



Forbes Flyer

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History reports itself

It is with great sadness that the legal community and community of historians mourns the loss of Emeritus Professor Alex Castles, who died on 1 December 2003 at the age of seventy. At his memorial service, held in Adelaide on 13 December 2003, it quickly became apparent how many lives Professor Castles had touched. Many stories were told that day, and the people who shared their memories of Professor Castles were intent on speaking about the person he was, as much as recounting his remarkable achievements and contributions to Australian history and the law.

Professor Castles is the subject of this edition's "Making History" column. The *Australian Journal of Legal History* has also devoted its latest edition to Professor Castles' career, and the editor recommends this as essential reading as it offers a detailed analysis of his achievements in the field of legal history.

Alex Castles' seminal text *An Australian Legal History*, remains the staple diet of legal historians around the country, more than twenty years after its publication. The rich resource of history presently being written owes much to Professor Castles' work.

This edition of the Forbes Flyer also features extracts from a book recently published by Federation Press, *A History of Criminal Law in New South Wales: The Colonial Period 1788-1900*, by GD Woods.

This book contributes greatly to our knowledge of the development of criminal law in the colonial days, and demonstrates the way in which the law deeply impacted on and influenced the history of New South Wales. Well known events such as the Rum Rebellion, which led to the overthrow of Governor Bligh, are canvassed, together with abstract issues including the origins of fundamental rights in the criminal justice system. The extracts in this edition of the Flyer focus on the issue of the accused's right to silence.

Finally, the Forbes Flyer would like to gratefully acknowledge the generosity of the Maitland Fund, which has recently bestowed a grant to the Francis Forbes Society to assist with the publication of the Dowling Reports. Without grants such as this, many invaluable historical resources would never see the light of day.

Coffee with Alex

(A memory of Emeritus Professor Alex Castles)

By Catherine Douglas

Having coffee with Alex Castles was always invigorating, if a little exhausting. We would meet at Café Bravo, near his home in Norwood, South Australia. I would stand outside waiting for him to arrive, and eventually see him hurrying up the street, coat flapping in the wind, ancient felt hat jammed over his head and hair flying in all directions. He would apologise profusely for being late, explaining that he'd been working on a particularly difficult section of his book until the early hours of morning. Sleep deprivation notwithstanding, he was always ready to talk, and after he bought us both a cappuccino, we would do just that.

The excuse for our meeting would be to discuss my thesis. However, our conversations would range far beyond the confines of my research, as Alex's encyclopaedic knowledge took us down many diverse and varied roads. We discussed countless topics, ranging from the constitutional and legal history of Sarawak, to some new fact he had uncovered in his research about Ned Kelly, or the finer aspects of Australian Rules football. When we eventually began to lend each other our football tickets, I realised that Alex was not just my supervisor, but also a valued friend.

I did not meet Alex until after his retirement from the Adelaide University Law School in 1994. It was my good fortune that he returned to teach a summer school course in legal history. Alex's passion and enthusiasm ignited my own interest in the subject. Over a number of years he began to steer me towards undertaking further studies in legal history, gently chiding me that my employment at the time must have been about as scintillating as a job he once had as a youth, bottling tomato sauce in a Heinz factory.

Alex's wisdom eventually held sway, and when he became one of my PhD supervisors, our conversations took on new dimensions. Despite my only knowing Alex in the twilight of his career, he revealed so much about himself that I felt that I had known him for a lot longer.

Alex was born into a working class family in Victoria, and educated at Scotch College in Melbourne. He graduated from Melbourne University Law School in the 1950s, undertook doctoral research in Chicago, and taught at both Melbourne University and in universities around America. In 1958, he began his long standing association with the University of Adelaide Law School, where he was appointed a professor in 1967, and Bonython Professor of Laws from 1982 until his retirement in 1994.

