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The Accused's Right to Silence
A paper to be presented to the Bundaberg Law Association Conference, 29 November 2008[1]

1. I am a new judge with only limited experience as a trial judge in criminal cases. Coming back to crime after a 20 year absence it has struck me anew how peculiar it is that we speak of an accused's right to silence. I thought it might be beneficial to examine the reasons behind that right and whether there are arguments going the other way.

2. Before coming to the logic behind this so-called right, there are a number of practical reasons that defence lawyers advance as to why an accused person should remain silent at their trial or why they would advise them to be silent. Some of the principal reasons advanced are:

   (a) The lawyer is concerned that the accused would perform poorly as a witness. This perception may be due to the lawyer's assessment of the client's personal characteristics such as their intellect or verbal skills as well as their perception as to how their clients might present, i.e. whether they would appear hostile, evasive, confused and so on;

   (b) The prosecution's case was very weak, making it unnecessary that the accused give evidence;

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[1] I have largely drawn on the work of the Honourable GL Davies : "*The prohibition against adverse inferences from silence: A rule without reason?*" (2000) 74 ALJR 26; and part II at p. 102.

(c) To shield the client from cross-examination where, despite innocence, the client might blunder;

(d) Where the accused had already answered police questions and so had supplied his or her version;

(e) The prospect of the prosecution arguing, and the jury accepting, that minor inconsistencies between the accused's responses and other evidence (for example earlier answers to police questions or other evidence in court) as evidence that the accused was lying and consequently guilty;

(f) The clients' concerns that whatever evidence they could give might incriminate another person whom they wish to protect;

(g) The prospect of exposing their client to cross-examination concerning their criminal record or in relation to outstanding charges;

(h) Where what evidence the client might give could endanger their safety or the safety of family, friends or associates;

(i) Because whatever the accused might give could only assist the prosecution case or indeed because the client was guilty.

3. Whilst each of these present some reason, and in some cases good reason, for there to be some protection, there remains a worrying discrepancy. Commonsense and logic strongly suggest – and I think most juries expect – that where a charge is brought and where an accused might be able to

answer that charge one would expect any innocent person to speak up. I can certainly recall as a young practitioner being told that the view of Des Sturgess, then the leading defence counsel in practice in the State, that his view was that juries always expected that an accused, if not guilty of a charge, ought to give their side of the story and he prepared accordingly. That, I might say, is contrary to the view that I have heard expressed by those who worked with Dan Casey that he would rarely call his client. Whether those differing views reflect the differing mores of society over the passing of the decades or whether they reflected the respective strengths and skills of the two advocates I cannot say.

4. In 1985 and 1987 the Australian Law Reform Commission handed down its interim and final reports on *Evidence.*[2] The Commission pointed out that there are:

> "... strong arguments in favour of permitting a tribunal of fact to draw adverse inferences from the failure of an accused to give evidence. It is important to encourage, but not compel, an accused to give his side of the case. An admission made by him during the trial is likely to be reliable. Reasonable inferences should be available from silence. If accused persons can avoid giving evidence, and being subject to cross-examination, without any adverse consequences, then there is a risk that guilty persons would escape conviction."[3]

5. In 1972 the Criminal Law Revision Committee (UK) handed down its Eleventh Report, on Evidence (General). The Committee recommended that it should be permissible to draw adverse inferences from an accused person's exercise of their right of silence:

> "In our opinion it is wrong that it should not be permissible for the jury or magistrates' court to draw whatever inferences are reasonable from the failure of the accused, when interrogated, to

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2 ALRC 26 & ALRC 38

3 ALRC 26 at [552]

> mention a defence which he puts forward at his trial. To forbid it seems to us to be contrary to common sense and, without helping the innocent, to give an unnecessary advantage to the guilty. Hardened criminals often take advantage of the present rule to refuse to answer any questions at all, and this may greatly hamper the police and even bring their investigations to a halt."

6. There has now been legislative change in the United Kingdom. Their legislature has chosen to rely on the 'commonsense' of the jury. The direction there permitted is:

> '... If you think in all the circumstances it is right to do so, you are entitled, when deciding whether the defendant is guilty of the offence charged, to draw such inferences from his failure to give evidence as you think proper. In simple terms, this means that you may hold this failure against him.'[4]

7. The Law Reform Commission of Western Australia too has recommended that silence be construed as one of the circumstances, or part of the evidence, in the case.[5]

8. The "Scrutiny of Acts & Regulations Committee" of the Victorian parliament published an issues paper in 1998 on the subject. In Chapter 7 they pointed out a fundamental question:

> **"7.1.1 Is the exercise of the right to silence relevant to the question of guilt?**
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> The argument that it should be permissible to use a suspect's silence as the foundation for an adverse inference is obviously

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4 Practice Direction [1995] 2 Cr App R 192.

