

The Weight of Silence

An Analysis of the Forensic Implications of Pre-Trial Exercise of the Right to Silence

Jake Wilhelm Henderson

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws
with Honours. University of Otago 5 October 2018

Acknowledgements

To my supervisor, Dr Anna High, thank you for your patience and expertise. I would not have finished this dissertation without your guidance and constant feedback. The University of Otago is very lucky to have you.

To my parents, for two people who never had the opportunity to attend university out of high school, you have worked all your life to give Luke and I every possible opportunity. This dissertation is as much yours as it is mine.

To Ti Frit, thank you for your tireless proof reading and grammar lessons. Your constant love and support made this an achievable task. Thank you for always keeping me grounded and reminding me every day that there is so much more to life than the Evidence Act.

To my friends, you have made my university experience the best five years of my life. Above all else, you are my most treasured asset. It is only lunch on day one.

All errors and omissions remain my own.

Contents

I.	Introduction	1
II.	The Right to Silence and the Privilege Against Self-Incrimination	4
A.	History of the Right to Silence	4
B.	The Scope of the Right to Silence	4
C.	The Privilege Against Self-Incrimination	6
D.	Distinction Between the Right to Silence and the Forensic Implications of a Defendant's Silence Pre-Trial.	7
E.	The Logical Link Between the Forensic Implications of a Defendant's Pre-Trial Exercise of the Right to Silence and the Value of the Right to Silence.....	7
III.	The Privilege Against Self-Incrimination and the Right to Silence - the Search for a Compelling Rationale	9
A.	Intrinsic Rationales:.....	10
1.	Cruel trilemma	10
2.	Privacy and maintaining the gap between the state and its citizens	11
3.	Prevention of inhuman treatment and abuses.....	13
B.	Conceptual Rationales	14
1.	The right to silence is an essential feature of our adversary system.....	14
2.	Presumption of innocence	15
C.	Consequential Rationales:	17
1.	The right to silence helps the innocent.....	17
D.	Conclusion.....	18
IV.	New Zealand's Approach to Forensic Implications of Pre-Trial Silence.....	20
A.	Introduction	20
B.	The Common Law Approach to Forensic Implications of Pre-Trial Silence	20
C.	A Description of New Zealand's Current Approach to What Evidential Use Can be Made of a Defendant's Pre-Trial Silence: Section 32 of the Evidence Act.....	21
1.	Section 32 overview	21
2.	The "prerequisite subsections"	22
3.	The "substantive provisions":	23
D.	Issues with Section 32's "Halfway-House" Approach to Adverse Inferences from a Defendant's Silence Pre-Trial.....	25
1.	The distinction between "guilt" and "credibility" is in practice difficult to make	25
2.	Allowing an inference adverse to the defendant's credibility is akin to allowing an inference of guilt.....	26
3.	The courts "low-bar" approach to section 32.....	27

4.	The police caution does not reflect what use is actually made of silence.....	29
E.	Conclusion.....	29
V.	A Comparative Analysis: Australia and the United Kingdom Approaches.....	30
A.	Introduction	30
B.	The Australian “No Adverse Inferences” Approach.....	30
C.	The United Kingdom Approach.....	32
1.	Overview:	32
2.	Meaning of “proper”	32
3.	Procedural safeguards	33
4.	Complexity of the UK approach	35
5.	Peripheral Issues with the UK Approach.....	36
6.	Conclusion.....	38
VI.	Discussion – Weighing Up the Options for Reform in New Zealand	39
A.	Introduction	39
B.	Packer’s Criminal Process Model: A Justification for Two Diametrically Opposed Views on the Evidential Use of the Right to Silence	39
C.	The ‘Common Sense’ Argument’ as Grounds for Permitting Adverse Inferences.....	40
D.	The Inherent Problems with ‘Common Sense’ Reasoning.....	41
E.	Disproving the Common-Sense Assumption that Silence is Necessarily Indicative of Guilt....	42
1.	Reasons for silence that are consistent with innocence.....	42
2.	Empirical evidence	43
F.	Additional Costs of the UK Approach: The Impinging of the Right to Silence and the Police Caution.....	46
G.	Conclusion.....	47
VII.	Recommended Reform and Draft Amendment.....	48

I. Introduction

The right to silence encompasses a variety of protections and immunities. In the criminal proceeding context, the right to silence refers to the right of a suspect to refuse to answer questions or to provide information to the prosecution.¹ It applies both at trial (criminal defendants have the right not to be compelled to be a witness or confess guilt)² and during pre-trial investigation (a criminal suspect cannot be compelled to speak to police).³ The right to silence has been described as a bedrock of the Anglo-American legal tradition and a fundamental principle in any liberal society.⁴ It follows that the existence of this right generally sits above challenge. In my dissertation I will focus on a more interesting and contested aspect of the right to silence: the question of the evidentiary value or forensic implications of a criminal defendant's pre-trial exercise of the right to silence. Where a suspect refuses to answer questions during police questioning, what use can be made at trial of such a refusal as evidence against the defendant?

This dissertation will analyse and critique the forensic implications of a defendant's pre-trial silence, as governed by section 32 of the Evidence Act. There are various ways of dealing with evidence that an accused exercised their right to silence during the police investigation stage, each with different implications for defendants, prosecutors and the running of a case.⁵ The current New Zealand position is to prevent the fact-finder from making inferences of guilt from a defendant's pre-trial silence, but to nonetheless allow adverse inferences as to credibility.⁶ This can be compared to the United Kingdom (UK) approach, which is to allow the fact-finder to draw any inferences that appear 'proper' from pre-trial silence, including inferences of guilt.⁷ The Australian approach, in contrast, prevents any such adverse inferences from being drawn.⁸

¹ Yvonne Marie Daly "The right to silence: inferences and interference" (2014) 47(1) Aust. N. Z. J. Criminol 59 at 60.

² New Zealand Bill of Rights Act 1990, s 25(d).

³ New Zealand Bill of Rights Act 1990, s 23(4).

⁴ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 1430.

⁵ Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 541.

⁶ Evidence Act 2006, s 32.

⁷ Criminal Justice and Public Order Act 1994 (UK), s 34; Criminal Procedure and Investigations Act 1996 (UK), s 11.

⁸ Evidence Act 1995 (Cth) (Aus), s 89.

If adverse inferences can be taken from silence, this possibility arguably creates an element of indirect compulsion on the accused to not remain silent during pre-trial questioning, thereby undermining the right to silence. Impinging the right to silence is not, however, a radical notion – the right has been described as a ‘qualified right’ that must be balanced against other public interests and that may be encroached upon in certain contexts, in light of that balancing process.⁹ The legal obligation to file tax returns or to provide motor documents on police request are examples of public interests trumping the right to silence.¹⁰ In the criminal procedure context, the Serious Fraud Office Act and examination order provisions in the Search and Surveillance Act 2012 are examples of encroachments upon the right.¹¹

The question therefore is whether any costs incurred by impinging on the right to silence are outweighed by the purported benefits of undermining the right by allowing adverse inferences to be drawn from its exercise. Accordingly, this dissertation takes as its starting point an analysis of the importance of the right to silence and the interests it is said to protect. These considerations must be balanced against the benefits of allowing adverse inferences from pre-trial silence. To assist with this analysis, I will undertake a comparative analysis of the UK and Australian approaches to the forensic implications of pre-trial silence. My dissertation will have the following structure:

I will start with a descriptive overview of the right to silence and the related privilege against self-incrimination, with reference to the forensic implications of the right’s pre-trial exercise.

Secondly, I will discuss the potential rationales for the right to silence. I consider various justifications, and conclude that taken as a whole these demonstrate the importance of strongly upholding and protecting the right.

In chapter three, I will analyse New Zealand’s current approach to the evidentiary value/forensic implications of a defendant’s silence during police investigation. I will outline a number of issues that have arisen with the governing Evidence Act provision, section 32, which indicate that the status quo is problematic.

My fourth chapter will involve a comparative analysis, where I will look at two contrasting approaches to the issue: Australia and the UK. Australia has adopted an approach that strongly upholds the right to silence in this context, by providing that no adverse inferences can be

⁹ Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), at 10.

¹⁰ Roberts and Zuckerman, above n 5, at 540.

¹¹ Serious Fraud Office Act 1990, s 28; Search and Surveillance Act 2012, ss 33-43.

drawn from pre-trial exercise thereof. In contrast, the UK permits common sense inferences of guilt from pre-trial exercise of the right to silence.

In my fifth chapter, I will critically evaluate the arguments in favour of allowing adverse inferences of guilt. In particular, I will focus on the common sense intuition that silence is indicative of guilt and the claim that such an approach is important for the administration of justice (“catching the guilty”). I will balance any costs of such an approach against the benefits of a strong right to silence. Finally, having come to a conclusion on whether adverse inferences should be drawn from pre-trial silence, I will propose a reform of s 32.

II. *The Right to Silence and the Privilege Against Self-Incrimination*

A. *History of the Right to Silence*

There is a lack of certainty as to the history of the right to silence.¹² One account is that the right to silence grew out of opposition to mandatory religious oaths coupled with incriminating questions in the Star Chamber,¹³ (an English court that operated from 15th to the mid-17th century, supplementing the judicial activities of the common law and equity courts).¹⁴ These oaths would require the accused to answer truthfully all questions regardless of whether the answers would result in self-incrimination. Silence under these oaths was considered tantamount to a confession of guilt.¹⁵ The opposition to this form of oath and questioning became transposed over time into a much wider opposition to being forced to respond to questions, both in and out of the courtroom.¹⁶ On this view, “the right to silence is bound up historically with a rejection of authoritarian, ‘foreign’, methods of criminal investigation”.¹⁷

An alternative view is that the rise of the right to silence coincided with the rise of the adversarial system at the end of the 18th century.¹⁸ On this view, the privilege against self-incrimination and the right to silence grew out of a need to maintain a key characteristic of the adversarial system: equality between the parties. The right to silence arguably helps maintain this equality as it prevents the state gaining an advantage through compelling the defendant to speak.

B. *The Scope of the Right to Silence*

The right to silence arguably has both a broad and a narrow meaning; at its most general, all persons have the right to remain silent in any context (whether or not they have been arrested

¹² Elizabeth McDonald “Why so Silent on the Right to Silence? Missing Matters in the Review of the Evidence Act 2006 (2012) 44 VUWLR 573 at 576.

¹³ Roberts and Zuckerman, above n 5, at 538.

¹⁴ Law Commission *Criminal Evidence*, above n 9, at 11.

¹⁵ Law Commission *Criminal Evidence*, above n 9, at 11.

¹⁶ Elizabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 257.

¹⁷ Roberts and Zuckerman, above n 5, at 538.

¹⁸ John Langbein, “The Historical Origins of the Privilege Against Self-Incrimination at Common Law” (1994) 92 Mich.L.Rev 1047, at 1066-1067.

or detained).¹⁹ As Cooke P put it in the landmark New Zealand decision of *Taylor v New Zealand Poultry Board*, “every citizen has in general a right to refuse to answer questions from anyone, including an official.”²⁰ It has been argued that this general liberty is protected by s 14 of the New Zealand Bill of Rights Act (NZBORA) – the freedom of expression, which includes the right not to express oneself.²¹

While s 14 of NZBORA arguably recognises the right to silence in its broader sense, the right to silence is perhaps more useful as a principle that explains the existence of various other rules across society.²² Section 23(4) of the NZBORA is one such rule that reflects this broad principle. It provides that any person who is arrested or detained for any offence or suspected offence has the right to refrain from making a statement - and furthermore, to be informed of that right.

A useful overview of the breadth of the coverage of the right to silence was provided by Lord Mustill in *R v Directors of Serious Fraud Office, ex parte Smith*.²³ Under Mustill’s approach, the right to silence in the context of criminal proceedings is a broad principle that does not denote any single right, but rather refers to a “disparate group of immunities” as follows:²⁴

1. A general immunity against being compelled on pain of legal punishment to answer questions;
2. A general immunity against being compelled on pain of legal punishment to answer questions which may incriminate;
3. A specific immunity enjoyed by suspects undergoing interrogation against being compelled on pain of legal punishment to answer questions;
4. A specific immunity enjoyed by persons charged with offences against being interrogated;
5. A specific immunity enjoyed by persons undergoing trial from being compelled on pain of legal punishment to testify and answer questions put by the prosecution;

¹⁹ Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 647.

²⁰ *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 349 (CA) at 398.

²¹ Butler, above n 4, at 1169.

²² Rishworth, above n 19, at 649.

²³ *R v Directors of Serious Fraud Office, ex parte Smith* [1992] 3 All ER 456 [HL].

²⁴ Zuckerman, above n 5, at 539.

6. A specific immunity enjoyed by an accused from having adverse comment made upon or adverse inference drawn from, a failure to answer questions put to him or her, either before or at trial or both.

The focus of this dissertation is on the sixth immunity in Mustill's categorisation.

C. *The Privilege Against Self-Incrimination*

The right to silence is closely related to the concept of privilege against self-incrimination. Although the terms "right to silence" and "privilege against self-incrimination" are sometimes used interchangeably,²⁵ the former has been described as both narrower and broader than the latter.²⁶

In its narrow sense, the privilege against self-incrimination comes under the broader concept of right to silence, and denotes the idea that we cannot be required by the state to provide information which may expose us to criminal liability.²⁷ This principle is protected expressly by s 60 of the Evidence Act 2006, which prevents a court or police officer compelling someone to produce self-incriminating evidence, as well as s 25(d) of the NZBORA which states that anyone who is charged with an offence has, in relation to the determination of the charge, the right not to be compelled to be a witness or to confess guilt.

Taken together, ss 23(4) and 25(d) of the NZBORA reflect New Zealand's international obligations under art 14.3(g) of the International Covenant on Civil and Political Rights, which states that every person facing a criminal charge shall have the right "not to be compelled to testify against himself or to confess guilt".

There is another way to conceptualise the relationship between the right to silence and the privilege against self-incrimination. In this alternative sense, the protection afforded by the privilege against self-incrimination is far wider than the right to silence.²⁸ The privilege places a limit on the accused being obliged to produce any *evidence* against themselves, a protection that extends well beyond compulsory questioning as restricted by the right not to say anything i.e., the right to silence.

²⁵ Roberts and Zuckerman, above n 8, at 540.

²⁶ Ian Dennis *The Law of Evidence* (5th ed, Sweet & Maxwell, London, 2013) at 152 defines the privilege against self-incrimination as the broader principle; Butler, above n 4, at 1431 describes the two principles the other way around.

²⁷ Law Commission *The Privilege Against Self-Incrimination* (NZLC PP 25 1996) at 1.

²⁸ Dennis *The Law of Evidence*, above n 26, at 153.