His academic career was merely one facet of his life. He was, among other things, a journalist, broadcaster, writer, legal consultant, and a widely celebrated historian. His overarching passion was for justice,

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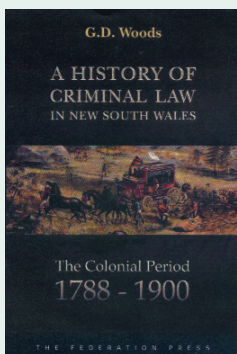
The origins of the right to silence

This issue of the *Forbes Flyer* contains an extract discussing the origins of the accused's legal right to silence, taken from *A History of Criminal Laws in New South Wales: The Colonial Period 1788 to 1900*, by GD Woods. In Mary Gaudron's words (in the Foreword to the book):

Hopefully, the presumption of innocence, the right to silence, and the right of every accused person to a fair trial according to law are now embedded in our criminal jurisprudence. Dr Woods' work demonstrates that that was not always so. It hardly needs to be said that our criminal justice system would be diminished if, to any extent, those rights or the presumption of innocence were to be compromised. An understanding of their historical significance is fundamental to their protection.

Members of the Forbes Society will be interested to note that Woods dates the introduction of the right to silence in Australia to the arrival of Sir Francis Forbes.

From *A History of Criminal Laws in New South Wales: The Colonial Period 1788 to 1900*, by GD Woods, Chapter 26 "The Accused as Witness: The 'Comment' Issue", pages 373–386



G.B. Simpson's amendment of 1891 allowing the accused to give evidence had a profound impact. In most of the common law jurisdictions it had become apparent in the latter part of the

19th century that the ancient rule preventing the accused from giving sworn evidence in his own defence was no longer reasonable. Several of the Antipodean colonies abandoned the rule before the Imperial Parliament did so: South Australia was first in 1882,¹ and New Zealand in 1889.² The brief New South Wales provision achieving this result was s6 of the *Criminal Law and Evidence Amendment Act 1891*³ ... Its effect was, on its face, simple: that the accused was to be henceforward *competent* but not *compellable* to give sworn evidence at his trial for any indictable offence, including felony.

This was a revolutionary change in trial procedure for major criminal cases. ...

When the 1891 Act was passed there was immediate trouble and uncertainty about its effect in one vital regard: since the accused was now entitled in law to give evidence if prosecuted for felony, could his failure to do so count against him? The South Australian and New Zealand statutes of 1882 and 1889 respectively had made it clear that, in those jurisdictions, no inference was to be drawn and no comment was to be permitted on failure to give evidence.⁴ In New South Wales a divergence of practice between various trial judges became apparent; but on appeal the opinion came to prevail - contrary to the South Australian and New Zealand law and practice - that such an inference could be drawn, and that the failure to testify might be the subject of comment to the jury.

Initially after 1891, several New South Welsh judges took differing approaches at the trial level on the "comment" issue. The question attracted appellate

attention in the case of *R. v. Kops*⁵ in 1893 [where the Privy Council ultimately upheld that comment on an accused's silence was reasonable]. ...

On 24 August 1898 the *Sydney Morning Herald* reported observations by Judge Murray of the District Court regarding comment on failure of an accused to give evidence: he said that practices varied - particularly his own practice and that of members of the Supreme Court⁶ when conducting trials - and that parliament should attend to clarification of the law. Shortly after this, on 20 September 1898, [R.D. Meagher M.L.A.] moved a Bill - the Accused Persons' Evidence Bill - aimed at reversing in New South Wales the effect of the decision in *R. v. Kops*.

The Legislative Assembly passed Meagher's 1898 Bill.

The Hon. H.C. Dangar accused those in favour of the Bill of "a very pernicious sympathy ... with criminals",⁷ but the reversal of the Kops decision was passed by the Council, and duly became law on

Footnotes differ from original

¹ 45 & 46 Vict. No. 245 (1882) (South Australia).

² *New Zealand Criminal Evidence Act 1889*, Act No. 16.

³ 55 Vict. No. 5 (1891).

⁴ The South Australian statute said that "no presumption of guilt shall be made from the fact of such person electing not to give evidence": the

New Zealand statute said "If a person charged with an offence shall refrain from giving evidence, such person shall not be prejudiced thereby, and no comment adverse to the person charged shall be allowed to be made thereon". Cited by Innes J in *R. v. Kops* (1893) 14 N.S.W.L.R. 150 at 196; 10 W.N. (N.S.W.) 19 at 29, 30.