5 Law Reform Commission of Western Australia, 'Review of the Criminal and Civil Justice System of Western Australian' Final Report – 1999.

> premised on the belief that a suspect's exercise of their right to silence is relevant to the question of their guilt. If it is not relevant, then clearly there is no need for any changes to the law. Equally, if silence is relevant, then it should be admissible as evidence of guilt unless there are clearly identifiable policy reasons for exclusion."

9. That silence is relevant or may be relevant to the question of guilt is evident if we consider some of the exceptions to the rule. The artificiality of our present situation becomes obvious as well. For example take the facts in *Parkes v R*[6] and *R v Alexander*[7]. In *Parkes* an inference of guilt was permitted where an accused failed to deny an accusation guilt made by the mother of the victim. What of the right to silence there? In *Alexander* the accused failed to protest his innocence in conversations with his friends about the fact he was suspected of murdering his wife. Again an inference of guilt was permitted to be drawn. Why? Solely apparently because the conversation was not with a person in authority. Where is the sense in that distinction? Those we entrust with the duty of upholding the law cannot report to the jury that an accused failed to respond to questions even though, if innocent, they might well have exonerated themselves. Those who might be prejudiced by grief or outrage are so entitled. All this because of the perception that innocent accused persons will be overcome by the occasion of questioning by a police officer to be unable to inform the police of exonerating circumstances or facts? In an era where virtually every person has an education and many have more than passing knowledge of their rights and police powers can this approach be accepted?

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6 [1976] 3 All ER 380

7 [1994] 2 VR 249, 258-263

10. It is worth noting that there is a distinction between the approach on the civil side and the approach on the criminal side. In a civil case where a defendant fails to give or call evidence to deny, explain or answer facts or inferences of fact arising from the plaintiff's case in circumstances in which it was reasonable to assume that if those facts were disputed or that the defendant had an explanation or answer for them he or she would have given or called such evidence then a court is quite entitled to more readily accept the facts and inferences arising from the plaintiff's case.[8] If as a matter of logic that is a legitimate process of reasoning on the civil side then so it must be on the criminal side. Yet that process is forbidden. Whether a defendant refuses to answer police questions or declines to give evidence, the rule is that no inference is to be drawn against the defendant save in quite exceptional circumstances.[9]

11. I should make it clear that I am not concerned with the proposition that a defendant should be entitled to decline to answer questions from the police or give evidence. What I am interested in does not involve compelling an accused to speak or give evidence. What is in issue is the immunity presently enjoyed by accused persons from having any adverse comment made on a failure to do so. The issue is whether any comment on that attitude can be made at trial that interests me.

12. Any examination of rights such as the one in question here runs foul of the traditional view which in modern times has the interests of the accused as paramount. What seems to me to have been forgotten and what in my view needs to be brought into the scales is the public interest

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[8] For example see *Wilson v Buttery* [1926] SASR 150 at 154; *British Railways Board v Herrington* [1972] AC 877 at 930.

[9] As to not answering police questions see *Petty* [1991] 173 CLR 95 at 97; *Coyne* [1996] 1 Qd R 512 at 519. As to not giving evidence see *Azzopardi* [2001] 205 CLR 50 at [34], [51] and [67]. As to the exception see *Weissensteiner v R (1993) 178 CLR 217 at p 229*

in the criminal law bringing to justice those who deserve to be brought to justice.

13. As I hope to demonstrate this right to silence, with its concomitant immunity from adverse comment, seems contrary to logic and commonsense. Why then is it part of our law? The question is whether the requirement that an accused receive a fair trial will be upset by the prosecutor or the court indicating to the jury that an adverse inference may be open, or the Crown case reinforced, where the accused remains silent.

