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International Rights and Australian Adaptations: Recent Developments in Criminal Investigation

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1. Introduction

To empower the "right to be presumed innocent until proven guilty according to law", Article 14 of the International Covenant on Civil and Political Rights[1] identifies a range of "minimum guarantees" for suspects under investigation and for the accused at trial. Significant among these is that the suspect\accused is "not to be compelled to testify against himself or to confess guilt".[2]

Recently, however, the protection against self-incrimination, or the "right to silence", as it is sometimes misleadingly known, has been undermined in various common law jurisdictions despite its essential connection with our notions of criminal justice.[3] In England, particularly, police and prosecutors have succeeded in law reform which would all but destroy the general impact of the protection through judicial inference.[4]

The protection against self-incrimination may either be considered a privilege or an impediment to the just and effective investigation of crime depending on the stage reached within the criminal justice process, and the agencies involved therein. Depending on one's investigation and trial perspective, the consequence of its exercise is alternatively viewed as a restriction on productive police investigations, a barrier against abusive interrogation practice, an

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1 United Nations General Assembly, *International Covenant on Civil and Political Rights* (1966) Resolution 2200 A(XXI). Article 14(2).

2 Id at Art 14(2)(g).

3 The right to silence in English legal convention has undergone legislative qualification and restriction over the years (eg, *Theft Act* 1968 (Eng) s31, *Supreme Court Act* 1981 s72, *Criminal Justice Act* 1987 (Eng) s2, *Criminal Evidence (Northern Ireland) Order* 1988), but these incursions have either been justified because of the extreme nature of the prohibitions enacted, or through the qualification of the resultant disclosures via limited "use" immunities.

4 See *Criminal Justice Act* 1994. Interestingly this legislative position contradicts the common law evidentiary rule that no inference of guilt should be drawn from the fact that a person has exercised their right to silence (see *R v Whitehead* [1929] 1 KB 99; *R v Keeling* [1942] 1 All ER 507; *R v Bathurst* [1968] 2 QB 99).

embargo on crucial Crown evidence or a limitation on unfair trial testimony. Those who would enhance investigation and prosecutorial powers seek to minimise the "right" in both interrogation and trial situations.

The innovative ways by which Australian legislators have qualified this right, and the development of criminal investigative practice as a consequence of such changes are the concerns of this article. The resultant tension within more traditional crime investigation options will also be addressed.

As the institutions and processes of investigation in present-day Australian criminal justice have specialised and diversified,[5] the general abrogation of defendant's rights has not been a feature, and the "balance" of trial privileges recently argued for in England[6] is yet to find favour broad legislative beyond the preferences of police and prosecutors. The qualifications of the right to silence which have accompanied recent institutional and procedural developments in Australian criminal investigation practice, it is suggested, provide a more particular and focussed revision of traditional investigative conventions, than a general abrogation does. The regulation of money laundering, organised crime, and drug trafficking transnationally, as well as in other overseas jurisdictions offer instances where the Australian attitude to the protection against self-incrimination has been preferred.[7]

The transformation of jurisdictional practice in criminal investigation, and self-incrimination in particular, within the international atmosphere of mutual assistance is discussed as the article develops. Transjurisdictional responses to the prevailing global imperatives behind criminal investigation are juxtaposed against a framework of international obligations designed to protect the rights of those investigated. Whether the tensions between investigative needs and justice "rights", which might be anticipated, are addressed through Australian legislative models appears to depend on the recent language of transnational responsibility for crime control and the politics of compromise.

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5 Findlay, M, Odgers, S and Yeo, S, *Australian Criminal Justice* (1994) at ch3.

6 In a recent speech to the Howard League for Penal Reform (14/10/94) the UK Attorney-General hinted that a new criminal justice bill, to be announced in the Queen's speech to parliament this year, not only would establish a new criminal cases review body to systematically deal with miscarriages of justice, but that new requirements demanded by the police, for earlier disclosure by the defence of "any documents and other background information relevant and necessary to secure a fair trial" would be imposed. Interestingly, news reports of the speech talked of the police position that the prosecution "has been under an unfair duty to disclose all its background documents with defence lawyers". The Attorney-General revealed a somewhat confused understanding of the defence role in a criminal trial when observing; "So far, subject to minor exceptions, the defense have been under no obligation to do anything of the same nature and the court and the jury have been left for long periods ... before they become aware of what the essential ingredients of the defense are said to be. This is not only wasteful of resources but it is also bad for justice".

7 For a discussion of these issues in general, see Fisse, B, Fraser, D and Coss, G, *The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting* (1992); Anderson, M, *Policing the World: Interpol and the Politics of International Police Co-operation* (1989); Abadinski, H, *Organized Crime* (3rd edn, 1990).

2. *The "General Abrogation" Approach to the "Right" to Silence*

The neutralisation of the impact of the right to silence, through recent English legislation, represents a telling example of "law and order politics" prevailing over empirical reality and rational policy recommendations. Two recent Royal Commission reports have rejected the suggestion that the right to silence be abolished, and have expressed reservations regarding the appropriateness of judges or juries inevitably drawing adverse inferences about the reasons behind the accused's exercise of this "right". The Philips Commission report on criminal procedure in 1981[8] endorsed the protection against self-incrimination from a "rights-based" point of view. The Runciman Commission[9] report, with its more utilitarian tone, failed to find sufficient reason in terms of efficiency or justice, to recommend a change away from the traditional common law protection. The empirical evidence before the Philips Commission established that most suspects did account for their conduct while undergoing police interrogation, and in a recent study only 2.4 per cent of suspects observed exercised their right to silence in such circumstances.[10] Therefore, the justifications for a restriction on the protection against self-incrimination relate more to wider struggles over investigative and prosecutorial powers, than to specific reservations regarding the "justice" or effectiveness of its operation.