⁵ *R. v. Kops* (1893) 14 N.S.W.L.R. 150.

⁶ C.E.R. Murray was an intellectually well equipped

District Court judge who had no difficulty regarding himself as qualified to differ from the Supreme Court on a point of criminal law or practice. He had been a brilliant undergraduate at Sydney University, contending with the young Samuel Griffith for the various prizes in Classics, Physics and Mathematics: H.T.E. Holt, *A Court Rises*, 1976, p. 99.

⁷ N.S.W.P.D. (L.C.), 20 October 1898, p.1632

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4 November 1898 as the *Accused Persons' Evidence Act*. Its operative provision was that: "It shall not be lawful to comment at the trial of any person upon the fact that he has refrained from giving evidence on oath on his own behalf". The 1898 law was an emphatic assertion that, at the end of the colonial period, the nature of the criminal trial at common law, as interpreted in New South Wales, was unequivocally accusatorial. Any inquisitorial component had been extirpated. The committal was accusatorial. At trial, the onus of proof was on the prosecutor; to obtain a conviction beyond reasonable doubt he was obliged to produce compelling independent proof - he could not force it from the mouth of the accused. This represented the law and governed trial practice in New South Wales for almost a century.⁸

In 1995, the subject being scarcely raised or discussed within the legal profession, the 1898 amendment was repealed and the *Kops* decision was apparently revived in s20(2) of the *Evidence Act*: "The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence". The *Evidence Act* 1995 was enacted as part of what was intended by various of the cooperating governments in Australia to be a code for the law of evidence, supposedly to be applicable in all jurisdictions by virtue of a coordinated scheme of legislation.

The drafting of s20 may have been influenced by the reasoning of the High Court in *Weissensteiner v. R.* (1993),⁹ a then recent decision based on the law of Queensland rather than of New South Wales. *Weissensteiner* was a classic case of circumstantial evidence: several people had disappeared; they were associates of the accused, who had come into possession of their yacht and certain of their possessions. The accused gave various explanations of these matters, and various conflicting versions of where the disappeared ones had gone. No body was found. The trial judge directed the jury that they could have regard to the fact that the accused had not given evidence, and could draw certain adverse

inferences therefrom. In upholding a conviction for murder, the High Court in *Weissensteiner v. R.* applied the reasoning of the majority in *R. v. Kops*, making no reference to the later legislative history of that principle in New South Wales.

The apparent revival of *Kops* in New South Wales law in 1995 thus came about in a most circuitous fashion. The *Weissensteiner*¹⁰ decision was taken up in the Evidence Code review being conducted by the Commonwealth and other cooperating governments, and when that statute was considered by the New South Wales parliament in 1995, there was no discussion of the history of the matter which had involved so much agitation and difficulty in the 1890s. However, the problems and objections put by Reid and others to the parliament in 1898 surfaced once again very quickly in relation to the 1995 version of the *Kops* principle. In a series of decisions in the New South Wales Court of Criminal Appeal between 1995 and 1999, s20 was given an expansive effect and judges were allowed a wide scope to comment on failure of the accused to give evidence, just as some judges had between 1891 and 1898.

High Court decisions in 2000 and 2001¹¹ confined to very unusual circumstantial cases (like *Weissensteiner*) room for "comment" on failure by an accused to provide an explanation for evidence against him. Comment was not to be allowed in the generality of criminal cases.

These decisions involved important arguments about the nature of the criminal trial at common law. By 2000, indeed by 1898, it was well established that the adjudication of criminal guilt was essentially adversarial or accusatorial, rather than inquisitorial. This is the antithesis which was apparent in the 1898 debate, particularly in the opposing contributions of Sir Normand McLaurin and Dr Cullen.

Some Historical Argument

In the common law world, arguments based on history can have a particular

potency. Common law legal reasoning is founded on the binding effect of direct precedent, and analogy and history are allowed a persuasive effect. If a relevant principle can be described as "ancient and venerable" it may possibly have a greater impact in argument than if it can be said to be merely a "recent invention". In the High Court case of *Azzopardi v. R.* (2001), this consideration was brought into play as a result of attention given to recent studies by Helmholz, Langbein and others revising scholarship on the subject of the origins of the right to silence. ...