D. *Distinction Between the Right to Silence and the Forensic Implications of a Defendant's Silence Pre-Trial.*

The broader right to silence and the more focused concept of the privilege against self-incrimination together support two underlying principles: that no-one should be made to produce evidence against themselves and that everyone has the right to remain silent. These principles extend well beyond the issue of forensic implications of refusing to answer questions during pre-trial criminal investigations.²⁹ This is demonstrated by a comparison of Mustill's "right to silence immunities" with protections afforded under NZBORA, the former being broader in scope than the latter. One author has suggested that s 25 of NZBORA protects the first, second, third and fifth of Mustill's immunities.³⁰ In contrast, Butler suggests that only the third and fifth immunities are explicitly protected by ss 23(4) and 25(d), with the fourth and first falling outside their ambit.³¹

Despite this ambiguity, it is generally clear that the sixth of Lord Mustill's immunities falls outside the ambit of the rules protecting the 'right to silence' in the NZBORA.³² This is demonstrative of the distinction between the right to silence (including the privilege not to be compelled to give evidence against yourself) and the separate but related issue that is the focus of my dissertation - the forensic implications of pre-trial exercise of the right to silence.³³

E. *The Logical Link Between the Forensic Implications of a Defendant's Pre-Trial Exercise of the Right to Silence and the Value of the Right to Silence*

Nonetheless, there is a strong logical link between the importance of the right to silence and the permissible forensic implications of a defendant's pre-trial exercise of that right. If adverse uses can be made against an accused based on pre-trial silence, there is an element of indirect compellability to speak and therefore potential intrusion on the right to silence.³⁴ Likewise, if a failure to make a statement or specify a defence pre-trial can be interpreted as admissions of

²⁹ Ian Dennis "Instrumental Protection, Human Right of Functional Necessity? Reassessing the Privilege against Self-Incrimination?" (1995) 54(2) CSLR 342 at 345.

³⁰ Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, Lexis Nexis) at [EVA 32.2].

³¹ Butler, above n 4, at 1431.

³² But see Butler, above n 4 at 1432, submits that view that s 25(a) NZBORA (right to a fair trial) is implicated by interference with the sixth of Lord Mustill's immunities (right to silence prevents adverse comment being made upon, or an adverse inference being drawn from, a failure to answer questions (either at trial or pre-trial)). If this was correct, the issue would then be whether this breach is demonstrably justified.

³³ Ian Dennis "Instrumental Protection", above n 29, at 345.

³⁴ Ian Dennis *The Law of Evidence*, above n 26, at 151.

guilt, then it can hardly be said that the accused enjoys a “strong” right to silence or privilege against self-incrimination.

Given this logical link it is important to consider the societal importance of the right to silence. If the right to silence is not of high value, then any encroachment on the right, resulting from the aforementioned indirect compellability, is less “costly” and therefore less problematic. Conversely, if the right to silence has compelling justifications, then its importance suggests that the cost to society when it is impinged is greater and more problematic.

In light of this logical link, I turn to evaluating the rationales for the right to silence and privilege against self-incrimination in my next chapter.

III. The Privilege Against Self-Incrimination and the Right to Silence - the Search for a Compelling Rationale

This analysis of the rationales is not intended as an attempt to identify one simple, compelling and non-contested justification for the privilege against self-incrimination or the right to silence; past literature has substantially traversed this issue with limited success.³⁵ As one author put it, “almost as many purposes have been suggested...as there are uses for a screw driver”.³⁶ Instead, I propose that a combination of different rationales collectively illustrate the importance of robustly upholding and protecting the right to silence in our adversarial system of justice. This leads to the conclusion that the right to silence is a desirable principle that should not be impinged without strong justifications.

In undertaking this enquiry, I will outline the main rationales for the privilege against self-incrimination and their matching critiques. The rationales can be considered in three different categories:³⁷

1. Intrinsic rationales: These rationales attempt to attach an intrinsic value to the right to silence, for example, the right to silence protects citizens’ privacy.
2. Conceptual rationales: These rationales suggest that the right to silence is an important feature of our existing legal system, for example, the right is a crucial part of the adversarial system.
3. Consequential rationales: These rationales justify the right to silence on the basis that the right produces desirable consequences, for example, the right to silence helps protect the innocent from conviction.

³⁵ See generally McDonald “Why So Silent”, above n 12; Ian Dennis “Instrumental Protection”, above n 29; Mike Redmayne “Rethinking the Privilege Against Self-Incrimination” (2007) 27(2) Oxford Journal of Legal Studies 209; Zuckerman, above n 5 at 548 – 561; Ronald J. Allen “Theorizing about Self Incrimination” (2008) 30 Cardozo L.Rev. 729; D. Polinko “Is there a Rationale for the Privilege against Self-Incrimination” (1986) 33 UCLA L.Rev. 1063; D.J. Seidmann & A. Stein “The Right to Silence helps the Innocent: A Game-Theoretic Analysis of the 5th Amendment Privilege” (2000) 114 Harvard L.Rev. 431; Law Commission *The Privilege Against Self-Incrimination*, above n 21, at 20-35; Donald Dripps “Self-Incrimination and Self Preservation: A Sceptical View” (1991) U. III. L. Rev. 329.

³⁶ John McNaughton “The Privilege against Self-Incrimination. Its Constitutional Affection, Rasiso d’Etre and Miscellaneous Implications” (1960) 51(2) The Journal of Criminal Law, Criminology, and Political Science 138, at 142.

³⁷ Roberts and Zuckerman, above n 5, at 548.

A. *Intrinsic Rationales:*

1. *Cruel trilemma*

One of the original rationales for the right was that it protects suspects from being put in the ‘cruel’ position of having to choose between perjury, contempt or self-incrimination.³⁸ William Stuntz argued that under this “cruel trilemma” understanding, the privilege protects against an inherent human failure, whereby the guilty person in such a situation will choose the wrong option (lying), despite knowing that the conduct is wrong.³⁹ He suggests that similar to substantive criminal law defences such as duress and provocation, the privilege acts to “spare the accused from having to tell wrongful, but excusable lies that would expose him to the risk of prosecution for perjury.”⁴⁰

Bentham ridiculed this rationale, suggesting that it may be harsh to place a suspect in this situation, but it is not cruel.⁴¹ An innocent suspect is not exposed to this trilemma,⁴² so it could be argued that instead all this rationale stands for is reducing harm on the guilty.⁴³ Furthermore, one could question why it is any less cruel to be incriminated by the evidence of another person, or by independent real evidence, which are not given any special treatment.⁴⁴

One author has even questioned the harshness of this dilemma on the guilty.⁴⁵ A guilty suspect faced with the possibility of conviction and aware of the very low perjury prosecution rates may not feel much pressure at all in perjuring themselves, with the fear of conviction being the dominant factor. Taking a more utilitarian view it should also be remembered that there are

³⁸ Roberts and Zuckerman, above n 5, at 549.

³⁹ Roberts and Zuckerman, above n 5 at 549, citing William Stuntz ‘Self Incrimination and Excuse’ (1988) 88 Columbia LR 1227.

⁴⁰ Roberts and Zuckerman, above n 5 at 549, citing William Stuntz ‘Self Incrimination and Excuse’ (1988) 88 Columbia LR 1227.

⁴¹ M Durmont and Ettienné Durmont *A Treatise on Judicial Evidence: Extracted from the Manuscripts of Jeremy Bentham* (William S Hein & Co, London, 1825) vol 5 at 230.

⁴² Law Commission *The Privilege Against Self-Incrimination*, above n 25 at 20: An innocent person who tells the truth will not commit perjury, engage in self-incrimination or be subjected to contempt for refusing to testify.

⁴³ Allen, above n 35, at 731.

⁴⁴ McDonald “Why So Silent”, above n 12, at 577; Law Commission *The Privilege Against Self-Incrimination*, above n 21, at 20.

⁴⁵ Roberts and Zuckerman, above n 5, at 550.

other competing interests at stake. One author has questioned why the interests of suspects should be given primacy over the interests of the victim, without any strong justifications.⁴⁶

Further, ordinary witnesses are routinely faced with ‘cruel choices’ that are no less agonizing than the ones faced by guilty suspects being asked to self-incriminate. For example, a parent might find the prospect of testifying against their child no less awful than compelled self-incrimination.⁴⁷ Finally, in regard to pre-trial silence, it is questionable how there is a risk of perjury or contempt when the self-incriminating information is sought in investigative contexts rather than in proceedings.

2. *Privacy and maintaining the gap between the state and its citizens*

Personal autonomy in the private zone without interference from the state is a foundational principle of liberal societies. It follows that a potential rationale for the right to silence is the protection of individual sovereignty and privacy. State-compelled confessions can be considered inherently degrading and in violation of the proper boundaries between the state and an individual.

Tazlitz saw the privilege through a privacy theory.⁴⁸ He contended that state pressured statements undermine the independence and uniqueness of human personality. Specifically, the compulsion of private thoughts forces the speaker to change their very nature,⁴⁹ and this subsequently leads to stigma and a “mis-definition of their personality” in the criminal justice system.⁵⁰ Another author saw the breach of privacy created by pressure to self-incriminate as analogous to plugging the suspect into a mind reading machine.⁵¹

Privacy rights, however, are not absolute and must always be balanced against other community interests.⁵² Modern criminal investigations are characterised by privacy intruding methods,⁵³ such as extensive surveillance and undercover operations; witnesses cannot

⁴⁶ Law Commission *The Privilege Against Self-Incrimination*, above n 27, at 20.

⁴⁷ McDonald “Why So Silent”, above n 12, at 577.

⁴⁸ Andrew E. Taslitz, “Confessing in the Human Voice: A defence of the privilege against self-incrimination” (2008) 7 *Cardozo Pub. L. Pol’y & Ethics* 121.

⁴⁹ at 135.

⁵⁰ at 136.

⁵¹ D.J. Galligan, “The Right to Silence Reconsidered” (1988) *C.L.P* 69 at 89.

⁵² Law Commission *The Privilege Against Self-Incrimination*, above n 27, at 25.

⁵³ Roberts and Zuckerman, above n 5, at 551.

withhold information just because it is private.⁵⁴ This leads one to question why a special privacy interest would be the justification for the right to silence, when privacy is invaded in so many other ways throughout the criminal process.⁵⁵ In short, citizens are already used instrumentally in privacy infringing ways by the state in many different contexts.⁵⁶

Along the same lines, Dennis claims that privacy is not a compelling rationale as it cannot explain why the privilege applies to pre-existing documents.⁵⁷ He claims that the privacy rationale is under inclusive, as handing something over to police does not constitute an intrusion into ones' consciousness. Opposing this, the Law Commission notes that in some instances there will be more of an intrusion on a person's dignity through revealing pre-existing written materials (such as a personal diary) than through a verbal disclosure.⁵⁸

One possible response to this is that the privilege protects 'mental privacy.' This rests on the assumption that testimonial compulsion is more intrusive on the individual than intrusions which gain access to the human body.⁵⁹ This assumption can be seen in humanity's inherent fear and intrigue of mind-reading; this can be contrasted with doctors having access to your body during a physical examination, where there is not the same deep-rooted fear. I see this rationale as having potential merit within the specific context of pre-trial exercise of the right to silence, which is exclusively concerned with expressions by the defendant and therefore is only concerned with 'mental privacy'.

Additionally, the right to silence prevents intrusion at the outset and is therefore more capable of protecting privacy in a way that after the fact non-admission of defendant statements cannot.⁶⁰ Mike Redmayne's justification rests on similar ideas of privacy and preventing inappropriate state intrusion into the private sphere. On his view, self-incrimination undermines a person's feeling of personal integrity as helping a prosecution may conflict with

⁵⁴ Peter Srenlla, "Schmerber and the Privilege against Self-Incrimination: A Reappraisal" (1982) 20 Am. L. Rev. 31, at 40.

⁵⁵ Roberts and Zuckerman, above n 5, at 552.

⁵⁶ Allen, above n 35, at 732.

⁵⁷ Law Commission *The Privilege Against Self-Incrimination*, above n 27, at 25.

⁵⁸ Law Commission *The Privilege Against Self-Incrimination*, above n 27, at 25

⁵⁹ Srenlla, above n 54, at 41.

⁶⁰ Law Commission *The Privilege Against Self-Incrimination*, above n 27 at 25; For example ss 28-30 Evidence Act 2006.

deeply held commitments.⁶¹ In this way, the privilege acts as a “distancing mechanism” between state and individual.⁶²

It is therefore plausible that, when viewed through the lens of concern for privacy and upholding the classical liberal public-private divide, a ‘strong’ right to silence at the pre-trial stage is a desirable thing.

3. *Prevention of inhuman treatment and abuses*

The nature of the criminal process is that agencies of the state both investigate and adjudicate on the behaviour of citizens, which leads to an inherent danger of abuse of power by the state.⁶³ The Law Commission saw the privilege as a tool for preventing inhuman treatment of suspects.⁶⁴ On their view, the pre-trial exercise of the right to silence is a check on both the interviewer and the suspect, as in many instances the invoking of the privilege leads to a cease in questioning.⁶⁵ This rationale is consistent with the European Commission on Human Rights view of the privilege as a safeguard against oppressive state conduct and part of the defendant’s broader right to a fair trial.⁶⁶

Some have argued, however, that this rationale for the right to silence is reflective of outdated historical justifications.⁶⁷ The right to silence arguably arose out of opposition to religious oaths, incriminating questions in the Star Chamber and wider disapproval of authoritarian methods of criminal investigation. Allen suggests that preventing such abuses is no longer the role of the right to silence and other areas of our law are better placed to prevent against such abuses.

The possibility that the law already provides sufficient protections against inhuman treatment and abuses was not, in the Commission’s view, a reason to undermine the role the privilege

⁶¹ Redmayne “Rethinking the Privilege”, above n 35, at 222.

⁶² Redmayne “Rethinking the Privilege”, above n 35, at 225.

⁶³ Dennis “Instrumental Protection”, above n 29, at 374.

⁶⁴ Law Commission *The Privilege Against Self-Incrimination*, above n 27, at 22.

⁶⁵ Law Commission *The Privilege Against Self-Incrimination*, above n 27, at 22.

⁶⁶ The European Court of Human Rights in *Murray v United Kingdom* (1996) 22 EHRR 29 at [45] and *Saunders v United Kingdom* [1998] 1 BCLC have interpreted the right to a fair trial (art 6(1) of European Convention for Protection of Human Rights and Fundamental Freedoms) as including right to silence.

⁶⁷ Ronald Allen “The Simpson Affair, Reform the Criminal Justice Process, and Magic Bullets (1996) 67 U.Colo.L.Rev. 989 at 1021.

may play alongside other legal tools in preventing state abuses in the criminal justice process.⁶⁸ In their view, “several different safeguards in combination”⁶⁹ provide an interconnecting series of defences against inhumane abuses.

