The right to silence at trial
A critique and a call for a new approach

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A thesis submitted in fulfilment of the requirements of the degree of
Doctor of Philosophy, Faculty of Law, Griffith University,
August 2007
ACKNOWLEDGMENTS

There are many people who have contributed to this thesis and I acknowledge their interest, encouragement, and support. I especially acknowledge and thank Professor Rosemary Hunter who was my Principal Supervisor until mid 2007. She taught me a great deal about academic writing and offered excellent feedback on many drafts. She greatly encouraged me through her belief in the importance of this project, and the difficult task of combining black letter law and feminist legal theory. I also thank Professor Richard Johnstone who was initially my Associate Supervisor, and then became my Principal Supervisor. He was supportive of me, read many drafts, and both he and Rosemary were very understanding of my constraints in combining a demanding job and part-time PhD study. I also thank Associate Professor Mary Keyes who gave valuable feedback on my final draft.

I have been privileged to have had access to the resources of the Squire Law Library at the University of Cambridge (UK), and to have the help of its Deputy Librarian, Peter Zwanda, on each of my three visits as a Visiting Fellow (Wolfson). I thank Dr Gordon Johnson and Wolfson College for their support and stimulating academic environment.

I wrote this thesis in an attempt to achieve what Jacques Derrida describes as ‘the possibility of justice’. Throughout my research, I have been inspired by reading feminist legal theory and philosophy, and in particular, the work of Seyla Benhabib, Drucilla Cornell, Margaret Davies, Costas Douzinas, Jean-Francois Lyotard, Nicola Lacey, Ngaire Naffine, Pierre Schalg, Diane Elam, and Patricia Williams. These writers, and others, have given me a different way of viewing the world, and affected me not only as a PhD candidate, but also as person and as a lawyer.

I have received wise advice and assistance through difficult times from friends who have been down the PhD road; these include Dr Stephanie Smith, Professor Margaret Robertson, Ms Gerry Neal, Professor Tony Lee, Dr Deb Kellie, Ms Susan Currie, Dr Geraldine McKenzie, and Dr Jan Ewing. Dr Kim Forrester started the journey with me in 2000, completed her own thesis in 2003, and has encouraged me ever since.

I am grateful for the research assistance and patience of my Associates, Jo Browne, Megan Window, Deb Kellie, Tania Lacy, Nadine Morley-Drabble, Suzanne McCormack, and Avril Donnelly.

My heartfelt thanks are due to Dr Jillian Clare, who inspired me to start, and helped me at every stage of the journey. Without her considerable input and ongoing support, I would not have completed.
ABSTRACT

The right to silence at trial: A critique and a call for a new approach

This thesis addresses two questions: what is the current law on the right of an accused to remain silent at trial? And, what is the impact of the right to silence on the participants in criminal trials?

The right to silence at trial was not introduced until the mid-late eighteenth century, and was not entrenched until the late nineteenth century. Today, it is accepted as a fundamental principle underpinning the common law adversarial criminal trial. The thesis argues that the right to silence is treated as fundamental and inviolate when there is no justification for doing so. When examined closely, it is exposed as a doctrine or rule which lacks consistency, clarity and predictability.

The thesis begins with a detailed analysis of the Australian appellate court decisions, and reveals a trend towards an absolute right to silence. Under the current law, the accused is not expected to give evidence at trial, except in rare and exceptional circumstances where there are facts additional to those in the Crown case which are known only to the accused.

The move to an absolute right to silence is interrogated within contexts where the courts are failing to address the numerous exceptions to the principle. Other influences on the right to silence are examined, including legislation facilitating scientific proof, common law doctrines such as silence in the face of accusation, reverse onus provisions in legislation, and compulsory defence disclosure.

The thesis reveals the gaps and incongruities in the way the right to silence is understood, how it is practiced, and its effect on a ‘fair trial,’ not just for the accused, but also for the accuser, and the community at large.

Unlike the current literature, the thesis deconstructs the right to silence, and seeks to avoid the current slippage between the right to silence on the one hand, and the presumption of innocence, the privilege against self-incrimination, and the burden of proof on the other. The right to silence is re-conceptualised as a choice with consequences, which may or may not be unfavourable to the accused, an issue which it is argued, is for the jury to determine in each case.

The thesis probes the appellate court decisions and commentary by academics and legal practitioners on the reasons for the continuing existence of the right to silence.
and its importance in the criminal trial. The thesis concludes that the reasons offered are fractured and inadequate.

The critique shows how the right to silence unjustifiably privileges the accused over the accuser, and how this privileging operates on the parties in the criminal trial. The thesis rejects the argument that the right to silence is so important that privileging is inevitable and/or justified. It also rejects the notion of irresolvable conflict between competing rights, which underpins the current law. It demonstrates that the rights model has a number of unacceptable features: it is hierarchical, and encourages competitiveness and zero-sum thinking.

The thesis argues for an alternative approach which reduces the privileging of the accused over the accuser, and develops the ‘particularity model.’ This model would treat both the accused and the accuser as sharing equality of moral worth, and thus entitled to be treated with respect and dignity. The particularity model uses theoretical tools drawn from critical legal theory, feminist legal theory, feminist philosophy, and post-structuralist theory.

The particularity model benefits both the accused and the accuser. The accused continues to have a fair trial because his/her personal circumstances are taken into account. The accuser is, for the first time, recognised as a person, on whom the silence of the accused impacts.

The thesis applies the particularity model to five key High Court and two State appellate court decisions on the right to silence, and shows the jury directions and jurors’ decisions are clear, workable, coherent, and non-privileging.

Other models for reform of the right to silence are also examined: the 1994 United Kingdom legislation, and proposals from Gleeson CJ, McHugh J, Davies, and the Western Australian Law Reform Commission. Their strengths and weaknesses are assessed. They are all found to suffer from the same major defects as the current law, namely, they fail to identify and then address the privileging of the accused over the accuser, and they fail to treat both the accused and the accuser as individuals rather than categories. Only the particularity model has regard to the circumstances of the accuser, in the judge’s direction to the jury, and in the jurors’ decision on whether it is reasonable to expect the accused to have given evidence. The particularity model offers an original and significant contribution to criminal jurisprudence.

The thesis concludes with a recommendation for the abolition of the current law on the right to silence, and the implementation of the particularity model.
STATEMENT OF ORIGINALITY

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

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CHAPTER ONE
INTRODUCTION

1. The scope of the thesis

Each day in courtrooms around Australia, the accused sits silent in the dock. At the end of the Crown case, the judge or associate asks the accused whether they intend to call or give evidence in defence. If the election is neither to give nor to call evidence, the accused is exercising the right to silence at trial. As a result, the accused remains silent in the dock, and he/she and the jury, the lawyers, and the presiding judge watch, and listen to, the accuser and the other Crown witnesses as they give evidence. The accused is silent; the accuser speaks. This thesis explores how this contrast between the accused and the accuser reveals itself in the courtroom; its historical origins; and, the implications for the accused, the accuser, and the community.

The research question addressed in this thesis is: what is the current law on the right of an accused to remain silent at trial, and what is its impact on the participants in criminal trials?

The thesis explores the following issues in order to answer the research question:

- What is the history of the right to silence at trial in Australia?
- Has the right to silence changed, and if so, why? The thesis makes particular
  reference to four key recent High Court cases: Weissensteiner v The Queen, RPS v
  The Queen, and Azzopardi v The Queen; Davis v The Queen.¹
- What is the current law on the right to silence at trial in Australia?

¹ Weissensteiner v The Queen (1993) 178 CLR 217 (‘Weissensteiner’); RPS v The Queen (2000) 199
  CLR 620 (‘RPS’); Azzopardi v The Queen; Davis v The Queen (2001) 205 CLR 50 (‘Azzopardi’).
• Why does the right to silence exist? What (if any) is the relationship between the right to silence, the presumption of innocence, the burden of proof, the adversarial nature of the criminal trial, and the privilege against self-incrimination?
• How does the right to silence impact on the accused and the accuser?
• Are there alternative approaches available?
• Which alternative approach is preferable?

This thesis includes an examination of the right to silence at trial as expounded in the appellate court decisions and in Commonwealth and State legislation. It identifies the inconsistencies, ambiguities, and ongoing problems which emerge from that examination. To adopt Schlag’s description, this close analysis is to ‘reveal paradoxes, gaps, aporia, discontinuities, disjunctions, undecidabilities, ambiguities, and ambivalences.’ Once these are understood, the thesis provides solutions and alternative models for more effective outcomes.

The overall rationale for the right to silence advanced by the appellate courts is that it is necessary to protect the accused. This thesis examines whether it achieves that purpose, by scrutinising the key appellate court cases on the right to silence. It explores the implications of the right to silence for the accuser, and in particular, whether it unjustifiably privileges the accused over the accuser. The thesis proposes an alternative model, which is applied to the key appellate court cases.

The Australian Parliaments have not introduced legislation similar to the 1994 United Kingdom legislation which radically changed the common law on the right to silence in the United Kingdom. Indeed, there is little pressure for change in Australia. In 2002, the Northern Territory Law Reform Committee noted ‘the prevailing climate of legal opinion in Australia is presently strongly against any change.’

There has been some agitation for changes to the law on the right to silence, principally

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from Davies, McHugh J, the Australian Law Reform Commission, and the Law Reform Commission of Western Australia. In contrast, in 2000, the New South Wales Law Reform Commission recommended no change in the law in its comprehensive report on the right to silence, and in 2002, the Northern Territory Law Reform Committee recommended no change. Arguments for and against the right to silence have been advanced, and strong views are held:

The debate surrounding the so-called right to silence has long generated a good deal more heat than light. Many of those who support retention of the "right", and many of those who favour its abolition tend to state their positions in aphorisms, heavily laced with rhetoric, with little in the way of reasoned analysis to support their views.

This thesis provides the reasoned analysis that is generally missing from the current arguments and assertions.

One difficulty which arises in attempting a reasoned analysis of the right to silence at trial in Australia is that, unlike other jurisdictions, the right is not specifically defined in the law. There is no constitutional right to silence in Australia, unlike the constitutional right to remain silent in South Africa, and the right not to be compelled to give evidence in Canada, the United States, India, and Papua New Guinea. The right to silence and

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4 Geoffrey Davies, ‘The Prohibition Against Adverse Inferences From Silence: A Rule Without Reason?’ (Pt 1) (2000) 74 Australian Law Journal 26; Geoffrey Davies, ‘The Prohibition Against Adverse Inferences From Silence: A Rule Without Reason?’ (Pt II) (2000) 74 Australian Law Journal 72. Davies suggests that legislation should be introduced to specify when an adverse inference may be drawn by the jury from the silence of the accused. He specifies the matters to be taken into account by the jury in that decision. Davies’s proposals are discussed further in Chapter Eight, pages 6-8.

5 McHugh J, in RPS (2000) 199 CLR 620, Azzopardi (2001) 205 CLR 50, and Dyers v The Queen (2002) 210 CLR 285. McHugh J suggests that the jury may draw an adverse inference from the silence of the accused if the facts are easily perceived to be in the knowledge of the accused, and also if the accused raises an affirmative evidentiary case in cross-examination of Crown witnesses. McHugh J’s proposals are discussed further in Chapter Seven, pages 8-9.


9 Constitution of the Republic of South Africa Act 108 of 1996, Clause 35(3) (h): ‘Every accused person has a right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings.’

10 Constitution Act (1982) (Canada), Schedule B, Part 1, Canadian Charter of Rights and Freedoms, Article 11(c): ‘Any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence.’
the right not to be compelled to testify are specified in the *Statute of the International Criminal Court*,\(^{14}\) and in the *International Covenant on Civil and Political Rights*.\(^{15}\)

2. **The history of the right to silence at trial in Australia**

An historical analysis shows that the right to silence at trial has not always existed at common law in England or Australia. Indeed, it has relatively recent origins. In the sixteenth and seventeenth centuries, the accused replied to the victim’s sworn evidence by making an unsworn statement. In fact, the accused was forbidden to give sworn evidence until the beginning of the eighteenth century. The issue for the jury in those centuries was whether the accused had adequately explained away the evidence against them. Langbein notes that because the accused conducted his [sic] own defence at trial, he ‘necessarily made himself an informational resource for the court.’\(^{16}\) He notes that the belief at that time was that the accused would ‘prove his [sic] innocence to the jury by the force and sincerity of his denials.’\(^{17}\) There was considerable pressure on the accused to speak, and Langbein therefore describes these trials as ‘altercation trials’ or ‘accused speaks trials.’\(^{18}\) The accused was under pressure to speak by virtue of a number of rules and practices: a prohibition on defence witnesses being sworn; prohibition on defendants making opening statements to the jury; and, the inability of an accused to locate and summons defence witnesses because accused persons were kept in custody until twice-yearly assizes. Death sentences were common, and because jurors had the power to

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11. *United States Constitution*, Fifth Amendment: ‘No person shall be compelled in any criminal case to be a witness against himself.’
12. *The Constitution of India 1950*, s 20(3): ‘No person accused of any offence shall be compelled to be a witness against himself.’
17. Ibid 63.
mitigate sanctions, and judges had the power to pardon, it was in the interests of defendants to raise matters at trial in order to reduce their sentences.

From the 1730s until the last quarter of the eighteenth century, the criminal trial changed from an altercation trial to an adversarial criminal trial. Whereas the altercation trial had been understood as an opportunity for the accused to speak to the charge, and to test the evidence against him/her, the adversary criminal trial became an opportunity for defence counsel to test the prosecution case.

In 1836 the United Kingdom Parliament extended the right to all accused (not just those facing treason charges) to be represented by defence counsel. The same Act gave counsel the right to speak for the accused on questions of fact, to make submissions on points of law, to address the jury, and to cross-examine prosecution witnesses. Langbein studied court documents between 1750 and 1800 and found that, increasingly, the accused said at the end of the prosecution case ‘I leave it to my counsel.’\(^\text{19}\) It became possible for accused to mount an effective defence without speaking to the merits of the charges and the evidence against them.\(^\text{20}\) Alschuler describes this as the ‘lawyerisation’ of the criminal trial which contributed to a changed ideology of criminal procedure, one in which the dignity of defendants lay not in their ability to tell their stories fully but rather in their ability to proclaim to the prosecutor, “Thou sayest,” and to force the state to shoulder the entire load.\(^\text{21}\)

Langbein concludes that the ‘adversary criminal trial developed piecemeal across the eighteenth century without forethought, in a series of measures intended to even up the advantages for the prosecution,\(^\text{22}\) and ‘[b]y the 1780s… counsel had largely silenced the accused…and the trial became what it has remained, a proceeding whose primary purpose is to provide defense counsel with an opportunity to test the prosecution case.’\(^\text{23}\)

\(^{19}\) Ibid 266.  
\(^{20}\) Ibid.  
\(^{22}\) Langbein, above n 16, 253.  
\(^{23}\) Ibid 270-71.
The trial thus shifted from an altercation trial to an adversary trial, and today it is known as the adversarial trial.

An examination of historical records leads Alschuler to conclude that “accused speaks” procedures persisted into the 1820s and even the 1830s. Criminal suspects and defendants had no right to remain silent until well into the nineteenth century. In mid-nineteenth century, the rule developed that the defence was entitled to address the jury only once, and so had to choose between a prisoner’s statement and a speech from counsel. Accused increasingly chose the latter.

Legislation in 1898 in the United Kingdom allowed the accused to give evidence on oath. Appellate courts decided that the legislation did not prevent jurors drawing adverse inferences from the accused’s failure to testify.

In Australia, between 1882 and 1898, three States introduced legislation to prevent comment by the judge or prosecutor on the failure to testify. Despite this legislation, judges continued to comment on the failure of the accused to contradict or explain prosecution evidence. Davies notes that judicial comment in Australia was similar to the practice at that time in the United Kingdom, namely, that judges did comment on the failure of the accused to give evidence, sometimes in ‘robust terms,’ until as late as 1973, as illustrated in the United Kingdom in R v Sparrow. However, by the 1930s and 1940s, the Judges Rules of 1912 (United Kingdom), which provided for the cautioning of the accused and stressed the need for voluntariness of statements from the accused, came to be construed by courts as ‘an invitation [for the accused] to say nothing [at trial],’ first in the United Kingdom in the 1940s, and then in Australia in the 1960s and 1970s. In Bridge v The Queen in 1964, the High Court referred to the assumption that ‘[i]n general,
it is more in the interests of the accused and of justice to forbid comment [by the trial judge] than to allow it. In 1971, in *Hall v The Queen*, the Privy Council recognised that an adverse inference from silence is available in some circumstances. Some judges continued to invite jurors to draw adverse inferences. Many judges used the jury direction approved in *R v Bathurst*, namely, that silence does not prove anything one way or the other; it does not mean that the accused is guilty; however, it does not rebut, contradict or explain the case put forward by the prosecution. The use of the *Bathurst* direction continued until 1993, when the High Court delivered its judgment in *Weissensteiner*, which then expressly allowed jurors to draw an adverse inference from silence ‘if there are facts peculiarly within the knowledge of the accused.’ The availability of an inference from silence was then abolished, or at least greatly reduced, by the High Court decisions of *RPS* in 2000, and *Azzopardi* in 2001. Currently, adverse inferences from silence are available in only very limited circumstances, namely, when there are ‘additional facts known only to the accused.’

In summary, the history of the right to silence from the sixteenth century until today is a history of movement from one end of the spectrum to the other; from the accused speaking, to the accused remaining silent. The examination of the history of the right to silence at trial in this section shows that the current form of the right to silence has very recent origins, and no obvious historical or defensible rationale. The following section goes beyond the literature on the history of the right to silence at trial, to review the literature on the right to silence at trial generally.

3. **Review of the literature on the right to silence at trial**

Very little has been written about the right to silence at trial, and especially there has been little critical comment about the key appellate court decisions from *Weissensteiner*.

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30 Bridge v The Queen (1964) 118 CLR 600, 615.
31 Hall v The Queen [1971] 1 WLR 298, criticised by the Court of Appeal in R v Chandler [1976] 3 All ER 105. Some decisions allowed an adverse inference to be drawn, eg, Parkes v The Queen [1976] 3 All ER 380 (Privy Council).
35 Azzopardi (2001) 205 CLR 50 [64].
to Azzopardi. Commentators have described individual High Court decisions mainly focussing on their impact on criminal trial procedure. However, there is still no substantial literature on Azzopardi, or the implications of it for Crown prosecutors, especially when it is combined with Dyers v The Queen. Authors of articles and conference papers have discussed the need for reform of the right to silence at trial, and a polarisation of views has emerged: some in favour and some opposed. The authors on both sides of the argument have concentrated on an examination of the abstract reasons


for and against the right to silence. By contrast, this thesis focuses on the implications of the law on the right to silence at trial for both the accused and the accuser.

Much of the discussion of the reasons for and against the right to silence at trial has centred upon the trenchant criticisms of the right to silence by the well-known jurists Jeremy Bentham and Rupert Cross. Bentham considered that the rationale for the right to silence was ‘the fox hunter’s reason,’ which he described as ‘just as the fox must be given a chance to run, so too must accused be given a chance to escape the hounds that so relentlessly pursue them.’ Cross described the judge’s direction to the jury on the right to silence as ‘talking gibberish.’ Thomas goes beyond Bentham and Cross and analyses where the right to silence ‘fits into the sort of society we are, and the need for the individual citizen to acknowledge personal accountability and responsibility, and to cooperate with the state.’ Galligan rejects most of the reasons usually given to justify the right to silence at trial as unconvincing. He concludes that the right to silence can only be justified in terms of protecting the privacy of the individual.

In Australia, Davies has published a number of articles, and spoken at conferences on the historical development of the right to silence, and its lack of rationale. His reservations about the right to silence were first expressed in 1996, and developed in three articles in the *Australian Law Journal* in 2000. McHugh J in his dissenting judgment in *Azzopardi* cited, and adopted, some of Davies’ views. Davies is a strong critic of the right to silence, and an advocate for legislative change specifying when jurors may draw adverse inferences from silence. Davies’ discussion of the right to silence focuses on the history of the right to silence, and on whether the current law achieves clarity and consistency.

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42 Bentham, above n 40.
43 Cross, above n 41, 333.
44 Thomas, above n 38, 318-319.
46 Davies, ‘Reinventing the Courts – Justice Reform – A Personal Perspective,’ above n 38.
48 *Azzopardi* (2001) 205 CLR 50 [108], [130].
49 Davies’ proposals are discussed in detail in Chapter Eight, pages 6-8.
This thesis also focuses on this lack of clarity and consistency, but it goes further to include an examination of the impact of the right to silence on all participants in the criminal trial, not just the accused.

There have been a number of reports and discussion papers on the right to silence from the Australian Law Reform Commission, the Victorian Scrutiny of Acts and Regulations Committee, the Law Reform Commission of Western Australia, the New South Wales Law Reform Commission, the Northern Territory Law Reform Committee, and the Parliament of New South Wales Legislation Review Committee.\(^\text{50}\) These reports and discussion papers have given greater attention to pre-trial silence, and the discussion of silence at trial has been limited.\(^\text{51}\) Only the Law Reform Commission of Western Australia recommended significant change to the right to silence at trial.\(^\text{52}\) The report of the New South Wales Law Reform Commission in 2000 recommended that ‘the present law should not be changed.’\(^\text{53}\) All these Law Reform Commission reports have concentrated on the reasons traditionally given for and against the right to silence, the legislative restrictions limiting the right of the trial judge and the prosecutor to comment on the silence of the accused, and on describing changes in the law of the United Kingdom.

Apart from the articles by Davies, as noted earlier, no Australian texts or substantial journal articles have rigorously investigated the right to silence at trial. Nor has there been any literature summarising (much less scrutinising) the cases, the commentaries and the proposed reforms. A handful of authors have discussed the rationale behind the right to silence and its role in the criminal trial, but this has largely involved a recital of the

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\(^{51}\) For example, only 35 of the 226 pages of the 2000 New South Wales Law Reform Commission report, ibid, are devoted to the right to silence at trial.

\(^{52}\) Law Reform Commission of Western Australia, above n 6, 208.

history of the right to silence, with considerable reliance on Helmholz’s history of the privilege against self-incrimination.\(^{54}\)

Stone suggests the judges are not being ‘straightforward,’ and the title of her article in the *Criminal Law Journal* is ‘Calling a Spade a Spade: the Embarrassing Truth about the Right to Silence.’\(^{55}\) Bagaric criticises the High Court judgment in *Weissensteiner*: ‘The curious issue to arise from *Weissensteiner* is why the court was so cryptic in its views and reluctant to state the obvious: that there are exceptions to the right to silence at trial.’\(^{56}\) Davies calls the right to silence ‘a rule without reason.’\(^{57}\)

There is more literature on the right to silence at trial in the United Kingdom. This may be due to the extent of the changes to the common law made by the 1994 legislation. The *Criminal Justice and Public Order Act 1994* (UK) allows juries to draw an adverse inference from the silence of the accused. The requirements which must be met before an adverse inference may be drawn, and what the trial judge should say to the jury, are contained in the *United Kingdom Judicial Studies Board Specimen Directions* and the Practice Direction, *Form of Words to be Used Pursuant to Section 35 of the Criminal Justice and Public Order Act 1994*.\(^{58}\) Academic commentators have followed the progress of the United Kingdom legislation, and in particular, when an adverse inference is open to the jury.\(^{59}\) The United Kingdom literature on the right to silence is of limited

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\(^{54}\) Davies ‘The Prohibition Against Adverse Inferences from Silence,’ above n 4; Marks, above n 38; Alschuler, above n 21.


\(^{56}\) Bagaric above n 36, 373.

\(^{57}\) Davies ‘The Prohibition Against Adverse Inferences from Silence: a Rule Without Reason? (Pt I), above n 4, 26.


assistance in considering the right to silence in Australia because Australia has not introduced similar legislation. Moreover, the law in the United Kingdom has been influenced by not only the Criminal Justice and Public Order Act 1994, but also the Human Rights Act 1999 which incorporates the European Convention on Human Rights into the law of the United Kingdom, and especially Article 6 of that Convention which refers to the accused’s entitlement to a fair trial.

Apart from calls for change from Davies, there has been no equivalent level of debate in Australia on the right to silence at trial. It may be that the lack of impetus for reform is simply that ‘law reform, especially in matters of procedure, always flows sluggishly; and especially in criminal procedure, tradition plays a strong part in protecting it from change.’

A few authors in the United States have written about the Fifth Amendment to the United States Constitution, and the privilege against self-incrimination, in sufficiently general terms to be of some relevance to Australia. Stone has written about decisions of the

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61 The Fifth Amendment to the United States Constitution is as follows: ‘No person shall be compelled to be a witness against himself.’
Supreme Court of Canada, suggesting they have some relevance to Australian appellate courts.\textsuperscript{63} Gauck has written a PhD thesis on ‘A Comparative Analysis of Self-incrimination and Silence from the Position of the Defendant in England, the United States and Canada.’\textsuperscript{64} New Zealand literature is of limited assistance in discussing the right to silence in Australia because New Zealand law is heavily influenced by New Zealand’s \textit{Bill of Rights (1990)}. However, a few commentators in New Zealand have written about the right to silence in ways that have some relevance to Australia.\textsuperscript{65} South African literature is of limited assistance in discussing the right to silence in Australia because South Africa has a constitutional right to silence,\textsuperscript{66} although Schwikkard, Van Dijkhorst and Nugent\textsuperscript{67} have written about not only the right to silence under South African law, but also the right to silence generally.

The Australian appellate court decisions are moving in a different direction to the recent decisions of the European Court of Human Rights and the English Court of Appeal, which seek to balance an absolute right to silence against the public interest. The Court of Appeal and the House of Lords have specifically recognised the ‘familiar triangulation of interests of the accused, the victim and society.’\textsuperscript{68} This triangulation of interests has not been recognised in Australia, except by Fitzgerald P when he discussed ‘competing interests of various stakeholders’ in two judgments in the Court of Appeal of Queensland.

\begin{footnotesize}
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\item \textsuperscript{63} Stone, above n 36.
\item \textsuperscript{64} Christina Gauck, \textit{Self-incrimination and Silence, the Position of the Defendant in England, the United States and Canada} (Ph D Thesis, Cambridge University, 1999).
\item \textsuperscript{66} \textit{Constitution of the Republic of South Africa Act 108 of 1996}, s 35 (3) (h), above n 9.
\item \textsuperscript{68} \textit{R v A} [2001] 3 All ER 1 [38].
\end{itemize}
\end{footnotesize}
in 1996 and 1997. His conclusion, that conflicting rights are inevitable and cannot be resolved, was provocative and innovative, yet it did not draw comment or criticism in the literature. Nor was it mentioned by other appellate court judges in subsequent decisions. This lack of engagement illustrates the entrenchment of the right to silence in Australian criminal jurisprudence, and the lack of interest in probing it. This thesis probes the right to silence at trial, and interrogates the inevitability of competing rights, and whether alternatives are desirable and possible.

The Australian appellate courts and legal practitioners treat the right of an accused to remain silent at trial as unassailable and above criticism. A classic illustration of this approach comes from a New Zealand judge in 1995: ‘As long as society espouses an accusatorial/adversarial criminal justice system, with its matrix of values and presumptions, the exercise of silence by an accused as a reflection and ingredient of that matrix, must remain unassailed.’ Showing much less respect for the right to silence, one commentator called it ‘a sacred cow.’ The appellate courts, and the secondary sources, offer a wide range of reasons for the right to silence, and this thesis explores each of those reasons, in Chapter Four.

One of the gaps in the current Australian law on the right to silence is the insistence of the appellate courts that the right to silence at trial is ‘fundamental,’ without examining how or why it is fundamental. When changes to the law were mooted in Victoria, one legal practitioner wrote that ‘the right to silence is a basic ingredient of the adversarial system.’ Similar statements permeate appellate court decisions. This thesis deconstructs the right to silence decisions of the appellate courts, in order to understand the assumptions and assumed meanings, underlying policies and procedures of the right to silence as it operates in the criminal trial. This deconstruction investigates the appellate court decisions, for ‘dogmatic assertions, rhetorical bluster, political posturing, ethical

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71 Robertson, above n 65, 146.
73 See, eg, RPS (2000) 199 CLR 620 [22] (Gaudron ACJ, Gummow, Kirby, and Hayne JJ).
bullying and shallow circularities. Deconstructing the right to silence is a legitimate and worthwhile aim in itself, but it also enables the development of more open and honest alternatives to the current situation. These alternatives acknowledge the implications of the appellate courts decisions and legislation for all persons, including, but not limited to, the accused. They stand in contrast to the current constructions of the right to silence which rely on dominating meta-narratives and rigid rules, and say, in effect, ‘this is the best we can do.’ The thesis examines whether the law must be restricted in this way, or whether there can be ‘the possibility of justice’ in relation to the right to silence at trial.

Some judges and commentators regard the right to silence as linked to, or part of, the presumption of innocence: ‘the right to silence is a symbolic and practical expression of the presumption of innocence.’ Two High Court decisions link it to the burden of proof. In contrast, Ingraham stresses that the right to silence is separate from, and significantly different to, the presumption of innocence, and the burden of proof.

Some judges and commentators have on occasion used the right to silence and the privilege against self-incrimination interchangeably, while others have stressed the importance of distinguishing between the right to silence and the privilege against self-incrimination. Alschuler describes the right to silence as a ‘linguistic shuffle from the privilege against self-incrimination.’ This thesis explores the relationship (if any) between the right to silence, the presumption of innocence, the privilege against self-in

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74 Schlag, above n 2, 60.
77 See, eg, Environmental Protection Authority v Caltex Refining Co Pty Ltd (1992) 178 CLR 477, 527, 532 and Petty v The Queen; Maiden v The Queen (1991) 173 CLR 95 (Gaudron J).
79 Van Dijkhorst J, above n 67.
81 Davies, ‘Reinventing the Courts – Justice Reform – A Personal Perspective,’ above n 38, 4; Harvey, above n 70, 181.
82 Alschuler, above n 21.
incrimination and the burden of proof, in order to develop a better understanding of the rationale for the right to silence, and how it operates in the criminal trial.

Ashworth, Cape and Richter stress the importance of the right to silence being recognised as a ‘right,’\(^{83}\) while Thomas and McHugh J refer to the ‘so-called right to silence.’\(^{84}\) McHugh J prefers to describe the right to silence as ‘an immunity from compulsion to testify in court’ (‘the non-compellability rule’),\(^{85}\) and Davies prefers ‘an immunity from drawing adverse inferences from silence.’\(^{86}\) The problem here is that no attempt has been made to discuss these different descriptions, nor whether they assist in an understanding of the role of the right to silence in criminal trials. Each of these understandings is examined in this thesis.

The thesis adopts a feminist jurisprudential approach which Naffine describes as: ‘The feminist intention [is] to inspect all of law’s practices, to accept nothing, to question everything, to regard it all as strange and in need of explanation.’\(^{87}\) This is the very antithesis of the current literature on the right to silence which treats the right to silence as fundamental and unassailable. The term ‘fundamental’ is used regularly in the appellate court decisions about the right to silence, and this thesis explores how the term is used, its possible meanings, and the implications for both the accused and the accuser.

In summary, the current literature on the right to silence at trial is limited in its examination of the appellate court decisions and the implications of those decisions for criminal law procedure. Although there is a significant body of literature, as demonstrated in the previous section, it does not address the wider questions which this thesis asks, such as whether the importance attached to the right to silence is justified.

This thesis, unlike the current literature, examines the legal principles which emerge from appellate court decisions both individually and collectively, but also reveals the wider

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\(^{84}\) Thomas, above n 60, 299; Azzopardi (2001) 205 CLR 50 [118] (McHugh J) 60.


\(^{86}\) Davies, ‘The Prohibition against Adverse Inferences from Silence: a Rule without Reason?’ (Pt I), above n 4, 28.

implications of those decisions for judges, accused, accusers, jurors and the community. The thesis, unlike any existing literature, combines substantive law and feminist jurisprudence.

4. Methodology

This thesis presents a detailed examination of the High Court and the State appellate court decisions on the right to silence, and how they operate in criminal trials. This combination is important because ‘an exclusive concentration on the written texts overlooks the fact that a criminal trial is essentially an oral and visual event involving a courtroom performance by the lawyers, witnesses, parties and the judge.’ In addition to examining reported and unreported appellate court decisions, journal articles, legal texts, and Commonwealth and State legislation, files containing written submissions and transcripts of the special leave hearings in Weissensteiner, RPS, and Azzopardi were obtained from the Registry of the High Court.

The author has been a judge of the District Court of Queensland since 1991; the court deals with most serious crimes in Queensland. She has presided over hundreds of criminal trials, and dealt with the exercise of the right to silence on hundreds of occasions. Prior to being appointed a Judge, she was a practicing solicitor and barrister for 12 years. She was Deputy Chair of the Law Reform Commission of Queensland for 3 years. This thesis is informed by her practical experience and extensive reading of cases, texts and conference papers over 30 years of legal practice. During 1998 and 2004, she visited numerous Crown Courts throughout England and Wales, in order to ascertain how the right to silence operates in criminal trials. She discussed the 1994 legislation with trial judges, and on some occasions sat on the bench during trials.

In the author’s experience as a judge presiding over criminal trials on a daily basis, about 80% of defendants exercise the right to remain silent at trial, and about 60% of those rely on their unsworn police record of interview to give their version of events.

The aim of this thesis is to provide a framework to enable reform of the law on the right to silence. The thesis is informed by critical legal theory in an attempt to:

- Critique and transform legal structure that constrains and exploits humankind... Advocacy and activism are key concepts. The criteria for judging the value of the inquiry is the extent to which it provides a stimulus to action, that is, to the transformation of the existing structure.  

This thesis aims to provide a critique of, and then transform, the existing law on the right to silence at trial. The specific objective is to develop ‘a critical analysis which unearths the logic, the substantive assumptions, underlying law’s current contextualisation of its subjects, and which can hence illuminate the interests and relationships which these arrangements privilege.’ The illumination of the interests and relationships which are privileged by the current law on the right to silence is a key component of this thesis.

The methodological approach used in the thesis draws from feminist legal theory, critical theory and deconstruction, with an agenda of law reform. The thesis includes both an internal critique and an external critique of the right to silence at trial. The internal critique used in Chapters Two and Three studies ‘the operation of the dominant ideology underpinning the right to silence in terms of its own internal form and dynamics.’ Lacey explains that the method of internal critique as:

- To scrutinise the discourses or practices in terms of their own realisation of the values by which they profess to be informed... [to hold] liberal legal systems up to scrutiny in terms of the standards which they professed to instantiate universally, by showing how aspects of legal and political practice systematically failed to accord rights or dispense justice even-handedly across different groups of citizens.

The critiquing of the right to silence in this thesis challenges the conventional approach to law, described by Naife as follows: ‘the problem-solving techniques of law simplify and reduce the individuality of experience, so as to make it analytically manageable and

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89 Egon Guba and Yvonne Lincoln, ‘Competing Paradigms in Qualitative Research’ in Norman Denzin, and Yvonne Lincoln (eds), *Handbook of Qualitative Research* (1994) 114.


pragmatically resolvable." Troup describes it in a similar way, namely: ‘the law attempts to fit facts, situations and experiences into a rigid codified order, a programmable structure.’ In examining how the law creates ‘programmable structures,’ the thesis investigates how the current conventional approach to law operates in respect of the right to silence at trial: it ignores the individuality of the accused and of the accuser and consequently produces rigid and unworkable results.

The external critique of the right to silence in this thesis exposes law’s partiality, its unapologetic refusal to look at ethics, that is, rightness or wrongness, and its insistence on focussing on compliance with rules and categories. Elias CJ (New Zealand) calls it ‘scrupulous legality.’ The thesis follows the course suggested by Denike, namely, ‘to examine each and every principle; unsettle inherent biases historically insulated within them.’

Bottomley argues that the power of feminist legal theory is that it offers ‘a means by which we shock ourselves out of the complacency of our established ways of thinking in order to open ourselves to new potentials.’ This thesis uses feminist legal theory to offer ‘shocks to thought’ to the current law on the right to silence at trial, in order to reveal the problems it creates in criminal trials. These problems are revealed by ‘pulling the contextual threads of legal language, [so] we can work towards making law more comfortable with diversity and complexity, less wedded to the felt need for universalising, reductive principles.’

The external critique undertaken in this thesis examines the current law on the right to silence from a perspective informed by feminist jurisprudence, deconstruction,

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philosophy, and ethics, and involves a critical assessment of the law to reveal its practical, theoretical, and moral limits. The theoretical tools used to do this work are drawn from critical legal theory, feminist legal theory, feminist philosophy, and post-structuralist theory. The thesis adopts a variety of themes and concepts, from a number of authors, including: ‘really looking’ (Murdoch); ‘paying attention’ (Weil); ‘honouring of faces’ (Levinas); judicial responsibility (Cover); ‘a just sensitivity to all relevant differences and particularities’ (Lacey); ‘fresh judgment’ (Derrida); and respect and dignity (Cornell). The thesis also relies on Douzinas and Warrington’s analysis of:

The performative aspect of the judgment which abstracts the particular, generalises the event, calculates and assesses individuals and distributes them along normative and normal (ised) paths under a rule that subjects the different to the same and the Other to the self.

The thesis uses a deconstructive approach, that is, to place particular emphasis on understanding the dominant meaning within the legal discourse on the right to silence, and to encourage reflection on the range of other possibilities of meaning that have previously been suppressed. Deconstruction involves ‘constant inquisitive openness and continual questioning of meaning…a reading [of texts] must find not only what the writer has expressed and privileged, but what has been ignored and marginalised.’ As Derrida has shown, meaning does not reside in a text, but in the writing and reading of it. Account is taken of ‘Derrida’s dedication – indeed obsession with – the voices and meanings trivialized, marginalized and discounted by dominant discourse.’ Sheehan explains

99 The use of italics for the word ‘look’ follows the practice of the author, Iris Murdoch, see below, 100.
that: ‘Deconstruction seeks out the meanings excluded to make the authorized meanings possible.’

Troup explains the different approach offered by deconstruction: ‘Deconstruction seeks out points of fault, and frailty within a text. It looks for sites of difference, absence, excess and contradiction where the text reveals its nonconformity to its own internal ideals, structures and logic of meaning.’

To follow a deconstructive approach is necessarily to be critical of law’s traditional approach, because it ‘bring[s] in the narratives, experiences and perspectives of formally objectified others [and] is deeply corrosive of the bald constitutionalized abstractions that presently parade across legal texts.’ It is thus necessarily critical of the approach of the current law, which relies on rigid rules and takes no account of the individuals before the court. However, deconstruction goes beyond criticism of the current law, and offers a positive goal: ‘Deconstruction is grounded in responsibility, in betterment, in making our social institutions work, and in making them work in a just manner.’

The post-modernist and post-structuralist theories used in this thesis urge engagement with otherness, and consideration of other perspectives and realities beyond those held and promoted through the dominant discourse. Law’s dominant image of the right to silence is of the accused, and specifically the accused silent in the dock. This thesis examines what reality is constructed for the accuser, and what the dominant legal discourse on the right to silence means not only for the accused but also for trial judges, jurors, and the community.

The thesis develops the particularity model as an alternative to the current law. This model recognises the individuality of the accused and the accuser, and the circumstances of the crime.

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104 Ibid 125.
105 Troup, above n 94, 68.
5. **Structure of the thesis**

In Chapter Two, the common law on the right to silence at trial, and legislation in each of the Commonwealth and State jurisdictions, are described. The chapter includes an examination of the differences between legislative provisions, especially relating to judicial comment to juries on the silence of the accused. It examines the High Court and State appellate court decisions of *Weissensteiner, RPS, Azzopardi, Fernando v The Queen, R v Hannes, R v Giri*, and *R v Fowler*. It compares the ‘original right to silence’ with the specific shifts and inconsistencies introduced by *Weissensteiner*. It reveals gaps, contradictions and ongoing problems with the increasing layering and complexity of High Court decisions. It shows how the current law on the right to silence is a collage of legislative principles and common law principles built up from several key High Court cases, and how this impacts on all participants in the criminal trial.

Chapter Three examines the qualifications to the right to silence under legislation and at common law. These qualifications derive from common law doctrines, legislation, and evidentiary rules. This is followed by an explanation of the failure of the appellate courts to address the inconsistency between the absolute right to silence described in the decisions examined in Chapter Two, and the qualifications to the absolute right to silence described in Chapter Three.

Chapter Four has three foci: the importance of the right to silence; the reasons for the right to silence; and, how the right to silence differs from other concepts in criminal trials. The appellate courts have given conflicting messages on the importance of the right to silence at trial, at the same time as they insist that it is ‘fundamental’; what ‘fundamental’ means, and what outcomes it produces, is explored in this chapter. The

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reasons for the right to silence are assembled and analysed. Those reasons come from appellate court decisions, and academic commentators. The chapter also includes an analysis of the differences between the right to silence and the presumption of innocence, the burden of proof, the privilege against self-incrimination, and the adversarial nature of the criminal trial. The analysis reveals that the failure to differentiate between these concepts produces considerable incoherence and uncertainty, and impacts on the daily operation of criminal trials.

Chapter Five demonstrates how the right to silence, as constructed by the appellate courts, privileges the accused in criminal trials. The analysis reveals how the appellate courts consider only the rights of the accused, and ignore the impact of the silence of the accused on the accuser. The privileging is shown in a number of ways, including: (a) the accused’s non-exposure to cross-examination (in contrast to the accuser’s exposure); (b) the onerous obligations on Crown prosecutors to call witnesses favourable to the defence; (c) the admissibility at trial of unsworn records of police interviews; (d) the gap between compulsory prosecution disclosure and compulsory defence disclosure; (e) the limits on comment about the silence of the accused to the jury by prosecutors and trial judges (in contrast to defence counsel); (f) the lack of expectation that the accused will give evidence when the case relies on the direct evidence of the accuser; and, (g) special consideration given to the accused in giving evidence, including the accused’s criminal history and vulnerabilities in giving evidence in court.

In the second part of Chapter Five, the thesis addresses the arguments advanced by the courts to justify privileging the accused. These arguments are: (a) a fair trial for the accused necessitates privileging; (b) the criminal trial is a contest between the state and the accused, and this calls for privileging to compensate the accused because the state has greater resources; (c) privileging is necessary because only the accused is in jeopardy of punishment; and, (d) privileging may be inevitable because of the need to avoid conviction of innocent accused. Each of these arguments is addressed, and conclusions are reached in terms of the privileging of the accused over the accuser.
Chapter Six is in two parts; the first part investigates the conflicting rights model underpinning the right to silence decisions of the appellate courts, that is, the rights of the accused and the rights of the accuser are seen as being in direct conflict, with the former inevitably prevailing. The investigation highlights the problems of this model, such as competitiveness, hierarchy, and zero-sum thinking, and concludes that the consequences of the rights model are unacceptable. The second part of the chapter develops an alternative model to the conflicting rights model. The alternative model has three main aims: first, to avoid privileging the accused over the accuser; secondly, to treat both the accused and the accuser with respect and dignity; and thirdly, to provide trial judges and juries with clear directions on the use of the silence of the accused at trial. This thesis refers to this alternative model as the ‘particularity model.’

Under the particularity model, the right to silence would be re-conceptualised as a choice with consequences. The particularity model would invite the jury to consider the particularities (including vulnerabilities) of both the accused and the accuser before the court. The role of the trial judge would become that of a disinterested third party, who ensures a fair trial for the accused and the accuser alike. The judge and the jury would be encouraged to engage with difference and, therefore, to ‘really look’\textsuperscript{109} at the accused, and the accuser, and the alleged crime. Under the particularity model, there would be ‘fresh judgment’\textsuperscript{110} in each case, and there would be reduced reliance on dominating meta-narratives and rigid rules. The decision whether it is reasonable to expect the accused to give evidence would be made by the jurors, who would focus on the particularities of the accused, the accuser, and the crime. If the jury decides it is reasonable to expect the accused to have given evidence and the accused elects not to do so, the jury may take the failure to do so into account in reaching a verdict. If the jury decides it is not reasonable to expect the accused to have given evidence, it must ignore the silence of the accused in reaching a verdict.

\textsuperscript{109} Murdoch, above n 100.
\textsuperscript{110} Derrida, above n 75.
In Chapter Seven, the particularity model is applied to the cases of Weissensteiner, RPS, Azzopardi, Giri, Bozzola,111 Fernando, and Dyers. The application of the particularity model produces a direction by the trial judge to jurors on the silence of the accused at trial which is very different from the jury directions currently given.

In Chapter Eight, the particularity model is compared with the other models for reform of the right to silence at trial, which include proposals from Gleeson CJ, Davies, McHugh J, and the Law Reform Commission of Western Australia, and also with the 1994 United Kingdom legislation. The comparison reveals the benefits of the particularity model, and its potential to overcome the privileging in the current law revealed in Chapter Five. The thesis concludes with a call for substantial changes to the current law on the right to silence, and the immediate implementation of the particularity model.

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111 R v Bozzola (2201) 122 A Crim R 453.
CHAPTER TWO

WHAT IS THE RIGHT TO SILENCE AT TRIAL?

Introduction

From the late nineteenth century, the courts had recognised the right of an accused to remain silent at trial, and judges had instructed jurors that no adverse inference is to be drawn by virtue of that silence. This changed with the landmark decision of the High Court in 1993 in Weissensteiner v The Queen, which allowed juries to draw an adverse inference if there were unexplained facts ‘peculiarly within the knowledge of the accused.’¹ The reaction to Weissensteiner was mixed, with some judges and academics, and many criminal defence lawyers, expressing negative views. There was a concern that allowing an adverse inference from silence would erode the presumption of innocence and reverse the burden of proof. These views did not change even with the introduction of ground-breaking legislation in the United Kingdom in 1994² to modify the right to silence, by permitting the drawing of adverse inferences from the silence of the accused. This legislation did not create much interest in Australia, then or since. The fears about Weissensteiner were dissipated with the High Court decisions in RPS v The Queen in 2000, and Azzopardi v The Queen; Davis v The Queen in 2001.³ These decisions reversed Weissensteiner because they recognised an absolute right to silence, and limited adverse inferences only to those cases that are ‘rare and exceptional.’⁴

The focus of this chapter is on the decisions of appellate courts and existing Australian legislation governing the right to silence. This focus enables an examination of the right to silence as enacted in the courtroom. A full understanding of the right to silence in the criminal trial must involve an examination of its operation in the practical context of the

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¹ Weissensteiner v The Queen (1993) 178 CLR 217 (‘Weissensteiner’) 228.
³ RPS v The Queen (2000) 199 CLR 620 (‘RPS’); Azzopardi v The Queen; Davis v The Queen (2001) 205 CLR 50 (‘Azzopardi’).
⁴ Azzopardi (2001) 205 CLR 50 [68].
courtroom, as well as the philosophical arguments for its retention, abolition, or amendment. This examination results in a better understanding of the range of contradictory views expressed by the appellate courts. The examination also reveals the practical difficulties created for trial judges in deciding what should be said to jurors about the silence of the accused.

Unlike the 1994 United Kingdom legislation, Australian legislation does not permit the jury to draw adverse inferences from silence. Rather, Australian legislation is limited to prescribing the circumstances in which the trial judge and the prosecutor can comment on the silence of the accused, and in all other respects, the common law prevails. Currently, the appellate court decisions provide that the accused has an absolute right to silence, qualified only in cases which are ‘rare and exceptional,’ where ‘there are additional facts known only to the accused.’

A review of Commonwealth and State legislation, the common law, and the statements of principle from the key right to silence cases is now undertaken, in order to understand how the right to silence operates in Australia in criminal trials.

1. Legislation on the right to silence

Legislation in Australia has never defined the right to silence at trial. Legislation in all States makes the accused a competent but not compellable witness, and prescribes the extent of permissible comment to the jury on the failure of an accused to give evidence at trial. In two Australian jurisdictions, the courts may compel answers to incriminating

5 Ibid.
7 Evidence Act 1995 (NSW) s 20; Evidence Act 1980 (NT) s 9; Criminal Code Act 1899 (Qld) s 618; Evidence Act 1995 (Qld) s 15; Evidence Act 1929 (SA) ss 18,18A; Evidence Act 2001 (Tas) s 89; Crimes Act 1958 (Vic) s 399; Evidence Act 1906 (WA) s 8; Evidence Act 1995 (Cth) s 95; Evidence Act 2001 (ACT) s 371.
questions. There is a specific provision under Commonwealth and New South Wales legislation permitting qualified judicial comment:

The judge or any party (other than the prosecutor) may comment on the failure of an accused to give evidence but the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.

In Tasmania, since 2001, ‘all parties may comment on the failure of a defendant to give evidence, but the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.’ This legislative change brings Tasmania into line with New South Wales and the Commonwealth. Legislation in Western Australia, South Australia, and the Australian Capital Territory prohibits any comment by the prosecutor on the accused’s silence at trial, but says nothing about comment by the judge. Comment by the judge and by the prosecutor is prohibited in Victoria and in the Northern Territory. Queensland has no legislation concerning comment to the jury by either the judge or the prosecutor, and both are therefore free to comment. In this respect, Queensland is different from the Commonwealth and all other States. Weissensteiner was a case from Queensland, but the decision of the High Court did not depend on that difference.

Under all Commonwealth and State legislation, the defence is entitled to comment on the failure to give evidence. What defence counsel often say in their addresses to the jury is: ‘my client has not given evidence, but what more could my client say other than to deny the charge?’ Gaudron J asked a similar, presumably rhetorical, question in the special leave hearing in Azzopardi.

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8 Evidence Act 2004 (WA) s 11; Evidence Act 1971 (ACT) s 69.
9 Evidence Act 1995 (Cth) s 95; Evidence Act 1995 (NSW) s 20.
10 Evidence Act 2001 (Tas) s 20.
11 Evidence Act 1906 (WA) s 8(1).
12 Evidence Act 1929 (SA) s 18(1).
13 Evidence Act 1971 (ACT) s 74.
14 Crimes Act 1958 (Vic) s 399(3).
15 Evidence Act 1939 (NT) s 9(3).
16 Transcript of Proceedings, Azzopardi (High Court of Australia, Gleeson CJ, Gaudron, McHugh and Gummow JJ, 21 November 2000) 8.
The diversity of State legislative provisions is unfortunate, and reflects the wider problem of the federal system of law in Australia. The High Court has not addressed the diversity, and instead the legislation in New South Wales has been disproportionately influential.

The appellate courts have strictly construed the Commonwealth and New South Wales legislative provisions which permit, but qualify, judicial comment. The majority High Court judges in *RPS* said: ‘Section 20 (2) [Evidence Act 1995 (NSW)] requires a line to be drawn and it should be drawn in a way that gives the prohibition against suggesting particular reasons for not giving evidence its full operation.’ Callinan J went further in *RPS*, and held that if a State has legislation similar to s 20, then there cannot be a Weissensteiner adverse inference direction. He also put a particular construction on s 20: ‘In my opinion, the purpose of s 20(2) is to enable a trial judge to make comments for the protection and benefit of an accused who has not given evidence and not otherwise.’

In his judgment in *Azzopardi*, McHugh J disagreed with Callinan J’s opinion, and said that it is wrong to read down s 20 as a provision for the benefit of the accused, and wrong to limit the judge’s comments beyond the limit expressly stated in that section.

In *Azzopardi*, the High Court expounded four different views of s 20. Gleeson CJ held that a strict reading of s 20 permits three observations:

First, that it [s 20] has nothing to say about a case, not of a failure by an accused to give evidence, but of a failure of an accused who gives evidence to deal with a certain topic, or a failure of the defence to call evidence other than the evidence of the accused. Secondly, that it permits the trial judge to inform the jury of the way in which they legitimately may take account of a failure to give evidence. Thirdly, the comment of the trial judge is to make clear that silence is not to be taken as flowing from a consciousness of guilt, nor as amounting to an implied admission of guilt.

The majority judges (Gaudron, Gummow, Kirby and Hayne JJ) held that s 20 ‘does not permit the judge to point out to the jury that the failure of the accused to give evidence is an argument in favour of the conclusion for which the prosecution contends.’

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17 Evidence Act 1995 (Cth) s 95; Evidence Act 1995 (NSW) s 20: refer to text accompanying n 9.
18 RPS (2000) 199 CLR 620 [20].
19 Ibid [108].
20 Ibid [109].
21 Ibid [109].
22 Azzopardi (2001) 205 CLR 50 [81].
23 Ibid [53].
majority held that both trial judges suggested to their respective juries that the accused did not give evidence because he was guilty of the offence charged, and they had thus infringed s 20.24 The majority High Court judges said that the word ‘suggest’ in s 20 is a word of very wide application,25 and that the prohibition in s 20(2) is ‘not to be given a narrow construction.’26 The judge in Mr Azzopardi’s trial had said:

Members of the jury, you may think that it is logic [sic] and common-sense that, where only two persons are involved in some particular thing – the complainant and/or a witness and the accused – so that there are only two persons able to give evidence about the particular thing, and where the complainant’s evidence or the witness’s evidence is left undeniied or uncontradicted by the accused, any doubt which may have been cast upon that witness’s evidence may be more readily discounted and that witness’s evidence may be more readily accepted as the truth.27

The trial judge in Mr Davis’s trial had said:

Now the only effect that his failure to give evidence may have on you is this. His failure to give evidence here may affect the value or weight that you give to the evidence of some or all of the witnesses who have testified in the trial if you think the accused was in a position to himself give evidence about the matter. His failure cannot be treated as an admission. His failure to give evidence [sic]. But it may enable you to give, or help you to evaluate the weight of other evidence in the case, that he has not give evidence...The accused has remained in the dock as is his right. You cannot treat that as an admission of guilt. But the fact that he has not given testimony may assist you when you come to evaluating the other evidence in the case.28

McHugh J dissented, and held that the trial judges in both cases had not infringed s 20 because they did not suggest that the accused persons failed to give evidence because they were, or believed that they were, guilty of the offences charged. McHugh J stressed that there is only one limitation in the section.29 He also said:

Indeed, 20 (2) appears to strengthen the position of a trial judge in New South Wales in making comments....Section 20 (2) is an express authority for the judge to comment on the evidence. It would be contrary to the principles for construing powers conferred on courts and judges to read down the power of the trial judge to comment on the accused’s failure to give evidence. Equally, it would be contrary to those principles to hold that the judge can only make comments favourable to, or protective of, the accused. The subsection has stated its one and only limitation - the comment of the judge “must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence.”30

26 Azzopardi, ibid [75].
27 Ibid [71].
28 Ibid [79].
29 Ibid [86].
30 Azzopardi (2001) 205 CLR 50 [171].
In construing s 20, Callinan J was cautious about the trial judge saying anything at all, but he suggested that any direction should be in accordance with the majority view in *RPS*:

> It is not in my opinion a case in which it is appropriate to say whether, and in what circumstances and in what terms (if any) a trial judge bound to apply the Act should speak about the absence of an accused from the witness box. In many cases the prudent and best course may be to say nothing at all on the topic, particularly if the appellant has not sought comment on it. All I need add is that I do not think that s 20 requires any different interpretation from the one that this Court gave it in *RPS*.  

None of the appellate court decisions clarifies the role of s 20. Penhallurick asks whether s 20 operates ‘as a sort of code’ in establishing what comments a trial judge may make about an accused’s silence. The High Court has not provided clear guidance on this issue, and it is therefore difficult, if not impossible, to say whether the High Court statements on judicial comment in *RPS* and *Azzopardi* apply in States which do not have legislation in similar terms to s 20 in the New South Wales legislation.

Section 20 states that a judge ‘may comment on the failure of an accused to give evidence.’ It does not clarify when the trial judge should do so. Trial judges face a number of possibilities: they may comment when invited to do so by the Crown, or the defence, or both; they may comment if they think it is appropriate to do so; or they may decline to comment if the defence objects to judicial comment. Prior to *Azzopardi*, the decision to comment or not comment was a matter for the trial judge’s unfettered discretion, to be exercised when ‘the interests of justice dictate.’ In *Azzopardi*, the majority judges limited this discretion: ‘It is to be emphasised that cases in which a judge may comment on the failure of an accused to offer an explanation will be both rare and

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31 Ibid [195].
33 Lawnton LJ said in *R v Sparrow* [1973] All ER 129, 137: What is said must depend on the facts of each case and in some cases the interests of justice call for stronger comment. The trial judge, who has the feel of the case, is the person who must exercise his (sic) discretion in this matter to ensure that a trial is fair. A discretion is not to be fettered by laying down rules and regulations for its exercise. There are some cases in which it would be unwise to make any such comment at all; there are others in which it would be absolutely necessary in the interests of justice that such comments should be made. That is a question entirely for the discretion of the judge: *R v Rhodes* (1898) QB 77, 83.
exceptional. This will occur only if the evidence is capable of explanation by disclosure of additional facts known only to the accused.\(^{34}\)

The appellate courts have also not clarified the importance of the judicial direction on the right to silence. Neither have they clarified whether a new trial will automatically be ordered if there is an error in the judicial direction on the right to silence.\(^{35}\)

If Commonwealth and State legislation as interpreted by the High Court provides no guidance to trial judges on when, and how, to address the jury on the silence of the accused, then trial judges must resort to the common law for guidance. As the following section demonstrates, the common law is also complex and confusing.

2. Common law and the right to silence

At common law, the right to silence is essentially a rule of procedure used in criminal trials. At the end of the Crown case, the accused is asked, in words to this effect:

The prosecution having closed its case against you, I must ask you if you intend to adduce evidence in your defence. This means you may give evidence yourself, call witnesses or produce evidence. You may do all or any of those things or none of them.\(^{36}\)

One of the factors which defence counsel take into account in advising their clients whether to give or call evidence is the rule of procedure in some States to the effect that if the accused gives or calls evidence, defence counsel loses the right of last address to the jury.\(^{37}\)

In the summing-up, the trial judge directs the jury on what the law says about the election of the accused not to give or call evidence. What appellate court judges have said about these jury directions varies considerably. They have changed their minds on several occasions.

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\(^{34}\) *Azzopardi* (2001) 205 CLR 50 [68] (Gaudron, Gummow, Kirby and Hayne JJ).

\(^{35}\) *R v Bell* [2000] QCA 442 (Unreported, Supreme Court of Queensland, Court of Appeal, Pincus, Thomas JJA, and Jones J, 27 October 2000).

\(^{36}\) Queensland Supreme and District Courts Benchbook, ‘Trial Procedure,’ Direction No 5B.1 [20].

\(^{37}\) See, eg, *Criminal Code 1899* (Qld) s 619.
occasions, and currently there are four different versions, each of which is discussed below.

The common law has said very little about the concept of the right to silence. It has concentrated on the judge’s summing-up to the jury. The notable exception to this paucity of discussion is the description of the right to silence given by Lord Mustill in 1992 in *R v Director of Serious Fraud Office; Ex parte Smith*. In the absence of other authoritative statements, almost all discussions of the right to silence adopt the description offered by Lord Mustill. He referred to ‘the right of silence’ as not denoting any single right, but rather a disparate group of six immunities:

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

Two of these six immunities are directly relevant to the right to silence at trial: immunity (4), a specific immunity from being compelled to give evidence, and immunity (6), a specific immunity from having adverse comment made on any failure to give evidence at the trial.

The majority judges in *RPS* referred to the right to silence as a ‘useful shorthand description of a number of different rules that apply in the criminal law,’ and cited *R v*

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38 *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1.
39 See, eg, Legislation Review Committee, Parliament of New South Wales, above n 6 [1].
40 *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1, 30-31.
Director of Serious Fraud Office, notwithstanding that that case did not refer to rules but rather to immunities.\textsuperscript{41} The majority judges then said:

But referring, without more, to the “right to silence” is not always a safe basis for reasoning to a conclusion in a particular case; the use of the expression “right to silence” may obscure the particular rule or principle that is being applied.\textsuperscript{42}

The majority judges offered no further explanation of this. It is open to the interpretation that the right to silence is a group of principles (as noted previously) or a rule, rather than a right. If so, then the ‘right’ to silence is really a rule of criminal procedure, and is more accurately described as the ‘right to silence rule.’

In Azzopardi, Gleeson CJ specifically referred to the right to silence as a collection of principles and rules:

The right of silence is not, in this country, a constitutional or legal principle of immutable content. Rather, it is a ‘convenient description of a collection of principles and rules; some substantive, and some procedural; some of long standing, and some of recent origin.’\textsuperscript{43}

It appears, then, that the ‘right’ to silence is a misnomer. However, because the phrase ‘the right to silence’ has become so entrenched, and the appellate courts continue to use it, this thesis does likewise.

As noted above, an examination of the recent High Court decisions reveals that there are four versions of the right to silence at trial:

- A right to silence qualified only by the probative weight of uncontradicted evidence, ‘the original right to silence.’

- A right to silence qualified by permissible adverse inferences, ‘the Weissensteiner right to silence.’

\textsuperscript{41} Ibid.
\textsuperscript{42} RPS (2000) 199 CLR 620 [22].
\textsuperscript{43} Azzopardi (2001) 205 CLR 50 [4].
A right to silence qualified by permissible adverse inferences from circumstantial evidence, ‘the RPS right to silence.’

An absolute right to silence, ‘the Azzopardi right to silence.’

A. ‘The original right to silence’

Until the decision of the High Court in Weissensteiner in 1993, trial judges explained the right to silence to the jury in a direction which was along these lines:

Members of the jury, the accused has elected not to give evidence. Under our system of law, the accused is not bound to give evidence. He [sic] is entitled to remain silent and let the Crown prove its case. The onus of proof always remains on the Crown. You should not assume that because he has not given evidence, he must be guilty. His silence proves nothing one way or the other. It does not prove he is guilty. On the other hand, it does not rebut, contradict or explain the case put forward by the Crown. You must not assume that he is guilty because he has not gone into the witness box. The weight you give to the silence of the accused is a matter for you; you are entitled to consider that the silence of the accused permits a more ready acceptance of the Crown case.  

This direction recognises the right of an accused to remain silent at trial, and merely points out to the jury that the Crown case remains uncontradicted and unexplained. This position changed with the High Court decision in Weissensteiner in 1993.

B. ‘The Weissensteiner right to silence’

Weissensteiner was charged with the murder of two people and the theft of their boat. He and those two people had set off on a cruise in the boat and the two people were never seen again, but the accused remained in possession of the boat and their personal belongings. The Crown case was circumstantial and required the jury to infer that the two people were dead and the accused had murdered them. Prior to being charged, the

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44 These words largely follow those recommended by Lord Parker CJ in R v Bathurst [1968] 2 QB 99, 107-8. In Australia, the ‘formula’ was approved in many cases, including R v Kops (1893) 14 LR (NSW) 150; Morgan v Babcock & Wilcox Ltd (1929) 43 CLR 163; May v O’Sullivan (1955) 92 CLR 654; R v Guiren (1926) 79 WN (NSW) 811; Bridge v The Queen (1964) 118 CLR 600; R v Young [1969] Qd R 417; R v Fellowes [1987] 2 Qd R 606.
accused had told police and others a series of inconsistent stories about the ownership of the boat, and the whereabouts of his two companions. He remained silent at trial.