14. It needs to be borne in mind that the accused has many protections in place. They include that the burden of proof lies on the prosecution, that the standard of proof is at a very high level – beyond reasonable doubt, that the accused has, and the jury is told that the accused has, a presumption of innocence in his or her favour and, if there is cross-examination of the accused, there are controls in place on that cross-examination particularly as to prior criminal history.[10]

15. It is often said that the immunity from adverse comment traces its ancestry back to the privilege against self-incrimination. However, the surprising thing is that this immunity from adverse comment is a relatively modern invention. Whilst privilege against self-incrimination dates back to English ecclesiastical law from the Middle Ages, that privilege did not become part of the English Common Law criminal trial until the middle of the 19th century.

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[10] *Evidence Act* 1977 s 15(2).

16. As the Honourable GL Davies explains[11] the privilege against self-incrimination grew up in a time very different to ours. In the 16th century the High Commission and Star Chamber required defendants to answer on oath questions put in a context where there was no accuser and no specific offence alleged. The questioning was directed to thoughts as well as deeds. It was in every sense the worst form of fishing expedition. And worse still – fishing by those in a position of power.

17. Bear in mind too that taking an oath in those times was a form of compulsion – people then were concerned about their immortal souls, not the consequences of perjury on this earth so much. That hardly reflects the views of people today.

18. So the privilege against self-incrimination came into being to prevent a court initiating a fishing expedition into the deeds and thoughts of a defendant by requiring him or her to be examined on oath in order to uncover evidence of some wrongdoing.[12] Interestingly it had no application, even 500 years ago, where there was in fact an accuser or a well-rounded suspicion of an offence.

19. As to the introduction of the privilege against self-incrimination into the criminal trial in the middle of the 19th century it needs to be appreciated that defence counsel were not permitted to appear in a criminal trial until relatively recent times. That occurred in the middle of the 18th century but their role was restricted to examining and cross-examining witnesses. It was not until the *Prisoners' Counsel Act* of 1836 that the right to address the jury was introduced. Consequently, until then, judges

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11 See Davies *op cit* at p 28

12 See Davies *op cit* at p 31.

routinely told criminal defendants that if their defences arose out of matters of fact they must speak for themselves. They could not be compelled to testify but if they did not speak up in their defence rebutting any incriminating evidence against them leaving it unanswered and unexplained then juries were routinely invited to draw adverse inferences from the absence of any answer or explanation.

20. The whole point of a criminal trial in those days was to afford the accused the opportunity to reply in person to the charges brought against him. A refusal to respond to incriminating evidence would have been 'suicidal'. No defendant claimed any such right.[13]

21. It appears it was only at the beginning of the 19th century when defence counsel started to appear regularly in the courts that our adversarial system came into being with all its rules relating to the presumption of innocence, proof beyond reasonable doubt and rules restricting the admission of evidence in criminal trials. Thus for centuries the Common Law system encouraged criminal defendants to make unsworn statements both pre-trial and at trial. Such statements were routinely made and courts drew adverse inferences from a failure to make them.[14]

22. The warning that we traditionally associate with the investigating police officer – that an accused or suspect is not obliged to say anything and anything they do say would be taken down in writing and might be given in evidence against them at trial[15] – was introduced in 1848 in England and modified a procedure that had existed under the Marian Committal

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[13] See Davies op cit at p 32 citing Langbein '*The Privilege and the Common Law Criminal Procedure'*.

[14] See Davies op cit at p 33.

[15] Later enshrined in the Judges' Rules 1912

Statutes of 1555 requiring a Justice of the Peace to conduct a pre-trial examination of a defendant promptly after apprehension. The point of the warning was to convey to the accused that he or she was not under any compulsion to speak. No-one in 1848 thought for a moment that the giving of the warning carried with it a right that no adverse inference could be drawn from a failure to speak.

23. It was the ability of defence counsel to speak on behalf of the accused persons, which right came into being in 1836 in England, that brought about the feature of criminal trials that defendants remain silent in court. Why bark when you have a dog? If counsel told the story then firstly they would probably be better at it than most accused and secondly the accused could not be questioned.

24. It wasn't until the end of the 19th century that a defendant was given the right to give evidence voluntarily on oath.[16] It has been said that this was a right, not an obligation.[17]

25. It was argued, and firmly rejected as late as 1893, that adverse comment by a trial judge on the failure of the defendant to give evidence should not be permitted.[18] The argument was that if such comment were permitted the defendant would be virtually compelled to give evidence. It was rejected on the ground that neither the drawing of adverse inferences by the jury nor the making of adverse comment by the judge involved any compulsion on the defendant. It was pointed out that the necessity for the defendant to give evidence only arose when facts had

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[16] Criminal Evidence Act 1898 (UK)

[17] Easton : *The Right to Silence* (Aldershot: Avebury 1991)

[18] *R v Kops* (1893) 14 NSWLR 150 at 165-166, 177.

been proved calling for denial or explanation and where such a denial or explanation would be reasonably expected from an innocent person.