In rejecting the privacy and inhuman abuses rationale, Zuckerman distinguishes between demanding a confession, which is clearly oppressive, and inviting citizens to respond to an accusation which has substantial backing in the form of corroborating evidence. As Zuckerman suggests, “this is after all what criminal trials do”.⁷⁰ A possible concern with this approach, however, is whether at that pre-trial stage there is sufficiently strong evidence to justify a response.⁷¹

After reviewing most of the rationales I discuss, Dennis concludes that the right to silence has a key role to play in preventing state abuses of power.⁷² He cites the concerns around presumption of innocence, protection of the innocent and breach of privacy as reflective of broader concerns of compulsion and abuse of state power against vulnerable individuals. Given these broader concerns, he sees the right to silence as a functional device required in some contexts where the risk of compulsion and abuse of state power is at its highest. By specifying the pre-trial stage as having a significant risk of abuse of state power and compellability, he justifies a strong right to silence in this context and warns that without a strong right in such instances, the legitimacy of the criminal justice system would be called into disrepute.

B. *Conceptual Rationales*

1. *The right to silence is an essential feature of our adversary system*

The right to silence’s role in upholding the adversary system is the theoretical justification that has gained the most support in the New Zealand context.⁷³ The Law Commission noted that,

⁶⁸ Hon Justice Thomas “The So-Called Right to Silence (1991) 12 New Zealand Universities Law Review 299, at 322.

⁶⁹ Law Commission *The Privilege Against Self-Incrimination*, above n 27, at 24.

⁷⁰ Roberts and Zuckerman, above n 5, at 552.

⁷¹ Mike Redmayne “English Warnings” (2008) 30 Cardozo L. Rev. 1047 at 1062-1065.

⁷² Dennis “Instrumental Protection”, above n 29, at 374 – 376.

⁷³ See generally David Harvey “Speak and Be Not Silent: Recent Developments of the Privilege Against Self-Incrimination” (1996) 4 Waikato L Rev 60, at 66; Law Commission *The Privilege Against Self-Incrimination*, above n 27; Law Commission *Criminal Evidence*, above n 9.

“the main justification for the privilege is that it is an essential feature of our accusatorial system of criminal justice”.⁷⁴

The accusatorial system is premised upon two adversaries being evenly matched. The concern is that if a defendant can be compelled to assist the state - who inherently has a resource advantage over the individual - this balance will be thrown out.⁷⁵ As one author put it, “it is strange if the weaker of the two parties, on top of all his other disadvantages, is also obliged to score own-goals”.⁷⁶

The Law Commission saw the right to silence as a crucial backbone to the adversarial system. On their view the right to silence helps to protect many different pillars of the adversarial system, such as the presumption of innocence, preventing of inhumane abuses, reliability of evidence, equality between parties and ensures an even contest between parties. Thus, on their view, it is this combination that justifies a strong right to silence.

Some authors have argued, however, that this rationale is based on an unrealistic theoretical view of the adversary system that does not reflect practical reality.⁷⁷ The reality, it is argued, is one dominated by pre-trial disclosure requirements and a convention whereby most suspects make statements to police and testify at trial. They strengthen their argument by citing civil litigation, which, despite its onerous pre-trial disclosure and discovery requirements, is still considered an adversarial system.

2. *Presumption of innocence*

A plausible justification for the right to silence is that it bolsters the presumption of innocence. The presumption of innocence is the rule requiring the state to prove its case beyond reasonable doubt; before this burden is discharged, the accused has the right to be presumed innocent.⁷⁸ It is argued consequentially that if the suspect is truly presumed to be innocent, it is wrong for the suspect to be a potential source of incriminating evidence.⁷⁹ By giving the accused the right to withhold incriminating evidence, it is contended that the right to silence plays an important role in upholding the presumption of innocence in practice.

⁷⁴ Law Commission *The Privilege Against Self-Incrimination*, above n 27, at 29.

⁷⁵ Roberts and Zuckerman, above n 5, at 552.

⁷⁶ Roberts and Zuckerman, above n 5, at 552.

⁷⁷ Roberts and Zuckerman, above n 5, at 552.

⁷⁸ Dennis “Instrumental Protection”, above n 29, at 353.

⁷⁹ Dennis “Instrumental Protection”, above n 29, at 353.

Dennis believes this argument fails on two levels⁸⁰, the first being that this rationale in regard to the privilege is over inclusive - it does not justify why the state can take self-incriminating evidence from a suspect in the form of searches and finger prints. If the concern is that the burden of proof will be harmed by allowing the suspect to be the source of incriminating evidence, then it follows logically that this sort of evidence would also not be able to be taken by the state. Secondly, he argues that this rationale fails at a doctrinal level.⁸¹ The burden of proof is not changed by allowing inferences of guilt, as the state still needs to bring other evidence in order to prove guilt beyond reasonable doubt.⁸²

Against Dennis's scepticism, the 1993 UK Royal Commission described the idea that an accused should only be required to respond when the prosecution case has been fully disclosed, as a pillar of the presumption of innocence.⁸³ Their concern was that, during the pre-trial stage, where there is no judicial oversight and no way of knowing if the prosecution case has been sufficiently made out, it breaches the presumption of innocence to place a suspect in a position where they feel compelled to answer, without first knowing the case against them. Greenawalt, in stating that an accused should not be expected to respond to accusations unless they are backed up with evidence, shares this concern.⁸⁴

Following this line of reasoning to its logical conclusion, there is the concern that a weakened right to silence could be abused by police, whereby they arrest citizens without worthy cause just to put them in a position where they feel compelled to talk.⁸⁵ Redmayne disregards this, empirically demonstrating that even within the UK context (where a weaker approach is taken to the right to silence), their case law demonstrates that police always have reasonable suspicion before arresting.⁸⁶ Nonetheless, one could argue that reducing the strength of the right to silence removes another check on police abuse of power and increases the risk of infringements into the presumption of innocence.

⁸⁰ Dennis "Instrumental Protection", above n 29 at 354-355.

⁸¹ Dennis "Instrumental Protection", above n 29 at 355.

⁸² Roberts and Zuckerman, above n 5, at 554.

⁸³ *Report of the Royal Commission on Criminal Justice* (Command Paper 2263, 1993), at 54.

⁸⁴ K. Greenawalt, "Silence as a Moral and Constitutional Right" (1981) 23 WM. & Mary L.Rev.15.

⁸⁵ Roberts and Zuckerman, above n 5, at 555.

⁸⁶ Redmayne "Rethinking the Privilege", above n 35, at 219.

C. *Consequential Rationales:*

1. *The right to silence helps the innocent*

One of the first critiques of the right to silence was that “it can never be useful” to an innocent person, as it is in their interests to plead their innocence and actively explain away any accusation.⁸⁷ On this view, the right to silence protects and ultimately acquits the guilty more than anything else,⁸⁸ and a world without a right to silence would be one where more suspects are compelled to talk to police, there are more confessions and less guilty people are acquitted.⁸⁹

On the other hand, the right to silence can be seen as an important procedural safeguard for the innocent.⁹⁰ Psychological research suggests that even the slightest pressure is enough to induce the innocent to falsely confess, with this pressure most impacting the vulnerable and inexperienced.⁹¹

Roberts and Zuckerman contended that protecting vulnerable suspects from making incorrect incriminating statements is not a role for the right to silence, and better police practices and interrogation techniques are more appropriate remedies for such issues.⁹² They are sceptical of the effect of the right of silence in practice, and contend that it is common place for suspects to be pressured to waive their right. In the New Zealand context McDonald suggests that there are other safeguards in our system, namely the presumption of innocence, right to counsel and the New Zealand Bill of Rights, which provide stronger protection of the innocent, compared with what she sees as the marginal contribution of the right to silence.⁹³ Conversely, one could question how excess protection for the innocent is in any way troublesome.

The New Zealand Law Commission perhaps came to the most measured conclusion that although the privilege is not essential to most innocent witnesses, it can still help some innocent witnesses (especially the vulnerable and inexperienced). They conclude that the acquittal or

⁸⁷ Durmont (Manuscripts of Jeremy Bentham), above n 41, at 241.

⁸⁸ Hon Justice Thomas, above n 68, at 304.

⁸⁹ Seidmann and Stein, above n 35, at 432.

⁹⁰ Roberts and Zuckerman, above n 5, at 560.

⁹¹ Seen generally Saul Kassin “The Psychology of Confession Evidence” (1997) 52(3) American Psychologist 221; Saul Kassin “On the Psychology of confessions: Does innocence put innocents at risk?” (2005) 60(3) American Psychologist 215.

⁹² Roberts and Zuckerman, above n 5, at 560.

⁹³ McDonald “Why So Silent”, above n 12, at 578.

vindication of those people is important and the privilege's role in this respect should be preserved.⁹⁴

The 1993 Royal Commission on Criminal Justice looked closely at the rationales for a strong right to silence (i.e. preventing adverse inferences of guilt). The majority echoed the conclusion of the same Commission more than a decade earlier,⁹⁵ stating that any chance of the increase in convictions of the guilty is outweighed by the extra pressure that would be placed on suspects as a result of the potential of adverse inferences from silence.⁹⁶ There was particular concern that the threat of adverse inferences would be most damaging to less experienced and vulnerable suspects. They concluded that if adverse inferences could be drawn:⁹⁷

“it might be strong (and additional) psychological pressure upon some suspects to answer questions without knowingly precisely what was the substance of and evidence for accusations against them...this in our view might well increase the risk of innocent people, particularly those under suspicion for the first time, making damaging statements”.

Thus, there appears to be plausible arguments that a strong right to silence can contribute towards protecting the innocent, especially our most vulnerable.

D. Conclusion

It is my suggestion that despite each purported rationale not providing a convincing theoretical justification for the right in isolation, taken cumulatively the rationales support the notion that the right to silence plays a crucial role in upholding many pillars of the adversarial system of criminal justice. On this view, the value of the right to silence is inherently complex to articulate as it draws on several strands.⁹⁸

The protection of privacy, maintenance of the gap between the state and the individual, prevention of inhuman abuses, preservation of the presumption of innocence and the protection of the innocent may not alone provide a sound theoretical justification for the right to silence. My alternative approach, however, is that a strong right to silence still helps to uphold these

⁹⁴ Law Commission *The Privilege Against Self-Incrimination*, above n 27, at 28.

⁹⁵ *Report of the Royal Commission on Criminal Procedure (Phillips Commission)* (Command Paper 8092, 1981) at [4.50].

⁹⁶ 1993 *Report of the Royal Commission*, above n 83, at 54.

⁹⁷ 1993 *Report of the Royal Commission*, above n 83, at 54.

⁹⁸ Redmayne “Rethinking the Privilege”, above n 35, at 232.

advantageous principles, and acts as a valuable support for other mechanisms within the adversarial system, and so, it is desirable.

In short, I share the conclusion of the Law Commission. Although the right to silence may not be necessary in an accusatorial system, it is nevertheless desirable because of its purported benefits.⁹⁹

⁹⁹ Law Commission *Criminal Evidence*, above n 9, at 33.

IV. *New Zealand's Approach to Forensic Implications of Pre-Trial Silence*

A. *Introduction*

In New Zealand, evidential use of a defendant's pre-trial exercise of the right to silence is governed by section 32 of the Evidence Act 2006. I will begin this chapter with a brief analysis of the pre-Evidence Act common law position on this issue, before undertaking a descriptive analysis of s 32 and the issues with its application. I suggest that the existing state of affairs is not practically workable and propose that New Zealand needs to adopt a new approach to what evidential use can be made of a defendant's silence during police investigation.

It is important to note that s 32 governs "silence" in the form of failure to respond to a question or statement during police questioning,¹⁰⁰ as well as "silence" in the sense of a defendant failing to disclose a defence at the pre-trial stage, that is later relied on at trial.¹⁰¹ This latter type of "silence" could occur outside of the police questioning stage, and in this sense "silence" as regulated by s 32 is broader than the scope of my dissertation, which focuses on silence during police questioning. However, much of my reasoning is also relevant to "silence" outside of the police questioning context.

B. *The Common Law Approach to Forensic Implications of Pre-Trial Silence*

The Law Commission's recent issues paper provides a helpful summary of the New Zealand pre-Evidence Act common law approach to forensic implications of a defendant's silence during police investigation.¹⁰² The New Zealand common law took the same approach to the evidential use of, (1) silence in response to police questioning and, (2) failure to disclose a defence that was later relied on at trial: namely, that the fact of such silence was admissible as to the defendant's credibility, but it was not probative of guilt.¹⁰³ This meant that any evidence of pre-trial silence during police questioning or a non-disclosure of a defence at the pre-trial stage had to be matched with a judicial direction that the silence was not indicative of guilt. As the Court of Appeal held in *R v Shaw*:¹⁰⁴

¹⁰⁰ Evidence Act 2006, s 32(1)(a).

¹⁰¹ Evidence Act 2006, s 32(1)(b).

¹⁰² Law Commission *Second Review of the Evidence Act 2006* (NZLC IP, 2018) at 81-82.

¹⁰³ *R v Coombs* [1983] NZLR 748 (CA); *R v McCarthy* [1992] 2 NZLR 550 (CA).

¹⁰⁴ *R v Shaw* CA 429/99, 28 March 2000 at [33].

“if the jury concludes that a failure to make a statement at the outset was due to a factor that did not reflect on the credibility of the accused, then it must not be given any weight.”

Thus, the New Zealand common law position was to distinguish between adverse inferences of credibility (which were admissible) and inferences of guilt (which were not admissible). This distinction is reflective of the UK common law position, prior to the decision in the UK to govern the forensic implications of a defendant’s silence during police investigation via statute in 1994.¹⁰⁵

C. *A Description of New Zealand’s Current Approach to What Evidential Use Can be Made of a Defendant’s Pre-Trial Silence: Section 32 of the Evidence Act*

1. *Section 32 overview*

Section 32: Fact-finder not to be invited to infer guilt from defendant’s silence before trial

(1) This section applies to a criminal proceeding in which it appears that the defendant failed –

- a. To answer a question put, or respond to a statement made, to the defendant in the course of investigative questioning before the trial; or
- b. To disclose a defence before trial.

(2) If subsection (1) applies, -

- a. No person may invite the fact-finder to draw an inference that the defendant is guilty from a failure of the kind described in subsection (1); and
- b. If the proceeding is with a jury, the Judge must direct the jury that it may not draw that inference from a failure of that kind.

(3) This section does not apply if the fact that the defendant did not answer a question put, or respond to a statement made, before the trial is a fact required to be proved in the proceeding.

¹⁰⁵ *R v Chandler* [1976] 1 WLR 585, CA; *Hall v R* [1971] 1 WLR 298, PC.

Section 32 prevents the fact-finder from using the defendant's silence in certain situations as evidence of guilt.¹⁰⁶ Either section 32(1)(a) or (b) (the "prerequisite subsections") must be satisfied before s 32(2) is engaged. Section 32(2) (the "substantive subsections") place obligations on the parties to proceedings, the Judge and the fact-finder. I will consider the court's approach to each of these subsections in turn.