The trial judge’s directions to the jury included the following:

You cannot infer guilt simply from his failure [to give evidence]. The consequence of that failure is this: you have no evidence from the accused to add to, or explain, or to vary, or contradict the evidence put before you by the prosecution. It asks you to infer guilt from a whole collection of circumstances. It asks you to draw inferences from such facts as it is able to prove. Such an inference may be more safely drawn from the proven facts when an accused person elects not to give evidence of relevant facts which it can easily be perceived must be within his knowledge. You might, for example, think in this case it requires no great perception that the accused would have direct knowledge of events which can be canvassed only obliquely from the point of view of seeking to have you draw an inference from the evidence which has been led by the Crown. The use that you make of the fact that there is no evidence given or called by the defendant in these proceedings is that.45

The Court of Appeal of Queensland upheld the direction by a majority.46 Pincus JA said:

Here, the jury would no doubt have been inclined to think that if there was an innocent explanation of the disappearance of the appellant’s former companions, it was up to the appellant, who had repeatedly lied on the subject, to tell it to them. They might, indeed, have thought that simple compassion might have induced the appellant to let the grieving parents know what had happened to their offspring. A jury following proper and logical processes of thought would be likely to treat his not having done so as pointing towards guilt.47

It is one thing to say that there is a right of silence and another to say that its exercise shall never be permitted to disadvantage those who exercise it. Adoption of the second rule is impossible, in a practical sense.48

McPherson JA acknowledged the difficulties for the trial judge in these terms:

Deciding whether the stage has been reached where the evidence calls for contradiction or explanation from the accused, and a comment is appropriate, requires the exercise of sound judgment and care in formulating the instruction lest the onus of proof be reversed or the accused’s right to remain silent undermined.49

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48 Ibid 20.
49 Ibid 7.
He cited Windeyer J in *Bridge v The Queen* who had said that ‘the failure of an accused person to contradict on oath evidence that to his knowledge must be true or untrue can logically be regarded as increasing the probability that it is true.’

Shepherdson J dissented, pointing to the lack of direct evidence to prove the two persons were dead, and any direct evidence linking the appellant with their deaths. He said that to follow the course adopted by the majority judges would be to assume the fact in issue, namely, that the appellant was somehow involved in or caused the deaths. He also criticised the majority for applying this rule from *R v Burdett*:

… when such proof [of enough to warrant a reasonable and just conclusion against him [sic] has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which proof tends? 51

Shepherdson J considered that to use this rule was to ‘set at nought the presumption of innocence.’

On 17 November 1993, the High Court delivered its judgment in *Weissensteiner*, in three separate judgments. Mason CJ, Deane and Dawson JJ said:

Once the Crown has shown a prima facie case, if the case is one where the accused is expected to give evidence because the facts are peculiarly within his knowledge, then his failure to do so may mean that an inference may more safely be drawn by the jury from the proven facts.

The qualification they stressed is that the jury may take the failure to explain into account ‘only when the failure of the accused to give evidence is a circumstance which may bear upon the probative value of the evidence.’ Brennan and Toohey JJ said:

The jury may draw inferences adverse to the accused more readily by considering that the accused, being in a position to deny, explain or answer the evidence against him, has failed to do so.

They also said:

50 *Bridge v The Queen* (1964) 118 CLR 600, 615.
51 *R v Burdett* (1820) 106 ER 873, 890.
52 *Weissensteiner v The Queen* (Unreported, Supreme Court of Queensland, Court of Appeal, Pincus and McPherson JJA, Shepherdson J, 22 June 1992) 11.
54 Ibid 229.
55 Ibid 236.
The jury must be told not to use the failure of the accused to give evidence unless relevant facts can be ‘easily perceived to be in his knowledge.’

Gaudron and McHugh JJ stressed that jury directions be given in terms of the particular unexplained facts calling for explanation, rather than in terms of the failure to give evidence or to meet the prosecution case generally.

Because the decision of the High Court was delivered in three separate judgments, all with different reasoning, it was not easy for trial judges to discern how it should be translated into a jury direction in a particular trial. Trial judges and appellate court judges alike had to grapple with it.

The judgments in Weissensteiner did not clearly explain whether they were significantly changing the right to silence at trial, except for this defensive justification in the judgment of Mason CJ, Deane and Dawson JJ:

> It [the principle that the failure to give evidence bearing upon the probative value of the evidence may be taken into account] is not to deny the right [to silence]; it is merely to recognize that the jury cannot, and cannot be required to, shut their eyes to the consequences of exercising the right.

Bagaric suggests that in deciding Weissensteiner, the High Court was ‘heavily influenced by the rights wave which now dominates moral discourse,’ which had this effect:

> The High Court found itself [in a dilemma] in Weissensteiner. It had acknowledged that the right of trial silence existed and was relevant to the facts, however it was also apparent that to permit the right to be exercised would be to subvert the important aim of ensuring the guilty are convicted. The deontological view of rights which the High Court appears to have adopted prompts an innate reluctance to allow rights to be infringed.

Bagaric offers an alternative approach:

> A far more congruous manner in which the majority of the High Court could have reached its decision, without reverting to the fictitious distinction it did, would have been to state that the community’s interest in convicting the guilty in some circumstances, including where there is a prima facie case against an accused who

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58 Ibid 229.
must have knowledge of the relevant facts, prevails over the accused’s right of silence at trial.  

Stone offers an explanation of the majority view in *Weissensteiner* which is similar to Bagaric’s: ‘The High Court ‘accepted an uneasy compromise between the need to give substance to the right to silence, and the desire not to exclude evidence which can rationally support a finding of guilt.’

A further explanation of *Weissensteiner* is that because of its particular facts, especially the accused’s possession of the boat and his inconsistent stories about the whereabouts of his two companions, the High Court judges were prepared to find that it was reasonable to expect the accused to give evidence.

After *Weissensteiner*, trial judges gave a direction to the jury in terms similar to this:

A defendant admits nothing by choosing not to testify, and his [sic] silence cannot displace the burden which the prosecution bears to prove his guilt beyond reasonable doubt. But if there is other evidence sufficient to sustain a verdict of guilty on the offence charged, his omission to explain how [judge to specify facts calling for explanation] may make the prosecution evidence more convincing. In general, a jury may draw inferences adverse to a defendant more readily by considering that a defendant who, because of facts which must be within his knowledge, can deny, explain or answer the case against him has not done so. In particular, possibilities consistent with innocence may cease to be reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the defendant. However, if the evidence is insufficient in quality or extent to warrant conviction, the defendant’s silence cannot supply its deficiencies. Moreover, a defendant may have reasons not to give evidence other than that his evidence would not assist his case: for example, timidity, a concern that cross-examination might confuse him, (that he gave an explanation to the police), (a memory loss) or a perception that deficiencies in the prosecution case would lead you to entertain a reasonable doubt as to his guilt. You must bear that in mind in considering whether the prosecution case is strengthened here by the defendant’s decision not to testify.

This direction was an attempt in one jurisdiction to reconcile the three blocks of judgments from the High Court in *Weissensteiner*. It was a direction that was difficult for jurors to follow.

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60 Ibid 376.
C ‘The RPS right to silence’

The High Court revisited the right to silence at trial in 2000 in RPS. The accused was charged with two counts of carnal knowledge of his daughter and six counts of sexual intercourse with her, when she was aged four to 14.

The Crown case relied in part on conversations between the accused and the complainant’s mother and grandmother. The former was:

Mother: ‘Can’t you just admit what you’ve done, or are you really calling your daughter a liar?’ Accused: ‘I never had intercourse with her but everything else she said is true.’
Mother: ‘How long has it been going on?’ Accused: ‘Since she was about ten.’

The conversation with the complainant’s grandmother was:

Grandmother: ‘Are you saying that you’ve never touched her with your hands or fondled her or put your penis inside her?’ Accused: ‘That’s right.’

The accused did not give evidence at his trial, and the trial judge directed the jury in accordance with Weissensteiner, and permitted the jury to draw an adverse inference from the silence of the accused about the failure to explain the partial admissions.

The majority judges of the High Court (Gaudron ACJ, Gummow, Kirby and Hayne JJ) said:

It will seldom, if ever, be reasonable to conclude that an accused in a criminal trial would be expected to give evidence. The most that can be said in criminal matters is that there are some cases in which evidence (or an explanation) contradicting an apparently damning inference to be drawn from proven facts could come only from the accused. 64

They held that it is not reasonable to expect the accused to give evidence denying or contradicting direct evidence of guilt led by the prosecution. They made a distinction between cases involving circumstantial evidence (when Weissensteiner is good law) and those involving direct evidence (when Weissensteiner is not good law):

If the case depends on direct evidence, the trial judge should instruct the jury that the accused is not bound to give evidence, there may have been many reasons why he (sic)

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64 Ibid [27].
did not do so and the jury should not speculate about those reasons, and it is for the prosecution to prove its case beyond reasonable doubt and the jury should draw no inference from the accused not having given evidence.\textsuperscript{65}

The ‘\textit{RPS} right to silence’ direction is more favourable to the accused than ‘the original right to silence’ direction. The ‘\textit{RPS} right to silence’ direction takes away the ability of the jurors to decide what weight to give to the accused’s silence. Instead, the direction now tells them that if the case does not involve circumstantial evidence, they should not draw any inference from the silence of the accused.

After \textit{RPS}, trial judges had to give a different direction to the one they had been giving since \textit{Weissensteiner}, to reflect the distinction between cases involving direct evidence and cases involving circumstantial evidence. It was unclear to trial judges when to give the ‘\textit{Weissensteiner} right to silence’ direction, because the distinction between direct and circumstantial evidence is not as straightforward as the High Court suggested. In 2000 in \textit{R v Fowler}, the Court of Criminal Appeal of New South Wales nominated two categories where the \textit{Weissensteiner} right to silence direction was justified.\textsuperscript{66} The two categories were a ‘smoking gun case,’ and a ‘circumstantial case dependent on inference from proved facts, the innocent explanation for which might only reasonably lie in the mouth of the appellant’ (that is, a case with facts very like those of \textit{Weissensteiner}!).\textsuperscript{67}

In contrast, in his dissenting judgment in \textit{RPS}, McHugh J eschewed the distinction between direct evidence and circumstantial evidence:

\begin{quote}
As long as the jury is instructed that the accused is under no obligation to give evidence, that the Crown must prove his or her guilt beyond reasonable doubt on the evidence adduced and that the accused bears no onus of proof, I find it difficult to see how the so-called ‘right to silence’ is infringed if the jury takes into account the silence of the accused in respect of any facts ‘easily perceived to be in his knowledge’ and which call for an answer.\textsuperscript{68}
\end{quote}

In other words, McHugh J considered that ‘the \textit{Weissensteiner} right to silence’ should apply in all cases, regardless of the nature of the evidence against the accused.

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65 Ibid [43]. \\
66 \textit{R v Fowler} [2000] NSWCCA 142 (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Wood CJ, Hulme and Barr JJ, 23 May 2000). \\
67 Ibid [159]. \\
68 \textit{RPS} (2000) 199 CLR 620 [60].
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C. ‘The Azzopardi right to silence’

The High Court further considered the right to silence at trial in Azzopardi in 2001. The High Court heard two separate cases, Azzopardi v The Queen and Davis v The Queen, together because they both involved instructions given to juries at criminal trials in New South Wales on the silence of the accused, and s 20 of the Evidence Act 1995 (NSW).69

Azzopardi was charged with soliciting P to murder G. P gave evidence that he had shot G with intent to murder him, at the request of the accused. Other witnesses gave evidence which supported P’s evidence that the accused had given him the gun he used to shoot G. The accused did not give evidence at his trial. The trial judge directed the jury that the accused did not give evidence and that the law required no response from the accused, but he also told the jury that any doubt which may have been cast upon the prosecution evidence may be more readily discounted and that evidence may be more readily accepted as the truth, because of the accused’s silence. The majority of the High Court held that this part of the direction contravened s 20 of the Evidence Act 1995 (NSW).

The majority held that in the trial of Azzopardi, the ‘Weissensteiner right to silence’ direction given by the trial judge was inappropriate because:

All that could be said in this case is that the accused did not give evidence contradicting evidence which had been led. This was not a case where the accused did not take the opportunity to provide some additional factual material for consideration by the jury which would explain or contradict the case sought to be made by the prosecution.70

Davis was charged with three counts of sexual offences against a friend’s daughter who was aged nine. The complainant had stayed the night at the accused’s house, which was down a gravel road from her own house. The complainant gave evidence that the accused assaulted her, that she waited until he was asleep and then walked, at night, the seven kilometres back to her home. As no one was at home, she slept in the family car until 11.00 the next morning when she was awoken by the accused. The complainant’s mother

69 Evidence Act 1995 (NSW) s 20. For the terms of the section, see text accompanying n 9.
70 Ibid [73].
gave evidence that the complainant was upset, and had said that the accused had interfered with her. The mother observed that the complainant’s inner thighs and vagina were swollen and red. The complainant was examined by a doctor some days later and the doctor’s observations were consistent with sexual penetration. The accused did not give evidence at trial.

The majority (Gaudron, Gummow, Kirby, and Hayne JJ) held that cases in which a judge may comment on the failure of an accused to offer an explanation will be ‘both rare and exceptional.’ They held that the summing-up in the Davis trial should not have included ‘the Weissensteiner right to silence’ direction because it should be given only if the evidence is capable of explanation by disclosure of additional facts known only to the accused:

If there is a basis for concluding that, if there are additional facts which would explain or contradict the inference which the prosecution seeks to have the jury draw, and they are facts which (if they exist) would be peculiarly within the knowledge of the accused, then a comment on failure to provide evidence may be made. The facts which it is suggested could have been, but were not, revealed by evidence from the accused must be additional to those already given in evidence by the witnesses who were called. The fact that the accused could have contradicted evidence already given will not suffice. Mere contradiction would not be evidence of any additional fact. In an accusatorial trial, an accused is not required to explain or contradict matters which are already the subject of evidence at trial. These matters must be assessed by the jury against the requisite standard of proof, without regard to the fact that the accused did not give evidence.

The majority (including Callinan J, on this point) drew a distinction between Crown cases involving direct evidence and cases involving circumstantial evidence:

If the complainant was unable to give evidence and the prosecution case had been founded only upon evidence of the otherwise unexplained departure of the complainant from the applicant’s house and return to her own house, coupled with clinical observations of the complainant’s physical condition consistent with her having been sexually assaulted, it might be said that the case was one in which a Weissensteiner comment could have been made... But that was not the way in which the prosecution put its case at the trial of the application. That case included direct evidence, from the complainant, of what the applicant was alleged to have done. That is reason enough to conclude that no Weissensteiner direction should have been given. If the complainant were accepted as a credible witness, the accused could not have given evidence of any additional fact that might have explained or contradicted her account.

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71 Azzopardi (2001) 205 CLR 50 [68].
72 Ibid [64].
73 Ibid [81].
Callinan J also held that no adverse comment on the failure of the accused to testify should have been made because this was not a case in which an explanation contradicting an apparently damning inference to be drawn from proven facts could come only from the accused. The injuries to the complainant’s vaginal area were not matters peculiarly within the knowledge of the accused. He said that there may have been reasons why the accused did not wish to give evidence, such as his fear that allegations made by another girl might be revealed, or his inability to explain why the complainant may have walked home, or his having received legal advice to rely on the record of interview.

He considered that the trial judge had erroneously conveyed the impression that the election not to give evidence could be taken into account in judging the value of, or the weight of the evidence for the prosecution, and that any doubt entertained about the evidence of witnesses for the prosecution might be more readily discounted because the accused had not given evidence. The trial judge had erroneously told the jury that the decision not to give evidence could be used in assessing the value of the evidence given by the prosecution witnesses. In addition, the trial judge had erroneously directed the jury that the absence of evidence from the accused meant that the version of events put by the accused’s counsel in cross-examination of witnesses for the Crown was not supported by evidence.74

Dissenting, Gleeson CJ held that the judge’s summing-up in each case conformed to both Weissensteiner and to s 20 of the Evidence Act 1995 (NSW). He considered that the High Court should adhere to the views expressed by the majority in Weissensteiner.75

McHugh J also dissented, finding that neither s 20, nor any principle of the common law, precludes a trial judge from informing the jury that it can take into account the failure of the accused to explain or deny evidence which he or she is in a position to deny or

74 Ibid [191].
75 Ibid [23].
explain. He declined to limit the judge’s ability to comment, and pointed out that to do so begs the question:

If comment is justified when the accused probably knows of additional facts that could deny inferences that can be drawn from the evidence, why is comment denied when the accused fails to rebut or explain evidence about matters that the accused knows are true or false?  

McHugh J maintained that there is no common law principle against self-incrimination by accused persons or any policy of the common law recognising a right to silence. Instead, there is simply an immunity from compulsion to testify, which he described as follows:

[The immunity from compulsion to testify] does not prevent a trial judge commenting on the failure of the accused to give evidence contradicting or explaining evidence which that person is in a position to contradict or explain. The judge’s comment fastens on the consequences of the accused’s failure to testify. It does not require the accused to testify. It does not force the accused to testify. The accused has a choice. He or she can rely on the perceived weakness of the prosecution case or run the risk that the jury will more confidently accept evidence or draw an inference in the absence of evidence from the accused denying that evidence or inference.

McHugh J supported the principle from Weissensteiner, that in weighing the evidence of the prosecution, the jury is entitled to take into account the failure of the accused to contradict or explain the evidence of the prosecution when evidence from him in contradiction or explanation might reasonably be expected.

If the distinction between direct evidence and circumstantial evidence, introduced in RPS and approved in Azzopardi, is to be rigidly enforced, it is unclear what should happen if some counts in an indictment attract circumstantial evidence and others do not; for example, specific intent to assault and non-specific intent for other counts. The potential for factual and legal variations between cases strongly supports the proposition that each jury should be directed as to what use they can make of the accused’s silence in that particular case, and this argument was submitted by counsel for the Crown at the special

76 Azzopardi (2001) 205 CLR 50 [169].
77 Ibid [117].
78 Ibid [131].
79 Ibid [164].
80 Ibid [111].
leave hearing in Azzopardi. He submitted that, ‘There is a need for directions to the jury to be tailored to the particular factual circumstances of the case,’ and to allow for combinations of direct and circumstantial evidence. These submissions were not accepted in any of the judgments.

The rigid distinction between direct and circumstantial evidence also fails to deal with the situation where the accused is the only person who can positively rebut an inference open on the Crown case, whether that case consists of direct evidence or circumstantial evidence or both. This was recognised in a number of early cases on the right to silence, but was rejected in RPS and Azzopardi.

To make the law in this area even murkier, the majority judges in Azzopardi drew a distinction between a ‘comment’ and a ‘direction,’ a distinction which, they said, ‘reflects the fundamental division of functions in a criminal trial between the judge and the jury.’

The distinction between comment and direction is important. Telling a jury that they may attach particular significance to the fact that the accused did not give evidence is a comment by the judge. Because it is a comment, the jury may ignore it and they should be told they may ignore it. By contrast, warning a jury against drawing impermissible conclusions from that fact is a direction by the judge which the jury is required to follow.

What is a ‘comment’ and what is a ‘direction’ may be difficult for jurors to fathom. The majority High Court judges gave no guidance as to when judges should comment: they merely said:

As with all judicial comments on the facts in a jury trial, it will often be better (and safer) for the judge to leave the assessment of the facts to the determination of the jury in the light of the submissions of the parties.

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81 High Court file, Azzopardi, Written Submissions of Counsel for the Crown [11.2].
82 Ibid [11.6].
85 Azzopardi (2001) 205 CLR 50 [49].
86 Ibid [50].
87 Ibid [52].
Trial judges are left with more questions than answers. The court has not explained why it is ‘better’ to say nothing; why it is ‘safer’ to say nothing; and why, if the prosecutor comments and defence counsel comments, the trial judge should not; what the role of the trial judge is; and, what responsibility he/she has to the accused, the accuser, and the jury. The fact that these issues remain unaddressed means that the only way the law can operate is for trial judges to direct juries as best they can, but there is always a risk of a successful appeal. Pincus is critical of the effect of this result, describing its effect on trial judges in this way: ‘They are becoming cribbed, chained, and confined.’

Davies considers that the only way to clarify the uncertainties is to introduce legislation to specify what ought to be included in the judicial direction, and what ought to be taken into account by the jurors. His proposal broadly follows the Practice Direction and Judicial Studies Board Specimen Directions pursuant to the Criminal Justice and Public Order Act 1994 (UK), which specify in detail what trial judges should say to juries.

The law currently recognises the Azzopardi right to silence, according to which the trial judge should give the following direction to the jury:

The accused has not given [called] evidence. That is his [sic] right. He is not bound to give [or to call] evidence. The defendant is entitled to insist that the prosecution prove the case against him, if it can. The prosecution bears the onus of proving the guilt of the defendant beyond a reasonable doubt, and the fact that the defendant did not give evidence is not evidence against him. It does not constitute an admission of guilt by conduct and it may not be used to fill gaps in the evidence led by the prosecution. It proves nothing at all, and you must not assume that because he did not give evidence that adds in some way to the case against him. It cannot be considered at all when deciding whether the prosecution has proved its case beyond a reasonable doubt, and most certainly does not make the task confronting the Crown any easier. It cannot change the fact that the Crown retains the responsibility to prove guilt of the defendant beyond reasonable doubt, and may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt.

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90 Practice Direction [1995] 2 Crim App R 192; United Kingdom Judicial Studies Board Specimen Direction 39. The United Kingdom legislation and Specimen Directions are discussed further in Chapter Eight.
The trial judge must decide whether there are ‘additional facts known only to the accused which call for explanation,’ in which case an adverse inference may be drawn by the jury. According to the High Court, this will occur only in ‘rare and exceptional’ cases. The High Court did not elaborate on why it is limited in this way. It is unclear whether it provides a further limit to the category of ‘additional facts known only to the accused which call for explanation.’ At the least, it seems to sound a note of caution. If a case falls within this category, or categories, the trial judge is required to give a different direction to the jury, along the following lines:

What I have said is subject to this qualification. The prosecution asks you to conclude that the defendant is guilty from the circumstances which it says are established by the following facts which it claims to have proved. I remind you that those facts are as follows: [list the significant facts relied on and said by the prosecution to call for an explanation].

The prosecution argues that those facts prove that the defendant is guilty as charged. You may think that if there are additional facts that would explain that evidence against the defendant, or contradict the conclusion of guilt which the prosecution asks you to draw, those additional facts, if they exist, would be additional facts known only to the defendant, and could not be the subject of evidence from any other person or source.

Those facts would be additional to evidence given by the witnesses who have been called; and mere contradiction would not be evidence of any additional fact. By mere contradiction, I mean the defendant simply giving evidence and denying he was guilty. That mere contradiction by the defendant of evidence already given would not be evidence of any additional fact.

The consequence of the defendant electing to call no evidence is that you have no evidence of additional facts from him to explain the evidence put forward by the prosecution. The conclusion of guilt the prosecution argues for may be more safely drawn from the proven facts when a defendant elects not to give evidence of relevant additional facts which, if they exist, must be within his knowledge.

You are not allowed to resolve doubts about the reliability of witnesses, or the conclusion to be drawn from the evidence simply because the defendant has not contradicted evidence already given. Remember also that the defendant has already contradicted the general allegation against him by the plea of not guilty. You may only ask yourselves if the prosecution case for the conclusion of guilt is strengthened by the decision not to

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92 Azzopardi (2001) 205 CLR 50 [64].
93 Ibid [68].
94 Ibid [67].
95 Ibid [67].
96 Ibid [64].
97 Ibid [67]. This wording is drawn from Weissensteiner (1993) 178 CLR 219, 224.
offer any explanation in evidence where, if there are additional facts that would explain the evidence led by the prosecution, or contradict the conclusion of guilt that the prosecution asks you to draw, those additional facts, if they exist, would be peculiarly within the knowledge of the defendant, who has not given evidence of them.\(^{98}\)

You should keep in mind that a person charged may have a number of reasons for not giving evidence, other than his evidence would not assist his case. Reasons might include timidity; a concern that cross examination might confuse the person charged; the fact that the person charged has already given an explanation to the police; a possible memory loss; fear of retribution from other persons; or a belief that weaknesses in the prosecution case will leave you in any event with a reasonable doubt as to guilt. These are just some possibilities. You must bear all those things in mind when considering whether it is safe to accept and act upon the evidence led by the prosecution, and to draw beyond reasonable doubt the conclusion of guilt it asks you to draw.\(^{99}\)

This direction is not only very long and complex but also proves difficult for juries to follow. This complexity reflects the current law on the right to silence at trial.

3. **Ongoing problems with RPS and Azzopardi**

The High Court decisions in *RPS* and *Azzopardi* did not clarify the law on the right to silence. Cases involving evidence ‘only from the accused’ (*RPS*), and ‘additional facts known only to the accused’ (*Azzopardi*) may be difficult to find. The High Court decision in *Fernando v the Queen*,\(^{100}\) and four cases from the New South Wales Court of Appeal,\(^{101}\) illustrate this point.

In 2000 in *Fernando v The Queen*, the High Court considered the appropriateness of an ‘*RPS* right to silence’ direction in a trial in which the accused had been convicted of

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98 This paragraph in the District and Supreme Courts of Queensland Benchbook, No 28.B.2 deviates from the wording used in *Azzopardi*, in two respects: ‘strengthened’ comes from *Weissensteiner*, not *Azzopardi*, and ‘conclusion’ replaces ‘inference.’ The Benchbook notes that ‘The term “conclusion” may be understood better by jurors than “inference.”’ 28.B.2 footnote 10. The Benchbook also notes that: “peculiarly” may not be easy for all jurors, but that is the term used in *Azzopardi*, at [64]:’ (footnote 11, page 28.B.2).


abduction, sexual assault and murder.\textsuperscript{102} Counsel for the appellant submitted that, like \textit{RPS}, the Crown case involved a partial admission and multiple counts, and the trial judge therefore erred in giving the ‘\textit{RPS} right to silence’ direction. The accused had admitted that he and his co-accused had agreed to steal a car, and that he had sexually assaulted the dead woman; however, he said, he had withdrawn before she was murdered. The High Court refused special leave, and said that the case was different from \textit{RPS}. The Crown was seeking to establish by inference, and by direct evidence from other witnesses, that the accused did not withdraw before the murder. The court attached importance to the fact that it was not a situation where the accused gave evidence that he withdrew: he merely mentioned withdrawal to the police.\textsuperscript{103} Gaudron J pointed out that \textit{RPS} concerned a different scenario, namely, the accused denied that the incident had taken place, as alleged by the complainant, notwithstanding the evidence from Crown witnesses of partial admissions by him. What this narrow differentiation illustrates is how the distinction made in \textit{RPS}, between direct evidence and circumstantial evidence, does not bear careful scrutiny, and \textit{RPS} is difficult to apply in practice.

In \textit{R v Hannes}, the New South Wales Court of Appeal considered a conviction for insider trading and held that the knowledge of the accused about the prospective take-over was not within the category justifying an adverse inference direction.\textsuperscript{104} The court held that the trial judge did not give enough specificity as to the particular evidence that could come only from the accused. The trial judge had instructed the jury that the failure of the accused to give evidence generally, rather than with respect to specific identified matters, was such as to establish a basis for the inference called for by the Crown [that the accused was the person called ‘Booth’].\textsuperscript{105}

In \textit{R v Bozzola}, a trial involving dangerous driving causing grievous bodily harm, the trial judge had referred to matters about which the jury would expect the accused to have first-hand knowledge, including his travel movements, his drug taking, his rest times, and his

\textsuperscript{102} Transcript of Proceedings, \textit{Fernando v The Queen} (2000) (Unreported, High Court of Australia, Gaudron, Gummow and Hayne JJ, 11 February 2000).

\textsuperscript{103} Ibid 15.

\textsuperscript{104} \textit{R v Hannes} [2000] 158 FLR 359.
motivation to lie.106 The New South Wales Court of Appeal held that these were not facts which could come only from the accused, as prescribed by the majority in Azzopardi.107

In R v Giri, the accused admitted in his police record of interview that he had hit the deceased on the jaw in self-defence, and he also made a partial admission that he had kicked the deceased on the ground. He claimed that he had withdrawn from the fight as soon as he punched the deceased. The New South Wales Court of Appeal held that the evidence of the appellant’s involvement in the attack upon the deceased was not capable of explanation by disclosure of additional facts known only to the accused.108 The New South Wales Court of Appeal held that there was evidence from other witnesses concerning the actions of the accused, and the evidence of the accused would only be a direct denial of the primary evidence of some of the Crown witnesses.

In R v Fowler, the accused had been convicted of murder. The trial judge had held that the ‘Weissensteiner right to silence’ direction was warranted by the combination of the circumstances in the case. These circumstances included evidence of the time the accused returned home on the night of the shooting, the fact that the gun had been seen at the accused’s house and the cartridge box was found in the freezer, and the fact that a taped telephone conversation suggested a version to account for the presence of the gun which was different from that offered by the accused.109

The New South Wales Court of Appeal held that the case was not appropriate for the ‘Weissensteiner right to silence’ direction. It quoted passages from the joint judgment in RPS as not authorising a direction in relation to the failure of an accused to answer the testimony of a prosecution witness as to the specific facts from which an inference is drawn.110 The court drew a distinction between this situation, and one where there is a ‘circumstantial case dependent on inference from proved facts, the innocent explanation

105 Ibid [164].
107 Azzopardi (2001) 205 CLR 50 [68].
for which might only reasonably lie in the mouth of the appellant."\(^{111}\) They said that the latter warrants a ‘Weissensteiner right to silence’ direction, but the former does not. The distinction is not only a fine one, but it is also unclear. They said that a ‘Weissensteiner right to silence direction’ should only ever be contemplated in a ‘smoking gun’ case, or a circumstantial case dependent on an inference from proved facts, ‘the innocent explanation for which might only reasonably lie in the mouth of the appellant.’\(^{112}\) Perhaps what the Court of Appeal intended (without saying so) was that only facts very similar to those in Weissensteiner fall within the nominated categories, and thus warrant an adverse inference direction. It is not clear what a ‘smoking gun’ case is: the facts in Fowler were very close to just that, which is presumably why the trial judge gave the ‘Weissensteiner right to silence’ direction.

In all the four cases discussed above, the New South Wales Court of Appeal held that a ‘Weissensteiner right to silence’ direction was not appropriate, notwithstanding that they involved entirely different facts. These cases indicate that there will (almost) never be a situation where the accused is expected to give evidence. However, the New South Wales Court of Appeal did not say so, and they leave open the possibility that such situations may arise.

In *R v Galea; R v Yeo*, the accused were convicted of murder. Galea gave evidence at trial but Yeo did not. The New South Wales Court of Criminal Appeal rejected a submission by the Crown that the DNA evidence of the deceased’s blood in Yeo’s unit called for an *Azzopardi* direction.\(^{113}\) The Court of Appeal said that because the Crown case was that the accused dismembered the body together, the presence of the blood of the deceased in Yeo’s unit was within the knowledge of more than one person, and so it was not a matter

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111 *R v Fowler* [2000] NSWCCA 142 (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Wood CJ, Hulme and Barr JJ, 23 May 2000) [159].
112 Ibid.
peculiarly within Yeo’s knowledge.\textsuperscript{114} An adverse inference from the silence of Yeo was therefore not open.

The lack of clarity in the law is further illustrated in the special leave application in the High Court in \textit{R v Dang}, a wholly circumstantial case involving heroin importation.\textsuperscript{115} Counsel for the Crown submitted that the appeal was important because the case was ‘the sort that the Commonwealth run day in and day out.’\textsuperscript{116} He also submitted that the appeal was important because the effect of the High Court judgments was that, ‘\textit{Weissensteiner} for practical purposes is dead.’\textsuperscript{117} McHugh and Hayne JJ did not directly respond to this; McHugh J merely wryly observed: ‘One of these days the Crown may be in a position where it gets a suitable case.’\textsuperscript{118} He gave no insight as to why \textit{Dang} was not such a case, and what type of case will be ‘suitable.’

Counsel in \textit{Dang} referred to the comment of Meagher JA in \textit{R v Law}, that ‘trial judges would be well advised never to refer to the silence of the accused, much less give directions on the topic.’\textsuperscript{119} He also referred to the need for clarification from the High Court as to what directions trial judges should give. Counsel for the Crown argued that the evidence called for a ‘\textit{Weissensteiner} right to silence’ direction:

\begin{quote}
If one views the direction that was given in this case through the eyes of the majority in \textit{Azzopardi and Davis}, then it was a direction, we say, which, accepting that, it was a strong, compelling, purely circumstantial case, was one in which it was proper to make some comment.\textsuperscript{120}
\end{quote}

In refusing special leave to appeal, the High Court made no reference to the clarification sought by Counsel for the Crown.

Problems arise from the use of categorisation in the right to silence decisions. To take just one example: in the special leave hearing in \textit{Azzopardi}, counsel for the Crown listed out

\begin{footnotes}
\item 114 Ibid [50].
\item 115 Transcript of Proceedings, \textit{R v Dang} (High Court of Australia, McHugh and Hayne JJ, 10 August 2001).
\item 116 Ibid 5.
\item 117 Ibid 4.
\item 118 Ibid.
\item 119 \textit{R v Law} (2001) 122 A Crim R 542 [29].
\item 120 Ibid 3.
\end{footnotes}
seven situations which would permit a *Weissensteiner* direction: ‘smoking gun’ cases, recent possession cases, flight cases, the *Weissensteiner* situation itself, cases involving specific intent and joint purpose, and the situation in *Kops v The Queen; Ex Parte Kops*.\(^{121}\) This list is arbitrary and lacking in any conceptual foundation. By limiting adverse inferences to categories, the appellate courts ignore the specific circumstances of each case. To take one of the seven categories, the flight of the accused from the scene of the crime, it may be observed that some flight cases may call for explanation, and some may not, therefore a general rule cannot appropriately apply to every case. This is true of each of the seven categories. Moreover, some situations may be outside the nominated seven categories, and yet may call for explanation from the accused.

4. **The current state of the law**

*Azzopardi* is the most recent High Court decision on the availability of adverse inferences from the silence of the accused at trial; it has stood since 2001, and all Australian courts are bound by it. It did not specifically overturn earlier High Court decisions, notwithstanding that it reached entirely different conclusions from them. It is difficult, if not impossible, to predict which of the four categories of the right to silence outlined in this chapter will be considered appropriate in a particular case (or, indeed, if further categories will be created). The current status of *Weissensteiner* is unclear, because the current Chief Justice of the High Court (Gleeson CJ), and a former justice of the High Court (McHugh J), have both expressed support for it.

After the decision in *RPS*, one of the principal issues requiring guidance from the High Court was the apparent inconsistency between *Weissensteiner* and *RPS*. The Chief Justice of the Supreme Court of New South Wales said in *R v Hannes*:

> There are difficulties in reconciling, in all respects, the reasoning and decisions in *Weissensteiner* and *RPS*. The High Court has heard arguments in two cases which raise

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\(^{121}\) Transcript of Proceedings, *Azzopardi* (High Court of Australia, Glesson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne, Callinan JJ, 21 November 2000) 5; *Kops v The Queen; Ex Parte Kops* [1894] AC 650 (a hat belonging to the defendant had been seen at the premises which were set alight).
these difficulties. Nevertheless, at this stage, the Court must proceed on the basis that it is bound by both *Weissensteiner* and *RPS*.\textsuperscript{122}

In *Azzopardi*, the judges of the High Court disagreed on this point. On the one hand, both Gleeson CJ and McHugh J considered that it was impossible to reconcile *RPS* and the majority judgments in *Weissensteiner*.\textsuperscript{123} Gleeson CJ openly criticised the *RPS* distinction between direct evidence cases and circumstantial evidence cases, and stated that he preferred *Weissensteiner*.\textsuperscript{124} He said that the two cases were different because *Weissensteiner* concerned the absence of evidence of additional facts peculiarly within the knowledge of the accused, while in *RPS* there was no question of any additional fact known only to the accused, merely the failure to contradict aspects of the prosecution case.\textsuperscript{125} On the other hand, Gaudron, Gummow, Kirby and Hayne JJ said that: ‘Properly understood there is no tension between the two decisions.’\textsuperscript{126} They did not elaborate on what they meant by ‘properly understood,’ and what they meant by ‘properly understood’ has not been clear to trial judges and commentators who have been unable to reconcile *Weissensteiner* and *RPS*. This uncertainty has still not been clarified by the High Court.

The majority in *Azzopardi* (Gaudron, Gummow, Kirby, and Hayne JJ) sought to reconcile *Azzopardi* and *Weissensteiner*, citing the statement of the majority (Mason, Deane and Dawson JJ) in *Weissensteiner*, that ‘Not every case calls for explanation or contradiction in the form of evidence from the accused.’\textsuperscript{127} They stressed the words ‘in the form of evidence from the accused,’ and concluded that ‘what is important is that only the accused can shed light on what happened, not just by making a sworn denial of the allegations but by giving evidence of facts which, if they exist, would explain or contradict the evidence tendered by the prosecution.’\textsuperscript{128} This effort at reconciliation is unconvincing because the passage in *Weissensteiner* (quoted above) did not say ‘only’ from the accused.

\textsuperscript{122} *R v Hannes* [2000] 158 FLR 359 [125].
\textsuperscript{123} *Azzopardi* (2001) 205 CLR 50 [17] (Gleeson CJ) [74], [86] (McHugh J).
\textsuperscript{124} Ibid [21].
\textsuperscript{125} Ibid [68].
\textsuperscript{126} Ibid [32].
\textsuperscript{128} Ibid, *Azzopardi*. 
A further problem is that jury directions which incorporate *Weissensteiner*, *RPS* and *Azzopardi* are complex and difficult to follow. As discussed above, this was recognised by Meagher JA in *Law*.\(^{129}\) Meagher JA’s frustration is understandable, and is no doubt shared by many Australian trial judges. His view may not accord with the most recent High Court authority, *Azzopardi*, although this is not clear, because the High Court in *Azzopardi* decided only what should not be said, rather than what should be said.

Meagher JA’s approach is also open to the further criticism that if a trial judge says nothing about the failure of the accused to give evidence, there is a risk that the jury may misuse the silence for example, by inferring guilt. It also overlooks the possibility that the jury may request specific assistance from the trial judge, which is what occurred in *Law*. The accused was charged with conspiring to import heroin, and was implicated by documentation, observation, and the evidence of a co-conspirator. He tendered a small number of documents but did not give evidence.

The jury asked the trial judge: ‘Are the jury able to use the fact that the accused did not mount a defence in any way to support proof of guilt?’\(^{130}\) The trial judge’s answer was in the form of ‘the *Weissensteiner* right to silence’ direction. The Court of Appeal followed *Azzopardi*, and upheld the appeal because the fact that the accused could have contradicted evidence already given does not warrant ‘the *Weissensteiner* right to silence’ direction.\(^{131}\) The decisions of the appellate courts leave trial judges in the invidious position that they may not be able to assist jurors when requested to do so.

A perusal of the Court of Appeal decisions from all States after *RPS* reveals that there have been no appellate court decisions in which an ‘*Azzopardi* right to silence’ direction was approved.\(^{132}\) For all practical purposes, the test of ‘additional facts known only to the accused,’ as interpreted by the appellate courts, is never likely to be satisfied.


\(^{130}\) Ibid [17].

\(^{131}\) Ibid [20].

\(^{132}\) The perusal was as at September 2006.
Conclusion

The current law on the right to silence is a mixture of legislative control of judicial comment to juries, and common law principles from key High Court cases. The situations when the jury is invited to draw an adverse inference from silence are limited to those where the Crown case is based on circumstantial evidence, and the accused can reasonably be expected to give evidence of facts known only to him or her and not already led in the Crown case. As illustrated in the discussion of cases in this chapter. It is not clear what type of circumstantial evidence is required, or whether the majority of the High Court in later cases intended to abolish the ‘Weissensteiner right to silence’ direction altogether.

The problem is that even after a succession of cases, the right to silence at trial remains unclear; indeed, with each case, the law has become more unclear and inconsistent. The right to silence has become more absolute, and the scope for adverse inferences has narrowed almost to extinction. At the same time, the appellate courts have failed to address the qualifications to the right to silence which have come from other sources: legislation, common law doctrines, rules of evidence, and the introduction of defence disclosure. The combined impact of these qualifications on the right to silence at trial is discussed in the next chapter.
CHAPTER THREE
QUALIFICATIONS TO THE RIGHT TO SILENCE

Introduction

The appellate court decisions and legislation on the right to silence at trial in Australia examined in the previous chapter, revealed four versions of the right to silence, and a trend towards an absolute right to silence. However, High Court cases and legislation governing judicial comment on the silence of the accused are not the only sources of law which impact on the right to silence at trial. The right to silence is also influenced by general criminal law doctrines and principles, and by legislation which does not deal specifically with the right to silence. These common law doctrines and legislative provisions have an impact on the right to silence, and they add further qualifications and contradictions to the right to silence appellate court decisions. Indeed, they seem to be directly inconsistent with the appellate court decisions. Some qualifications, principally defence disclosure requirements, specifically qualify the right to silence at trial. Other qualifications do not specifically qualify the right to silence at trial, but this is the practical effect of their operation.

The doctrines and legislation which impact on the right to silence at trial are discussed in this chapter. They include the common law and legislative provisions which focus on the pre-trial conduct of the accused; scientific proof; miscellaneous other qualifications to the right to silence; defence disclosure; and defence opening. Each of these five groups is discussed in turn in this chapter. Initially, however, in order to understand the qualifications, it is important to reflect on the meaning of silence, and how it differs from conduct.

In the criminal justice system, the use of the word ‘silence’ in ‘the right to silence’ means a lack of oral testimony, that is, an absence of speech. However, as the doctrines and legislative provisions described in this chapter illustrate, the conduct of the accused is also important. Indeed, the combined power of these doctrines and legislative provisions
prove the old adage that ‘actions speak louder than words.’ Consequently, in the Crown case, there may be evidence of conduct which may be sufficient to convict the accused without a single word having been spoken in the defence case.

1. The pre-trial conduct of the accused

At common law, there are three situations where the pre-trial conduct of the accused may be taken into account at trial. These are silence in the face of accusation, conduct amounting to consciousness of guilt, and answers during a police interview implying consciousness of guilt (‘the Woon principle’). At common law, evidence of this conduct is admissible in the trial of the accused, and thus the common law qualifies the right of an accused to remain silent at trial because of pressure to give or call evidence to explain the pre-trial conduct.

A. Silence in the face of accusation

In the Privy Council decision in the murder case of Parkes v The Queen, the victim’s mother was allowed to give evidence of the silence of the accused in the face of accusation. The mother said she had found her daughter injured, and had gone to the accused and said to him: ‘what she do you-why [sic] you stab her?’ which she had repeated, and that the accused made no answer and tried to stab her when she threatened to hold him until the police came. The Privy Council held that the defendant’s reactions to the accusations, including his silence, were matters that could be taken into account (along with other evidence) in deciding guilt. The court cited the old English case of R v Mitchell:

Now the whole admissibility of statements of this kind rests upon the consideration that if a charge is made against a person in that person’s presence it is reasonable to expect that he or she will immediately deny it, and that the absence of such a denial is some evidence of an admission on the part of the person charged, and of the truth of the charge. Undoubtedly, when persons are speaking on even terms, and a charge is made, and the

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1 Woon v The Queen (1964) 109 CLR 529 (‘Woon’) 541.
2 Parkes v The Queen [1976] 3 All ER 380.
person charged says nothing, and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he [sic] admits the charge to be true.³

This simple explanation of human behaviour is not accepted by Palmer. He refers to the need for a double inference, namely, guilty state of mind from guilty behaviour, and guilt from guilty state of mind, before an inference of guilt can be safely drawn. He argues that all forms of guilty behaviour are susceptible of innocent explanation, and the jury must therefore be informed of all possible explanations, and instructed that unless those explanations can be excluded, the behaviour cannot be used as the basis for an inference of guilt.⁴

Nowhere in the appellate court decisions is there any explanation as to why the courts permit adverse inferences from silence in the face of accusation, and yet prohibit adverse inferences from the silence of the accused at trial.

If evidence of silence in the face of accusation is admitted, it may have the consequence of ‘forcing the hand’ of the accused to give evidence at trial to explain the silence or conduct. The Victorian Court of Appeal has noted that: ‘[E]vidence of silence in the face of accusation is inconsistent with the normal rules of evidence, which prohibit hearsay.’⁵ Ordinarily, evidence of a person that the accused remained silent when accused would not be admitted because it is hearsay. However, this is changed by the special common law rule, that evidence of silence in the face of accusation, is admissible.

The assumption behind the admissibility is that a person will deny an accusation when confronted. As Ontiveros has pointed out, the assumption that by silence or conduct a person has manifested an adoption of or belief in the truth of the accusation makes no allowance for race, class, gender, and ethnicity: ‘Unfortunately, courts have not displayed

³ R v Mitchell (1892) 17 Cox CC 503, 508.
a very nuanced understanding of human behaviour, especially for disempowered and excluded people such as women and people of color.”

Silence in the face of accusation is in fact capable of alternative and equally plausible, explanations, which are illustrated in expressions such as ‘silence is golden,’ ‘silence is the most perfect expression of scorn,’ and ‘words divide and rend but silence is most noble till the end.’ Silence may also be the result of ignorance, misunderstanding, deference to authority, cultural response, and many factors other than consciousness of guilt. Nevertheless, the silence of the accused in the face of accusation is admissible in criminal trials. One example of admissible evidence of this type is the use of transcripts of pretext telephone calls where the complainant puts the details of the alleged offences to the accused. If the accused fails to deny the allegations put by the complainant, then the failure to deny is admissible as silence in the face of accusation.

The only qualification to admissibility of the silence of the accused in the face of accusation is that the accusation must be put clearly and fairly, and the accused must have had the opportunity to deny it. The trial judge retains a judicial discretion to exclude the evidence of the silence of the accused if its prejudicial effect outweighs its probative weight.

B. Conduct amounting to consciousness of guilt

At common law, evidence of the conduct of the accused amounting to consciousness of guilt is admissible, even if there has been no confrontation or accusation. This conduct includes: (a) utterance, silence or conduct of the accused, as demonstrated by the leading Victorian cases of *R v Thomas*, *R v Alexander*, and *R v Gallagher*; and (b) flight, bribery, forgery, resistance to arrest, tampering with evidence, concealment of a body,

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7 *Commonwealth v Dravecz*, (1967) 227 A 2nd 904 (US), 906-7, quoting and discussing various contradictory proverbs about silence.

and laying a false trail; (c) possession by the accused of recently stolen property; and (d) incriminating presence of the accused at the scene of a crime.

(a) The principle of admissibility of the ‘utterance, silence or conduct’ of the accused amounting to consciousness of guilt was explained by the Full Court of the Supreme Court of Victoria in *Thomas*:

The admissibility of evidence of consciousness of guilt is on the basis that the accused has done something in the way of utterance, silence or conduct which in the particular circumstances justifies an inference that he [sic] has acknowledged the truth of the statement so as to make it his own, or has so conducted himself as to show a consciousness of guilt.  

In *Gallagher*, the accused’s former de facto wife gave evidence of a telephone conversation with the accused. She threatened that if he did not cease contact with her and her children, she would inform the police that he had committed a robbery. He did not respond to that accusation, but ceased to have contact with her following the conversation. The accused gave evidence denying the conversation. Counsel for the Crown conceded at the appeal that the accused’s alleged silence in the face of the implicit accusation was not, in the circumstances, enough to constitute an admission; however, he submitted, it was admissible as evidence of the conduct of the accused in desisting from contact with the woman after her threat to him, which, combined with his failure to respond to the threat, showed consciousness of guilt. The Victorian Court of Appeal agreed that it was admissible on the latter basis.  

In *Alexander*, the accused was charged with the murder of his wife; in the following year, he told an acquaintance that the police could prove nothing because they had left it too late to conduct a forensic analysis of blood from injuries on his leg. He told another acquaintance that the police did not have anything and would not find anything. Both witnesses gave evidence that the accused at no time protested that he had been wrongly charged or that the allegation of murder levelled against him was without foundation. The

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Supreme Court of Victoria held that it was open to the jury to accept that the statements made by the accused to others showed that the accused was expressing confidence not only that the police had nothing, but that they would find nothing, a confidence which, it might be inferred, emanated from knowledge of the safe disposal of such a critically important item as the murder weapon.\(^\text{12}\) The court held that the statements by the accused were clearly admissible as a basis for an inference of guilty knowledge.\(^\text{13}\) It was open to the jury to accept that in the context of the whole of the relevant conversations, the failure of the applicant to proclaim his innocence amounted to conduct inconsistent with innocence.\(^\text{14}\)

The principle underlying the admissibility of this type of evidence was explained by the Full Court of the Supreme Court of Victoria in *R v Salahattin*:

> An allegation is not admissible in evidence against an accused person unless the circumstances are such as to leave it open to the jury to conclude that the accused having heard the statement and having had the opportunity of explaining or denying it, and the occasion being one upon which he [sic] might reasonably be expected to make some observation, explanation or denial, has by his silence, his conduct or demeanour or by the character of any observations or explanations he thought fit to make, substantially admitted the truth of the whole or some part of the allegation made in his presence,... or that he has so conducted himself as to show consciousness of guilt.\(^\text{15}\) (citations omitted).

McInerney and Murray JJ justified the principle in these terms:

> The justification of the doctrine of adoptive admission rests on human experience, on the probabilities of human reactions, in the circumstances prevailing at the time, to the making of an accusation, and these probabilities are capable of being assessed by the jury provided that their attention has been directed to the need to be satisfied that the accused was silent because he [sic] did not dispute but on the contrary accepted the truthfulness of the allegations made in his presence concerning him.\(^\text{16}\)

The Crown may also use lies told out of court by the accused to show consciousness of guilt. The lies must be precisely identified by the judge to the jury,\(^\text{17}\) and the jury must be satisfied that the accused told a deliberate untruth, that the lie was concerned with some

\(^{12}\) Ibid 250.

\(^{13}\) Ibid.

\(^{14}\) Ibid 263.

\(^{15}\) *R v Salahattin* [1983] 1 VR 521, 527.

\(^{16}\) Ibid 531.

circumstance connected with the offence, and that the accused knew that the truth of the matter would implicate the accused in the commission of the offence.\textsuperscript{18}

(b) Conduct amounting to consciousness of guilt:

(i) Flight, bribery, forgery, resistance to arrest, tampering with evidence, concealment of a body, and laying a false trail.

In addition to silence in the face of accusation and conduct during police interview, there are other forms of conduct which the Crown may use to establish consciousness of guilt. These are flight, bribery or attempted bribery of prosecution witnesses, fabrication or forgery of documents, resistance to arrest, concealing or tampering with evidence, concealment of a body, laying a false trail, false alibis, false denials, and telling lies generally concerning events relating to the alleged crime.\textsuperscript{19} The prosecution may lead evidence of these matters to invite the jury to infer consciousness of guilt on the part of the accused. However, the judge must direct the jury that before they can use this evidence as indicative of guilt, they must be satisfied beyond reasonable doubt that the conduct of the accused can only be explained in terms of his or her knowledge of guilt of the offence charged, and not any other explanation. They must consider any explanations for the conduct revealed in the evidence. The judge must direct the jury that people do not always act rationally and the conduct of the accused can often be explained in other ways, for example, as the result of panic, fear, or other reasons having nothing to do with the offence charged. The judge must also direct the jury that none of the examples of conduct amounting to consciousness of guilt, that is, flight, bribery, forgery, resistance to


\textsuperscript{19} R v Tadic; R v Gibb (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Crockett, Marks and Ormiston JJ, 31 August 1993) 32; R v Rice [1996] 2 VR 406 (lies by the accused in relation to the movements of himself and deceased, and the accused had hidden the body of the deceased); R v Perera [1982] VR 901 (disappearance of shotgun purchased by the accused four days before death of deceased).
arrest, tampering with evidence, concealment of a body, and laying a false trail, can of itself be used to prove guilt.\textsuperscript{20}

The Crown may lead evidence of these types of conduct to strengthen the Crown case, and this may put pressure on the accused to give evidence at trial, and to forgo the right to silence. As noted earlier, the use of this evidence invites the jury to make assumptions about human behaviour, and the appropriateness of conduct in a given situation.\textsuperscript{21} These same assumptions, however, are not permitted in the appellate court decisions on the right to silence. Although, as explained above, evidence of these types of conduct is subject to specific and extensive directions to the jury, the admissibility of the conduct nevertheless represents a significant qualification to an absolute right to silence, and begs the question: why is speech more in need of protection than conduct?

(ii) Possession by the accused of recently stolen property

At common law, an adverse inference may be drawn against an accused found in possession of recently stolen property, thus putting pressure on the accused to give evidence to explain the possession.

The classic formulation of the doctrine of recent possession is in the High Court decision of \textit{Bruce v The Queen}:  

\begin{quote}
Where an accused person is in possession of property which is recently stolen, the jury is entitled to infer as a matter of fact, in the absence of any reasonable explanation, guilty knowledge on the part of the accused. Such an inference will be drawn from the unexplained fact of possession of such property and not from any admission of guilt arising from the failure to proffer an explanation. It is the possession of recently stolen property in the absence of explanation or explanatory circumstances, which enables the inference to be drawn. Thus the absence of any reasonable explanation must not itself be explicable in a manner consistent with innocence.\textsuperscript{22}
\end{quote}

There are a number of caveats on the doctrine of recent possession. First, the accused must have had an opportunity to explain in circumstances where, if innocent, an

\begin{itemize}
\item \textsuperscript{21} \textit{Ontiveros}, above n 6.
\item \textsuperscript{22} \textit{Bruce v The Queen} (1989) 74 ALR 219 [1].
\end{itemize}
explanation might reasonably be expected.\textsuperscript{23} Secondly, if the accused has given an explanation which the jury accepts or thinks might be true, even though not convinced that it is true, the prosecution has not discharged its onus of satisfying the jury beyond reasonable doubt of the guilt of the accused. Thirdly, it is for the jury to decide whether the possession is ‘recent.’\textsuperscript{24}

The High Court has more recently sought to minimise the peculiarity of the doctrine of recent possession. In \textit{Gilson v The Queen}, it said that ‘the so-called doctrine of recent possession is no more than a particular and familiar example of the sufficiency of circumstantial evidence to establish to the required standard of proof elements of an offence.’\textsuperscript{25} However, the court did not take the opportunity to abolish the doctrine altogether, merely saying that the doctrine does not represent a reversal of the onus of proof (or the unravelling of the ‘golden thread’ enunciated in 1935 in \textit{Woolmington v Director of Public Prosecutions} and quoted so often since).\textsuperscript{26} Why the doctrine of recent possession remains, at the same time as the right to silence is made more absolute, is a puzzling inconsistency.

(c) Incriminating presence at the scene of a crime

It has long been settled at common law that it is permissible to draw inferences from the incriminating presence of the accused at the scene of a crime. The trial judge is obliged to direct the jury that they must consider innocent explanations for the presence of the accused. Nevertheless, the doctrine puts the accused under pressure to give or call evidence to explain the presence.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{23} Ibid.
\item \textsuperscript{25} \textit{Gilson v The Queen} (1991) 172 CLR 353 [6] (Brennan J).
\item \textsuperscript{26} \textit{Woolmington v Director of Public Prosecutions} [1935] AC 462, 481: ‘Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception.’
\item \textsuperscript{27} In the United Kingdom, the \textit{Criminal Justice and Public Order Act 1994} permits the jury to draw an adverse inference from the failure or refusal of the accused to account for objects, substances, or marks found on the accused, or in the possession of the accused when arrested: s 36, or for his presence at or near the scene of a crime: s 37.
\end{itemize}
In summary, the Crown may lead evidence of a wide range of conduct amounting to consciousness of guilt, in three broad categories, namely, inference from silence or conduct, being in possession of recently stolen property, and incriminating presence at the scene of a crime. The actions of the accused may thus speak louder than words. The admissibility of this evidence has the potential to force the hand of the accused to give evidence at trial in order to prevent an adverse inference. In this way, the right to silence at trial becomes more theoretical than real. A further category of inference from conduct comes from the case of *Woon*.28

C. The *Woon* principle

The High Court stated the principle in *Woon* as follows:

A question asked of a person accused or suspected of a crime, or a statement made in his [sic] presence, is admissible if he is invited to, or might reasonably be expected to, respond in some way indicative of denial or of acceptance. It is not that what is said to the accused can of itself be evidence against him. But his response or reaction may be; and that is why what is said to him is admitted. His words, silence or conduct may amount to an admission of the truth of what was said. This is subject to the qualification that no inference adverse to a man [sic] can be drawn from his refusal to answer questions which he has been expressly told he is not bound to answer or from his silence after he has been told he need not speak at all.29

The accused was charged with breaking, entering and stealing from a bank. The Crown case depended upon the police evidence of the accused’s answers to statements and questions put to him during two interrogations. The accused answered some questions put to him, but did not confess guilt or admit or adopt any statement put to him to the effect that he was a member of the group that had broken into the bank. The trial judge directed the jury that they must acquit the accused unless they were satisfied beyond reasonable doubt of the facts alleged against him, but left it to the jury to consider whether any of the answers the applicant elected to give persuaded them beyond reasonable doubt that he was conscious of guilt as a party to the crime. The High Court held that the selective and evasive answers of the accused in the record of interview were admissible to show an overall consciousness of guilt in the face of police allegations. It was not the silence of

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28 *Woon* (1964) 109 CLR 529.
29 Ibid 541.
the accused, rather it was the pattern and timing of his utterances, which created the inference of consciousness of guilt. The issue was whether the replies of the accused to police questions disclosed, albeit unwittingly, that he was conscious of having been a member of the group that had broken into the bank on the relevant occasion.

In his dissent in *Woon*, Windeyer J agreed that the responses of the accused were admissible, but issued a word of warning: ‘When there is no other evidence implicating the accused, an attitude of guilt, without more, may mean only that the accused was a participant in some wrongdoing, not that he committed the crime alleged, in the manner and form alleged.’

Generally speaking, the *Woon* principle states that if the answers of the accused during a police interview imply consciousness of guilt, then they are admitted into evidence, and it is for the jury to determine their probative weight. However, there are qualifications on admissibility:

> There must be something in the surrounding circumstances which could reasonably be thought to compel a denial, and where the accused gives an answer which is ambiguous, neutral, equivocal, or otherwise not plainly inconsistent with a consciousness of innocence, it ought not to be left to the jury for their consideration but should be excluded by the trial judge in the exercise of judicial discretion.

Thus, for example, in *R v Astill*, the trial judge had allowed evidence of the accused’s shrug during his police interview, because of its capacity to be understood as a response to police questions, rather than as a refusal to respond. The English Court of Criminal Appeal held that the trial judge had erred in not pointing out to the jury that there were alternative interpretations of the shrug. The court also held that the trial judge should have exercised his judicial discretion to exclude the evidence of the shrug because it was a matter of speculation as to what the shrug was intended to convey, and accordingly its prejudicial effect outweighed its probative weight.

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30 Ibid 542.
32 *R v Williams* [1987] 2 Qd R 777, 780.
The Woon principle was further discussed by the High Court in 1991 in *Petty v The Queen; Maiden v The Queen*.\(^{34}\) Dawson J referred to the joint judgment of Kitto and Windewyer JJ in *Woon*, and distinguished an admission of guilt inferred from the behaviour of the accused (as in *Woon*), and previous silence which was not maintained at trial (as in *Petty and Maiden*). Dawson J said: ‘In my view if a person remains silent intending to exercise his right to do so, his silence cannot amount to an admission of any kind or display a consciousness of guilt, whether or not a caution has previously been given.’\(^{35}\) Gaudron J also sought to distinguish *Woon*, describing the latter as ‘an inference of consciousness of guilt drawn from conduct or demeanour (including silence) when taken in combination with other evidence.’\(^{36}\)

The New South Wales Parliament sought to clarify the scope of the *Woon* principle by introducing s 89 into the *Evidence Act 1995* (NSW). This section, and a similar provision in the *Evidence Act 2001* (Tas), restricts the admissibility of evidence of the silence of the accused in the course of ‘official questioning.’\(^{37}\) It provides that an ‘unfavourable inference must not be drawn from failure or refusal to answer one or more questions in the course of official questioning.’\(^{38}\) The words in s 89 ‘failure or refusal to answer questions in the course of official questioning’ are not easy to interpret. For example, does it require total silence? What if the accused says, ‘I am not going to say anything until I have spoken to my lawyer?’ Is this a ‘failure or refusal to answer’ or is the accused claiming a right to silence? In 1996 in *Yisrael v District Court of New South Wales*, it was argued that a ‘no comment’ response by the accused was not exercising a right to silence.\(^{39}\) The court rejected the argument, but did not take the opportunity more generally to clarify the section, and it continues to be problematic.

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\(^{34}\) *Petty v The Queen; Maiden v The Queen* (1991) 173 CLR 95.

\(^{35}\) Ibid 122.

\(^{36}\) Ibid 126.

\(^{37}\) *Evidence Act 1995* (NSW) s 89. ‘Official questioning’ is defined in the Act to mean questioning by an investigating official in connection with the investigation of the commission, or possible commission, of an offence; *Evidence Act 2001* (Tas) s 89.

\(^{38}\) ‘Unfavourable inference’ is defined to include inferences of consciousness of guilt and inferences relevant to credibility.

\(^{39}\) *Yisrael v District Court of New South Wales* (1996) 87 A Crim R 63.
In *R v Boros*, the Victorian Court of Appeal held that ‘no comment’ answers are ‘usually admissible as reflecting on the reliability of what otherwise is contained in the record of interview.’ The court left to another day the submission of counsel for the applicant that *Woon* should not be followed or should be restricted to the very special circumstances there revealed.

Dennis argues that the combination of ss 20 and 89 of the *Evidence Act 1995* (NSW), and the High Court decision in *Weissensteiner v The Queen*, leads to a situation where silence can be used at trial to weaken a defence, but not as evidence of guilt or a consciousness of guilt. He points out that this is the very distinction rejected by the High Court in *Petty and Maiden*. Dennis’ comments were made before *RPS v The Queen* and *Azzopardi*, which, as shown in Chapter Two, have severely limited the inferences open to the jury from the silence of the accused at trial. Nevertheless, his comments remain relevant because the *Woon* principle has remained good law since 1964; it has not been criticised by the High Court, and it continues to sit (incongruously) side-by-side with the High Court right to silence decisions.