The conclusion reached by Justice McHugh [the dissenting judge in *Azzopardi*] was that:

It is now clear that a right to silence, in the modern sense, was the invention of lawyers in the nineteenth and twentieth centuries. Certainly, it is impossible to contend that the common law recognised a general "right to silence" before the middle of the nineteenth century.¹²

The majority judgment in *Azzopardi* sidestepped the historical argument as to the antiquity or recency of the right to silence, saying that:

The history of the common law concerning the immunity from self-incrimination and the "right to silence" has taken a meandering course over many centuries . . . Whilst English and local legal history are undoubtedly of much interest, they do not, in our view, dictate the emerging law on the subject . . . [Over the last century] the accusatorial character of the criminal trial has become deeply embedded in the common law of Australia, whatever that law might earlier have provided.¹³

The decision of the majority in *Azzopardi* led to a result resembling that produced by the 1898 statute, and limited "comment". Yet the legal history agitated by Justice McHugh remains at least interesting. It is Anglo-American historical

⁸ After 1898 the terms of the *Accused Persons' Evidence Act* were incorporated into s. 407 of the *Crimes Act* 1900.

⁹ *Weissensteiner v. R.* (1993) 178 C.L.R. 217.

¹⁰ *Weissensteiner v. R.* (1993) 178 C.L.R. 217 was considered in a Canadian case of *R. v. Noble* (1997)

146 D.L.R. (4th) 385; there a Full Bench of the Supreme Court of Canada declined, by a narrow majority, to follow the Australian precedent. The division in the judgments in *Noble* reflects the division of the New South Wales Supreme Court a century before in *R. v. Kops*.

¹¹ *RPS v. R.* (2000) 199 C.L.R. 620; *Azzopardi v. R.* (2001) 205 C.L.R. 50.

¹² Per McHugh J (dissenting) in *Azzopardi v. R.* (2001) 205, C.L.R. 50, at 101.

¹³ *Ibid.*, at 65.

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research upon which the "revisionist" view of Helmholtz, Langbein and others is based. The research by Kercher into New South Wales cases after 1824 was, of course, not mentioned in the revisionist studies, nor was it available to Justice McHugh in *Azzopardi*. When one looks at this material, the revisionist conclusions about the history of the "right to silence" must be somewhat modified.

The essential revisionist argument is this:

1. There could not have been a right to silence from the 17th century, because the accused could not give sworn evidence, and he could not have a lawyer. All he could do was to attempt to defend himself by answering the prosecution evidence unsworn, in his own voice. A right to silence in those circumstances was an absurdity, because silence meant forensic suicide.
2. From 1555 until 1848 (1850 in New South Wales) trial on indictment was preceded by a committal before justices of the peace at which all relevant parties, including the suspect, were "examined" - that is, asked questions. A written deposition of such interrogations was supposed to be kept and provided in due course for use at trial. Unsworn confessions or admissions produced in this essentially inquisitorial fashion could be put into evidence against an accused at trial.
3. Not only was the committal (and hence by effect the trial) essentially inquisitorial until Sir John Jervis' Act of the mid-19th century required a caution: even if there had been a right to silence, there was no practical way for it to be enforced because until 1836 (1840 in New South Wales) there was no statutory right to counsel.

What this adds up to, revisionists claim, is that to the extent that the "right to silence" exists, it is a "recent invention", rather than an "ancient and venerable" right.

This thesis encounters some difficulties in the New South Wales experience. Let us turn to the argument regarding

committals. Justice McHugh in *Azzopardi* accepted the revisionist scholarship as justifying a conclusion that

Until 1848, [1850 in New South Wales] the committal stage of criminal proceedings was plainly inquisitorial. The committal stage was inconsistent with a privilege against self-incrimination.¹⁴

However, in New South Wales the inquisitorial committal certainly did not continue up to 1848 (or 1850). In 1834, Chief Justice Forbes dealt with a Sydney case¹⁵ which involved the presentation at trial of admissions made before committing justices of the peace. He allowed the evidence because "due caution had been given to the prisoner not to say anything which might criminate him". This clearly means that well before the Jervis Acts there was a practice that at committal a suspect was to be cautioned that he need not speak if it would incriminate him. A 1980 study of the Jervis Acts by Freestone and Richardson cites a number of English cases to similar effect as *R. v. Vials* in New South Wales.¹⁶ A fair conclusion may be that the practice of cautioning a suspect at committal that he need not speak to incriminate himself was established both in colonial and English law for a substantial period before Sir John Jervis' Acts. In England, this might stretch back into the 18th century, because the decision in *Warickshall* (1783)¹⁷ excluding a confession at committal on the ground of an inducement certainly points in that direction.