2. *The "prerequisite subsections"*

a) *Section 32(1)(a)*

This subsection is satisfied when a defendant fails to answer a question put, or respond to a statement made, to the defendant in the course of investigative questioning before trial.¹⁰⁷ Responses of "no comment" and partial responses to police questions before exercising the right to silence have both been held to amount to "silence" for the purposes of s 32.¹⁰⁸ This is indicative of the broad approach the courts have taken to the interpretation of "silence".¹⁰⁹

Section 32(1)(a) only applies to "investigative questioning". This is defined in s 4 as questioning in connection with the investigation of an offence or a possible offence, or in the presence of a member of the police or a person whose functions include the investigation of offences. This means that silence in the face of questioning or an allegation put by someone with whom the defendant is on "even terms" does not fall within the scope of s 32.¹¹⁰ This maintains the common law position that any inferences, including as to guilt, can be drawn from silence in response to an accusation by a layperson.¹¹¹ Further, s 32 does not alter the common law position permitting adverse inferences to be drawn based on inconsistency between what was said out of court and what was said in evidence in court.¹¹²

¹⁰⁶ Richard Mahoney and Others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers, Wellington, 2014), at 158.

¹⁰⁷ Evidence Act 2006, S 32(1)(a).

¹⁰⁸ Richard Mahoney, above n 106, at 158; *R v King* HC Whangarei CRI-2010-088-2617, 29 July 2011; *Blair v R* [2012] NZCA 62.

¹⁰⁹ Richard Mahoney, above n 106, at 158.

¹¹⁰ Rupert Cross and Others *Cross on Evidence* (10th ed, LexisNexis, Wellington, 2017), at 149.

¹¹¹ Simon France (ed) *Adams on Criminal Law* (online loose-leaf ed, Thomson Reuters) at [32.01(3)] citing *R v F* CA74/05, 14 April 2005.

¹¹² *Hamdi v R* [2017] NZCA 242 at [21].

b) *Section 32(1)(b)*

Under this subsection, the section 32(2) limitations also apply to inferences based on a defendant's failure to disclose a defence before trial. This limb applies regardless of whether the defendant has made a statement before trial, the key enquiry being whether the defendant disclosed the defence relied on at trial.¹¹³ Some legislation, such as The Criminal Disclosure Act 2008,¹¹⁴ requires pre-trial disclosure in certain circumstances. However, regardless of whether statutory obligations are complied with, s 32(2) ensures that inferences of guilt cannot be made from the "late" disclosure of a defence at trial.

3. *The "substantive provisions":*

The substantive obligations in section 32(2) prevent the inviting and drawing of inferences "that the defendant is guilty" from the aforementioned types of pre-trial silence. Provided that either of the two pre-conditions in s 32(1) are satisfied then the requirements in s 32(2) are engaged. There are two questions which the court will ask in making a determination whether s 32(2) has been breached:¹¹⁵

- a. **Section 32(2)(a):** Did any person invite the jury to infer guilt from a failure to do either of the s 32(1) pre-conditions?
- b. **Section 32(2)(b):** If s 32(2)(a) was breached by the prosecution, was the Judge's mandatory summing up sufficient to overcome that breach?

a. *Section 32(2)(a)*

Section 32 does not provide that evidence of pre-trial silence is generally inadmissible, for any purpose.¹¹⁶ While the courts have held that evidence of pre-trial silence may not be treated as relevant to guilt, the same evidence can nonetheless be offered to detract from the defendant's credibility.

¹¹³ Rupert Cross, above n 110, at 149.

¹¹⁴ Criminal Disclosure Act 2008 section 22 (the defendant must give notice to the prosecution if they intend to raise an alibi defence) and section 23 (14 days before the trial, evidence of expert witnesses to be called by the defence must be disclosed).

¹¹⁵ *Hamdi v R*, above n 112, at [19].

¹¹⁶ *Hitchinson v R* [2010] NZCA 388, at [40].

The Court of Appeal in *Smith v R* summarised the current approach to s 32 in the following way:¹¹⁷

“Section 32 is a proscription only on inviting or drawing an inference of guilt from silence before trial, whether in response to ‘investigative questioning’ or not disclosing a defence before trial. It does not proscribe challenges to the defendant’s credibility because the defendant said nothing before advancing a defence in evidence at trial”.

This distinction between guilt and credibility reflects the pre-Evidence Act position.¹¹⁸ It was recently described as “well-settled”¹¹⁹ and has been followed in cases subsequent to *Smith v R*.¹²⁰

This distinction is reinforced by an analysis of the Evidence Act’s legislative history.¹²¹ The Law Commission’s Draft Bill sought to overturn the common law position by preventing both inferences of guilt and adverse inferences as to a defendant’s credibility being drawn from a failure to answer during official questioning or failing to disclose a defence before trial.¹²² This draft provision was not adopted into the final legislation. One author has noted that in rejecting this approach, the government placed a primacy on unfettered juror inferences and allowing the prosecution to comment generally on the fact that a defence is raised for the first time.¹²³ The omission of this clause in s 32 is telling and reaffirms that as it currently stands, some use of pre-trial silence is permissible in the form of adverse comment on credibility.¹²⁴

b. Section 32(2)(b): The judge’s mandatory direction

Section 32(2)(b) imposes an obligation on the Judge to direct the jury that they may not draw an inference of guilt whenever either of the s 32(1) pre-requisites occur. Thus, even when a prosecutor makes an acceptable credibility challenge, the judge is still required to give a s 32(2)(b) warning.¹²⁵

¹¹⁷ *Smith v R* [2013] NZCA 362 at [42].

¹¹⁸ *R v Hill* [1953] NZLR 668 (CA) at 693, *R v Foster* [1955] NZLR 1194 (CA) at 1200, *R v Ryan* [1971] 2 NZLR 611 (CA) at 615.

¹¹⁹ Law Commission *Second Review of the Evidence Act*, above n 102 at 87.

¹²⁰ *McNaughton v R* [2013] NZCA 657; *Hastings v R* [2015] NZCA 180; *Hamdi v R* above n 112.

¹²¹ Elizabeth McDonald “Why so Silent on the Right to Silence?” above n 12.

¹²² Law Commission *Evidence: Reform of the Law* (NZLC R55(1) 1999) at [129]; Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55(2), 1999) at [C158].

¹²³ Elizabeth McDonald *Principles of Evidence*, above n 16, at 262.

¹²⁴ Richard Mahoney above n 106 at [EV 32.02].

¹²⁵ *Hastings*. Above n 120, at [50].

The Court of Appeal held that this special warning obligation in *McNaughton v R*:¹²⁶

“reflects a legislative recognition that an orthodox judicial direction...would not be sufficient to answer the underlying risk where the prosecutor attacked credibility....and protect the settled principle that guilt is not to be necessarily inferred from a defendant’s lies.”

In some cases a strong judicial direction is enough to remedy the crossing of the line by the prosecution in inviting an inference of guilt.¹²⁷

D. Issues with Section 32’s “Halfway-House” Approach to Adverse Inferences from a Defendant’s Silence Pre-Trial

In preventing inferences of guilt from a defendant’s exercise of pre-trial silence, but allowing adverse inferences towards the defendant’s credibility, s 32 can be described as a “halfway house” approach: the section does not prevent all adverse inferences, but prevents inferences of guilt. It is my contention that this half-way approach is “illogical,”¹²⁸ and has too many practical difficulties to be of value.

1. The distinction between “guilt” and “credibility” is in practice difficult to make

There is concern that in practice drawing the distinction between making an adverse inference towards the defendant’s credibility and an adverse inference towards guilt is difficult to make.¹²⁹ The Court of Appeal has previously described this distinction as often too fine to be of practical value,¹³⁰ and has suggested that “many judges think this is a distinction that would test the skills of a philosopher.”¹³¹

The concern that jurors would not be able to make this distinction in practise led to the majority of the High Court of Australia rejecting this distinction on the grounds that it was not practical for jurors. They stated:

¹²⁶ *McNaughton v R*, above at [19].

¹²⁷ See *E (CA727/09) v R* [2010] NZCA 202; But also see *Smith v R*, above n 117 were a breach of s 32(2)(a) was not rescued by a strong judicial warning.

¹²⁸ Law Commission *Second Review of the Evidence Act*, above n 102, at 90.

¹²⁹ See generally *Hamdi v R*, above n 112, at [21]; *Reuben v R* [2017] NZCA 138 at [60] and *Gurran v R* [2015] 327 at [47].

¹³⁰ *R v Coombs* [1983] NZLR 748.

¹³¹ *E (CA727/09) v R* [2010] NZCA 202, above n 127, at [60].

“We acknowledge that there is a theoretical distinction between the two modes of making use of the accused’s earlier silence. However, we doubt that it is a distinction which would be observed in practise by a jury, even if they understand it.”¹³²

Indicative of the inherent difficulty in drawing this distinction is the high number of appeal and leave for appeal decisions in the Court of Appeal and Supreme Court that have arisen due to claims of incorrect application of the s 32 distinction – there have been six such cases in the past two years alone.¹³³

2. *Allowing an inference adverse to the defendant’s credibility is akin to allowing an inference of guilt*

Even assuming the distinction can be meaningfully drawn by juries, the concern remains that while the distinction prevents explicit invitations to infer guilt, in allowing silence to be used to detract from credibility this still places some evidentiary weight on silence. It has thus been questioned whether the distinction amounts to an implicit invitation to infer guilt.¹³⁴ Rupert Cross described the distinction as “gibberish” and said that calling into question someone’s credibility based on pre-trial silence was akin to an invitation to infer guilt.¹³⁵ The Court of Appeal seemed to acknowledge this when they indicated that it will be rare that a challenge to a defendant’s veracity will not necessarily undermine the defendant’s interest in illegitimate inferences of guilt from silence.¹³⁶ In acknowledging this concern, the Law Commission recently questioned if the distinction had any practical effect.¹³⁷

The Australian High Court in *Petty* held that allowing an inference as to credibility is akin to allowing an inference of guilt and concluded that allowing any inference adverse to the defendant as a result of a defendant’s pre-trial silence “would be to erode the right to silence or render it valueless.”¹³⁸

¹³² *Petty v R* (1991) 102 ALR 129, at 131-132.

¹³³ See *Waters v R* [2018] NZSC 49; *W v R* [2018] NZCA 181; *Tihi v R* [2017] NZSC 143; *Hamdi v R*, above n 112; *Hamdi v R* [2017] NZSC 134; *Reuben v R*, above n 129.

¹³⁴ Law Commission *Second Review of the Evidence Act*, above n 102, at 86.

¹³⁵ Law Commission *Second Review of the Evidence Act*, above n 102 at 87; Rupert Cross “The Evidence Report: Sense or Nonsense – A very wicked animal defends the 11th Report of the Criminal Law Revision Committee” [1973] Crim LR 329 at 333.

¹³⁶ *McNaughton v R*, above n 120, at [16].

¹³⁷ Law Commission *Second Review of the Evidence Act*, above n 102, at 87-88.

¹³⁸ *Petty v R* (1991) 102 ALR 129, at 135 per Mason CJ, Deane, Toohey and McHugh JJ.

There is significant judicial concern that in practise New Zealand’s “half-way house” approach leads to the fact-finder drawing adverse inferences as to the defendant’s guilt. It is my contention that such concern is reflected in the very cautious approach New Zealand courts have taken to s 32 line-drawing, which I turn to now.

3. *The courts “low-bar” approach to section 32*

An analysis of recent Court of Appeal decisions on this section reveals that the courts have set a low bar for when prosecution and trial judge directions will cross the “fine and uncertain line”¹³⁹ between mere invitations to the fact-finder to make adverse inferences as to credibility, and invitations to infer guilt. It is my contention that the reason for this approach is the underlying concern that inviting the fact-finder to place some weight on pre-trial silence in the form of credibility is in practise akin to inviting an inference of guilt to be made from a defendant’s pre-trial silence.

Smith v R is instructive here. The main issue for the jury in *Smith* was whether the alleged stabbing was self-defence. Having failed to disclose this defence before trial, the s 32(2) prohibition on inviting the jury to make an inference of guilt as a result of the accused’s failure was engaged. The court concluded that the prosecutor had clearly breached s 32(2) by inviting the jury to make an inference of guilt, rather than merely as to credibility. In so holding, the court reasoned that the cross-examination of the defendant about his failure to raise self-defence initially was isolated from, and unrelated to, to an attack on credibility.¹⁴⁰ Rather, the defendant’s failure, despite numerous opportunities, to raise the defence was described by the prosecution as “very very telling factor in this case”. The court held that this phrase alone amounted to a clear invitation to infer guilt.¹⁴¹

In contrast, the prosecution in *McNaughton v R* explicitly linked the defendant’s failure to raise self-defence before trial with a direct attack on the credibility of the self-defence claim.¹⁴² The Court of Appeal, however, still reached the conclusion that the prosecution had gone too far in inviting adverse inferences from that failure and could possibly have left the jury with the impression that pre-trial silence was evidence of guilt. The court regarded the “sheer scale,

¹³⁹ *McNaughton v R*, above n 120, at [16].

¹⁴⁰ Simon France (ed) *Adams on Criminal – Evidence* (online loose-leaf ed, Thomson Reuters) at [EA 32.02].

¹⁴¹ *Smith v R*, above n 117, at [47].

¹⁴² *McNaughton v R*, above n 120, at [18].

content and repetition”¹⁴³ of the prosecutor’s emphasis on a linkage between the failure to raise the defence initially and the defendant’s threatening behaviour at the time of the alleged incident, as crucial to the conclusion that the prosecutor had invited the jury to make an inference of guilt.

In *Hamdi v R* the prosecutor invited the jury to infer that because the full account given in court was not mentioned in the initial comment made to police, the full account given in court was untrue.¹⁴⁴ Undermining the defendant’s explanation is surely the aim of an adverse comment on credibility. It could therefore be argued that the prosecutors approach in *Hamdi* was consistent with an invitation to make an adverse inference as to credibility. The court held, however, in reinforcing the low-bar approach, that using pre-trial silence to undermine the defendant’s explanation was a clear breach of s 32(2)(a).

Reflective of this “low-bar” approach to s 32(2)(a), in *Hamdi* the prosecution’s description of the defendant’s narrative as a “little odd because it was not raised before trial”, was cited by the court as in itself enough to amount to an invitation to infer guilt.

Cases where prosecution comment were held to not cross the line still reflect this “low bar” approach. In *Hastings v R* the prosecution suggested the defendant was lying by uttering to the defendant in cross-examination that “you didn’t mention it [self-defence] because you’re making it up as you are going along.”¹⁴⁵ A key factor in deciding that the prosecution’s words only amounted to a challenge to credibility was that the self-defence was not a central plank of the accused’s overall defence. The fact that the court did, however, note that the prosecutor comments of “well if it was all just self-defence, you’d say that wouldn’t you?”¹⁴⁶ came close to that “fine and uncertain line” is indicative of this low bar approach to the distinction between inference of guilt and credibility.