It has been argued in support of the protection against self-incrimination that despite the statistically small number of occasions on which it is invoked, "it provides a safeguard for the vulnerable against wrongful convictions".[11] Paradoxically, in the United Kingdom the police have waged a long and active campaign against the "right" on the grounds that justice is regularly abused through its exercise. The Royal Commission on Criminal Justice was specifically invited to consider whether changes were necessary in the "opportunities available for an accused person to state his position".[12] The Commissioners did not support the police position that such "opportunities" be made more compulsory at the pre-trial and trial stage. Interestingly, in 1929 the Royal Commission on Police Powers and Procedures proposed that the police should be forbidden from questioning suspects in custody at all because a right to ask questions might give the impression of a right to an answer, and onto the right to extract the "expected answer, that is a confession of guilt".[13]

Pressure in England for the abolition of the "right to silence" has not only come from the police, but also the Criminal Law Revision Committee (1972)[14] and more recently the Home Office Working Group (1989).[15] Neither

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8 Philips, C, *Report of the Royal Commission on Criminal Procedure* (Command Paper (Cmnd) 8092, 1981).

9 Runciman, L, *Report of the Royal Commission on Criminal Justice* (Cmnd 2263, 1993).

10 Sanders, A, Bridges, L, Mulvaney, A and Crozier G, *Advice and Assistance at Police Stations and the 24 hour Duty Solicitor Scheme*, (1989).

11 Walker, C and Starmer, K, *Justice in Error* (1993) at 59.

12 Above n9.

13 Command Paper 3297 at par 164.

14 Criminal Law Revision Committee, *Eleventh Report, Evidence, General,* (Cmnd 4991, 1972).

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

recommendation was based on empirical evidence, and they proceeded from the problematic assumption that suspects' protections under present law were increasing, or becoming unfairly balanced against the prosecution.

Some points about the privilege against self-incrimination should be clarified prior to any consideration of the merits or otherwise of law reform in the area. First, if it is a right, then how can it be abused through its exercise? Second, in a system of criminal justice based on a presumption of innocence it is right that pre-trial protections should favour the accused. Third, silence does not mean guilt. Fourth, as evidence before the most recent Royal Commission on Criminal Justice in the United Kingdom indicated,[16] most people who exercise their right to silence do not end up being acquitted. Finally, the right to silence no longer facilitates the presentation of "ambush" defences.[17]

The doctrine against self-incrimination has been a long-standing recognition in British criminal justice of the sometimes tyrannical pressures which the State can exert against an accused person prior to trial.[18] Even so, many judges would concede that when they give a direction to a jury that the jury should not draw an adverse inference from an accused person's election not to testify, the jury will go ahead and infer what it likes. As such, one might question the reality of the right, as well as the apprehensions attendant on its exercise, at least at the point of trial testimony.

Rather than the compromise of traditional "rights" as an essential response to identified and unjustified impediments for investigation practice, or more generally the achievement of criminal justice, the issues influential over recent law reform in England appear to be:

> the political utility of old "law and order" chestnuts, at times when governments seek to present a "tough" response to crime, and to satisfy powerful electoral constituencies;
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> the "trade-off" or balanced approach to criminal justice reform, particularly when the police are actively promoting the reform agenda; and
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> the desire of the police to maintain and expand their position of power throughout investigation and trial encounters. This is pertinent where a correlation is indicated between exercising the right to silence, and the presence of a solicitor during interrogation.[19]

The form of the general abrogation of a right to silence under English law, and the procedure effecting it, also presents problems. The practical difficulty of how the "adverse inference" instruction might be delivered, and the scope of the evidence to which it will apply suggests a potential for injustice through irregularities or inconsistencies of application.

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16 Above n9.
17 See *Criminal Justice Act* 1967 (UK) s11.
18 Compare its omission from the European Convention on Human Rights (1950) at Art 6.
19 Sanders, A and Bridges, L, "The Right to Legal Advice" (1993), in Walker and Starmer above n11 at 37–53.

3. *New Investigators and the Institutionalisation of Specialised Investigative Power*

Whether it is the spectre of organised crime,[20] the threat of tax evasion and avoidance,[21] the drug menace,[22] or the epidemic of corruption,[23] crime problems of recent decades in Australia have often been portrayed as beyond the competence of the traditional criminal justice investigative agencies. Police investigation techniques are criticised for not keeping pace with the sophistication of criminal enterprise. Intelligence gathering, in particular, is accused of failing to support successful prosecutions. And the old methods of prosecution have faced accusations of ineptitude and parsimony.

In addition, conventional investigation and prosecution agencies bemoan the advantage a suspect and an accused are given by the "right" to silence throughout the standard progress of a police investigation and the preparation of the prosecution brief. Despite recently introduced guidelines which qualify the evidentiary standing of admissions or confession of the accused, and judicial interpretation of their inculpatory significance, many appeals from the convictions in criminal trials contest issues surrounding such materials.[24] There appears to be little consensus between either side of the conventional trial process, about the extent and operation of general criminal investigation powers.[25]

Today's crime control agendas in Australia have been heavily influenced by an official discourse which emphasises the uniqueness of current crime "threats" and the failure of traditional investigatory responses and prosecutorial results. For instance reams of reports from state and Federal Royal Commissions,[26] have portrayed practices of illicit drug commerce and abuse in such common and unequivocal terms that policing priorities would remain inextricably tied to the "war on drugs" for years to come, if their findings were acted upon. Police forces in all jurisdictions have been implicated in the problem because of their apparent failure to stem the tide of drug trafficking and despite a significant increase in resources for the task.[27] Even their reluctant flirtations with joint task forces have done little more than expose the limitations inherent in state and federal jurisdictional rivalry.