In New South Wales the situation is more clear cut. Between 1788 and the arrival of Forbes in 1824, committing justices of the peace had never heard of the decision in *R. v. Warickshall*. They conducted themselves as vigorous inquisitors, not only expecting answers from suspects but sometimes having them flogged if answers were not forthcoming. For example, the *Gazette* of 17 November 1805 reveals a case of *Stones* from which it is apparent that flogging as part of the judicial process was not secret. It is no surprise that the bench engaged in this openly reported conduct included the pious Reverend Marsden.

As related in earlier chapters, it was Forbes' arrival, and the emphasis he put on juristic propriety after 1824 which brought - or began to bring - an end to the old practices of the magistrates. Forbes was not immediately successful. Even in 1831, after *R. v. Stack and Hand* (1824)¹⁸ and after the revelations of 1825, Mr Justice John Stephen was forced to exclude a confession which had been induced from A by the justices of the peace ordering that B be flogged for encouragement: the report of *R. v. Hopkins* said that "The learned judge summed up on the incompetency of the testimony received by the Magistrates".¹⁹ Nonetheless, in contrast with the situation in England, there is in New South Wales a clear point from which it may be said that the development of a "right to silence" can be dated: that is, the arrival of Forbes. The atrocious behaviour of the magistrates revealed in the Dr Douglass case of 1825 no doubt concentrated Forbes' mind on the issue. Of course, the justices of the peace in England were not necessarily above bullying tactics. Referring particularly to the administration of the game laws,

Henry Brougham, in the course of his famous six-hour speech on law reform in 1828, reserved his most severe invective for the justices - "there is not a worse constituted tribunal on the face of the earth, not even that of the Turkish Cadi . . . I mean a bench or brace of sporting justices".²⁰

There can be no doubt that for at least several centuries after the committal statute of 1555 requiring "examination", the English committal interrogation was at odds with the notion of a right to silence for criminal suspects. However, a further central argument of the revisionists is that the absence of counsel at trial meant that the accused (who could not speak in the trial on oath) must in reality either speak unsworn or be convicted and possibly hanged: any "right to silence" in these circumstances was meaningless. Again, this is clearly true, as J.F. Stephen spelt out as early as 1883.²¹ However, it cannot be a basis for concluding that there was no right to

¹⁴ Per McHugh J. in *Azzopardi v. R.* (2001) 205 C.L.R. 50 at 96, 97.

¹⁵ *R. v. Vials* [1834] K.R.

¹⁶ D. Freestone and J.C. Richardson, "The Making of English Criminal Law: (7) Sir John Jervis and his Acts" [1980] *Crim L.R.* 5 at 8.

¹⁷ *R. v. Warickshall* (1783) 1 Leach 263.

¹⁸ *R. v. Stack and Hand* [1824] K.R.

¹⁹ *R. v. Hopkins* [1831] K.R.

²⁰ Freestone and Richardson, *op. cit.*, at 5.

²¹ J.F. Stephen, *History*, vol. 1, p. 440.