These recent Court of Appeal cases demonstrate a conservative approach as to what amounts to an invitation to infer guilt. This conservative approach is indicative of the concern that inviting the fact-finder to put evidential weight on silence is in practise akin to allowing an inference of guilt from the silence.

¹⁴³ *McNaughton v R*, above n 120, at [27].

¹⁴⁴ *Hamdi v R*, above n 112, at [28].

¹⁴⁵ *Hastings v R*, above n 120, at [38].

¹⁴⁶ *Hastings v R*, above n 120, at [47].

4. *The police caution does not reflect what use is actually made of silence*

The current police caution does not reflect the reality of how pre-trial silence is actually used: it does not mention the possibility of an adverse inference being drawn from a defendant's silence pre-trial.¹⁴⁷ This issue will be addressed in more detail in Chapter 5, in discussing the implications of my reform recommendations.

E. *Conclusion*

This analysis demonstrates that the purported distinction between guilt and credibility inferences in s 32 of the Evidence Act is not practical. At best, it is difficult for the fact finder to apply in practise, and at worst it is illusory, in that an inference as to credibility effectively amounts to an inference as to guilt. The courts' "low-bar" approach to s 32 lends weight to this critique. The "low bar" approach is also of itself problematic given that it leads to uncertainty in terms of the application of s 32, most obviously for prosecutors who have to walk the fine and arguably unclear line between inviting the jury to make an inference adverse to credibility, but not guilt.

¹⁴⁷ The content of the caution that is required to be given is set out in the Chief Justice's Practise Note on Police Questioning (Practise Note – Police Questioning (s 30(6) of the Evidence Act 2006) [2007] 3 NZLR 297).

V. *A Comparative Analysis: Australia and the United Kingdom Approaches*

A. *Introduction*

Given the problems with New Zealand's half-way house approach, I now turn to consider two alternative approaches to the evidentiary use of a defendant's pre-trial silence during police investigation: the Australian and UK approaches. These two approaches sit on opposite ends of the scale. The UK approach is to allow the fact-finder to draw any inferences that appear 'proper' from a defendant's silence at the police investigation stage; in stark contrast to the UK, the Australian position is to prohibit any adverse inferences being drawn from a defendant's silence in response to police questioning, whether as to guilt or merely as to credibility.

B. *The Australian "No Adverse Inferences" Approach*

The Australian approach seeks to prevent unfavourable inferences being drawn from a defendant's failure to answer one or more questions or to respond to a representation made or put by an investigating official who at the time was performing functions in connection with the investigation of the commission, or possible commission of an offence.¹⁴⁸ Significantly, "inferences" is defined as to include both inferences of guilt and an inferences relevant merely to a party's credibility.¹⁴⁹

This statutory position reflects the Australian common law approach that previous silence about a defence (or explanation) raised at trial does not provide a basis for inferring that the defence or explanation is a new invention, or is rendered suspect or unacceptable or otherwise less credible.¹⁵⁰ A key reason for this 'blanket rule' was the difficulty in practise in making the distinction between credibility and guilt.¹⁵¹

It is important to note that the coverage of s 89 (of the Australian Evidence Act) is narrower than New Zealand's s 32 provision. Section 89 only covers silence in the face of failure to

¹⁴⁸ Evidence Act 1995 (Cth), s 89(1).

¹⁴⁹ Evidence Act 1995 (Cth), s 89(4).

¹⁵⁰ Stephen Odgers *Uniform Evidence Law* (12th Ed, Thomson Reuters, NSW, 2016) at [EA.89.90] citing *Petty v R* [1991] HCA 34, *R v Stravinos* [2003] NSWCCA 339, *Sanchez v The Queen* [2009] NSWCCA 171 at [53], [70].

¹⁵¹ See *Petty v R* [1991] HCA 34 at [6] per Mason CJ, Deane, Toohey and McHugh JJ.

answer questions or respond to a representation by an investigation official.¹⁵² As I have noted, s 32 covers this type of ‘silence’ in s 32(1)(a), but also extends protection to a failure by the defendant to disclose a defence before trial in s 32(1)(b).

The Australian “no adverse inferences” position reflects the approach proposed by the New Zealand Law Commission in their 1999 draft Evidence Bill.¹⁵³ Following substantive public consultation and examination of the issues around pre-trial silence,¹⁵⁴ the Law Commission proposed that s 32 should extend the traditional common law prohibition of inferences as to guilt to include a prohibition of adverse inferences as to credibility.¹⁵⁵

Aside from a recent change in NSW, all Australian states have adopted this approach.¹⁵⁶ NSW has recently enacted a UK-type model that allows the fact finder to draw unfavourable inferences as appear “proper” from a failure of the defendant to raise a fact during official questioning, where that fact is later relied on at court and that the defendant ought reasonably to have mentioned the fact at the time of official questioning.¹⁵⁷ There are a number of procedural safeguards that must be established before an unfavourable inference can be drawn,¹⁵⁸ such as a “special caution”.¹⁵⁹ Furthermore, the offence must be punishable for a term of 5 years’ imprisonment or more.¹⁶⁰

¹⁵² Stephen Odgers, above n 150, at [EA 89.90].

¹⁵³ Law Commission: *Evidence Code and Commentary*, above n 122, at 90.

¹⁵⁴ See generally Law Commission *Criminal Evidence*, above n 9; Law Commission *The Privilege Against Self-Incrimination*, above n 27.

¹⁵⁵ Law Commission: *Evidence Code and Commentary*, above n 122, at 91.

¹⁵⁶ Law Commission *Second Review of the Evidence Act*, above n 102, at 88 notes that largely similar provisions have been adopted in Victoria, the Australian Capital Territory, the Northern Territory, Tasmania, NSW and Norfolk Island: Evidence Act 2008 (Vic), Evidence Act 2011 (ACT), Evidence (National Uniform Legislation) Act 2011 (NT), Evidence Act 2001 (Tas), Evidence Act 1995 (NSW) and Evidence Act 2004 (NI).

¹⁵⁷ Evidence Act 1995 (NSW), s 89A.

¹⁵⁸ See generally Stephen Odgers, above n 150, at [EA.89A.30].

¹⁵⁹ Evidence Act 1995 (NSW), s 89A(2) specifies that this “special caution” must be to the effect that the person does not have to say or do anything, but that it may harm the person’s defence if the person does not mention when questioned something that the person later relies on in court.

¹⁶⁰ Evidence Act 1995 (NSW), s 89A(1).

C. *The United Kingdom Approach*

1. *Overview:*

Sections 34, 36 and 37 of the Criminal Justice and Public Order Act (CJPOA) 1994 govern the forensic implications of a defendant's pre-trial silence in the UK.¹⁶¹ These sections permit the fact-finder, in determining whether there is a case to answer or whether the accused is guilty, to draw such inferences as appear "proper" against the accused for a failure to provide information to police in response to questioning in the following situations:¹⁶²

- a. When the possession of an article or the presence of some marks or substances makes the accused a suspect;¹⁶³
- b. Where the accused's presence at some place makes him a suspect;¹⁶⁴
- c. In the event that his defence at trial relies on a fact which he could reasonably have been expected to have mentioned to the police pre-trial, but did not.¹⁶⁵

The overall effect of these sections is to place pressure on suspects to co-operate with police investigations and to disclose defences at the earliest opportunity.¹⁶⁶ They have been described as a "radical departure from the common law,"¹⁶⁷ and make significant inroads into the right to silence by allowing a range of inferences from an accused's pre-trial silence.¹⁶⁸ The focus of my enquiry will be s 34 of the CJPOA as it most closely relates to a defendant's silence during police questioning and has attracted the most judicial and academic analysis.

2. *Meaning of "proper"*

Section 34 invites the fact-finder to draw such inferences as appear "proper" in deciding whether the accused is guilty. In allowing such inferences to be made, the UK approach places

¹⁶¹ Also see Criminal Procedures and Investigations Act 1996, ss 5 and 11, which govern the evidential implications of not disclosing a defence before trial.

¹⁶² Rosemary Pattenden "Silence: Lord Taylor's Legacy" (1998) 2 Int'l J. E & P 141 at 141.

¹⁶³ Criminal Justice and Public Order Act 1994 (UK), s 36.

¹⁶⁴ Criminal Justice and Public Order Act 1994 (UK), s 37.

¹⁶⁵ Criminal Justice and Public Order Act 1994 (UK), s 34.

¹⁶⁶ Dennis *The Law of Evidence*, above n 26, at 175.

¹⁶⁷ Diane Birch "Suffering in silence: a cost benefit analysis of section 34 of the Criminal Justice and Public Order Act 1994" [1999] Crim LR 769 at 770.

¹⁶⁸ Roberts and Zukerman, above n 5, at 570.

a primacy on the common-sense proposition that innocence loudly proclaims itself and silence is indicative of guilt.¹⁶⁹

Provided the statutory¹⁷⁰ and court imposed procedural conditions are satisfied, s 34(2) invites the fact finder to make whatever inference they think “proper” in deciding whether there is a case to answer or whether the defendant is guilty. There is a lack of judicial guidance as to what inferences are “proper” - with the courts suggesting that this question should be answered using fairness and common sense and that what inferences are “proper” will depend on the circumstances of each case.¹⁷¹ The most obvious inference is likely to be that the “new” or previously undisclosed fact is untrue, however, such an inference can also be used in coming to a conclusion of guilt.¹⁷² For example, where the previously undisclosed evidence is crucial to the accused’s defence, the inference that the evidence is untrue will likely lead to an inference that the defendant is guilty. Thus, whether an inference of guilt will be “proper” will depend on the issue in the case, the nature of the fact in question and the state of other evidence.¹⁷³

3. *Procedural safeguards*

Under section 34, there are a number of statutory pre-conditions that must be satisfied before the fact-finder can draw such inferences from the silence as appear “proper”.¹⁷⁴ These are:

- The failure to mention facts must have occurred either when the accused was being questioned under caution, or when the accused was charged with an offence or when the accused was officially informed that he or she might be prosecuted for an offence;¹⁷⁵
- The questioning must be either by a constable or someone charged with duty of investigating offences or charging offences;¹⁷⁶
- If the questioning occurs before the accused is charged, the questions must be directed to trying to discover whether or by whom the alleged offence had been committed;¹⁷⁷

¹⁶⁹ *R v Webber* [2004] 1 Cr App R 40 at [33]-[34].

¹⁷⁰ CJPOA (UK), s 34(1).

¹⁷¹ *R v Condrón and Condrón* [1997] 1 Cr.App.R. 185 CA; *R v Cowan* [1996] Q.B. 373 CA.

¹⁷² Dennis *The Law of Evidence*, above n 26 at 193.

¹⁷³ Dennis *The Law of Evidence*, above n 26 at 193.

¹⁷⁴ *R v Argent* [1997] 2 Cr.App.R. 27.

¹⁷⁵ CJPOA (UK), s 34(1)(a) and (b).

¹⁷⁶ CJPOA (UK), s 34(4).

¹⁷⁷ CJPOA (UK), s 34(1)(a).

- The failure must be to mention some fact on which the accused relies in defence in proceedings;¹⁷⁸
- The fact which the accused failed to mention must be one that, in the circumstances existing at the time, he or she could reasonably have been expected to mention when questioned;¹⁷⁹
- The accused must have been allowed an opportunity to consult a solicitor before being questioned or charged;¹⁸⁰
- An adverse inference from silence must not be the sole evidence for conviction.¹⁸¹

On top of this the courts have imposed additional requirements before the fact-finder may make an inference adverse to the defendant. One author has suggested that these additional safeguards are the result of a combination of European jurisprudence and an increasingly conservative interpretation of s 34 in the English courts.¹⁸² These judicially imposed safeguards require:

- That the jury consider any explanation which the defendant may give for their failure, and unless the jury are sure that there was not a genuine reason for the defendant's silence, the jury should not draw any unfavourable inference against the defendant;¹⁸³
- That the jury be satisfied by the other evidence that a prima facie case is established that calls for an explanation from the accused;¹⁸⁴
- That convictions must not be based mainly or solely on inferences from silence.¹⁸⁵

Despite the right to silence and privilege against self-incrimination not being expressly mentioned in art. 6 of the European Convention on Human Rights (ECHR) as part of the right to a fair trial, the European Court of Human Rights (ECtHR) has subsequently declared that

¹⁷⁸ CJPOA, s 34(1)(a).

¹⁷⁹ CJPOA (UK), s 34 (1).

¹⁸⁰ CJPOA (UK), s 34(2A). Note this subsection was added via s 58 of the Youth Justice and Criminal Evidence Act 1999.

¹⁸¹ CJPOA (UK) s 38(3).

¹⁸² See generally Ian Dennis "Silence at the police station: The Marginalisation of section 34" [2002] Crim LR 25.

¹⁸³ Judge Simon Tonking and Judge Wait *Crown Court Bench Book Companion* (Judicial Studies Board, March 2012) a 117.

¹⁸⁴ Dennis *The Law of Evidence*, above n 26 at 191 citing *R v Gill [2001] 1 Cr.App.R. 11*; *Crown Court Bench Book Companion*, above n 183, at 117.

¹⁸⁵ See *Murray v United Kingdom (1996) 22 E.H.H.R. 29*, where the European Court of Human Rights extended the statutory language from "solely" to "solely or mainly".

art. 6 impliedly protects both the right to silence¹⁸⁶ and the privilege against self-incrimination.¹⁸⁷ The European Court has also, however, held that the drawing of adverse inferences from silence in either bench¹⁸⁸ and jury trials¹⁸⁹ does not necessarily amount to a breach of art 6 of the ECHR. This is not the end of the matter however, as the Strasbourg case-law on art 6, suggests that an inference may only ‘fairly’ be drawn from a defendant’s pre-trial silence, if the aforementioned pre-conditions are satisfied.¹⁹⁰

4. *Complexity of the UK approach*

Given all of these procedural safeguards, one could argue that the risk of adverse inferences leading to wrongful convictions is minimised even under the liberal UK approach. However, these procedural safeguards and the corresponding case law have also been severely criticised as making the section overly complex and unworkable.¹⁹¹ The Judicial Studies Board called s 34 one of the most lengthy and complicated sets of judicial instructions in the entire Crown Bench Book.¹⁹² It is contended that this has detrimental consequences for trial judges and juries.

