present law's prohibition on inferences from silence. Under the existing system, as noted earlier, the right to silence is exercised only by a small minority of suspects. One reason may simply be an inner compulsion to confess, but another is likely to be the various psychological pressures considered above. Where a lawyer acting for the

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39. Odgers, op. cit., 87-9
40. Ayling C.J., "Comment - Corroborating Confessions: An Empirical Analysis of Legal Safeguards against False Confessions" [1984] Wisconsin Law Review 1121, 1156
41. See Odgers, op. cit., 89

suspect is present, these pressures would be considerably reduced and it is likely that a suspect would in most cases comply with the advice of his lawyer to say nothing.

This, it is submitted, is not necessarily in the public interest. In a significant number of cases, alternative evidence of guilt will be unavailable. In other cases, alternative techniques, such as the use of informers and electronic surveillance, may be more intrusive on individual freedom than pressure to answer questions. It is arguable that the whole criminal justice system is dependent upon people confessing to crimes they have committed - the vast majority of accused persons plead guilty to charges to which they have confessed.

At a more philosophical level, while our adversarial model of trial procedure may require that an accused have the option of unpenalized silence at trial it does not follow that the same is true in the interrogation context. Criminal investigation in our society falls somewhere between and adversarial procedure and an inquisitorial procedure. An adversarial trial is a procedure whereby an independent third party resolves a dispute between two parties who are given equal opportunities to present their case and dispute that of their opponent (or, in the accusatorial model, procedural advantages are given to the accused). But police interrogation is not some sort of sporting context between equals. No third party exists to resolve disputes; instead, one side acts directly upon the other. The police, with society's approval, seek to obtain information from the suspect and the procedure works from the premise that the interrogators should prevail. It is desirable that the suspect should speak, provide relevant information and, if guilty, admit guilt - so long as there is no physical or mental abuse and such admissions are reliable.

The present balance will, therefore, be upset if a lawyer is present during interrogation and the right to unpenalized silence retained. In these circumstances, it is suggested that the former option is preferable since it will, in combination with electronic recording, achieve the very goals sought to be achieved by the prohibition on inferences from silence. Indeed, such "policing" of interrogation will perform those tasks more effectively.

What such a change would mean in practice is that a suspect, on being placed in custody, would receive a caution in the following terms:

> You have a right to contact a lawyer before you make a statement or answer any questions. If you cannot afford a lawyer, a duty solicitor will be provided. You also have a right to remain silent and you are free to exercise that right at any time. However, if you do remain silent this fact may be introduced as evidence in court. Anything you say will be recorded and may be introduced as evidence in court.

The police would also inform the suspect of the allegations against him. Failure to do this or give the caution would render any subsequent interrogation improper. Further, any interrogation would be improper if a lawyer acting for the suspect was not present, unless it was not reasonably practicable to ensure this. It

would not be reasonably practicable, for example, if the suspect's lawyer refused to attend the interrogation in an attempt to render it improper. Electronic recording would be required, unless not reasonably practicable, of the caution, the allegations and the entire interrogation. Any failure to comply with these requirements would result in possible discretionary exclusion at trial of evidence of the interrogation.[42]

A slightly less attractive option would be to permit inferences from silence when there is electronic recording and a properly protected *right* to a lawyer. This is likely to be the position in Great Britain and also that proposed by the Review of Commonwealth Criminal Law. Under this regime, it is likely that a proportion of suspects would waive the right to a lawyer, just as they waive the right to silence under existing law. However, if there is electronic recording of the suspect being offered the assistance of a public solicitor and of waiver by the suspect, and the waiver is shown to be voluntary, then this approach may be sufficient. Most suspects, probably, would recognize the benefits of having a lawyer present during their interrogation. The attraction of this regime over the first is that it would not require judicial investigation of the practicability of obtaining a lawyer for the interrogation.

Whichever option is adopted, it is suggested that permitting inferences from silence in these circumstances would not constitute compulsion, or mental abuse, or encourage unreliable admissions. Rather, it would be a perfectly civilized encouragement to speak and a perfectly legitimate consequence of the failure to speak.

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42. A different version of this approach would be to admit statements made by a suspect during police interrogation in the absence of a lawyer but to only permit inferences from silence if a lawyer was present. But this is unsatisfactory as it would permit the police to interrogate as they do now (without the presence of a lawyer) and allow in a lawyer only if the suspect refused