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silence in the modern sense until the 19th century.²²

It was not until 1836 that a strict legal right to have counsel was granted to a person accused of felony, but in reality the judges had as a matter of practice and discretion allowed it long before then, indeed early in the 1700s. In 1758 Lord Mansfield, while on circuit to the Lancaster Assizes, wrote a letter to a colleague saying that in his criminal list "I think I had not a single Trial without Counsel on both sides".²³ Such a proportion of represented accused was presumably exceptional even on the Assize Circuit. It was certainly very exceptional in London. The great majority of those who arrived in Sydney as transportees between 1788 and 1800 had not been legally represented in their trials at the Old Bailey and elsewhere. Nonetheless, the likely effect of the increasing presence of defence counsel in English criminal courts during the 18th century would have been to put critical attention on the work of justices of the peace in committal proceedings. One may realistically surmise that as counsel briefed to appear at trial came more frequently to examine the methods of committing justices, there must increasingly have been a realisation of the unfairness involved in "grilling" suspects, threatening adverse consequences and otherwise compelling them to admit guilt. Such realisation led, no doubt, to arguments about admissibility such as in *R. v. Warickshall* (1783). A surmise along these lines as to what happened in England is consistent with Forbes' experience in Sydney. He was profoundly shocked by the revelations in 1825 that the magistrates of Sydney had, virtually since 1788, conducted themselves in a fashion even more excessive than that which was to prompt Lord Brougham, only three years later, to describe justices of rural England in vitriolic terms.

The effect of such analysis in relation to the origin of the right to silence is this: the right to silence in any of its aspects did not exist in the everyday courts of England between 1555 and 1783. Probably sometime in the three or four decades after 1783 the inquisitorial component of the committal process abated, and various elements of what we now call the right to silence crystallised. On the basis of what is currently known, one cannot be precise.²⁴ However, the crystallisation of the modern right to silence certainly cannot be put at so late a date as 1848 or 1850. In New South Wales, litigation in 1837 demonstrates this. In *Ex parte Ingless, in re Wilson*,²⁵ a magistrate was sued for assault. In a context which clearly covered the criminal law, "Acting Chief Justice [Dowling] said that it is a well-known rule in British Law, that no person is bound to say anything that will criminate himself". This was generally consistent with the previously cited decisions in *R. v. Vials* (1834), *R. v. Hopkins* (1831), *R. v. Stephenson* (1828) and *R. v. Stack and Hand* (1824).

Justice McHugh may be said to be rather too strong in asserting in *Azzopardi v. R.* that the right to silence was the "invention" of lawyers in the 19th and 20th centuries.²⁶

A legal principle against self-incrimination would not have been "well-known" to Dowling in 1837 if it had been a recent invention. The notion of 19th century invention of a right to silence ignores centuries of important English history: the historical fact and recollection of tortures, such as the rack, which were not abandoned until 1640;²⁷ the white heat of popular resentment caused by answers compelled from people by the "ex officio oath" in the Court of High Commission; the same and equally lasting resentments provoked by the procedures of the Court of Star

Chamber; the reference in the Bill of Rights 1688 to the misdoings of the Courts of High Commission and Star Chamber as one of the justifications for the "Glorious Revolution"; and the revulsion of the 18th century courts, led by Chief Justice Holt, against punishment of witches on the basis of compelled confessions.²⁸ The persistence of common memory of such historical events made it not unnatural for English lawyers, and for writers such as Wigmore and Holdsworth, to have regarded the right of silence as being of venerable origin. The modern revisionist school, reflected in Helmholz's 1997 publication, is certainly based on more detailed research into historical and court records (particularly from the 18th century) than were available to Wigmore and Holdsworth, but it is out of sympathy with English historical consciousness.

... The Bill of Rights of 1688 did not mention a "right to silence", but it did the next best thing: it is implicit in the declaration against "the late Court of Commissioners for Ecclesiastical Causes" as "illegal and pernicious" that the parliament had decisively set its face against any reversion to the practices of the Star Chamber and High Commission. The Bill of Rights remains law in New South Wales to this day.²⁹

Whether the modern version of the right to silence should be dated from 1783 (the *Warickshall* decision) or from a few decades later, it did not spring into common law jurisprudence as a novelty, fully formed, in 1848/1850. It was not "invented". Of course, it is very difficult from Australia to make a reliable judgment of American studies of ancient English legal practices, and especially to compare and contrast these with mediaeval European doctrines and practices. It may be inferred that the peculiar complexities involved in teasing out the origins of the right to silence led

²² As per McHugh J. in *Azzopardi v. R.* (2001) 205 C.L.R. 50 at 101.

²³ Cited by J. Langbein in Helmholz et al., op. cit., p. 241.