Such tensions, particularly within police investigations, are not new. They exist at many levels within all individual Australian police organisations. Jurisdictional barriers have tended to exaggerate the problems of a free flow of operational information between investigation services. With the pressure for prosecution results against those offences which do not stop at state borders

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20 Moffit, A R, *A Quarter to Midnight: The Australian Crisis* (1985).
21 Costigan, F, *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, Final Report* (1984).
22 Dobinson, I, and Ward, P, *Drugs and Crime* (1985).
23 Temby, I, "ICAC: Working in the Public Interest" *Curr Iss Crim Jus* (1991)2(3) at 11–16.
24 See *McKinney* (1990–1991) 171 CLR 468.
25 See the debate over police powers presented in Freckleton, I, and Selby, H (eds), *Police in our Society* (1988).
26 Williams, E, *Australian Royal Commission of Enquiry into Drugs, Report*, (1980); Stewart, D, *Royal Commission into Drug Trafficking*, (1983); Woodward, P, *NSW Royal Commission into Drug Trafficking* (1979).
27 Bottom, B, *Without Fear or Favour* (1984).

(such as drug trafficking), traditional policing has obviously not been able to bury the suspicions of the past in favour of a less parochial and territorially limited policing perspective.

The response of both state and federal governments when faced with the declared and baffling complexity of criminal enterprise in more "organised" forms, has been to concede the failure of the criminal justice system to go beyond street crime, and to join in the rush for institutional reform. The political answer to public sensitivity over "new crime threats" has centred around bureaucracy and technology. Along with "novel" institutional responses to crime such as the Independent Commission Against Corruption (ICAC–NSW), the Criminal Justice Commission (CJC–Qld), the National Crime Authority (NCA), and the Australian Securities Commission (ASC), Australia has witnessed new methods of investigation which Hogg refers to as "proactive policing and the 'information economy'".[28]

The development of criminal investigation through institutional specialisation has been supported by a range of information-gathering powers. Principal among these are various investigatory options which reduce the availability and impact of the protection against self-incrimination. Yet, as with the rejection of conventional policing structures and practices, when addressing the new crime agenda, restrictions on the right to silence in Australia are more purpose-designed than a general abrogation policy. This emphasis on special responses to meet particular crime threats works from the assumption that traditional investigatory and prosecutorial methods have failed, and will no longer be remedied through the on-going and broad expansion of police powers. The "balanced" policy of investigation reform has been rejected by Australian governments in favour of particular, specialist responses.

Any responsibility for the failure of traditional investigation agencies loses its significance and focus in light of the new powers and procedural options available to these "purpose-designed" investigation institutions. Cohen identifies this trend as a "failure model" of criminal justice; wherein administrators and policy-makers accept failure and pursue its consequences; where a new bureaucratic alternative is justified not so much in terms of its own potential but rather as a necessary response to past failure.[29]

In creating these novel crime fighting bodies, federal and state governments of different political persuasions have agreed to suspend significant individual liberties and hand over constitutional responsibilities.[30] However, many such attempts by these crime fighting bodies, to address particular crime threats have been as conspicuous in their failures as those of the institutions which they were said to augment, or in part replace.[31]

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28 Hogg, R, "Criminal Justice and Social Control: Contemporary Developments in Australia", (1988) 2 *J Studies Just* 99.

29 Cohen, S, *Visions of Social Control* (2nd edn, 1987).

30 See Senate Standing Committee on Constitutional and Legal Affairs, *National Crime Authority Bill: Report of the Senate Standing Committee on Constitutional and Legal Affairs* (1983).

31 See Corns, C, "Evaluating the National Crime Authority" (1991) *L Institute J* at 829.

4. *Specific Situations of Qualified Privilege in Australian Investigation Practice*

In the early 1980s a fundamental problem facing the Royal Commission into the Activities of the Federated Ship Painters and Dockers Union[32] in its investigation of some sophisticated criminal enterprises connected with the Victorian branch of the Union was;

> ... the complete silence of those involved and affected. Apart from utilising its royal commission powers the Commission turned its attention to making optimal use of a diverse range of other records that were publicly available and might aid its investigators ... [T]he really important feature of the Commission's approach to its task however, rested upon exploitation of the potential of computer technology to store, collate and analyse masses of data collected from these diverse sources.[33]

The Costigan Commission through the use of an open ended approach to the investigation process relying on computer-based "linkage analysis" of criminal associations, along with complex criminal profiling and matching also made possible through computer technology, was able to extend its focus from the misconduct of a few trade union officials, to complex schemes of tax avoidance and evasion, money laundering, corruption, and drug trafficking of significant proportions. The consequent picture of organised crime in Australia which Costigan portrayed was used to justify calls for a more proactive style of crime investigation and policing involving novel institutional structures with complementary specialist powers.[34] Costigan was critical of traditional policing methods which had a limited preventative dimension, and as such, were too reliant on passive and non-interventionist information gathering and analysis. Costigan argued that an appropriately empowered crime commission should target matters and persons involved in those concealed and consensual crimes, rather than await the complaints of individual victims, such as those which initiate more conventional justice intervention. Because of the nature and spread of the crimes concerned, the role of the victim\informant would be far less evident or effective, and therefore reactive police investigations may not even get off the ground. Why should the police await the next crime if patterns of criminality could be identified, followed, and hopefully intercepted?

It is interesting to observe how a new approach to crime investigation, such as that adopted by the Costigan Commission, produced new representations of the crime threat, which in turn fuelled the push towards new investigation agencies and complementary, specialist powers and procedures. The narrower mandates of the new investigation institutions, with their more intrusive but more purpose-directed powers created specific environments of criminal investigation in which both the powers of the investigator and the rights of the suspect should recognise the contextual significance of the particular crime in question. Traditional policing and prosecution agencies within an adversarial

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32 Chaired by Frank Costigan QC.

33 Hogg, R, above n28 at 99–100.

34 Costigan, F, "Control of Organized Crime with Reflections on Sydney" (1986) *Proceedings of the Institute of Criminology* 29 at 10–16.

trial structure[35] are required on the other hand to operate with discretionary and universal powers to investigate individuals without initial or essential regard for the social and political context of nominated classes of offence, offender, or consequent social threat and harm.