Anderson and Hunter argue that the relationship between the *Evidence Act 1995* (NSW) and *Woon* requires re-consideration. The current law means that the prosecution cannot rely on a suspect’s failure or refusal to answer one or more questions or to respond to a representation as evidence of consciousness of guilt. However, if the prosecution seeks to rely on other aspects of the suspect’s conduct as evidence of consciousness of guilt, then

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40 *R v Boros* [2002] VSCA 181 (Unreported, Supreme Court of Victoria Court of Appeal, Ormiston, Vincent and Eames JJA, 21 October 2002) [19].
41 Ibid [19]. In *R v Towers* [1993] NSWCCA (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Hunt CJ, Handley JA, and Badgery-Parker J, 7 June 1993), the court approved a line of Victorian cases which had distinguished *Woon*, commenting that ‘If the jury are not entitled to draw adverse inferences from an exercise of the right to silence the position should be no different when the right has been exercised selectively,’12 (Handley JA). The court referred to Windeyer J in *Woon* at 542, where he had pointed out that there may be many reasons why an accused person answers some questions and not others.
44 *Petty v The Queen; Maiden v The Queen* (1991) 173 CLR 95.
it is outside the Act, and admissible under *Woon*. The need for reform goes further than this problem described by Anderson and Hunter: the *Woon* principle generally, and how it operates in conjunction with the key right to silence decisions of the High Court, needs to be considered, in order to clarify the many inconsistencies and contradictions which have emerged. For the reasons which have been advanced, it is not possible to reconcile *Petty and Maiden* on pre-trial silence; *Woon* on conduct amounting to consciousness of guilt; *Weissensteiner, RPS* and *Azzopardi* on the common law right to silence at trial; and ss 20 and 89 of the *Evidence Act 1995* (NSW). They each have their own rules (some of which are unclear) and the appellate courts have not attempted to clarify the overall picture.

One attempt at clarification was made by the High Court in 2000 in *Zoneff v The Queen*.47 The specific problem before the court was the one identified by Windeyer J in his dissent in *Woon*, namely, that the conduct may prove no more than some connection with wrongdoing short of demonstration of guilt of the crime alleged, in the manner and form alleged.48 The High Court agreed with the Supreme Court of Canada in *R v White*, where the Canadian Court said, ‘Consciousness of guilt evidence is a label which is somewhat misleading and its use should be discouraged.’49 The Canadian court instead proposed ‘a more general description using more neutral language, such as “evidence of post-offence conduct” or “evidence of after-the-fact conduct.”’50 *White* was also cited by the Victorian Court of Appeal in *R v Burrows*, where the court stressed the need for careful directions to the jury because ‘consciousness of guilt is highly ambiguous and susceptible to jury error.’51 The trial judge had referred to ‘realisation of guilt’ and ‘consciousness of murder,’ to be inferred from the accused’s flight from the scene of the crime, and his disposal of the gun after the event.

The High Court relied on a distinction between the significance of the conduct on the one hand, and the psychological sources of behaviour on the other, and said that this

50 Ibid.
distinction overcomes the criticism that the legal principles concerning consciousness of
guilt undermine the presumption of innocence.\textsuperscript{52} The Canadian decision, rather than the
decision in \textit{Zoneff}, provides some clarity; the latter merely adds a further fine distinction.
Discussing \textit{White}, Ferguson argues that the law in Australia should be that ‘evidence of
the accused’s silence is not to be considered post-offence conduct and cannot normally be
used as a basis upon which to infer guilt.’\textsuperscript{53} However, this is not the law in Australia.

In summary, the High Court seems unwilling to confront the apparent inconsistencies
between its right to silence decisions and its consciousness of guilt decisions. It has not
addressed the question why an inference of consciousness of guilt may be drawn from
silence in the face of accusation, yet an inference of guilt may not be drawn from silence
at trial. The attempt to resolve the issue by introducing s 89 into the \textit{Evidence Act 1995}
(NSW) has not been successful, and indeed the legislative provisions have raised more
problems than they have solved.

2. \textbf{Scientific proof and the right to silence}

Over the past few decades, all States have introduced legislation to support a whole range
of methods of scientific proof which allow the Crown to more easily prove the guilt of
the accused. These methods of scientific proof may indeed go so far as to reduce the right
to silence to an irrelevance, by circumventing it altogether.

Scientific proof qualifications to the right to silence include DNA results; fingerprints,
handwriting, photographs and other identifiers; medical, dental, blood and breath tests;
detection and listening devices; voice comparisons and voice identification; and, covert
audio-recorded admissions.

\textsuperscript{52} \textit{Zoneff} \textit{v The Queen} (2000) 200 CLR 234 [63].
\textsuperscript{53} Gerry Ferguson, ‘Recent Developments in Canadian Criminal Law: Is Silence “Post-offence
These forms of proof concentrate on ‘scientific’ evidence, rather than the direct oral testimony of the accused. They have largely gone unnoticed in the discussion on the right to silence, with very few exceptions. One was in 2001, in the Privy Council, when Lord Bingham said: ‘It is not easy to see why a requirement to answer a question is objectionable and a requirement to undergo a breath test is not. Yet no criticism is made of the requirement that the respondent undergo a breath test.’\textsuperscript{54} This incongruity has not been raised in subsequent judgments.

The various methods of scientific proof have not been specifically recognised as qualifications to the right to silence. Nevertheless, that is how they operate in the courtroom. The increasing use of scientific proof follows an international trend. In the United States, for some decades, courts have recognised that the privilege against self-incrimination is not applicable to non-testimonial evidence, such as fingerprints, blood samples, breath samples, appearances in line-ups, and handwriting and voice exemplars.\textsuperscript{55} There is no rule of law that persons cannot be made to incriminate themselves by giving their fingerprints.\textsuperscript{56}

As Dennis points out, no legal system ‘could possibly entertain the notion that the defendant can never supply evidence of his or her own guilt: body searches, samples, fingerprints and confessions are examples of such evidence.’\textsuperscript{57} He points out that to argue that the presumption of innocence is inevitable, fundamental, and non-negotiable ignores the numerous legislative inroads which have already been made. Inroads in the United Kingdom were documented in 1996 by Ashworth and Blake, who examined a large number of statutes and found a significant number of examples of reverse onus of proof, strict liability, deeming provisions, inferences, and presumptions.\textsuperscript{58}

\textsuperscript{54} Brown v Stott [2001] 2 All ER 97, 116.
\textsuperscript{55} See, eg, the long list of cases cited in People v Collie 458 US (1981), 465.
\textsuperscript{56} R v Carr [1972] 1 NSWLR 608.
\textsuperscript{57} Ian Dennis, ‘Reconstructing the Law of Criminal Evidence’ (1989) 42 Current Legal Problems 21, 41.
\textsuperscript{58} Andrew Ashworth and Meredith Blake, ‘The Presumption of Innocence in English Common Law’ [1996] Criminal Law Review 306. The research found that there were 219 examples, among 540 triable offences in the Crown Court which involved legal burdens or presumptions operating against the accused.
The use of scientific proof has lessened the dominance of oral testimony, historically seen as a cornerstone of United Kingdom (and Australian) criminal trials. Damaska refers to ‘the creeping scientization of factual inquiry.’\textsuperscript{59} He notes that ‘common sense and conventional means of proof … compete with scientific data in establishing the factual predicate for the court’s decision.’\textsuperscript{60} Damaska recognises that it is likely that, with society becoming more and more reliant on technology, courts will be forced to give scientific proof more weight. This can work against the accuser as well as the accused. As Du Mont and Parnis illustrate, scientific evidence in the form of medicolegal reports may impact on the complainant’s oral testimony at trial, to the point that ‘[t]he official version of her story may not only appear unrecognisable to her; it may challenge her veracity.’\textsuperscript{61} An example is the lack of physical injury in a rape case involving the issue of consent, or the refusal of the complainant to submit to a sexual assault kit examination.\textsuperscript{62}

It may be the case that scientific evidence is given more weight than the oral testimony of people. Gieryn argues that: ‘If science says so, we are more often than not inclined to believe it or act on it – and to prefer it over claims lacking its epistemic seal of approval.’\textsuperscript{63}

The various forms of scientific proof include:

- A. DNA results.
- B. Fingerprints, handwriting, photographs and other identifiers.
- C. Medical, dental, blood and breath tests.
- D. Detection and listening devices.
- E. Voice comparisons and voice identification.
- F. Covert audio-recorded admissions.

Each of these is now discussed in turn.

\textsuperscript{60} Ibid 144.
\textsuperscript{61} Janice Du Mont and Deborah Parnis, ‘Constructing Bodily Evidence Through Sexual Assault Evidence Kits’ (2001) 10 (1) \textit{Griffith Law Review} 63, 73.
\textsuperscript{62} Ibid 64.
A. DNA results

Legislation in all States allows a court to order a compulsory sample to be taken from a person charged with or convicted of an indictable offence, for analysis for DNA.\(^64\) The test results from the sample are then placed in a DNA data bank, and can be accessed at any time and used in future trials.\(^65\) Refusal to provide a sample may be admissible against the accused: in a 1991 case in Victoria, the jury was permitted to take into account the accused’s refusal to provide a sample of blood for DNA testing.\(^66\)

DNA technology is now commonly used in the courts in a variety of ways. Two frequent uses of the technology are: to prove the presence of the accused at the scene of a crime, and to prove the existence of the accused’s semen or blood on the body or property of the accuser. The only limitation imposed on the admissibility of DNA test results is that the jury must be directed that where DNA is an indispensable link in the chain of proof, the jurors should not act on the DNA results unless satisfied of their reliability beyond reasonable doubt. In the situation in a rape prosecution where the Crown relies on DNA from a semen sample, there is the possibility that the semen may be from the accused, but that does not of itself prove guilt because sexual intercourse may have taken place with consent. In that situation, the accused may be put under pressure to give evidence of consent, or an honest and reasonable belief as to consent, and thus waive the right to silence. It could also be argued that this pressure amounts to a reversal of the onus of proof.

As with all expert evidence, including evidence on scientific matters, the trial judge must warn the jury that they should not blindly accept scientific results without scrutiny, and that findings of fact are matters for them.\(^67\) Notwithstanding these directions, it is

\(^{64}\) Eg, Police Powers and Responsibilities Act 2000 (Qld) ss 309, 310.
\(^{65}\) The use of test results is governed by legislation, which varies between States. One such example is Police Powers and Responsibilities Act 2000 (Qld), ss 315-6.
\(^{66}\) Walsh v Loughnan [1991] 2 VR 351.
possible that jurors are greatly influenced by DNA results and the mathematical (im)probabilities that accompany them, and may not pay sufficient heed to the warnings.

B.  Fingerprint, handwriting, photographs and other identifiers

Legislation in most States provides that a person in lawful custody may be compelled to provide fingerprints, photographs, palm prints, footprints, handprints, toe prints, eye prints, and voiceprints. The jury may be invited to identify the accused as the perpetrator of the alleged crime because of scientific evidence, such as fingerprints, footprints, or shoe marks found at the scene of the alleged crime. The jury must be given a direction similar to the one for DNA results, explained above, that is, the judge must also warn the jury of the possibility of an innocent explanation for the presence of the fingerprints or other identifiers, and must go through the evidence which may point to this.

Police officers may gather evidence of the identity of suspects by means of identification parades, photo boards, videotapes, and computer-generated images. In Pitkin v The Queen, the High Court held that ‘evidence of identification should be subjected to careful scrutiny before it is accepted as evidence of positive identification; however, the use of photographs of suspects to identify an offender is a necessary and justifiable step in the course of efficient criminal investigation.’ The use of identification by these means represents a form of scientific proof which is unrelated to oral testimony, and thus has significant potential to erode the right to silence.

Evidence from handwriting experts has traditionally been used as a method of identifying the accused as the perpetrator of the alleged crime. In 2001, the New South Wales Court of Appeal held that a handwriting sample may be obtained from a suspect without

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68 See, eg, Corrective Services Act 2000 (Qld) s 10; Police Powers and Responsibilities Act 2000 (Qld) s 270; Crimes Act 1900 (NSW) ss 353AC, 353AD, 353AE; Crimes Act 1914 (Cth) s 3ZJ.
69 See text at page 18 above.
70 See, eg, Police Powers and Responsibilities Act 2000 (Qld) s 275.
administering a caution, and a claim of privilege against self-incrimination was not available. The court held that it is not necessary for the accused to be informed of the purpose for which the handwriting was sought to be provided, or its possible use. The court rejected the argument that using the handwriting samples was analogous to using evidence improperly obtained. The court held that handwriting samples provide particulars of identification and drew an analogy with fingerprints, photographs, palm prints, blood, hair and semen samples and other particulars obtained for the identification of a person in custody. There is no rule of law that persons cannot be made to incriminate themselves by means of their handwriting.

Although trial judges retain a general discretion at common law to exclude evidence if its prejudicial effect outweighs its probative value, or if there are reasons making it unfair to admit the evidence, handwriting evidence is usually admitted, and may prove the offence without any need to rely on oral evidence from the accused.

Images from security cameras also provide a means of identifying the accused as the perpetrator of a crime, without the need for oral testimony to identify the person.

C. Medical, dental, blood and breath tests

Legislation in all States provides for mandatory breath testing, and the certificates generated from the tests results are deemed to be conclusive proof of the results contained in them. At common law, a superior court has inherent jurisdiction to direct a reasonable medical test, and fact-finders may draw an adverse inference from non-compliance. The power does not include a power to direct a person to provide bodily samples for testing, and in the absence of statutory authority, the power is to be used

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74 R v Knight [2001] 160 FLR 465, [78]-[81].
75 See, eg, Transport Operations (Road Use Management) Act 1995 (Qld) s 80.
‘very sparingly.’77 Legislation in most States provides that a court may order medical or
dental procedures to be performed on a person in custody, with or without consent, and to
take samples of blood, saliva, hair, and urine.78

These legislative provisions allow the Crown to obtain evidence to prove its case, and put
pressure on the accused to give or call evidence to explain away the presumptive proof
and to avoid adverse inferences being drawn, and thus forego the right to silence at trial.

D. Detection and listening devices

Legislation in all States provides for photographic and radar speed detection devices, and
allows the certificates so generated to be tendered in evidence as truth of the matters
contained in them.79

State legislation also permits the admissibility of transcripts of conversations resulting
from the use of listening devices or surveillance devices obtained by virtue of warrants.80
The trial judge may exercise the usual discretion at common law to exclude the
transcripts (or parts of them) on the grounds of unfairness, or to exclude them pursuant to
legislative provisions concerning improperly obtained evidence.81

Material obtained pursuant to these legislative provisions may be used in the Crown case,
thus putting pressure on the accused to give or call evidence to explain them, and thus
forego the right to silence,

E. Voice comparisons and voice identification

78 See, eg, Police Powers and Responsibilities Act 2000 (Qld) ss 289, 292, 293. In a 1985 case in the
United Kingdom, the jury considered the accused’s refusal to provide a sample of hair for comparison:
R v Smith (1985) 81 Cr App R 286.
79 See, eg, Transport Operations (Road Use Management) Act 1995 (Qld) s 124.
80 See, eg, Police Powers and Responsibilities Act 2000 (Qld) ss 132-147; Listening Devices Act 1984
(NSW) s 16; Telecommunications (Interception) Act 1979 (Cth).
The Crown may lead evidence of voice comparisons and voice identification. A voice comparison may involve the jury comparing the voice on tapes of intercepted telephone calls with the voice of the accused from other sources, such as a confiscated mobile phone. The jury must be satisfied that the quality and quantity of the material is sufficient to enable a useful comparison to be made. Evidence is also admissible of a voice identification, where the witness identifies the voice as belonging to the accused, but the trial judge must warn the jury of the dangers of such identification evidence, and the necessity for the witness to have familiarity with the voice or the distinctiveness of the voice.

The admissibility of this evidence means that the Crown can obtain statements from the accused from sources other than oral testimony at trial. This has the effect of diluting the importance of the right to silence.

F. Covert audio-recorded admissions

Where an admission has been obtained from a suspect in a tape recording made covertly, there may be a perception that the suspect has been deceived, or coerced into giving up the right to silence. The leading case on this point is R v Swaffield; Pavic v The Queen. The High Court held that it would be unfair to Swaffield to admit evidence obtained by means of an undercover police officer covertly recording his admissions because Swaffield had made it clear that he intended to exercise his right to silence, and the police had failed to give him an adequate caution. In contrast, the High Court held that it would not be unfair to his co-accused, Pavic, to admit the evidence obtained from a covert taping by a friend who acted on police instructions, because Pavic had spoken freely. Brennan CJ justified the ruling in Swaffield on the basis that a serious crime had been committed, and the means adopted for its solution and for the securing of evidence

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84 Bulejcik v The Queen (1996) 185 CLR 375.
85 R v Swaffield; Pavic v The Queen (1998) 192 CLR 159.
against the prime suspect were quite legitimate.\textsuperscript{86} This type of justification has not been raised in the appellate court decisions on the right to silence at trial. Indeed, it seems contrary to those decisions. Nevertheless, Swaffield has not been overturned and remains good law, notwithstanding its apparent inconsistency with the right to silence decisions.

Judges can use their general discretion under legislation and at common law to exclude improperly or illegally obtained evidence.\textsuperscript{87} However, it is by no means certain that they will do so. For example, in \textit{R v Suckling} in 1999, the Court of Appeal of New South Wales upheld the admissibility of covertly recorded admissions.\textsuperscript{88} A friend of the accused had instigated contact with police, and facilitated the tape-recording of admissions by the accused. The court held that there was no unfairness, unreliability or breach of the principles governing the interrogation of suspects, and the police had acted lawfully and properly. A similar result was reached by the same court in 2000 in \textit{R v Walker}, where admissions of the accused on a tape-recording made by a fellow prisoner were held to be admissible.\textsuperscript{89}

In summary, the scientific proof mechanisms which have been discussed are significant, and they represent a substantial source of proof which does not rely on oral testimony at trial. They involve using statements by the accused made without knowledge or consent, or even evidence obtained illegally. Given this, the importance of the accused’s right to silence at trial is diluted. In some cases these mechanisms result in pressure on the accused to give evidence to rebut inferences from scientific material.

3. Miscellaneous other measures which qualify the right to silence

A. ‘Real’ (physical) evidence

\textsuperscript{86} Ibid 185-6.
\textsuperscript{87} See, eg, \textit{Evidence Act 1995 (NSW)} s 38. It must be noted that the defence bears the evidential onus of proving illegality.
\textsuperscript{88} \textit{R v Suckling} [1997] NSWCCA 36 (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, McInerney, Ireland and Adams JJ, 12 March 1999).
\textsuperscript{89} \textit{R v Walker} [2000] NSWCCA 130 (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Spigelman CJ, Ireland and Simpson JJ, 23 March 2000).
In *R v Clout*, the Crown case relied on the identification of the semi-trailer described by witnesses as that of the appellant, and the central link connecting the accused to the crime of culpable driving causing death. The appellate court held that the evidence was admissible, but called for a strong direction to the jury warning them of the need for particular care with identification evidence not supported by other evidence. The same principle may apply to tyre marks, damaged vehicles, and other examples of physical evidence which are frequently admitted in the Crown case: admission of this type of evidence puts pressure on the accused to give or call evidence to explain it, foregiving the right to silence.

B. Surveillance warrants and covert searches

Legislation in most States provides for warrants to be issued to authorise a nominated person to enter and search any place, by force if necessary, to locate, photograph, and seize property. On reasonable suspicion of the commission of an indictable offence, police officers above a certain rank may obtain a surveillance warrant. Any evidence thus obtained is admissible in trials. Legislation allows senior police officers to apply to courts for warrants for covert searches, and gives them the power to enter, search, photograph, seize and inspect places reasonably suspected of involving organised crime.

Property seized as a result of surveillance warrants and covert searches is admissible in trials to prove the Crown case, thus putting pressure on the accused to forego the right to silence, and to call or give evidence to explain the possession of the property.

C. Reverse onus provisions, presumptions and statutory averments

There are many legislative provisions which facilitate proof for the prosecution, and wholly or partly reverse the onus of proof; some refer to persuasive burdens, some to

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91 See eg, *Police Powers and Responsibilities Act 2000* (Qld) s 74.
evidentiary burdens. These include statutory averments that amount to evidence, specific reversal of onus of proof, statutory presumptions, certificates that serve as evidence, and mandatory judicial notice.92 A 1982 Senate Standing Committee report identified 96 Commonwealth Acts which shifted the persuasive burden to the accused, and 47 Commonwealth Acts which included averment provisions.93 In its Discussion Paper in 2005, the Legislation Review Committee of New South Wales identified 14 Bills between September 2003 and June 2005 that directly raised concerns associated with the right to silence.94 Clearly, the legislatures of the Commonwealth and New South Wales continue to shift the burden of proof in criminal trials. It is likely that other legislatures have done the same, although the extent to which this has occurred has not yet emerged from research.

Commonwealth criminal offences are governed by the Crimes Act 1914 (Cth), which provides that averments by the prosecution are prima facie evidence of the matters averred.95 These averments cast only an evidential burden on the accused.96 Even if the burden is only evidential, and not persuasive, the distinction is not easy for a jury to grasp; it is possible that jurors will blur the distinction, and the accused may be prejudiced as a result.

An averment may be conclusive evidence in the absence of rebuttal, or it may be prima facie evidence. Statutory averments may relate to essential, not merely technical, parts of the offence, and may not be limited to proof of mundane facts. They may enable the prosecution to prove a matter otherwise difficult to prove, or prove something which is otherwise really a matter of opinion. In 1993, the High Court hinted that negative averments have always existed at common law on the basis that the defence should be

92 Numerous examples can be found in Commonwealth and State legislation. One example is the Criminal Procedure Act 1986 (NSW) s 109, which provides that a certificate of a medical examination stating the conclusions arrived at is admissible as evidence of the matters stated in it.
95 Crimes Act 1914 (Cth) s 30R.
96 R v Hush; Ex parte Devanny (1932) 48 CLR 487.
expected to prove facts which are better known to it than to anyone else. However, this may no longer be good law in view of recent decisions, particularly Dyers v The Queen, in which the High Court stressed that the accused cannot be expected to give or call evidence.

In Gough v Braden, the Court of Appeal of Queensland interpreted the reverse onus provisions of the Drugs Misuse Act 1986 (Qld). This legislation provided that once there was a reasonable suspicion attaching to the property, the onus was on the accused to satisfy a magistrate on the balance of probabilities how the accused had lawful possession of the property. The police had obtained a search warrant and found plastic bags with drugs and money inside them. In the Court of Appeal, Byrne J commented that: ‘Statutes with these characteristics are conspicuous intrusions into liberties protected at common law; but they retain a continuing appeal to legislatures.’ That ‘appeal’ continues in the United Kingdom where reverse onus provisions in legislation are increasing. Indeed, reverse onus provisions are being upheld in the English appellate courts notwithstanding the existence of the Human Rights Act 1998 (UK) which incorporated the European Convention on Human Rights jurisprudence on the need for a fair trial under Article 6 into the law of the United Kingdom. These decisions have found that the right to silence is not absolute, and a fair trial does not preclude reverse onus provisions.

In most Australian States, legislation provides for irrebuttable and rebuttable statutory presumptions; for example, in most States there is a rebuttable presumption of law that

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99 Gough v Braden [1993] 1 Qd R 100.
100 Ibid 109.
every person is of sound mind at any time that comes into question until the contrary is proved. The accused bears the onus of rebutting the presumption.

In summary, the miscellaneous measures which qualify the right to silence discussed in this section have the effect of providing evidentiary means of proving the Crown case in a way which puts pressure on the accused to forego the right to silence at trial, in order to offer an explanation to avoid an adverse inference. In the case of ‘real’ evidence, surveillance warrants and searches, the pressure is covert. In the case of reverse onus provisions and statutory averments and presumptions, the pressure is overt: the accused cannot discharge the onus of proof and also remain silent.

The right to silence at trial focuses exclusively on the oral testimony of the accused. Meanwhile, the Crown can rely on evidence obtained without knowledge or consent, of hair, voice, fingerprint, palm print, saliva, blood, dental sample, breath, handwriting, property at the accused’s house, video footage, photographs, DNA, and telephone interception tapes. The appellate courts have not addressed this incongruity.

4. Defence Disclosure

A. Introduction and history

As well as the common law doctrines, evidentiary rules, scientific proof mechanisms, and legislation aiding the Crown case which have already been discussed in this chapter, there is another way the right of an accused to remain silent is qualified, and that is by voluntary and compulsory defence disclosure. Compulsory defence disclosure significantly qualifies the right to silence at trial.

At common law, the accused does not have any obligation to disclose any aspect of the defence case. Historically, the accused has not been required to assist the prosecution, and indeed can deliberately withhold information or documentation favourable to the

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103 See, eg, Criminal Code 1899 (Qld) s 26.
prosecution. In practice, voluntary defence disclosure is widespread. It is common for
defence counsel to provide disclosure indirectly, by formal admissions and agreement on
the live issues for trial. They will do this if they believe such disclosure of the defence
case (or part of it) may benefit the accused, for example, by leading to a *nolle prosequi*,
or the amendment of the indictment to allege less serious offences, or by giving a
favourable impression to the jury. However, legislation providing for compulsory defence
disclosure is a different matter. Until recent legislation, the accused had only limited
statutory obligations of disclosure. Disclosure was required of alibi, expert evidence, substantial impairment by abnormality of mind, and evidence of tendency or
coincidence or first-hand hearsay evidence. Recent legislation in a number of States
has significantly widened defence obligations of disclosure, following a number of
comprehensive reports from the Law Council of Australia, the Standing Committee of

In 1998, the Law Council of Australia was the first body to make recommendations
concerning defence disclosure. It recommended ‘some degree of pre-trial defence
disclosure, whether in the form of answers to questions, responses to notices to admit,
disclosure of any defence to the accusation, or disclosure of defence evidence to be
adduced at trial.’ The phrase ‘answers to questions’ in the Law Council report is very
wide, and seems to directly qualify the right to silence of the accused. The Law Council
recommended that defence disclosure be voluntary, not compulsory because:

An important component of the accusatorial process is the accused person’s right to
silence. If the state must prove guilt without the assistance of the accused, the accused
should not be compelled to answer questions, make admissions, disclose a defence or
disclose evidence. Equally, the accused should not be penalised for exercising the right.

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104 *Criminal Code Act 1983* (NT) s 331; *Criminal Code 1924* (Tas) s 368A; *Criminal Law Consolidation Act 1935* (SA) s 285C; *Criminal Code 1899* (Qld) s 590A; *Crimes Act 1958* (Vic) ss 399A and 399B; *Criminal Code Act 1913* (WA) s 636A; *Criminal Procedure Act 1986* (NSW) s 48.
105 See, eg, *Criminal Code 1899* (Qld) s 590B.
106 See, eg, *Crimes Act 1900* (NSW) s 23A; *Criminal Procedure Act 1986* (NSW) s 49.
107 *Evidence Act 1995* (NSW) ss 67, 97, 98.
110 Ibid [17].
Consequently: (a) the defence should not be precluded from relying on a defence or evidence which was not disclosed pre-trial and; (b) adverse inferences should never be drawn from the exercise of the right.\footnote{111}{Ibid [18].}

Instead of compulsory disclosure, the Law Council preferred instead to focus on incentives such as ‘where the accused is found not guilty, taking into account defence disclosure in consideration of costs awards’ and ‘where the accused is found guilty, taking into account defence disclosure in sentencing proceedings as a mitigating circumstance.’\footnote{112}{Ibid [19].}

The report by the Standing Committee of Attorneys-General was delivered in 1999, with input from judges and practitioners.\footnote{113}{The working group was made up of senior criminal law practitioners and judges: Martin J (SA), (Chair), Wood J (NSW), the Commonwealth Director of Public Prosecutions, the Director, Legal Aid (NT), the Managing Director Legal Aid (Vic), Hammond DCJ (WA), a Victorian Queens Counsel, and a NSW Senior Counsel.}

It recommended that the accused should be required on an ongoing basis to disclose whether he or she intends to rely on the defences of self-defence, substantial impairment of mental responsibility, automatism, claim of right, duress or intoxication. Notices would be required as to whether the defence required prosecution witnesses to be called regarding surveillance evidence, continuity of exhibits, accuracy of listening device transcripts, and admissibility or accuracy of charts, diagrams and schedules.\footnote{114}{These notices were incorporated into the \textit{Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001} (NSW), but that Act was subsequently repealed.}

The recommendations were discussed during a deliberative forum in 2000, with members nominated by the Attorneys-General of the Commonwealth, State and Territory Governments. The forum broadly adopted the recommendations; however, it issued a contrary recommendation concerning sanctions for breaches of disclosure obligations, preferring (like the Law Council in its report) to rely instead on encouragement and incentives. For reasons it did not disclose, it recommended that notification should not apply to self-defence, claim of right, duress, or intoxication. It also recommended restricting defence disclosure of expert evidence to circumstances where the defence proposes to call that evidence at trial. The members of
the forum disagreed about whether a judge may comment on any failure of the defence to respond to the Crown opening.\textsuperscript{115}

New South Wales initially adopted the recommendations for complex criminal trials, but the legislation was subsequently repealed.\textsuperscript{116} Other jurisdictions are still to decide whether to implement the recommendations; this is somewhat surprising, given the passage of time since the recommendations were finalised, and also the fact that the membership of the committee was broad and represented all jurisdictions.

In its report in 2000 on the right to silence, the New South Wales Law Reform Commission discussed the arguments for and against compulsory prosecution and defence pre-trial disclosure in some detail, and noted that:

\begin{quote}
The mere fact that a particular defence might reasonably be anticipated [by the Crown] does not mean that the defendant should not be required to make the disclosures which we recommend, including, where appropriate, a defence which might well be foreseeable, so that the prosecution can focus on the factual issues that will actually be in dispute.\textsuperscript{117}
\end{quote}

The Commission’s recommendations on extensive compulsory defence disclosure were incorporated into the \textit{Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001} (NSW), which was subsequently repealed.

B. Defence disclosure in Victoria

Since 1998, Supreme Court trials in Victoria must comply with a Practice Direction which provides that a pre-trial hearing, known as a ‘Pegasus Two Hearing,’ must be held before the commencement of every criminal trial.\textsuperscript{118} The parties must exchange an agreed list of prosecution witnesses, a chronology of agreed facts, a list of issues to be resolved prior to the empanelment of the jury, and an agreed statement of the legal elements of the charges and issues. The defence is also required to provide a statement of its admissions.

\begin{footnotes}
\item [115] Standing Committee of Attorneys-General ‘Deliberative Forum on Criminal Trial Reform’ Report (2000): Weinberg and Ipp JJ pointed to the likelihood of appeals: 74; Davies J opined that adverse comment for failure to explain a defence should be allowed: 74.
\item [116] \textit{Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001} (NSW).
\item [117] New South Wales Law Reform Commission, above n 108, [3.103].
\item [118] Supreme Court of Victoria, Criminal List Practice Direction, 3 August 1998.
\end{footnotes}
In Victoria, defence disclosure was widened considerably with the *Crimes (Criminal Trials) Act 1999* (Vic). Under that Act, the defence response to the Crown case must ‘identify the acts, facts, matters and circumstances with which issue is taken, and the basis on which issue is taken.’ The defence response must indicate what evidence in the prosecution notice of pre-trial admissions is agreed to be admitted as evidence without further proof, what is in issue, and the basis on which issue is taken. The accused is not required to state the identity of any defence witness other than an expert witness, nor whether the accused will give evidence, but is required to disclose questions of law.

The parliamentary debate in 1997 on the *Crimes (Criminal Trials) Act 1999* resulted in a wide range of views about compulsory defence disclosure. On the one hand, the Government sought to justify the Act as ‘[a] recognition of the public’s right to expect efficient, timely and fair court processes.’ The overall aim of the Bill was described as ‘protecting not only accused persons and victims but also the entire Victorian community. It will give Victorians a criminal justice system that will continue to work in the best interests of the community.’

In contrast, Members of Parliament from the Opposition parties offered a long list of potential difficulties with compulsory defence disclosure, including that it encourages an inquisitorial system; [that] it is an attempt to abolish the right to silence by stealth, through the back door; and, it offends against the privilege against self-incrimination, the presumption of innocence and the onus of proof. Their general criticism was that

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119 *Crimes (Criminal Trials) Act 1999* (Vic) s 7 (2).
120 Ibid s 7(3). In the Second Reading Speech debate on 26 May 1999, this defence response was described as a requirement for the defendant ‘to give his or her hand away totally:’ 1263 (Hulls).
121 *Crimes (Criminal Trials) Act 1999* (Vic) ss 7 (4), 10.
123 Victoria, *Parliamentary Debates*, Legislative Council, 2 June 1999, 1056 (Katsambanis). This was the concluding comment before the vote was taken.
125 Ibid 1249 (Hulls).
‘mandatory defence disclosure could only serve the purpose of tilting the balance in favour of the prosecution.’\(^{127}\)

The Victorian Scrutiny of Acts and Regulations Committee said that the Bill is ‘not about the right to silence: it is about pre-trial disclosure. The Bill does not alter the accused’s right to silence.’\(^{128}\) In a literal sense, this is true because it requires disclosure only, and the accused is still free to choose not to give or call evidence. However, it does require the defence to show its hand before trial, and to reveal details of the defence case. This may enable the Crown to better prepare its case, and for Crown witnesses to be forewarned of matters likely to be raised in cross-examination. It also locks in the defence, so that if evidence in the Crown case catches the defence by surprise, there may be difficulties in continuing to rely on the disclosed defence case, and there may be pressure on the accused to call or give evidence.

C. Defence disclosure in New South Wales

Since 1998, a Practice Note in New South Wales requires the defence after arraignment to inform the court of the facts in the statement of Crown case which are agreed and the facts which are in issue, and also of the Crown witnesses the defence intends to cross-examine.\(^{129}\) The New South Wales Law Reform Commission concluded in its report in 2000 that this Practice Note has not been effective in procuring disclosure, largely due to a lack of cooperation from the legal profession, and the lack of sanctions for non-compliance.\(^{130}\)

At the time the now-repealed \textit{Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001} (NSW) was debated in Parliament, there was considerable criticism within the legal profession and the media that the Act represented a serious erosion of the rights of the accused, and a denial of a fair trial for the accused. The primary reason given for the Act

\(^{127}\) Ibid.
\(^{129}\) \textit{Supreme Court Practice Note 103} (1998) 44 NSWLR 184.
\(^{130}\) New South Wales Law Reform Commission, above n 109 [3.25].
by the New South Wales Attorney-General was ‘to reduce delays and complexities in criminal trials.’\textsuperscript{131} One Member of the Legislative Assembly referred to the need to prevent ambush defences, to reduce trauma for victims, and to recognise the ‘rights and care’ [sic] of victims.\textsuperscript{132} Another Member argued:

It will benefit accused persons who are not guilty. They will spend less painful and difficult time in court. They will have a more reasoned and rational approach, without the tension of the courtroom to distract them when considering the submissions of the prosecution on paper.\textsuperscript{133}

The same Member also asserted that:

My constituents would not appreciate erosion of age-old principles [the right to silence and onus of proof], but they do seek better systems to deliver justice. The two are not mutually exclusive, as this sensible legislation demonstrates.\textsuperscript{134}

Another Member was arguably closer to the mark:

[The Bill] will reduce the rights of accused people when they defend themselves because it represents a significant impact on the three principles of the criminal law: the right to silence, the privilege against self-incrimination and the presumption of innocence.\textsuperscript{135}

Perhaps surprisingly, the Members from the Coalition parties did not oppose the Bill, and indeed the Shadow Attorney-General was supportive of it. He focussed on the need for better management of lengthy and complex cases, and also said ‘I do not accept that the Bill will in some way violate a right to silence. It includes a requirement that if the prosecution or the defence proposes to lead evidence they must disclose what that evidence is going to be. There is no requirement that they have to lead evidence.’\textsuperscript{136} He also said the Act ‘[d]oes not take away the rights of the defence; it merely brings disclosure forward, rather than forcing the defence to lead any evidence.’\textsuperscript{137}

In a literal sense this is true, but the legislation did require the defence to reveal a great deal about the defence case prior to trial. It may exert pressure on the accused to give or call evidence to support the matters contained in the defence response.

\textsuperscript{131} New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 16 August 2000, 8288 (Debus).
\textsuperscript{132} New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 22 November 2000, 10647 (Saliba).
\textsuperscript{133} Ibid 10645.
\textsuperscript{134} Ibid.
\textsuperscript{135} New South Wales, \textit{Parliamentary Debates}, Legislative Council, 6 December 2000, 11688 (Cohen).
\textsuperscript{136} New South Wales, \textit{Parliamentary Debates}, Legislative Council, 23 November 2000, 10745 (Hartcher).
\textsuperscript{137} Ibid 19744.
D. Defence disclosure in Western Australia

Defence disclosure was introduced into Western Australia in 2004, implementing the recommendations of the Law Reform Commission of Western Australia in 1999.\(^\text{138}\)

The proposals for the abolition of committal hearings and extended prosecution disclosure requirements attracted extensive debate in both the Legislative Assembly and the Legislative Council. However, unlike the situation in the New South Wales and Victorian Parliaments, the defence disclosure requirements were passed without criticism, some Members noting that the defence already voluntarily provided disclosure.

Under the *Criminal Procedure Act 2004* (WA), the defence must give notice of any factual elements of the offence which the accused may contend cannot be proved, notice and grounds of objection to documents the prosecution proposes to adduce, notice and grounds of objection to any evidence disclosed in the statements of Crown witnesses, and notice of alibi.\(^\text{139}\) As pointed out during the debate on the Act, the phrase, ‘factual elements of the offence which the accused may contend cannot be proved’ is wide, and may be confusing.\(^\text{140}\) Anecdotal evidence suggests that, notwithstanding the wide terms of the legislation, defence disclosure is not provided in practice.\(^\text{141}\)

E. Sanctions for non-compliance with compulsory defence disclosure

The sanctions for non-compliance with compulsory defence disclosure vary between the States, although they share in common restrictions on the defence leading evidence if it has not been disclosed as required. In Victoria, the judge may comment on the failure to disclose, and may give leave to a party to also comment if the judge is satisfied that the

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\(^\text{139}\) *Criminal Procedure Act 2004* (WA) s 96.

\(^\text{140}\) Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 May 2002, 10182 (Quigley).

\(^\text{141}\) Personal communication with judges of the District Court of Western Australia.
proposed comment is relevant and not likely to produce a miscarriage of justice.\textsuperscript{142} The comments concerning departure from the disclosed case must not suggest that an inference of guilt may be drawn from the departure except in those circumstances in which an inference might be drawn from a lie told by an accused.\textsuperscript{143} This is a significant limitation.

Unless the legislative sanctions are stringently enforced, it is probable that defence lawyers will not provide compulsory defence disclosure as required by legislation because it goes against defence culture. If, however, it is enforced, and it becomes part of criminal practice, then it may impact on the right to silence at trial. As explained earlier, there are differing views as to whether compulsory defence disclosure erodes the right to silence at trial. The practical impact of the legislative provisions is hard to determine until research is undertaken to determine the extent of compliance, and the extent to which judges have imposed sanctions for non-compliance.

In a Parliamentary Briefing Paper on the \textit{Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001}, Griffith commented on the relationship between compulsory pre-trial disclosure and the right to silence at trial:

\begin{quote}
A number of approaches can be taken to the issue of whether compulsory pre-trial disclosure is apt to compromise the presumption of innocence, or else infringes either the principle of the right to silence or the privilege against self-incrimination. One approach is to contend that a balance needs to be struck between, say, the right to silence and the public interest in increasing the efficiency of the criminal justice system. Such an approach would accept that the right to silence is infringed but would also maintain that this can be justified both in terms of the limited nature of that infringement and/or by the competing public good the infringement serves. The obvious response is that either the right to silence (assuming defence disclosure to be an incidence of this) is a fundamental principle or it is not. If it is, it should not be traded or balanced off against anything, no matter what the presumed gains may be in the efficiency of the courts.\textsuperscript{144}
\end{quote}

\begin{itemize}
\item \textsuperscript{142} \textit{Crimes (Criminal Trials) Act 1999} (Vic) s 16.
\item \textsuperscript{143} Ibid s 16(3)(a). Before the jury can use a lie as evidence of consciousness of guilt, as distinct from credibility generally, it must be satisfied that the accused told a deliberate lie revealing knowledge of the offence and told it out of a realisation that the truth would implicate him in the offence.
\item \textsuperscript{144} Gareth Griffith, \textit{Pre-Trial Defence Disclosure: Background to the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000}, Briefing Paper for New South Wales Parliament, 25.
\end{itemize}
Griffith’s view that if the right to silence is a fundamental principle, it should not be ‘traded or balanced off against anything’ begs the question whether the right to silence is in fact fundamental, and if so why.

In *R v Ling*, Doyle CJ considered a South Australian Magistrates Court Rule which provided for a limited form of defence disclosure (namely, a requirement to identify the precise matters of fact and law which are in issue).\(^{145}\) He held that the Rule did not infringe the right to silence, and added this comment about compulsory disclosure and the right to silence:

> It may be that the time has come for some limits to be placed upon the right of silence and for some obligation to be imposed upon the defence to join in the identification of and limiting the issues in criminal proceedings to an extent inconsistent with the maintenance of the right of silence… whether the right of silence should be limited is an important issue, and will have to be faced by the courts and by the Parliament in due course.\(^{146}\)

This is the first judicial reference to disclosure specifically qualifying the right to silence, and the need for a discussion as to whether such qualifications are justified. Since the comment was made, three States have introduced legislation to require compulsory defence disclosure, as discussed above. In introducing the legislation, the respective Attorneys-General have summarised the benefits of compulsory disclosure without referring to its impact on the right to silence. However, as explained in the foregoing section, there is a real possibility that the compulsory defence disclosure requirements will, if strictly enforced, indeed qualify the right to silence.

### 5. Defence opening

Another qualification to the right to silence at trial is legislation requiring a defence opening. Although trial judges have the power at common law to require a defence opening, they rarely do so. The defence can voluntarily open its case immediately after the prosecution opening and it may decide to do so if the defence counsel sees it as advantageous for the jury to understand the defence case from the outset. A compulsory defence opening is a different proposition, because it reveals the defence case, and

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\(^{146}\) Ibid 382.
abolishes the notion of an election at the end of the prosecution case whether or not the accused will give or call evidence.

The Law Council’s 1998 report recommended a defence opening ‘of the nature of the defence case.’\(^{147}\) In its 1999 report, the Standing Committee of Attorneys-General recommended that immediately after the prosecution opening, the trial judge should (in a prescribed form of words) invite the defence to respond to the Crown opening, and to identify issues in dispute.\(^{148}\) However, it also recommended that no explanation or remark should be addressed to the jury by the judge or the prosecutor concerning a failure by the defence to respond.\(^{149}\)

In all Victorian jury trials, the defence must, immediately after the prosecution opening, present the defence response to the jury.\(^{150}\) In Western Australia, recent legislation states that the defence may open its case after the prosecution opening of the Crown case.\(^{151}\) In all other States, a defence opening is voluntary.

In summary, Victoria is the only State which requires a defence opening after the prosecution case. Like compulsory defence disclosure, it reveals the defence case before the Crown witnesses give evidence, and may thus assist the Crown case. Moreover, an opening ‘locks in’ the defence case so that it may become necessary for the accused to give or call evidence revealed during the cross-examination of the Crown witnesses, and in this way, it qualifies the right to silence at trial.

**Conclusion**

As explained in Chapter One, the appellate courts have increasingly moved towards an absolute right to silence. They have failed to recognise the myriad of common law doctrines and legislative provisions that qualify the right to silence, as discussed in this

\(^{147}\) Law Council of Australia, *Reform of Pre-Trial Criminal Procedure Draft Principles* (1998), [20].
\(^{148}\) Standing Committee of Attorneys-General, above n 108 [40].
\(^{149}\) Ibid [41].
\(^{150}\) *Crimes (Criminal Trials) Act 1999* (Vic) s13.
\(^{151}\) *Criminal Procedure Act 2004* (WA) s143.
chapter. Significantly, they have also failed to address how an absolute right to silence can sit alongside common law and legislation which qualifies it, and why it is permissible to draw an adverse inference by virtue of these common law doctrines and legislative provisions, but not to draw an adverse inference from silence at trial.

The qualifications to the right to silence are numerous. At common law, they include conduct in various forms amounting to consciousness of guilt. Pursuant to legislation, the qualifications include scientific proof, real evidence, surveillance warrants, and statutory averments and presumptions. The combined impact of these qualifications is to reduce significantly the absolute right to silence which, mystifyingly, continues to be emphasised in the appellate court decisions on the right to silence. The appellate courts have not discussed these qualifications, notwithstanding that they put pressure on the accused to give or call evidence.

The qualifications to the right to silence have not been discussed and criticised as much as the appellate court decisions on the right to silence have. This may be due in part to a preoccupation in the common law with appellate court decisions. It may also be due to the significance of the principle of orality within the criminal trial process. Changing the rules concerning oral testimony from the accused is seen as more radical than changing the rules for defence disclosure, or allowing scientific proof, or any of the other means used to assist the Crown case.

The appellate courts, particularly the High Court, have largely ignored these qualifications, and (inconsistently with them) progressively created fewer instances in which the silence of the accused at trial may be taken into account by the jury. How this incongruity has been left unaddressed ought to be examined. In order to do so, an examination of the reasons given by the appellate courts for the right to silence at trial is necessary. This examination is undertaken in the next chapter. It is also necessary to grapple with the failure of the appellate court decisions on the right to silence to differentiate between the right to silence, the burden of proof, the privilege against self-
incrimination, and the adversarial nature of the criminal trial. This differentiation is also explored in the next chapter.
CHAPTER FOUR

THE RATIONALE FOR THE RIGHT TO SILENCE AT TRIAL

Introduction

As discussed in Chapter One, an examination of the history of the right to silence at trial reveals that the right of an accused to remain silent did not become entrenched in England and Australia at the common law until the late nineteenth century. The right to silence at trial was significantly changed in Australia by the High Court decision in *Weissensteiner v The Queen* in 1993, and again by its decisions between 2000 and 2002 in *RPS v The Queen and Azzopardi v The Queen; Davis v The Queen*. As revealed in the literature review in Chapter One, very little has been written about the rationale for the right to silence, except for the articles by Davies, and the discussion by McHugh J in *Azzopardi*. Notwithstanding this lack of discussion, the appellate courts continue to assert the importance of the right to silence at trial. The reasons given for its importance, and indeed for its continued existence, are explored and critically evaluated in this chapter.

1. The importance of the right to silence at trial

The appellate court decisions on the right to silence provide little in-depth discussion of the importance of the right to silence in criminal trials, and their discussion rarely goes beyond the assertion that it is ‘fundamental’. An example comes from a Victorian Supreme Court decision in 1984: ‘The right to silence is a fundamental principle of the criminal law and is not to be overridden by any other so-called doctrine or other principle.’ Doyle CJ (South Australia) made a similarly blunt assertion in 1966 when he referred to the right to silence as ‘a central part of our criminal procedure and a fundamental rule of the common law.’ He was prepared to make this statement even though he conceded that ‘[t]he scope and incidents of that right are not so clear.’ He did not elaborate on what he meant by ‘central aspect’ or ‘fundamental rule,’ beyond citing a

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5 Ibid.
passage from the judgment of Brennan J in *Petty v The Queen; Maiden v The Queen* which, he said, set out ‘the manner in which the right of silence, and the obligation of the prosecution to prove its case beyond reasonable doubt, are linked and underpin our concept of the criminal trial.’ This is an ambitious and not wholly accurate statement because in the passage Doyle CJ cited, Brennan J said only that the burden of proof is on the Crown and that there was no obligation on the part of the accused to assist. Nowhere did Brennan J specifically refer to the right of silence! In the light of this inaccuracy, it is hard to accept the statement from Doyle CJ that ‘no further authority is needed to show that the right of silence is a central part of our criminal procedure and a fundamental rule of the common law.’ Perhaps what this demonstrates is the idea that it ‘goes without saying.’

Another example of the appellate courts stating the importance of the right to silence was in 2000, in *R v Tang*, when the Court of Criminal Appeal of New South Wales said, ‘[I]t cannot be doubted that the right to silence is fundamental to the common law system of justice: *Petty and Maiden*. The principle has also had recent emphasis in *RPS*.’

The appellate court judges have placed more emphasis on asserting the importance of the right to silence than addressing the weaknesses in its current formulation. They fail to say why it is so important that criticisms need not be addressed. An example is found in *RPS* when Callinan J referred to the 1985 report of the Australian Law Reform Commission on evidence. The Commission recommended the removal of the prohibition on judicial comment on the silence of the accused at trial, and, instead, that judges be permitted to instruct the jury as to the inferences they may, and may not, draw from the silence of the accused. The Commission considered that comment by the judge would assist both the jury and the accused. Callinan J’s response to the Commission’s criticism of the current law was to say:

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6  *Petty v The Queen; Maiden v The Queen* (1991) 173 CLR 95 (‘*Petty and Maiden*’) 108, 111.
8  Ibid 379.
11  Australian Law Reform Commission, ibid [258].
Although this right [the right to silence] has been the subject of criticism, it is, and remains, certainly, in the criminal trial itself (except in those jurisdictions where there has been statutory intervention to modify it) a fundamental plank of criminal jurisprudence.\footnote{12} 

Callinan J made no attempt to address the matters raised by the Commission; it seems his belief that it is a ‘fundamental plank,’ and therefore important, rules out the need to address weaknesses, and the need for careful argument and transparent rationale.

The appellate court decisions have provided no insights into why the right to silence is important or ‘fundamental.’ This may be because they are unable to offer an explanation, or it may be because they think it ‘speaks for itself’ or ‘goes without saying.’ If it is the latter, the question also arises why it is so important that an explanation is unnecessary. Alternatively, the appellate courts may have recognised that it is impossible to explain the continued existence of the right to silence at trial. The appellate courts have also not explained how important the right to silence is, nor how its importance is to be determined. They have not explained whether it is a fundamental principle underpinning the criminal trial, or a rule like many other rules. It is unclear whether there is a hierarchy of principles or rules, and if there is, where the right to silence is situated in that hierarchy. The existence of a hierarchy is suggested by the statements from Callinan J in \textit{RPS} quoted above. His statements fail to clarify whether the right to silence is less important than the presumption of innocence and the burden of proof, and if so, how much less important.

The appellate courts’ continuing use of the word ‘fundamental’ in association with the right to silence is unhelpful, and does not contribute to an understanding of criminal jurisprudence. The \textit{Oxford English Dictionary}’s definition of ‘fundamental,’ namely, ‘leading or primary principle, rule, law or article, which serves as the groundwork of a system; an essential part,’ is of some assistance.\footnote{13} \textit{Stroud’s Legal Dictionary of Words and Phrases} defines fundamental principles as those which are ‘declared unalterable.’\footnote{14} Clearly, the \textit{Stroud} definition is not apposite, even though many continue to claim that it is in some way ‘unalterable.’ As demonstrated in Chapters Two and Three, the right to silence is not ‘unalterable,’ because it has frequently been altered.

\footnote{12}{\textit{RPS} (2000) 199 CLR 620 [101].} 
\footnote{13}{\textit{Oxford English Dictionary} (2\textsuperscript{nd} ed, 1989) 266.} 
\footnote{14}{\textit{Stroud’s Legal Dictionary of Words and Phrases} (5\textsuperscript{th} ed, 1994) 1065.}
The New South Wales Court of Appeal complicated the issue of the importance of the right to silence even further in *R v Giri*, when it remarked that although the right to silence is a fundamental right of any accused person, ‘any misdirection on the right to silence is not a fundamental irregularity.’ The trial judge had directed the jurors that they were not to use the right to silence in a manner adverse to the accused, but (inconsistently) he then went on to direct them that they might take into account that the accused had elected not to deny or contradict matters in the evidence about which he could have given direct evidence. He said they could take that silence into account as going to the weight they gave to the evidence of the Crown witnesses. The Court of Appeal held that this was a misdirection, but there had not been a substantial miscarriage of justice. The appellate judges did not say why. The questions that arise from *Giri* are: just how important is the right to silence if a misdirection does not amount to a fundamental irregularity or a miscarriage of justice? And how do judges identify a misdirection that is not a substantial miscarriage of justice as distinct from one that is?

Another factor which is relevant to any discussion of the importance of the right to silence in Australia is that other jurisdictions with a jurisprudence similar to Australia’s do not recognise an absolute right to silence at trial. For example, the *Canadian Charter of Rights and Freedoms* includes a right not to be compelled to be a witness, but not a right to silence. The *European Convention for Protection of Human Rights and Fundamental Freedoms* (which is now incorporated into the law of the United Kingdom) includes a right to a fair trial, a presumption of innocence, and other ‘minimum rights.’ However, these ‘minimum rights’ do not include the right to silence. The *Constitution of the Republic of South Africa* includes a right to refuse to testify, and the right to silence is included only as an element of the right to a fair trial.

In summary, the appellate courts have asserted the importance of the right to silence at trial, but have not explained why it is important, except by unhelpfully using the word ‘fundamental.’ Its ‘fundamental’ status is not obvious, and is not supported by

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17 *Constitution Act 1982* (Canada), Schedule B, Part 1, Charter of Rights and Freedoms, s 11(c).
jurisprudence from other common law countries. The appellate courts have not explained how important it is, nor whether a misdirection will be seen as a miscarriage of justice, or (to use the words in Giri) ‘a substantial miscarriage of justice.’ In summary, the only thing that is certain is that the appellate courts say that the right to silence is important. Given that importance and rationale are closely connected, the lack of exploration and explanation of the latter is baffling. In some cases, the courts have offered some purported rationales for the right to silence, and these are now examined. Further rationales have been advanced by Australian and overseas commentators, and these are also investigated.

2. The reasons for the right to silence at trial

A. Introduction

Commentators in the United Kingdom, the United States, South Africa, and New Zealand have examined the rationale for the right to silence at trial, although much more has been written on the right to pre-trial silence. Commentators in Australia on the

right to silence at trial have focussed more on its operation (especially in the form of negative responses to proposed reform) rather than on its rationale. Discussion in Australia about the rationale for the right to silence at trial has been limited, both from the courts and from legal analysts and practitioners.\textsuperscript{25}

An analysis of the Australian appellate court decisions to glean the reasons for the right to silence at trial is not easy, partly because the reasons are not clearly stated, and partly because the decisions do not clearly differentiate between pre-trial silence and silence at trial. For example, the Australian appellate courts often cite the High Court decision in \textit{Petty v The Queen; Maiden v The Queen},\textsuperscript{26} a decision concerning pre-trial silence, in their decisions involving silence at trial. This is confusing, and disguises the lack of rationale for the right to silence at trial. Pre-trial silence and silence at trial are not the same, for a variety of reasons, the most important being that the accused may not be legally represented in the pre-trial police interview, and the accused will probably not know the particularised Crown case until trial.

Stone examines the reasons for the right to silence at trial reflected in the High Court decision of \textit{Weissensteiner v The Queen},\textsuperscript{27} and opines that ‘the High Court’s recent defence of the right to silence appears to have been based on encouraging better methods of investigation; protecting the individual from abuse of state power; and redressing the imbalance of resources between the state and the individual.’\textsuperscript{28} She considers that ‘the court’s emphasis is not on the inherent value of the right, but on its ability to achieve other aims of the criminal justice system; it is an instrumental, rather than a purely principled, approach.’\textsuperscript{29} The High Court decision in \textit{Weissensteiner} did not, in fact,
include any of the reasons cited by Stone for the right to silence at trial.\textsuperscript{30} Indeed, the High Court in that case gave no reasons for the right to silence.

The reasons for the right to silence at trial which have been nominated in the appellate court judgments are:

- the presumption of innocence;
- the burden of proof;
- the risks inherent in exposure of the accused to cross-examination;
- the adversarial nature of the criminal trial;
- a combination of the presumption of innocence and the burden of proof;
- common sense; and
- the privilege against self-incrimination.

Further reasons given by academic commentators are:

- privacy, autonomy and the integrity of the individual accused;
- the relationship between the individual and the state;
- fairness;
- convention, habit, symbolic value, cultural values.

Each of these suggested rationales for the right to silence is now examined.

B. The presumption of innocence

Biber observes that: ‘The right to silence has been the subject of superior court rhetoric for centuries, tied to discourse around the presumption of innocence.’\textsuperscript{31} For criminal law practitioners, the right to silence ‘flows from’ the presumption of innocence.\textsuperscript{32} In reality, an examination of the Australian appellate court judgments on the right to silence reveals that judges have rarely specifically linked the right to silence and the presumption of innocence alone.

\textsuperscript{30} \textit{Weissensteiner} (1993) 178 CLR 217.

One exception was Shepherdson J, in his dissenting judgment in *R v Weissensteiner*, when he considered that to allow the adverse inference approved by the majority judges would be to ‘set at nought the presumption of innocence.’ A further example is in the New South Wales Court of Appeal judgment in 1999 in *R v Davis*, when the trial judge said ‘the right to silence arises because of the presumption of innocence.’

In an article discussing *RPS*, Eakin states that the High Court ‘emphatically reasserts principles fundamental to the criminal trial including the accused’s right to be presumed innocent and the responsibility on the prosecution to discharge the burden of proof without the assistance of the accused.’ A reading of the majority judgment in *RPS*, however, reveals that none of the High Court judges referred to the presumption of innocence. Indeed, it is difficult to see that the majority judges asserted any principles, fundamental or otherwise, in support of the right to silence at trial. The difficulty with treating the presumption of innocence as a reason, or the reason, for the right to silence at trial is twofold: the presumption of innocence is itself unclear, and there is considerable confusion as to how the presumption of innocence and the right to silence overlap, fit together, relate to, or influence each other.

Ashworth provides a working definition of the presumption of innocence: ‘Where a person is charged with a criminal offence, the prosecution must bear the burden of proving the elements of the offence, and that proof must be beyond reasonable doubt.’ What is not easy to define, however, is how the presumption of innocence operates in the criminal trial. In her text on the presumption of innocence, Schwikkard refers to the South African Constitution and decisions of the South African Constitutional Court, as well as decisions in Canada and the United Kingdom. Her examination reveals that there is little consensus regarding the definition or scope of application of the

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32 This observation is based on the author’s experience over thirty years in law, listening to criminal lawyers and judges. The phrase ‘flows from’ is consistently used.
33 *R v Weissensteiner* (Unreported, Supreme Court of Queensland, Court of Appeal, Pincus, McPherson and Shepherdson JJ, 22 June 1992). Shepherdson J also criticised the use of this principle from *R v Burdett* (1820) 106 ER 873, 898: ‘If the accused offers no explanation or contradiction can human reason do otherwise than adopt the conclusion to which the proof tends?’
34 Cited in *R v Davis* [1999] NSWCCA 15 (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, McInerney CJ, Spigelman and Wood JJ, 24 February 1999) [36].
presumption of innocence, despite its acceptance in many national and international jurisdictions, with both inquisitorial and accusatorial systems. She concludes that it remains ‘an open question whether the drawing of a negative inference [from silence] infringes the right to silence or the presumption of innocence.’ After a detailed analysis of how the presumption of innocence has been described in South Africa, Canada and the United Kingdom, Schwikkard states:

It may be convenient to substitute references to the presumption of innocence with the term right to a fair trial, which acknowledges that there are many separate rights which must be upheld at different stages of the criminal process.

She stresses the necessity for a definition of the presumption of innocence which is not unwieldy, and suggests: ‘A rule placing the burden on the prosecution to prove the guilt of an accused person beyond reasonable doubt.’ This definition may have the advantage that it is not unwieldy, but it has the disadvantage that it fails to distinguish between the right to silence, the standard of proof, and the presumption of innocence. Schwikkard’s approach is to sidestep the problem of delineating the right to silence, the presumption of innocence, and the burden of proof, by putting them all under the umbrella of a ‘fair trial.’ However, this merely raises another question: what is a fair trial?

Healy, too, recognises the difficulty of describing the presumption of innocence:

[It is] impervious to positive definition and incapable of prescriptive formulation or consistent application. As a reason of policy or principle, it is indeterminate in scope and, theoretically, could be invoked as a reason for any decision or rule that seeks to control the jeopardy of the accused by minimising the risks of prejudice, unfairness, error or miscarriage of justice.

Healy seeks to narrow the definition of the presumption of innocence, otherwise: ‘It would be transformed into a vaporous euphemism for fairness in the administration of criminal justice and would lose its practical utility or coherence.’ Both Healy and Schwikkard are unable to define the presumption of innocence with any clarity.

38 Ibid 169.
39 Ibid 131.
40 Ibid 38.
41 Ibid 38.
43 Ibid.
Robertson concludes that its meaning is elusive, and the best explanation is that it is 'simply a restatement of the allocation of the burden of proof.'

In 1996, a United States academic, Ingraham, also sought to define the presumption of innocence:

> There is virtually no nation today that does not claim to abide by the ‘presumption of innocence’ in the administration of its criminal justice system, but to some the phrase means little more than that the state bears the burden of proving the allegations it has made against the defendant up to the level of some standard greater than a mere preponderance in favor of the state, and that doubts should be resolved in the defendant’s favour.

After detailed examination, Ingraham, Schwikkard, and the authors of *Cross and Tapper on Evidence*, all conclude that the presumption of innocence does not mean anything other than the Crown bears the onus of proof to the standard of beyond reasonable doubt, and any doubts should be resolved in the defendant’s favour. In *R v Oakes*, the Supreme Court of Canada said: ‘The minimum content of the presumption of innocence included not only a rule that the prosecution prove guilt beyond a reasonable doubt but also that criminal prosecutions be carried out in accordance with lawful procedures and fairness.’ This definition includes the link with the onus of proof, but it goes further, to also include ‘lawful procedures and fairness.’ The Supreme Court did not elaborate on what either ‘lawful procedures’ or ‘fairness’ requires, because its definition, like those proposed by Ingraham, Schwikkard and *Cross and Tapper*, does not refer to the right to silence.

In summary, the presumption of innocence probably means no more than a re-iteration of the burden of proof and the standard of proof. If this is its meaning, then it can be argued that there is no valid reason to link it to the right to silence.

A South African commentator, Van Dijkhorst J, considers that the right of silence is not to be confused with the presumption of innocence, though both fall within the concept of

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44 Robertson, above n 24, 141.
45 Barton Ingraham, ‘The Right of Silence, the Presumption of Innocence, The Burden of Proof, And A Modest Proposal: A Reply to O’Reilly’ (1996) 86 (2) *Journal of Criminal Law and Criminology* 559, 564. He examines the concepts that inform the presumption of innocence, which he considered to be accountability (one is answerable in punishment for one’s actions) responsibility (one must accept blame for consequences of an act which could have been avoided), and culpability (account must be taken of moral as well as legal blameworthiness).
46 Ingraham, ibid; Schwikkard above n 23, 16, 39; *Cross and Tapper on Evidence* (8th ed, 1995) 135.
a fair trial, and are referred to in the same section of the South African Constitution. He considers that the principle underlying the presumption of innocence is that a person must not be convicted where there is a reasonable doubt about his guilt, and the presumption seeks to eliminate the risk of conviction based on factual error. He argues that, in contrast, there is no principle invoked for the right of silence: ‘It is a right which has merely an historical origin. Its antecedents are outdated in our complex society and the reason for its existence has fallen away,’ consequently, it should be abolished.