26. The important point to appreciate from all this is that the privilege against self-incrimination that a criminal defendant enjoyed at the commencement of the 20th century was based on two rationales – abhorrence of compulsion and concern that evidence obtained by compulsion was inherently unreliable. Neither rationale has any application where there is no compulsion. Is the prospect of an adverse inference – often well merited – a compulsion?

27. The present-day view that no adverse inference should be drawn from pre-trial silence or from silence in court, subject to some exceptions, is very much a modern invention. Davies has argued that this modern invention has no sustainable rationale.[19] I agree with him.

28. Davies has traced the origins of the modern view to two decisions in 1933 and 1944 of the Court of Criminal Appeal in England.[20] The argument accepted there was that the terms of the traditional caution administered to suspects – that they were not obliged to say anything unless they wished to do so but, if they did, what they said might be taken down in writing and given in evidence – was effectively an invitation to say nothing and it was unfair then to permit an accused's silence as a point against him at his trial. By 1970 this had become a principle of the Common Law according to the Privy Council.[21] The right being one to 'refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence'.

[19] Davies o*p cit* at p 35.
[20] *R v Naylor* [1933] 1 KB 685; *R v Lecky* [1944] 1 KB 80.
[21] *Hall v The Queen* [1971] 1 WLR 298.

29. The law was settled in Australia in 1991in accordance with this view.[22] Davies has suggested that the only rational explanation for the conclusion that is now enshrined as a principle of the Common Law is ‘a distrust by judges of the capacity of juries, if evidence of silence were placed before them and comment by judge and counsel permitted, to draw sensible inferences from that silence free of prejudice’.[23]

30. Thus it is only in the second half of the 20th century that the practice has emerged of judges not commenting on the absence of the defendant from the witness box.

31. Our present situation being one where there is an absolute exclusion of evidence of pre-trial silence but some permitting of an adverse inference to be drawn from silence at trial[24] is difficult to defend from any standpoint of logic and commonsense and impossible to defend on the grounds that it has been a long-standing principle of Common Law.

32. What I contend for is not that in every case an adverse inference should be drawn from the silence but rather that a discretion should be restored to trial judges to comment where they see fit that an adverse inference might be drawn from silence. It seems bizarre that even in cases where it is patent that an adverse inference ought to be drawn from silence, nothing can be said.

33. Perhaps another feature which may not be so common in a large city is that in the smaller communities very often the same people appear in the

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22 *Petty and Maiden v The Queen* (1991) 173 CLR 95.

23 Davies *op cit* at p 36.

24 *Weissensteiner v The Queen* (1993) 178 CLR 217 at 224.

jury panels in trial after trial. That certainly occurs where there are multiple trials in the one sitting. Repetition of the same warnings in vastly different factual situations might lead to a degree of scepticism from those jurors. That might lead to jurors drawing whatever inferences they see fit irrespective of what they are told.

34. Davies has argued, drawing on the work of Heydon J in his extra-judicial writings that there are three commonsense inferences capable of being drawn from a defendant's silence. They are:

    (a) Silence taken as an implied admission that the whole or part of what is suggested or said against the defendant;
    (b) Silence, alone or with other evidence, taken as a consciousness of guilt generally;
    (c) Silence used to evaluate other evidence or inferences from other evidence, permitting that other evidence to be more readily accepted or those inferences to be more readily drawn.[25]

35. It is obvious to all that an adverse inference should not necessarily be drawn in every case where an accused exercises a right to silence. Davies has identified two factors relevant to that question – the strength of the case against the defendant and the strength of the evidence that the defendant knew or must have known of facts said to call for a denial, explanation or answer at a time when the accused was given the opportunity to respond.[26] Obviously the stronger the case or the stronger the strength of the evidence that the defendant knew or must have known

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[25] See Davies op cit at at 28.

[26] See Davies '*The Prohibition Against Adverse Inferences from Silence: A Rule without Reason?* – Part II (2000) 74 ALJR at p 102.

of relevant facts then the stronger the reason to draw an adverse inference.