Organised crime, corruption, and drug trafficking, now placed in more prominent positions on the crime agenda, are increasingly the concerns of the new investigators, and are examined with the help of specialist information gathering powers possessed by such bodies. The justification for such a trend rests with consideration of threat and harm which have not traditionally motivated conventional investigators. These crime problems are now regarded as requiring investigation technologies, prosecution expertise, and special court presumptions and penalties, unavailable or thought unnecessary for the more commonplace reactive policing styles. For instance, in following the "money trail", crime investigators in the ASC and the NCA are concerned to identify the material products of criminal enterprise. This is beyond the traditional interests of police who accumulate just enough evidence to confirm the individual criminal liability of suspects.

More important to Costigan than the securing of convictions, was the potential to identify the overlap between legitimate finance and criminal enterprise. For this purpose, the criminal investigations by his Commission went well beyond the evidentiary needs of a successful court room prosecution in amassing information useful for civil, administrative and commercial litigation, or wider intelligence-gathering purposes.

The ICAC in particular, has been interested in making non-judicial findings of fact which while sometimes insufficient for, or not appropriate as evidence for criminal conviction,[36] so influence the reputation of the individual under investigation as to interfere with their public profile or commercial future. Such information may not without legislative intervention be constrained by the rules of evidence applying to criminal investigation and trial, in that it may be used as crime "intelligence" and a tool for investigation, but it rarely appears successfully as a legal proof. By avoiding a claim to being justiciable evidence both its source and utility may not need to be revealed in the court-room.

To some extent the "new" institutional and procedural responses to contemporary crime investigation problems in Australia have become driven by the powers which they possessed, and as such are a part of a self-fulfilling prophesy for crime control. The crime threat which was said to be behind these new agencies was the motivation for a re-ordering of crime control priorities, and proposing expanded investigation powers.

The new crime control agenda which emerged along with the development of investigatory powers and procedures adopted the language and perspective on crime and control promoted by these new agencies. Their common development

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35 It is interesting to note that new investigation institutions such as the ICAC, and the ASC rely on procedures which exhibit inquisitorial rather than adversarial characteristics. See Independent Commission Against Corruption, *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison* (1994).

36 See Independent Commission Against Corruption, *Report on Investigation into the Metherell Resignation and Appointment* (1992).

seemed mutually supportive to a point where one was soon seen as a justification for the other. Thus organised crime had to be addressed by a crime commission; organised crime meant a redirection of control resources and required an expansion and specialisation of investigatory powers; the crime commission becomes the essential feature of the new control agenda, and that agenda justifies the use of greater powers and demands the development of the commission.

5. *Challenges to the "Right" to Silence: Legislative Compromise*

During the 1980s the High Court has emphasised that the privilege against self incrimination is not merely a procedural or evidentiary rule but rather is a substantive legal principle;[37] "in effect a constitutional doctrine, applicable to both judicial and non-judicial proceedings".[38] As mentioned previously legislators can, and have modified, such common law privileges. Nevertheless, the general influence of the privilege remains in investigation and trial contexts where legislative qualification would otherwise not apply.

The methods employed to limit the accessibility and impact of the privilege against self-incrimination in Australian investigative practice may be classified under one of two headings:

- where the suspect or witness is offered various immunities, indemnities or undertakings, by prosecuting authorities, in return for being compelled to answer questions or produce documents as requested by the investigation agency concerned,[39] or
- where the usual burden or onus of proof is reversed so that silence may either enable critical inferences to be drawn, or may represent a failure to adequately answer a presumption of fact or guilt.

A. *Use Immunities*

There can be little argument that the information-gathering powers vested in these new agencies present a potential challenge to the rights of suspects, and those under investigation. Qualification of the protections against self-incrimination in particular, and the rights of witnesses before such investigations and subsequent hearings, the nature, and potential, and balance of these investigations and hearings lean far more in the direction of the investigator and prosecutor than would be possible in a conventional criminal trial.

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37 See *Controlled Consultants v Commissioner for Corporate Affairs* (1985) 59 ALJR 254; *Sorby v Commonwealth of Australia* (1983) 46 ALR 237 at 260–1.

38 Corns, C, "The Big Four: Privileges and Indemnities" (unpublished Conference Paper, 1992) at 4.

39 It may be said that this is no difference from the information gathering practices of Royal Commissions. However, the investigation agencies in possession of such powers exist within Australian criminal justice on a more permanent footing than Royal Commissions. Also the terms of reference over which such investigation agencies may range their powers are usually far broader than those typically issued to Royal Commissions.

With the CJC, the NCA, the ICAC and the ASC, reside the power to require a witness to answer questions or produce documents which might tend to incriminate the person in so doing. The rationale for this is that these authorities must be able to investigate where the known facts concerning the individual or company give rise to a suspicion that they are involved in illegitimate, corrupt or fraudulent activity, or are being mismanaged.[40] As these institutions are involved in investigations which are often beyond the particular purpose of criminal prosecutions then the normal protections available to a suspect in a criminal investigation have been viewed by legislators as being not so essential.

The protection against the abuse of these powers, and the interference with a fundamental civilian right is supposed to be contained in various "use immunities" referred to in the Authorities' or Commission's enabling legislation. These immunities exist because successful investigations in these contexts do not always need to rely on an eventual criminal prosecution. For example, the Queensland Criminal Justice Commission (CJC), has the power to abrogate the privilege against self–incrimination through compelling a person to furnish information or to answer a summons to give evidence.[41] Section 3.24 of the *Criminal Justice Act* 1989 (Qld) specifically abrogates the privilege. However, if objection is taken in reliance on a claim of self–incrimination the information produced under compulsion is not admissible against the witness in subsequent civil or criminal proceedings except in charges of contempt against the Commission, or perjury.[42] If no claim of privilege is made then the evidence is admissible against the person in any subsequent proceedings. At most the claim of privilege triggers a "use only" immunity. Evidence derived as a result of the matters subject to the indemnity and not acquired through compulsion, remains admissible.