As stated earlier, Callinan J in *RPS* referred to the right to silence as ‘a fundamental plank of criminal jurisprudence,’ and the presumption of innocence as ‘an even more important fundamental plank.’ He then goes on to say that ‘the right to silence is consistent with the presumption of innocence and the onus of proof.’ The problem with this statement is that it is unclear whether Callinan J chose the word ‘consistent’ deliberately, but in any event, it is open to the suggestion that the link is less strong than cause and effect.

Both the right to silence and the presumption of innocence are concepts that courts and commentators have struggled to define. It follows, therefore, that linking them together will not only lack clarity, but may in fact add to the confusion because their relative importance is unclear. To the extent that appellate courts have relied on a link between the right to silence and the presumption of innocence as a rationale for the right to silence, this link appears to be rhetorical, unclear, unhelpful, and even confusing.

C. The burden of proof

The link between the right to silence and the burden of proof has been stressed by appellate courts, criminal law practitioners, and legal commentators. In *Petty and Maiden*, Gaudron J described the burden of proof as ‘an important aspect of the right to silence,’ but she did not elaborate on what she meant by this. Since 1935, appellate courts in Australia have frequently quoted Lord Sankey’s ‘golden thread’

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48 Van Dijkhorst J, above n 23, 1.
49 Ibid 1.
50 *RPS* (2000) 199 CLR 50 [101].
51 Ibid.
52 *Petty v The Queen; Maiden v The Queen* (1991) 173 CLR 95, 128-9.
statement: ‘Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt.’\textsuperscript{53} Eakin also refers to ‘the golden thread’ in her discussion of \textit{RPS}, when she concludes that ‘the High Court has once again proven itself to be the guardian of the golden thread.’\textsuperscript{54} Unlike Eakin, Ashworth is critical of ‘the golden thread’ statement because, he says, it goes no further than ‘romantic imagery about webs and golden threads.’\textsuperscript{55}

Notwithstanding this rhetoric, and as argued here, the Australian appellate courts have not examined the relationship between the right to silence and the burden of proof in any detail; they have merely asserted that they are linked. A classic example is from the following passage in \textit{Environmental Protection Authority v Caltex Refining Co Pty Ltd}:

\begin{quote}
[The right to refrain from giving evidence] is explained by the principle, fundamental in our criminal law that the onus of proving a criminal offence lies upon the prosecution and that in discharging that onus it cannot compel the accused to assist in any way.
\end{quote}

The link between the right to silence and the burden of proof, however, is not inevitable; they are independent concepts. This can be illustrated by developments in the United Kingdom since the passing of the \textit{Criminal Justice and Public Order Act 1994} (UK). This legislation modifies the common law, to allow the drawing of adverse inferences from silence, but it does not alter the burden of proof. The argument that the legislation watered down the burden of proof was specifically rejected by Taylor LCJ in an early decision on the legislation.\textsuperscript{57} Dennis, who has written extensively on criminal evidence in general, and the right to silence in particular (especially on the 1994 United Kingdom legislation), expresses the firm view that allowing an adverse inference from silence, that is, qualifying the right to silence, does not reverse the burden of proof.\textsuperscript{58}

A Home Office Research Study in 1999 found there was a difference of opinion between respondents (police officers, Crown prosecutors, and criminal practitioners at the bar) as to whether the United Kingdom legislative provisions had, in practice if not in law,

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{53} \textit{Woolmington v Director of Public Prosecutions} [1935] AC 462 (HL) 481.
  \item \textsuperscript{54} Eakin, above n 35, 681.
  \item \textsuperscript{55} Ashworth, ‘Four Threats to the Presumption of Innocence’, above n 36, 70.
  \item \textsuperscript{56} \textit{Environmental Protection Authority v Caltex Refining Co Pty Ltd} (1992) 178 CLR 477, 527.
  \item \textsuperscript{57} \textit{R v Cowan} [1996] 1 Crim App R 1.
  \item \textsuperscript{58} Dennis, ‘The \textit{Criminal Justice and Public Order Act 1994},’ above n 21, 355.
\end{itemize}
\end{footnotesize}
shifted the burden of proof onto the defendant. Those who felt that the legislation had shifted the burden of proof argued that, in effect, the defendants now had to prove their innocence by accounting for their silence. Those who thought the opposite argued that the prosecution still had to prove its case beyond reasonable doubt. There was a third opinion also mentioned in the study, namely, that the legislative provisions did not alter the burden of proof, but made it easier for the prosecution to prove the guilt of the accused. The fact that there are differing views shows at the very least that the link between the right to silence and the burden of proof is not obvious, and allowing an adverse inference from silence does not automatically alter the burden of proof.

Discussion of the United Kingdom legislation, and its impact during the 12 years of its operation in the courts, is important to any discussion of the Australian law on the right to silence, and especially the asserted link between the right to silence and the burden of proof. Australian criminal law historically has followed the common law of the United Kingdom, and it is uncharacteristic of Australian appellate courts not to refer to that law in their judgments. The United Kingdom experience illustrates that the two concepts can, and should, be kept separate, and the burden of proof is not a reason for the right to silence at trial.

D. Exposure to cross-examination

One of the reasons given by the appellate courts for the right to silence is that it protects the accused against exposure to cross-examination, and in particular the problems which may arise when there are multiple counts, or when uncharged offences or prior criminal history may be revealed.

The majority judges in RPS said it was not reasonable to expect the accused to answer the prosecution case on some counts, because it may expose him or her to cross-examination on other counts. McHugh J, however, specifically disagreed with the majority on this point:

An accused person often has to face the dilemma that, although he or she is able to answer one or more aspects of the evidence which reasonably calls for an answer, his or

60 Ibid [39].
her case could be significantly damaged, perhaps disproportionately so, by cross-
examination as to other aspects of the case. But tactical reasons of this sort do not
constitute a good reason for not denying or explaining facts within the accused’s
knowledge which reasonably call for an answer.61

He then went on to refer to ‘good reasons for not giving evidence,’ which, he said, were
‘likely to be few,’ and he nominated ‘loss of memory, illness, age, low intelligence and
similar matters.’62 He thus drew a distinction between ‘tactical reasons’ and ‘good
reasons,’ and rejected the blanket rule that the risk of exposure to cross-examination
justifies silence. McHugh J’s views, however, are not supported by the majority appellate
court judges and neither are they reflected in recent High Court decisions.

The appellate courts have also opposed cross-examination of the accused because it may
reveal similar allegations by another accuser.63 This reason is unconvincing, because the
risk can be avoided by pre-trial rulings, pre-trial conferences by prosecutors with
witnesses, and *voir dire* rulings during the trial. It fails to take into account that a similar
risk may equally arise in evidence-in-chief of the accuser (especially if the accuser is
young or traumatised) and is usually avoided by a vigilant trial judge (and counsel), and
by pre-trial hearings and rulings in the absence of the jury.

The appellate courts have not considered whether an absolute right to silence is
necessary, given the existing current procedures which already protect the accused from
exposure to unfair cross-examination. Under the current law, a prosecutor must seek the
leave of the court if the proposed cross-examination may reveal that the accused has
prior criminal convictions. There is legislation in most States specifically requiring leave
for such cross-examination.64 If the prosecutor does not seek leave before cross-
examination of the accused, defence counsel will object, and argument and a ruling will
proceed in the absence of the jury. If the prosecutor oversteps the mark, and the jury
hears prejudicial material, then a mistrial is likely to be declared. If the prejudicial
material is ruled to be admissible similar fact evidence, then it ought in any event be
admitted and heard by the jury. Trial judges also have a general discretion at common
law to exclude evidence if it is unfair to the accused. Therefore, it can be demonstrated

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61 Ibid [57].
62 Ibid [58].
64 See, eg, *Evidence Act 1971* (ACT) s 70. However, leave is not required in Western Australia:
   *Evidence Act 1906* (WA) s 23.
that the prospect of unfair questioning of the accused, or prejudicial material being heard by the jury, is more illusory than real, and does not constitute a valid reason for the right to silence at trial.

The appellate courts are also concerned that if accused give evidence, they may be implicated in offences other than those charged, or offences which were the subject of pre-trial admissions. The possibility of prejudicial evidence being revealed during cross-examination is not limited to adverse inferences from silence. If the accused chooses to give evidence, that evidence is no different from the evidence of other witnesses in the sense that in order to prevent mistrials, the Crown prosecutor or defence counsel will no doubt seek rulings on admissibility, by means of pre-trial hearings, or on a *voir dire* during trial.

In summary, unfairness to the accused from exposure to cross-examination can be avoided by using existing evidentiary rules and procedures, and is not a valid reason to support the continuing existence of an absolute right to silence. This applies equally to multiple counts, possible uncharged offences or other accusers, and prior criminal history.

E. The adversarial nature of the criminal trial

Many appellate court judges, members of the legal academy, and criminal defence lawyers consider that the right to silence at trial is the inevitable consequence of the adversarial nature of the criminal trial. They claim that any changes to the right to silence will convert the Australian criminal justice system into an inquisitorial system, the inference being that the accused will thereby be disadvantaged. Appellate court judges have placed considerable emphasis on the adversarial nature of criminal trials, and they

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65 In *Fernando v The Queen* (2000) (Unreported, High Court of Australia, Gaudron, Gummow and Hayne JJ, 11 February 2000), the appellant had admitted sexual assault but denied murder.

stress that criminal trials are therefore radically different from civil proceedings, and it follows that the accused cannot be expected to give evidence at a criminal trial.\textsuperscript{67}

The majority judges in \textit{RPS} asked: ‘In a trial of that kind [accusatorial] what significance can be attached to the fact that the accused does not give evidence?’\textsuperscript{68} They did not answer the question they posed, or elaborate, nor did they categorically state that the accusatorial process justifies an absolute right to silence at trial.

In \textit{Azzopardi}, the majority judges said that, ‘in an accusatorial trial, an accused is not required to explain or contradict matters which are already the subject of evidence at trial.’\textsuperscript{69} At the special leave hearing, Kirby J said: ‘We have a rather special legal system which is accusatorial. The Crown must prove [sic]. It’s at the heart of our liberties. It’s been around for hundreds of years and it’s an obligation of the Crown that is central to our legal system.’\textsuperscript{70} The majority judgment was subsequently cited by the New South Wales Court of Appeal in \textit{R v Law}.\textsuperscript{71} Neither the High Court nor the New South Wales Court of Appeal explained what it is about an accusatorial trial which supports the conclusion. If the essence of an adversarial [or accusatorial] trial is that the case is brought by the Crown, and the burden of proof is on the Crown to prove the case beyond reasonable doubt, then the relevance of the right to silence is problematic. The High Court’s insistence that, ‘an accused is not required to explain or contradict matters which are already the subject of evidence at trial’ does not follow from the adversarial nature of criminal trials.

In \textit{Dyers}, Kirby J drew a distinction between ‘an adversarial civil trial’ and ‘the accusatorial elements of a criminal trial.’ He described the criminal trial’s ‘full

\textsuperscript{67} See especially, \textit{RPS} (2000) 199 CLR 620 [27]; \textit{Azzopardi} (2001) 205 CLR 50 [34] (Gaudron, Gummow, Kirby, Hayne JJ). See, eg, \textit{Azzopardi} (2001) 205 CLR 50 [38] ‘The character of the accusatorial process is one of the most important features of the criminal trial in contemporary Australia.’ (Gaudron, Gummow, Kirby, Hayne JJ); \textit{Dyers v The Queen} (2002) 210 CLR 285 [53] (Kirby J): ‘It is important in such circumstances [abolition of unsworn statements by accused] that the reasoning appropriate to an adversarial civil trial should not undermine the accusatorial elements of a criminal trial.’

\textsuperscript{68} \textit{RPS} (2000) 1999 CLR 205 [22].

\textsuperscript{69} \textit{Azzopardi} (2001) 205 CLR 50 [64].

\textsuperscript{70} Transcript of Proceedings, \textit{Azzopardi} (High Court of Australia, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 20 November 2000) 8.

accusatorial (i.e. non-adversarial) character.’ Kirby J is the only High Court judge who differentiated between ‘adversarial’ and ‘accusatorial’ when describing the nature of the criminal trial. The other High Court judges used both ‘adversarial’ and ‘accusatorial’ in their judgments, and it is not clear whether they considered them to be interchangeable. Perhaps the only significance of the distinction is that it illustrates that the concept of the ‘adversarial’ trial may not be so important after all. As mentioned earlier in this chapter, both adversarial and inquisitorial systems have a right to silence.

In summary, because the right to silence exists in both adversarial and inquisitorial systems, it cannot be validly argued that it distinguishes the two systems. Nor can it be argued that the right to silence arises automatically because of the nature of the adversarial criminal trial. As suggested in the foregoing analysis, the essential elements of an adversarial trial are that the case is brought by the Crown, and the Crown bears the burden of proof, to the standard of beyond reasonable doubt. Therefore, it does not follow as a matter of logic that the adversarial nature of the criminal trial is a rationale for the right to silence.

F. A combination of the presumption of innocence and the burden of proof

In Weissensteiner, Gaudron and McHugh JJ suggested the right to silence exists because of a combination of the presumption of innocence and the burden of proof:

The right to silence is, of course, concerned with more than the presumption of innocence and the duty of the prosecution to prove guilt beyond reasonable doubt. However, it is the presumption of innocence and the prosecution’s burden of proof which preclude an adverse inference being drawn from silence which does not amount to evidence or, as we have called it, mere silence.

They did not elaborate on how much ‘more’ the right to silence concerns above the presumption of innocence and burden of proof, and, indeed, the first and second sentences of the passage quoted above seem to contradict each other. In another passage in the same judgment, they said:

72 Dyers v The Queen (2002) 205 CLR 205 [53].
Neither the presumption of innocence nor the burden of proof bears upon the situation in which failure to explain is, itself, evidence; in circumstances involving an assumption that an innocent person would offer an explanation, the accused is not asked to testify against himself [sic] but in favour of himself.\textsuperscript{73}

This passage does not provide any further clarity, and indeed adds to the incoherency of the distinction they seem to be drawing between the presumption of innocence and the burden of proof on the one hand, and the right to silence on the other. Very few accused would see the possibility of an adverse inference being drawn as an opportunity to speak in favour of themselves, and neither Gaudron J nor McHugh J refer to it in subsequent decisions on the right to silence. In view of the distinction they seem to be making, it is illogical to suggest that the presumption of innocence and the burden of proof, either individually or in combination, provide a rationale for the right to silence.

In 2005, a submission to the New South Wales Legislation Review Committee referred to the relationship between the presumption of innocence and the right to silence:

\begin{quote}
The presumption of innocence is fundamental to the Australian criminal justice system and the right to silence, along with the right not to incriminate oneself, is a product of the presumption of innocence. Therefore, the right to silence forces the burden of proof on the prosecution, where it belongs.\textsuperscript{76}
\end{quote}

This suggests that the presumption of innocence leads to the right to silence which in turn leads to the burden of proof. Presumably, this is different from the presumption of innocence and the burden of proof leading to the right to silence. The possible combinations of the three concepts of the presumption of innocence, the burden of proof, and the right to silence are numerous. As demonstrated earlier, neither the presumption of innocence nor the burden of proof offers a compelling, clear, or convincing rationale for the right to silence. Combining them does not change this.

G. Common sense

Some commentators suggest that common sense as a rationale for the right to silence is common sense. Others say the opposite, that is, drawing an adverse inference from silence is common sense. Still others question whether ‘common sense’ is a term with sufficient clarity and definition to be useful. In the discussion which follows, both interpretations are described and analysed.

\textsuperscript{75} Ibid 245.
According to Doyle CJ in *R v Ellis*, the relevant principles behind the right to silence involve a ‘mix of common sense and fundamental principle.’ He did not elaborate on what he meant by ‘fundamental principle,’ and he did not elaborate on what the ‘mix’ is; for example, whether they are equally important, whether they are related, or whether it is an exclusive definition.

Kirby J, during the special leave hearing in *RPS*, suggested that there is a contrast between common sense on the one hand, and the accusatorial system of trial on the other:

> An ordinary lay person would think, I am sure, that if you do not give an explanation, then you cannot give one which is helpful to you, and against that has to be pitted the very peculiar accusatorial system of trial we have which is really sometimes difficult for people, including some lawyers, to understand but which is absolutely fundamental to our system of criminal justice.

He did not elaborate on what he meant by ‘the very peculiar accusatorial system of trial,’ nor did he explain what specific difficulties lawyers and ordinary lay people have with this ‘peculiar accusatorial system of trial.’ He seems to have given this as a reason for an absolute right to silence, although this is not clear from the context. He also seems to suggest that ‘an ordinary lay person’ might think that it is ‘common sense’ that if you do not give an explanation, then you cannot give one which is helpful. Thus, he argued, the accusatorial system goes against common sense. Kirby also referred to ‘common experience:’

> I think the trial judge surely has to give help to the jury on how they deal with this because it is not common experience that when you are accused, you remain silent. That is not common experience. It is just a feature of our system of criminal trial and of the rights of the accused that have to be explained, otherwise the jury just will not understand it and they will draw an inference of guilt.

He thus acknowledged that it is ‘common experience’ to draw an inference of guilt from silence. That common sense may indeed support an adverse inference from silence was accepted by the Northern Territory Law Reform Committee in its 2002 report on the right to silence:

> Is it rather more correct to expect that silence without later explanation, or an explanation which is unconvincing should be part of the broad picture that people in everyday life and

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78 Transcript of Proceedings, *RPS* (High Court of Australia, Gaudron ACJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 8 September 1999) 47.
79 Ibid 50.
in everyday incidents take into account in assessing what has actually occurred? And should not juries be in the same position and expected to react as other members of the community would in like circumstances? From the characteristically robust and direct viewpoint of the average Australian it would defy common sense that, if a person chooses a course of action, he should then demand that no one should question that course of action or draw inferences from it.80

Davies also links the adverse inference from silence and common sense:

Moreover, the reality mocks the rule. Judges solemnly tell juries not to draw adverse inferences from a defendant’s silence knowing that they will. Juries draw such inferences notwithstanding instructions to the contrary because to do so is plainly common sense.81

A South African judge, Claasan J, went even further, and observed that: ‘No rule of law can effectively legislate against the drawing of an inference [by jurors] from a failure to testify.’82

Further, in the context of ‘common sense,’ it must be recognised that there is a tension between an absolute right to silence and the inescapable fact that silence is probative, as discussed in Chapter Three. If silence is probative, then it is not common sense to deny the possibility of an adverse inference from silence. A former Chief Justice of Canada, in discussing why cases on the right to silence so frequently arise in the Supreme Court of Canada, said it is because ‘silence can be probative and form the basis for natural, reasonable, and fair inferences.’83 As one commentator on the right to silence put it: ‘Every hour of the day people are being asked to explain their conduct to parents, employers and teachers.’84 In ordinary life, actions generally call for explanation, not silence. Other commentators have referred to the lack of expectation of a response from the accused as ‘costly and foolish’ because:

The person who knows the most about the guilt or innocence of a criminal defendant is ordinarily the defendant. Unless expecting the defendant to respond to inquiry is immoral or inhuman, renouncing all claim to his or her evidence is costly and foolish.85

81 Davies, above n 25, 105.
84 Friendly, above n 22, 680.
A further difficulty with common sense as a rationale for the right to silence is that ‘common sense’ is itself difficult to define. The appellate court judges who use ‘common sense’ arguments fail to ask: ‘common and sensible to whom and uncommon to whom?’ ‘Whose views are being expressed and whose are absent?’ and, ‘would the common sense of a trial judge or defence lawyer necessarily be the same as the common sense of a juror?’ These questions expose the difficulties and thus challenge the usefulness of using common sense as a rationale for the right to silence (or indeed any aspect of criminal procedure).

Schwikkard raises another difficulty with using common sense as a rationale for the right to silence, namely, that the application of common sense reasoning does not necessarily yield only one answer:

It is the very intuitive belief system represented by common sense that has the potential to act as a barrier to an examination of the premises on which claims of common sense are made. However, rational examination may well yield more than one common sense approach, and common sense shaped by context and personal experience will, after rational examination, determine which of the competing common sense claims is to be preferred.86

Schwikkard thus draws attention to the need for a mechanism to determine which of the competing common sense claims is to be preferred, and she suggests ‘rational examination.’ However, as the analysis in Chapter Two has demonstrated, ‘rational examination’ may not produce clarity, and instead may lead to complexity, confusion and unpredictability.

Davies suggests that the reason the appellate court judges have moved towards an absolute right to silence is that they ‘distrust juries to draw common sense inferences from a defendant’s failure to give evidence.’87 It is true that it is not possible to predict with confidence whether a juror will, or will not, draw an adverse inference from silence. ‘Common sense’ may lead to a result either way. However, there is no valid reason why the decision should not be left to the jurors, to decide in each particular case. In Ellis, Doyle CJ endorsed this approach when he was ‘[c]autious about stating principles in absolute terms when the relevant principles…are to be applied very much in the context of a particular case.’88 The major drawback with ‘common sense’ as a rationale for an

87 Davies, above n 25, 37.
absolute right to silence at trial, therefore, is that it can equally be used as a rationale for the abolition of an absolute right to silence.

In summary, it is clear that common sense is a problematic concept, and it is more likely to support rather than deny an adverse inference from silence. It is not a valid rationale for the right to silence.

H. The privilege against self-incrimination

The privilege against self-incrimination is often given as a rationale for the right to silence. Indeed, many commentators do not distinguish between the privilege against self-incrimination and the right to silence, and use them interchangeably. This is nowhere more obvious than in the reports of legislative committees and law reform commissions. This interchangability is also evident in commentaries on the right to silence from the United States and the United Kingdom. Dennis, a United Kingdom academic, suggests that the ‘right to silence is a derivative application of the privilege against self-incrimination.’ The existence of a possible link between the right to silence and the privilege against self-incrimination is now explored.

The first stage in the enquiry is to define the privilege against self-incrimination, and to determine its rationale. The exploration begins with the views of Murphy and McHugh JJ who describe the privilege against self-incrimination in terms of personal freedom, human dignity, and privacy. In 1982 in Rochfort v Trade Practices Commission, Murphy J described the privilege against self-incrimination as ‘a human right, based on the desire to protect personal freedom and human dignity.’ He raised it again in 1983 in Pyneboard Pty Ltd v Trade Practices Commission in these terms:


The United States commentators are: Amar and Lettow, above n 22; Arenella, above n 22; Dolinko, above n 22; Friendly above n 22; Gerstein, above n 22; Greenawalt, above n 22; Helmholtz, above n 85; John Langbein, ‘The Self-Incrimination Debate in Great Britain’ (1994) 92 Michigan Law Review 1049; Schulhofer, above n 22; Stuntz, above n 22. The United Kingdom commentators are Dennis, above n 21; Menlowe, above n 21.


The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigation. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society’s acceptance of the inviolability of the human personality.\footnote{Pyneboard Pty Ltd v Trade Practices Commission (1982-1983) 152 CLR 328, 346.}

He raised it again in 1985 in \textit{Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs}:

The privilege against self-incrimination is a human right. It is a safeguard of conscience and human dignity and freedom of expression as well as protection against conviction and prosecution…it registers an important advance in the development of our liberty – one of the great landmarks in man’s [sic] struggle to make himself civilized…it reflects many of our fundamental values and most noble aspirations.\footnote{Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs (1985) 156 CLR 385, 394, citing Ullman v United States (1956) 350 U.S. 422, 445 and Murphy v Waterfront Commission of New York Harbor (1964) 378 US 52, 52-3.}

Murphy J’s views were adopted by McHugh J in \textit{Environmental Protection Authority} when the latter said that the privilege was justified because it protected human dignity and personal freedom.\footnote{Environmental Protection Authority v Caltex Refining Co Pty Ltd (1992) 178 CLR 477, 545-6.} The views of Murphy and McHugh JJ were also adopted by the Supreme Court of Canada in dealing with s 11c of the Canadian Charter, in \textit{Amway Corporation v The Attorney-General for Ontario}.\footnote{Amway Corporation v The Attorney General for Ontario (1989) 1 SCR 21. The Supreme Court of Canada also cited McHugh J in Environmental Protection Authority v Caltex Refining Co Pty Ltd (1992) 178 CLR 477, 541.} The court cited the passage from Murphy J in \textit{Pyneboard} quoted above.

These passages from Murphy J, as adopted by McHugh J and the Supreme Court of Canada, refer to the rationale behind the privilege against self-incrimination. If, as Dennis contends, the right to silence is a derivative application of the privilege against self-incrimination,\footnote{Dennis, ‘Instrumental Protection, Human Right or Functional Necessity?’ above n 21, 346.} then discussion of the privilege has some importance for the discussion of the right to silence.

The traditional explanation for the privilege against self-incrimination at common law is attributed to Wigmore, who concludes that the origins of the privilege against self-incrimination are to be found in the late seventeenth century when it developed as a
reaction to the excesses of the courts of the Star Chamber and the High Commission.\textsuperscript{98}

This explanation was cited by the High Court as the purpose of the privilege against self-incrimination in \textit{Environmental Protection Authority}: ‘Historically, the privilege [against self-incrimination] developed to protect individual human persons from being compelled to testify, on pain of excommunication or physical punishment, to their own guilt.’\textsuperscript{99}

Helmholz rejects this traditional explanation because his examination of court records shows that the privilege against self-incrimination existed for witnesses in ecclesiastical law before the seventeenth century.\textsuperscript{100} His research shows that in the early seventeenth century, and even before that, the maxim \textit{nemo tenetur prodere seipsum} (no one is obliged to accuse himself) was used in the European and English prerogative and ecclesiastical courts. He says that, in contrast, at common law the privilege against self-incrimination was not available to criminal defendants until the middle of the nineteenth century. Levy disagrees with Helmholz, and says there was a ‘general right to silence’ as far back as 1568.\textsuperscript{101}

Alschuler argues that, historically, the focus of the privilege against self-incrimination was on whether the accused would be required to speak under oath, rather than on whether the accused would speak at all.\textsuperscript{102} He argues that when the privilege was embodied in the United States Constitution, it neither mandated an accusatorial system nor afforded defendants a right to remain silent.\textsuperscript{103} He considers that much of the history of the privilege against self-incrimination has been a ‘story of slippage from one doctrine to another without awareness of the change.’\textsuperscript{104} This ‘slippage’ also seems to occur in the Australian appellate court judgments on the right to silence at trial.

\begin{itemize}
\item \textsuperscript{98} John Wigmore ‘\textit{A Treatise on the Anglo-American System of Evidence in Trials at Common Law} (3\textsuperscript{rd} ed, 1940) [2250], adopted by Leonard Levy, \textit{Origins of the Fifth Amendment and its Critics} (1997), and accepted by the High Court in \textit{Environmental Protection Agency v Caltex Refining Co Pty Ltd} (1992) 178 CLR 477, 497-8, 526, 543.
\item \textsuperscript{99} \textit{Environmental Protection Authority v Caltex Refining Co Pty Ltd} (1992) 178 CLR 477, 498.
\item \textsuperscript{100} Helmholz, above n 85.
\item \textsuperscript{101} Ibid 843.
\item \textsuperscript{103} Ibid 2652.
\item \textsuperscript{104} Albert Alschuler, ‘A Peculiar Privilege in Historical Perspective’ in Helmholz, above n 85, 201.
\end{itemize}
Langbein considers that the privilege against self-incrimination developed in common law criminal trials in order to protect prosecution witnesses against the growing aggressiveness of defence counsel when cross-examining, rather than the protection of the accused.\footnote{John Langbein, \textit{The Origins of the Adversary Criminal Trial} (2003) 284.} Davies traces the privilege against self-incrimination back to the nineteenth century rules excluding compelled confessions and the refusal of non-party witnesses to answer on oath if they were exposed to criminal prosecution.\footnote{Davies, above n 25, 33. He acknowledges that his explanation is derived from William Smith, \textit{The Modern Privilege: Its 19th Century Origins}, and Alschuler, above n 104.}

Redmayne considers that the most compelling rationale for the privilege against self-incrimination is that it ‘operates as a distancing mechanism, allowing defendants to disassociate themselves from, or disavow, particular criminal prosecutions.’\footnote{Mike Redmayne, ‘Rethinking the Privilege Against Self-Incrimination (2006) \textit{Oxford Journal of Legal Studies} advance internet access <http:doi:10.1093/ojls/gq1001>23 September 2006.} Given this rationale, he considers that: ‘No distinction should be drawn between requirements to speak and requirements to provide the authorities with documents, blood samples and the like.’\footnote{Ibid 7.}

Davies is adamant that the right to silence and the privilege against self-incrimination should be differentiated. He defines the right to silence as an immunity from adverse inferences being drawn from silence. He defines the privilege against self-incrimination as an immunity from compulsion to speak. He posits that the right to silence and the privilege against self-incrimination are antithetical: ‘an immunity from compulsion to speak is not a right not to speak.’\footnote{Davies is adamant that the right to silence and the privilege against self-incrimination should be differentiated. He defines the right to silence as an immunity from adverse inferences being drawn from silence. He defines the privilege against self-incrimination as an immunity from compulsion to speak. He posits that the right to silence and the privilege against self-incrimination are antithetical: ‘an immunity from compulsion to speak is not a right not to speak.’}

In summary, an examination of the history of the privilege against self-incrimination provides no consistent or generally accepted explanation as to when and why the privilege developed. The appellate courts do not clearly differentiate between the concepts of the presumption of innocence, the burden of proof, the privilege against self-incrimination, and the right to silence. The lack of differentiation means that none of them is clear; it is not possible to discern the relationship between them, or any hierarchy of importance; and it is not clear how they should be translated or enacted in criminal trials. The appellate courts seem content to continue to refer to a mixed bag of doctrines

\footnote{In summary, an examination of the history of the privilege against self-incrimination provides no consistent or generally accepted explanation as to when and why the privilege developed. The appellate courts do not clearly differentiate between the concepts of the presumption of innocence, the burden of proof, the privilege against self-incrimination, and the right to silence. The lack of differentiation means that none of them is clear; it is not possible to discern the relationship between them, or any hierarchy of importance; and it is not clear how they should be translated or enacted in criminal trials. The appellate courts seem content to continue to refer to a mixed bag of doctrines.}
and principles, one of which is the right to silence, without offering any real understanding of the meaning and importance of its contents. The precise rationale for the right to silence, like that of the other doctrines and principles in the mixed bag, continues to remain a mystery.

I. Privacy, autonomy, and integrity of the individual accused

Some academic commentators have found the rationale for the right to silence in the privacy, autonomy, and integrity of the individual accused.\(^{110}\) Seidmann and Stein emphasise the liberty of the individual, namely, that the right to silence embodies civil-libertarian values, such as privacy (the right to be let alone),\(^ {111}\) individualism (the right not to facilitate the case of one’s adversary, especially when the latter happens to be the state),\(^ {112}\) and free agency (the right not to be punished for resistance to questioning out of fear of self-incrimination or perjury, which reduces one’s freedom).\(^ {113}\) Fried stresses that an individual is entitled to privacy as ‘an expression of respect for personal integrity,’ and the need for ‘our society to affirm the extreme value of the individual’s control over information about himself.’\(^ {114}\) Gerstein sees enforced self-incrimination as a threat to ‘the autonomy and self-respect of the individual.’\(^ {115}\) He describes a preferable system of criminal justice as one ‘within which the individual is allowed to retain a substantial amount of freedom of action and freedom from interference by the authorities, practically as well as symbolically.’\(^ {116}\)

Menlowe examines privacy as a rationale for the right to silence and finds it wanting, because the right to privacy is already violated by other uncontroversial practices, such as income tax returns.\(^ {117}\) A number of these violations have been described in Chapter Three. Galligan considers that ‘privacy is a notoriously difficult concept to use with both precision and conviction, but he goes on to say that ‘the right to silence


\(^{110}\) Especially, Charles Fried, ‘Privacy’ (1968) 77 Yale Law Journal 475; Gerstein, above n 22.


\(^{112}\) Seidemann, above n 22, citing Saunders v United Kingdom (1997) 23 EHRR 331.

\(^{113}\) Seidmann, above n 22, 435-6.

\(^{114}\) Fried, above n 110, 493.

\(^{115}\) Gerstein, ‘The Self-Incrimination Debate in Great Britain,’ above n 22, 106.

\(^{116}\) Ibid.
protects privacy, and privacy is important because it protects personal identity and autonomy. Without a zone of privacy, identity, autonomy, and personality cannot exist. Galligan accepts that a conflict between privacy on the one hand and crime control on the other is clear. He argues that privacy provides 'a sound case for the right to silence.' However, he notes a number of issues which need to be addressed: first, the argument from privacy might appear to lead to the paradox that the more serious the alleged crime, the greater society’s interest is in detecting the offender, and therefore the greater the permissible intrusion into privacy; secondly, not all questions that might be asked involve a deep intrusion into privacy; and thirdly, how to distinguish privacy as to consciousness on the one hand and privacy as to bodily parts, such as finger-prints and bodily samples, on the other. He concludes that 'the problems with the privacy argument are substantial and it might well be asked whether, in accommodating those problems and in making the elaborate distinctions that are necessary, there is indeed much left of the general principle.'

Galligan and Menlowe recognise that the privacy and autonomy argument fails to distinguish between privacy and oral testimony on the one hand, and privacy and the many forms of scientific proof, on the other. Privacy in the first sense is reflected in an absolute right to silence, whereas privacy in the second sense is not. Dennis describes privacy in the sense of freedom from oral testimony: ‘privacy must be understood in a narrower sense of an interest in mental privacy, in other words, the individual’s right to freedom from intrusion into consciousness.’ He quotes Arenella, who makes a distinction between ‘the individual’s right to limit accessibility to his [sic] mind and his right to limit accessibility to his body.’ Arenella argues that the focus is on invasions of mental privacy and the need to protect the individual’s right to control the state’s access to his thought processes. Dennis is not convinced by this argument, however, and rhetorically asks: ‘Is it really true that personal privacy is more deeply or

117 Menlowe, above n 21, 299.
118 Galligan, above n 21, 88.
119 Ibid 89.
120 Ibid 90.
121 Ibid.
122 Ibid 91.
123 This is recognised by Menlowe, above n 21, 299.
124 Dennis, ‘Instrumental Protection, Human Right or Functional Necessity?” above n 21, 357.
125 Arenella, above n 22, 42.
126 Ibid.
significantly infringed by questions, say, about a person’s movements on a particular day, than by a strip search or the taking of a urine sample?\textsuperscript{127} Clearly, his view was that it is not.

Dennis’s question is reminiscent of Lord Bingham’s in \textit{Brown v Stott} when he questioned the difference between answering questions and submitting to a breath test.\textsuperscript{128} The right to silence protects only oral testimony, and not the range of scientific tests which are equally intrusive of privacy. The question arises: if privacy is so important, why have so many incursions occurred without challenge? This question has been very rarely raised in the judgments and texts on the right to silence, and yet it seems profoundly connected and significant.

Dennis rejects the argument that the right to silence is justified by personal autonomy and dignity. He considers that:

\begin{quote}
The benefits of the core principle of respect for personal autonomy and dignity which underlies the modern conception of the criminal trial also carry certain burdens, one of which is to respond to well-founded claims that the defendant appears to have abused his [sic] freedom of action by committing an offence.\textsuperscript{129}
\end{quote}

As Dennis urges, the notion of burdens, as well as personal autonomy, must be addressed.

In summary, the purported privacy rationale for the right to silence does not take into account the invasions of privacy which have occurred through scientific proof and the other means discussed in Chapter Three. The insistence on an absolute right to silence fails to take into account the legitimate interests of the state which may qualify privacy. Privacy and autonomy of the individual may, on occasion, need to give way to legitimate interests of the state, and this has been recognised in the wide range of legislative provisions in all Australian States. The privacy and autonomy of accused is not unqualified, and they do not offer a valid rationale for an absolute right to silence at trial.

\textsuperscript{127} Dennis, ‘Instrumental Protection, Human Right or Functional Necessity?’ above n 21, 357.
\textsuperscript{128} See Chapter Three, page 16.
\textsuperscript{129} Dennis, ‘Reconstructing the Law of Criminal Evidence, above n 21, 42.
J. The relationship between the individual and the state

Some argue that the right to silence, like other defence rights, has been granted to the accused in order to overcome the imbalance between the resources of the state and the resources of a single individual.\textsuperscript{130} Dennis explains the argument this way: ‘In an adversary system of criminal adjudication based on formal equality of parties, there is an inherent danger of unfairness in the state exploiting its enforcement power to place an individual in a vulnerable position.’\textsuperscript{131} In referring to ‘the individual accused pitted against the state,’\textsuperscript{132} he is highlighting the vulnerability of the former.

Other commentators refer to the need to avoid the accused being forced to give evidence, and thus be placed in a ‘cruel trilemma;’ that is, a choice between self-accusation, perjury, or contempt, all of which are prejudicial to the accused. The reference to perjury is surprising, because it flies in the face of the presumption of innocence. The phrase ‘cruel trilemma’ was used in a United States decision in 1964 on the privilege against self-incrimination.\textsuperscript{133} This same case used emotive language to describe the relationship between the individual and the state:

Our sense of fair play dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him [sic] and by requiring the government in its contest with the individual to shoulder the entire load.\textsuperscript{134}

The use of the term ‘shoulder the entire load’ does not refer to the right to silence alone; it also includes the presumption of innocence, the burden of proof, and the privilege against self-incrimination. Yet, as demonstrated in Chapter Three, all of these have been changed so that the accused is required to shoulder at least part of the burden. Clearly, therefore, the relationship between the state and the accused does not justify an absolute right to silence: the state may indeed, directly and specifically, choose to qualify, or even abolish, the right to silence if it considers it is justifiable to do so.

Legislation abrogating the privilege against self-incrimination offers an alternative view of the relationship between the individual and the state. In its 2003 discussion paper on the abrogation of the privilege against self-incrimination, the Queensland Law Reform

\textsuperscript{131} Dennis, ‘Instrumental Protection, Human Right or Functional Necessity?’ above n 21, 374.
\textsuperscript{132} Ibid 373-4.
\textsuperscript{133} \textit{Murphy v Waterfront Commission} (1964) 378 US 52.
Commission cited this passage from *Environmental Protection Authority v Caltex Refining* which recognised the issue of the public interest: ‘The legislatures have taken this course when confronted with the need, based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained.’\(^{135}\) In its discussion paper in 2006, the Legislation Review Committee of the Parliament of New South Wales states the right to silence should not be abrogated unless the abrogation is ‘justified by, and in proportion to, an object in the public interest.’\(^{136}\) The Committee recommends that the following factors be taken into account: the importance of the public interest sought to be protected or advanced, and the extent to which the information could reasonably be expected to benefit the relevant public interest.\(^{137}\)

Galligan discusses the relationship between the citizen and the state in these terms:

> The relationship is not absolute but one of degree and balance. Considering the many existing exceptions…the imposition of a duty to answer questions might be taken as an adjustment within the relationship between the citizen and the state which is incremental rather than fundamental…the imposition of a duty to answer questions is tolerable and legitimate.\(^{138}\)

This relationship, and the changes effected by legislation, illustrate that the nature of the criminal trial is much more than a contest between the state and the individual accused. It is also necessary to challenge the notion that it is a contest which can only be resolved by giving the accused an absolute right to silence.

**K. Fairness**

Lawyers often argue that it is not possible to have a fair trial without the right to silence.\(^ {139}\) However, this link has never been specifically recognised by the appellate courts. In fact, the right to silence has not been discussed in the decisions which

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\(^{134}\) Ibid 55.


\(^{137}\) Ibid.

\(^{138}\) Galligan, above n 21, 88.

\(^{139}\) This observation is based on the author’s experience in 30 years of legal practice, and conversations with criminal practitioners in particular.
specifically mention a fair trial, which is surprising considering the importance appellate court judges have placed on this fundamental principle of the common law trial.\textsuperscript{140}

In South Africa, the right to silence was put under the umbrella of a fair trial in the South African Constitution when it was drafted between 1996 and 1998.\textsuperscript{141} Section 35 of that Constitution provides that every accused person has a right to a fair trial, which includes, ‘the right to be presumed innocent, to remain silent, not to testify during the proceedings,’\textsuperscript{142} and not be compelled to give self-incriminating evidence.\textsuperscript{143} In 1997, in \textit{S v Coetzee}, Langa J referred to the ‘cluster of rights associated with it [the presumption of innocence] namely, the general right to a fair trial, the privilege against self-incrimination, the right not to be a compellable witness against oneself, and the right to silence.’\textsuperscript{144} However, he considered it unnecessary to his decision to elaborate on the relationship between the ‘cluster of rights’ and the presumption of innocence.\textsuperscript{145}

In Australia, the part played by the right to silence in guaranteeing a fair trial is not easy to ascertain. Australian appellate courts have not discussed the attributes of a fair trial as such. Their decisions have invariably focussed on avoiding unfairness to the accused, without further elaboration. Fairness has been determined on a case-by-case basis, without recourse to a set of principles derived from the common law, legislation, a Constitution, or Conventions. One High Court judge has articulated what has resulted, namely, that the judicial decisions about what is ‘fair’ involve ‘a large content of

\begin{footnotesize}

\textsuperscript{141} \textit{The Constitution of the Republic of South Africa Act 108 of 1996}

\textsuperscript{142} Ibid Clause 35(3) (h).

\textsuperscript{143} Ibid Clause 35(3) (j).

\textsuperscript{144} \textit{S v Coetzee} (1997) (3) SA 527 (CC) [9]; Schwikkard, above n 23, 32, footnote 24: ‘In \textit{S v Melani} 1996 (1) SACR 335 (E), 347-8 and \textit{S v Brown} 1996 (2) SACR 49, (NC) at 56-in both cases the right to remain silent and the privilege against self-incrimination were viewed as closely related to the presumption of innocence however the courts cannot be said to equate the three separate concepts. Cf \textit{S v Mathebula} 1997 (1) SACR 10 (W) 17-18.’

\textsuperscript{145} Ibid, \textit{S v Coetzee}.
\end{footnotesize}
essentially intuitive judgment.”¹⁴⁶ This statement provides very little insight into what a fair trial involves, and indeed implies arbitrary judicial discretion.

Galligan has written about the fundamentals of a fair trial in the United Kingdom, and his comments are apposite for Australia.¹⁴⁷ He lists the fundamentals as ‘a right not to be wrongly convicted and punished and a further right to procedures which protect that outcome, a right often referred to as the right to a fair trial.’¹⁴⁸ He asks the question: ‘Is the right to a fair trial, understood against the background of the right to not be convicted wrongly, better protected by the right to silence, or a duty to answer questions subject to stringent safeguards?’ He concludes that: ‘It is hard to be convinced that it would not be the latter.’¹⁴⁹

When he was still a New Zealand Court of Appeal judge, Thomas controversially rejected the right to silence as a tenet of British justice. He advocated instead a focus on a fair trial, which does not include the right to silence:

> It is the thesis of this article that the right to silence has long outlived its usefulness and may properly be perceived as a bogus right providing only illusory protection for those involved in an investigation by a law enforcement agency or in the courtroom confrontation of the criminal justice system. Because, by its very nature, the right helps the guilty and seldom assists the innocent, it should be discarded and attention focused on identifying and securing those aspects of procedural fairness which will ensure a fair trial for guilty and innocent alike.¹⁵⁰

He suggested abandoning the right to silence, and allowing adverse inferences from silence as evidence pointing to guilt. He proposed a judicial direction to the jury to the effect that the proper inference would no doubt vary with the strength of the prosecution’s case and the plausibility of any proffered explanation as to why the accused chose not to give evidence.¹⁵¹

In summary, appellate courts have not specifically linked the right to silence and the notion of a fair trial. Indeed, they have not generally discussed what the concept of a fair trial entails; their discussion has been limited to the right of an accused to a number of particular trial procedures. Neither the appellate courts nor the legislatures have

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¹⁴⁶ *Jago v The District Court of New South Wales* (1989) 168 CLR 23, 57 (Deane J).
¹⁴⁷ Galligan, above n 21.
¹⁴⁸ Galligan, above n 21, 86.
¹⁴⁹ Ibid 86-7.
¹⁵⁰ Thomas, above n 24, 299.
discussed the elements of a fair trial from the viewpoint of the public interest, and the expectations of the community. Given the uncertainties surrounding a fair trial, it is not convincing to say that a fair trial necessitates a right to silence at trial. As Galligan and Thomas suggest, a fair trial is possible without an absolute right to silence at trial.

L. Convention, habit, symbolic value, cultural values

Uviller says the right to silence (like public trial of criminal accusations, presumption of innocence, burden of proof, proof beyond reasonable doubt and the privilege against self-incrimination) is no more than a convention. Hill has a similar view: ‘In a society such as ours, without a written Constitution or a relevant Bill of Rights, Constitutional Conventions are part of the bindings of society and thus not lightly (or at all) to be damaged or abandoned.’ If ‘convention’ is another word for habit, and if the right to silence is merely a habit, is it a bad habit? If yes, should it be (like all bad habits) given up? However, there is resistance to change, from within the legal profession, the legal academy, and even the High Court judges who, Bagaric suggests, ‘do not like to be seen to take rights away.’

In Australia, the appellate courts have reified the right to silence by drawing from a mixture of rhetoric and ideology which has resulted, not in clarity and effective guidelines, but a seemingly untouchable ‘sacred cow.’ In his long article on the right to silence, Friendly (a retired United States judge and academic) described some attitudes to the right to silence as displaying ‘religious adulation.’ Thomas says that the real reason for the right to silence is the ‘American as apple pie’ reason, namely, that it is symbolic. When concepts attain the powerful symbolic status of a ‘sacred cow,’ or ‘religious adulation,’ then challenging them may be seen as a form of heresy.

151 Ibid 322.
152 Uviller, above n 85.
154 Bagaric, above n 25.
156 Friendly, above n 22, 381.
157 Thomas, above n 24, 314.
Galligan examined the reasons given by the United Kingdom courts for the right to silence at trial, and he found them unconvincing. He too gave symbolic value as the ‘real’ reason: ‘The right to silence is simply part of our culture; it provides important symbols about how the individual person stands within that culture, and about how authority is constituted.’ In a famous article in 1955 on the Fifth Amendment to the United States Constitution, Griswold referred to the right to silence in terms of, ‘An expression of the moral striving of the community...a reflection of our common conscience, a symbol of the America which stirs our hearts.’ Therefore, if the reasons for the right to silence are convention, habit, symbolic value, or cultural values, the question arises as to whether these reasons are sufficient to justify the continued existence of an unqualified right to silence.

If the right to silence is shown to be oppressive and unfair, then the fact that it is part of our culture should be examined and questioned. Flatman and Bagaric’s comments on defence disclosure are apposite here for an understanding of the right to silence, and the need for constant vigilance about what are accepted as ‘truths’:

The purpose of the criminal law is to control socially harmful behaviour by punishing the guilty. A corollary of this is that the innocent should not be subject to criminal sanctions. To promote these ends our criminal justice system embraces a number of contingent ideals and adopts certain rules of practice, such as casting the onus of proof on the prosecution, setting the standard of proof at the level of beyond reasonable doubt and implementing rules regarding the reception of evidence. The crucial point here is that none of these ideals are sacrosanct. All are subject to ongoing modification and if appropriate outright revocation.

The lack of principled rationale for the right to silence at trial demonstrated in this chapter raises the real possibility that the right to silence is a ‘contingent ideal.’ What has been demonstrated is that the right to silence (like all concepts) should not be considered sacrosanct, a ‘sacred cow.’ Rather, it should be subjected to continual review and, if necessary, ongoing modification or outright revocation.

158 Galligan, above n 21.
159 Ibid 85. This is similar to the comments made by Goldberg J in the decision of the United States Supreme Court in Murphy v Waterfront Commission of New York Harbor 378 US 52 (1964).
160 Griswold, above n 22.
Conclusion

When examined closely, the reasons given by the appellate courts for the right to silence at trial are individually and collectively unconvincing. Coherent, consistent, and convincing reasons do not emerge from the judgments or the commentaries, but the problem is not acknowledged, and reasons continue to be given without any discussion or exploration. McKay’s statement in 1967 applies to an understanding of the reasons for the right to silence which still resonates today: ‘Honesty demands recognition that many of these reasons, faithfully and solemnly repeated year after year, are nothing but pretentious nonsense,’ or, at the very least, problematic.

The problem has been compounded by the blurring and slippage of the right to silence, the presumption of innocence, the burden of proof, and the privilege against self-incrimination. This lack of clarity remains unrecognised. These concepts each have an important part to play in criminal trials, but they are separate and independent of each other, and should not be relied on to provide a circular process of internal and mutual justification. By reference to the concepts of the adversarial nature of the criminal trial, the burden of proof, the presumption of innocence, the privilege against self-incrimination, and common sense, the appellate courts give the accused an absolute right to silence in almost all situations, without explaining why. Schlag refers to concepts used in this way as ‘default settings.’ He says that when there can be no defensible reason for a rule or practice, the courts resort to ‘dogmatic assertions, rhetorical bluster, political posturing, ethical bullying, and shallow circularities.’ In their right to silence decisions, the appellate courts use these ‘default settings’ to seek to foreclose a thorough examination or the need for rational explanation.

The exposure of the accused to cross-examination does not provide a rationale for the right to silence, because any prejudice to the accused can be addressed by existing evidentiary rules and procedures.

164 Ibid 60.
The relationship between the individual and the state does not explain the existence of the right to silence; indeed, the right to silence may be qualified specifically because of the public interest. Nor does fairness provide a rationale for the right to silence, because a fair trial is possible without an absolute right to silence. Therefore, if the rationale for the right to silence is limited to convention, habit, symbol or cultural values, then how it operates in the criminal trial must be addressed. If the rationale for the right to silence is privacy, autonomy and integrity of the individual accused, then the question arises whether it may need to be qualified to acknowledge the legitimate interests of the state.

Stuntz argues that the rationale for the right to silence is illusory:

Those who attack … tend to draw back from the conclusion that it simply ought to be abolished but without being sure why they do so; those who defend the privilege find themselves unable to explain it in terms that take account of the basic moral sense that truth and not silence is the right choice in the face of accusation.165

Neither of the positions he describes can validly claim absolute truth or legitimacy. Rather, what is argued here is the need for an open-minded examination of the rationale for the right to silence, and clear guidelines as to how the right to silence is important. The right to silence may need to be modified, qualified or revoked. Clear rationale is lacking, and this leads to a situation which is at best confusing, and at worst indefensible.

Alschuler, in speaking about the privilege against self-incrimination, makes a comment which applies equally for any examination of the rationale for the right to silence:

[The history of the privilege against self-incrimination] seems to reveal the tyranny of slogans. Shorthand phrases have taken on lives of their own in a process of reification. These phrases have eclipsed the goals of the doctrines that they purported to describe and even the texts that embody these doctrines.166

The same could be said of the right to silence: it is a slogan, a ‘shorthand phrase,’ which has taken on a life of its own. Why it exists and what it really means has been lost in the tyranny of the slogan.

The discussion in this chapter begs the question: ‘If there is no rationale for the right to silence at trial, how does it operate in practice?’ What impact does it have on the accused and the accuser? Does it unjustifiably privilege the accused over the accuser? It can be demonstrated that the current form of the right to silence as it operates in the courtroom

165 Stuntz, above n 22, 1264.
166 Alschuler, above n 104, 200.
privileges the accused over the accuser. This privileging includes protecting the accused by means of a significant number of rulings and procedures which are described in the next chapter.
CHAPTER FIVE

PRIVILEGING THE ACCUSED

Introduction

In this chapter, the discussion moves from describing the law on the right to silence at trial, to an exploration of how it operates in the courtroom. The particular focus is on the impact of the law on the accused and the accuser. It is argued that the law results in privileging of the accused over the accuser which is manifested in different ways, and each of them is discussed.

The right of an accused to remain silent results in the accused avoiding cross-examination and the revelation of any prior criminal history. The current law on the right to silence poses significant and contradictory restrictions on both the prosecutor and the trial judge in their comments to the jury on the silence of the accused; in contrast, defence counsel have no such restrictions. Because accused have an election whether or not to give evidence, it is common for them to follow legal advice to elect not to give evidence, and to rely on what they said in the police record of interview, knowing that the prosecutor is required to tender the video-audio/transcript of that interview in the Crown case. In contrast, the accusers’ statements to police are not tendered at the trial and they must give evidence in the formality and pressure of the courtroom. The difficulties they encounter in doing so, especially facing aggressive cross-examination, are not recognised, and are not taken into account in the decision whether it is reasonable to expect the accused to have given evidence.

The personal vulnerabilities of the accused are taken into account in the decision whether it is reasonable to expect the accused to give evidence; however, the personal difficulties of the accuser are not. The accuser must give his/her account of the events in question and, at the same time, rebut any and all defence hypotheses raised in cross-examination. Defence hypotheses are put without notice because the accused, unlike the Crown, is not
required to provide pre-trial disclosure. Moreover, the Crown prosecutor is required to call all witnesses, including those favourable to the accused. The accused is not expected to give or call evidence of matters raised in the cross-examination of Crown witnesses. If the Crown does not call a witness who they might have been expected to call, the trial judge may give an adverse direction to the jury. In contrast, a similar direction is not required in respect of the failure of the defence to call a witness.

The accused is not expected to give evidence when it is a word-on-word situation, because of the High Court decision in *RPS v The Queen*.¹ As a result, a greater burden is placed on the shoulders of the accuser, without any allowance for personal difficulties. A greater burden is placed on the Crown because of the gap between compulsory disclosure for the prosecution and for the defence. This privileging arises because the sole focus of the criminal trial is on the accused.

In Part One of this chapter, the many forms of privileging of the accused under the current law are discussed. Part Two is an examination of the reasons given by the courts for that privileging.

**Part One  How the current law privileges the accused**

The accused is privileged over the accuser in the way the right to silence operates within the criminal trial, and begins right from the commencement of the trial because at that stage the prosecution has particularised its evidence, provided details of all witnesses, and disclosed all documents in the Crown case. The defence is thus fully apprised of the Crown case. In stark contrast, the prosecution knows very little about the defence case. Voluntary defence disclosure occurs only if it is beneficial to the accused, and compulsory defence disclosure is very limited: there is a significant gap between compulsory disclosure for the prosecution compared with the defence.

As well as rigorous disclosure requirements, the prosecution must also call all material witnesses as part of the Crown case. In contrast, the defence has no obligation to call
witnesse, even if their version of events has been put in cross-examination of Crown witnesses, by means of either an affirmative defence case or a defence hypothesis. If the prosecution fails to call a witness, it may be at risk of a Jones v Dunkel inference being drawn by the jury, whereas the defence is immune from any such inference. The Crown witnesses, particularly the complainant, are exposed to vigorous cross-examination, while the accused is able to elect whether to call and/or give evidence, and if the election is to remain silent, the jury cannot draw an adverse inference. In contrast, the accused may rely on the version he/she gave during interviews with police, and these are routinely tendered in the Crown case. In deciding whether it is reasonable as a matter of law to expect the accused to give evidence, the appellate courts take into account his/her vulnerabilities and difficulties in giving evidence, especially in facing cross-examination, and in the possible revelation of a criminal history or bad character. In contrast, the vulnerabilities and difficulties of the accuser are not discussed by the appellate courts. The decision whether it is reasonable to expect the accused to give evidence is circumscribed by the decisions of the appellate courts to the effect that the accused is not expected to give evidence if the Crown case includes direct evidence, rather than consisting entirely of circumstantial evidence. In general terms, the focus of the criminal trial is solely on the accused, and the impact of the silence of the accused on the accuser and on the community is overlooked.

Each of these impacts of the right to silence within criminal procedure is examined, to identify how it operates, and how it privileges the accused over the accuser.

1. **The accused is not exposed to cross-examination**

The appellate courts are reluctant to expect accused to give evidence because this might expose them to cross-examination. The two reasons which are usually given are firstly, the possible inability of the accused to adequately deal with questioning on indictments alleging multiple counts, and, secondly, the risk that the prior criminal history of the accused will be revealed to the jury. The majority judges in RPS expressed concern that

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1 *RPS v The Queen* (2000) 199 CLR 620 (‘RPS’).
when multiple counts are alleged, the accused’s choice to give evidence or remain silent may be affected by, ‘[w]hether the denial or contradiction of each charge can be maintained with the same degree of force.’\(^2\) This argument is unduly favourable to the accused, and ignores the fact that the accuser may also feel less confident in giving evidence on some counts. The courts privilege accused by allowing them to have a blanket exemption from cross-examination if there are multiple counts, irrespective of the counts actually alleged on the indictment. Further, the appellate courts have also not addressed the situation where multiple counts are not alleged, in which case there may be no prejudice to the accused from exposure to cross-examination.

The second concern about exposure to cross-examination of the accused is the possible revelation of the prior criminal history of the accused. However, an accused’s election to give or call evidence does not automatically expose the accused to cross-examination on bad character or previous convictions.\(^3\) There are existing robust protections for the accused in relation to exclusion of bad character evidence. At common law, evidence of bad character or prior criminal history is not automatically admissible, and leave to admit such evidence is often refused. If leave is granted, the trial judge must direct the jury that they may take into account evidence of bad character or previous convictions when considering the credibility of the accused, but the use is subject to this qualification:

The fact that someone has previous convictions does not necessarily mean his [sic] evidence has to be rejected out of hand. It is a matter for you what weight you give to the fact that he has been previously convicted. In deciding that, you look at the rest of the evidence, including any evidence that supports his evidence independently, and weigh his evidence and the fact that he has convictions in that context.\(^4\)

\(^2\) *RPS* (2000) 199 CLR 620 [34] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

\(^3\) By contrast, in the United Kingdom, evidence of ‘bad character’ may be admissible, pursuant to the *Criminal Justice Act 2003* (UK). Sections 100-108 of that Act provide that bad character (which includes prior criminal history) may be admitted. The factors to be considered under the legislation are whether the prior offence is of the ‘same description as the one with which he [sic] is charged;’ the nature and extent of the similarities between the offence charged and the prior incident, the length of time since conviction, whether it would be unjust to admit the evidence, and whether the prior conviction has ‘substantial probative value.’ The legislation does not rule out an adverse inference from silence pursuant to s 35 *Criminal Justice and Public Order Act 1994: R v Becouarn* [2005] 4 All ER 673.

This direction is designed to protect the accused from prejudice if (as rarely occurs) evidence of bad character or previous convictions is admitted by leave.

Under the current law, the accused can call evidence of good character, for the purpose of considering whether a person with the kind of reputation sworn to by the character witnesses would do the acts alleged by the prosecution. In contrast, the Crown cannot call evidence of the good character of the Crown witnesses, not even to rebut attacks on good character during cross-examination. This constitutes, and results in, privileging of the accused over the accuser.

In summary, the reluctance to expose the accused to cross-examination constitutes privileging of the accused over the accuser, because existing protections offer sufficient protection against unfairness to the accused. Further, the reluctance to refuse bad character evidence, but at the same time allow good character evidence, is blatant privileging of the accused over the accuser.

2. The courts recognise the difficulties of the accused in giving evidence

The appellate courts seek to protect the accused from the possibility that he/she may have personal problems, such as an intellectual disability, which may make giving oral testimony in open court difficult. Two State appellate court decisions illustrate how much weight Australian courts give to the personal difficulties of the accused. The first example is from the New South Wales Court of Criminal Appeal in 1997, where Sperling J said: ‘Possible reasons for not giving evidence may include the risk that an inadvertently incorrect answer, given under the pressure of cross-examination, outweighed the risk of the jury finding the accused guilty on the evidence led in the

Section 15(2) of the Evidence Act 1977 (Qld) deals with the four circumstances in which a defendant may be cross-examined as to bad character or previous convictions. Section 112 of Evidence Act 1995 (NSW) requires leave for bad character evidence to be given. Under that legislation, fairness is relevant: Stanovski v The Queen (2001) 202 CLR 115.

proceedings. A reading of the transcript does not reveal any specific difficulties faced by the accused. It seems that the mere possibility of an ‘inadvertently incorrect answer’ is considered enough to warrant protection of the accused from cross-examination. The second example is from a 1996 Victorian Court of Appeal case, where Smith AJA was concerned that ‘in deciding to give sworn evidence, much would have depended on an assessment of the applicant’s ability to handle cross-examination; his normal demeanour may have been to his disadvantage.’ The court held that this potential problem, together with the possibility of erroneous legal advice about the strength of the Crown case, created a situation whereby the failure to give evidence was not ‘clearly capable of assisting [the jury] in the evaluation of the evidence by them,’ as required by Weissensteiner v The Queen.

No allowances are similarly made for the personal difficulties of the accuser, even if she/he is a relative of the accused, or is speaking of intensely private and embarrassing matters. The majority judges in RPS, Azzopardi v The Queen; Davis v The Queen, and Dyers ignored the difficulties faced by the accusers in these cases in giving evidence. In Davis, the accuser (of three sexual offences) was the nine-year-old stepdaughter of a friend of the accused Davis, who had come to stay the night at his house. In the middle of the night, she had walked seven kilometres from his house to her stepfather’s house, and slept in the family car. She was followed by the accused who, she said, made threats about not telling others what had happened. In RPS, the accuser, the daughter of the accused, alleged two counts of carnal knowledge and six counts of sexual intercourse, penile and digital, when she was aged between four and 10. She was still only 14 at trial. In Dyers, the accuser was a young girl aged 13, who was under the control of her mother and the accused, as part of a religious sect. In each of these cases, the accuser had good reason to find it difficult to give evidence against the accused, because of the circumstances of the offences; the accuser’s young age; the difference in age between her

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7 R v Mora (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Southwell and Smith AJA, 30 May 1996) 14.
9 Azzopardi v The Queen; Davis v The Queen (2001) 205 CLR 50 (‘Azzopardi’); Dyers v The Queen (2002) 210 CLR 285 (‘Dyers’).
and the accused, who was much older; and, the power and authority of the accused over the accuser. The majority judges did not take these difficulties into account in their decision whether the accused should be expected to give evidence.