In determining whether the pre-conditions have been satisfied, courts have established a substantial amount of jurisprudence as to what each of the preconditions require. The case law on most of the pre-conditions is beyond the scope of my dissertation, but consider the following example of the complexity of the s 34 pre-conditions: one pre-condition is that the court or jury is to take into account whether it was reasonable “in the circumstances” to expect the defendant to state the relevant fact during police questioning.¹⁹³ “In the circumstances” has been held to include all relevant circumstances of the interview and the circumstances of the accused themselves.¹⁹⁴ Therefore, an enquiry into the accused’s age, mental capacity and personality among other things, are all things that the court must direct the jury to take into account when

¹⁸⁶ *Murray v United Kingdom*, above n 185; *Condrón v United Kingdom* (1997) 23 E.H.R.R. 1.

¹⁸⁷ *Funke v France* (1999) 16 E.H.R.R. 297; *Saunders v United Kingdom*, above n 185.

¹⁸⁸ *Murray v UK*, above n 185.

¹⁸⁹ *Condrón v United Kingdom*, above n 186.

¹⁹⁰ Dennis “Silence at the police station”, above n 182, at 28-29.

¹⁹¹ See generally Birch “Suffering in Silence”, above n 167.

¹⁹² Judicial Studies Board (JSB) Specimen direction No 40 addressing the “Defendant’s failure to mention facts when questioned or charged – section 34, CJPOA 1994”

¹⁹³ CJPOA, s 34(1).

¹⁹⁴ *R v Argent* [1997] 2 Cr.App.R. 27 at 33.

making this assessment.¹⁹⁵ Such a complicated pre-condition is indicative of the technical intricacies that now characterise s 34.

As a result of these complexities, section 34 has been described by a judge as a “notorious minefield” that requires a near perfect judicial direction.¹⁹⁶ Birch has criticised s 34 for becoming so complex and containing so many traps for trial judges about how to direct juries that the costs of the section are outweighed by any evidentiary benefits it might provide.¹⁹⁷

It has also been questioned whether these technical and lengthy procedural safeguards around the evidential use of pre-trial silence, results in such evidence taking on unwarranted significance, in other words, being placed on a pedestal in a way that distracts the jury from the real issues. The Court of Appeal has noted this concern, saying:¹⁹⁸

“it is a matter of some anxiety that, even in the simplest and most straightforward cases, where a direction is to be given under s 34 it seems to require a direction of such length and detail that it seems to promote the adverse inference question to a height it does not merit.”

This clearly runs contrary to the idea that silence under s 34 is confined to a supporting role and that it cannot be the main evidence against the accused.¹⁹⁹

5. *Peripheral Issues with the UK Approach*

a) Legal advice

Aside from the sheer complexity of the legislation generally, the “enduring” issue of legal advice and its relationship with allowing the fact-finder to make adverse inferences from a defendant’s silence during police investigation, has been described as the most serious and unresolved issue with s 34.²⁰⁰

Consideration of a defendant’s reasons for remaining silent (such as reliance on legal advice) is a necessary evaluation for the jury when considering whether it was reasonable for the

¹⁹⁵ Dennis, *Law of Evidence*, above n 26 at 181.

¹⁹⁶ Roberts and Zuckerman, above n 5 at 572 citing Dyson LJ in *R v B (Kenneth)* [2003] EWCA Crim 3080 at [20].

¹⁹⁷ Birch “Suffering in silence”, above n 167.

¹⁹⁸ *R v Bresa* [2005] EWCA Crim 1414 at [4].

¹⁹⁹ As required by CJPOA (UK) s 38(4) and reaffirmed in *Murray v United Kingdom*, above n 185.

²⁰⁰ Roberts and Zuckerman, above n 5, at 578.

defendant to fail to mention a fact at the time of police investigation.²⁰¹ Due to the concern that s 34 would otherwise become superfluous, the UK courts have held that an adverse inference can still be drawn even if the defendant's reason for silence is reliance on legal advice.²⁰² A defendant's reliance on legal advice in remaining silent only precludes adverse inferences from such silence where the reliance was both reliable and reasonable.²⁰³

A common question in English cases for a jury faced with the fact of a defendant's pre-trial silence is therefore whether the defendant truly relied on legal advice when choosing to remain silent, or whether the advice was merely used as a shield to mask the reality that there was no explanation consistent with innocence that could be given at interview (i.e. that silence was indicative of guilt).²⁰⁴

This current approach has been criticized as undermining the lawyer-client relationship, good faith reliance on legal advice and bringing into disrepute the value of legal advice at the police station.²⁰⁵ Allowing adverse inferences from silence creates a tension with the importance of a defendant being able to accept and act upon their lawyers advice without fear of later incurring an evidential disadvantage as a result.²⁰⁶ This in turn implicates the utility of legal advice in the police station.²⁰⁷

Further, the requirement for the accused to disclose the basis, as well as the reasons for legal advice, means the defendant must in essence disclose everything they told their solicitor. This no doubt undermines lawyer-client privilege.²⁰⁸

b) The police caution

The effect of s 34 is reflected in the words of the caution which must be given to a suspect before questioning: "You do not have to say anything, but it may harm your defence if you do not mention when questioned something which you later rely on in Court."²⁰⁹ This can be

²⁰¹ CJPOA (UK), s 34(1).

²⁰² *R v Condrion and Condrion* [1997] 1 Cr App R 185.

²⁰³ Simon Cooper "Legal advice and pre-trial silence – unreasonable developments" (2006) 10 E & P 60 at 65-66.

²⁰⁴ See generally *R v Howell* [2005] 1 Cr App R 1; *R v Beckles* [2005] 1 Cr App R 23.

²⁰⁵ Roberts and Zuckerman at 575 citing Ed Cape, 'Sideline Defence Lawyers: Police Station Advice After *Condrion*' (1997) 1 E & P 386 at 402;

²⁰⁶ Cooper "Legal advice and pre-trial silence", above n 203 at 66.

²⁰⁷ Pattenden "Silence: Lord Taylor's legacy", above n 162, at 152.

²⁰⁸ Pattenden "Silence: Lord Taylor's legacy", above n 162, at 153.

²⁰⁹ Code of Practise for the Detention, Treatment, & Questioning of Persons by Police Officers, Code C (UK) at [10.5].

contrasted with the New Zealand approach which does not accurately reflect the forensic implications of remaining silent during police or official questioning.²¹⁰

6. *Conclusion*

In all, the UK position appears to have significant detrimental consequences – in terms of complexity and flow-on concerns around the undermining of the lawyer-client relationship. These same issues do *not*, obviously, arise under the Australian approach, which is simply a blanket ban on the drawing of inferences. Supporters of the UK approach, however, argue that allowing the fact finder to freely draw adverse inferences (as the UK approach does), has significant flow-on benefits for the criminal justice system. In turning to consider overall reform, I will analyse these purported benefits and consider whether they justify the obvious costs of the UK approach.

²¹⁰ Law Commission *Second Review of the Evidence Act*, above n 102, at 92-93.

VI. *Discussion – Weighing Up the Options for Reform in New Zealand*

A. *Introduction*

The current New Zealand approach to the forensic implications of pre-trial exercise of the right to silence, as governed by s 32 of the Evidence Act, is not workable and reform is needed. The UK and Australia present two possible reformist positions at opposite ends of the spectrum. In this chapter I will discuss reform options for New Zealand, with reference to the assumptions and principles that underpinned reform in the UK and Australia

Jackson has noted that the United Kingdom approach allowing the fact-finder to draw any adverse inferences that appear “proper” from an accused’s silence during police questioning is premised on a common-sense assumption that silence mainly protects the guilty.²¹¹ Assuming this is correct, it follows that allowing adverse inferences as to guilt from a defendant’s pre-trial silence reduces the extent to which the right to silence functions as a shield, for the guilty, from conviction. I will critically examine this common-sense assumption and whether its purported benefits hold true in practise. It will be shown that the common-sense assumption that silence protects only the guilty is an unconvincing myth.

The analysis will lead me to conclude that New Zealand should instead adopt the Australian approach of prohibiting any adverse inferences to be drawn from a defendant’s pre-trial exercise of the right to silence. This approach best reflects the equivocality of silence during police investigation, avoids the significant costs of the common sense approach, provides greater clarity for participants in the criminal process and significantly prevents unnecessary impingement on the right to silence.

B. *Packer’s Criminal Process Model: A Justification for Two Diametrically Opposed Views on the Evidential Use of the Right to Silence*

Packer provides a useful justification for why reasonable people can disagree on important issues in our criminal justice system.²¹² His model provides a slightly tangential, but useful explanation for why there are such strongly held, yet opposing views on the issue of what evidential use should be made of a defendant’s exercise of the right to silence, and demonstrates

²¹¹ John Jackson “Inferences from Silence: From Common Law to Common Sense” (1993) 44 N. Ir. Legal Q. 103 at 107.

²¹² Herbert L. Packer “Two Models of the Criminal Process” (1964) 113(1) U.Pa.L.Rev 1.

that this issue is reflective of broader disagreements about the role of the criminal justice system.

Packer contends that societal views of the criminal justice system can be split into two camps: those who view the system's most important function as convicting the guilty (the 'crime control model');²¹³ and those who think the criminal justice system should be most concerned with ensuring the criminal process is fundamentally fair and protects citizens from undue oppression (the 'due process model').²¹⁴

As discussed below, the UK approach is premised on the common-sense assumption that the right to silence is a weapon needed only by the guilty. Allowing adverse inferences to be drawn therefore fits neatly with Packer's "crime control model" (reforming a safeguard that benefits solely the guilty should improve the system's ability to convict the guilty). Conversely, the Australian "no adverse inferences" approach - premised on the assumption that there are many "innocent-consistent" reasons for silence in face of police questioning is reflective of the 'due process model,' and the Blackstone idea that "it is better that ten guilty persons escape than one innocent person suffers."²¹⁵

Interestingly, conservative administrations have traditionally enacted policy reflective of 'crime control model' and liberal governments have tended to place a primacy on the due process model.²¹⁶ This connection is reinforced by the fact that the "adverse inference" reforms in Northern Ireland (1988) and the UK (1994) both occurred under conservative right-wing administrations.

C. *The 'Common Sense' Argument' as Grounds for Permitting Adverse Inferences*

One "common sense" argument that arises in the context of the right to silence is that the right is a weapon that only the guilty could have valid reasons to wield,²¹⁷ and that silence will therefore be indicative of guilt in almost all circumstances.²¹⁸ This is reflective of the Bentham

²¹³ Packer, at 9-13.

²¹⁴ Packer at 13 - 22

²¹⁵ William Blackstone, *Commentaries on the Laws of England* (1765-1769), vol 4 at 27.

²¹⁶ Kent W. Roach "Four Models of the Criminal Process" (1999) *J.Crim.L.& Criminology* (89(2)) 671 at 677.

²¹⁷ See generally Bernard Robertson "The right to silence" [2012] *NZLJ* 221; Bernard Roberston "The Right to Silence Ill-Considered" (1991) 21 *Victoria U. Wellington L.Rev.* 139

²¹⁸ Glanville Williams "the Tactic of Silence" [1987] 137 *New World Journal* 1107.

aphorism: “innocence claims the right of speaking, as guilt involves the privilege of silence.”²¹⁹ On Bentham’s view, the right to silence is of no practical use or importance to the innocent, whose only interest is in dissipating “the cloud which surrounds their conduct by giving an explanation for it”.²²⁰ From this assumption, it follows that by allowing adverse inferences to be drawn from a defendant’s pre-trial silence, the jury is given the freedom to use their common sense and daily experience to infer that where a suspect was silent in the face of police questioning, such silence was likely motivated by a desire to conceal the self-incriminating truth.²²¹

It is notable that the England and Wales Criminal Law Revisions Committee (CLRC) published a 1972 report citing similar Bentham remarks on this with approval.²²² Despite two subsequent Royal Commissions advising otherwise, this 1972 report became the basis of the 1994 UK statutory reforms on the forensic implications of exercise of the right to silence.²²³

D. *The Inherent Problems with ‘Common Sense’ Reasoning*

Common sense reasoning is used throughout evidence law.²²⁴ However, “common-sense” has been criticised as an inappropriate approach to take in the evidentiary use of pre-trial silence,²²⁵ and has been described as “unreliable, impressionistic and unsystematic” in this context.²²⁶ Salter warns that common sense is a “self-justifying mode of interpretation”,²²⁷ in that it justifies previously held views, without any rationale examination of the premises underlying a particular conclusion. On Salter’s view, the danger in allowing the fact-finder to freely draw adverse inferences from silence is that the fact-finder will use the “common sense” argument that silence is indicative of guilt without questioning the premises underlying the common

²¹⁹ M Durmont (*Manuscripts of Jeremy Bentham*) above n 41, at 241.

²²⁰ M Durmont (*Manuscripts of Jeremy Bentham*) above n 41, at 241

²²¹ Law Commission *Criminal Evidence*, above n 9, at 17.

²²² Criminal Law Revision Committee *Eleventh Report on Evidence* (Criminal Law Revisions Committee 1972).

²²³ Steven Greer “The Right to Silence: A Review of the Current Debate” (1990) 53(6) *The Modern Law Review* 709 at 715-718.

²²⁴ See generally M MacCrimmon “What is “Common” About Common Sense?: Cautionary Tales for Travellers Crossing Disciplinary Boundaries” (2001) 22 *Cardozo L.Rev.* 1433.

²²⁵ Jesse Slankard “Non-Common-Sensical: An Inference of Guilt to Sanction Non-Compliance with Defence Disclosure” (2011) 42 *VUWLR* 537 at 547.

²²⁶ Susan Easton “Legal Advice, Common Sense and the Right to Silence” (1998) 2 *Int’l J. E & P* 109 at 114.

²²⁷ Slankard “Non-Common-Sensical” above n 225 at 547 citing M Slater “Common Sense and the Resistance to Legal Theory” (1992) 5 *Ratio Juris* 212 at 212.

sense assumption.²²⁸ Easton suggests that because of this inherent weakness in common sense reasoning, there are dangers in leaving the fact finder to rely on their unfettered common sense without judicial guidance.²²⁹

These critiques point to the importance of scrutinising the common sense assumption that silence is indicative of guilt by considering the underpinning assumption: that the exercise of pre-trial silence is necessarily indicative of guilt. In fact, both theory and empirical evidence suggest that it is not only the guilty who may have reasons for pre-trial silence.

E. Disproving the Common-Sense Assumption that Silence is Necessarily Indicative of Guilt

1. Reasons for silence that are consistent with innocence

As discussed above, the UK position effectively permits silence to be ‘positive evidence of guilt.’²³⁰ However, this arguably overlooks the fact that there are also reasons consistent with *innocence* as to why an accused may choose to remain silent pre-trial. In light of those reasons, the danger of the UK approach is that ‘common sense’ may lead juries to wrongly equate silence with guilt and fail to give sufficient weight to “innocent-consistent” reasons for silence.²³¹ There have been substantial amounts written on such reasons, which include the following.²³²

- A desire to conceal embarrassing but non-criminal facts, or to conceal offences not under investigation;
- A desire to protect others;
- A negative or distrustful attitude towards police;
- A belief that allegations are so absurd or offensive that they should not be dignified with a response;
- The fact that the suspect may be shocked or confused by the allegations;

²²⁸ Slankard “Non-Common-Sensical” above n 225 at 547 citing M Slater “Common Sense and the Resistance to Legal Theory” (1992) 5 Ratio Juris 212 at 212.