The lure of successful prosecutions might not be so great for bodies such as the CJC and the ICAC which can rely on the deterrent impact of public hearings, but the NCA sees such results as a measure of its success. Along with the ASC, the NCA has been criticised for not providing evidence sufficient to support convictions in criminal trials. These agencies identify the use immunities as a major impediment in this regard. The Joint Statutory Committee on Corporations and Securities (JSCCS)[43] examined the "use immunity provisions"[44] contained in the ASC Law, and concluded that the "the effective

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40 See Standing Committee of State and Commonwealth Attorneys-General (Eggleston Committee), *Company Law Advisory Committee Report* (1990).

41 *Criminal Justice Act* 1989 (Qld) s69, 74 and 76.

42 Id, s3.24.

43 Parliament of the Commonwealth of Australia, Joint Standing Committee on Corporations and Securities, *Use Immunity Provisions in the Corporations Law and the Australian Securities Commission Law* (1991).

44 The use immunity cited in the Corporations and ASC legislation relates to indemnification against the consequences of giving evidence by making the oral evidence, and in the case of s68(3) of the *ASC Act* the signing of the record and the production of a document , inadmissible in any criminal proceedings. The legislation goes further and indemnifies the person against the use of evidence gained indirectly from "leads" provided by the answers to questions or documents produced to investigators. This is the derivative use immunity.

regulation of the corporate sector may include legislative provisions which vary the established common law rights available to the ordinary citizen".[45]

The Committee recommended that section 579(12) of the Corporations Law, and section 68(3) of the ASC Law be amended to remove the derivative use immunity provisions and that section 68(3) also be amended to remove the use immunity with regard to the fact that a person has produced a document. In addition they recommended that the use immunities should not be available to corporations.

Despite the concerns expressed by the Commonwealth Director of Public Prosecutions (DPP) and the ASC that they are reluctant to bring a prosecution where the evidence may not support its success, Commonwealth legislators have not yet been convinced that such reluctance is well founded on the use immunity. The threat to successful convictions in the criminal courts might not simply be overcome by the removal of use immunities. Further, the failure of prosecutions while immunities remain may be testimony to the appropriateness of civil remedies above criminal proceedings in these situations. Such reservations are echoed in the submission of the Queensland Premier to the Committee on the matter:

> Any decision to abrogate use immunity or derivative use immunity clearly involves a choice between an encroachment on the right to privacy of the individual, on the one hand, and the need to ensure that the Australian Securities Commission is not prejudiced in the pursuit of its regulatory responsibilities, on the other ....[46]

Reservations are further endorsed in the Committee's dissenting report:

> We note with unease the growth in powers given to investigators over the last decade. Their ability to legally tap telephones has been markedly increased. Financial transactions have been opened up to their scrutiny ... The state must look to order and good government but must not intrude unduly on people's rights in so doing. Were a trend to develop of allowing it whatever powers it declared were necessary for the detection of crime, the sort of community we now enjoy would be devalued.[47]

It is intended that the compromise effected through the compulsion to produce evidence, balanced against the use immunities over that evidence when privilege is claimed, may provide at least partial protection if the person subject to the coercive power is subsequently proceeded against in a legal forum.

B. Reverse Burden or Onus of Proof, and Presumptions

To some extent this technique relies on a similar form of qualification to that proposed in the more general abrogation of the privilege under English law. What does differ here is the specific nature of the inference which may be drawn from silence due to the presumptions which may prevail. For example, the requirements to prove particular offences associated with the proceeds of crime may involve presumptions about the sources of pecuniary interests, and

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45 Above n43 at 26.
46 Id at 25.
47 Id at 35.

the motives behind commercial transactions which, if not explained by the accused, will stand as fact.

The ASC and the NCA are involved in, among other matters, investigations which may establish offences under the *Cash Transaction Reports Act* 1988 (Cth) (*CTR Act*). If the transactions in question relate to the proceeds of crime, out of drug trafficking in particular, both the Queensland CJC, and the State Crime Commission in NSW might also employ their investigation powers in order to support prosecutions under the *CTR Act*.

Essential to the offence structure of the *CTR Act* is the "reasonable to conclude" test.[48] This test imposes liability in circumstances where, after determining that the person is a party to two or more transactions, and having regard to other factors:[49]

> it would be reasonable to conclude that the person conducted the transactions in that manner or form for the sole or dominant purpose of ensuring, or attempting to ensure, that the currency involved in the transactions was transferred in a manner and form that: ...
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> iii) would not give rise to a significant cash transaction; or
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> iv) would give rise to an exempt cash transaction.[50]

Thus the trier of fact could arrive at the reasonable conclusion necessary to satisfy the offence merely if the prosecution established the specified transaction, arguably without the need for mens rea to be established. Conclusions as to the purpose for the transaction would be drawn from proof of the transaction in the required context. If the defence failed to otherwise explain the transaction's purpose, or raise the defence of reasonable mistaken belief, if available, then the individual's silence on matters to which he or she is otherwise compelled to respond, may be incriminating.

6. *Divesting of Criminal Investigation, and Jurisdictional Sovereignty*

One of the most significant recent developments in Australian criminal justice is the manner in which traditional agencies of policing, prosecution, and punishment are retreating from, or are having removed from them, traditional functions in the modern crime control agenda. Along with this retreat has been an extensive qualification of the traditional protections offered suspects under investigation. Certain new investigation and prosecution agencies, with enhanced powers and to some extent unfettered by protections of due process, operate in ways which do not recognise the traditional sequences of criminal justice. Investigations may produce evidence which is for purposes other than to support an eventual prosecution. Hearings may proceed as little more than fact-finding processes. Penalty may take the form of public disclosure, adverse media comment and community approbation without judicial determination or

48 For a discussion of the features and dimensions of the test see; Fisse, B and Fraser, D, "Smurfing: Rethinking the Structural Transaction Provisions of the Cash Transaction Reports Act", in Fisse et al above n7 at 173–98.

49 *Cash Transaction Reports Act* 1988 (Cth) s31 (1)(b)(i) and (ii).

50 Id at s31(1)(b).

decisions on guilt. The manner in which these new agencies have changed the function and form of criminal justice merits particular examination, in the light of wider debates such as those recently occurring in the United Kingdom about the fundamentals of criminal justice.