A less privileging approach would be to look at the specific difficulties the accused may have and, if appropriate, to allow for them. Specific personal difficulties in giving evidence are likely to emerge during the evidence at trial, and will be obvious to the jury. Further, if the accused is likely to suffer undue prejudice, the defence counsel can raise the issue with the trial judge in the absence of the jury. The judge can give appropriate directions, which may include the Crown tendering documentation, or leading evidence in the Crown case to overcome the undue prejudice. It can be argued, as the Northern Territory Law Reform Committee acknowledges, that jurors are capable of assessing the reasons for silence in the body of evidence before them:

Jurors will be well aware of confused behaviour under stress, but still consistent with innocence; and equally properly suspicious of no explanation or an unconvincing one. Neither of these will necessarily be conclusive and the jury will still be bound to consider whether the case has been proved beyond reasonable doubt.²⁰

The current law requires trial judges to outline to juries not only the actual reasons for silence as revealed in the evidence at trial, but also all the possible hypothetical reasons for silence. They must tell juries that there may be other reasons for the accused’s silence which were not revealed in the evidence, and may therefore be unknown to the jurors, such as timidity, confusion, and memory loss.²¹ Trial judges must also direct the jury of non-specific justifications for the silence of the accused, along the lines of ‘other reasons known only to the accused.’

In summary, the appellate courts take into account the personal difficulties of the accused (including hypothetical difficulties) in the decision whether it is reasonable to expect the accused to give evidence. However, they do not make a similar allowance for the

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²¹ These are nominated in the ‘Azzopardi Direction,’ Queensland Supreme and District Courts Benchbook, No 28.3.
personal difficulties of the accuser. This results in privileging the accused over the accuser.

3. **Limits on comment to the jury on the silence of the accused**

The legislative provisions governing comment on the silence of the accused differentiate between the trial judge and the Crown prosecutor on the one hand, and defence counsel on the other. In all jurisdictions, defence counsel have an unlimited right to comment to the jury on the silence of the accused. In contrast, trial judges and prosecutors are limited, as outlined in Chapter Two. Defence counsel are able to stress to the jury that the accused is entitled to remain silent, and may suggest to the jurors that the accused did not give evidence because he or she could do no more than deny the charge. Defence counsel may also stress to the jury that the accused has given a version in the pre-trial statement to police tendered by the Crown, and there is nothing more to be said. There is a significant disparity between the ability of defence counsel to comment to jurors on the one hand, and the very limited ability of trial judges and prosecutors to do so, on the other. This disparity constitutes explicit privileging the accused over the accuser.

4. **The use at trial of records of interviews of the accused with police**

The appellate courts seek to protect accused in the situation where they may have received ‘possibly erroneous legal advice’ to the effect that it was safe to rely on the record of interview with the police, and not run the risk of cross-examination. No doubt, accused often rely on legal advice in reaching a decision whether or not to give or call evidence; however, this is a matter between accused and their lawyers.

In the United Kingdom, reliance by the accused on legal advice whether or not to give or call evidence is not a valid reason to avoid the possibility of an adverse inference from silence pursuant to s 35 of the *Criminal Justice and Public Order Act 1994*. In 1999, the

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12 See Chapter Two, page 2.
English Court of Appeal held that an accused could be cross-examined at trial about the nature of the legal advice, and the factual premises on which it was based.\textsuperscript{14} Thus, in the United Kingdom, the existence of legal advice does not automatically rule out an adverse inference from silence. It may be necessary for the accused to give or call evidence of reliance on the legal advice, and the reasonableness of that reliance.

Unlike the United Kingdom courts, the Australian appellate courts have not been prepared to ‘go behind’ the legal advice, to allow the jury to assess actual reliance on the advice, and the reasonableness of that reliance. Instead, the mere prospect of the accused having received ‘possibly erroneous’ legal advice is accepted as a valid reason why the accused cannot be expected to give evidence. In contrast, the accuser and other Crown witnesses cannot rely on legal advice given to them as a reason for refusing to answer a question.

Accused often rely on records of police interviews to convey their version of events, and so they elect not to give evidence at trial. They gain the advantage that the trial judge will tell the jury that the availability of the record of interview may be one of the reasons why the accused chose not to give evidence at trial.\textsuperscript{15} In contrast, the accuser cannot rely on statements to police at the time of the commission of the alleged offence, and must give evidence orally at trial, sometimes many years after the event. Indeed, one of the key aspects of the cross-examination of the accuser is to bring out differences between the statement to police, and the evidence at committal and trial. The police statement of the accuser is admissible only if the defence has cross-examined on it, and suggested inconsistency, in which case the defence may ask for it to be tendered by the prosecutor to prove inconsistency, or the prosecutor may tender it to refute inconsistency. There is

\textsuperscript{14} \textit{R v Bowden} [1999] 4 All ER 43. The court emphasised that the jury is not concerned with the correctness of the solicitor’s advice, or whether it complies with recommendations of the Law Society of England and Wales; rather, it is concerned with the reasonableness of the conduct of the accused, in all the circumstances the jury find existed at the time.

\textsuperscript{15} This reason was accepted in \textit{R v Mora} (Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Southwell and Smith AJA, 30 May 1996) 14 (Smith AJA). He referred to the accused not giving sworn evidence about the matter, even though his contemporaneous account was already before the jury.
no right to tender the accuser’s police statement in order to establish the consistency of her or his story.

The other exception to the inadmissibility of police statements from accusers is that special witnesses may rely on statements given to the police, pursuant to State legislation aimed at improving the quality of evidence given by children and vulnerable witnesses. The child or vulnerable witness may also be given special consideration in the form of special pre-trial recorded evidence, in rooms remote from the accused.\textsuperscript{16} Most Crown witnesses, however, have to face the formality of a courtroom and give oral evidence without assistance from prior statements.

The accused is further privileged because the Crown prosecutor is usually required to tender the videotape, audiocassette, or transcript of interviews of the accused with the police, and it becomes a formal exhibit in the trial. This means that the accused’s version of what happened is in the jury room, but the accuser’s statement to police, and the transcript of the accuser’s evidence at trial, are not. Jurors have to memorise the evidence of the Crown witnesses, supplemented by what the judge may include about that evidence in the summing-up. In most States, if jurors require clarification of particular evidence, they are not permitted to view the trial transcript, and instead must rely on listening to the transcript being read to them by the judge’s associate. Where there is no trial transcript of evidence, the judge must rely on personal notes to remind the jury of the evidence of the accuser and the other Crown witnesses. In contrast, the accused’s statement to the police is in written form before the jury.

Recent appellate court decisions approve the long-standing practice of allowing trial judges to draw the jury’s attention to the fact that statements by the accused to police are unsworn, and the accused has not been cross-examined at trial.\textsuperscript{17} Nevertheless, the jurors

\textsuperscript{16} Criminal Law Amendment (Sexual Assault and Other Matters) Act 2004 (WA); Evidence (Children) Act 1997 (NSW); Evidence Act 1958 (Vic); Evidence (Children and Special Witnesses) Act 2001 (Tas); Evidence Act 1929 (SA); The Acts Amendment (Evidence of Children and Others) Act 1992 (WA); Evidence (Protection of Children) Amendment Act 2003 (Qld).

\textsuperscript{17} Thompson v The Queen (2001) (Unreported, High Court of Australia, McHugh and Kirby JJ, 14 September 2001); R v Kovacs (2000) 111 A Crim R 374 [43]; Trucia v The Queen [2001] WASCA
may give considerable weight to them, because they are in the form of an audiotape, a videotape or a written transcript, unlike other evidence, which must be recollected by the jurors. Although the accused may no longer give evidence by means of unsworn statements, reliance on videotapes, audio cassettes, or transcripts of police interviews offers a similar advantage to the accused, namely, the ability to rely on a statement without facing cross-examination on it. The police interview of the accused is admitted into evidence notwithstanding that it is unsworn, and is otherwise inadmissible because it is self-serving.

Records of the accused’s police interview are admitted because Crown prosecutors are obliged to put all relevant facts before the jury, even if they contain statements inconsistent with the Crown case. The appellate courts have not yet clarified whether fairness to the accused requires a Crown prosecutor to tender a record of interview even though the prosecutor considers it offers an ‘implausible explanation.’ In R v Ryan, the Court of Appeal of Queensland held that although the transcript of the interview was not tendered by the Crown, the trial judge should have mentioned to the jury that the accused had provided an explanation to police.

In summary, the accused has a number of advantages over the accuser so far as police records are concerned. The police interview is available in the jury room and the accused

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18 The right of an accused to give unsworn evidence has been abolished in all Australian States and under Commonwealth legislation. The abolition has taken place over a period of more than 30 years. In Dyers (2002) 210 CLR 285, an unsworn statement was permitted only because of the date of the offences.

19 See, eg, Summary Offences Act 1953 (SA) s74E: statements are inadmissible if they do not comply with the requirements set out in s 74D (principally video-recording requirements). An exception exists in s 74E(1)(b) for it to be admitted in the interests of justice should the accused want the whole interview to be before the jury.


is not cross-examined on it. In contrast, the accuser must give all evidence orally, in the
courtroom, and is cross-examined about the reliability of that evidence. The accuser’s
police statement and transcript of evidence at trial are not in the jury room. The
difficulties faced by the accused are raised, but not the difficulties faced by most
accusers. The courts have not advanced any reasons for this imbalance, and its
consequent privileging of the accused over the accuser.

5. Defence hypotheses and affirmative defence cases

The appellate court decisions on the right to silence at trial lead to the consequence that
the defence is not obliged to call evidence in support of hypotheses or alternative versions
put during cross-examination of the accuser. Accusers must not only give evidence of
their own version of events, but they must also rebut defence hypotheses. An example of
this type of question addressed to an accuser is: ‘you say this happened at your house at x
address; I put it to you that the family moved from there many years before that.’
Accusers may also be cross-examined on matters about which the accused has particular
knowledge, without the accused being expected to give or call evidence in respect of
them. An example of this is the question: ‘I put it to you that the accused never came into
your room at night because he watched TV.’ Since Azzopardi, there is no expectation that
the accused will give evidence of defence hypotheses or alternative versions of events put
to the accuser during cross-examination. The accused must have knowledge of facts
which are additional to the evidence led in the Crown case; particular knowledge of facts
is not sufficient to create an expectation the accused will give evidence. Defence counsel
can cross-examine the accuser on defence hypotheses, safe in the knowledge that any
inaccuracies will not be revealed in cross-examination of the accused. Williams calls the
way defence counsel are able to raise new matters or defence hypotheses during the
cross-examination of a complainant, without a corresponding obligation to call evidence
in support them, ‘the tactic of silence.’

Defence counsel can also constrain the narrative of the accuser, by insisting that the answers in cross-examination be in the form of ‘yes’ or ‘no,’ a technique which is often unchallenged by the Crown prosecutor or the trial judge (indeed, it may suit them to agree with it, because it may shorten the trial). It is true that trial judges usually warn jurors that suggestions put to witnesses, and not agreed to by those witnesses, do not become evidence; they remain suggestions only. This warning does not alter the reality that the jury has nevertheless heard the suggestions, and may give some weight to them in their deliberations, as Young explains:

Juries are told, either in opening or closing addresses, or by the judge in the charge to the jury, that the evidence is constituted by the answer to the question, rather than the question itself. It is, of course, ludicrous to think that juries either ignore the question and focus on the answer (a notion that denies the self-proclaimed dialogism of trial discourse) or are unaffected by the barrage of suggestions that defence counsel lay out before them.24

Defence counsel may raise defence hypotheses in cross-examination, and thus create the possibility of jurors drawing alternative inferences from the evidence of the accuser and Crown witnesses. This is especially significant if the Crown case is circumstantial, because the Crown must prove beyond reasonable doubt that the Crown inferences are the only rational inferences. Jurors are told that if there are other inferences which are consistent with innocence, then they must accept those inferences because that follows from the requirement that guilt must be established beyond reasonable doubt.25

The defence may even go beyond hypotheses, and advance an affirmative case, which is what occurred in Dyers. The accused was charged with indecently assaulting a girl aged 13. In an unsworn statement at trial, the accused acknowledged that he had seen the accuser that morning, but he said it was only in the company of her mother, and he was otherwise engaged in meetings with others, as noted in his diary. The diary was not tendered at trial, and none of those whose names were recorded in the diary gave evidence at trial. The majority judges in Dyers held that the course taken by the defence did not create an expectation that the accused would give evidence of his meetings on the

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morning in question. In contrast, in his dissenting judgment, McHugh J considered that the accused had not merely denied the offences; he had put forward an ‘affirmative evidentiary case.’ He said: ‘The cards are not yet stacked so heavily against the prosecution that it has a duty to call every witness that might support any affirmative case the accused might have put forward.’ McHugh J drew an analogy between an affirmative evidentiary case, as in Dyers, and the situation in Petty v The Queen; Maiden v The Queen where an adverse inference discrediting the defence was open, because the accused made a pre-trial assertion which he had not withdrawn at the committal or during the trial, which conflicted with his defence at trial. McHugh J argued that both the Dyers situation, and the Petty and Maiden situation, should lead to the possibility of an adverse inference from silence.

Defence counsel have traditionally told jurors that accused are entitled to ‘put the Crown to proof.’ This is quite different from the accused raising an affirmative case during cross-examination of the accuser, and then not giving or calling evidence in support of it. The accuser must not only deal with defence hypotheses, but must do so without advance notice of hypotheses, or any details of the defence case. The ability to rely on hypotheses is reduced by recent requirements in some States for compulsory defence disclosure, and for a defence opening at the end of the prosecution opening, but these requirements are still limited, and legislation has only been introduced in Victoria and Western Australia.

The accuser is cross-examined without knowing the accused’s version until it is revealed progressively during the cross-examination. There are no allowances for the fact that the hypotheses may be at complete variance with what the accuser says is the truth. The unfairness to the accuser arises from the combined effect of the right to silence and the lack of defence disclosure. If accusers were given some advance notice of defence hypotheses, or the defence case, then they might be in a better position to respond. The

27 Ibid [35].
28 Petty v The Queen; Maiden v The Queen (1991) 173 CLR 95.
29 Dyers (2002) 210 CLR 285 [40]-[41].
element of surprise if not ambush, under the current law is unfair. In contrast, the accused is fully appraised of the Crown case before an election is made whether or not to call or give evidence, and can prepare the response accordingly, unlike the accuser.

By using the variety of techniques which have been described, the trial process is ‘laying waste to the victim’s own story.’

Moreover, the accuser suffers a further disadvantage not suffered by the accused, namely, the accuser is exposed to the physical, mental, and emotional scrutiny of lawyers, court staff, and jurors when giving evidence. In contrast, accused are able to tell their stories in the confines of a police station, sometimes with their own lawyers overseeing and controlling the process. The impact on accusers of the scrutiny of them in court cannot be underestimated, and accusers may feel the trial process is unnecessarily confrontational, and unfairly weighted against them.

In summary, the treatment of the accused and the accuser is significantly different. The accused is fully appraised of the Crown case before the trial commences. In contrast, the accuser has no prior knowledge of the defence case, or of defence hypotheses and affirmative defence cases until they are revealed during cross-examination of the accuser. The only exceptions are the limited legislative provisions governing defence disclosure. Accusers are exposed to a range of techniques used by defence counsel to discredit their testimony and put them under maximum pressure. This disparity in treatment between the accused and the accuser privileges the accuser over the accuser.

6. The obligations of Crown prosecutors towards the defence

The obligations of Crown prosecutors reached a high point in 2002 in Dyers. The Crown prosecutor did not call the people whose names were recorded in the diary of the accused, notwithstanding that the defence case was that the accused was with these people and not

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30 Compulsory defence disclosure is required pursuant to Crimes (Criminal Trials) Act 1999 (Vic); Criminal Procedure Act 2004 (WA). A compulsory defence opening is required in Victoria: Crimes (Criminal Trials) Act 1999 (Vic). See Chapter Three, pages 30-34.

31 Young, above n 24, 462.
the complainant. The High Court judges delivered separate judgments on the duties of Crown prosecutors, which they interpreted in the light of earlier authorities on the subject.\(^{32}\) Gaudron and Hayne JJ said that although Crown prosecutors have a discretion not to call a witness if they form the view that the witness is unreliable, untrustworthy, or otherwise incapable of belief, a fair trial requires the prosecution to call all material witnesses unless there is some good reason not to do so.\(^{33}\) They also said if persons are able to give credible evidence about matters directly in issue at the trial, those facts, standing alone, would ordinarily suggest that the prosecution should call them as witnesses, notwithstanding that the evidence concerned matters raised by the accused in the unsworn statement to the police.\(^{34}\) The fact that a witness will give an account inconsistent with the prosecution case is not a sufficient reason for not calling that person.\(^{35}\)

The majority judges disagreed on what constitutes ‘material witnesses.’ Gaudron and Hayne JJ said that the people whose names were in the accused’s diary were not material witnesses because their evidence was not ‘necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based.’\(^{36}\) In contrast, Callinan J said that the term ‘material witness’ should not be given any narrow meaning. A witness will not cease to be a material witness merely because he or she is a witness to a relevant circumstantial matter or event. The persons [named in the diary] were material witnesses, because evidence from them could have borne upon the movements and activities of the accuser and the appellant at about the time of the alleged commission of the offence. A broad practical view of materiality should be taken. All the available admissible evidence, which could reasonably influence a jury on the question of the guilt or otherwise of an accused, is capable of answering the description ‘material.’\(^{37}\)

The majority judges in *Dyers* (Gaudron, Hayne, Kirby, and Callinan JJ) considerably widened the obligation of Crown prosecutors to call witnesses. The practical effect is that Crown prosecutors must monitor the possible defence case, as well as present the Crown case, and must call all possible witnesses, notwithstanding that there may have been no

\(^{34}\) Ibid.
\(^{36}\) Ibid [18], citing Dawson J in *Whitehorn v The Queen* (1983) 152 CLR 657, 674.
defence disclosure. Some years before *Dyers*, the New South Wales Law Reform Commission was critical of too high a burden being placed on prosecutors: ‘It is not a legitimate consequence of the right to silence that a defendant can run opportunistic and spurious defences which take advantage of some matter against which, in the result, the prosecution failed to guard.’ The practical effect of *Dyers* is that accused need not call witnesses in support of their case because Crown prosecutors are obliged to fulfil this role for them. What ‘material witness’ means is not clear, because of the differences in the High Court judgments.

Some appellate court decisions since *Dyers* have ameliorated its effects; for example in *Callander v The Queen*, the court gave a narrow meaning to what constitutes a ‘material witness,’ and held that the nominated witness was not in that category. In *Randall v The Queen*, the court held that the nominated witness was not a ‘material witness’ within *Dyers*, because there had been no request, by either the accused or his counsel, for the proof of evidence from that witness, or a request for the witness to be called in the Crown case. Similarly, in *Gillan v Police*, the court held that the nominated witnesses were not ‘material’ because the Crown had not obtained statements from them, and there was uncertainty whether those witnesses had made any observations of any matter relevant to the proceedings. However, the ameliorating effects of these cases is far outweighed by the reality that most cases are decided in accordance with *Dyers*.

No allowance is made by the appellate courts for the difficulties the Crown may have in proving a totally circumstantial case when the accused remains silent. In *R v Weissensteiner*, at first instance in the Supreme Court of Queensland, the trial judge told the jury they ‘may consider that the truth is not easily ascertainable by the Crown.’ This statement was not specifically criticised by any of the High Court judges as an error by the trial judge, nor was it taken up again in any subsequent appellate court decisions on

37 Ibid [118].
38 *Crimes (Criminal Trials) Act 1999* (Vic); *Criminal Procedure Act 2004* (WA).
40 *Callander v The Queen* (2004) 144 NTR 1 [29].
the right to silence. Presumably, it is not good law now because it would seem to be inconsistent with Azzopardi, and the appellate courts have never given any weight to the difficulties of proving the Crown case.

In summary, the Crown prosecutor must call all material witnesses, and take into account any possible defence case. The prosecutor must do so, even if he/she considers that those witnesses are unreliable or irrelevant. The appellate courts make no allowance for the non-disclosure of the defence case, or the practical difficulties the Crown may face. This constitutes privileging of the accused over the accuser.

7. The operation of Jones v Dunkel inferences

In 1983, in Jones v Dunkel, the High Court held that if a party had not called a witness whom the jurors might have expected that party to call, the jurors may, in the absence of a satisfactory explanation, infer that the witness could not have assisted that party’s case. The rule was commonly applied in criminal trials to both prosecution and defence. For example, in R v Brennan, the accused was charged with robbery, and did not give or call evidence at trial. The Crown relied on fingerprint evidence. The Court of Appeal of Queensland allowed a Jones v Dunkel inference because the accused had not called his wife to support the explanation he gave to the police, namely, that his palm print was imprinted on the door of the safe on another occasion.

The majority judges in RPS held that jurors must not draw a Jones v Dunkel inference, ‘without taking into account that an accused person is not bound to give evidence and that it is for the prosecution to prove its case beyond reasonable doubt.’ After RPS, State appellate courts expressed reservations about the availability of Jones v Dunkel inferences in criminal trials, and several recommended that the matter be raised with counsel in the absence of the jury, in order to ascertain any possible reasons for the

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44 Jones v Dunkel (1959) 101 CLR 298.
46 RPS (2000) 199 CLR 620 [28].
failure to call a witness, and any reasons why the giving of a Jones v Dunkel direction may be unfair.\textsuperscript{47} In R v Dang in 2000, the New South Wales Court of Appeal said that in a criminal case where the accused remains silent there is ‘almost no room for the operation of a Jones v Dunkel inference.’\textsuperscript{48}

In Dyers, the High Court clarified the issue, and held that the trial judge should not have given a Jones v Dunkel direction against the defence.\textsuperscript{49} The majority judges gave three reasons why a Jones v Dunkel direction should not have been given. First, the principle from Azzopardi that there can be no expectation that an accused should or will go into evidence;\textsuperscript{50} secondly, the importance of the prosecutor’s duty to call all material witnesses;\textsuperscript{51} and thirdly, because the jury must not speculate about what evidence might have been given, and should focus on the witnesses to the events described by the accuser, rather than on inferences about peripheral issues.\textsuperscript{52}

The defence in Dyers had not given notice of alibi. Neverthless, Gaudron and Hayne JJ said that even if the accused had relied on his unsworn statement as evidence of alibi, their conclusions on the Jones v Dunkel point would not have been any different.\textsuperscript{53} This is surprising in view of the fact that under State legislation, the accused must disclose alibi evidence.\textsuperscript{54} Gaudron and Hayne JJ also said that the judge should have told the jury that they had to take the unsworn evidence from the dock into account, and that they were not to speculate about what others may or may not have said had they been called to give evidence.\textsuperscript{55} Although Dyers involved unsworn evidence from the dock, and this method of giving evidence has been abolished in all States, the decision extends further than this.

\begin{itemize}
\item \textsuperscript{48} R v Dang [2000] NSWCCA 269 (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Meagher JA, Grove and Bergin JJ, 14 July 2000) [14].
\item \textsuperscript{49} Dyers (2002) 210 CLR 285 [6].
\item \textsuperscript{50} Ibid [9] (Gaudron, Hayne JJ).
\item \textsuperscript{51} Ibid [11].
\item \textsuperscript{52} Ibid [13].
\item \textsuperscript{53} Ibid [19].
\item \textsuperscript{54} Criminal Code Act 1983 (NT) s 331; Criminal Code 1924 (Tas) s 368A; Criminal Law Consolidation Act 1935 (SA) s 285C; Criminal Code 1899 (Qld) s 590A; Crimes Act 1958 (Vic) ss 399A and 300B; Criminal Code Act 1913 (WA) s 636A; Criminal Procedure Act 1986 (NSW) s 48.
\end{itemize}
The majority judges held that a *Jones v Dunkel* direction should not be given against the defence in *any* criminal trial.\(^{56}\)

In *Dyers*, Callinan J held that:

> In almost all cases, a trial judge should say nothing about an absent material witness whom an accused might supposedly have called. At most, a trial judge might in some circumstances have occasion to say that the jury should act on the evidence, and only the evidence that has been called.\(^{57}\)

McHugh J dissented, and held that the trial judge had not erred in leaving a *Jones v Dunkel* inference open to the jury. He considered that an affirmative evidentiary case was no different from ‘an ordinary alibi case,’\(^{58}\) and, ‘[i]t is natural to expect that the jury might reasonably think that the appellant should have called that witness to support what was in effect an alibi.’\(^{59}\)

Since *Dyers*, it is clear that a *Jones v Dunkel* inference is not available against the defence, but there has been lingering uncertainty about whether a *Jones v Dunkel* inference is open against the Crown. Papamantheos argues that it can be,\(^{60}\) however, the point has not been specifically argued in the appellate courts.

In summary, since *Dyers*, a *Jones v Dunkel* inference is not open on the defence case, but may be open on the Crown case, which privileges the accused. A more even-handed approach is possible. For example, the judge could warn the jury to refrain from speculation as to why witnesses were not called, or what evidence they might have given, and to decide the case on the evidence before them. This direction is similar to the one advocated by Callinan J in *Dyers*. It could apply equally to the Crown and to defence, and thus avoid privileging the accused over the accuser.

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\(^{56}\) Ibid [6].

\(^{57}\) *Dyers* (2002) 210 CLR 285 [123].

\(^{58}\) Ibid [30].

\(^{59}\) Ibid [35].

8. The gap between compulsory disclosure from the prosecution and the defence

As discussed in Chapter Three, compulsory defence disclosure qualifies an absolute right to silence. However, the qualification is limited because the extent of compulsory defence disclosure is limited. Victoria and Western Australia are the only States with legislation extending compulsory defence disclosure beyond alibi and expert evidence. In contrast, compulsory prosecution disclosure has been expanded in recent years in all jurisdictions, both in legislation and also in numerous policies and guidelines issued by Directors of Public Prosecutions in all States and the Commonwealth. Hunt suggests that a solution to the existing gap between compulsory prosecution disclosure and compulsory defence disclosure is the introduction of reciprocal disclosure. He argues that there is a link between fairness and ‘equality of arms’ for the prosecution and the accused:

If the purpose of a criminal trial is a fair trial, then reciprocal disclosure can be justified as recognizing the need for equality of arms: both the prosecution and the accused to have knowledge of, and the opportunity to comment on the observations filed or evidence adduced by the other party.

Reciprocal disclosure offers a non-privileging approach to disclosure.

In summary, the combined effect of the existing gap between compulsory prosecution disclosure and compulsory defence disclosure, and the increasing responsibility imposed on Crown prosecutors to call all material witnesses since Dyers, means that the accused is significantly privileged over the accuser.

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61 Crimes (Criminal Trials) Act 1999 (Vic); Criminal Procedure Act 2004 (WA).
62 The requirements for prosecution disclosure are contained within broader topics in Statements and Policy documents for Directors of Public Prosecutions in all States and the Commonwealth. The Commonwealth, Northern Territory and Victoria have specific policy documents specifically dealing with prosecution disclosure.
64 Reciprocal disclosure was suggested by Sopinka J in Stinchcombe v Her Majesty, The Queen [1991] 3 SCR 326, the leading Canadian case on disclosure.
9. The accused is not expected to give evidence in a word-on-word situation

In *RPS*, the majority judges said:

In a case where the prosecution leads direct evidence of the accused’s guilt (as will usually be the case where sexual offences against a young person are alleged) it is, therefore, not right to say that it would be reasonable to expect the accused to give evidence denying or contradicting that direct evidence.65

The majority judges in *RPS* thus introduced a distinction between Crown cases consisting of direct evidence on the one hand, and Crown cases consisting of circumstantial evidence on the other. For the former, it is not reasonable to expect the accused to give evidence. If there is a combination of direct evidence and circumstantial evidence, then the former prevails, and the accused is not expected to give evidence.66 In the cases decided prior to *RPS*, the distinction between direct evidence and circumstantial evidence had not been relevant to the right to silence. The distinction in *RPS* was new, although the majority judges said otherwise.67

The majority judges in *RPS* thus displayed an unwillingness to expect an explanation from the accused when a case involves a word-on-word conflict between the accuser and the accused. In *R v Arbolino*, the Crown prosecutor conceded that by virtue of *RPS*, the trial judge had mis-directed the jury when he had referred to the ‘two persons best able to give evidence of what happened in that incident.’68 The fact that this was held to be an ‘error’ by the trial judge might be seen by disinterested outsiders as difficult to understand, because they may well think the opposite, that is, if there are two persons best able to give evidence of what happened in an incident, both should give evidence. They may also consider the current law is unduly burdensome on the accuser, and unjustifiable privileges the accused. There is no logical or clear reason why circumstantial facts call for explanation, while the accuser’s accusations do not, and to

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65 *RPS* (2000) 199 CLR 620 [34].
66 See Chapter Two, page 28.
67 Although they said it was supported by *Weissensteiner* (1993) 178 CLR 217, a close examination of that decision does not support their reading, as McHugh J pointed out in *Azzopardi* (2001) 205 CLR 50 [111]. This has been discussed in Chapter Two, pages 20-21.
date appellate court decisions have not included a satisfactory rationale for the
distinction.

The appellate court judges fail to acknowledge the impact of the silence of the accused on
the accuser. The accuser is required to carry the full burden of proving the case,
notwithstanding personal vulnerabilities. This is in sharp contrast to the accused, whose
difficulties in giving evidence are relevant to the legal consequences of his/her silence. In
a 2002 judgment of the Court of Appeal of Queensland, Jerrard JA described the court
process in this way:

Others may share my view that it is an unacceptable oddity in this 21st century that the
criminal processes in this State place the entire evidentiary burden of proof of the serious
charges brought against the appellant upon the evidence of a child who was only 11 and a
half years old in May 2002, whereas other courts making equally important
determinations on the same topic of sexual abuse of children by family or extended
family members routinely, and almost invariably, gain information from many other
sources, and positively discourage the concept that truth can be ascertained by the cross-
examining of a child.69

In the right to silence decisions, the High Court has not acknowledged the unfairness of
relying solely or mainly on the oral testimony of a child, while the accused is entitled to
remain silent. As discussed previously, the decisions allow for the personal circumstances
of the accused, but not for the personal circumstances of the accuser, even if the accuser
is a child, or an especially vulnerable adult (such as a traumatised rape victim). The
distinction created by RPS between direct evidence and circumstantial evidence creates a
situation where even more responsibility is put on the shoulders of the accuser, and no
allowance is made for the difficulties of proof in a word-on-word situation when words
from only one side are heard.

The majority judges in Azzopardi rationalised the distinction they created by saying that
the direct evidence of the accuser provided one possible explanation of the circumstantial
evidence. Therefore, they argued, ‘if the complainant were accepted as a credible witness,
the accused could not have given evidence of any additional fact that might have

69 R v D [2002] QCA 445 (Unreported, Court of Appeal of Queensland, McMurdo P, Jerrard JA, and
Holmes J, 25 October 2002) [46]. As Jerrard JA is a former Justice of the Family Court of Australia, it
is assumed that the ‘other courts’ to which he referred were the Family Court of Australia and the
Federal Magistrates Courts.
explained or contradicted her account. They raised the hypothetical possibility that if the accuser had been unable to give evidence, then it would have been a circumstantial case only, and the facts would then have called for explanation or contradiction by the accused. The court thus sent a powerful and negative message to accusers, namely, that their evidence is inferior. In effect, it seeks to silence accusers by saying the Crown would have been better off without them!

The majority judges in *RPS* and *Azzopardi* allowed categorisation (direct evidence and circumstantial evidence) alone to dictate when an accused may reasonably be expected to give evidence. They acknowledged that direct evidence usually occurs where sexual offences against young persons are alleged, but they did not make allowance for this in their judgment. The principle that the accused cannot be expected to respond to direct evidence is contrary to everyday experience of life: where there are two versions of a story, and no independent verification for either story, then hearers expect to hear both sides of the story. As Davies points out, it is ‘logically fallacious’ not to expect a response to direct evidence; indeed, evidence from the accused should be expected more in direct evidence cases than in circumstantial evidence cases.

The issue of consent in rape trials is problematic in this context, and illustrates Davies’ point. The accused is not expected to give positive evidence of belief in consent, or honest and reasonable mistake as to consent, and can simply contradict the accuser through cross-examination by defence counsel, while remaining silent in the dock. In *R v Bozkus*, the New South Wales Court of Criminal Appeal held that the giving of positive evidence of consent is not considered to be evidence which ‘could come only from the accused,’ as required by *Weissensteiner* and *RPS*. This decision was handed down before the High Court judgment in *Azzopardi*, but presumably the majority judges in

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70 *Azzopardi* (2002) 205 CLR 50 [81].
71 Ibid. The facts were the accuser’s otherwise unexplained departure from the accused’s house and return to her own house, coupled with clinical observations of her physical condition consistent with her having been sexually assaulted.
Azzopardi would (if asked) express the view that consent is not an ‘additional’ fact because absence of consent must be part of the Crown case. This is unsatisfactory because consent is very much an issue where two sides of the story ought to be heard. It therefore follows that if juries reach verdicts based only on the evidence of the accuser and the denials or alternative hypotheses of the defence, then those verdicts are not only logically flawed, but also unfair.

In summary, the fact that appellate courts do not expect the accused to give evidence in a word-on-word situation privileges the accused over the accuser. The artificial distinction between direct evidence and circumstantial evidence is unsatisfactory, unclear and impractical. Further, the distinction is also demeaning of the accuser and gives no weight at all to the allegations made against the accused. It is especially problematic when the accuser is a young or vulnerable person, when no allowance is made for the difficulties of the accuser in giving evidence when it is word-on-word.

10. **The accused is the sole focus of concern in the criminal trial**

Biber describes the focus on the accused in the right to silence cases in this way:

> On reading superior court decisions in which the right to silence is at stake, the primary concern of the courts is in ascertaining whether a judicial comment contained something improper, or whether the jury might have drawn an improper inference from a judicial comment. “Improper,” in this context, means anything that is “adverse” to the accused. 74

In deciding whether to expect an explanation from the accused, the appellate courts focus exclusively on protecting the accused, and not on the overall circumstances of the case. The focus is only on accused, and any problems encountered by them in giving evidence; there is no counter-balancing consideration of any problems of Crown witnesses. If the High Court judges were to widen their focus to take in the accuser as well as the accused, then different conclusions might follow. The use of a wider focus is expanded and analysed in the next chapter.

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Another way the current law on the right to silence privileges the accused is that although the accused is entitled to remain silent because defence counsel considers the Crown case is weak, the reverse does not apply; even where the Crown case is strong, there is still no expectation of evidence from the accused. An alternative approach would be for the trial judge to tell the jury that one of the matters they may take into account in deciding whether the circumstances created a reasonable expectation of explanation from the accused was their assessment of the strength of the Crown case. The strength of the Crown case was considered relevant in the dissenting judgments of Lamer CJ and McLachlin J in the leading Canadian right to silence case of *R v Noble*. Lamer CJ said: ‘It is only where a case to meet has been put forth and the accused is enveloped in a cogent network of inculpatory facts that triers of fact may draw inferences from an accused’s silence.’\(^{75}\) The willingness of two justices of the Supreme Court of Canada to look at the ‘cogent network of inculpatory facts’ in deciding the significance of the silence of the accused offers the possibility that the justices of the High Court of Australia could do likewise, thus widening their focus beyond the protection of the accused. Davies concurs, and includes it as one of the factors to be specified in legislation governing the jury’s decision whether an adverse inference should be drawn from silence.\(^{76}\)

In deciding whether evidence can be expected from an accused, the current focus of the Australian appellate courts is restricted to whether there are ‘additional facts known only to the accused.’\(^{77}\) This focus invites the jury to look at the evidence only from the perspective of the accused, and to ignore the perspective of Crown witnesses, especially the accuser. This limited focus involves privileging the accused over the accuser, as illustrated in this comment by Callinan J in *Azzopardi*:

> If he [the accused] was not guilty of the alleged offences, he would not have been in a position to explain, at least by admissible evidence, the apparent injuries to the accuser’s vaginal area. To put it another way, the injuries to the accuser’s vaginal area were not matters peculiarly within the knowledge of the applicant.\(^{78}\)

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\(^{75}\) *R v Noble* [1997] 1 SCR 874, 896 (Lamer CJ).


\(^{77}\) *Azzopardi* (2001) 205 CLR 50 [64] (Gaudron, Gummow, Kirby and Hayne JJ).

\(^{78}\) Ibid [210].
Quite apart from its tone, which trivialises and demeans the accuser, this approach is unfair. It isolates one piece of circumstantial evidence. A preferable approach would have been to look at the evidence as a whole (including the circumstances of the accuser as well as the accused, and the context of the alleged crime) and then to say whether all those circumstances called for explanation from the accused. Judges and defence counsel have traditionally shown an abhorrence of what they call ‘bare denials,’ and say to juries: ‘What could the accused say, other than to deny the allegations?’ This argument overlooks the reality that further evidence may emerge during the evidence of the accused; for example, details which may support, or contradict, the evidence of the accuser about the place, time, and nature of the offence. This is explored further in Chapter Six.

Because their focus is exclusively on the accused, the appellate courts implicitly refuse to look at the consequences of their rules for the other parties in the case. Cover goes so far as to suggest that judges today share the same attitude as the nineteenth century United States judges who heard the early anti-slavery cases:

> Most judges would similarly [to the judges in the anti-slavery cases] respond to the plural dimensions of normative argument by selecting the most rigid thread and, at the same time, denying their own responsibility for that choice.79

In the right to silence decisions of the Australian appellate courts, the ‘most rigid thread’ is that the accused is entitled to remain silent and is not expected to give evidence. This ignores the consequences for the accuser. The appellate court judges do not consider it is their responsibility to minimise the burden on the accuser. Nor do they consider whether the community is entitled to expect the accused to offer an explanation in circumstances wider than those enunciated in Azzopardi. One such community expectation arose following a 2002 trial in the Supreme Court of Queensland.80 The accused was acquitted of the murder and manslaughter of a man who died following a violent fight. The accused remained silent at trial. In a newspaper interview, the family of the dead man commented

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80 R v Gibson (Unreported, Supreme Court of Queensland, Muir J, 5 November 2002).
that where the accuser was dead, and thus could not give his version, the accused ought to have been required to explain his actions. The same reasoning would apply if an accuser suffered a head injury and had no recollection of the incident, or indeed, in any situation where the accused is the only person who can give an account of what happened.

**Conclusion**

The decisions, trial procedures and legislation described in this chapter empower the accused and disempower the accuser. The existing provisions in the law can adequately protect the accused without the necessity for an absolute right to silence. The current law on the right to silence allows the accused not to disclose the defence case (with one or two exceptions) and to remain silent, even when there is an affirmative defence case. By putting defence hypotheses, the accused can attack the accuser’s credibility, without the risk of having to give or call evidence. This also applies to matters of which the accused may have particular knowledge. The gap between compulsory prosecution disclosure and compulsory defence disclosure is too wide, and privileges the accused.

Since *Azzopardi* and *Dyers*, exculpatory facts are included by the accused in the record of the police interview; they may also be suggested to Crown witnesses in cross-examination. Neither course creates an expectation that the defence will call evidence to support those facts, or that the accused will be exposed to cross-examination. Moreover, no adverse comment can be made by the prosecutor or judge, and the jury are told that no adverse inference is open to them by virtue of those defence choices. The accused has choices with no consequences. In contrast, accusers cannot rely on their statements to the police, and must face cross-examination in the courtroom. The accuser’s evidence is only in oral form before the jury. The Crown prosecutor is usually required to tender the audiocassette, videotape and transcript of the police interview with the accused, and they are played or read (and re-played or re-read) by the jurors in the jury room. Even if the accused makes full or partial admissions, either in a police interview or at some stage.

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81 ‘Family of dead man speak out,’ *Courier-Mail*, Brisbane, 5 November 2002, 3.
prior to trial, those admissions do not create an expectation that the accused will give evidence to explain them. The accused is not expected to give evidence in a word-on-word situation, even if the accuser is young and/or vulnerable. In all these ways, the accused is privileged over the accuser. This begs the question: how do the courts justify this privileging?

Part Two How the courts justify the privileging of the accused

Introduction

The Australian appellate courts have never denied that the criminal trial is weighted in favour of the accused. 82 Indeed, they have justified this weighting by reference to the following arguments: firstly, privileging is inevitable if the accused is to be given a fair trial; second, because the criminal trial is a contest between the state and the accused, allowance must be made for the state’s greater resources; third, the significance of the fact that only the accused is in jeopardy of punishment; and, fourth, the need to avoid convictions of innocent accused. Each of these justifications is now discussed in turn.

1. A fair trial for the accused

In RPS, the High Court said: ‘The fundamental task of a trial judge is of course to ensure a fair trial of the accused.’ The analysis in this chapter focuses on this emphasis on the words ‘of the accused.’ In an article on fairness in the criminal trial, Walker concludes: ‘Fairness is a jurist’s will-o’-wisp, the crucial distinction is between justified and unjustified bias, and fairness can mean no more than an absence of biases which are regarded as unjustifiable in the jurisdiction in question.’ 83 He argues that if there is unjustifiable bias, then the trial is not fair. In contrast, the appellate courts have

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82 See, eg, Transcript of Proceedings, Azzopardi (High Court of Australia, Gleeson CJ, Gaudron, McHugh, Kirby, Gummow, Callinan JJ, 30 April 2004) 42 (Kirby J): ‘the weighted nature of the criminal trial.’

conceptualised a fair trial as a trial which is fair to the accused, and thus impliedly that
fairness to others is irrelevant. Questions arise as to why they have side-stepped the issue
of bias. The fairness of trials to only the accused has rarely been expressly articulated,
although Fitzgerald P did so, when as President of the Court of Appeal of Queensland in
1995, he ruled in *R v Kemp*:

[The trial judge’s] directions were inadequate to ensure that the appellant had the fair trial
to which he was entitled. That entitlement is not qualified by notions of fairness to the
complainant or the community, and references to such considerations are meaningless
unless as qualifications of an accused person’s right not to be tried unfairly. It is not open
to the judiciary, at least at this level, to introduce a new theory of what is in the public
interest into this area of the criminal law. The doctrine that an accused person is not to be
tried unfairly is entrenched in the common law, which accepts the paramountcy of that
public interest over competing interests in the vindication of victims and the conviction
of guilty persons. 84

As this passage illustrates, fairness in a criminal trial is a concept with a very narrow
meaning. It means fairness to the accused, and to the accused only, and is achieved by
compliance with procedural requirements. The problem with this is that when fairness is
thus reduced to its operational meaning, it loses its transcendent quality. 85 Fitzgerald P’s
definition of ‘public interest’ in a criminal trial is very narrow, because he limits it to the
right of an accused ‘not to be tried unfairly.’ This narrowly defined public interest is
paramount over other aspects of public interest, such as the vindication of victims and the
conviction of guilty persons.

Fitzgerald P said that if the traditional common law approach is to be challenged, it
‘cannot be on the basis of legal principle: it depends on contemporary community values
and conditions.’ 86 He does not say why the challenge to the common law cannot be based
on legal principle, or why the judiciary cannot introduce a new theory of the public
interest. The appellate courts have not hesitated to do so in many other areas, and there is
no reason why they cannot do so in this area. 87 Without convincing explanations, the

84 *R v Kemp* (No 2) [1997] 1 Qd R 383, 399.
85 Antoine Peters, ‘Law as Critical Discussion’ in Gunther Teubner (ed), *Dilemmas of Law in the Welfare
State* (1986) 270.
87 An example is the High Court decision in *Dietrich v The Queen* (1992) 177 CLR 292, when the court
recognised that those who are accused of serious offences have a right to a fair trial and it would be
unfair for them to be unrepresented.
principle of ‘paramountcy’ of the accused is no more sophisticated than bias towards the accused. ‘Contemporary community values and conditions’ may, or may not, support the ‘paramountcy of the accused.’ In any event, the differentiation between ‘legal principle’ on the one hand, and ‘contemporary community values and conditions’ on the other, is curious: surely they should be related?

One or two appellate court judges have expressed reservations about the narrow definition of a fair trial, and the need for change, but these statements have not had any direct impact on case law.88 A former Chief Justice of the High Court, Mason CJ, when speaking at a criminal law conference, acknowledged ‘community interest’ and ‘the public interest’:

Invariably, invocation in a given case of the right to a fair trial generates an element of tension between the implementation of the right and some other competing community interest; for example, the public interest in securing the conviction of persons who have committed criminal offences. In that respect, the right to a fair trial may be compared with freestanding fundamental rights protected by a statute or a constitution, though in other respects it is different.89

This statement raises more questions than it answers. It is unclear what Mason CJ meant by ‘an element of tension;’ for example, whether he was foreshadowing Fitzgerald P’s argument two years later that a fair trial for the accused has paramountcy over other interests. He, like Fitzgerald P after him, did not offer any insights as to what changes are possible or desirable.

Earlier, in 1989, another Chief Justice, Brennan CJ, had referred to the public interest in his judgment, in *Jago v The District Court of New South Wales:*

Moreover, although our system of litigation adopts the adversary method in both the criminal and civil jurisdiction, interests other than those of the litigants are involved in litigation, especially criminal litigation. The community has an immediate interest in the administration of criminal justice to guarantee peace and order in society. The victims of crime, who are not ordinarily parties to prosecutions on indictment and whose interests have generally gone unacknowledged until recent times, would be able to see that justice is done if they are not given to self-help to rectify their grievances.90

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89 Sir Anthony Mason, ‘Keynote Address’ (Fifth International Criminal Law Congress, Sydney, 26 September 1994).
90 *Jago v The District Court of New South Wales* (1989)168 CLR 23, 49.
Brennan CJ even went so far as to say: ‘The interests of the community and of the victims of crime in the enforcement of the criminal law seem to have been depreciated, if not overlooked.’\footnote{Ibid 54.} He does not explicitly say so, but he seems to be suggesting that recognition of a wider range of interests is possible, and, in this respect, his view is different from that of Fitzgerald P in \textit{Kemp}, eight years later. Disappointingly, neither judge mentioned the matter again in subsequent judgments, and the issue has not been subsequently taken up by other judges or legislators.

The Australian courts have not explored the possibility that privileging the accused is avoidable, and that it is possible for a fair trial to be fair to the accused and the accuser alike. A fair trial for accusers has not been embraced by the legislature; politicians who have engaged in ‘law and order’ debates have focussed on the sentencing process, rather than on the trial process itself. There have been a few exceptions, such as special procedures for children giving evidence,\footnote{\textit{The Acts Amendment (Evidence of Children and Others) Act 1992} (WA); \textit{Criminal Law Amendment (Sexual Assault and Other Matters) Act 2004} (WA); \textit{Evidence (Children) Act 1997} (NSW); \textit{Evidence Act 1958} (Vic); \textit{Evidence (Children and Special Witnesses) Act 2001} (Tas); \textit{Evidence Act 1929} (SA); \textit{Evidence (Protection of Children) Amendment Act 2003} (Qld).} and prohibiting direct cross-examination by unrepresented accused.\footnote{\textit{Evidence (Children) Act 1997} (NSW); \textit{Crimes Act 1914} (Cth); \textit{Criminal Law Amendment Act 2000} (Qld); \textit{The Sexual Offences (Evidence and Procedure) Act 2004} (NT); \textit{Domestic Violence Act 1992} (NT); \textit{Evidence Act 1906} (WA); \textit{Evidence Act 1929} (SA); \textit{Crimes (Sexual Offences) Act 2005} (Vic).} Politicians and law reform commissioners have not responded to Brennan CJ’s comment that victims are ‘depreciated, if not overlooked.’ One exception was the Attorney-General for Western Australia, who in 2002 said, in the context of legislation to introduce compulsory defence disclosure:

\begin{quote}
[When hanging was a punishment] our criminal law became criminalcentric. It picked up the moral issues that pertained to the criminal, but did not become very good at handling the moral issues that pertained to the victim. To this day, generally speaking, the courts handle victims atrociously [sic]...The present process was established in the name of people who we thought would be hanged but who now will not be. We have a process that is so concentric to the criminal that we completely forget the interests of the complainant. The two are inextricably combined particularly in stalking or rape cases in which it is not unreasonable to ask, ‘What will your defence be; we will meet it and we will accept that the onus is on us to prove you are wrong, but at least let’s have a fair contest.’\footnote{Ibid 1016-7 (Foss).}
\end{quote}
Despite this statement from the Attorney-General, the ‘moral issues that pertain to the victim,’ have not been addressed in legislation in Western Australia, or in any other State. In the same debate in the Western Australian Parliament, another Member specifically referred to, ‘The balance between the rights of the accused and the interests of the community’ under ‘the umbrella concept of a fair trial.’ She quoted the former Commonwealth Director of Public Prosecutions, Rozenes:

> The interests of justice are not limited to the interests of the accused, but include the interests of the victims of crime, jurors and the community, in seeing that crime is punished, that the innocent go free, that criminal conduct is deterred and that public funds are expended wisely.  

However, she went on to qualify her comment by saying, ‘Jury trial, the right to silence, and perhaps even such fundamental pillars of the criminal justice system as the presumption of innocence, are sacrosanct.’ Thus, the discussion returns to the proposition that a fair trial remains a fair trial for the accused only. The appellate court judges have also not taken up the challenge of widening the concept of a fair trial so that it is not ‘criminalcentric,’ and, instead, includes the interests of accusers and the community. ‘The interests of justice’ remain limited to those of the accused, and accusers continue to be ‘overlooked.’

It is possible, and indeed desirable, to widen the concept of a fair trial. Hoyano argues:

> Affording witnesses some protection by mitigating the rigors of the orthodox adversarial trial does not necessarily mean that one is hollowing out the defendant’s rights. The defendant’s birthright under any rational criminal justice system is a fair trial, that is, a public process whereby the probative value of all of the available admissible evidence can be fairly, thoroughly and effectively tested in the court’s quest to ascertain the truth about past events.

This definition of a fair trial takes the focus away from the accused, and re-conceptualises the criminal trial as a public process which fairly and effectively tests the admissible evidence.

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Some judges of the Supreme Court of Canada have tried to get away from a concept of a fair trial which focuses only on the accused.\footnote{\textit{Dagenais v Canadian Broadcasting Corporation} [1994] 3 SCR 835 (Lamer CJ).} L’Heureux-Dube J in particular has espoused a broader approach. In 1991 in \textit{Seaboyer v The Queen}, the Supreme Court of Canada considered whether legislative provisions concerning sexual history evidence infringed the fair trial provisions of the Canadian Charter. She dissented in holding that one of the provisions did not infringe the Charter. In the course of her judgment, she said:

> It is true that s 11 of the Charter constitutionalizes the right of an accused and not that of the state to a fair trial before an impartial tribunal. But ‘fairness ‘implies, and in my view demands, consideration also of the interests of the state as representing the public. Likewise, the principles of fundamental justice operate to protect the integrity of the system itself, recognizing the legitimate interests not only of the accused but also of the accuser.\footnote{\textit{R v Seaboyer} [1991] 2 SCR 577, 698.}

In 1995 in \textit{R v O’Connor}, the Supreme Court of Canada considered disclosure of medical, counselling ands school records. L’Heureux-Dube, La Forest and Gonthier JJ and McLachlin JJ dissented, and L’Heureux-Dube J said:

> Although the Constitution guarantees the accused a fair hearing, it does not guarantee the most favourable procedures imaginable…Finally, although fairness of the trial and, as a corollary, fairness in defining the limits of full answer and defence, would primarily be viewed from the point of view of the accused, both notions would nevertheless also be considered from the point of view of the community and the complainant.\footnote{\textit{R v O’Connor} [1995] 4 SCR 411 [CV11].}

In 2000 in \textit{Dagenais v Canadian Broadcasting Corporation}, the Supreme Court of Canada considered a publication ban and the fair trial rights in the Canadian Charter. L’Heureux-Dube and Gonthier JJ dissented; the former embraced the public interest within the concept of a fair trial:

> The fairness of a trial, however, is also of general public interest. The fairness and integrity of the criminal process is a cornerstone of the legal system. In protecting the fairness of the trial, both under the Charter and at common law, courts have frequently recognised that the potential for prejudice relates not only to the accused, but to society in general.\footnote{\textit{Dagenais v Canadian Broadcasting Corporation} [1994] 3 SCR 835, [71].}

In addition to the accused’s interest in the fairness of their trial, the public had an interest in their being acquitted or convicted through trials that were fair and that had the appearance of fairness… Similarly, the courts had an interest in ensuring that justice was done, and an interest in safeguarding the repute of the administration of justice by ensuring that justice was seen to be done.\footnote{Ibid [79].}
In contrast to the fixed position adopted by Fitzgerald P, the concept of justice espoused by L’Heureux-Dubé J includes the interests of ‘society in general,’ as well as the interests of the accused, and it recognises that the two need not be mutually exclusive. In *Darrach v The Queen*, the Supreme Court of Canada (McLachlin CJ and L’Heureux-Dube, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbo LeBel JJ) unanimously upheld s276 of the Criminal Code concerning sexual history of the complainant. The court stated that the core principles of fundamental justice can be respected without the accused being entitled to ‘the most favourable procedures that could possibly be imagined.’ As demonstrated in the earlier chapters of this thesis, when it comes to the right to silence, ‘the most favourable procedures’ are indeed what the accused has been granted by the Australian appellate courts, and more especially in their recent decisions.

In summary, it is possible to have a concept of a fair trial which does not privilege the accused, although this has not traditionally been conceded by judges, nor embraced by legislatures. The starting point is to challenge the inevitability of the paramountcy of the accused over all other aspects of the public interest. This challenge has yet to be mounted. Meanwhile, the appellate courts continue to assert that the interests of the accused must remain paramount. They unapologetically privilege the accused because that is the accepted procedure in criminal trials.

2. **The criminal trial is a contest between the state and the accused**

Another argument advanced by the appellate courts for privileging the accused is that the criminal trial is a contest between the state and the accused, with consequential inequality of resources, and this inequality justifies privileging the accused over the accuser. The contest between the state and the accused has been a significant, indeed overarching, concept which dominates the discussion on the nature of criminal trials. Again, this has rarely been expressly articulated except by Fitzgerald P:

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In my opinion, the common law starts for this purpose, as it does elsewhere, with the presumption that an accused person is innocent and any choice which would be made between the two approaches [fairness to accused only, and overall fairness] to which I have referred would be made in the context of a contest between the state and an individual citizen; these considerations strongly favour continuation of the traditional approach which focuses attention only on the interests of the accused.105

The inequality of resources between the Crown and the accused, however, is assumed rather than proven. A number of factors ought to be taken into account: first, ‘the inequality of resources is ameliorated by the obligation on the part of the prosecution to make available all material (which includes statements from all persons, not just those called to give evidence) which may prove helpful to the defence,’106 and the obligation on the Crown to call all witnesses as required by Dyers; second, ‘there are many cases where the financial resources of the defence are not so much less than the prosecution;’107 and, third, the inequality of resources is inevitable if the prosecution is to have sufficient resources to discharge the onus and standard of proof.108 If these factors are taken into account, the ‘contest’ seems much more evenly balanced. Assuming, however, that the resources are unequal, the perceived need to privilege the accused to make up for that inequality takes the role of the trial judge beyond that of a disinterested third party, and the judge becomes the ‘protector’ of the accused.

If judges continue to maintain they are concerned only with redressing the power of the state over the accused, and that the vindication of accusers is outside their realm, then they are sending a negative message to accusers. Weil interprets this message as saying, in effect: ‘You do not interest me.’ She was critical of that negative message because, ‘No man [sic] can say these words to another without committing a cruelty and offending against justice.’109 She urged for change, for ‘power to be put in the hands of men [sic] who are able and anxious to hear and understand, and give tender and sensitive attention

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106 R v McIlkenny v The Queen (1991) 93 Cr App R 287, 312.
to the faint and inept cry of those afflicted by blows.'\(^{110}\) How those ‘afflicted by blows’ may be seen and heard in the criminal trial is discussed in the next chapter.

In the criminal trial as presently conceptualised, accusers are witnesses for the prosecution, with no status in their own right.\(^{111}\) This view reflects the ‘binary or bipolar reasoning that is an integral part of the legal process and culture,’ and overlooks the fact that the accusers are, ‘[w]ithout advocacy and may have little or no contact with the prosecutor.’\(^{112}\) It also overlooks the reality that as an officer of the court, the prosecutor has a duty to the court which may override any obligation to the accuser. There is necessarily a separation, and possible conflict of interest, between the accuser on the one hand, and the state as represented by the prosecutor, on the other. The current view of the accuser as only a witness for the state refuses to recognise that accusers, like accused, are people in their own right, and have a stake in the criminal trial. The appellate courts do not proffer any explanation as to why the accuser’s individuality is reduced to the abstract concept of a witness for the prosecution. There is no justification for the privileging of the accused that this entails.

Denike refers to reform by means of, ‘justice being freed from its single dyadic focus (the state versus the individual).’\(^{113}\) McInnes and Boyle refer to the courts’ focus on the inequality between the state and the accused as a ‘unidimensional approach,’ and they argue instead for ‘a justice which accommodates the equality and integrity of those other than the accused.’\(^{114}\) This approach directly challenges the notion that the privileging of the accused is the inevitable consequence of the criminal trial being a contest between the state and the individual.

\(^{110}\) Ibid 316.
\(^{112}\) Patricia Eastal (ed), Balancing the Scales: Rape, Law Reform, and Australian Culture’ (1998) 204.
In summary, as several commentators argue, the state may have greater resources, but it also has obligations towards a wider range of persons than just the accused. The failure of the courts to recognise that the criminal trial is more than a contest between the state and the individual accused has led to the accuser’s personhood and individuality being ignored, and to unjustifiable privileging of the accused over the accuser.

3. **Only the accused is in jeopardy of punishment**

A further argument advanced by the courts for privileging the accused is that only the accused is in jeopardy of punishment. Hoyano describes the argument in this way:

> [The trial] places primacy on the rights of the defendant, as the only person in jeopardy of punishment in the trial. Therefore it is intrinsically incompatible with that model to balance those rights against the interests of other participants in the criminal justice system, and specifically witnesses.\(^{115}\)

This emphasis on jeopardy of punishment fails to address other goals of criminal justice, such as the opportunity of accusers to put their allegations in a courtroom where there is fairness towards all parties. It fails to address the short-term and long-term risks for the accuser of not being believed, such as the risks of psychological harm, repeated or continued victimisation, and loss of faith in the justice system. Accusers may feel they did not participate in their trial in any real sense because they were circumscribed by rules designed to protect the accused in the trial. There may be a perception in the community: ‘why should I put myself through a gruelling cross-examination, when my attacker can sit silent in the dock?’ If the rules designed to protect the accused result in the non-conviction of the guilty, then the accuser (and the community more broadly) is at risk of further crimes being committed. The treatment of accusers may also put at risk the willingness of victims to report crimes against them because they may see the criminal justice system as protecting only the accused.

In summary, it is important the courts do not overlook the reality that only the accused is in jeopardy of punishment. The courts do this by virtue of the presumption of innocence,
the onus of proof, the burden of proof, the privilege against self-incrimination, and the adversarial nature of the criminal trial. However, there are other issues at stake in the criminal trial. These include reduction of crime, vindication of victims, a fair hearing of all issues in an open court, and treating all parties with respect and dignity. To recognise only the issue of punishment of the accused is to present a distorted picture, and amounts to unjustifiable privileging of the accused over the accuser.

4. **Innocent persons may be convicted**

A further argument advanced by the appellate court judges for privileging the accused is the prospect that an innocent person may be convicted, a prospect which (they say) requires great vigilance, and overrides the prospect of a guilty person not being convicted. The principle, ‘Better nine guilty men [sic] go free, than one innocent man be convicted,’\(^\text{116}\) has been used to justify a system in which the accused is protected at all costs, and significant privileging is an inevitable part of that.

Deane J articulated the emphasis on conviction of the innocent in *Dietrich v The Queen*:

> The law’s insistence upon the pre-eminence of the need to ensure that the innocent are protected from wrongful conviction inspires the basic principle that the guilt of a criminal offence should be proved beyond reasonable doubt. It is also reflected in the guiding requirement of fairness to a suspect or an accused in the administration and enforcement of the criminal law.\(^\text{117}\)

Other examples of the same attitude are found in other appellate court decisions.\(^\text{118}\)

Kennedy describes the emphasis on the non-conviction of the innocent as a ‘preferred truth’:

> In the adversarial criminal justice system we do not start off from a position of neutrality. We start off with a preferred truth – that the accused is innocent – and we ask the jury to err on the side of that preferred truth, even if they think she [sic] probably did do it…The

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\(^{115}\) Hoyano, above n 89, 949.


\(^{117}\) *Dietrich v The Queen* (1992) 177 CLR 292, 298.

criminal justice system is based on the fundamental value that it is far worse to convict an innocent person that to let a guilty one walk free.\textsuperscript{119}

As Fitzgerald P recognised in \textit{R v O’Neill}, the possibility of conviction of the innocent is already accommodated in the very high standard of proof, proof beyond reasonable doubt, which is imposed on the Crown.\textsuperscript{120} There are also other protective means in place, including the onus of proof, the presumption of innocence, the burden of proof, full prosecution disclosure, and the onerous duties of Crown prosecutors. The right to silence at trial adds to these protective measures available to the accused. The reality, however, is that no matter how many protective measures are in place, inevitably, innocent people may still be convicted. An absolute right to silence cannot change this reality, and if it results in unjustifiable privileging of the accused over the accuser, then it should be changed.

Conclusion

In summary, the arguments advanced by the courts to justify the privileging of the accused over the accuser are unconvincing. A fair trial should mean a fair trial generally, not just a fair trial for the accused. The concept of the criminal trial needs to be broadened, in order to recognise that it is more than just a contest between the state and the accused, and has consequences wider than punishment of the accused. In stating the law, appellate court judges should always consider the possibility of conviction of innocent persons, but not to the exclusion of conviction of the guilty. The goal of a criminal trial should be to treat the accused, the accuser, and all witnesses with respect and dignity. The courts must continue to monitor the impact of all rules and procedures, taking justice, not exclusive protection of the accused, as the yardstick.

Unlike those critics opposed to changing the status quo, it is argued here that alternative perspectives on the right to silence at trial which reduce unjustifiable privileging of the accused are possible, and these are developed in the next chapter. To do this requires

\textsuperscript{119} Kennedy, above n 111, 11.
\textsuperscript{120} \textit{R v O’Neill} [1996] 2 Qd R 326, 413.
widening the focus, so that it is not just on the accused, but on all those involved in the criminal trial – accused, accusers, and the community/public interest. Under a different model, jurors would be invited to consider the particularities of the accused, the accuser, the alleged crime, and all the circumstances of the particular case, before deciding whether it is reasonable to expect the accused to give evidence. Unlike the privileging outlined in this chapter, the ‘particularity model’ developed in the next chapter treats both the accused and the accuser with respect and dignity. The goal of every trial becomes one of striving towards ‘the possibility of justice’¹²¹ not just for some, but for all.

CHAPTER SIX
AN APPRAISAL OF THE RIGHTS MODEL AND AN ALTERNATIVE MODEL

Introduction

The decisions of the Australian appellate courts on the right to silence at trial privilege the accused by a variety of means, and these were described in the previous chapter. The decisions centre on procedures claimed to be necessary in order to protect the accused, but in reality they unjustifiably privilege the accused, exemplifying the trial’s exclusive focus on the accused. Whether this privileging is inevitable, and whether non-privileging alternatives are possible, are discussed in this chapter.