²²⁹ Easton “Legal Advice”, above n 226, at 114.

²³⁰ S Nash, ‘Silence as Evidence: A Common Sense Development or a Violation of Basic Rights?’ 91997) 21 Crim LJ 145, 148.

²³¹ Easton “Legal Advice”, above n 226, at 114.

²³² See generally Easton “Legal Advice”, above n 226, at 145; M Colvin and K Akester ‘Directions for silence’ (1995) 145 New Law Journal 1621; Ian Dennis ‘The evidence provisions [1995] *Crim L R* 4; Birch 777; P. J. Schwikkard “Silence and Common Sense” (2003) *Act Juridica* 92 at 108-109, Royal Commission on Criminal Justice 1993, above n 83, at 52.

- The inability to communicate because of language difficulties;
- Tiredness, intoxication, psychiatric illness or intellectual disability;
- The fact that the allegations may be vague or unclear;
- Insufficient disclosure by the police;
- An awareness of the complexity of the issues;
- Reliance on legal advice.

This survey of possible “innocent-consistent” reasons to remain silent demonstrates the equivocal nature of silence and sheds light on the dangers of blindly following a common-sense assumption that silence is merely a tool for the guilty.²³³

Admittedly, given that the European Court has required that before drawing an adverse inference from silence, juries must consider innocent explanations for the silence, some have warned against taking this critique of the UK approach too far.²³⁴

However, it can still be seriously questioned whether this requirement alone is sufficient to ensure juries take into account the inherent ambiguity of silence pre-trial.²³⁵ As Redmayne warns, the UK courts have been reluctant to give any guidance on drawing inferences from silence, and judges are not required to explicitly address the equivocality of silence.²³⁶ Accordingly, it is possible that in practise UK jurors will tend to resort to the common sense assumption that silence is indicative of guilt, despite possible innocent explanations for such silence. The “innocent explanation” safeguard is further compromised by the requirement that the defence provides evidence supporting any purported “innocent explanation” before a jury can be invited to consider it.²³⁷

2. *Empirical evidence*

There is a lack of empirical evidence to back up common sense’s claim that the right to silence is a tool used by the guilty. If the ‘common sense’ assumption is correct, then the UK approach of disincentivising pre-trial silence by allowing proper adverse inferences to be drawn therefrom, should disadvantage only the guilty, and in theory should lead to a reduction in

²³³ J D Heydon “Silence as Evidence” [1974] 1 Monash U L Rev 53 at 55.

²³⁴ Redmayne “English Warnings”, above n 71, at 1058.

²³⁵ Redmayne “English Warnings”, above n 71, at 1060-1061.

²³⁶ Redmayne “English Warnings”, above n 71, at 1060.

²³⁷ Pattenden, above n 162 at 157-158.

crime and fewer wrongful acquittals.²³⁸ However, the purported benefits of a ‘common sense’-based approach have not materialised in jurisdictions that have adopted the UK position. In fact, it appears that “common sense” legislation was instead introduced on largely symbolic and political, rather than empirical, grounds.²³⁹

Proponents of the “allow adverse inferences” approach argue that defendants exploit law enforcement by hiding behind the right to silence.²⁴⁰ There is limited evidence to back up these claims.²⁴¹ The right to silence is, as a general rule, is not relied upon,²⁴² and there is no evidence to suggest that when it is, the chance of conviction falls.²⁴³ It can therefore be questioned whether the right to silence does in fact pose a significant obstacle to police during their investigations.

It also appears that the purported benefit of increasing suspect’s co-operation at the police station has not materialised in practise. Supporters of the UK approach claim that the “allow all inferences” approach has an inherent element of indirect compulsion, whereby, experienced criminals, who would otherwise use the right as a “shield,” will be forced to talk.²⁴⁴ Opinion evidence from both Northern Ireland and the UK, however, shows there was little change in the willingness of professional and experienced criminals to answer police questions as a result of the “allow all inference” reforms in both jurisdictions.²⁴⁵ Further, research of similar

²³⁸ Gregory W. O’Reilly “England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice” (1994) 85(2) J.Crim.L. & Criminology 402 at 442-443; Also note these policy objectives reflect Packer’s “crime control model,” see above n 212-216.

²³⁹ O’Reilly, above n 238, at 405.

²⁴⁰ John Jackson “Silence and Proof: Extending the Boundaries of Criminal Proceedings in the UK” [2005] 5 E & P 145 at 158.

²⁴¹ O’Reilly, above n 238, at 431 cites internal police research as the only research that justifies these claims.

²⁴² Law Commission *Report on the Analysis of the Right to Silence Survey* (August 2005) see: Appendix 2 in Elizabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington 2012) at 325: suggests that the right to silence at the pre-trial stage is only invoked 20% of the time; T. Bucke, R. Street and D. Brown, *The Right of Silence: The Impact of the Criminal Justice and Public Order Act 1994* (2000), Home Office Research Study No. 199, at 31 suggests suspects give a “no comment” answer during police interviews only 6-10% of the time.

²⁴³ Law Commission *Report on the Analysis of the Right to Silence Survey* (August 2005), above n 242.

²⁴⁴ John Jackson “Silence and Proof”, above n 240, at 158.

²⁴⁵ John Jackson “Silence and Proof”, above n 240, at 158 citing J Jackson, M. Wolfe and K Quinn *Legislating Against Silence: The Northern Ireland Experience* (2000) Northern Ireland Office at 112-115 and T. Bucke, R. Street and D. Brown, *The Right of Silence: The Impact of the Criminal Justice and Public Order Act 1994* (2000), Home Office Research Study No. 199 at 36-37.

provisions in Singapore suggests that allowing the fact-finder to freely draw adverse inferences does not change the amount of times the right to silence is exercised in any significant way.²⁴⁶

Aside from decreasing the exercise of the right to silence, “adverse inference” reforms have also failed to fulfil their promise of increasing convictions. A report commissioned ten years after the enactment of such reforms in Northern Ireland noted that conviction rates²⁴⁷ and police clearance rates²⁴⁸ did not improve as a result of “common sense” reforms and suggested instead that these reforms represented no more than a “symbolic victory for police and prosecution”, with the reforms effect in practise being marginal at best.²⁴⁹ These findings are consistent with successive UK studies, which concluded that the 1994 “common sense” reforms had little or no effect in terms of gaining convictions of the guilty.²⁵⁰

Academic opinion about the purported benefits of this common sense approach in practise is also negative. Jackson concluded that there was no empirical evidence to show that any of section 34’s intended objectives had been achieved.²⁵¹ Similarly, O’Reilly contended that the supposed problems with the right to silence are greatly exaggerated and the promised benefits of curtailing the right (through allowing the fact-finder to freely draw adverse inferences) are an illusion in practise.²⁵²

Instead, it is suggested that a growing law-and-order orientation within the then conservative British Government, along with a rising tide of violence in Northern Ireland meant that the enactment of the 1994 ‘common sense’ reforms were driven by political will, rather than empirical evidence.²⁵³ Schwikkard suggests that as a matter of political survival, public actors must place a primacy on common-sense reasoning and warns that those representatives who

²⁴⁶ Meng Heong Yeo, “Diminishing the Right to Silence: The Singapore Experience” (1983) *Crim. L. Rev.* 89 at 94

²⁴⁷ J Jackson, M Wolfe and K Quinn *Legislating Against Silence: The Northern Ireland Experience* (2000) Northern Ireland Office at 173-174.

²⁴⁸ Jackson *Legislating Against Silence*, above n 247 at 166.

²⁴⁹ Jackson *Legislating Against Silence*, above n 247 at 181; See also Mark Berger “Reforming Confession British Law Style: A Decade of Experience with Adverse Inferences from Silence” (2000) 31 *Colum. Hum. Rts. L. Rev.* 243 at 294 who shares the same conclusion.

²⁵⁰ R Leng, *The Right to Silence in Police Interrogation: A study of some of the issues underlying the debate* Research Bulletin No 35, HMSO, London (1994); T Bucke, *The Right to Silence: The Impact of the Criminal Justice and Public Order Act*, above n 245; Redmayne “English Warnings”, above n 71 at 1081 shows that even since these studies the conviction rate has remained stagnant.

²⁵¹ Jackson “Silence and Proof”, above n 240, at 164.

²⁵² O’Reilly “England Limits the Right to Silence”, above n 238, at 444.

²⁵³ Mark Berger “Reforming Confessions”, above n 249, at 301.

do not appease to common sense will likely pay at the ballot box.²⁵⁴ It is suggested that by enacting this legislation in the face of advice of two royal commission reports,²⁵⁵ the UK government was motivated by political kudos rather than instrumental change.²⁵⁶ In echoing these concerns, it has been claimed that the recent NSW “common sense” reforms also lacked evidential foundation and were instead motivated by political pressure to ‘cut down on crime.’²⁵⁷

F. Additional Costs of the UK Approach: The Impinging of the Right to Silence and the Police Caution

When adverse inferences can be made against an accused based on pre-trial silence (as the UK approach permits), there is an element of indirect compellability to speak upon the accused, resulting in an infringement on the right to silence.²⁵⁸ The “costs” of this impingement are greater and more problematic, given my conclusions that the right to silence is an important right, with significant societal value.²⁵⁹

This impingement of the right to silence is manifested by the UK-type police caution (one that gives adequate notice to suspects of the possibility of such inferences being drawn at a later stage). The current UK warning provides, “You do not have to say anything, but it may harm your defence if you do not mention when questioned something which you later rely on in Court.”²⁶⁰ Such a warning amplifies the already inherent pressure of a police interview and increases the likelihood of false confessions and mistaken self-incrimination.²⁶¹ This added pressure has the greatest impact upon vulnerable and inexperienced suspects.²⁶²

²⁵⁴ Schwikkard, above n 232 at 95.

²⁵⁵ *Report of the Royal Commission* (1993), above n 83; *Report of the Royal Commission* ((1981), above n 95.

²⁵⁶ Mark Berger “Reforming Confessions”, above n 249, at 301.

²⁵⁷ Ashley Cameron “Common Sense or Unnecessary Complexity? The Recent Change to the Right to Silence in New South Wales” (2013) 19(2) *Deakin LR* 311 at 322-323.

²⁵⁸ Ian Dennis *The Law of Evidence*, above n 26, at 151; see also above pages 11-12

²⁵⁹ See above page 22.

²⁶⁰ Code of Practise for the Detention, Treatment, & Questioning of Persons by Police Officers, Code C at [10.5].

²⁶¹ Heydon, above n 233 at 288; Michelle Lam, ‘Remaining Silent: A fundamental right’ (2012) 50(9) *LSJ* 17 at 18; Ashley Cameron, above n 257 at 325 suggested that any such warning will inevitably lead to more false defences.

²⁶² Michael Chaaya “The Right to Silence Reignited: Vulnerable Suspects, Police Questioning and Law and Order in New South Wales” (1998) 22 *Crim LJ* 82.

In rejecting a UK-type caution, the New Zealand Law Commission concluded that such a caution would result in an unacceptable risk of an innocent person making a false admission or creating a false impression of guilt.²⁶³ Along similar lines, Heydon warned of the dangers of such a caution, suggesting that they place “irresistible pressure on the accused to speak.”²⁶⁴ Significantly, these concerns appear to have held true in practise.²⁶⁵

G. Conclusion

I have suggested that one possible reform option for New Zealand is the UK’s “allow all inferences” approach. The claimed benefits of such an approach, however, are premised on the principally and empirically unconvincing common-sense assumption that the right to silence is only of use to the guilty, and that it will never be in an innocent person’s interests to exercise the right to silence during pre-trial questioning. Once it becomes clear that the purported advantages of the UK approach do not materialise in practise and that such an approach comes at the cost of impingement on the right to silence, the UK approach becomes little more than a warning to other jurisdictions.²⁶⁶

²⁶³ Law Commission *Criminal Evidence*, above n 9, at 39; similarly the Royal Commission in 1993 cited the associated warning as the main reason for advising against the s 34 CJPOA reforms see *Royal Commission on Criminal Justice 1993*, above n 83 at, ch 4, [23].

²⁶⁴ Ashley Cameron, above n 257, at 325; JD Heydon ‘Confessions and Silence’ (1976) 7 Syd LR 375 at 387-9

²⁶⁵ Bucke, *The Right to Silence: the impact of the Criminal Justice and Public Order Act*, above n 245, at 37.

²⁶⁶ Redmayne “English warnings”, above n 71.

VII. Recommended Reform and Draft Amendment

After concluding that New Zealand's current "half-way house" approach to the evidential implications of pre-trial exercise of the right to silence is not workable, I suggested two possible reform options: the UK ("allow adverse inferences") approach and the Australia ("prevent all inferences unfavourable to the defendant") approach. It is recommended that New Zealand adopt the Australian "no adverse inferences" approach to the forensic implications of pre-trial exercise of the right to silence.

In permitting the fact finder to draw adverse inferences against an accused based on pre-trial silence (as the UK approach does), there is an inherent element of indirect compellability to speak and therefore an intrusion on the right to silence. It is suggested that given the high societal importance of the right to silence, this encroachment on the right is significantly "costly". This intrusion on the right is not, however, present under the Australian 'blanket ban' approach.

In seeking to off-set this cost, proponents of the UK approach have argued that an "allow adverse inferences" approach has significant flow-on benefits, such as reductions in crime and wrongful acquittals. The fact that these benefits have not materialised in any empirical fashion is demonstrative of the inherent dangers of common sense reasoning generally, and more specifically, the falsity of the common sense assumption that underpins the UK approach - namely, that the right to silence is a tool needed only by the guilty. Somewhat ironically, the UK experience has instead exposed the significant consequential costs of adopting an "allow all inferences" approach. Issues of complexity, eroding of the lawyer-client relationship and amplification of the already inherent pressure of a police interview act as red flags for other jurisdictions. In short, the UK approach comes at significant costs, with little obvious benefits.

Conversely, the Australian approach can be praised for all the reasons that the UK approach is critiqued. The Australian approach neatly avoids the issues of complex judicial directions, reflects the equivocality of silence in the police station and limits rather than adds to the fundamental pressure upon a suspect during police questioning. Most significantly, it prevents an unnecessary impinging of the right to silence and as empirically shown, is likely to have little to no effect upon the actual rate of successful criminal convictions or other assumed benefits of the UK approach.