Traditionally, criminal justice in Australia has been conceived as a responsibility of each state or territory. Except in the instance where the Commonwealth has assumed the task of policing those crimes "imported" into Australia, states and territories operate their own criminal jurisdiction, and cross border crime is addressed through mutual assistance or extradition. The wisdom of this has been challenged by those crime threats which are so structured as not to respect the artificial barriers of jurisdictions. Drug trafficking, money laundering, corporate fraud, and tax evasion have demonstrated the need for policing in particular to at least go on a cooperative footing on the part of each state and territory jurisdiction. Such developments have not been without their casualties. Federal law-makers have grabbed control of drug law enforcement through their customs powers. Joint police task forces have been constructed with strict operational limits, determined through compromise and economic expedience. And bodies such as the NCA have faced challenges and constraints from competing state initiatives such as the NSW Crimes Commission (previously the State Drug Crime Commission). Even so, the single jurisdictional approach to law enforcement in Australia is shifting in tandem with the new crime control agenda.

With an expansion of criminal justice horizons within Australia, the political and social pressure to represent and control crime as a significant feature within globalisation is producing a critical phase in the development of criminal investigation. This is a period of shared responsibilities, techniques and endeavour. It is also a time where the motivations behind new crime agendas, and the expectations for criminal investigations are challenging universal statements of rights and due process.

An example of the transformation of criminal investigation parameters from the often jealously maintained jurisdictional limits of state policing to the transnational potentials of international cooperation, is the mutual legal assistance arrangements which the Commonwealth Government is currently negotiating and enjoying.[51] However the jurisdictional dimensions of investigation practice retain a critical influence over the operations of transjurisdictional cooperation. For instance, these mutual assistance initiatives while vastly refining the investigation options available to both state and federal agencies, are still to some extent reliant on the requirements governing the obtaining of evidence locally. In this regard the attitudes towards self-incrimination which prevail within the jurisdiction from which evidence is sought will govern the results and potentials of mutual assistance.

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51 For a discussion of Australia's commitment to criminal investigation through mutual assistance arrangements see; Bannerman, B, "International Aspects of Investigating Complex Commercial Frauds" (1992) *Cth L Bull* 18 at 326–33; Kriz, G, "International Co-operation to Combat Money Laundering: The Nature and Role of Mutual Legal Assistance Treaties" (1992) *Cth L Bull* 18 at 723–34; Stafford, D, "Mutual Legal Assistance in Criminal matters: The Australian Experience" in (1991) *Cth L Bull* 17 at 1384–91.

> [I]n Australia, self incriminating oral evidence compulsorily acquired by corporate regulators cannot [or could not at least in 1991] be used in criminal proceedings against the person giving evidence. Absent a guarantee from the requesting country that the same protection would be granted to the witness in that country there was, and remains, serious concern about the potential scope of co-operation between regulatory agencies. Such is the concern that we [Commonwealth law officers] are now needing to look seriously at schemes which will satisfy the legitimate interests of both regulators and guardians of our criminal justice system. In so doing we will need to consider the proper boundaries of each scheme — the real needs of the criminal justice system — particularly, those related to necessary grounds for refusal of assistance, the protections which must remain and those which may be less relevant to a truly effective regime of international co-operation.[52]

It is in this sense that those protections which will remain alive in local jurisdictions also depend on compatibility with international priorities which are now straining to shift responsibility for criminal investigation well beyond state and Commonwealth jurisdictional concerns, and changing the background against which such concerns are confirmed or ignored.

7. *Transjurisdictional Facilitation in Criminal Investigation*

With the advent of international cooperation in criminal investigation, beyond extradition and the exchange of prisoners, structural opportunities to support new and global crime control agendas have arisen outside the more traditional institutional responses like Interpol. The form taken to enable these structural opportunities has either involved international treaties, such as the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[53] or bilateral or multilateral agreements like the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth.[54] These arrangements have promoted:

- information gathering and enforcement across jurisdictions; and
- the development of networks to assist in the investigation and prosecution of transnational crime.

The new methods employed as a result of the transjurisdictional opportunities now afforded by such bilateral and multilateral arrangements involve the use of both formal and informal channels of investigation. There is nothing new about the informal channels of cooperation and these have operated for many years largely through the goodwill and shared interests of enforcement and investigation agencies. The formal channels however have come to rely on a legislative support framework within friendly states. For example, in Australia, so that its mutual assistance and treaty obligations might be given force, it has been necessary to enact a range of legislation which either directly empowers local institutions and agencies to cooperate when requested

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52 Stafford id at 1389–90.
53 UN document E/CONF 82.15.
54 Commonwealth Secretariat, London, LMM (86)13.

under some arrangement, or expands investigative strategies within Australia to provide a cooperative dimension.[55] In return for such enabling legislation:

> The particular types of assistance which we [Commonwealth law officers] hope to eventually have access to in other countries include various types of information gathering orders, (such as production orders, search and seizure orders in relation to tainted property and monitoring orders), and enforcement in a foreign country of Australian Court orders (such as interim restraining orders, forfeiture orders and pecuniary penalty orders). Subject to some exceptions the various types of assistance will only be available if there is a mutual assistance treaty or arrangement in force with the particular country concerned.[56]

It is the information gathering order which is particularly relevant for our consideration of the tension or the challenge presented to self-incrimination protections by the compulsion to disclose backed up by use immunities. Bannerman talks of monitoring orders which he describes as "one of the most novel features of the 'proceeds' legislation and enables the investigatory agency to obtain access to a 'window' showing the pattern of movements of funds".[57] While domestically there are limitations on the availability of such orders which relate to the nature of the offence under investigation, such limitations internationally may be the movement of funds into a jurisdiction in which such orders are not legislated for.