One of the reasons for the privileging of the accused is the pre-occupation of the Australian appellate courts with the model of conflicting rights, which is examined in Part One of this chapter. Alternative, less privileging approaches to the conflicting rights model are discussed, such as those used by the European Court of Human Rights and the Supreme Court of Canada. More fundamentally, the discussion interrogates the notion of competing rights, in order to ascertain how it operates in the criminal trial, and what outcomes it produces.

The particularity model developed in Part Two of this chapter offers an alternative, non-privileging approach. The overall feature of the particularity model is a call for the courts to treat both the accused and the accuser as worthy of equal respect and consideration.1 This approach requires particular consideration, not generalisation, abstraction and categorisation. The particularity model developed in this chapter offers a completely new approach to the current law, or to any other models for reform (the other models are discussed in Chapter Eight). The particularity model has a number of components which may be summarised as follows:

- The courts would ensure that they recognise the accuser in the courtroom;

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• Trial judges and jurors would be required to ‘really look’\textsuperscript{2} at the particular accused, the particular accuser, and the particular crime, and to ‘handle differences,’\textsuperscript{3} rather than dismissing them;
• The trial judge would be a ‘disinterested third party,’\textsuperscript{4} rather than a protector of the accused;
• The model eschews dominating meta-narratives by focussing on ‘little narratives,’\textsuperscript{5} and requiring ‘fresh judgment’ in each case;\textsuperscript{6}
• The courts would treat the accused and the accuser as people with reason, emotion and vulnerabilities;
• The courts would treat both the accused and the accuser as worthy of equal respect and dignity.

The application of the particularity model addresses the problems of the conflicting rights model. The particularity model also has the advantage that it abolishes unjustifiable privileging of the accused over the accuser, and allows for the ‘possibility of justice’ to become achievable.\textsuperscript{7}

Part One The conflicting rights model

1. Introduction to the model

The model of rights which underpins the right to silence sees justice as a zero-sum game. The rights of the accused on the one hand, and the dignity, equality and privacy rights of accusers, on the other, are portrayed as ‘moving inexorably towards collision, resulting in

\textsuperscript{2} The phrase ‘really looking’ is attributable to Iris Murdoch, \textit{The Sovereignty of Good} (1970) 91. This concept is explained further below. The italicisation of the word ‘looking’ is Murdoch’s.
\textsuperscript{3} The phrase ‘handle differences’ is attributable to Diane Elam, \textit{Feminism and Deconstruction} (1994) 85. It is explained further below.
\textsuperscript{4} The phrase ‘disinterested third party’ is attributable to Zygmunt Bauman, \textit{Postmodern Ethics} (1993) 113-114. It is explained further below.
\textsuperscript{5} The phrase ‘petits recits’ (little narratives) is attributable to Jean-Francois Lyotard, \textit{The Postmodern Condition} (1979) 60.
\textsuperscript{6} The phrase ‘fresh judgment’ was coined by Stanley Fish in his article ‘Force’ in \textit{Doing What Comes Naturally} (1989), and adopted by Jacques Derrida, ‘The Force of Law and the Mythical Foundations of Authority’ in Drucilla Cornell, Michael Rosenfeld and David Carlson (eds), \textit{Deconstruction and the Possibility of Justice} (1994).
\textsuperscript{7} Derrida, ibid, 934.
one set of rights inevitably having to give way to the other.’ The validity of this assumption of a zero-sum game has not been challenged, and alternatives have not been examined, with the result that the privileging of the accused continues unabated. The use of the rights model in the criminal trial produces outcomes which are characterised by hierarchy, conflict, and contention. The rights model’s resort to balancing rights does not reduce the privileging of the accused. Overall, the rights model involves unacceptable consequences and should be abandoned. Each of these consequences is discussed in the following section.

2. The rights model produces conflict

Australian appellate courts have insisted that the rights of the accused and the rights of the accuser are in conflict, and this conflict cannot be resolved without privileging one over the other. Fitzgerald P stressed the conflict, and its inevitability, in *R v O’Neill*:

> The traditional approach of the common law, as I understand it, is to consider the fairness of a criminal trial solely by reference to the interests of the person accused, in part because of the deep-rooted concern to eliminate, or at least minimise, the risk of an innocent person being convicted: perhaps the most obvious product of this approach is the requirement of proof beyond reasonable doubt. If, instead, the chosen starting point is that a fair trial in an adversarial system is one which is fair to both parties, the conclusion reached is that an accused’s right to a fair trial only entitles him or her to a trial which is fair to both parties. On this approach, fairness is not considered only by reference to the interests of either adversary, whose interests will, in some respects, conflict: the objective is overall fairness, with those conflicting interests balanced, accommodated and compromised; the interests of the accused, and of the community, in the fairness of criminal trials according to the interests of the accused are set against a range of public and private interests, including the protection of the community, the vindication of victims and the punishment of criminals. Although there is no possibility of reconciling the two approaches in any circumstances in which it would be significant to do so, each is defensible.

Fitzgerald P described an inevitable conflict between fairness to the accused and ‘overall fairness’ which he declared could not be resolved, even before he attempted to do so. His choice of fairness to the accused rather than ‘overall fairness’ was based on tradition, rather than carefully developed legal principles or arguments. Further, he did not engage with the possibility that the protection of the community, the vindication of victims, and the punishment of criminals could be achieved without necessarily detracting from the

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rights of the accused. Fitzgerald P’s approach was characterised by binary opposites and fixed positions, reminiscent of the ‘extreme position’ described by Friendly in speaking of the United States Supreme Court:

It thus is strange how rarely one encounters in the [Supreme] Court’s opinions the careful weighing of pros and cons, the objective investigation of how rules of law actually work, and, above all, the consideration whether a less extreme position might not adequately meet the needs of the accused without jeopardizing other important interests, which ought to characterize constitutional adjudication before the Court goes beyond the ordinary meaning of the language. Instead, the privilege [against self-incrimination] is treated with almost religious adulation.  

Friendly was talking specifically about the privilege against self-incrimination, not the right to silence, but the call for ‘a careful weighing of pros and cons’ and a ‘less extreme position’ is apposite.

Fitzgerald P opined that because of the lack of constitutional and legislative guidance on this issue, the choice between the two approaches he described should be made by the judges of the High Court. He said that intermediate appellate court judges should not make the choice but he nevertheless did just that. He expressed the opinion that ‘any choice would be made in the context of a contest between the state and an individual citizen: these considerations strongly favour continuation of the traditional approach which focuses attention only on the interests of the accused.’ Fitzgerald P stated that the right of an accused not to be tried unfairly is a fundamental human right, and justifies an absolute right to silence. In support of this proposition, he cited Article 14 of the

International Covenant on Civil and Political Rights. However, Article 14 does not include the right to silence in its list of ‘minimum rights,’ and its overall prescription is for a ‘fair and public hearing by a competent, independent and impartial tribunal established by law.’ Article 14 does not support the argument that the rights of the accused should be the sole concern of the courts to the exclusion of all other rights.

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13 International Covenant on Civil and Political Rights, ibid, Article 14(3). The minimum rights are to be informed of the case against him [sic], to have time and facilities for preparation, to be tried without undue delay, to be tried in his presence and with legal assistance of his own choosing, to examine witnesses against him, to have the free assistance of an interpreter, and ‘not to be compelled to testify against himself or to confess guilt.’
14 Ibid, Article 14(1).
Kingdom argues that rights suffer from the phenomenon that the ‘invocation of one right attracts the invocation of another, irreconcilable right, occasioning rights wrangles.’\(^\text{15}\)

This invocation is clearly illustrated in the passage from Fitzgerald P’s judgment quoted above, and his claim about the irreconcilability of rights. Kingdom contends for a re-conceptualisation of rights so that attention is drawn away from abstract and moralistic rights, to a ‘formulation in realistic terms which includes a calculation of specific issues, strategies, tactics and possible outcomes.’\(^\text{16}\) The particularity model developed in this chapter focuses on the ‘specific issues’ which arise in the current law on the right to silence, and avoids Fitzgerald’s irreconcilable rights model.

L’Heureux-Dubé J acknowledged that the ‘imagery of conflicting rights’ may not always be appropriate for a fair trial because it detracts from fairness for complainants:

> A hierarchical approach to rights, which places some over others, should be avoided both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict…Charter principles require a balance to be achieved that fully respects the importance of both sets of rights. Notwithstanding my agreement with this proposition, I would emphasize that the imagery of conflicting rights which it conjures up may not always be appropriate. One such example is the interrelation between the equality rights of complainants in sexual assault trials and the rights of the accused to a fair trial. The eradication of discriminatory beliefs and practices in the conduct of such trials will enhance rather than detract from the fairness of such trials. Conversely, sexual assault trials that are fair will promote the equality of women and children, who are most often the victims.\(^\text{17}\)

The result of the right to silence as currently formulated under the rights model is that there is ‘no equality of women and children’ who, as L’Heureux-Dubé J notes in the above passage, ‘are most often the victims.’ Instead, there is unjustifiable privileging of the accused over the accuser.

It can be argued that the ‘traditional approach,’ as described by Fitzgerald P, which referred to the interests of the accused only, is unethical because it ‘reduces the standing of competing normative perspectives to an inferior position.’\(^\text{18}\) This illustrates another one of the problems with rights, namely, they inevitably create a hierarchy. Ashworth examines the operation in the United Kingdom of the Council of Europe’s *Convention for*

\(^\text{16}\) Ibid 149.
\(^\text{17}\) *R v O’Connor* [1995] 4 SCR 411 [CXXXIX].
the Protection of Human Rights and Fundamental Freedoms, and he expresses similar views to Fitzgerald’s. Ashworth’s analysis offers some insights into why the Australian appellate courts continue to privilege the accused. He argues that some rights of the accused are absolute and so their ‘essence’ should not be destroyed, and they should not give way to ‘public interest considerations.’ He is prepared to be sympathetic to the non-violation of victims’ rights, but at the same time, he insists that the ‘essence’ of the ‘important’ rights of the accused should, nevertheless, be preserved. This argument not only begs the question of what rights are ‘important,’ but it also perpetuates the exclusive focus on the rights of the accused. In the final analysis, what Ashworth is really saying is that the rights of the accused take precedence over the rights of the accuser. He does not consider whether some rights of the accuser are also so important that they, too, should not be qualified. He also fails to recognise that there are values at stake for each side. The reality is that since 1994, adverse inferences from silence have been open to United Kingdom juries, but the disastrous consequences Ashworth predicted, in the year after the Human Rights Act came into operation (1999), have not eventuated. This should offer some comfort to those in Australia who, like Fitzgerald P, may be reluctant to adopt a ‘less extreme position.’

Because rights involve a zero-sum game, they tend to be used like swords, wielded even when there is no threat. Weil pointed to an underlying ‘tone of contention’ in the use of the notion of rights:

The notion of rights is linked with the notion of sharing out, of exchange, of measured quantity. It has a commercial flavour, essentially evocative of legal claims and arguments. Rights are always asserted in a tone of contention; and when this tone is adopted, it would rely upon force in the background or else it will be laughed at.

The ‘commercial flavour’ of rights described by Weil also comes through in the work of Kennedy, when she says:

Improving the system has been a central plank of my work. But we should guard against campaigns to improve the position of victims by reducing defendants’ rights. Maintaining

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that justice for victims can only be purchased at the expense of the accused is …

dishonest.22

The concept of ‘purchased’ has a commercial flavour which is inappropriate in a criminal justice context. ‘Purchased at the expense of the accused’ is also unacceptable because it assumes that victims’ rights ‘cost’ the accused, implying that there is a limited pool of resources (justice). The preferable course is to adopt a model which allows for recognition of both the accused and the accuser.

3. Can rights be balanced?

Because the current law sees rights as a zero-sum game, balancing is a tool which is used to deal with competing rights. However, the concept of balancing is problematic. Experience in the European Court of Human Rights, and in the United Kingdom since the Human Rights Act 1998, suggests that ‘balancing is a nebulous exercise, unless clear indications are given of the relative weight of the factors being balanced.’23 Balancing leaves too much to the discretion of the judge, without any guidance as to how the balance is to be struck. This runs the risk that judges will follow the traditional approach, which is to give much higher priority to the rights of the accused.

Further, balancing does not overcome the possibility of judges adopting different approaches, as illustrated by some of the judgments in R v A.24 in the House of Lords. Lord Hutton conceded that a balance should be struck between the rights of the accused and the right of a rape complainant to be treated with dignity, but he nevertheless went on to hold that the accused should not be denied the opportunity to cross-examine the complainant.25 It could be argued that he was merely paying lip service to the right of the complainant to be treated with dignity. Other judges opted out of the dilemma altogether by saying that if interests of parties other than the accused are to be taken into account, this is a matter for the legislature not the judiciary.26 They were thereby suggesting that the interests of parties other than the accused are mere interests, not rights, in contrast to the rights of the accused which are enforceable. As explained in the

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25 Ibid 53.
26 Ibid. See, eg, Lord Hope at 21.
next section of this chapter, this constitutes an abdication of judicial responsibility because judges have a judicial responsibility to address inequalities, and they can do so without having to refer the matter to legislators.

A further problem with the balancing of rights is that the conflict ‘cannot be resolved equitably for lack of a rule applicable to the two modes of argumentation.’ Lyotard identifies a significant inequality or ‘differend’ between two parties which takes place ‘when the regulation of the conflict which opposes them is done in the idiom of one of the parties, while the injustice suffered by the other is not signified in that idiom.’ In criminal trials, the right to silence of the accused is in the idiom only of the accused. The injustice suffered by accusers is hidden from the gaze of the courts, because accusers have no way of speaking in an idiom accepted by the courts.

In summary, balancing rights does not remedy the problem of privileging the accused. In fact, it creates its own problems. The answer to privileging lies elsewhere, in a model which refuses to adjudicate between competing claims to rights, and does not conceive of the issue in terms of rights at all.

4. The rights model has unacceptable consequences

As illustrated by the foregoing discussion, the rights model has unacceptable consequences. The unacceptable consequences that flow from a rights-based approach are described by Eisenberg:

First, the values at stake will be advanced as fundamental and incommensurable and therefore conflicts will appear to involve non-negotiable values. Second, resolutions will appear to be arbitrary and biased rather than impartial and fair. And third, selecting one value as more fundamental than the other will greatly diminish the normative significance of the losing claim. When rights are used to express the fundamental importance of particular interests and values, they end up obscuring the identity-related interests at stake and creating impasses, which are only resolved by declaring one right to be more important than the other in what appears to be an arbitrary manner.

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28 Ibid 12.
In the context of the right to silence, the rights of accusers are not ‘negotiated’; the choice of the rights of the accused over the rights of accuser is ‘arbitrary and biased rather than impartial and fair’; the normative significance of the rights of the accuser is ‘greatly diminished,’ and impasses are created. The rights model has unacceptable consequences which need to be addressed.

In summary, the model of conflicting rights which currently dominates the right to silence decisions is arbitrary, privileges the accused, ignores the interest of accusers and the community, leads to unnecessary conflict, is hierarchical and contentious, and has unacceptable consequences. An alternative model which addresses these substantial and unacceptable deficiencies should therefore replace the conflicting rights model. Such an alternative model, the particularity model, is now developed.

**Part Two  Can an alternative model abolish privileging?**

1. **Introduction to the alternative model**

As has been demonstrated, the appellate courts unjustifiably privilege the accused over the accuser, and the arguments they advance to justify that privileging are unconvincing. The examination undertaken earlier in the previous chapter reveals that the arguments are not convincing, and that this unjustifiable privileging can, and should, be avoided. The question that now needs to be examined is what alternative approaches might be possible. Any alternative model should have as its conceptual underpinning the following principles: it requires courts to treat both the accused and the accuser as individuals deserving of respect and dignity, not as objects to be placed in categories. An alternative model would involve Iris Murdoch’s idea of ‘really looking’ at the accused and the accuser, and also Lacey’s idea of ‘showing a just sensitivity to all relevant differences and particularities.’ This alternative approach recognises the accuser in the courtroom, thus widening the focus to take in both the accused and the accuser. It eschews blind adherence to dominating meta-narratives, such as the presumption of innocence and the

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30 Murdoch, above n 2, 91.  
adversarial nature of the criminal trial. It calls for ‘fresh judgment’\textsuperscript{32} in each case, rather than the application of rigid rules. In order to treat both the accused and the accuser as individuals worthy of respect and dignity, the model takes account of the vulnerabilities of both the accused and the accuser. It requires judges to, ‘[h]andle differences,’ and not dismiss them.\textsuperscript{33} This alternative approach, which I call ‘the particularity model,’ is now developed in detail.

1. Recognition of the accuser in the courtroom

Under the current law, the accused is recognised in the criminal trial, and indeed, that is the focus of the trial. In contrast, the accuser is not recognised in the criminal trial, although there have been some steps in some jurisdictions towards this. As long ago as 1985, the Council of Europe specifically recognised accusers in the framework of criminal law and procedure when it drafted its preamble to ‘Recommendations On the Position of the Victim in Criminal Law.’ The preamble states that:

- Considering that the objectives of the criminal justice system have traditionally been expressed in terms which primarily concern the relationship between the state and the offender;
- Considering that consequently the operation of this system has sometimes tended to add to rather than to diminish the problems of the victim;
- Considering that it would be a fundamental function of criminal justice to meet the needs and to safeguard the interests of the victim;
- Considering that it is also important to enhance the confidence of the victim in criminal justice and to encourage his [sic] co-operation, especially in his capacity as a witness…\textsuperscript{34}

Although the preamble is wide, the recommendations in the report are disappointingly limited in their scope because they do not specifically refer to recognition of victims at trial. They are limited to advising victims of dates of hearings and the outcome of cases, the need to prevent the intimidation of victims, and the rights of victims to compensation. The Council’s recommendations stop short of implementing the above principles into the trial process itself.

\textsuperscript{32} Derrida, above n 6.
\textsuperscript{33} Elam, above n 3, 85.
From its inception, the International Criminal Court has been required to protect victims and witnesses. The Rome Statute requires that:

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In doing so, the Court shall have regard to all relevant factors, including age, gender [as defined in article 7, paragraph 3] and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and presentment of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.  

The protection extends to the ‘safety, physical and psychological well-being, dignity and privacy’ of victims and witnesses. It is not limited to a particular class of persons, or victims of particular crimes. It specifically recognises that treating victims and witnesses in this way is not inconsistent with, or prejudicial to, a fair trial for the accused. The International Criminal Court does not consider that rights of the accused on the one hand, and those of victims and accusers on the other, are necessarily in conflict.

In a few instances, the Australian appellate courts have acknowledged that the accuser should be recognised for policy reasons, such as ‘the protection of the community, the vindication of victims and the punishment of criminals.’ In Jago v The District Court of New South Wales, Brennan CJ commented that, ‘[a]ccusers should be able to see that justice is done if they are not to be given to self-help to rectify their grievances.’ There is a more important reason why accusers should be recognised, and that is because they are people before the court who are integrally linked to the outcome of the trial. Accusers are not just witnesses in the prosecution case; rather, they are people with individual identities and histories. Levinas describes the recognition of this individuality as ‘the equitable honouring of faces.’ Cornell and Douzinas and Warrington also adopt this idea. Cornell comments that the ‘honouring of faces’ ‘demand[s] the recognition of each one of us in his/her singularity.’ The singularity of the accuser is not recognised in the criminal trial in its current conception because the accuser is defined as a binary opposite

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37 Jago v The District Court of New South Wales (1989) 168 CLR 23, 49.
to the accused; as one who threatens the accused, and has no individuality. This lack of singularity is reflected in the use by the courts of the abstract term, ‘the complainant,’ rather than his/her name.

Cornell also suggests that as well as the ‘honouring [of] faces’ and the recognition of singularity, ethics dictates the need for courts to treat people with dignity. Cornell admits that dignity is difficult to define, but she suggests that it includes ‘respecting the individuality and aspirations of the person.’ 40 One attempt she makes at defining dignity is: ‘Dignity is an old-fashioned word, used in some religious and philosophical traditions to respect or revere our uniqueness as human beings who can take rational responsibility for their lives or have an inner divinity that gives them infinite worth.’ 41 She describes its effect in this way: ‘Respect for our dignity and our imaginary domain allows us to individuate enough so that we claim our desire and take effective responsibility for our lives.’ 42

If, as Cornell urges, the accused and the accuser were treated with dignity, as unique human beings, then they could take rational responsibility for their lives. The accused would no longer be an object in need of protection from the judge; instead, he/she would be an individual who possesses strengths and weaknesses, and an ability to make choices. The accuser would no longer be just a binary opposite to the accused; instead, he/she would be an individual who is entitled equally to be treated with dignity.

Berns also recognises the importance of the rights-bearer accepting responsibility:

I do not simply assert rights but assert them within a context in which I accept ultimate responsibility for the manner and purpose of their exercise i.e. I would like to think that I demand certain rights precisely because without them I cannot accept responsibility for my own life in certain areas. My demand for rights carries with it my ultimate responsibility for the manner and form of their exercise. 43

Under the particularity model, the accused is an individual with choices, not just a bearer of abstract rights. Under the current law, the choices open to the accused are unacknowledged. There was one exception when, in Weissensteiner v The Queen, the majority judges recognised that choices have consequences: ‘The jury cannot, and cannot

40 Cornell, ibid 67.
41 Cornell, ibid 2.
42 Cornell, ibid 32.
be required to, shut their eyes to the consequences of exercising that right [the right to silence].

However, this acknowledgment was fleeting, and was not repeated in the subsequent right to silence decisions. Unlike the post-Weissensteiner cases, the Northern Territory Law Reform Committee recognised in its 2002 report that the exercise of rights involves consequences:

From the characteristically robust and direct viewpoint of the average Australian it would defy common sense that, if a person chooses a course of action, he [sic] would then demand that no one would question that course of action or draw inferences from it.

The majority judges in Azzopardi expressed concern about choices when they said: ‘An accused’s choice about whether to give sworn evidence remains a real choice and not simply a disguised obligation to give evidence.’ They did not explain what they meant by a ‘real choice,’ nor did they differentiate between compulsion to testify and the right to silence. Under the particularity model, a ‘real choice’ is made by an accused who understands the case against him/her, who appreciates that the choice may have unfavourable consequences.

Roberts aligns ‘the dignity principle’ with the status of personhood and says, ‘[s]ubjects must at all times be treated with the concern and respect to which they are entitled just in virtue of their humanity; that is what the dignity of subjects demands.’ He ascribes the dignity principle to Kant, and he notes that the principle of dignity is incorporated into the European Court of Human Rights Protocols. Hale acknowledges the centrality of the dignity principle in English human rights jurisprudence. Roberts suggests that in the context of criminal trial proceedings, ‘the dignity principle mandates that every person appearing in a courtroom should be recognised and respected as a participating subject, rather than being objectified as a means to penal ends.’

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44 Weissensteiner v The Queen (1993) 178 CLR 219 (‘Weissensteiner’) [109].
46 Azzopardi (2001) 205 CLR 50 [40] (Gaudron, Gummow, Kirby and Hayne JJ).
47 The United Kingdom Judicial Studies Board Specimen Direction on s 35 of the Criminal Justice and Public Order Act 1994 (UK) specifically requires the judge to warn the accused of the possibility of an adverse inference from silence.
50 Roberts, above n 48; He quotes as an example European Court of Human Rights Protocol No 13 Concerning the Abolition of the Death Penalty in all Circumstances (CETS No 187, in force 1 July 2003).
51 Ghaidan v Godin–Mendoza [2004] 2 AC 557 [132].
52 Roberts, above n 48, 43.
This approach is consistent with the findings of research conducted by Lind and Tyler, to the effect that parties in the criminal trial, accused and accuser alike, place less emphasis on the ultimate decision than has historically been recognised, and more emphasis on ‘the manner in which the encounter is handled – whether there are signs of bias, or of trustworthiness and respect.’ In stark contrast, under the current model of the criminal trial, neither the accused nor the accuser is treated as a person; they are both subjected to generalisations, stereotypes, exclusions, classifications, categorisation, and other means which deny them their personhood. In this way, both the accused and the accuser are treated as ‘de-personalised categories.’ Foucault, in his analysis of difference and ‘othering,’ is critical of categories because of their suppression of difference:

> The most tenacious subjection of difference is undoubtedly that maintained by categories…they suppress the anarchy of difference, divide differences into zones, delimit their rights, and prescribe their task of specification with respect to individual beings.

Cornell is also mistrustful of classifications, and she considers that the process of classifications behind the current rules underpinning the criminal trial ‘perpetuates violence against singularity.’ This ‘violence’ means that people are not treated as individuals, worthy of respect and dignity; and also, as demonstrated in the previous chapter, this has a significant influence over the process and outcomes of the trial.

Douzinas and Warrington offer an alternative: they argue for the principle of \textit{audi alteram partem}, which they describe as requiring:

> judges to hear the ‘concrete other’ [person] who comes before the court, rather than to calculate and adjudicate the general qualities and characteristics of the abstracted legal person and judge according to classification in broad and universal categories.

Benhabib also refers to ‘the concrete other,’ and explains, [t]he standpoint of the concrete other requires us to view each and every rational being as an individual with a concrete


\textsuperscript{54} Michael Foucault, \textit{Language, Counter-memory, Practice} (Donald F Bouchard and Sherry Simon trans, 1977 ed).

\textsuperscript{55} Ibid 86.


\textsuperscript{57} Douzinas and Warrington, \textit{Justice Miscarried: Ethics and Aesthetics in Law}, above n 39, 175.

history, identity and affective-emotional constitution." She argues that if we assume this standpoint, '[e]ach is entitled to expect and to assume from the other forms of behaviour through which the other feels recognized and confirmed as a concrete individual being with specific needs, talents and capacities.'

Traditionally, accusers have not been recognised in criminal trials in their own individualities, notwithstanding their physical presence and oral testimony in the courtroom. Accusers are not given a separate identity; they are seen merely as a binary opposite of the accused, and thus denied dignity and personhood. In the context of moral philosophy, Sevenhuijsen describes how ‘the “other” unwillingly remains a mirror or a projection-screen for “the” moral subject, the generic being that has truly inhabited modernity’s phantasmagorical world for too long.’ The accused is ‘the’ moral subject of criminal trials, and the courts continue to act on the assumption that it is not possible for both the accused and the accuser to be ‘the’ subject. In contrast, under the particularity model, the accuser is entitled to an equal part in the criminal trial process.

Kennedy is sensitive to the damage caused to accusers by criminal trials that operate according to binary categories. She therefore suggests that because sexual offences involve ‘damage to lives, contaminating what is precious and an abuse of intimacy,’ sexual offence victims should have special rights. Kennedy says that for sexual offences the law should ‘prohibit negligent disregard for the other.’ In suggesting this, her focus is limited to sexual offences. In contrast, the particularity model recognises all accusers, and does not give special rights to only one section of them. Under the particularity model, accusers of all types of crimes, not just sexual offences, are entitled to better treatment than the ‘negligent disregard,’ which (rightly) concerns Kennedy. The particularity model requires the courts to treat all accusers with dignity, in the sense of not being indifferent to them, recognising their presence in the criminal trial, and allowing them to individuate themselves.

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59 Seyla Benhabib, ‘The Generalized and the Concrete Other,’ in Seyla Benhabib and Drucilla Cornell (eds), Feminism as Critique (1987) 87. ‘Concrete other’ was also adopted by Douzin as Warrington, above n 39, 165, 173, 185.
60 Ibid.
62 Kennedy, above n 22, 182.
63 Ibid.
Under the particularity model, respect and dignity based on each person being equally worthy of respect and consideration replace abstract rights. Cornell argues that the recognition of the dignity of both the accused and the accuser leads to, ‘[t]he feeling of awe or respect that the person’s dignity, along with her [sic] suffering, evokes in us.’

Dignity, and feelings of awe and respect for suffering, are absent from the right to silence decisions. Indeed, the appellate courts deliberately reject them, for no substantiated reason. The particularity model accords respect and dignity to the accused, and this means appropriate specific protection, rather than abstract general protection in the form of universal rules. The accused is not treated as a rights-wielding, abstract object without personality or agency who is unable to make choices, weak and in need of protection, as reflected in the right to silence decisions. Rather, he/she is treated as an individual with agency, who is empowered to make choices, and a person who is entitled to be treated with respect and dignity.

3. The need for ‘really looking’ and ‘paying attention’

Under the particularity model, treating the accused and the accuser with respect and dignity requires the judge to engage with the particular accused, the particular accuser, and the particular circumstances of the case. This necessitates a process described by Weil and Murdoch as ‘really looking,’ and ‘paying attention.’ Weil describes ‘attention’ in this way:

Attention consists of suspending our thought, leaving it detached, empty, and ready to be penetrated by the object; it means holding in our minds, within reach of this thought, but on a lower level and not in contact with it, the diverse knowledge we have acquired which we are forced to make use of.

Weil regards ‘paying attention’ as a widening of focus resulting from detachment, which involves ‘[s]tepping back from the immediate objects of concern which tend to cause a distortion of moral perception.’ Detachment leads to a reliable perception of the individual. The detachment and paying attention advocated by Weil is different from ‘the

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65 The phrase ‘paying attention’ is attributable to Simone Weil, above n 21, 49. The phrase ‘really looking’ is attributable to Murdoch, above n 2.
66 Weil, above n 21, 49.
cool reason of law and rights,’ which Kennedy argues is an integral part of the common law criminal trial.68

Murdoch defines ‘really looking’ as: ‘Keeping the attention fixed upon the real situation and to prevent it from returning surreptitiously [sic] to the self with consolations of self-pity, resentment, fantasy and despair.’69 She insists that this process requires concentration and focus, so that what is seen is not influenced by what is expected to be seen, that is, by a category or a prescription of normative behaviour. Weil’s ‘paying attention’ and Murdoch’s ‘really looking’ both encourage trial judges and jurors to adopt an approach which is very different from the current law which limits the attention of judges to the application of the rules and categories. Under the proposed model, the particularities of the person are affirmed, rather than denied.

The law has traditionally used objectivity to justify universal principles and rules, and thus avoid engagement with emotion, and the particularities of the people in the courtroom. In contrast, the detachment and ‘paying attention’ advocated by Weil precludes pre-judging, categorisation, and universal rules. It involves treating each person in the courtroom according to his/her own individuality and singularity, and requires trial judges and appellate court judges to ‘pay attention’ to both the accused and the accuser as individuals. The accuser is not treated merely as a binary opposite or threat to the accused, that is, as a ‘dangerous Other.’

The task advocated under the proposed model may not be easy for trial judges, who may find comfort in categories, and they may feel uneasy about individuation. However, if privileging is to be avoided, and if judges are to act ethically by according respect and dignity to all parties, then it is a fundamental requirement. The initial stumbling block is that judges would need to accept that the focus of the criminal trial should not be solely on the accused. They would need to adopt the principle that accusers (as well as accused) are entitled to be treated with respect and dignity, and that they have interests in the outcome of the trial which are quite independent of those of the accused. Trial judges may then be able to accept the challenge issued by Weil and Murdoch, that is, to ‘really look’ and to ‘pay attention’ to all those before them in the courtroom. They may then be

68 Kennedy, above n 22, 12.
69 Murdoch, above n 2, 91.
prepared to deal with the emotion, grief, humiliation, and exploitation of the accuser resulting from the alleged crime. They would be disinterested third parties, rather than protectors of the accused.

This change of judicial approach is not difficult or unworkable, as demonstrated in the next chapter when the particularity model is applied to the right to silence decisions. The advantages of the change of approach include: simpler and clearer directions by judges to jurors; more focused decision-making by jurors; greater consistency in the law between cases and between the common law; rules of evidence, and legislation; and, reduction in unjustifiable privileging of the accused over the accuser. These advantages are described more fully in Chapter Eight. 70

In facing this challenge, Equal Treatment Benchbooks may be of some assistance, because they may help judges to recognise and avoid stereotyping, and to better understand and deal with the complexity of the problems and disadvantages suffered by people very different from themselves. 71 However, these Benchbooks are often oriented towards the courts’ treatment of accused, and the problems the accused may encounter in giving oral testimony in court. They do not specifically address the difficulties faced by an accuser in the context of the specific circumstances of the crime. For example, the child aged nine in Azzopardi who alleged sexual assault by a friend of her father. What the particularity model requires is for each decision to involve ‘fresh judgment,’ which can only occur if judges and juries ‘really look’ at the particular accused, the particular accuser, the particular crime, and the inter-relationships between them.

Kyte argues that detachment, as reflected in Weil’s notion of ‘paying attention,’ is needed in order ‘to attain a reliable perception of others’ needs, thus assisting, rather than preventing, impartiality.’ 72 The particularity model requires impartiality towards the accused and the accuser, unlike the current law which condones unjustifiable privileging of the accused over the accuser. Under the current law, judges view impartiality as

applying universal rules, and taking no account of emotion or individualities. In contrast, Weil’s ‘paying attention,’ and Murdoch’s ‘really looking’ under the particularity model, assume that impartiality means painstakingly ‘really looking’ at both the individual accused, and the individual accuser, in the context of the alleged crime.

The distancing currently advocated by criminal lawyers and trial judges is illustrated by this exchange at the special leave hearing in *RPS*:

* Transcript of Proceedings, *RPS v The Queen* (High Court of Australia, Gaudron ACJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 8 September 1999) 39-40.

In contrast, under the particularity model, the ‘human aspect’ and the ‘legal aspect’ are intertwined and interdependent, and judges would not ‘extricate’ themselves from emotion. The model hears and acts upon the exhortations of Weil and Murdoch, rather than just ‘confining oneself to the legal aspect,’ as proposed by defence counsel in *RPS*.

Under the particularity model, the judge acknowledges differences between the accused and the accuser, and indeed between accuser and accuser, and accused and accused. Elam calls for trial judges to pay ‘an obligation to differences,’ For her, this does not mean putting oneself in the shoes of the other because she, like Tronto, accepts that care in the sense of connection is not possible. She argues that: ‘There is no simple way one can generalise from one’s own experience to what another needs.’ Rather, according to Elam, paying an obligation to differences entails an acknowledgment that each person is unique, and thus unique needs should not be denied, and each person should be treated with dignity and respect. This approach calls for an ethics of difference, to counteract what Van Marle argues is ‘[t]he violence that every act of generalisation, exclusion, stereotyping and limiting does to women and men.’

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73 Transcript of Proceedings, *RPS v The Queen* (High Court of Australia, Gaudron ACJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 8 September 1999) 39-40.
74 Elam, above n 3, 113.
75 Joan Tronto, ‘Women and Caring: What Can Feminists Learn about Morality from Caring?’ in Held, above n 1, 105.
76 Van Marle, above n 67, 266.
Elam suggests that the lesson from Lyotard’s notion of ‘differend’ is to recognise that justice should seek to ‘[h]andle differences, to pay obligation to them, without implying that what is other can be made identical by means of that handling.’ What follows from these arguments is that the particularity model proposed here allows for the recognition of the rights of the accused and the rights of the accuser as different, without the need for quantitative measurement. Elam suggests a ‘politics of undecidability’ which requires that difference be dealt with in each case, and not be reduced to the generalised same. She argues that a politics of the undecidable is ‘[v]ery different from identity or rights politics in that a politics of the undecidable refuses to close down the question or account for it by merely balancing competing claims to rights.’

A non-privileging model adopts Elam’s approach, by refusing to adjudicate between competing claims to rights, indeed, by not using rights as a conceptual tool at all.

Under the particularity model, treating the accused and the accuser as individuals worthy of respect who are entitled to be treated with dignity necessarily abolishes generalisations, and requires engagement with differences. As Douzinas and Warrington recognise, ‘[i]njustice results when all traces of particularity and otherness are reduced to a register of sameness and cognition mastered by the judge.’ In criminal trials, accused are not all the same, nor are accusers. Under the particularity model, judges do not make judgments based on what they see as appropriate behaviour for every situation. Instead, they look at specific situations, and this necessarily excludes reliance on non-referential, abstract rules and prescriptions.

The particularity model treats the people in the courtroom as individuals, not as categories along ‘normative and normal(ised) paths’:

The law is about rules and universals. Its categories and concepts, self-enclosed and auto-referential, form a normative grammar that multiplies endlessly according to its internal logic. But the justice of the abstract code must be tested in its applications. The non-referential code must create its own instances of application and be seen to work on the world. In its performative aspect the judgment abstracts the particular, generalises the event, calculates and assesses individuals and distributes them along normative and normal(ised) paths under a rule that subjects the different to the same and the Other to the self.

77 Elam, above n 3, 85; Lyotard, above n 27.
78 Ibid, Elam, 81.
80 Ibid 136-37.
In their right to silence decisions, the appellate court judges have sought to lay down ‘normative and normal(ised) paths.’ In *Azzopardi*, the majority judges acknowledged that the courts have ‘sometimes appeared to struggle’ with what may be said to the jury if an accused does not give evidence at trial. The analysis in this thesis reveals that they have ‘struggled’ because the principles and rules they have prescribed have relied on ‘normative and normal(ised) paths,’ and they have lead to inconsistencies and uncertainties, with a lack of specific and particular guidance from appellate courts to trial judges. Under the particularity model, trial judges do not ‘struggle’ because they would not be confronted with rigid, universal rules and distinctions that make no sense in the context of a particular trial. Under the particularity model, the trial judge sums-up the evidence in the trial, and makes it clear to the jury that it is for them to decide what conclusion to draw from the silence of the accused; there is no need for trial judges or juries to struggle with categories and fine distinctions.

The existence of ‘normative and normal(ised) paths’ as described by Douzinas and Warrington above, is illustrated in this statement from Kirby J at the special leave hearing in *Azzopardi*:

> I think, if at all possible, the Court would endeavour to have some simple principle that does not turn on the nature of the evidence in the case, because otherwise it is going to be very difficult for judges and very difficult for juries to understand it.

Counsel at that hearing was also urging for ‘a broad general rule which is applicable to every case.’ While superficially the efficacy of one-rule-fits-all seems useful, it is clear from evidence in this thesis that it results in a poor fit for everyone. Indeed, the current law is, as Kirby J feared, ‘very difficult for judges and very difficult for juries to understand.’ A ‘broad general rule’ is an anathema under the particularity model because every case is different, and for that reason under that model there are no broad, general and universal rules. To have ‘some simple principle,’ as suggested by Kirby J, is both illusory and flawed as the contradictory array of rulings attests. There is also a more important criticism of a ‘simple principle’ or ‘a broad general rule,’ namely, they both overlook the people in the trial, unlike the recognition of individuality in the particularity model. Under the particularity model, it is essential to have regard to the nature of the

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82 Transcript of Proceedings, *RPS v The Queen* (High Court of Australia, Gaudron ACJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 11 October 2000) 2.
83 Ibid 10.
evidence in the case because this recognises the particularity of the people in the courtroom, and this would mean an individual assessment in each case, to decide whether or not it is reasonable to expect the accused to give evidence. The approach advocated by the proposed model replaces the cold and calculated use of so-called reason and rules which are both confusing and unclear but, more importantly, which de-personalise and restrict the gaze of judges and juries.

The particularity model may be unacceptable to those who argue that some rules should never be changed. Kennedy, for example, asserts that, ‘[w]e should not jettison well-established rules.’\(^{84}\) She also insists on ‘strict adherence to the fundamentals of criminal justice.’\(^{85}\) She describes the underlying principles of law as ‘glue and mortar,’ and of the impossibility of restoration if the underlying principles are ‘frittered away.’\(^{86}\) One problem with this argument is that it fails to appreciate the distinction between principles being ‘frittered away,’ and the need for the foundations of law to be open to examination and, if necessary, re-working and re-aligning with current contexts and needs. This ongoing examination is part of judicial responsibility, and is not confined to the legislatures. Kennedy also overlooks the reality that appellate courts and legislators in both the United Kingdom and Australia have frequently made changes to rules and principles which were previously conceived as ‘underlying,’ such as corroboration, fresh complaint, similar fact evidence, and cross-examination on prior sexual history (to name only a few). Law reform should involve reform of everything, not just tinkering around the edges. Change, as evidenced by the many changes occurring daily, does not inevitably cause the foundations of law to crumble for want of ‘glue and mortar,’ as Kennedy fears.\(^{87}\) As the particularity model shows, changing the right to silence is no more troubling than changing any other aspect of the law.

In summary, the current law relies on broad, general and universal rules in deciding the relevance of the silence of the accused. In contrast, the particularity model requires the trial judge and the jury to ‘really look’ at the accused, the accuser and the crime before the court, and to ‘pay attention’ to the individuality of the accused, the accuser, and the

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\(^{84}\) Kennedy, above n 22, 7.

\(^{85}\) Ibid 173.

\(^{86}\) Ibid 9.

\(^{87}\) Ibid.
crime. The people in the courtroom are treated as individuals, and not as normative and normalising categories.

4. The trial judge as a ‘disinterested third party’

Under the particularity model, the role of the trial judge is that of a ‘disinterested third party,’ not a protector of the accused. Bauman, relying on Levinas, conceptualises the judge as separate from the accused and the accuser, and as ‘the third’ who decides between two equals:

The other who is the Third can be encountered only when we leave the realm of morality proper, and enter another world, the realm of Social Order ruled by Justice – not morality. To quote Levinas once more: “This is the domain of the State, of justice, of politics. Justice differs from charity in that it allows the intervention of some form of equality and measure, a set of social rules established according to the judgment of the State, and thus also of politics. The relationship between me and the other would then leave room for the third, a sovereign judge, who decides between two equals.” What makes the Third so unlike the Other we met in the moral encounter is the distance of that Third, so sharply distinct from the moral Other’s proximity... The “third” is constantly left behind, set apart by anything that brings close any of the “dyad” inside the “triad.” We may guess that precisely this setting apart, this dis-embly, this de-coupling of concerns, which may be dubbed “the loss of proximity” had set the Third in the unique role of the “disinterested third party.” “Disinterestedness” rebounds as “objectivity”... the Third may now set the “objective criteria” of interests and advantages. Asymmetry of the moral relationship is all but gone, the partners are not equal, and exchangeable, and replaceable. They have to explain what they do, face the arguments, justify themselves by reference to standards which are not their own. The site is cleared for norms, laws, ethical rules and courts of justice.88

Bauman is thus conceptualising the trial judge as ‘the disinterested third party,’ who has the role of setting the standards for the parties in the encounter, the trial. The trial judge uses norms, laws, and ethical rules to set ‘the objective criteria’ of interests and advantages. This is quite different from the trial judge described in the right to silence decisions of the appellate courts, who uses abstract rights to privilege one party over the other. The ‘norms, laws and ethical rules’ currently used by trial judges on the right to silence are not compatible with disinterestedness and objectivity, and, as illustrated in this thesis, lead to the opposite result, namely, privileging of the accused over the accuser.

The current ‘norms, laws and ethical rules’ need to be re-written if the trial judge is to be a ‘disinterested third party,’ rather than a protector of one party from the other. As has

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88 Bauman, above n 4, 113-14.
been demonstrated, the right to silence is a norm, law or ethical rule that needs to be re-writen.

4. No dominating meta-narratives

The dominating meta-narratives in the appellate court decisions on the right to silence are the presumption of innocence and the adversarial nature of the criminal trial. Cavarero argues that reliance on meta-narratives ‘[f]attens out the uniqueness of the individual, in favour of a set of universal rights for the individual.’ 89 Lacey describes the use of meta-narratives in law as ‘[a] means to repress difference and particularity, fixing subjects in pre-given identities.’ 90 She considers that the courts have been ‘[f]ar more concerned with the formal having of rights, than with their substantive worth to differently situated subjects.’ 91 This concern with the ‘formal having of rights’ was demonstrated in Chapters Two and Three: the accused has rights, but in reality these are unclear and heavily qualified. Because the courts have not made allowances for differences between accused, unworkable doctrines and rules have emerged.

Lacey argues for a re-conceptualisation of the criminal trial so that the wielding of absolute and abstract rights, such as the right to silence, is replaced by a ‘[r]ecognition of the equivalent worth of rights to differently situated subjects.’ 92 This approach requires judges to look at the worth of rights to different accused, in different situations, and also to look at the worth of rights to different accusers in the context of the particular trial in which the rights are claimed. The result is that rights as abstract objects of ownership by the accused are no longer considered appropriate.

The particularity model requires courts to ‘pay attention’ and ‘really look’ at the accused and the accuser, in their uniqueness, and thus the courts would no longer have to rely on meta-narratives and universal rules for their rulings. An example of the outcomes of the use of dominating meta-narratives in the right to silence decisions comes from the

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92 Ibid 241.
hearing of the special leave application in *RPS*. Kirby J stressed that ‘the trial judge would instruct the jury that the accusatorial process is a rule, and the accused does not have to respond.’93 Hayne J exhorted judges to ‘drive home to the jury the fact that because it is an accusatorial system, explanation is neither expected nor required.’94 Under the particularity model, it is not appropriate for the trial judge to ‘drive home’ meta-narratives to the jury; rather, the task of the trial judge would be to invite the jury to consider whether or not it is reasonable to expect the accused to give evidence. The use of meta-narratives by judges is not acceptable, or indeed required, under the particularity model. Indeed, under that model, the opposite conclusion to Kirby J’s may well be reached, that is, the jury may decide that explanation is expected or required.

Dominating meta-narratives shut down debate and shift the focus away from the evidence in the trial and back onto themselves. In contrast, the particularity model shifts the focus back onto the participants, and the evidence in the particular trial. Lyotard applauds the shift of focus from meta-narratives to ‘little narratives,’ and describes it in this way:

> [Grand narratives] must give way to less ambitious “petits recites”- little narratives that resist closure and totality, stressing the singularity of every “event”-whether ethical, political or aesthetic. Only by means of repeated testimony as “petits recites” can we be reminded of the irreducibility and particularity of “events” in our lives that resist global categorization.95

In order to ‘resist closure and totality,’ and global and universal categorisation, the particularity model abolishes dominating meta-narratives, and focuses on particularities and ‘little narratives.’ Thornton also advocates for this approach when she says, ‘[n]arratives, experiences and perspectives of the other should be incorporated into the criminal trial.’96 In the right to silence decisions of the appellate courts, all particularities of the individuals before the court (accused, accusers, and witnesses alike) are lost from sight, obscured by universal rules and dominating meta-narratives, thus denying those individuals the respect and dignity due to them. In recognising the tension between singularity and generality in the current law, Derrida poses the question:

> How are we to reconcile the act of justice that must always concern singularity, individuals, irreplaceable groups and lives, the other or myself as other, in a unique

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93 Transcript of Proceedings, Azzopardi (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, and Callinan JJ) 11 October 2000, 12; 20 November 2000, 8, 32, 41.
94 Ibid [8].
95 Lyotard, *The Postmodern Condition*, above n 5, 60.
situation, with rule, norm, value or the imperative of justice which necessarily have a general form, even if this generality prescribes a singular application in each case? Derrida does not answer the question he poses; the answer may lie in the courts following a different approach that places less reliance on universality, and more reliance on particularity. Benhabib describes a different approach of this type:

First of all, a commitment to the equal worth and dignity of every human being in virtue of his or her humanity; secondly, the dignity of the other as a moral individual is acknowledged through the respect we show for their needs, interests and points of view in our concrete moral deliberations. As the particularity model shows, to apply these principles to the right to silence decisions means treating the accused and the accuser as possessing equal worth and dignity, and showing respect for their needs, interests and points of view in deciding whether or not it is reasonable to expect the accused to give evidence at trial.

It may be argued that one of the disadvantages of the particularity model is that if particularity replaces universality, uncertainty will occur. There are two problems with this argument. First, as shown in earlier discussion, the right to silence decisions of the appellate courts have already led to uncertainty, notwithstanding that they rely on universal rules. Taking the interests of all parties into account does not make the results any less certain than they already are. Massaro argues that in judicial decision-making there is ‘an opportunity for contextual and empathic decision-making’; that judges ‘should focus more on context, and the particular circumstances of the alleged offence, and less on formal rationality, which involves squaring this result with results in other cases.’ In Dyers, the Crown prosecutor, in written submissions, expressly argued that this approach should be taken:

The legitimate use that a jury can make of an accused’s silence at trial should be identified in the context of the particular circumstances of the case. Thereafter, judicial directions that explain the legitimate use that is available to the jury should be given.

The High Court did not accept the submission, and insisted that the jury’s use of the silence of the accused depends on the rules laid down in RPS and Azzopardi.

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97 Derrida, above n 6, 17.
98 Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (1992) 185.
100 Dyers v The Queen (2002) 210 CLR 285, [5.1]. This approach was advocated by the Law Reform Commission of Western Australia in its recommendations in Review of the Criminal and Civil Justice System in Western Australia, Final Report, Project 92 (1999).
Secondly, uncertainty may be conceptualised in a positive, rather than a negative, way. Elam adopts Derrida’s view on the undecidability of determinations, and she advocates for a ‘standpoint of indeterminacy.’ She draws a distinction between undecidability, which is about refusing to make decisions, on the one hand, and indeterminacy, which is about refusing to ground decisions in universal laws, on the other. She calls for ethical judgments which she says are actually groundless in the sense that ‘[w]e have to try to do the right thing, here, now, where we are, and no transcendental alibis will save us’. She considers that these judgments ‘[a]ttempt to speak without recourse to the meta-language of authority, to speak as singularities, to attempt to do justice in singular cases, rather than to be just once and for all.’ Elam insists that: ‘We cannot avoid making a decision by just applying a pre-existing universal law’ As the array of High Court right to silence decisions illustrate, pre-existing universal law become rules which neither fit nor rule. Instead of pre-existing universal law, Elam advocates ‘ethical activism’ and ‘groundless solidarity.’ She insists that justice involves accounting for each and every specific event and variable, and refusing to apply universal laws. For her, trial judges and jurors must ‘attempt to do justice in singular cases,’ rather than apply abstract universal rules.

In eschewing dominating meta-narratives and categorisations, the particularity model also draws on the idea of ‘fresh judgment’ in each and every case. Derrida explains ‘fresh judgment’ in this way:

To be just, the decision of a judge, for example, would not only follow a rule of law or a general law but would also assume it, approve it, confirm its value, by a reinstituting act of interpretation, as if ultimately nothing previously existed of the law, as if the judge himself [sic] invented the law in every case. No exercise of justice as law can be just unless there is “fresh judgment.”

If the judge and the jurors were to use ‘fresh judgment,’ they do not just follow a general rule; rather, they confirm its value for each particular situation. Derrida argues: “Fresh judgment’ is called for because an act of justice would concern singularity, individuals,
irreplaceable groups and lives, the other as myself as other in a unique situation.\textsuperscript{109} Elam extends this idea when she says, ‘[j]udges would attempt to do justice in singular cases.’\textsuperscript{110} The particularity model incorporates Derrida’s principle of ‘fresh judgment’ in each case, and Elam’s exhortation to courts to, ‘[a]ttempt to do justice in singular cases.’ This precludes the rigid application of universal rules, even those long-standing or so-called ‘fundamental’ rules, because they do not involve ‘fresh judgment’ and they deny the personhood of those in the courtroom.

For Derrida, justice requires each decision to be different:

> In short, for a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulation; it would conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, or at least reinvent it in the reaffirmation and the new and free confirmation of its principle. Each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely.\textsuperscript{111}

Derrida is sceptical that justice can be achieved; he sees law and justice as different. He argues that: ‘Justice as law (droit) seems to imply an element of universality, the appeal to a third party who suspends the unilaterality or singularity of the idioms.’\textsuperscript{112} For him ‘[j]ustice remains unrepresentable, that is, it is impossible to do justice to justice, to carry out one’s responsibility entirely.’ He is not entirely pessimistic because he also speaks of the ‘possibility of justice,’\textsuperscript{113} and the importance of continuing to seek justice. Derrida urges: ‘Even though justice is unrepresentable and impossible, one would not stop trying to be just.’\textsuperscript{114}

In summary, the particularity model requires the courts to strive towards Derrida’s ‘possibility of justice,’\textsuperscript{115} rather than adhering to rigid rules and dominating meta-narratives which privilege the accused over the accuser. The particularity model is consistent with the trial judge’s obligation under his/her judicial oath, namely, ‘to do justice according to law without fear, favour or affection.’ Under the particularity model, the use of rigid rules and categories, so clearly evident in the law on the right to silence, is replaced by ‘fresh judgment’ in each case.

\textsuperscript{109} Ibid.
\textsuperscript{110} Elam, above n 3, 120.
\textsuperscript{111} Derrida, above n 6, 23.
\textsuperscript{112} Ibid 17.
\textsuperscript{113} Ibid 21.
\textsuperscript{114} Elam, above n 3, 120.
\textsuperscript{115} Derrida, above n 6, 21.
Currently, courts concentrate on an abstract right to silence, which has distracted attention away from the consequences of the choice for both the accused and the accuser. Under the particularity model, if the accused makes choices, then consequences follow from those choices. The model recognises that trials involve a range of people (not just the accused), with a variety of goals, and it is possible to maintain equity and treat all participants as people, not just rights’ claimants. The right to silence is then re-conceptualised so that it includes an immunity from compulsion to testify, and also a choice with consequences which may or may not be adverse to the accused.

6. **Treat the accused and the accuser as people with reason, emotion, and vulnerabilities**

In focusing on respect and dignity for the individuals before the court, the particularity model calls for an acceptance of the reality that both the accused and the accuser are people with emotion and vulnerabilities, as well as reason. In contrast, as described earlier in this chapter, the common law criminal trial has historically operated on the principle that judges and jurors must separate reason and emotion, and must distance themselves from the personal circumstances of the accuser, especially from expressions of pain and grief. The traditional claim has been that distancing is required if ‘objectivity’ is to be achieved, and a ‘true’ verdict delivered. In contrast, the particularity model requires judges and juries to deal with both the accused and the accuser as real people who have reason, emotion, and vulnerabilities.

Kyte challenges the current law which requires judges to distance themselves from grief and emotion, and to instruct jurors to do the same. He argues that: ‘There is nothing in the notion of a rule or principle itself that excludes the possibility of care for particular individuals.’ He considers that rule-fetishism results when certain actions are considered morally required just because a rule enjoins them, rather than because the consequences of obeying the rule are justified in terms of moral requirements. He warns that the problem is not with the rule itself, but with how the individual acts in accordance with the rule. The appellate court judges have not heeded this warning when it comes to the right to silence decisions because they seemingly act in accordance with rules without

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116 Kyte, above n 72, 110.
sufficient, or any, consideration of the consequences of those rules. The courts’ heavy reliance on rules governing the right to silence leads to a refusal to consider the particularities of the accused and the accuser, and the creation of layers of contradictory rulings that have become increasingly difficult to interpret, apply and understand. Similarly to Kyte, Kerruish is also concerned about the rigid application of rules, which she calls ‘rights-fetishism.’

At least one former appellate court judge has been prepared to acknowledge the possibility of rule-fetishism. In RPS, McHugh J quoted Wigmore on Evidence on the privilege against self-incrimination: ‘We should resolve not to give it more than its due significance. We are to respect it rationally for its merits, not worship it blindly as a fetish.’ As has been shown, the merits of the right to silence in its current formulation are questionable, and the problems it creates are substantial. By continuing to adhere blindly to an absolute right to silence, notwithstanding its lack of merit and the scope of the difficulties it creates, the appellate courts are indeed engaging in the rule-fetishism described by Kyte and Kerruish, and echoed by McHugh J.

The right to silence decisions erase the individuality of the accused and the accuser from the courtroom, by the use of rules, categories, universals and dominating meta-narratives, and by not ‘paying attention’ to the specific people in the courtroom. The courts’ refusal to engage with the pain and trauma of both the accused and the accuser also amounts to an abdication of judicial responsibility in favour of rights fetishism. Kerruish describes rights fetishism and its influence on legal practices in this way:

Legal practices of deciding particular cases by general rules, of coercive enforcement of those decisions, and of claiming that such judgments and their enforcement are objectively or uniquely right, constitute rights fetishism. Rights fetishism, most generally, is a phenomenon of active thoughtful subjects losing themselves in and to their own product: their thought and their laws.

She criticises the refusal of judges to accept their judicial responsibilities and obligations:

There is here [in jurisprudence] both an alienation of subjectivity and a disclaimer of responsibility for the repressive and coercive aspects of legal practices and institutions: a claim for the impartial innocence of law.

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119 Kerruish, above n 117, 194.
120 Ibid 195.
The analysis in this thesis has demonstrated that the right to silence cases are decided by
general rules, with a disclaimer of responsibility for the unacceptable results, especially
the unjustifiable privileging of the accused. There is no engagement with the
vulnerabilities of the accused and the accuser. In contrast, under the particularity model,
the judge accepts responsibility to acknowledge the pain and trauma of both the accused
and the accuser, and to include that in the summing-up to the jury. The jurors, in turn,
take those matters into account in reaching the decision whether it is reasonable to expect
the accused to give evidence.

Minow, quoting Cover, also explores the way judges avoid responsibility for their
decisions: ‘Most judges … respond to the plural dimensions of normative argument by
selecting the most rigid thread and, at the same time, denying their own responsibility for
that choice.’ An example of ‘the most rigid thread’ was discussed in Chapter Four, in
the context of the ‘golden thread’ statement of Lord Sankey.

Minow is critical of the ‘objective’ or ‘neutral’ legal standards claimed by judges:

“Objective” legal standards seem to absolve judges of responsibility for the fates of
individual parties. “Neutral” legal standards seem to absolve their promulgators –
sometimes the very judges who apply them – of responsibility for their contributions to
socially unequal or conflictual outcomes. Accordingly, a judge’s commitment to imperial
responsibility also involves a certain withholding of commitment. In this circumstance
lies the pathos of the judicial role, and its irony, which Robert Cover expressed in the
ironic label he gave it: “the jurispathic office.”

Under the particularity model, judicial responsibility extends beyond the mere application
of rules. Cover’s ‘rigid thread’ and Lord Sankey’s ‘golden thread’ gives way to Cornell’s
‘dignity,’ and Levinas’ ‘honouring of faces,’ to achieve a fair trial for all participants.
The courts would no longer be allowed to focus on abstract rights and so-called
objectivity, in order to avoid dealing with the pain and trauma described during the
course of the evidence. Instead, the criminal trial would focus on the particularities of the
people and the crime before the court.

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121 Martha Minow, Michael Ryan and Austin Sarat (eds), Narrative, Violence and the Law: the Essays of
Robert Cover (1975) 5, discussing Robert Cover, Justice Accused: Antislavery and the Judicial
122 See Chapter Four, page 12.
Yale Law Journal 1601, and Robert Cover, Justice Accused: Antislavery and the Judicial Process
(1975).
As has been illustrated, any claims to objectivity or neutrality in the right to silence decisions are problematic. Instead, what the appellate court decisions reflect is distorted legal reasoning, which Schlag describes as attempting to make an irrational law more rational, by means of ‘the piling on of endless legal distinctions.’\(^\text{124}\) This ‘piling on’ is what the appellate court judges have done in their right to silence judgments; they have piled on endless legal distinctions, and continue to do so. Under the particularity model, there are no legal distinctions of this type. Instead, there is an engagement with the individuality, personality and experiences of the accused and the accuser, a process of ‘really looking,’ so that each is treated with respect and dignity, and difference is accommodated.

The particularity model therefore rejects the argument that judges, lawyers and jurors need to, ‘[d]istance [themselves] from the grief, anger and understandably vengeful human emotions felt by a victim.’\(^\text{125}\) The appellate courts are afraid to look at the particular people before the court because this moves them away from the mind (reason) and towards the body (emotion), a move that they perceive to be dangerous. Douzinas and Warrington vividly describe what happens in this separation of reason and emotion, in terms of what they call ‘the face in fear of pain’:

The suffering face of the outsider is “translated” into the reasonable man of the common law and on this basis is found not to be suffering at all, not in need of the very protection that the law is supposed to provide for the weak and the other becomes self and in the process her [sic] destruction is assured.\(^\text{126}\)

A face in fear of pain cannot be explained by “true facts” or be reduced to “objective reasons.” It cannot be subsumed to the generality of the norm or to the uniformity of application of the law.\(^\text{127}\)

In contrast, under the particularity model, judges ‘really look’ at the ‘face in fear of pain,’ whether the face belongs to the accused or the accuser. To do otherwise is to erase them from the courtroom by blindly following rules, irrespective of their impact on those people. As Douzinas and Warrington urge, judges would ‘remove the mask from the face of the subject and the blindfold from the eyes of justice.’\(^\text{128}\) They would look at the impact of crimes, including, ‘shame, loss of self-esteem, objectification, [and]


\(^{125}\) Kennedy, above n 22, 24.

\(^{126}\) Douzinas and Warrington, *Justice Miscarried*, above n 39.

\(^{127}\) Ibid 229.

dehumanisation. Judges would acknowledge that the trial is a painful process for the accuser, as well as for the accused, and would have the moral courage and honesty to accept that ‘[j]udges deal in pain and death.’ The fear and trauma of the accuser would no longer be relegated to the sentencing process or criminal compensation hearings, because it would become a part of the criminal trial.

The incorporation in the criminal trial of the impact of the crime on both the accused and accuser is especially important when the individual is an obviously vulnerable person, such as a child, or a person with an intellectual disability. The particularity model does not argue that especially vulnerable people be given special rights; rather, the model requires that their particular, personal circumstances be taken into account in the decision whether the accused can reasonably be expected to give evidence. The decisions made by the judge and the jury would not be made in a ‘factual vacuum,’ and vulnerability would be taken into account.

Historically, the courts have deliberately not examined the personal characteristics of the accused and of the accuser in their evidentiary rulings, and in summing-up to the jury. For example, judges commonly instruct jurors that:

You should reach your decision solely on the evidence. You should dismiss all feelings of sympathy or prejudice, whether it be sympathy for or prejudice against the defendant or anyone else. No such emotion has any part to play in your decision.

Although this instruction does not specifically say so, it encourages jurors not to focus on the people in the courtroom. It assumes that evidence can be understood without any reference to the person giving the evidence, and that it is possible for jurors to disengage their emotions in the way they are currently instructed to do. In stark contrast, under the particularity model, judges and jurors alike ‘really look’ at the accused, the accuser, and the crime, and do not overlook vulnerabilities, even if they include emotion, grief, pain, and trauma.

129 Lacey, above n 90, 120.
130 Cover, ‘Violence and the Word, above n 123, 213.
7. **The concept of ‘particularity’**

The concept of particularity in the particularity model as developed in this thesis is new, and differs significantly from the common law. It involves much more than reaching a decision in a particular case, which is how particularity is currently understood in law. It is not the same as ‘[t]aking each case on its own merits.’ This is because, in common law trials, the ‘merits’ are determined not by reference to the people and the circumstances before the court, but by the application of general rules and principles. Sommerlad argues that the common law criminal trial already recognises singularity, because of its case-by-case approach, and she argues that: ‘In its particular emotional scripts, it [the common law] already allows for care.’ However, the examples she gives are in housing law, employment law, and child care law; when she speaks of criminal law, she refers only to the sentencing process and not to the trial itself, and takes no account of the fact that the ‘care’ which is shown is only towards the accused, and not the accuser. As shown in this thesis, the decisions on the right to silence do not recognise the singularity of the accused, or of the accuser, and, as has been demonstrated, it is impossible to agree with Kennedy when she argues that the common law ‘allows for experience of real litigants and real situations.’ Instead, neither the accused nor the accuser is ‘real’ because the accused is an abstracted category in need of protection, and the accuser is a binary opposite, a dangerous Other.