My proposed reforms could be achieved by making the following amendments (*in italics*) to s 32 of the Evidence Act:

Section 32: Fact-finder not to be invited to infer guilt from defendant's silence before trial

- (1) This section applies to a criminal proceeding in which it appears that the defendant failed –
 - a. To answer a question put, or respond to a statement made, to the defendant in the course of investigative questioning before the trial; or
 - b. To disclose a defence before trial.
- (2) If subsection (1) applies, -
 - a. No person may invite the fact-finder to draw *any inference to the defendant* from a failure of the kind described in subsection (1); and
 - b. If the proceeding is with a jury, the Judge must direct the jury that it *may not draw any such unfavourable inference* from a failure of that kind.
- (3) This section does not apply if the fact that the defendant did not answer a question put, or respond to a statement made, before the trial is a fact required to be proved in the proceeding.
- (4) *Inferences includes:*
 - a. *An inference of consciousness of guilt; or*
 - b. *An inference relevant to the party's credibility*

Bibliography

A. Cases

1. New Zealand

Blair v R [2012] NZCA 62.

E (CA727/09) v R [2010] NZCA 202.

Gurran v R [2015] NZCA 327.

Hamdi v R [2017] NZCA 242; (2017) 28 CRNZ 319

Hamdi v R [2017] NZSC 134.

Hastings v R [2015] NZCA 180.

Hitchinson v R [2010] NZCA 388.

McNaughton v R [2013] NZCA 657; [2014] 2 NZLR 467.

R v Coombs [1983] NZLR 748 (CA).

R v F CA74/05, 14 April 2005.

R v Foster [1955] NZLR 1194 (CA).

R v Hill [1953] NZLR 668 (CA).

R v King HC Whangarei CRI-2010-088-2617, 29 July 2011.

R v McCarthy [1992] 2 NZLR 550 (CA).

R v Ryan [1971] 2 NZLR 611 (CA).

R v Shaw CA 429/99, 28 March 2000.

Reuben v R [2017] NZCA 138.

Smith v R [2013] NZCA 362; [2014] 2 NZLR 421.

Taylor v New Zealand Poultry Board [1984] 1 NZLR 349 (CA).

Tihi v R [2017] NZSC 143.

Waters v R [2018] NZSC 49.

W v R [2018] NZCA 181.

2. Australia

Petty v R [1991] HCA 34; (1991) 102 ALR 129.

R v Stravinos [2003] NSWCCA 339; (2003) 140 A Crim R 594.

Sanchez v The Queen [2009] NSWCCA 171; (2009) 196 A Crim R 472.

3. *England and Wales*

Hall v R [1971] 1 WLR 298, PC.

R v Argent [1997] 2 Cr App R. 27.

R v B (Kenneth) [2003] EWCA Crim 3080.

R v Beckles [2005] 1 Cr App R 23.

R v Bresa [2005] EWCA Crim 1414.

R v Chandler [1976] 1 WLR 585, CA.

R v Condron and Condron [1997] 1 Cr App R. 185 CA.

R v Cowan [1996] Q.B. 373 CA.

R v Directors of Serious Fraud Office, ex parte Smith [1992] 3 All ER 456; [1993] AC 1 (HL).

R v Gill [2001] 1 Cr App R. 11.

R v Howell [2005] 1 Cr App R 1.

R v Webber [2004] 1 Cr App R 40.

4. *European Court of Human Rights*

Condron v United Kingdom (1997) 23 E.H.R.R. 1.

Funke v France (1999) 16 E.H.R.R. 297.

Murray v United Kingdom (1996) 22 E.H.R.R. 29.

Saunders v United Kingdom [1998] 1 BCLC.

B. *Legislation*

1. *New Zealand*

Evidence Act 2006.

New Zealand Bill of Rights Act 1990.

Search and Surveillance Act 2012.

Serious Fraud Office Act 1990.

2. *Australia*

Evidence Act 1995 (Cth).

Evidence Act 2008 (Vic).

Evidence Act 2011 (ACT).

Evidence (National Uniform Legislation) Act 2011 (NT).

Evidence Act 2001 (Tas).

Evidence Act 1995 (NSW).

Evidence Act 2004 (NI).

3. *England and Wales*

Criminal Justice and Public Order Act 1994.

Criminal Procedure and Investigations Act 1996.

Youth Justice and Criminal Evidence Act 1999.

4. *Northern Ireland*

The Criminal Evidence (Northern Ireland) Order 1988.

C. Books

William Blackstone, *Commentaries on the Laws of England* (1765-1769), vol 4.

Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015).

Rupert Cross and Others *Cross on Evidence* (10th ed, LexisNexis, Wellington, 2017).

Ian Dennis *The Law of Evidence* (5th ed, Sweet & Maxwell, London, 2013).

Mathew Downs (ed) *Cross on Evidence* (online looseleaf ed, Lexis Nexis).

Simon France (ed) *Adams on Criminal Law* (online loose-leaf ed, Thomson Reuters).

Richard Glover *Murphy on Evidence* (14th ed, Oxford University Press, Oxford, 2015).

Alex Keane & Paul McKeown *The Modern Law of Evidence* (11th ed, Oxford University Press, Oxford, 2016).

Richard Mahoney and Others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers, Wellington, 2014).

Elizabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012).

Stephen Odgers *Uniform Evidence Law* (12th Ed, Thomson Reuters, NSW, 2016).

Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003).

Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010).

Judge Simon Tonking and Judge Wait *Crown Court Bench Book Companion* (Judicial Studies Board, March 2012).

D. Journal Articles

Ronald J. Allen “Theorizing about Self Incrimination” (2008) 30 *Cardozo L.Rev.* 729.

Ronald J. Allen “The Simpson Affair, Reform the Criminal Justice Process, and Magic Bullets (1996) 67 *U.Colo.L.Rev.* 989.

Mirko Bagaric “The Diminishing “Right” of Silence” (1997) 19(3) *Syd LR* 366.

Mark Berger “Europeanizing Self-Incrimination: The Right to Remain Silent in the European Court of Human Rights” (2006) 12 *Colum. J. Eur. L.* 339.

Mark Berger “Reforming Confession British Law Style: A Decade of Experience with Adverse Inferences from Silence” (2000) 31 *Colum. Hum. Rts. L. Rev.* 243.

Diane Birch “Suffering in silence: a cost benefit analysis of section 34 of the Criminal Justice and Public Order Act 1994” [1999] *Crim L.R.* 769.

Ashley Cameron “Common Sense or Unnecessary Complexity? The Recent Change to the Right to Silence in New South Wales” (2013) 19(2) *Deakin LR* 311.

Ed Cape, ‘Sideline Defence Lawyers: Police Station Advice After *Condrón*’ (1997) 1 *E & P* 386.

Michael Chaaya “The Right to Silence Reignited: Vulnerable Suspects, Police Questioning and Law and Order in New South Wales” (1998) 22 *Crim LJ* 82.

Daniel P. Collins “Making Juries Better Factfinders” (1997) 20(2) *Harv.J.L.&Pub.Pol’y* 489.

M Colvin and K Akester ‘Directions for silence’ (1995) 145 *New Law Journal* 1621.

Simon Cooper “Legal advice and pre-trial silence – unreasonable developments” (2006) 10 *E & P* 60.

Rupert Cross “The Evidence Report: Sense or Nonsense – A very wicked animal defends the 11th Report of the Criminal Law Revision Committee” [1973] Crim LR 329.

Yvonne Marie Daly “The right to silence: inferences and interference” (2014) 47(1) Aust. N. Z. J. Criminol 59.

Ian Dennis “Silence at the police station: The Marginalisation of section 34” [2002] Crim LR 25.

Ian Dennis ‘The evidence provisions [1995] Crim LR 4.

Donald Dripps “Self-Incrimination and Self Preservation: A Sceptical View” (1991) U. III. L. Rev. 329.

Ian Dennis “Instrumental Protection, Human Right of Functional Necessity? Reassessing the Privilege against Self-Incrimination?” (1995) 54(2) CSLR 342.

Susan Easton “Legal Advice, Common Sense and the Right to Silence” (1998) 2 Int’l J. E & P 109.

D.J. Galligan, “The Right to Silence Reconsidered” (1988) C.L.P 69.

K. Greenawalt “Silence as a Moral and Constitutional Right” (1981) 23 Wm.& Mary L.Rev. 15.

Steven Greer “The Right to Silence: A Review of the Current Debate” (1990) 53(6) The Modern Law Review 709,

David Harvey “Speak and Be Not Silent: Recent Developments of the Privilege against Self-Incrimination” (1996) 4 Waikato L. Rev. 60.

J D Heydon “Silence as Evidence” [1974] 1 Monash U L Rev 53.

JD Heydon ‘Confessions and Silence’ (1976) 7 Syd LR 375.

Dr Barbara Ann Hocking and Laura Leigh Manville “What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Fiction” (2001) 1(1) Macquarie Law Journal 63.

John Jackson “Curtailling the Right to Silence: Lessons from Northern Ireland” (1991) Crim LR 404.

John Jackson “Inferences from Silence: From Common Law to Common Sense” (1993) 44 N. Ir. Legal Q. 103.

J. Jackson, 'Interpreting the Silence Provisions in Northern Ireland' (1995) Crim LR 587.

John Jackson “Silence and Proof: Extending the Boundaries of Criminal Proceedings in the UK” [2005] 5 E & P 145.

Saul Kassin “On the Psychology of confessions: Does innocence put innocents at risk?” (2005) 60 American Psychologist 215.

Saul Kassin “The Psychology of Confession Evidence” (1997) 52(3) *American Psychologist* 221.

Michelle Lam, ‘Remaining Silent: A fundamental right’ (2012) 50(9) *LSJ* 17.

John Langbein, “The Historical Origins of the Privilege Against Self-Incrimination at Common Law” (1994) 92 *Mich.L.Rev* 1047.

Roger Leng “Silence in Court: From Common Sense to Common Law: Azzopardi: (2002) 6 *Int’l J.* 62.

Roger Leng “Silence Pre-Trial: Reasonable Expectations and the Normative Distortion of Fact-Finding” (2001) 5 *E & P* 240.

S Nash, ‘Silence as Evidence: A Common Sense Development or a Violation of Basic Rights? 91997) 21 *Crim LJ* 145.

M MacCrimmon “what is “common” about common sense?: Cautionary tales for travellers crossing disciplinary boundaries” (2001) 22 *Cardozo L.Rev.* 1433.

Elizabeth McDonald “Why so Silent on the Right to Silence? Missing Matters in the Review of the Evidence Act 2006 (2012) 44 *VUWLR* 573.

John McNaughton “The Privilege against Self-Incrimination. Its Constitutional Affection, Raison d’Etre and Miscellaneous Implications” (1960) 51(2) *The Journal of Criminal Law, Criminology, and Political Science* 138.

Gregory W. O’Reilly “England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice” (1994) 85(2) *J.Crim.L.& Criminology* 402.

Herbert L. Packer “Two Models of the Criminal Process” (1964) 113(1) *U.Pa.L.Rev* 1.

Andrew Palmer “Silence in Court – The Evidential Significance of an Accused Person’s Failure to Testify” (1995) 18(1) *UNSW LJ* 130.

Rosemary Pattenden “Silence: Lord Taylor’s Legacy” (1998) 2 *Int’l J. E & P* 141 at 141.

D. Polinko “Is there a Rationale for the Privilege against Self-Incrimination” (1986) 33 *UCLA L.Rev.* 1063.

Mike Redmayne “English Warnings” (2008) 30 *Cardozo L. Rev.* 1047.

Mike Redmayne “Rethinking the Privilege Against Self-Incrimination” (2007) 27(2) *Oxford Journal of Legal Studies* 209.

Kent W. Roach “Four Models of the Criminal Process” (1999) *J.Crim.L.& Criminology* (89(2)) 671.

Bernard Robertson “The right to silence” [2012] *NZLJ* 221.

Bernard Robertson “The Right to Silence Ill-Considered” (1991) 21 *Victoria U. Wellington L.Rev.* 139.

P. J. Schwikkard “Silence and Common Sense” (2003) *Acta Juridica* 92 .

D.J. Seidmann & A. Stein “The Right to Silence helps the Innocent: A Game-Theoretic Analysis of the 5th Amendment Privilege” (2000) 114 Harvard L.Rev. 431.

Jesse Slankard “Non-Common-Sensical: An Inference of Guilt to Sanction Non-Compliance with Defence Disclosure” (2011) 42 VUWLR 537.

M Slater “common sense and the Resistance to Legal Theory” (1992) 5 Ratio Juris 212.

Peter Smerulla, “Schmerber and the Privilege against Self-Incrimination: A Reappraisal” (1982) 20 Am. L. Rev. 31.

Alex Stein “The Right to Silence Helps the Innocent: A Response to the Critics” (2008) 30 Cardozo L. Rev. 1115.

William Stuntz ‘Self Incrimination and Excuse’ (1988) 88 Columbia LR 1227.

Andrew E. Taslitz, “Confessing in the Human Voice: A defence of the privilege against self-incrimination” (2008) 7 Cardozo Pub. L. Pol’y & Ethics 121.

Hon Justice Thomas “The So-Called Right to Silence (1991) 12 New Zealand Universities Law Review 299.

Glanville Williams “the Tactic of Silence” [1987] 137 New World Journal 1107.

Meng Heong Yeo, “Diminishing the Right to Silence: The Singapore Experience” (1983) Crim. L. Rev. 89.

E. Reports

T. Bucke, R. Street and D. Brown, *The Right of Silence: The Impact of the Criminal Justice and Public Order Act 1994* (2000), Home Office Research Study No. 199.

Criminal Law Revision Committee *Eleventh Report on Evidence* (Criminal Law Revisions Committee 1972).

Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1992).

Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55(2), 1999).

Law Commission *Evidence: Reform of the Law* (NZLC R55(1) 1999).

Law Commission *Report on the Analysis of the Right to Silence Survey* (August 2005).

Law Commission *Second Review of the Evidence Act 2006* (NZLC IP, 2018).

Law Commission *The Privilege Against Self-Incrimination* (NZLC PP 25 1996).

Home Office *Report of the Working Group on the Right to Silence* (Home Office, London, 1989).

J Jackson, M. Wolfe and K Quinn *Legislating Against Silence: The Northern Ireland Experience* (2000) Northern Ireland Office.

R Leng, *The Right to Silence in Police Interrogation: A study of some of the issues underlying the debate* Research Bulletin No 35, HMSO, London (1994).

Report of the Royal Commission on Criminal Justice (Command Paper 2263, 1993).

Report of the Royal Commission on Criminal Procedure (Phillips Commission) (Command Paper 8092, 1981).

F. *Dissertations*

Isabella Margaret Gladstone Clarke “A Kahui Exception? Examining the Right to Silence in Criminal Investigations” (LLB (Hons) Dissertation, University of Otago, 2007).

G. *Other Resources*

Practise Note – Police Questioning (s 30(6) of the Evidence Act 2006) [2007] 3 NZLR 297).

Code of Practise for the Detention, Treatment, & Questioning of Persons by Police Officers, Code C (UK).