Whatever the nature of the information orders and their availability which may transform investigation potential in a transnational sense, it would seem that the prevailing concerns for self-incrimination on both sides of the assistance relationship are significant. For instance, in the Commonwealth Scheme as revised, clause 8 holds:

> 1) The competent authorities of the requested country shall in complying with a request under this Scheme use only such measures of compulsion as are available under the laws of that country in respect of criminal matters arising in that country.
>
> 2) Where under the law of the requested country measures of compulsion cannot be applied to any person to take the steps necessary to secure compliance with a request under the Scheme but the person concerned is willing to act voluntarily in compliance or partial compliance with the terms of the request, the competent authorities of the requested country shall make available the necessary facilities.[58]

And more specifically in respect of situations where compulsion comes up against the domestic barrier of protections against self-incrimination, clause 19 states:

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55 Such legislation includes the *Mutual Assistance in Criminal Matters Act* 1987 (Cth); *Proceeds of Crime Act* 1987(Cth); *Cash Transactions Reports Act* 1988 (Cth); *Extradition Act* 1988 (Cth); *Telecommunications (Interception) Amendment Act* 1987 (Cth). For a discussion of this legislative package see; Bannerman, B, above n51 at 326–9.

56 Bannerman, id at 328.

57 Id at 329.

58 As discussed in detail by McClean, D, "Revision of Commonwealth Schemes on Mutual Assistance in the Administration of Justice" (1990) *Cth L Bull* at 1408–18.

1) No person shall be compelled in response to a request under this Scheme to give any evidence in the requested country which he could not be compelled to give

a) in criminal proceedings in that country; or

b) in criminal proceedings in the requested country.

2) For the purposes of this paragraph any reference to giving evidence includes references to answering any question and to producing any document.[59]

Therefore the impact of investigative models which qualify the protection against self-incrimination may be inextricably dependent on a preference for similar qualifications in a friendly jurisdiction, if transnational information flow is to occur to complement Australian investigation priorities. It benefits Australian investigators then, if such investigatory models are exported, favoured or common.

8. *Language of International Responsibility*

In a speech entitled "Australia's fight against crime: national and international initiatives", delivered at the height of Australia's transnational legislative experiment in crime control, the then Commonwealth Attorney-General set the tone for political discourse on such priorities:

> We must move vigorously, both domestically and internationally, to effectively curb these increasingly sophisticated criminal activities. First, we need to review our domestic legislation — both at the Federal and State levels — and if that legislation is inadequate, the defects must be remedied. Second, it is essential that we improve international co-operation in the fight against crime. National frontiers are meaningless to organized criminals who move from one jurisdiction to another in a matter of hours. These same individuals or groups have access to substantial financial resources, which pose an unprecedented challenge to law enforcement agencies both in Australia and overseas. To illustrate this point I need do no more than mention the notorious 'Mr Asia Drug Syndicate' which operated across many national frontiers and involved extremely large sums of money.
>
> It is not just desirable, it is now imperative that co-operation between nations is improved to the maximum extent possible. Otherwise resourceful fugitives will simply escape prosecution by moving around the world.[60]

It is such representations of the nascent crime threat, and the urgency for a novel, transjurisdictional response which have driven both the moves to qualify self-incrimination protections, and to diversify investigation opportunities. However it was also the political rhetoric of new threat\novel response which has in part constructed the Australian Commonwealth Government's arguments over the past two decades for the activation of United Nations covenants on human rights through domestic legislation.[61] While transnational

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59 Ibid.

60 Bowen, L, (1985) 56 *Australian Foreign Affairs Record* at 985–92.

61 For a discussion of the checkered legislative history of successive Federal government initiatives towards the inclusion and ratification of the UN Covenant on Civil and Political Rights through domestic legislation see Caleo, C, "Implications of Australia's Accession

crime has the potential to endanger the "rights" of nations and generations, recently in Australia there has been a recognition, on some sides of politics at least, that the absence of a strong or apparent local legislative base to reflect the aspirations of the United Nations Covenant may make the political rhetoric of rights protection in other contexts somewhat less convincing.

The Australian position on the United Nations Covenant has always been overly conditional.[62] In respect of Article 14 of the Covenant which has direct relevance for the protection against self-incrimination Triggs observes;

> No other state makes a comparably broad reservation [not to amend laws relating to persons convicted of serious criminal offences]. Several states have made specific reservations to specific aspects of Article 14 but no reservation purports to cover a number of Articles as they relate generally to serious criminal offences. Even where states have made reservations to Articles 18, 19, 25 and 26 the reservations do not concern convicted persons...It is in respect of this reservation that Australia comes closest to derogating from the object and purpose of the Covenant, particularly in relation to Article 14. No reason is given for limiting the rights of persons convicted of serious criminal offences as distinct from lesser crimes and no definition is given of the term "serious".[63]

It was said by Australia when ratifying the Covenant, its laws relating to persons convicted of serious criminal offences were generally consistent with the obligations expressed in Articles 14, 18, 19, 25 and 26. That may have been the case in 1980 but it clearly is not so now particularly with regard to the protections against self-incrimination contained in Article 14.

The discussion of international rights in an Australian context has often adopted the language of "balance", not dissimilar to that which prevailed around the time of the recent Criminal Justice Bill in England. The line of argument usually flows that the rights of the victim have been diminished by the offender, and those of future victims stand at risk from further offences. Therefore the rights of individual suspects and offenders might need qualification when balanced against the social harm posed by such victimisation. This logic has been prominent when the bail rights of persons accused of drug related offences have been limited, when the usual conditions of proof have been reversed, and when search, seizure and confiscation conditions have been imposed. The removal of the protection against self-incrimination for suspects of serious criminal offences, and those who might bear witness to these has also been so justified. Rights, no matter how enshrined, become conditional in the context of criminal victimisation. Unfortunately the more immediate balance of rights against investigation efficiency is concealed within the potent and persuasive consideration of the victim. In reality the rights of actual victims may find little protection through investigation and prosecution practice.

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to the First Optional Protocol to the International Covenant of Civil and Political Rights" (1993) 4 *Public LR* at 175–92.

62 See Triggs, G, "Australia's Ratification of the International Covenant on Civil and Political Rights: Endorsement or Repudiation?" (1982) 31 *Int'l Comp LQ* at 278–305.