Detmold maintains that: ‘The true common law judge is one who lets the particular parties speak their own relations, unmodified by theory, and the common law respects particularity.’ The analysis of the right to silence decisions in this thesis has demonstrated that the appellate court judges do not let the parties ‘speak their own relations,’ especially not the accuser; moreover, they are heavily influenced by dominating meta-narratives, and there is no respect for particularity. The common law on the right to silence is heavily process-oriented and rule-governed, and continually seeks a universal standard, even if that involves privileging.

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134 Kennedy, above n 22, 96.
In summary, the common law does not allow for particularity in criminal trials. Indeed, the opposite is true, namely, the right to silence decisions of the appellate courts are heavily reliant on rules, categories, meta-narratives, and normative paths. In contrast, the particularity model focuses on the particular people and circumstances before the court.

**Conclusion**

The examination of the model of conflicting rights in Part One of this chapter revealed that the model overlooks the interests of accusers and the community, privileges the accused, and is hierarchical, contentious, and arbitrary. A more acceptable model, the particularity model, which requires the courts to recognise the accuser in the courtroom, and accepts that the accused and the accuser are deserving of equal respect and consideration, should therefore replace it. Judges and jurors are required to ‘pay attention’ to the accused and the accuser as individuals, not as generalisations or categories, and to ‘really look’ at them as people. Trial judges would not abdicate their judicial responsibilities by blind adherence to rigid rules or dominating meta-narratives, and there would be ‘fresh judgment’ in each case. The particularity model requires the judge to handle differences between accused and accused, between accuser and accuser, and between accused and accuser. It also requires jurors to do the same. Judges and jurors would take into account the particularities of both the accused and the accuser, including their vulnerabilities. The impact of crimes would be taken into account in the way people give (or do not give) their evidence.

In Chapter Seven, the particularity model is applied to the right to silence decisions of the appellate courts. By applying the model to these cases, it can be demonstrated that privileging is avoided, and a new approach emerges, namely, the courts strive towards ‘the possibility of justice.’\(^\text{136}\) The particularity model can be applied to criminal procedure generally, especially its insistence that both the accused and the accuser be treated with dignity and respect, and their individuality recognised. However, the application of the model in Chapter Seven is limited to the right to silence at trial.

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\(^\text{136}\) Derrida, above n 6, 23.
CHAPTER SEVEN

APPLYING THE PARTICULARITY MODEL
TO THE RIGHT TO SILENCE CASES

Introduction

An alternative to the current law on the right to silence at trial, called the particularity model, was developed in the previous chapter. The particularity model involves recognising the accuser in the courtroom, and treating both the accused and the accuser with respect and dignity, and, unlike the current law, avoids unjustifiable privileging of the accused. Under the model, the courts do not use abstract rights, and, instead, deal with the accused and the accuser as individuals with reason, emotion, and vulnerabilities. Unlike the current law, the model does not exclude the pain and trauma of the accused and the accuser, or the impact of the particular crime. The courts accept that their rulings have consequences for all parties, not just the accused, and they take those consequences into account in their decisions. Judges and jurors make a ‘fresh judgment’ in each case, and the courts display a just sensitivity to all relevant differences.

Under the particularity model, the significance of the silence of the accused is for the jury to assess, rather than a matter for the judge to decide before the summing-up. The jury’s individual assessment in each case is based on the evidence at trial, not on categories or distinctions. The jury is asked to determine whether or not it is reasonable to expect the accused to have given evidence at trial, taking into account all the circumstances of the case and especially by really looking at the accused, the accuser, and the alleged crime. If the jury decides it is not reasonable to expect the accused to have given evidence, then the silence of the accused cannot be used in the decision on guilt. If the jury decides it is reasonable to expect the accused to have given evidence, then the jury may (not must) accept more readily the evidence led by the Crown.

To understand how the particularity model works in its application to the right to silence, it is now applied to the following right to silence cases:
1. *Weissensteiner v The Queen*, High Court of Australia, 17 November 1993.¹
2. *RPS v The Queen*, High Court of Australia, 3 February 2000.²
3. *Fernando v The Queen*, High Court special leave application, 11 February 2000.³
5. *Davis v The Queen*, High Court of Australia, 3 May 2001.⁵
7. *Dyers v The Queen*, High Court of Australia, 9 October 2002.⁷

The sequence of the cases is important because there was a substantial period of time between *Weissensteiner* in 1993, and *RPS* in 2000, when trial judges directed juries in accordance with *Weissensteiner*.⁸ Further changes were made to the directions to juries by the High Court judgments in *Azzopardi* in 2001 and *Dyers* in 2002. The sequence of the cases also shows the marked contrast between the trial judge’s directions which were in accordance with the law at the time, and the directions which are now required.

Because of the sequence of changes to the law, the seven cases which are discussed differ in what they say about the right to silence, and consequently there are differences in how the particularity model applies to them.

The cases have been chosen because they represent a spectrum of offences: sexual offences, murder, and dangerous operation of a motor vehicle. The particularity model is applied to those right to silence cases in order to demonstrate how the model changes the directions trial judges give to juries on the silence of the accused. The application of the

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¹ *Weissensteiner v The Queen* (1993) 178 CLR 217 (‘*Weissensteiner*’).
² *RPS v The Queen* (2000) 199 CLR 620 (‘*RPS*’).
³ *Fernando v The Queen* (2000) (Unreported, High Court of Australia, Gaudron, Gummow and Hayne JJ, 11 February 2000) (‘*Fernando*’).
⁵ *Azzopardi v The Queen; Davis v The Queen* (2001) 205 CLR 50 (‘*Davis*’).
⁷ *Dyers v The Queen* (2002) 210 CLR 285 (‘*Dyers*’).
⁸ The trial in *Giri* was in 1999, before *RPS* and *Azzopardi* were decided by the High Court. The appeal to the New South Wales Court of Criminal Appeal was three years later, after the decisions in *RPS* and *Azzopardi* had been delivered. The trial and the appeal in *Fernando* were both before the decision of the High Court in *RPS*, which was delivered on 3 February 2000, and were thus post-*Weissensteiner* and pre-*RPS*. The High Court special leave hearing in *Fernando* was on 11 February 2000, after it was postponed to await the decision in *RPS*. The trial in *Bozzola* was on 16 February 2000, 13 days after the *RPS* judgment of the High Court, and before the High Court judgment in *Azzopardi*. 
model also changes the way the evidence unfolds in trials, and avoids the privileging of the accused over the accuser. Particular reference is made to the trial judges’ summings-up to the jury in the cases to be examined, because the law on the right to silence is primarily reflected in them. This is because the law has developed by a process of appellate court rulings on a series of summings-up by trial judges, in the absence of clear, general common law principles or legislative provisions. The particularity model is also applied to judge-only trials where there is no summing-up to the jury, to demonstrate that it is appropriate and workable for these trials as well as jury trials.

If the accused is entitled to remain silent without any adverse consequences, then this has implications for the accuser. Accusers must not only carry the burden of convincing the jury of the veracity of their stories, but they must also deal with alternative and/or hypothetical versions put by defence counsel, without notice, during cross-examination. Particularly since Dyers, accusers must also deal with all defence hypotheses put to them, without any obligation on the defence to call witnesses to support them. Under the particularity model, this burden on accusers is lightened because in some cases evidence would be expected from the accused or defence witnesses.

Like the current law, and the other models for reform, the accused cannot be compelled to testify under the particularity model. However, under the particularity model, if the accused chooses to remain silent, then this may have consequences, which may or may not be unfavourable. At the end of the Crown case, the trial judge is obliged to explain these possible consequences to the accused, in words similar to those required under the United Kingdom legislation.9 In the United Kingdom, the court must satisfy itself that the accused is aware that the stage has been reached at which evidence can be given for the defence, and that if the accused chooses not to give evidence, it will be permissible for the jury to draw such inferences as appear proper from the failure to give evidence.10

The particularity model is now applied to each of the chosen right to silence cases.

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9 Criminal Justice and Public Order Act 1994 (UK) s 35(2).
10 United Kingdom Judicial Studies Board Specimen Direction 38.
1. **Weissensteiner**

Weissensteiner was charged with the murder of two people and the theft of their boat. He and those two people had set off on a cruise in the boat, and the two people had not been seen for 22 months. The accused remained in possession of the boat and the personal belongings of the two people. The Crown case was circumstantial, and required the jury to infer that the two people were dead, and that the accused had murdered them prior to the boat leaving Cairns. The accused had told a series of inconsistent stories to customs officers, the police, and others about the ownership of the boat, and the whereabouts of his two companions. The Crown called two people who had separate conversations with the accused, during which he told them, ‘How can there be murder? They can’t find the bodies,’ and ‘They will never find those two.’

The summing-up of the trial judge in the Supreme Court of Queensland included the following:

The accused bears no onus. He does not have to prove anything. For that reason he was under no obligation to give evidence. You cannot infer guilt simply from his failure to do so. The consequence of that failure is this: you have no evidence from the accused to add to, or explain, or to vary, or contradict the evidence put before you by the prosecution. Moreover, this is a case in which the truth is not easily, you might think, ascertainable by the prosecution. It asks you to infer guilt from a whole collection of circumstances. It asks you to draw inferences from such facts as it is able to prove. Such an inference may be more safely drawn from the proven facts when an accused person elects not to give evidence of relevant facts which it can easily be perceived must be within his knowledge. You might, for example, think in this case it requires no great perception that the accused would have direct knowledge of events which can be canvassed only obliquely from the point of view of seeking to have you draw an inference from the evidence which has been led by the Crown. The use that you make of the fact that there is no evidence given or called by the defendant in these proceedings is that.\(^\text{11}\)

The High Court upheld the direction, and the law on the right to silence at trial thus changed significantly, because the jury was allowed to draw an adverse inference from the silence of the accused in certain circumstances.

Under the particularity model, the direction to the jury in *Weissensteiner* would be to this effect:

A. Mr Weissensteiner has elected not to give or call evidence at trial. An accused is not obliged to do so. The onus of proof is on the Crown and does not shift. Even if Mr Weissensteiner had elected to give evidence, the onus of proof remains on the Crown and if you have a reasonable doubt as to whether the Crown has discharged that onus, then as a matter of law you must acquit the accused.

B. It is a matter for you to decide whether it reasonable to expect Mr Weissensteiner to have given evidence at trial. What evidence you take into account in reaching that decision is a matter for you, but it might include the following:

- Mr Weissensteiner had possession of the boat and personal belongings of the missing persons, Hartwig Bayerl and Susan Zack.
- Mr Weissensteiner told various stories [elaborate] about that possession. These versions differed in these respects [elaborate].
- You heard evidence that Mr Bayerl was somewhat of an eccentric, including that he told others about his plans to disappear.
- The evidence from the family of Ms Zack said that they had not heard from her, which was uncharacteristic of her, especially as she was pregnant. Ms Zack had said she intended to have the baby in hospital, possibly in Cairns.
- The nature of the relationship between Mr Weissensteiner, Mr Bayerl and Ms Zack, for example, how long they had known each other, and what they told others of their plans to travel together.
- The fact that no-one has heard from Mr Bayerl and Ms Zack for 22 months and their bodies have not been located.

C. It is for you to decide whether these matters, and any other parts of the evidence you consider relevant to this question, make it reasonable to expect the accused to have given evidence at trial.

D. If you decide that it is reasonable to expect Mr Weissensteiner to have given evidence, then the fact that he has elected not to do so may mean that you can accept more readily the evidence led by the Crown. I direct you as a matter of law that it does not of itself mean that he is guilty as charged: you should look at the totality of the evidence and decide whether you are satisfied beyond reasonable doubt that the Crown has proved its case.

E. If you decide that it is not reasonable to expect Mr Weissensteiner to have given evidence, then his silence must not be taken into account by you in reaching your verdicts. Your focus should be on the evidence which has been led in the trial, and whether you are satisfied beyond reasonable doubt that the Crown has proved it case.
F. If you are satisfied on the whole of the evidence that the Crown has discharged its onus of proving the guilt of Mr Weissensteiner, then you must return a verdict of guilty. If you are not so satisfied, then you must return a verdict of not guilty.

There are similarities between the trial judge’s direction to the jury in Weissensteiner and this direction under the particularity model. They both stress that the jury should look at the particular circumstances of the case. They both recognise that silence may not be fatal to the accused, but it is one factor in determining whether or not the accused is guilty. They both put silence in the context of the evidence as a whole. The direction under the particularity model is more personal because it refers by name to the accused, the victims and the witnesses. It also focuses more closely on the evidence and matches the evidence with the person. This is required by the insistence under the particularity model that the trial judge and the jurors ‘really look’ at the accused, the accuser, and the alleged crime.

The trial judge told the jury that the Crown invited them to infer guilt from the whole collection of circumstances. Under the particularity model, the judge outlines the matters relevant to the jury’s decision and specifically invites them to decide whether it was reasonable to expect the accused to have given evidence; if the accused failed to do so, they may consider they could more readily accept the evidence led by the Crown.

The major difference between the direction in Weissensteiner and the particularity model direction is that the High Court said that the jury must look only at evidence of ‘facts peculiarly within the accused’s knowledge.’ Under the particularity model, the jury is performing a different exercise. Instead of listing the facts, as the trial judge did, the particularity model requires the judge to invite the jury to focus on all the particularities of the accused, not just his knowledge, and also to widen the focus to include the particularities of the accuser and the crime. An example of how the judge might direct the jury under the particularity model comes from Pincus JA’s comment in the Court of Appeal of Queensland:

The jury would no doubt have been inclined to think that if there was an innocent explanation of the disappearance of the appellant’s former companions, it was up to the

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appellant, who had repeatedly lied on the subject, to tell it to them. They might, indeed have thought that simple compassion might have induced the appellant to let the grieving parents know what had happened to their offspring.\textsuperscript{13}

Pincus JA treated the accused and the deceased as people rather than as categories. He acknowledged the accused as a person with choices when he said, ‘It is one thing to say that there is a right of silence and another to say that its exercise shall never be permitted to disadvantage those who exercise it.’\textsuperscript{14}

In summary, the principal difference between the direction in \textit{Weissensteiner} and the direction under the particularity model is that the latter requires the trial judge and the jury to ‘really look’ at all the particularities of the accused, the accuser, and the crime, unlike the trial judge and the High Court judges who focussed only on ‘facts peculiarly within the knowledge of the accused.’

\textbf{2. \textit{RPS}}

In \textit{RPS}, the accuser was a girl aged 17 who alleged that her father had sexual intercourse with her on hundreds of occasions, and particularised two counts of penile penetration and six counts of digital penetration. The offences occurred over a period of 10 years, commencing when the girl was four. The accused made admissions to the mother of the girl that: ‘I never had intercourse with her but everything else she said is true.’ The accused’s mother asked him: ‘You’ve never touched her with your hands or fondled her or put your penis inside her?’ and he replied: ‘No.’ His written statement to the police was short: ‘I [name] have never at any time vaginally penetrated my daughter.’ He did not give any other statements to police, nor did he give evidence at trial. He was found guilty of four counts of sexual intercourse.

The trial judge had said in his summing-up:

\textsuperscript{13} \textit{R v Weissensteiner} (Unreported, Supreme Court of Queensland, Court of Appeal, Pincus, McPherson, and Shepherdson JJ, 22 June 1992) 12.

\textsuperscript{14} Ibid 20.
The accused’s election not to contradict the evidence given by the complainant’s mother of what was said to be a partial admission, could be taken into account [by the jury] in judging the value of, the weight of, the prosecution’s evidence about it. In the absence of denial or contradiction of the evidence given of the partial admission [the jury] could more readily discount any doubts about that evidence and more readily accept the evidence of Crown witnesses as the truth. If it was reasonable, in the circumstances, to expect some denial or contradiction of the prosecution evidence, [the jury] were entitled to conclude that the appellant’s evidence would not have assisted him in the trial and that the absence of denial or contradiction was a circumstance which could lead them more readily to accept the evidence given by the witnesses for the prosecution case.\(^\text{15}\)

The majority of the High Court judges decided that the accused could not reasonably be expected to give evidence because all he could do was give a bare denial. They distinguished \textit{Weissensteiner} on the basis that an adverse inference is not open in cases which depend on direct evidence, rather than on circumstantial evidence. They said:

\begin{quote} In a case where the prosecution leads direct evidence of the accused’s guilt (as will usually be the case where sexual offences against a young person are alleged) it is, therefore, not right to say that it would be reasonable to expect the accused to give evidence denying or contradicting that direct evidence.\(^\text{16}\)\end{quote}

Under the particularity model, this distinction between direct and circumstantial evidence is immaterial. The jury is invited to reach its own conclusion as to whether they thought it was reasonable to expect the accused to give evidence. If the Crown case consists solely or substantially of direct evidence, then the jury is invited to ‘really look’ at who is giving the direct evidence. They are required to pay painstaking attention to the person giving the direct evidence, in the context of the nature and circumstances of the alleged crime. The fact that it may involve sexual offences against a young person may be a reason to look more closely, rather than to apply rigid rules and dismiss direct evidence cases as ineligible simply because they do not fit within a category. Under the particularity model, the vulnerabilities of young accusers, such as the daughter in \textit{RPS}, are relevant. Similarly, the vulnerabilities of the accused are relevant.

Under the particularity model, the jury may reach the conclusion that in the particular circumstances of the trial, the accused could only give a bare denial, and it is not reasonable to expect the accused to have given evidence in this particular case. However,

\(^{15}\) \textit{RPS v The Queen} (2000) 199 CLR 620 (‘\textit{RPS}') [16] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

\(^{16}\) Ibid [34].
RPS is unlikely to be such a case because the jury may consider it reasonable to expect the accused to have given evidence about the contradiction between his partial admission to his ex-wife and his subsequent complete denial to police.

In RPS, the majority judges said that the ‘fundamental task of a trial judge is, of course, to ensure a fair trial of the accused.’\(^\text{17}\) They did not mention the accuser. Under the particularity model, the fundamental task of a trial judge is different, namely, to ensure that both the accused and the accuser are treated with respect and dignity. The trial judge outlines to the jury the particularities of the accused, the accuser, and the crime, as revealed in the evidence at trial. The trial judge explicitly instructs the jurors that the evidence outlined by him/her as relevant to the silence of the accused is neither exhaustive nor binding on them, and it is open to the jury to look at whatever parts of the evidence they consider relevant. If the trial judge omitted to include a matter which was clearly relevant and likely to be of some importance, either to the accused or to the accuser, it is not automatically an error of law. However, it is open to an appellate court to decide if, looking at the case as a whole, the omission amounts to a miscarriage of justice.

Under the particularity model, the trial judge would ‘really look’ at the accused and the accuser and all witnesses, and would ‘pay attention’ to all aspects of the evidence at trial. At the special leave hearing in RPS, the majority judges acknowledged there was evidence of a partial admission by the accused; they said: ‘It is true to say that only the appellant knew what he meant by saying (if he did) that “everything else she [the accuser] said is true.”\(^\text{18}\) They nevertheless gave no weight to the partial admission, and held:

Even if the evidence of the alleged partial admission were said to require the jury to infer what the appellant meant by his statement, this was not a case in which it was reasonable to expect some denial, explanation or answer by the accused about the alleged partial admission.\(^\text{19}\)

\(^{17}\) RPS (2000) 199 CLR 620 [41] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).
\(^{18}\) Ibid [38].
\(^{19}\) Ibid [39].
It was equally open to the High Court judges in *RPS* to have reached the opposite conclusion, namely, that it was reasonable to expect the accused to explain his conversations with his ex-wife and his mother, and the inconsistency between them and his statement to the police. The majority judges assumed that everyone would reach the same conclusion about whether it is reasonable to expect the accused to have given evidence. In contrast, under the particularity model, the jurors decide this question; they might, or might not, decide it the same way as the majority High Court judges. The important difference is that the decision is made by the jury and, further, it does not depend on a rigid rule which makes no allowance for the particularities of the case. It thus becomes unnecessary for appellate courts to agree or disagree with the trial judges’ directions to juries about whether or not they should draw an adverse inference from the silence of the accused. This is because trial judges would not direct juries at all on whether or not they should draw adverse inferences: it is a matter for them. This makes appeals on this aspect of judicial directions much less likely.

Under the particularity model, the trial judge may tell the jury that in some cases (for example, sexual assault) because of the nature of the offence, the Crown has to rely on direct evidence, that is, the word of the accuser, and there may be no corroborating evidence from forensic sources or eye witnesses. The trial judge may explain that the lack of corroborating evidence is common, if not invariable, for some offences. The trial judge may tell the jury that because of this, the jury may (not must) consider it reasonable to expect the accused to have given evidence in that word-on-word situation. The trial judge may refer to aspects of the evidence which reveal violation of trust by the accused, and infliction of shame, humiliation, objectification, and exploitation of the accuser. The nature of the crime, and the particular evidence in the trial, governs whether it would be appropriate for the trial judge to make these comments. The trial judge makes it clear to the jury that it is always a matter for them, because there are no pre-conceptions or rules of law, and ‘fresh judgment’ is called for in each case. The trial judge may not actually use the phrase, ‘fresh judgment,’ but it is to that effect.
Under the particularity model, jurors decide whether the accused could indeed have done more than give a bare denial. In RPS, the accused could have given evidence on oath to deny the charge. The accused could have given evidence about times, places, and other details, such as a description of the place where the events are alleged to have occurred. This evidence may contradict the accuser, or may support her. This evidence may show that there are details the accuser could not have known unless the alleged incident occurred. The accused could have given evidence about his daily routines and events around the time of the alleged offences. This evidence goes to opportunity (or lack thereof) to commit the alleged offences. It may contradict the accuser, or it may support her. The accused could have given evidence about his contact with his daughter, which may also be relevant to opportunity, or lack thereof. Most importantly of all, the accused could have given evidence of his conversations with his wife and his mother, and his partial admission of wrongdoing.

If, because of delay, there is prejudice to the accused in terms of his ability to give this type of evidence, then a Longman direction is required as a matter of law.20 Longman requires the trial judge to warn the jury of the consequences of delay in reporting the alleged crime, and possible prejudice to the accused because of that delay.

The jury may decide that the matters put to the girl in cross-examination create a reasonable expectation of evidence from the accused. The evidence of the accused may well reveal matters put in cross-examination to the accuser to be untrue, and may indeed corroborate some of the evidence of the accuser. The evidence of the accused may also relieve the pressure on the accuser to avoid inconsistent statements (and thus the possibility of defence counsel saying to the jury that the accuser is unreliable). By giving evidence in the heat of the courtroom, the accused may also be shown to be inaccurate or unreliable in some respects. This opens the possibility of the Crown prosecutor commenting to the jury that no witness can be expected to recall every detail of a past event with total accuracy, and to offer encouragement to the jury to accept the version of the accuser. This is particularly important for accusers who are vulnerable, such as young

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witnesses or witnesses with an intellectual disability, or witnesses who are suffering the effects of psychological trauma.

Under the particularity model, the jury is invited to really look at the accused, the accuser and the circumstances of the alleged crime, and to confront the reality of the circumstances of the case before the court. The circumstances in RPS could be explained to the jury in these terms:

The accuser [full name] alleges that when she was aged between four and 14 the accused, her father, had sexual intercourse with her on hundreds of occasions. He was aged between [detail].

She says there was both digital and penile penetration.

Her mother and father had separated when she was 20 months old.

The accused did not live with his daughter but had regular contact with her when he was not at sea fishing.

She had complained to her school friend about some of the alleged offences when she was eight. She told that friend that her father had been ‘oofing’ her.

She says that when she was 14 she complained to her mother that her father had been fingering her and he had made her have intercourse with him. Her mother gave evidence that her daughter had told her that the touching up and penile penetration had been happening ever since she could remember.

The accuser’s grandmother gave evidence that she approached the accused and asked him: Are you saying that you’ve never touched her with your hands or fondled her or put your penis inside her? The accused replied ‘That’s right.’

The accuser’s mother gave evidence that she approached the accused a week later and asked the accused: ‘Can’t you just admit what you’ve done, or are you really calling your daughter a liar? The accused replied: ‘I never had intercourse with her but everything else she said is true.’ The mother then asked the accused: ‘How long has it been going on?’ and he replied: ‘Since she was about 10.’

Police investigations followed the complaint. The accuser refused to be medically examined. There is no evidence before you of why she refused.

The accused said in a written statement given to the police: ‘I, R..P…S.., have never at any time or in any way vaginally penetrated my daughter (SW).’ This unsworn statement amounts to a written denial of the alleged offences.

Under the particularity model, the judge directs the jury in terms similar to this:
A. Members of the jury, Mr S has elected not to give or call evidence at trial. An accused is not obliged to do so. The onus of proof is on the Crown and does not shift. Even if Mr S had elected to give evidence, the onus of proof remains on the Crown and if you have a reasonable doubt as to whether the Crown has discharged that onus, then as a matter of law you must acquit him.

B. It is for you to decide whether it is reasonable to expect Mr S to have given evidence. What evidence you take into account in reaching that decision is a matter for you but it might include the following:

- The nature of the offences charged and the fact that usually they occur in secret and there are therefore no witnesses;
- The period of time over which they are alleged to have occurred;
- The ages of Mr S and the girl [name] at the time the events are alleged to have occurred;
- The relationship between Mr S and the girl [name] at the time the assaults were alleged to have occurred, including how frequently they saw each other;
- The relationship between the accused and his former wife;
- The difficulty for the girl [name] in giving evidence of alleged serious sexual assault over some years, particularly where the assault is alleged to have been perpetrated by a member of her family, her embarrassment at speaking about such intimate matters, and the involvement of her mother and grandmother. Her possible trauma at her father’s allegedly exploitative conduct, and having it exposed in public in the courtroom;
- [Matters put to the accuser in cross-examination];
- The denial of guilt by Mr S to his mother;
- The partial admission of Mr S to his former wife;
- What Mr S said in his police interview and whether it is in sufficient detail to make it unnecessary for him to offer any further explanation at trial;
- The fact that Mr S’s statement to the police is unsworn and not subjected to cross-examination;
- The apparent inconsistency between what Mr S told his mother and the police, and what he told his wife;
- The words, silence and conduct of Mr S when confronted by his mother and his wife.

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21 These details would be available from the trial transcript.
C. It is for you to decide whether these matters, and any other parts of the evidence you consider relevant to this question, make it reasonable to expect the accused to have given evidence at trial.

D. If you decide that it is reasonable to expect Mr S to have given evidence, then the fact that he has elected not to do so may mean that you can accept more readily the evidence led by the Crown. I direct you as a matter of law that it does not of itself mean that he is guilty as charged: you should look at the totality of the evidence and decide whether you are satisfied beyond reasonable doubt that the Crown has proved its case.

E. If you decide that it is not reasonable to expect Mr S to have given evidence, then his silence must not be taken into account by you in reaching your verdicts. Your focus should be on the evidence which has been led in the trial, and whether you are satisfied beyond reasonable doubt that the Crown has proved its case.

F. If you are satisfied on the whole of the evidence that the Crown has discharged its onus of proving the guilt of Mr S beyond reasonable doubt, then you must return a verdict of guilty. If you are not so satisfied, then you must return a verdict of not guilty.

The reference in the direction to the conduct of the accused when confronted about the allegations obviates the need for a separate Woon direction concerning conduct showing consciousness of guilt. Under the particularity model, his words, silence, and conduct when confronted are assessed in the context of the evidence as a whole, and are taken into account by the jury in its decision whether or not it is reasonable to expect the accused to give evidence. His conduct is taken into account by the jury in its decision whether it is reasonable to expect the accused to have given evidence at trial. Unlike the current law, there is no tension between the right to silence as enunciated by the appellate courts on the one hand, and the common law doctrines which are also binding on the jury, on the other.

Under the particularity model, it is for the trial judge in each case to decide whether it is appropriate to mention matters related to the nature of the crime, and how these may affect the way the accuser gives evidence. In R v Webb, the trial judge pointed out to the jury that it is not realistic to expect the victim of a sexual crime, especially a child aged 11 who had suffered serious injuries as a result of sexual interference, to be able to give

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22 Woon v The Queen (1964) 109 CLR 529: ‘A question asked of a person accused or suspected of a crime, on a statement made in his [sic] presence, is admissible if he is invited to, or might reasonably be expected to, respond in some way indicative of denial or of acceptance,’ at 541. There is a detailed discussion of Woon in Chapter Three, pages 10-15.
an entirely connected and uncontradicted account of her experiences. This was after her evidence had been criticised by defence counsel for lacking those very qualities. The Court of Appeal dismissed the appeal, finding that the trial judge’s summing-up, when read in its totality, did not include any error of law. Discussing Webb, and other cases on judicial comment, Taylor concludes:

This is exactly the sort of situation in which it is perfectly legitimate for judges to inform juries of their own experience with the evidence of such complainants, which suggests that such features, far from being unusual as the inexperienced might think, are in fact par for the course.

Taylor is critical of the recent trend in the appellate court decisions, starting with RPS and continuing with Azzopardi, which encourages trial judges not to comment on the evidence. He suggests that this trend is inappropriate, and that judicial officers should comment to juries in certain cases:

Judicial comments are best suited for cases in which a point might otherwise escape the jury, or be misunderstood by them, because it is not obvious to laypeople serving for a brief period of their lives on juries, but rather is one that is likely to occur only to those with much greater experience of the criminal law such as trial judges.

He suggests that suitable cases include those involving victims of a sexual crime, especially a child, complicated evidence such as fraud prosecutions, and cases in which detailed scientific evidence is presented. All these examples of ‘suitable cases’ are taken into account in the particularity model, and indeed it goes further, and extends the principle to all cases.

In summary, the jury direction under the particularity model and the trial judge’s direction in RPS, are broadly similar, but the latter outlines more fully to the jury the wide range of particularities they may take into account in deciding whether or not it is reasonable to expect the accused to have given evidence. The jury direction under the particularity model is entirely different from the direction required by the High Court

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25 Ibid 84.
26 Ibid 78.
because of the model’s rejection of the distinction between direct evidence and circumstantial evidence. A further difference arises because of the appellate courts’ sole focus on the knowledge of the accused. As demonstrated in the proposed direction under the particularity model, the judge invites the jury to take into account the particularities of the accused, the accuser, and the nature of the alleged crime, namely, sexual assault of a young girl by her father.

3. Fernando

Brendan Fernando had been found guilty of murder and aggravated assault and his co-accused, Vester Fernando, had been found guilty of murder and assault with intent to have sexual intercourse without consent in circumstances of aggravation. The Crown alleged that the men had planned to steal a car, but abduction, aggravated sexual assault and murder had occurred. The Crown alleged that Brendan Fernando was guilty of murder based on the contemplation by him that in carrying out the crime of stealing the car, Vester Fernando might kill the deceased. The Crown alleged that the deceased had been murdered to cover up the sexual assault. During his police interview, Brendan Fernando admitted that he was present when the deceased was abducted at knife point and when a threat to her life was made if she screamed, but he had then walked away from his co-accused and the deceased, and was not connected with the murder. In his interview, he made extensive, damaging allegations against his co-accused, Vester Fernando. Brendan Fernando did not give evidence at trial, but Vester Fernando did.

The trial judge had directed the jury in these terms:

However, a failure to contradict or explain incriminating evidence, in circumstances where it would be reasonable to expect it to be in the power of an accused to do so, may make it easier for you to accept or draw inferences from evidence relied upon by the Crown. Inferences available to be drawn from facts proved by the Crown’s case can be drawn more safely or more readily where the accused elects not to give evidence on relevant facts which you, the jury, perceive to be within his knowledge. Where the evidence of the Crown witnesses is left undenied or uncontradicted by, for example, an accused’s evidence, in circumstances where the accused must have personal knowledge of the relevant facts, doubts about the reliability of the Crown witnesses may be more readily discounted and the evidence of those witnesses more readily accepted. However, members of the jury, I should give you a further warning and direction, that there may be
reasons unknown to you why the accused person, Brendan Fernando, even if otherwise in a position to contradict or explain evidence, remained silent.\textsuperscript{27}

In the High Court special leave to appeal hearing, counsel for Brendan Fernando submitted that a \textit{Weissensteiner} direction was not appropriate for four reasons. The first was that counsel for the co-accused had made adverse comment to the jury on the appellant’s silence. The second was that the appellant was an Aboriginal person and had a significant intellectual disability. The third was that the accused had given his account to police which included damaging admissions, and he would be exposed to conviction for sexual assault; and the fourth was that the accused was reluctant to give admissible evidence against his cousin co-accused as this would make him a ‘dog.’ The High Court did not accept any of these reasons, and upheld the trial judge’s direction.

The High Court judges in \textit{Fernando} did not engage with the four reasons advanced by counsel for the appellant. Instead, they relied on categories and fine distinctions; for example, in order to support the argument that \textit{RPS} was not applicable to \textit{Fernando}, the court re-visited \textit{RPS}, to distinguish it from \textit{Weissensteiner}. Gaudron J distinguished \textit{RPS} and \textit{Weissensteiner} on the basis that in one case, the accused said ‘I wasn’t there; it didn’t happen’ and in the other case, the accused said: ‘Well I was there up until a point.’\textsuperscript{28} She held that the evidence of the appellant in \textit{Fernando} fell into the latter case, and therefore a \textit{Weissensteiner} direction was appropriate.

The particularity model does not need to make these fine distinctions, because it recognises that each case is unique. Under the particularity model, the absurdity of relying on fine distinctions is avoided because the jurors makes an assessment in each case as to whether it was reasonable to expect the accused to have given evidence. The decision does not hinge on a comparison of the facts in one case with those in another, or

\textsuperscript{27} This jury direction was included in the transcript of the judgment of the Court of Criminal Appeal: \textit{R v Fernando} [1999] NSWCCA 66 (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Newman, Studdert and James JJA, 14 April 1999) [173], and of the High Court: \textit{Fernando v The Queen} (2000) (Unreported, High Court of Australia, Gaudron, Gummow and Hayne JJ, 11 February 2000).

\textsuperscript{28} Transcript of Proceedings, \textit{RPS} (High Court of Australia, Gaudron ACJ, McHugh, Kirby, Gummow, Callinan JJ, 8 September 1999) 38.
on a fine distinction or a category. The particularity model recognises that the people in *Weissensteiner* are different from the people in *RPS*, and from the people in *Fernando*; indeed, all cases are different. Because of this, categories can never be closed and the evidence must be evaluated by the jury in the light of the particularities in the trial.  

Under the particularity model, each of the four reasons advanced by counsel for the appellant is relevant to the decision whether it is reasonable or not to expect the accused to give evidence, but none are determinative. It is for the jury to assess their weight, individually and collectively, and to decide what follows from the silence of the accused.

Under the particularity model, in the case of *Fernando*, the trial judge directs the jury in these terms:

A. Members of the jury, Brendan Fernando has elected not to give evidence at trial. An accused is not obliged to do so. The onus of proof is on the Crown and does not shift. Even if Brendan Fernando had elected to give evidence, the onus of proof remains on the Crown and if you have a reasonable doubt as to whether the Crown has discharged that onus, then as a matter of law you must acquit him.

B. It is for you to decide whether it is reasonable to expect Brendan Fernando to have given evidence at trial. What evidence you take into account in reaching that decision is a matter for you, but it might include the following:

- Mr Fernando gave evidence in an electronically-recorded interview with police which included full details of what he said was his involvement, and the involvement of his co-accused, his cousin, Vester Fernando. You will have the recording with you in the jury room, and you will have the facilities to play it. You may consider that there is nothing more he could have said at trial because he had said everything in that interview. You may consider it relevant that the statement is unsworn, and it has not been subjected to cross-examination. [The trial judge may mention evidence given during cross-examination of the police officer who took the statement, to the effect that the accused gave a long interview, and that he was co-operative. He may also mention that the accused was asked by the police officer whether he had anything further to say, and he said no].

- Mr Fernando co-operated with police in what is known as a ‘run-around,’ pointing out what he says was done by him, and by his co-accused.

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29 Transcript of Proceedings, *RPS* (High Court of Australia, Gaudron ACJ, McHugh, Kirby, Gummow, Callinan JJ, 8 September 1999) 38.
You may consider that the combination of the police interview and the ‘run-around’ means that Mr Fernando has said all he could say, and it is not reasonable to expect him to have given evidence at trial.

There was evidence of footmarks consistent with the presence of Mr Fernando at the murder. It is a matter for you how prejudicial this evidence is, and how it fits in with his version of events in the police interview.

You may consider the relationship between Brendan Fernando and Vester Fernando, and Brendan Fernando’s fear of the consequences which may flow from his giving evidence against his cousin, although you may also consider that he has already put himself at risk by virtue of what he said to police about the involvement of his co-accused.

It is a matter for you whether you consider Mr Fernando’s Aboriginality, and any difficulties that may cause in giving evidence at trial, and being cross-examined in the formality of a courtroom, may be reasons for his not giving evidence [elaborate on specific difficulties].

Mr Fernando’s purported intellectual disability, and any difficulties that may cause in giving evidence and being cross-examined in the formality of a courtroom. It is a matter for you whether you consider this may be a reason for his not giving evidence [elaborate on specific difficulties].

Evidence from several witnesses [give names, and summarise their evidence] that they had seen Brendan Fernando in the vicinity of the crime around the time of the crime (in the early hours of the morning) and of his hiding a knife and then retrieving it. Because Mr Fernando has not given evidence of this, you do not have the benefit of his response to that evidence.

Evidence of Vester Fernando [elaborate].

Counsel for Vester Fernando pointed out to you that his client gave evidence, unlike this accused, who elected not to do so.

Brendan Fernando’s admission to the police that he had sexually assaulted the deceased.

The fact that the victim [name] is dead, and therefore cannot give her account of what happened that night.

Members of the jury, I direct you as a matter of law that you must not reason that because Mr Fernando has admitted guilt to one offence, namely aggravated sexual assault, that he is by virtue of that fact alone, guilty of another offence, murder. Instead, you must look at all the evidence and decide whether you are satisfied that the Crown has proved beyond reasonable doubt that he is guilty of murder.
D. It is a question for you to decide: do these matters, and any other parts of the evidence you consider relevant to this question, make it reasonable to expect Brendan Fernando to have given evidence at trial?

E. If you decide it is reasonable to expect Brendan Fernando to have given evidence, then the fact that he has elected not to do so may mean that you can accept more readily the evidence led by the Crown. I direct you as a matter of law that it does not of itself mean that he is guilty as charged: you should look at the totality of the evidence and decide whether you are satisfied beyond reasonable doubt that the Crown has proved it case.

F. If you decide it is not reasonable to expect Brendan Fernando to have given evidence, then his silence must not be taken into account by you in reaching your verdicts. Your focus should be on the evidence which has been led in the trial, and whether you are satisfied beyond reasonable doubt that the Crown has proved its case.

G. If you are satisfied on the whole of the evidence that the Crown has discharged its onus of proving the guilt of Mr Fernando beyond reasonable doubt, then you must return a verdict of guilty. If you are not so satisfied, then you must return a verdict of not guilty.

This jury direction is not radically different from the one given by the trial judge, especially as they both refer to a reasonable expectation that the accused would have given evidence. The main difference is that the trial judge in Fernando did not specify to the jury what evidence they might take in to account in arriving at that decision. Another difference is that under the particularity model, the jurors are not limited in their deliberations to facts within the personal knowledge or power of the accused. Rather than embarking on this task, the jurors are invited to look more widely at the evidence as a whole. This includes, for example, the accused’s intellectual disability, his Aboriginality, and his relationship with his cousin/co-accused, that is, all his particularities. It includes the evidence of his co-accused, Vester Fernando, the fact that the victim is dead and cannot give evidence, and the nature of the alleged crime.

Under the current law, the trial judge must tell the jury of all the possible reasons why the accused has not given evidence in the trial, including hypothetical reasons. The trial judge in Fernando followed the current law in referring to ‘reasons unknown to you why the accused remained silent.’ Under the particularity model, the trial judge does not do this; rather, the trial judge tells the jurors to take into account all the evidence in the trial, including specific evidence which they may consider amounts to a sufficient reason for silence. In this context, the trial judge reminds the jury of any evidence led in the trial which is relevant to that issue. Thus, for example, if the accused is an Aboriginal person,
then judges may obtain assistance from the ‘Aboriginal Benchbook for Western Australian Courts’ published by the Australian Institute of Judicial Administration.\(^{30}\) This Benchbook outlines the vulnerabilities of Aboriginal people in giving evidence in court.\(^{31}\)

The special vulnerability of Aboriginal people was given by the Northern Territory Law Reform Committee as a reason why the current law on the right to silence should not be changed.\(^ {32}\) The Committee said:

The failure of the defendant to give evidence at trial would still see him cloaked in that protection [during police interview—the Anunga Rules] as a member of a group entitled to special care and understanding and against whom it would be unfair to draw any adverse inference.\(^ {33}\)

However, the Committee did not consider the option available under the particularity model, namely, that those personal vulnerabilities be taken into account by the jury. Under the particularity model, the trial judges attempt to demonstrate a ‘nuanced understanding of issues of race, class, gender and ethnicity,’ as urged by Ontiveros.\(^ {34}\)

Under the particularity model, the accused is free to lead evidence of any particular vulnerabilities. This evidence could be in the form of sworn evidence, for example, from an expert; it could not be in the form of suggestions made during cross-examination of Crown witnesses, or from the bar table. This procedure has been followed in the United Kingdom since the 1994 legislation.\(^ {35}\)

Because the particularity model calls for ‘fresh judgment’\(^ {36}\) in each case, it is not possible to predict what a jury in *Fernando* might decide about the silence of the accused if they


\(^ {31}\) Ibid, ‘Chapter Seven: Criminal Proceedings,’ especially [7.4].


\(^ {33}\) Ibid 33. ‘The Anunga Rules’ were developed by Forster J in *R v Anunga* (1976) 11 ALR 412, and are guidelines for the interrogation of Aborigines. They include a range of protections such as an interpreter, a ‘prisoner’s friend,’ administering a caution, careful formulation of questions, offering a meal, making allowance for temporary disability, and legal assistance. They are designed to improve the quality of the evidence obtained during police interview.


\(^ {36}\) Jacques Derrida, ‘Force of Law: The Mystical Foundation of Authority’ in Drucllla Cornell, Michael Rosenfeld and David Carlson (eds), *Deconstruction and the Possibility of Justice* (1994).
were given the direction under the particularity model suggested above. They might decide it would be reasonable to expect him to give evidence because of the matters he raised in his police interview, or they may not. *Fernando* illustrates the importance of ‘fresh judgment,’ because both possibilities are open. Even though the jury might, using the particularity model, arrive at the same conclusion as the High Court, this is not because of rigid tests.

4. **Bozzola**

The accused was charged with dangerous driving causing death and dangerous driving causing grievous bodily harm. He was driving his truck along the Newell Highway when it ran into the back of a stationary truck that had stopped just before some road works on the highway. A car driven by a male, with a female passenger, ran into the back of the accused’s truck. The male was killed instantly and the female was seriously injured.

There was evidence that the accused’s truck had not slowed down as it approached the stationary truck and the road works, even though there were road signs warning of the road works. An analysis of the accused’s blood revealed amphetamine and other drugs. The accused had made entries in his log book concerning times he had been at various places, but these entries were contradicted by Crown witnesses.

In his record of interview, the accused gave details of the times he had been at various places, and said he had no memory of the events leading up to the accident. He said he had taken the log book out of the cabin of his truck immediately after impact because he could smell diesel. He denied he took drugs. The Crown relied on the entries in the log book, and the answers in the interview about travel movements, rest periods, and drug taking as evidence of lies told by the accused out of consciousness of guilt. The appellant did not give evidence at trial, but called a witness concerning interpretation of tyre marks and the speed of the accused’s truck just before impact.

The trial judge told the jury:

> You may however, as a matter of common sense and in accordance with the law, you may take the view that where a fact is disputed between the Crown and the Accused and
the Accused is in a particular position to respond or deny any particular assertion by the Crown, then you may as a matter of law more readily accept that evidence of the Crown as being truthful in the absence of the Accused having elected to respond to matters about which you would expect him to have first hand knowledge.

Now those matters in this particular trial, not exhaustively but probably, include the following. Indeed I tell you as a matter of law they do include the following. His movements on the day and the night before the event and the morning thereof. The rest periods he took, if any, during that time. The question of whether he took any drugs and, if so, what and how much.

Finally, but possibly not exhaustively, any reason he might advance for having told the police a number of untruths.

Now they are matters about which you would expect the Accused to have first hand knowledge. The Crown, of course, have led evidence about all of those matters and I tell you as a matter of law that you would more readily, if you wish, accept the Crown evidence, it having not been the subject of any denial by the Accused, at least in regards to those matters to which I have just alluded.37

The New South Wales Court of Criminal Appeal noted:

No attempt was made by the Crown to submit that the present case was one of the rare cases referred to in par (27) of the joint judgment of the majority in RPS in which evidence contradicting an apparently damning inference to be drawn from proven facts could come only from the accused. It is apparent from the general tenor of the judgment of the majority in RPS and the terms of par (27) itself, that such cases, if they exist at all, will be rare.38

The Crown prosecutor conceded that the trial judge was in error in using the phrase ‘more readily accept the Crown case’ in relation to the matters he nominated to the jury.39 Under the particularity model, this is not an error; indeed, it is part of the trial judge’s direction to the jury. The jury are free to disregard the nominated matters, if they so chose, because the nominated matters are not binding on them as a matter of law.

Under the particularity model, the jury direction on the silence of the accused is very similar to the one the trial judge gave in Bozzola, and quite different from the direction required by the Court of Criminal Appeal. Minow, quoting Cover, refers to judges, ‘[s]electing the most rigid thread in response to plural dimensions of normative

38 RPS (2000) 199 CLR 620 [27] (Gaudron ACJ, Gummow, Kirby and Hayne JJ). In fact, the majority judges in RPS did not say ‘rare cases.’
39 This concession is surprising because RPS was a case of direct evidence only, while Bozzola was a case of circumstantial evidence, and thus closer to Weissensteiner. See Chapter Two, pages 24-29.
argument.’

In *Bozzola*, the Court of Criminal Appeal used the category of ‘rare cases’ as a ‘rigid thread.’ In contrast, under the particularity model, the trial judge does not refer to categories, rather, the judge invites the jury to ‘really look’ at the accused and the accuser, and the circumstances of the offence. The trial judge specifies that it is for them to decide whether it was reasonable to expect the accused to have given evidence, and what consequences flow from that. The jurors may, or may not, conclude that the silence of the accused leads them to more readily accept the Crown case. The jury are directed to look at the whole of the evidence in making those decisions. It is not necessary for the judge to decide whether the case fell within the category of ‘rare cases,’ or any other category. Under the particularity model, every case is exceptional because it involves a different accused, a different accuser, a different offence, and different circumstances; there are no broad, general rules.

The jury direction given under the particularity model, and the trial judge’s direction in *Bozzola* are similar in that they both invite the jury to use the silence of the accused in assessing the Crown case. However, there are differences. Under the particularity model, there is no reference to the ‘first hand knowledge of the accused;’ indeed, to the knowledge of the accused at all.

Under the particularity model, the jury may take into account whether or not evidence could have been obtained from a source other than the accused, but this is not determinative. If the accused is in the best position to give evidence, or is the only one who can give evidence on a particular point, then this may (not must) lead to an expectation of evidence in the defence case. For example, the jury may consider that the accused is the only one who could explain why he did not see the signs warning of road works, or if he did, why he did not slow down, and, in each case, whether he could give evidence that his conduct was due to inattention, or drugs, each of which might be explained by pressure of work or deadlines. In considering this issue, they do of course take into account the evidence from the other witnesses about what they saw and how

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they drove, but nevertheless the jury may conclude that it is reasonable to expect this evidence from the accused. Alternatively, the jury may consider that these matters are not crucial and thus it is not reasonable to expect the accused to have given evidence of them, in view of what he had already disclosed in his police statement. It is for the jury to decide what significance to attach to the fact that the statement to police is unsworn, and untested by cross-examination.

Under the particularity model, the trial judge in Bozzola directs the jury in these terms:

A. Members of the jury, Mr Bozzola has elected not to give or call evidence. An accused is not obliged to do so. The onus of proof is on the Crown and does not shift. Even if Mr Bozzola had elected to give evidence, the onus of proof remains on the Crown and if you have a reasonable doubt as to whether the Crown has discharged that onus, then as a matter of law you must acquit him.

B. It is for you to decide whether it is reasonable to expect Mr Bozzola to have given evidence. What evidence you take into account in reaching that decision is a matter for you, but it might include the following:

- Mr Bozzola’s statement to the police that he has no recollection of events immediately prior to the collision. The lack of medical evidence concerning his injuries and any possible memory loss;

- The evidence of the witnesses [names and summary of their evidence] concerning his travel distances and routes, and the rest stops at various places;

- The evidence of the witnesses [names and summary of their evidence] who were at or near the scene of the accident, of what they saw and heard;

- The details given by Mr Bozzola to the police about his travel movements, and whether they are consistent or inconsistent with evidence given at trial by others [elaborate];

- The entries in Mr Bozzola’s log book, and whether they are consistent or inconsistent with evidence given at trial by others [elaborate];

- The evidence concerning the timetable, deadlines and work pressures on Mr Bozzola;

- The certificate proving the existence of amphetamines in his blood, and the lack of challenge of its accuracy;

- Mr Bozzola’s statement to the police that he did not take drugs, and whether that is inconsistent with the drug certificate. Members of the jury, I direct you as a matter of law that under the laws of this State, a certificate of the
presence of drugs in the blood of the accused is deemed to be conclusive proof, and thus binding on you, unless there is evidence to the contrary.

- Whether Mr Bozzola’s statement to the police was in sufficient detail to make it unnecessary for him to give further explanation at trial. The statement is unsworn and was not subjected to cross-examination.

- Mr Bozzola called evidence from an expert about the braking of his vehicle, and its path of travel. Members of the jury, it is for you to decide if this evidence, together with other evidence in the case, make it unnecessary for him to have given evidence.

- One of the drivers of the vehicle [name] is dead and therefore cannot give evidence but [name], the person who sustained grievous bodily harm was able to give evidence, but what she saw and heard was limited. Members of the jury, it is for you to decide if it is reasonable to expect Mr Bozzola to respond to that, or does the fact that someone else who was at the scene gave evidence make it unnecessary for the accused to do so?

C. You may also take into account that there may be good reasons why Mr Bozzola has not given or called evidence. He said to the police that he could not remember the incident. Members of the jury, do you consider this amounts to a sufficient reason for his silence? Was there medical evidence that might support his claim of amnesia? Was there anything in the evidence of the other witnesses that might provide a good explanation for his silence? Do you think that the incident itself, resulting in the death of one person [name] and grievous bodily harm to another person [name] might affect his ability to clearly recall it?

D. It is for you to decide whether these matters, and any other parts of the evidence you consider relevant to this question, make it reasonable to expect the accused to have given evidence at trial.

E. If you decide it is reasonable to expect Mr Bozzola to have given evidence, then the fact that he has elected not to do so may mean that you can accept more readily the evidence led by the Crown. I direct you as a matter of law that it does not of itself mean that he is guilty as charged. You should look at the totality of the evidence and decide whether you are satisfied beyond reasonable doubt that the Crown has proved its case.

F. If you decide that it is not reasonable to expect Mr Bozzola to have given evidence, then his silence must not be taken into account by you in reaching your verdicts. Your focus must be on the evidence which has been led in the trial, and you must decide whether you are satisfied beyond reasonable doubt that the Crown has proved its case.

G. If you are satisfied on the whole of the evidence that the Crown has discharged its onus of proving Mr Bozzola's guilt beyond reasonable doubt, then you must return a verdict of guilty. If you are not so satisfied, then you must return a verdict of not guilty.

Under the particularity model, the judge specifically invites the jury to take all relevant matters into account, including the relevant legislative provisions, in its decision about
the silence of the accused. These include legislative provisions which allow scientific proof, such as DNA results, fingerprints, medical tests, voice recordings, listening devices, and handwriting identification. In the case of Mr Bozzola, the direction makes specific reference to the legislative provisions concerning blood tests. The tension in the current law between the right to silence as enunciated by the appellate courts and the legislative provisions and scientific proof which qualify it, no longer arises. In contrast, under the particularity model, all these matters are taken into account by the jury.

Under the particularity model, the trial judge does not give the jury direction required under the current law, namely, to nominate all the reasons an accused might elect to remain silent, such as fear of cross-examination, the formality of the courtroom, fear of confusion, reliance on weaknesses in the prosecution case, and also the general reason: ‘There may be other good reasons for an accused person to decide not to give evidence and you must not speculate as to why he [sic] has decided not to give evidence.’ Rather, the particularity model requires that good reasons for not giving evidence be specific to the accused and the particular trial, and that evidence to support them be given, either in the Crown case, or in the evidence of witnesses called by the defence. Under the particularity model, the jury is able to take into account Bozzola’s assertion in his police interview that he suffered from a memory loss following the accident, although they may consider it of some weight that there was no evidence to support this in the Crown case. Under the particularity model, the importance of this lack of supporting evidence is a matter for the jury.

In summary, the jury direction under the particularity model gives the jury a wider range of matters to consider in reaching their decision about the silence of the accused than the trial judge did. The focus is wider than ‘first hand knowledge of the accused,’ because the jury is also invited to take into account the death of one person, the evidence of the witnesses who were at the accident, and all the circumstances surrounding the accident. There is a focus on particularities, not on categories.
The particularity model does not accept that the accused has no obligations. Rather, the model considers that the accused is a participant in the trial, not an onlooker, and the choices he/she makes have consequences. As Uviller argues: ‘The right not to be compelled to be a witness against oneself does not mean being immune from inquiry.’\(^{42}\) The trial judge makes it clear to the accused that if his/her choice is to remain silent, and not call evidence, then adverse consequences may follow. By focusing on the specific evidence in the case, the particularity model invites the jury to consider whether or not it is reasonable to make inquiry of the accused, that is, to expect evidence in the defence case. Because the jury is aware of specific evidence during the trial, the particularity model also has the advantage of transparency. There is always the risk that without that transparency a jury might adopt an attitude that silence of itself is proof of guilt (notwithstanding a jury direction to the contrary).\(^{43}\)

5. \textit{Davis}\

The accused was charged with three counts of serious sexual misconduct involving a friend’s daughter aged nine. The girl had been visiting the house of the accused, which was seven kilometres from the house where she lived. During the night she walked from the accused’s house to her house. When she arrived at her house, it was in darkness so she slept in a car, where the accused approached her the next morning. The girl gave evidence that he asked her to keep the incident secret. The girl’s mother gave evidence that her daughter seemed upset when she was found, and she elicited a complaint of interference. The mother observed that the girl’s inner thighs and vagina were swollen and red. A doctor examined the girl and found suggestions of tissue injury or hymeneal interference. The accused gave a short statement to police, denied the charges, and gave a different version of his conversation with the girl when she was sleeping in the car outside her father’s house.

The trial judge’s direction to the jury included the following:


\(^{43}\) \textit{R v BWT} (2002) 54 NSWLR 241, 60 (Sully J) [115], [116]. See also Crown written submissions in \textit{Azzopardi} (2001) 205 CLR 50 [12.2].
His failure to give evidence here may affect the value or weight that you give to the evidence of some or all of the witnesses who have testified in the trial if you think the accused was in a position to himself give evidence about the matter...The accused has remained silent in the dock as is his right. You cannot treat that as an admission of guilt. But the fact that he has not given testimony may assist you when you come to evaluating the other evidence in the case.\textsuperscript{44}

The Court of Criminal Appeal of New South Wales upheld the trial judge’s direction, and held that the fact that the accused gave a statement to the police did not preclude a \textit{Weissensteiner} direction. The majority judges in the High Court (Gaudron, Kirby and Callinan JJ) held the trial judge was in error, and suggested a new formulation of the appropriate direction to the jury:

\begin{quote}
It will almost always be desirable for the judge to warn the jury that the accused’s silence in court is not evidence against the accused, does not constitute an admission by the accused, may not be used to fill gaps in the evidence tendered by the prosecution, and may not be used as make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt.\textsuperscript{45}
\end{quote}

There is a significant difference between this direction, and the one proposed under the particularity model; namely, the High Court direction deals in negatives, that is, what the jury must not do. It provides little guidance on how and when the jurors may use the silence of the accused. In contrast, the jury direction under the particularity model explains clearly how the jury may use the silence of the accused.

The majority judges also stipulated a new test when deciding whether it is reasonable to expect the accused to give evidence:

\begin{quote}
If there is a basis for concluding that, if there are additional facts which would explain or contradict the inference which the prosecution seeks to have the jury draw, and they are facts which (if they exist) would be peculiarly within the knowledge of the accused, then a comment on the accused’s failure to provide evidence may be made. The facts which it is suggested could have been, but were not, revealed by evidence from the accused must be \textit{additional} to those already given in evidence by the witnesses who were called. The fact that the accused could have contradicted evidence already given will not suffice. Mere contradiction would not be evidence of any \textit{additional} fact. In an accusatorial trial, an accused is not required to explain or contradict matters which are already the subject of evidence at trial.\textsuperscript{46}
\end{quote}

The majority judges made this comment about when a \textit{Weissensteiner} direction could be made:

\begin{footnotesize}\begin{enumerate}
\item \textit{Azzopardi} (2001) 205 CLR 50 [80].
\item Ibid [51].
\item Ibid [64].
\end{enumerate}\end{footnotesize}
If the complainant was unable to give evidence, and the prosecution case had been founded only upon evidence of the otherwise unexplained departure of the complainant from the applicant’s house and return to her own house, coupled with clinical observations of the complainant’s physical condition consistent with her having been sexually assaulted, it might be said that the case was one in which a Weissensteiner comment could have been made.47

They relied on the distinction between cases involving direct evidence and cases involving circumstantial evidence, which had emerged from their earlier decision in RPS. Under the particularity model, the decision whether it is reasonable to expect the accused to give evidence does not depend on this distinction, or indeed any distinction or category. The majority judges in Davis showed no respect for the accuser: indeed, they said that her giving evidence was problematic, because if she had not given evidence, an inference from silence may have been open. Under the particularity model, the judge and the jury are not concerned with what could have been. Instead, they really look at her evidence in the context of her age, her relationship to the accused, her physical injuries, her walking seven kilometres to her home at night when she was only nine years old, and a myriad of other particularities (which are outlined in the model direction set out below).

Gleeson CJ dissented in Davis, and held that explanation was required from the accused for the combination of two circumstances, namely, the medical evidence being consistent with the girl having been sexually assaulted, and her walking home at night.48 His judgment offered no reason for choosing just these two circumstances. Under the particularity model, all circumstances (including these two circumstances) are relevant.

At the special leave hearing in Davis, Gaudron J said: ‘The fact that she walked home, at the time and over the distance she did, gave a degree of credibility to her account which you would not find in a case where the complainant stayed in the house thereafter.’49 Kirby J made a similar point: ‘The factual element that I find very difficult to get out of my mind is of a little girl of 12 walking twelve kilometres in the dark, not from her

47 Azzopardi (2001) 205 CLR 50 [79]-[80].
48 Transcript of Proceedings, Azzopardi (High Court of Australia, Gleeson CJ, Gaudron, McHugh, Kirby, Gummow, Hayne and Callinan JJ, 20 November 2000) 34.
49 Ibid 35.
father’s place to your client’s place, but from your client’s place to her father’s place.’

By those comments, both judges were ‘really looking’ at the accuser in the trial. However, while they were prepared to use this evidence in considering whether to order a new trial, they were not prepared to use it in their judgments on whether a Weissensteiner direction was appropriate. In contrast, the particularity model requires trial judges to specifically invite the jury to consider these two circumstances, along with all the other evidence at trial.

Callinan J focused only on the accused:

The applicant, if he was not guilty of the alleged offences, would not have been in a position to explain, at least by admissible evidence, the apparent injuries to the complainant’s vaginal area. To put it another way, the injuries to the complainant’s vaginal area were not matters peculiarly within the knowledge of the applicant.

Callinan J was not ‘really looking’ at the accuser; indeed, he was not looking at her at all, because his focus was exclusively on the accused. He gave no weight to the personal circumstances of the accuser, the nature of the crime, and the position of trust the accused held. Instead, he used the narrow test of whether it was a case in which evidence (or an explanation) contradicting an apparently damning inference to be drawn from proven facts could come only from the applicant. Moreover, he focussed on only a small part of the evidence. In contrast, under the particularity model, the injuries are not singled out as Callinan J did; rather, they are considered by the jury in the context of the whole of the evidence, including such matters as the girl being at the accused’s house, then walking from it in the middle of the night, and sleeping in a car outside her father’s house.

Callinan J said that the applicant ‘[m]ay have been concerned that he would be unable to provide admissible evidence to explain why the complainant may have walked home.’

Under the particularity model, an entirely different approach is taken, namely, the fact that the complainant walked some distance in the middle of the night is considered by the jury, as part of the evidence. They may consider it reasonable to expect the accused to have given evidence of any plausible explanation for her doing this, other than as a

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50 Ibid 18. In fact, the girl was aged nine at the time, and she walked seven kilometres.
51 Azzopardi (2001) 205 CLR 50 [210].
52 Ibid [213].
response to the alleged crime against her. Under the particularity model, what is especially unacceptable in Callinan J’s approach is his failure to treat the accuser with respect and dignity, and his failure to show a ‘just sensitivity to all relevant differences.’

In the special leave application, counsel for the Crown submitted that the accused could reasonably be expected to have given evidence at trial, on two bases: first, because in his police interview he challenged the truthfulness of the conversation recounted by the girl; and secondly, in his interview he gave a version of what occurred in the house. This submission was not accepted by the High Court judges. The approach suggested by counsel for the Crown is consistent with the jury direction under the particularity model, although it does not go as far, because counsel did not refer to other matters about which the accused could equally be expected to give evidence at trial.

Under the particularity model, the trial judge’s direction to the jury in *Davis* would be in these terms:

A. Members of the jury, Mr Davis has elected not to give or call evidence at trial. He is not obliged to do so. The onus of proof is on the Crown and does not shift. Even if Mr Davis had elected to give evidence, the onus of proof remains on the Crown and if you have a reasonable doubt as to whether the Crown has discharged that onus, then as a matter of law you must acquit him.