36. Many people acting on the defence side would be horrified at the thought that juries should be told that an adverse inference can be drawn should an accused not respond to the charges and evidence brought against him or her. Michael Bosscher in a recent paper published at the Central Queensland Law Association Conference, argued that there had been a steady erosion of the assumption of innocence. He would be appalled at the thought of this further erosion. But it seems to me that what is easily lost sight of is that there are competing interests. Society has an interest in not having innocent people convicted of crimes. But society also has an interest in ensuring that those who commit crimes are brought to justice. Victims of crime have an interest and a strong one in ensuring that there is some redress by way of the criminal justice system of the harm done to them. These competing interests are not to be thrust aside merely because of the notional assumption of innocence. By the time this question is to be addressed – after the Crown case has concluded – then notions of innocence are hardly relevant. Either there is a reason to respond or there is not. If there is good reason to respond and you don't then why draw no inference?

37. It is often argued that it would be unfair to be required to answer questions when in the dark about the charges being brought or the evidence that might be put against the accused person. That is not an irrelevant consideration but it is not always true – defendants often know precisely the facts relevant to the charge. It is the investigating police and prosecuting authority that does not know in many cases. Certainly by

the time of trial, and often earlier, a defendant will know the case that is made against him or her.

38. And it needs to be borne in mind that the time of judgment is at trial when, more often than not, these things become abundantly clear, i.e. that the accused person when questioned by the police must have known the facts relevant to the charge or very likely did. And if the question is whether the accused should give evidence then by the time that question is to be addressed the whole of the case and every detail of the evidence and how strong it is, is known to the accused person.

39. That is not to say that there are not legitimate concerns that have to be addressed should the law be changed and juries advised that adverse inferences can be drawn. There will always be defendants who one can well understand may not respond to police questioning intelligently. Aspects of their personality, emotional state or intellect can interfere with reasoned answers. But why assume that a jury cannot judge these things? They must do so in respect of the complainant and other witnesses.

40. One of the interesting things to have occurred in the course of the 30 years that I have been in practice is that it is commonplace now for police to tender video records of interview. It is evidence that accused people, despite being warned by the police officers, are prepared to give their versions. Davies asserts that the empirical evidence shows that those who have a criminal history are more likely to exercise a right to not speak than those who have no experience with the criminal law. That is the right to avoid any adverse comment from silence is being enjoyed by that class of our community more likely to offend.

41. My own view is that juries are perfectly well-equipped to judge the differing personalities and characteristics that need to be borne in mind when weighing up an accused person's response to questioning, whether by police or in the courtroom.

42. Davies has suggested that strict guidelines need to be put in place, and put in place legislatively, as to when and what inferences can be drawn from pre-trial silence or a failure to give evidence. Those safeguards include:

    (a) Not drawing any inference unless a denial, explanation or answer would reasonably be expected having regard to the nature of the question, accusation or evidence and any explanation for the absence of a denial, explanation or answer;
    (b) In determining whether and what inference may be drawn ought to depend on nominated considerations including the strength of the prosecution case, the extent to which facts said to call for an explanation were within the personal knowledge of the defendant, whether the facts calling for an explanation are capable of an innocent one, and any explanation actually given whether on the occasion in question or another occasion;
    (c) Bringing into account the conduct of the prosecution including whether the interviews have been electronically recorded and if not, why not, the opportunity given to the defendant to offer an explanation, the opportunity that the accused person had to get legal advice before being called on to answer any question, and any caution given.[27]

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[27] Davies o*p cit* at p 104.

43. The Australian Lawyers Alliance in a submission to the Parliament of New South Wales Legislation Review Committee submitted that the right to silence should be preserved. However it seems to me, with all due respect, that the arguments advanced were hardly compelling.

44. The Alliance argued that it was 'an essential safeguard that was built into the Australian criminal justice system for the purpose of protecting the rights and freedoms of the individual'. Precisely why those persons, against whom the Crown have established a case that calls out for an explanation, lose their "rights and freedoms" by suffering adverse comment on their silence does not immediately appear.

45. The Alliance asserted that the right to silence was a 'fundamental right of the individual in Australian democracy'.[28] I suspect that the author of the submission did not appreciate that until 60 years or so ago the supposed 'fundamental right' was unknown.