63 Id at 300.

It is perhaps easier for international treaty obligations to be compromised in Australia under an atmosphere of competing political imperatives. Regarding Australian law, treaties do not have any legal effect in domestic law upon ratification or accession alone.[64] Rights contained in international treaties are not enforceable in local courts unless specific legislation is passed implementing the substantive provisions of the treaties, although as the High Court has deemed Australian courts may look to the terms of an international instrument for guidance.[65] The Covenant has been scheduled in the *Human Right and Equal Opportunities Act* but it is only to this limited extent that Australia has fulfilled its obligations to give effect to the rights recognised in the Covenant. No effective remedy for violation of the declared rights and freedoms is provided and no procedure exists where citizens can have their rights determined by judicial authority.

The contradictions inherent in the federal government generally endorsing the rights as laid down in the Covenant, particularly through the First Optional Protocol on the Covenant which involves the Human Rights Committee in rights violations in Australia, and failing to make these rights enforceable, was identified and criticised by the High Court in *Deitrich:*

> On one view it may seem curious that the Executive Government has seen fit to expose Australia to the potential censure of the Human Rights Committee without endeavouring to ensure that the rights enshrined in the [Covenant] are incorporated into domestic law, but such an approach is clearly permissible.[66]

And further:

> [I]t is incongruous that Australia should adhere to the Covenant containing [Article 14] unless Australian courts recognise the entitlement and Australian governments provide the resources required to carry that entitlement into effect.[67]

In 1973 and 1985–86 when Labor Governments made attempts to entrench the Covenant into domestic law they failed. The debate which surrounded these initiatives was not dissimilar to that which supports jurisdictional sovereignty, or a "balanced" approach to rights and responsibilities in criminal investigation.

From the point of view of the Covenant and of the Human Rights Committee it has to be kept in mind that the guarantees set forth in article 14 are minimum guarantees. Therefore, strict compliance by signatory States is required and a detailed account of the legislative and other measures taken to ensure the full implementation of all the provisions in article 14 is required by the Committee.

Unlike the Universal Declaration of Human Rights, the Covenant includes no general limitation clause designed to respect the rights and freedoms of others or "meeting the just requirements of morality, public order and the general welfare in a democratic society".[68] All legislative and procedural qualifications

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64 *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Bradley v The Commonwealth* (1973) 128 CLR 557; *Simsek v MacPhee* (1982) 148 CLR 636; *Kioa v West* (1985) 159 CLR 550

65 *Deitrich v R* (1992) 109 ALR 385. [See also Mathew, above at 196–7.]

66 Id at 391 per Brennan, Mason and McHugh JJ.

67 Id at 404 per Brennan J.

68 Universal Declaration of Human Rights 1948 Art 29(2).

of these rights, external to the Covenant, need to be appreciated against this unequivocal drafting. The provisions of Article 14(3) are not exhaustive but are the necessary, if not always sufficient, standards of a "fair trial" referred to in 14(1). While being limited to persons accused of a crime, and not necessarily relating to witnesses whose evidence might lead to a criminal charge or trial, the protection against self-incrimination is incontrovertible in the context of the Covenant.[69]

9. *Rights v Results*

Despite the protections offered suspects under the principles of common law, the rules of evidence, and international human rights conventions, recent legislative reform as it effects criminal investigation has demonstrated the supremacy of crime control policy over a due process model of criminal justice. The Australian response to calls for greater information gathering powers for investigation agencies (in principle at least) has been to:

- recognise the failure of traditional policing;
- resist pressure for a general expansion of police power;
- create new investigatory institutions to colonize specialised policing concerns;
- empower these institutions in a manner designed to address specific investigation environments;
- inextricably link new crime agendas and new investigatory institutions with specific new powers, in the context of investigation for purposes beyond the mere exercise of the criminal sanction; and
- open up structures of assistance and channels of investigation which, while cognisant of Australian investigation legislation and practice, operate within a political atmosphere of international imperatives and local compromise.

In 1987 the *Criminal Justice Act* (UK) created the Serious Fraud Office in the United Kingdom. This institutional development was justified using arguments similar to those which supported the establishment of the new investigation agencies in Australia. The Serious Fraud Office has largely assumed the specialist criminal investigation responsibilities of the police, and augments the prosecutorial duties of the Crown Prosecution Service, in matters of serious fraud throughout the United Kingdom.

The enabling legislation for the Serious Fraud Office has adopted the information gathering power model of the new investigators such as the ASC and the NCA; the qualification of witness\suspect protections through specific powers, against particular offence contexts. In fact the legislation takes the process of specialisation somewhat further than the Australian model by sometimes narrowly defining the context within which certain significant coercive powers are to be exercised. For instance, when requiring bank records which may assist in later criminal prosecutions, an order may be issued

69 Interestingly there is no comparable provision in the European Convention.

against a financial institution to produce the required records.[70] It is an offence under the Act not to comply with the order, and the interests of the record keeper are to some extent recognised by the condition that such orders may only be sought under the Director's fiat.

Therefore, along with the more general push from conventional policing and prosecution agencies to limit traditional rights of the suspect\accused, the more distinctive institutional and procedural approach to the development of investigation powers preferred in Australia has found favour in the United Kingdom, in situations where the crime agenda impugns the effectiveness of conventional criminal investigation. As with the investigation of money laundering, and the confiscation of the proceeds of crime in particular, Australian legislative models of institutional and procedural response have had a profound influence over the development of criminal investigation transnationally.[71] All this in the face of international conventions which would protect those privileges now being specifically qualified. One may conclude that the pressures at work to develop new crime and control agendas operate beyond the discourse of international law, or traditional legal principle. It might be conceded for Australian law reform in the area of criminal investigation, however, that qualified recognition of such conventions and principles has endorsed the legislative reluctance to entertain a general abrogation of the right to silence.

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70 *Criminal Justice Act* 1987 (UK) s2(10).
71 See Fisse et al above n7.