B. It is for you to decide whether it is reasonable to expect Mr Davis to have given evidence. What evidence you take into account in reaching that decision is a matter for you, but it might include the following:

- What Mr Davis said in his police interview and whether this is in sufficient detail to make it unnecessary for him to offer any further explanation at trial. This evidence is not sworn or subjected to cross-examination.

- Mr Davis’s denial in the police interview of the content of the conversation with the girl [name] which occurred on the next morning, especially that she was not to tell anyone about what had occurred.

- The nature of the offences charged and the fact that they usually occur in secret and, therefore, there are no witnesses;

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• The relationship between the girl [name] and Mr Davis, including the difference in their ages, and the friendship between Mr Davis and her father. Whether the relationship involved power and trust.

• The physical location of the girl [name]’s house and Mr Davis’s house, and the distance the girl [name] walked at night.

• The evidence given by [name of girl]’s mother of her complaint of interference, and her observation of swelling and redness.

• The evidence of the doctor of an examination showing injuries consistent with sexual interference.

• The trauma and emotion the girl [name] may have experienced in giving evidence about Mr Davis’s conduct, added to by the process of being cross-examined in the formality of a courtroom, in the presence of Mr Davis.

• There are multiple counts in the indictment. Does this have a bearing on the way the girl [name] gave her evidence? Does it create a reasonable expectation that Mr Davis will give evidence of them, or does it make it difficult for him to do so?

C. It is a question for you to decide whether these matters, and any other parts of the evidence you consider relevant to this question, make it reasonable to expect Mr Davis to have given evidence at trial.

D. If you decide that it is reasonable to expect Mr Davis to have given evidence, then the fact that he has elected not to do so may mean that you can accept more readily the evidence led by the Crown. I direct you as a matter of law that it does not of itself mean that he is guilty as charged: you should look at the totality of the evidence, and decide whether you are satisfied beyond reasonable doubt that the Crown has proved its case.

E. If you decide that it is not reasonable to expect Mr Davis to have given evidence, then his silence must not be taken into account by you in reaching your verdicts. Your focus must be on the evidence which has been led in the trial, and you must decide whether you are satisfied beyond reasonable doubt that the Crown has proved its case.

F. If you are satisfied on the whole of the evidence that the Crown has discharged its onus of proving the guilt of Mr Davis beyond reasonable doubt, then you must return a verdict of guilty. If you are not so satisfied, then you must return a verdict of not guilty.

This proposed trial direction under the particularity model is different from the trial judge’s direction in Davis because it invites the jury to look at the particularities of the accused and the accuser, and it includes the trauma, emotion, grief, and impact of the alleged crime. The jury may decide that it is reasonable to expect the accused to have given evidence, or it may not.
In summary, under the particularity model the proposed direction in *Davis* is very different from the direction required by the High Court, principally because the latter does not differentiate between cases involving direct evidence and cases involving circumstantial evidence. The particularity model is also different because it widens the focus of the jury, to really *look* at the accused, the accuser and the alleged crime, and takes into account all the particularities which have been included in the model direction proposed here.

6. *Giri*

The accused was convicted of murder outside a nightclub. Neither he, nor his co-accused, gave evidence at trial. The events leading to the death of the deceased arose out of an argument in the early morning in the nightclub, which led to a fight outside. The Crown alleged that the accused punched the deceased and kicked him after he had fallen to the ground. When interviewed by the police, the accused admitted that he struck the deceased causing him to fall to the ground. He conceded: ‘Maybe I have kicked him because if somebody else has seen me it means I actually have been [sic] kicked.’ There was evidence from eye witnesses that both accused kicked the deceased after he fell. However, there was also evidence to the contrary. The trial judge expressed the view to the jury that he preferred the former.

The trial judge directed the jury that there may be reasons why the accused elected to remain silent, and then said:

However, you may when judging the value, or the weight of the evidence which has been put forward by the Crown, in seeking to prove its case against the accused, take into account the election by the accused, not to deny or contradict matters in the evidence at this trial, about which the accused could have given direct evidence...The relevance of the fact that the accused has not give evidence can only go to the value, or the weight, which you give to the evidence which the Crown witnesses have given.\(^{55}\)

The Court of Criminal Appeal of New South Wales held that the trial judge’s direction contravened s 20 of the *Evidence Act 1995* (NSW). It held that the trial judge erred in his instructions on the jury’s use of the failure of the accused to give evidence at trial. It held that the case was not one of those ‘rare and exceptional cases’ required by *Azzopardi* to justify a comment by the trial judge to the jury about the silence of the accused.\(^{56}\) The evidence of the involvement of the accused in the attack on the deceased was not capable of explanation by disclosure of ‘additional facts known only to the accused,’ as required by *Azzopardi*. They held that the trial judge should have told the jury that they could not take the silence of the accused into account. In contrast, under the particularity model, the jurors are invited to look at the evidence as a whole, and not limit their deliberations to the artificial exercise of trying to work out what might be ‘additional facts known only to the accused.’ They are invited to look at him as a person, not just as a knower of facts.

The Court of Criminal Appeal held that the circumstances of the withdrawal of the accused from the scene were not ‘matters peculiarly within the mind’ of the appellant because all observers at the scene could speak of what they saw and heard, and the mental state of the accused was not a matter peculiarly within his knowledge but could be inferred from the evidence of those witnesses supportive of the view that he withdrew from the scene.\(^{57}\) In contrast, under the particularity model, the jury may consider that what is in the mind of the accused is a matter that is personal to the accused, and it cannot be ascertained by reference to others, and the jury may or may not expect him to give evidence. To say that the observations of other people can reveal the mind of the accused is to treat the accused as an object, not a person.

The version given by the accused in his police interview raised an affirmative case, namely, that he had withdrawn from the fight. Under the particularity model, an affirmative defence case is a matter the jury may take into account in its assessment of whether it is reasonable to expect the accused to have given evidence as suggested by McHugh J in *Dyers*. Unlike McHugh J, however, the particularity model does not always

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\(^{56}\) *Azzopardi* (2001) 205 CLR 50 [68].

\(^{57}\) *R v Giri* (2001) 121 A Crim R 568 [31].
expect the accused to give evidence of the matters raised in an affirmative defence case put in cross-examination. Alternatively, because of the record of interview, the jury may consider that there is nothing more the accused could add. Under the particularity model, if the accused raises matters which go beyond a bare denial, then the jury are invited to consider whether it is reasonable to expect him to have given evidence of those matters.58

Under the particularity model, the trial judge’s direction to the jury in *Giri* includes the following:

A. Members of the jury, Mr Giri has elected not to give or call evidence at trial. He is not obliged to do so. The onus of proof is on the Crown and does not shift. Even if Mr Giri had elected to give evidence, the onus of proof remains on the Crown and if you have a reasonable doubt as to whether the Crown has discharged that onus, then as a matter of law you must acquit him.

B. It is for you to decide whether it is reasonable to expect Mr Giri to have given evidence. What evidence you take into account in reaching that decision is a matter for you, but it might include the following:

- The fact that the victim [name] is dead, and therefore cannot give evidence.

- Evidence from witnesses [names and summary of their evidence] that Mr Giri did not kick the deceased [name], but tried to stop the co-accused [name] kicking the deceased [name].

- Evidence from other witnesses [names and summary of their evidence] that both Mr Giri and his co-accused [name] had kicked the deceased [name] after he fell.

- Evidence from witnesses [names and summary of their evidence] as to what they saw and heard at the scene of the crime. You have not had the opportunity to hear Mr Giri’s response to this evidence, in sworn form, during cross-examination at trial.

- You will have with you in the jury room the video of Mr Giri’s interview with police. It is a matter for you whether he has said all he could have said in that interview, or whether it is reasonable to expect him to have given evidence at trial.

- If Mr Giri had given evidence, he could have explained what he meant in his admissions to the police about kicking the deceased, and he could have elaborated on what he did, and did not, do before he withdrew from the scene.

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58 This would apply, for example, if the defence raised consent or provocation.
• [Anything particular to Mr Giri].

C. It is a question for you to decide whether these matters, and any other parts of the evidence you consider relevant to this question, make it reasonable to expect Mr Giri to have given evidence at trial.

D. If you decide that it is reasonable to expect Mr Giri to have given evidence, then the fact that he has elected not to do so may mean that you can accept more readily the evidence led by the Crown. I direct you as a matter of law that it does not of itself mean that he is guilty as charged: you should look at the totality of the evidence and decide whether you are satisfied beyond reasonable doubt that the Crown has proved its case.

E. If you decide that it is not reasonable to expect Mr Giri to have given evidence, then his silence must not be taken into account by you in reaching your verdicts. Your focus should be on the evidence which has been led in the trial, and whether you are satisfied beyond reasonable doubt that the Crown has proved its case.

F. If you are satisfied on the whole of the evidence that the Crown has discharged its onus of proving the guilt of Mr Giri beyond reasonable doubt, then you must return a verdict of guilty. If you are not so satisfied, then you must return a verdict of not guilty.

Both Giri and Fernando involved an alleged withdrawal by the accused, and both involved an assessment of the extent of their involvement in the crime. The accuser in both cases was dead. In Giri, there was evidence from other witnesses who could describe the fight. In Fernando, there were no witnesses to the actual crime, but there was evidence given by a co-accused. Under the particularity model, the focus is on the particular accused, the particular accuser, and the circumstances of the particular crime. In cases of murder, manslaughter, or dangerous operation of a motor vehicle causing death, the deceased cannot give evidence, and the jury may take this account when deciding whether it is reasonable to expect the accused to have given evidence.

In summary, the directions under the particularity model and the trial judge’s direction in Giri are broadly similar, in the sense that the jury may use the silence of the accused to assess the strength of the evidence given by the Crown witnesses. However, the direction under the particularity model is entirely different from the direction advocated by the Court of Criminal Appeal of New South Wales, which involved the application of the

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59 The personal details of the accused are not apparent from the appellate court decision. These details would emerge during the course of a trial, and would be included in the jury direction required under the particularity model.
rigid rules and categories from *Azzopardi*, without regard to whether in the particular circumstances evidence from the accused could reasonably be expected.

7. **Dyers**

The accused was charged with indecently assaulting a girl aged 13. He was aged 66 and a leader in a sect to which her mother belonged. The girl alleged that on the morning of the incident, she attended an ‘energy conversion session’ with the accused, at the premises of the sect, during which he had sexually assaulted her. In an unsworn statement at trial, the accused acknowledged that he had seen the accuser that morning, but he said it was only in the company of her mother, and he was otherwise engaged with others, either at meetings or in a session. None of those whose names were recorded in the accused’s diary gave evidence at trial.

The High Court (by majority) held that one of the reasons why an adverse inference cannot be drawn from a failure to call a witness (a *Jones v Dunkel* inference), in a criminal trial is that ‘there can be no expectation that an accused should or will go into evidence.’ The majority judges held that the jury should be told not to speculate about what others may or may not have said had they been called to give evidence. Gaudron and Hayne JJ also said that this even extended to alibi evidence.

*Dyers* involved an affirmative evidentiary case, namely, that the accused was not with the girl on his own and had no opportunity to commit the offences, because at all relevant times he was with other people. Unlike the majority judges, McHugh J held that consequences flow when an accused elects to put an affirmative evidentiary case:

Similarly, when an accused elects to put an affirmative evidentiary case, the jury is entitled to evaluate that case by all that the accused does or has done including the failure to call a witness who might have been expected to be called to support that affirmative case. Having elected to speak at his trial and assert that he was with Ms Tinkler, the

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60 *Jones v Dunkel* (1959) 101 CLR 298.
62 Ibid.
63 Ibid [19].
appellant cannot complain if the jurors are permitted to evaluate his claim by his conduct in failing to call the witness that he could reasonably be expected to call.64

This approach is consistent with the particularity model, although the model goes further, because all evidence is considered relevant, not just those parts relating to an affirmative defence case. Under the particularity model, the trial judge says to the jury:

Mr Dyers has raised matters which go beyond a bare denial, namely, that he was with Ms Tinkler at the time the girl [name] says she was assaulted by him. He did not give evidence of this, or call Ms Tinkler to give evidence of it. You may take this into account in reaching your decision whether it is reasonable to expect him to have called or given evidence of those matters. You must, however, not speculate about what those possible witnesses might have said. You must reach your verdict only on the evidence led at trial.

In Dyers, the majority High Court judges were also concerned with the importance of the distinction between a judicial comment and a judicial direction because, they said, it reflected the different functions of the judge and the jury.65 No such concerns arise under the particularity model because the functions of the judge and the jury are clear. So far as the silence of the accused is concerned, the primary task belongs to the jury, as illustrated in the model jury directions included in this chapter. Under the particularity model, the trial judge invites the jury to take all the evidence into account in reaching their decision whether it is reasonable to expect the accused to have given evidence. The trial judge mentions to the jury those aspects of the evidence they may consider relevant to this decision. In Dyers, this includes matters such as the difference in ages between the accuser and the accused, and the position of power and authority the accused had over the accuser.

Under the particularity model, the accused, Dyers, is treated as a person with choices. He is not compelled to testify, but if he raises affirmative matters in his defence, and does not give evidence of them, he runs the risk that the jury may more readily accept the evidence led by the Crown.

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64 Ibid [41].
8. Judge-alone trials

There are judge-alone criminal trials in South Australia, New South Wales, Australian Capital Territory, and Western Australia. The legislative provisions vary as to whether the Crown, or the accused, can elect a judge-alone trial, or whether it is at the discretion of the judge. Waye conducted a survey of the fact-finding processes of the judges of the Circuit Court in Eugene, Oregon, United States, and the South Australian District Court and Supreme Court. She concludes that, as far as fact-finding and the drawing of inferences were concerned, there was little to distinguish the approaches of judges and lay fact-finders. However, she also concludes that, ‘[j]udges’ decisions are also subject to appeal and, where written reasons are required, appellate review is likely to be more thorough than in lay decision-making, where no such transparency applies.’

These conclusions suggest that there is no need to modify the particularity model for trials before judges sitting without juries. The only difference is that although judges may make similar decisions to juries when they come to apply the particularity model to the right to silence, their process of reasoning is more obvious.

9. Conclusion

As can be seen from the application of the particularity model to five High Court cases and two decisions of the New South Wales Court of Criminal Appeal, the model requires a direction by the trial judge to the jury on the silence of the accused which is significantly different from the current law. As has been demonstrated, the particularity model directions differ (in varying degrees) from all the directions advocated by the appellate courts in the cases which have been examined, although not so markedly from the trial judges’ directions. As the model directions demonstrate, the particularity model is clear and lacks the complexity and fine distinctions which arise under the current law.

67 Ibid 29.
The proposed trial judge’s direction to the jury under the particularity model has the following elements:

- The onus of proof is always on the Crown. The accused is entitled to the presumption of innocence.
- The jury must not infer guilt from the silence of the accused alone.
- The accused has a right to remain silent, and cannot be compelled to testify.
- It is for the jury to decide whether it is reasonable to expect the accused to have given evidence.
- In considering whether it is reasonable to expect the accused to have given evidence, the jury may take all the evidence at trial into account.
- The trial judge refers the jurors to the evidence at trial, and encourages them to ‘really look,’ at the particular accused, the particular accuser, and the alleged crime.
- If the jury decides it is reasonable to expect the accused to have given evidence, then the silence of the accused may mean that the jury may accept more readily the evidence led by the Crown.
- If the jury decides it is not reasonable to expect the accused to give evidence, then the silence of the accused must not be taken into account by the jury in reaching a verdict.
- In order to convict the accused, the jury must be satisfied of guilt beyond reasonable doubt.

The trial judge’s direction to the jury on the silence of the accused incorporates these elements, but the direction in each case is specifically modified to suit the particular case, as demonstrated in the directions which have been formulated for the seven cases discussed in this chapter. Unlike the current law, all the particularities of the accused, not just the knowledge of the accused, are taken into account in the particularity model.
The particularity model also changes the way the accuser is treated in the criminal trial because the particularities of the accuser are considered relevant to the issue whether the accused should reasonably be expected to have given evidence. As explained in Chapter Six, the relevance arises because the particularity model requires trial judges and jurors to widen their focus. By accepting that accusers have a separate identity from accused, and are entitled to be treated as individuals deserving of dignity and respect, it follows that their particularities ought to be taken into account on the question whether it is reasonable to expect the accused to have given evidence at trial. As argued in Chapter Six, a fair trial should be fair to the accuser as well as the accused, and what is fair can only be determined in the context of the particular crime before the court. The impact of the crime on the accuser, not just its impact in an abstract way, is a matter which ought to be taken into account. The fact-finders decision whether it is reasonable to expect the accused to have given evidence a trial cannot be made in a factual vacuum.

The particularity model varies significantly from the other proposed models for reform of the right to silence at trial. These proposals have come from the Law Reform Commission of Western Australia, Gleeson CJ, McHugh J, Davies, and United Kingdom legislation. How the particularity model differs from, and is preferable to, these proposed models is discussed in the next chapter.
CHAPTER EIGHT

THE SUPERIORITY OF THE PARTICULARITY MODEL TO OTHER PROPOSALS FOR REFORM

Introduction

Speaking on the right to silence at trial, the Northern Territory Law Reform Committee stated in 2002 that: ‘The prevailing climate of legal opinion in Australia is presently strongly against any change.’\(^1\) The Committee did not elaborate further on this opinion, and did not specifically identify whose opinion was represented. The report refers to the High Court decisions in *Weissensteiner v The Queen* and *Azzopardi v The Queen*; *Davis v The Queen*,\(^2\) a very early report of the Australian Law Reform Commission,\(^3\) the dissenting judgments of McHugh J,\(^4\) and Davies.\(^5\) These sources certainly do not support the Committee’s opinion. Rather, as this chapter demonstrates, there is indeed legal opinion in Australia in favour of changes to the right to silence at trial.

The Victorian Scrutiny of Acts and Regulations Committee and the New South Wales Law Reform Commission have recommended changes to the law on judicial comment on the silence of the accused.\(^6\) The Law Reform Commission of Western Australia, Davies, Gleeson CJ, and McHugh J have all called for reform of the law governing the jury’s use

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4. McHugh J in *RPS* (2000) 199 CLR 620, [56], [58], [59], [62]; *Azzopardi* (2001) 210 CLR 205, [86], [131], [160], [164], [165], [173].
of the silence of the accused. The United Kingdom Parliament introduced legislation to change the law on the right to silence in 1994. Each of the proposals for reform, as well as the United Kingdom legislation will be examined in Part Three of this chapter. They will also be compared with the particularity model developed in Chapter Six. The issues arising from the examination of the models will be discussed in Part Four, under the following headings: the focus of each of the models; how each of the models changes the current law on the right to silence at trial; the roles of the trial judge and jury; and how each of the models would be implemented.

The comparison demonstrates that there are similarities between the particularity model and other proposals for reform, and they all improve the current law in some way. The particularity model is superior because it alone identifies and seeks to address the privileging of the accused in the current law, and it alone encourages courts to treat both the accused and the accuser as individuals who are equally deserving of respect and dignity. The model also offers greater clarity and simplicity than the other proposals for reform. The thesis concludes with a recommendation for the abolition of the current law, and the implementation of the changes as outlined in the particularity model.

1. Reform of the law concerning judicial comment on the silence of the accused

Under the current law, State legislation regulates the extent to which a trial judge may comment to the jury on the silence of the accused; there is considerable variation between the States.9 As explained in Chapter Two, some legislation permits comment, and some prohibits it. As long ago as 1985, the Australian Law Reform Commission recommended that trial judges be permitted to instruct jurors as to what inferences they are, and are not,
entitled to draw from the silence of the accused. In 1999, the Law Reform Commission of Western Australia recommended the amendment of Western Australian legislation, to permit the prosecutor to comment on the silence of the defendant. Also in 1999, the Victorian Scrutiny of Acts and Regulations Committee recommended that Victorian legislation, which prohibits comment by the trial judge, be repealed and replaced with a provision similar to the 1995 Commonwealth and New South Wales provisions, that is, to permit qualified comment. In 2000, the New South Wales Law Reform Commission recommended the removal of the prohibition on prosecutors’ comment on the silence of the accused. The Commission recommended that the prosecution should be required to apply for leave before commenting, but it did not give any reason why leave should be necessary. The Commission said it envisaged that applications for prosecution comment ‘[w]ould ordinarily be granted, unless there were exceptional factors in the case, and the fact that the defendant was not represented is a relevant consideration for the trial judge in determining whether to grant leave.

State Governments in Western Australia, Victoria, and New South Wales have not implemented the Law Reform Commission Recommendations. Accordingly, the law governing judicial comment on the silence of the accused still varies substantially between the States. Queensland legislation alone permits the trial judge, prosecutor, and defence counsel to comment on the silence of the accused.

Under the particularity model, legislative regulation of comment on the silence of the accused is unnecessary because trial judges, Crown prosecutors, and defence counsel may comment to the jury. The trial judge’s comment is along the lines of the model

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10 Australian Law Reform Commission, above n 3, [260].
11 Law Reform Commission of Western Australia, above n 6, Recommendation 255 (2) [24.24].
12 Victorian Scrutiny of Acts and Regulations Committee, above n 6, Recommendation 3; Evidence Act 1995 (NSW) s 20; Evidence Act 1995 (Cth) s 20.
13 Law Reform Commission of New South Wales, above n 6, [4.85].
14 Ibid.
direction developed in Chapter Six, and stresses to the jury that it is for them to decide whether or not it is reasonable to expect the accused to have given evidence.

2. **Proposals for reform relating to the consequences of the silence of the accused**

In Chapter Two, the current law on the relevance of the silence of the accused at trial, especially the High Court decision in *Azzopardi*, was analysed.\(^{16}\) In summary, the current law states that the accused cannot reasonably be expected to give evidence at trial unless there are facts known only to the accused, which are additional to facts in the Crown case. Accordingly, the jury must not draw an adverse inference from the silence of the accused, except in those ‘rare and exceptional’ cases.\(^ {17}\) There have been a number of proposals for reform of this law:

- Recommendations of the Law Reform Commission of Western Australia (‘WALRC model’).
- Proposals of Geoffrey Davies (‘Davies model’).
- Dissenting judgments of McHugh J in *RPS, Azzopardi*, and *Dyers* (‘McHugh model’).
- Judgment of Gleeson CJ in *Azzopardi* (‘Gleeson model’).
- United Kingdom legislation and Practice Directions (‘UK model’).

All these proposals advocate reform of the law governing adverse inferences from the silence of the accused at trial, although they differ considerably from each other. This chapter examines how the particularity model differs from all the other models for reform. The comparison of the models will demonstrate that the particularity model is superior to the other models for reform, principally because it alone widens the focus of inquiry to include the accuser and the community interest. Each of the proposals for reform is now discussed.

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\(^{16}\) *Azzopardi* (2001) 205 CLR 50.

\(^{17}\) Ibid [68].
A. The WALRC model

The 1999 Report of the Law Reform Commission of Western Australia recommends that:

The law on the right to silence at trial should be amended to permit the jury to have regard to a defendant’s silence as one of the circumstances or part of the evidence but not, in and of itself, permitting an inference of guilt, so long as the jury is first directed as to the defendant’s right to be silent.18

The law on the right to silence at the time of the Commission’s report was Weissensteiner,19 and the report pre-dates both RPS and Azzopardi. The model is now much more radical in its impact than it was in 2000, because both these later cases narrowed the availability of an adverse inference from the silence of the accused. The expression ‘have regard to’ in the Recommendation is very wide, and the Recommendation as a whole is wider than any of the proposals in the other models for reform.

The particularity model and the WALRC model are similar because they invite the jury to regard the silence of the accused as part of the evidence. Neither model applies the distinction in the current law between cases involving direct evidence and cases involving circumstantial evidence. Indeed, they avoid the need for categorisations of any kind. However, the models differ in this important respect: the WALRC model still has its focus solely on the accused, and therefore does not take into account the particularities of the accuser and the crime. More significantly, under the WALRC model, the judge invites the jury to have regard to the silence of the accused as part of the evidence in all cases. In contrast, under the particularity model, the jury must first decide whether it is reasonable to expect the accused to have given evidence. If they decide it is not reasonable, then they must disregard the silence in reaching their verdict. If they decide it is reasonable, then they must decide whether the election to remain silent means they can more readily accept the evidence of the Crown witnesses.

18 Law Reform Commission of Western Australia, above n 6, Recommendation 255 (1) [24.24].
The particularity model provides a framework for the jury’s decision on the silence of the accused. It invites them to ‘really look’ at the accused, the accuser, and the alleged crime. The judge reminds the jury of the evidence led at trial which is relevant to that issue. In contrast, the WALRC model does not provide the jury with any framework; it merely offers two qualifications. The first qualification is that the jury must not infer guilt from silence alone. The second is that the judge must tell the jury that the accused has a right to remain silent. Thus, although the WALRC model has the advantage of leaving the central issue to juries, and does not rely on categorisation, it suffers from the disadvantage of lack of guidance to juries.

B. The Davies model

In 2000, Davies J criticised the law on the right to silence in an article on the right to silence, published in two parts in the Australian Law Journal. His main arguments were that the right to silence is not a right; rather, it is an immunity from compulsion to testify; and that the right to silence has no historical justification. The jury direction advocated under the Davies model is as follows:

1. At the end of the prosecution case, the judge will need to ensure that the defendant knows that he or she is under no compulsion to give evidence. But the judge will also have to ensure that the defendant knows that a failure to deny, explain, or answer evidence against him or her, whether by giving or calling evidence, where the jury thinks that a denial, explanation or answer should reasonably have been given, may result in their accepting that failure as an admission of guilt or in their more readily accepting the prosecution case.

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21 Davies,'The Prohibition against Adverse Inferences from Silence: a Rule without Reason? ‘(Pt II), above n 5, 103.
2. Inferences may only be drawn if ‘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.’

3. Legislation should be introduced to specify the matters to be taken into account by the jury in drawing inferences, as follows:

‘Whether any and which inferences may be drawn will depend, amongst other things, on:

(a) The strength of the prosecution case apart from any such inference;
(b) The extent to which facts which are said to call for a denial, explanation or answer were within the personal knowledge of the defendant when given an opportunity to respond; knowledge which may be inferred from a failure to make inquiries or call evidence from others;
(c) Whether facts calling for a denial, explanation or answer are capable of innocent explanation;
(d) Any explanation given by or on behalf of the defendant;
(e) The extent to which a denial, explanation or answer has been given on some other occasion and, if later, the explanation for that.’

Both the Davies model and the particularity model differ from the current law in their rejection of the distinction between cases involving direct evidence and cases involving circumstantial evidence. Under both models, this distinction is irrelevant. The Davies model specifies in detail the matters which the jurors must take into account in reaching their decision on the silence of the accused. In contrast, under the particularity model, the trial judge makes it clear to the jurors that they may take any evidence into account, and they are not limited to the matters mentioned in the summing-up. The particularity model does not require the complex legislation advocated by Davies because in each trial the relevant matters are included in the trial judge’s direction to the jury in a way that is specific to that trial. It thus avoids the artificial tests and wordiness in the legislation recommended in the Davies model. If the WALRC model has the problem that it offers too little guidance to jurors, the Davies model has the opposite problem, that is, it is too prescriptive and detailed, and makes no allowance for individual situations.

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22 Ibid 104.
23 Ibid [3].
Importantly, the particularity model is more jury-centred than the Davies’ model, which is judge-centred. Because the Davies model is so formulaic, and requires the judge to direct the jury on so many different aspects, it creates more scope for judicial error in the summing-up, and thus a greater likelihood of appeals.

The Davies model focuses the attention of the jurors solely on the accused, whereas under the particularity model, the judge invites the jurors to ‘really look’ at the accuser and the circumstances of the crime, as well as the accused. The Davies model concerns the knowledge of the accused, facts, and explanations. It does not take into account the particularities of the accused, the accuser, and the crime. In this respect, it is very different from the particularity model.

C. The McHugh model

In RPS, McHugh J disagreed with the majority judges about the use the jury may make of the silence of the accused, and offered the following alternative principles:

1. ‘In weighing the evidence, a jury is entitled to take into account that the accused has given no evidence in respect of any fact which is “easily perceived to be in his knowledge,” and in respect of which it is reasonable to expect a denial or explanation from the accused.’

2. ‘Any direction concerning the accused’s failure to give evidence must be qualified… by reference to the possible or actual existence of a good reason why he/she has not given evidence. Whether or not such a reason exists is a matter for the jury to determine. In the ordinary course of criminal trials, good reasons for not giving evidence about facts “easily perceived to be in his knowledge” and reasonably calling for an answer are likely to be few. They may include loss of memory, illness, age, low intelligence and similar matters.’

3. ‘I see nothing intrinsically wrong with a reasoning process whereby the failure to give evidence made it likely that the jurors would reason that the lack of a sworn denial or explanation from him made it more likely that the evidence of the complainant and her

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24 RPS (2000) 199 CLR 620 [50]. The phrase ‘easily perceived to be in his knowledge’ is from Weissensteiner (1993) 179 CLR 217, 237.
25 RPS (2000) 199 CLR 620 [56].
26 Ibid [58].
mother was reliable. The silence of the accused was a factor which strengthened the Crown case and which might induce the jury to find the Crown had proven the guilt of the accused beyond reasonable doubt.  

4. ‘The principles enunciated by Gaudron and myself in Weissensteiner should apply, namely, that the trial judge’s directions to the jury should be given in terms of the unexplained facts, rather than in terms of the failure to give evidence or to meet the prosecution case generally. The direction should be precisely framed in terms of the particular facts which call for explanation. The courts should accept the principle from the majority judgments in Weissensteiner, namely, that in weighing the evidence of the prosecution, the jury is entitled to take into account the failure of the accused to contradict or explain the evidence of the prosecution when evidence from his or her in contradiction might reasonably be expected.’

In Azzopardi, McHugh J again disagreed with the majority, and offered these further alternative principles:

5. ‘There was [historically] no common law principle against self-incrimination by accused persons or any policy of the common law recognizing a right to silence. The relevant immunity is an immunity from compulsion to testify in court.’

6. ‘The immunity, or non-compellability rule, is not infringed by allowing a trial judge to comment on the failure of the accused to give evidence contradicting or explaining evidence which that person is in a position to contradict or explain. The comment fastens on the consequences on the accused’s failure to testify. It does not require the accused to testify. Nor does it force the accused to testify. The accused has a choice. He or she can rely on the perceived weakness of the prosecution case or run the risk that the jury will more confidently accept evidence or draw an inference in the absence of evidence from the accused denying that evidence or inference.’

7. ‘The judge’s comments must not:
   Invite the jury, directly or indirectly, to assume guilt from the failure to give evidence,
   Invite the jury to draw any inferences it likes, or
   Use the accused’s failure to give evidence to bolster up a weak prosecution case. Adverse comments should not be made in that situation. The failure to give evidence has no evidential value.’

8. ‘I do not think that the majority in Weissensteiner intended to hold that the failure of the accused to give evidence is relevant only where the prosecution seeks to draw an inference from facts. Nor would it be logical to do so.’

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27 Ibid [59].
28 Ibid [62].
29 Azzopardi (2001) 205 CLR 50 [131].
30 Ibid [164].
31 Ibid [165].
32 Ibid [173].
In *Azzopardi*, McHugh J referred to the right to silence as an immunity: ‘As is so often the case when reference is made to a “right” in the criminal law, what is really meant is an immunity from some process.’\(^{34}\) He, like Davies, described the right to silence as an immunity from compulsion to testify, and he also referred to it as ‘the non-compellability rule.’\(^{35}\) In *Dyers*, McHugh J added the following to his model: ‘When the accused does more than merely deny the prosecution case, if the accused sets up an affirmative evidentiary case, I think the judge can still give a failure-to-call-a-witness direction.’\(^{36}\)

The particularity model and the McHugh model are similar in a number of respects. They both reject the distinction in the current law between cases involving direct evidence and cases involving circumstantial evidence. The McHugh model, the particularity model, and the Davies model (unlike the current law) all recognise that the accused has a choice whether or not to give evidence, and/or call witnesses in the defence case, and cannot be compelled to do so. Unlike the current law, they see this choice as a choice with consequences. McHugh J noted that:

> There is nothing intrinsically wrong with a reasoning process [which says] that the silence of the accused was a factor which strengthened the Crown case and might induce the jury to find the Crown had proven the guilt of the accused beyond reasonable doubt.\(^{37}\)

This ‘reasoning process’ is also part of the particularity model, and both the Davies model and the particularity model challenge the current law in this respect.

Both the McHugh model and the particularity model invite the jury to consider whether the accused has offered something more than a bare denial; McHugh calls this ‘an affirmative evidentiary case.’ Both models require consideration of an affirmative evidentiary case in the jurors’ decision whether it is reasonable to expect the accused to have given evidence. The relevance of an affirmative defence case was illustrated in Chapter Seven with the proposed directions under the particularity model for *Dyers.*\(^{38}\)

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\(^{34}\) *Azzopardi* (2001) 205 CLR 50 [160].

\(^{35}\) Ibid [164].

\(^{36}\) *Dyers* (2002) 210 CLR 285 [29]. See also [30], [35], [41].

\(^{37}\) *RPS* (2000) 99 CLR 620 [59].

\(^{38}\) See Chapter Seven, page 39.
On the other hand, the McHugh model adopts the Weissensteiner test of ‘facts easily perceived to be in his knowledge,’\(^{39}\) and requires the trial judge to identify the unexplained facts precisely. In stark contrast, under the particularity model the trial judge invites the jury to look at the whole of the evidence, and not to limit their inquiry to only certain facts. There is no need for the jury to assess what facts are ‘easily perceived to be in the knowledge of the accused,’ because there is no reference to the knowledge of the accused. The particularity model, unlike the McHugh model, asks the jury to ‘really look’ at the particularities of the accuser, and of the crime, and does not restrict the jurors’ consideration to the accused.

Yet another difference between the McHugh model and the particularity model is that under the particularity model, trial judges refer only to reasons for silence from the evidence in the trial. In contrast, the McHugh model mirrors the current law, and requires the trial judge to mention ‘[t]he possible or actual existence of a good reason why the accused has not given evidence.’ However, unlike the current law, the McHugh model, acknowledges that: ‘Good reasons are likely to be few, and may include loss of memory, illness, age, low intelligence and similar matters.’\(^{40}\) These matters nominated by McHugh J are all relevant under the particularity model, but they are not exhaustive, because the particularities of the accuser and the crime are also relevant. By ‘really looking’ at the accused, the accuser, and the crime, it is possible to determine which facts or circumstances are relevant. What might be relevant cannot be pre-determined, as is suggested in the Davies model, for example, but it depends on the evidence at trial. The application of the particularity model to the important appellate court decisions in the previous chapter illustrates the differences between the directions in trials which invariably occur because of the specific evidence in each trial.

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\(^{39}\) Weissensteiner (1993) 178 CLR 217, 228.
\(^{40}\) Ibid [58].
D. The Gleeson model

In *Azzopardi*, Gleeson CJ dissented, and offered these alternative principles:

1. ‘There is no justification for distinguishing between a failure to give or call evidence about some additional fact, on the one hand, and a failure to give or call evidence about some fact already the subject of evidence, on the other; there is no justification for limiting the occasion for comment to facts known only to the accused;’  
   \[41\]

2. It is difficult to understand why it is more reasonable to expect an accused to explain away circumstantial evidence than to contradict direct evidence;  
   \[42\]

3. Section 20 of the *Evidence Act 1995 (NSW)* should be construed as allowing the trial judge to inform the jury of the way in which they legitimately may take account of a failure to give evidence.\[43\] The trial judge must make it clear that silence is not to be taken as flowing from a consciousness of guilt, and as amounting to an implied admission of guilt.\[44\]

The Gleeson model (like the McHugh model) advocates a change back to *Weissensteiner*, and a reversal of RPS and *Azzopardi*. *Weissensteiner* stated that the jury must decide whether there are ‘facts peculiarly within the knowledge of the accused which call for explanation.’\[45\] The Gleeson model rejects the *Azzopardi* artificial category of ‘additional facts known only to the accused.’\[46\] It also rejects the RPS artificial distinction between cases involving direct evidence and cases involving circumstantial evidence. It advocates for a broad construction of s 20 of the *Evidence Act 1995 (NSW)*, rather than the narrow construction in the current law. The particularity model goes further, however, by seeking the repeal of s 20 (and similar legislative provisions) because it serves no useful purpose under the model; indeed, it is inconsistent with the particularity model.\[47\]

In recommending a return to *Weissensteiner*, Gleeson CJ limits the jury’s attention to the knowledge of the accused. In contrast, under the particularity model, the focus of the jury

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\[41\] *Azzopardi* (2001) 205 CLR 50 [20].  
\[42\] Ibid [22].  
\[43\] Ibid [26].  
\[44\] Ibid [27].  
\[45\] *Weissensteiner* (1993) 178 CLR 221, 228 (Deane and Dawson JJ).  
\[46\] *Azzopardi* (2001) 205 CLR 50 [111].  
\[47\] See below, pages 26-27.
is much wider, because it also take in the particularities of the accused beyond knowledge of facts, the particularities of the accuser, and the nature of the alleged crime.

E. The UK model

Section 35 of the *Criminal Justice and Public Order Act 1994* (UK) states:

1. At the trial of any person who has attained the age of fourteen years for an offence, subsections (2) and (3) below apply unless-
   (b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him [sic] to give evidence.
2. Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, …it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence…
3. Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence.
4. This section does not render the accused compellable to give evidence on his [sic] own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.

Section 38(3) states that an accused cannot be convicted of an offence solely on an inference drawn from the failure or refusal to give evidence. Since 1988, there has been similar legislation in Northern Ireland.

A 1995 Practice Direction issued by the Lord Chief Justice in England sets out the steps which trial judges must follow pursuant to s 35. At the end of the Crown case, the court must ask the legal representative for the accused whether the accused has been advised that the stage has now been reached that if he/she chooses not to give evidence, the jury may draw such inferences as appear proper from the failure to give evidence, and the court must satisfy itself that the accused is so aware. If the matter is raised by the defence, the court must decide whether ‘the physical or mental condition of the accused

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makes it undesirable for him to give evidence,’ and if so, then the jury must be directed not to draw an adverse inference.\textsuperscript{51}

The United Kingdom Judicial Studies Board has issued Specimen Direction 39 for the use of trial judges directing juries on the silence of the accused, which includes the following:

1. The defendant has not given evidence ... That is his [sic] right. He is entitled to remain silent and to require the prosecution to make you sure of his guilt. You must not assume he is guilty because he has not given evidence. But two matters arise from his silence.

2. In the first place, you try this case according to the evidence, and you will appreciate that the defendant has not given evidence at this trial to undermine, contradict or explain the evidence put before you by the prosecution.

(If appropriate, add :) However, he did answer questions in interview, and he now seeks to rely on those answers.

3. In the second place, his silence at this trial may count against him. This is because you may draw the conclusion that he has not given evidence because he has no answer to the prosecution's case, or none that would bear examination. If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it but you may treat it as some additional support for the prosecution's case.

4. However, you may draw such a conclusion against him only if you think it is a fair and proper conclusion, and you are satisfied about two things: first, that the prosecution's case is so strong that it clearly calls for an answer by him and second, that the only sensible explanation for his silence is that he has no answer, or none that would bear examination.

5. (If appropriate, add:) The defence invite you not to draw any conclusion from the defendant's silence, on the basis of the following evidence (here set out the evidence)... If you [accept the evidence and] think this amounts to a reason why you should not draw any conclusion from his silence, do not do so. Otherwise, subject to what I have said, you may do so.

Under the UK model, the trial judge is obliged to draw the jurors’ attention to evidence which may offer an explanation for the accused’s silence.\textsuperscript{52} The UK model recognises that the election of the accused to remain silent at trial may have consequences.\textsuperscript{53} In these respects, it is similar to the particularity model.

\textsuperscript{51} United Kingdom Judicial Studies Board Specimen Direction No 39 [7], and Practice Direction, ibid.
\textsuperscript{52} Specimen Direction, ibid [5].
\textsuperscript{53} Ibid [1], [3], [5].
Under the UK model, the jury is required to consider some of the personal circumstances of the accused. Section 35 states that the judge must, as a preliminary question, consider whether ‘[t]he physical or mental condition of the accused makes it undesirable for him [sic] to give evidence’.\(^\text{54}\) In \textit{R v Friend} in 1996, the English Court of Appeal considered the operation of those words in s 35. The accused was just over 14 years at the time of the offence (murder), and 15 at his trial. However, evidence from a clinical psychologist was to the effect that he had a mental age of a person of nine, and his comprehension and ability to give an account of himself were limited. He was not suggestible, but he may have had difficulty expressing himself in the witness box before a jury. The trial judge ruled on a voir dire that an adverse inference was open, and it was a matter for the jury. The trial judge invited the jury to consider the medical evidence, the accused’s conduct immediately after the murder (seeking to get rid of the knife), and his ability to give answers which were lies during the police interview (even though it lasted only 12 minutes). The Court of Appeal dismissed the appeal against the judge’s ruling, and agreed that the impact of the accused’s vulnerabilities was a matter for the jury.

Under the particularity model, the ‘physical or mental condition of the accused’ is not a threshold question for the judge; rather, the jury considers it as one of the factors relevant to the silence of the accused. These factors are not limited, and the judge invites the jury to take into account all the particularities of the accused, not just the accused’s ‘physical or mental condition,’ and to have regard to the relationship between the accused and the accuser, and to the nature of the crime.

The UK model and the particularity model both require specific evidence to support special reasons for the silence of the accused at trial. Mere oral assertion from the bar table is not sufficient for this purpose, nor is medical evidence not provided in advance to the prosecution, or sought to be put before the jury in an inadmissible form, for example, as part of a closing address by counsel. In requiring admissible evidence of specific reasons for silence, the UK model and the particularity model both differ significantly

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from the current Australian law, which requires trial judges to nominate hypothetical reasons, as well as specific reasons revealed in the evidence.

In *R v A*, the English Court of Appeal held that s 35 ‘[i]mposed at least an evidential burden on the defence to provide admissible evidence of the accused’s intellectual impairment.’ The court held that the prosecution and the defence had both provided medical evidence concerning mental capacity, and the choice between them was for the jury. In *R v Lee* in 1998, the Crown Court (Harrow) held that expert evidence led on a voir dire was insufficient to take the matter away from the jury. The court said that it might be possible to show that it was ‘undesirable’ for the accused to give evidence within s 35 if the following pre-condition was satisfied:

The mental condition of the defendant was such that the act of giving evidence itself would have an adverse effect on his condition and cause deterioration in his mental state or the nature of the condition was such that there was a likelihood of embarrassing outbursts which would be likely to have a prejudicial effect on the jury.

The court held that the jury was aware from evidence in the trial that the accused had a psychiatric history, and, therefore, they would be on their guard in any event, and would be well able to make the appropriate allowances.

What the English cases of *R v A, Friend*, and *Lee* illustrate is that admissible evidence is necessary to support alleged reasons for silence. The reasons in the current law for the accused’s silence do not warrant the blanket rule that the accused cannot be reasonably expected to give evidence. The current Australian law reflected in the appellate court decisions on the right to silence is diametrically opposed to the UK model in this respect.

A significant difference between the UK model and the particularity model is that the UK model invites the jury to ‘draw such inferences as appear proper,’ and to consider whether ‘the only sensible explanation for the silence of the accused is that the accused

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55 *R v A* [2001] 3 All ER 1, 5.
56 Ibid, citing *R v Makanjuola; R v Easton* [1995] 3 All ER 730.
58 *Criminal Justice and Public Order Act 1994* (UK) s 35(3).
has no answer, or none that would bear examination.'

Rather than this confined approach, the particularity model requires the jury to decide whether it is reasonable to expect the accused to have given evidence. The issue for the jury under the particularity model is much clearer and simpler. Under the UK model, the jury must draw a number of conclusions: first, that the accused has not given evidence because the accused has no answer to the case for the prosecution, or none that would bear examination; second, that the conclusion they draw is a ‘fair and proper’ conclusion (whatever this means); third, that the case for the prosecution is so strong that it clearly calls for an answer by the accused; and, fourth, that the only sensible explanation for the silence of the accused is that the accused has no answer, or none that would bear examination. In contrast, the particularity model is clearer and more straightforward because it requires the jury to address just one issue: whether it is reasonable to expect the accused to have given evidence in this particular trial.

The jury’s conclusion under the UK model, that the accused ‘has no answer to the case for the prosecution, or none that would bear examination,’ runs the danger of reversing the onus of proof. The test in the particularity model - whether or not it is reasonable to expect the accused to have given evidence at trial - is a more neutral question.

The possible implementation of the United Kingdom legislation into the law of the Northern Territory was included in the right to silence terms of reference for the Northern Territory Law Reform Committee in 2002. The Committee concluded that there may be strong arguments for modification of the present rules on the right to silence along the lines of the legislation in the United Kingdom and Singapore. The Committee was unable to identify any undesirable problems per se with the United Kingdom legislation. Nevertheless, the Committee recommended against its incorporation into the law of the Northern Territory. One of the reasons given by the Committee for this recommendation was ‘[t]he special difficulties created by the large proportion of Aboriginals in the Northern Territory.’

The ‘special difficulties’ to which the Committee referred could be

59 Ibid s 35(4).
60 Northern Territory Law Reform Committee, above n 1, 33.
accommodated under the particularity model, as demonstrated in the proposed directions in Chapter Seven. Indeed, the ‘special difficulties’ of the accused (and the accuser) are by their very nature particularities, and thus, part of the focus of the particularity model. The particularity model takes into account the very particularities raised by the Northern Territory Law Reform Committee.

In summary, the UK model shares a number of desirable features with the particularity model: they both specify the roles of the judge and the jury (although the roles differ between the models); they both specify the use the jury may make of the silence of the accused; they both take account of the vulnerabilities of the accused (although the UK model is more limited); and they both call for specific reasons for silence, not just hypothetical ones. The significant differences between the UK model and the particularity model are that the UK model takes no account of the particularities of the accuser or the crime: the sole focus remains on the accused. Further, the question for the jury is more straightforward in the particularity model and does not involve any inferences as to why the accused may not have given evidence.

F. Conclusion on the models

In summary, an examination of all the proposals for reform has revealed how different the models are from each other, and how they all change the current law on the right to silence at trial in significant ways. The UK model has been in operation in the United Kingdom since 1994, and thus, not surprisingly, it is the most specific in its terms. In contrast, the WALRC model is very wide and vague, and there has been no commentary on it since 1999. The Davies model and the McHugh model share a number of proposals in common. The Davies, McHugh and Gleeson models all rely heavily on Weissensteiner.

The particularity model differs significantly from all the other models, but it shares some commonality with the UK model. An analysis of the issues from the earlier examination of the model is now undertaken. The thesis concludes that this analysis demonstrates that
the particularity model is superior to all other models for reform, and should be implemented, by the means described later in this chapter.

3. Issues arising from an examination of the models

The significant differences between the models which emerge from the earlier discussion in this chapter are:

A. The focus of each of the models;
B. How each of the models changes the current law on the right to silence;
C. The roles of the trial judge and the jury under each of the models;
D. The implementation of each of the models.

Each of these is now discussed.

A. The focus of each of the models

The particularity model differs from the other models for reform in two respects, namely, (a) the focus under the particularity model is on the broad particularities of the accused (not just his/her knowledge); (b) the focus under the particularity model includes the accuser as well as the accused.

(a) The focus is on the broad particularities of the accused

The focus of all the models for reform, other than the particularity model, is on the knowledge of the accused, not on the broader particularities of the accused. Under the Davies model, facts, knowledge, and explanations dominate the jury’s decision on the silence of the accused. There is no mention of the wider particularities of the accused. Under the McHugh and Gleeson models, ‘the unexplained facts which are easily perceived to be in the knowledge of the accused’ are determinative of the jury’s decision on the silence of the accused. However, there is no mention of the particularities of the accuser. The UK model differs from the other models in that the ‘physical or mental condition’ of the accused must be taken into account in the judge’s ruling on whether an adverse inference from silence is open to the jury.
The Davies, UK and McHugh models prescribe rules which are complex and unwieldy for jurors. They place great emphasis on the knowledge of the accused, for example, ‘the personal knowledge of the accused’ or ‘the first hand knowledge of the accused.’ They isolate the knowledge of the accused from the personal characteristics of the accused, and create a constrained, decontextualised framework for the jurors’ decision-making. In this respect, they are like the current law, for example, ‘matters easily perceived to be in his [sic] knowledge;’ ‘matters for which an innocent explanation might only reasonably lie in the mouth of the appellant;’ and, ‘matters peculiarly within the mind of the accused.’

In contrast to all the other models for reform, the particularity model invites the jury to perform a different exercise, namely, to look at the evidence in the case, including the personal circumstances of the accused and of the accuser, and the particular crime, and to answer the question: is it reasonable to expect the accused to have given evidence? This is a very different exercise from an isolated assessment of what facts are, or are not, within the knowledge of the accused.

(b) The focus under the particularity model includes the accuser

Only the particularity model has regard to the accuser’s circumstances and particularities, in the decision whether the silence of the accused has adverse consequences for the accuser. The other models all continue to focus exclusively on the accused. In stark contrast, the particularly model invites the judge, and the jury, to ‘really look’ at the accused, the accuser, and the crime. Because the other models do not refer to the accuser, and (like the current law) focus only on the accused, the privileging of the accused over

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61 Davies, above n 5, 104.
64 R v Fowler [2000] NSWCCA 142 (Unreported. Supreme Court of New South Wales, Court of Criminal Appeal, Wood CJ, Hulme and Barr JJ, 23 May 2000) [159].
65 R v Giri (2001) 121 A Crim R 568. This is similar to ‘peculiarly within the accused’s knowledge’ in Weissensteiner (1993) 178 CLR 217, 228 (Mason CJ, Deane and Dawson JJ).
the accuser remains. Of all the models for reform, only the particularity model identifies, and addresses, the privileging of the accused over the accuser.

Unlike the other models for reform, the particularity model looks at the impact of the crime on the accused and the accuser. The proposed particularised jury direction for _RPS_ in Chapter Seven demonstrates the relevance of the impact of the crime on the accuser.⁶⁶ The proposed model direction includes the age of the complainant girl, her relationship to the alleged offender, her difficulties in giving evidence of serious sexual assault by a member of her family over some years, her embarrassment at speaking about such intimate matters, and the involvement of her mother and grandmother. The proposed particularised model direction for _Bozzola_ in Chapter Seven demonstrates the relevance of the impact of the crime in that case, namely, the death of one person, grievous bodily harm to another, and the accused’s alleged memory loss because of injuries suffered in the incident.⁶⁷

B. How each of the models changes the current law on the right to silence at trial

None of the models for reform changes the presumption of innocence, the burden of proof, the standard of proof, the necessity for a prima facie case, immunity of the accused from compulsion to testify, the principle that silence of itself does not prove guilt, and, the adversarial nature of the criminal trial.

The presumption of innocence is a difficult and unclear concept, as demonstrated in Chapter Three, and indeed, it may add nothing to the burden of proof and the standard of proof.⁶⁸ Nevertheless, none of the models for reform abolishes the presumption. In _Dyers_, McHugh J said that the presumption of innocence can co-exist with the right to silence if the latter is conceptualised as a non-compellability rule.⁶⁹ The concept of a choice with consequences, which is an important component of the particularity model,

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⁶⁶ This model direction is in Chapter Seven, page 12.
⁶⁷ _R v Bozzola_ (2001) 122 A Crim R 453. The model direction is in Chapter Seven, page 25.
⁶⁸ See Chapter Four, page 10.
does not preclude the presumption of innocence. The difference between all the models, and the current law, is that the presumption of innocence is no longer a meta-narrative dominating the right to silence.

Under all the models, the burden always remains on the Crown to prove the guilt of the accused beyond reasonable doubt. None of the models reverses this onus of proof. Under all the models, the jury take the silence of the accused into account in deciding guilt. The particularity model stresses that the jury must look at all the evidence, and the jury must be satisfied of the guilt of the accused beyond reasonable doubt.

Under all the models for reform, there are no more and no less chance of conviction than under the current law. Fears that changes to the right to silence may unduly prejudice the accused are shown here to be unfounded. Under the particularity model, the particularities of accuser and the crime are relevant to the jury’s decision on the right to silence. Because the model takes into account the particularities of both the accused and the accuser, it may not necessarily lead to higher rates of conviction (but it will lead to a better process for the accused and the accuser). The focus of the model is on treating the accused and the accuser with respect and dignity, not on rates of conviction.

All models retain the high standard of proof beyond reasonable doubt. Under all models, the trial judge must stress to the jurors that if they have a reasonable doubt about the guilt of the accused, they are required, as a matter of law, to acquit.

Under all the models for reform, the trial judge must instruct the jury that it should not assume guilt from silence alone. The jury are not able to draw an adverse inference from silence unless the Crown first shows there is a prima facie case to answer. If the Crown case does not disclose a prima facie case, the judge is required to invite the Crown to consider a nolle prosequi.

Under all the models, accused cannot be compelled to testify; they can still elect not to give evidence and/or to call other witnesses in the defence case. The accused can still
choose to rely on the deficiencies in the Crown case, and remain silent. However, the choices of the accused will have consequences (which may or may not be unfavourable) under all the models for reform, unlike the current law.

All the models for reform retain the adversarial criminal trial, although (unlike the current law) it is no longer a meta-narrative dominating the right to silence. As argued in Chapter Three, changes to the right to silence do not convert criminal trials from adversarial to inquisitorial. Most inquisitorial systems of justice also have a presumption of innocence and a right to silence (in the sense of an immunity from compulsion to testify). The essence of an adversarial trial is that the Crown brings the case, the burden of proof is on the Crown, and the standard of proof is beyond reasonable doubt. According to Bronitt and Mares, the attributes of an adversarial legal system include the following: the prosecution and defence are given the opportunity to present the case in the manner which reflects the evidence of witnesses and the instructions of the accused; counsel have control of proceedings which are conducted by oral testimony with a fact-finder (either a jury or a judge); and the role of the trial judge is restricted to matters of law and the summing-up. All these elements remain under all the models for reform of the right to silence. The adversarial nature of the criminal trial does not preclude the principle which is central to the particularity model, namely, that the accused has choices, and the exercise of those choices may have consequences. The notion of a choice with consequences does not change trials from adversarial to inquisitorial.

Under all the models, the trial judge retains a responsibility to ensure a fair trial for the accused. Under the particularity model alone, the trial judge also has a responsibility to ensure a fair trial for the accuser, and for the community.

All the models for reform explicitly abolish the High Court’s distinction in Azzopardi between direct evidence and circumstantial evidence. They also abolish the Azzopardi

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70 See Chapter Four, pages 15-17
category of ‘additional facts known only to the accused.’ The WALRC model implicitly abolishes these categories.

The McHugh model and the particularity model explicitly abolish the need for the judge to nominate hypothetical reasons (as required under the current law) as well as the actual reasons for silence in the evidence at trial. The other models are silent on this issue. The McHugh model changes the current law by making special rules if the defence raises an affirmative evidentiary case.

In summary, the models for reform retain the principles of criminal justice necessary to ensure fairness to the accused. However, as demonstrated earlier in this chapter, they are significantly different from the current law on the right to silence.

C. The roles of the trial judge and the jury under each of the models

The models for reform differ significantly in the roles they ascribe to the trial judge and the jury. Under the Davies, Gleeson and McHugh models, the trial judge details the evidence capable of leading to an adverse inference. Under those models, the jury is limited to the nominated evidence. Under the UK, WALRC and particularity models, the jury makes the decision about the significance of the silence of the accused; this offers the jury a greatly expanded role than exists in the current law.

The Gleeson and McHugh models leave the decision about the silence of the accused to the jury, but their decision is constrained by Weissensteiner; namely, the need for the judge to go through the unexplained facts so that the jury may consider whether they are peculiarly within the knowledge of the accused.

The Davies, McHugh and Gleeson models express concern that the jury may mis-use the silence of the accused, by attaching too much importance to it, or using it inappropriately. The Davies model recognises that traditionally there has been a distrust of juries, and that

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72 Azzopardi (2001) 205 CLR 50 [64] (Gaudron, Gummow, Kirby, and Hayne JJ).
model therefore puts forward a proposal which purports to trust juries. However, an examination of the Davies model leads to the conclusion that its trust of juries is limited, because of the detail and complexity of the proposed directions to the jury. The McHugh and Gleeson models rely on the judge to nominate the unexplained facts, in order to ensure that the jury do not have the task at large.

Under the particularity model, the jury is trusted with the essential issue. The proposed model directions state: ‘It is a matter for you to decide whether the accused could reasonably be expected to have given evidence. What you take into account in reaching that decision is a matter for you but it might include the following [outline matters specific to the trial].’ The task of the trial judge under the particularity model is clearer than under the current law. The trial judge does not need to decide whether there are additional facts known only to the accused, as required by Azzopardi.

As described earlier in this chapter, the roles of the judge and the jury are clearer under the particularity model than they are under any of the other models for reform.

D. The implementation of each of the models

The particularity model requires the repeal of s 20 Evidence Act 1995 (NSW) and all State legislative provisions concerning comment on the silence of the accused at trial, because they no longer have any useful role to play. The Gleeson model urges for a broad construction of s 20, namely, that it does not preclude a trial judge from comment to the jury about the silence of the accused, except that the trial judge must not suggest the accused was silent because he or she was guilty or believed he or she was guilty. The WALRC model and the Davies model are silent on the existing legislative provisions governing comment.

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73 See, eg, model direction in RPS, Chapter Seven, page 12.
The Davies model explicitly requires detailed legislation to specify when adverse inferences may be drawn from the silence of the accused, and what factors ought to be considered by the jury in that task.

The Gleeson model advocates for a return to *Weissensteiner* and it may therefore require legislation specifying the principles from that case, as enunciated by Gaudron and McHugh JJ, as outlined earlier in this chapter.

The WALRC model requires legislation to change the law on the right to silence, using the wording of the recommendation of the Law Reform Commission of Western Australia.\(^\text{74}\)

Because of a lack of clarity in the current law on this point, all models require legislation to clarify that the accused cannot be compelled to testify at trial. A provision similar to the one in the UK model may be appropriate: ‘This section does not render the accused compellable to give evidence on his [sic] own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.’\(^\text{75}\)

Because of the artificial distinction created in *RPS* and *Azzopardi*, all the models for reform include legislation specifying that the jury may take the silence of the accused into account in reaching a decision on guilt. Implementing legislation would also specify that the jury may take the silence of the accused into account, irrespective of whether or not the Crown case relies on direct evidence or circumstantial evidence or both.

The implementation of the particularity model requires very little legislation. It would only require legislation to include three statements of principle: First, that it is for the jury (not the judge) to decide whether or not it is reasonable to expect the accused to have given evidence at trial; second, the jury may take into account in reaching that decision

\(^{74}\) Law Reform Commission of Western Australia, above n 6, Recommendation 255 (1): ‘The law on the right to silence at trial should be amended to permit the jury to have regard to a defendant’s silence as one of the circumstances or part of the evidence but not, in and of itself, permitting an inference of guilt, so long as the jury is first directed as to the defendant’s right to be silent.’

\(^{75}\) *Criminal Justice and Public Order Act 1994* (UK) s 35 (4).
any evidence at trial they consider relevant, including but not limited to the particular circumstances of the accused, the particular circumstances of the accuser, and the nature of the alleged crime; and, third, if the jurors decide that it is reasonable to expect the accused to have given evidence in a particular trial, then the fact that the accused has elected not to do so may mean that the jury may accept more readily the evidence led by the Crown.

In summary, the implementation of the particularity model would be much easier than it would be any of the other models for reform.

4. The superiority of the particularity model

The foregoing comparison and examination of the various models for reform has shown that there are similarities and differences between them.

Only the particularity model is premised on the need for courts to treat both the accused and the accuser with respect and dignity, and to ‘really look,’ and to ‘pay attention’ to the accused, the accuser and the crime. The jury takes into account the particularities of the accused and the accuser (including their vulnerabilities) in reaching its decision on guilt. To treat the accused and the accuser with respect and dignity is to treat them as individuals, not as categories, and to resist ‘normative and normal (ised) paths’.76

The particularity model takes into account the emotion, grief, trauma and impact of the crime, and thus prevents judges ‘abdicating judicial responsibility.’77 In contrast, none of the other models extends their focus beyond the accused and his/her knowledge. Unlike the current law, all the alternative models treat the accused as an individual whose choices have consequences. The particularity model goes further than the other models because it invites the jury to include all particularities of the accused, and to do so in the

specific context of the trial before the court. Only the particularity model requires the trial judge to ‘handle differences,’ that is, to accept that the accused and accusers are different in each trial. It also requires that the jury look at the crime in its specific context.

In common with the other models for reform, the particularity model releases trial judges from the need to make decisions about whether the case involves direct evidence or circumstantial evidence or both, or if there are ‘additional facts known only to the accused.’ Unlike the other models for reform, the task of the judge under the particularity model is clear, namely, to sum-up the evidence in the case and to remind the jury of the evidence concerning the details of the accused, the accuser and the crime. The particularity model and the UK model, unlike the other models, stress the need for ‘fresh judgment’ in each case, rather than automatic conclusions based on categories and distinctions.

Under the particularity model, trial judges instruct jurors on how they may use the silence of the accused. As the examples given in Chapter Seven show, those directions are less complex than those under the current law, because the focus is on the specific people and evidence in the case, and not on complex rules and fine distinctions.

Under all the models, the existing safeguards to protect the accused from undue prejudice and an unfair trial remain in place. All the models respect the importance of the presumption of innocence, the Crown’s burden of proof, and the high standard of proof. However, unlike the current law, these are not meta-narratives which dominate the right to silence decisions of the appellate courts.

In conclusion, although all the models for reform improve the current law in some way, they do so to varying degrees. Only the particularity model addresses the problems in the current law comprehensively, especially the privileging of the accused. The particularity model recognises that both the accuser and the accused are individuals, and thus entitled to respect and dignity. Under the other models, and the current law, the particularity

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model offers clarity and simplicity. It has flexibility because ‘fresh judgment’ in each case takes account of the particularities of the accused, the accuser, and the crime. The particularity model solves the problems in the current law discussed in Chapter Three, including the lack of consistency in the appellate court decisions on whether an adverse inference from the silence of the accused is open to the jury. It also removes the tension between the appellate court decisions calling for an absolute right to silence on the one hand, and qualifications to the right to silence in legislation, common law and evidentiary rules on the other. The particularity model clearly differentiates between the right to silence, the presumption of innocence, the privilege against self-incrimination, and the burden of proof. The right to silence is re-conceptualised as a choice with consequences. The particularity model avoids the unacceptable consequences of the rights model revealed in Chapter Five.

The current law on the right to silence at trial should be abolished. Because it is superior to all the other models for reform, the particularity model should be implemented in the ways suggested in this thesis.

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79 See Chapter Three, ‘Qualifications to the Right to Silence.’
80 Chapter Six, pages 2-8.
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