46. The submission argues that the right is 'an important tool that is necessary in order to balance the scales of justice' between the State and individual. The submission adds nothing at all to the debate. It ignores entirely the rights of those who are the victims of crime, and of society in general, to have crime properly dealt with by the justice system. There is the concern expressed that some individuals may not be able to articulate themselves in a satisfactory manner. That can be accepted. That is really another way of saying that we should 'distrust ... the capacity of juries to draw sensible unprejudiced inference, even with appropriate guidance

[28] See submission Australian Lawyers Alliance to *'The right to silence Parliament of NSW Legislation Review Committee'* of November 2005 at p 3.

from judges'.[29] As Davies observes if juries are incapable of bringing such ordinary, every day things into account then why do we have a jury system at all?

47. The Alliance argued that the right to silence, if removed, 'may result in the weakening of the standard of evidence-gathering'. I do not understand this as logically following. We are not discussing compelling a defendant to speak. What we are discussing is permitting a jury to be told that they are entitled to draw an adverse inference if the defendant chooses not to speak in circumstances where the facts are such that they call for an explanation. Without adequate evidence gathering that stage is never reached.

48. The simple fact is the maintenance of the present rule flies in the face of commonsense.

49. To return to the submission by the Australian Lawyers Alliance, the author argued that there were many valid reasons why an accused person might remain silent when being questioned by police and at trial. That too can be accepted. However, if there are valid reasons there is no reason why they can't be given at trial. That can then be placed in the mix for the jury to decide how cogent the explanation might be.

50. A further reason advanced by the Australian Lawyers Alliance was fear of police corruption. I accept that the justice system must always be on guard to ensure that the prosecuting and investigating authorities do their work in accordance with the law. One of the things that has been obvious to all of us who have practised over the last 30 years is that since

[29] Davies *op cit* at p 105.

the requirement that police electronically record all interviews and since the introduction of the practice in the courts to warn against evidence of interviews not so recorded, the number of complaints has dramatically reduced. Indeed they have almost disappeared. When I was a young barrister 30 years ago virtually every criminal trial involved an attack on the investigating police officers for fabricating confessions. Ironically the police opposed the introduction of electronic records of interview. Their adoption of the practice has resulted in the police now being almost always accepted as witnesses of honesty which of course is as it should be.

51. That however is by the by. As Davies points out if one preserves the immunity against adverse inferences from silence then that is likely to act as an incentive to extract a confession or to manufacture one. If the police know that the jury will be told that an accused's silence can be used against him then they are much more likely to accept that outcome from their interview, if there was otherwise some inclination to cut corners.

52. In an interesting paper Dr Deborah Kellie and Judge Helen O'Sullivan have examined this issue from an ethical perspective. The paper is entitled 'Ethical or amoral? Is an unqualified right to silence at trial defensible from an ethical perspective?' In their paper the authors say:

> 'The public expects the legal system to deliver justice. The public has a right to expect that the complainant and the accused get a chance to narrate their stories, rather than be drawn into the game of strategy and tactics which is the courtroom drama. An ethical

> approach to criminal justice surely requires that the courtroom drama recognise the true face of the other.'

53. The 'game of strategy and tactics' has no doubt always been part of the criminal trial. Michael Bosscher pointed out in his paper that one important tactical consideration in determining whether an accused should give evidence is the tactical consideration of whether he or she wishes to keep the right of last address to the jury. He argued that that tactical consideration ought to be removed – the accused should be given the right of last reply. I agree with him.

54. Indeed there is much to be said for the view that the most important right is not the right of last reply but the right of first address. It is the Crown who goes first and the Crown who sets the scene. From that point on it is the accused who is battling to change the picture painted by the Crown. If the accused is prepared to go into the witness box and face cross-examination then it seems to me there is no valid ground for arguing that he should not have his right of last reply preserved. Without evidence from the accused it is arguable that the Crown must guess at the likely arguments. With such evidence the Crown knows precisely the case it has to meet.

55. In an interesting analysis Kelly and O'Sullivan pointed out that in an admittedly small sample of twelve trials over a period of nearly eighteen months the chances of acquittal increased dramatically when an accused gave evidence. Generally the figures seemed to be that about 60 per cent of those accused who go to trial are acquitted. In Judge O'Sullivan's sample of her trials some 90 per cent of those who gave evidence were acquitted.

56. The reality of life is that if the facts cry out for explanation then no matter what a judge says any juror is going to ask themselves why the accused chose not to explain the facts. Davies referred to this inevitability as 'the reality mocks the rule'. If a rule has no great pedigree in past authority – which means that its logic did not appeal to previous generations – flies in the face of common sense, and has the potential to allow guilty persons to go free – why keep the rule?[30]

[30] Davies *op cit* at p 105.