²⁴ The crystallisation of a "right to silence" has been interpreted as closely related to the development of the adversary trial. Landsman (1990) argues that "The 1760s and 1770s were an extraordinary period in the history of the English courts. It was the time when the potential of adversary procedure was realised. Blackstone captured something of the sentiment of the era in his wildly popular *Commentaries*, published

between 1765 and 1769. There he presented the court system as adversarial in many of its attributes, and tied its contentious aspects to vital liberty interests". S. Landsman, "The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England" (1990) 75 *Cornell Law Review* 497 at 591. Cairns (1998) has warned that Langbein is guilty of "an adversarial bias in the scholarship that simplifies the emergence of the modern trial and gives the impression of an inevitable development rushing to completion". D.J.A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865*, 1998, p. 36.

²⁵ [1837] K.R.

²⁶ *Azzopardi v. R.* (2001) 205 C.L.R. 50 at 101.

²⁷ J. Heath, *Torture and English Law: An Administrative and Legal History from the Plantagenets to the Stuarts*, 1982; *The Jurist*, vol. 1, 1837, p. 562.

²⁸ Hale, *History of the Pleas of the Crown*, 1736, vol. 1, pp. 694, 695; J.F. Stephen, *History* vol. 2, p. 432; C. Mackay, *Extraordinary Popular Delusions and the Madness of Crowds*, 1995.

²⁹ *Imperial Acts Application Act* 1969, S6.

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the majority judges of the Australian High Court in *Azzopardi v. R.* to eschew the effort. Nonetheless, the question of the origin of the "right to silence" remains one of distinct historical interest, and it may yet again be of practical forensic importance.

The apparent paradoxes identified by Justice McHugh in *Azzopardi* may be better understood if it is kept in mind that, during the whole period between the Tudors and Lord Jervis, English society remained profoundly stratified. The characters who appear in the State Trials Reports were usually wealthy or well connected recalcitrants, as were those featuring in "high profile" ecclesiastical proceedings of one kind or another. The characters who went to Newgate or Tyburn via the Old Bailey after a felony trial, or who were strung up from an oak tree after a sanguinary Assize, were generally from the lower classes. English criminal law and procedure flowed in two quite different streams, as the *Treason Act* of 1696 made clear.³⁰ The ordinary criminal trial before then was procedurally brutish and short

by modern standards, the accused being denied legal representation or even the most basic procedural rights, such as the right to call witnesses.³¹ It remained procedurally primitive for more than a century after 1696. By contrast, after 1696, the well bred notable accused of political or religious treason could have a number of procedural advantages denied to the alleged felon, particularly the right to counsel, the right to a copy of the indictment, and the right to call witnesses on oath.

What could be more natural, given the English class structure, and its peculiar expression in two streams of criminal law procedure which did not fully coalesce until the 19th century, that a right to silence should have been more readily recognised in the one stream than in the other? This may go some way towards explaining how it was that the everyday criminal courts, unreported, dealing with the vile and outcast, continued for most of the 18th century to be inquisitorial both at committal and at trial, while the class of person who might actually come to read the State Trials Reports or reports

of the speeches of famous counsel would have a notion of a right to silence in one sense or another, at least for the benefit of the eccentric or recalcitrant well bred. This possibly explains the puzzlement expressed by Wigmore and Holdsworth on this subject.³²

In any event, whichever historical analysis of the English experience is preferred - indeed, whether or not one goes back into English history at all before 1788 - by the end of the colonial period the right to silence was firmly established in New South Wales criminal courts as a fundamental aspect of an accusatorial system of adversary trial. Nothing made this clearer than the "comment" prohibition legislated in the *Accused Person's Evidence Act* 1898.

³⁰ *Treason Act*, 7 & 8 Will. III c. 3 (1696).

³¹ J.F. Stephen, *History*, vol. 1, pp. 350, 416, 417.

³² As discussed by McHugh J. in *Azzopardi v. R.* (2001) 205 C.L.R. 50 at 92, 93.

A History of Criminal Laws in New South Wales: The Colonial Period 1788 to 1900, by GD Woods (2002, ISBN 1862874395, HB, 480pp, rrp \$69.50), was published by The Federation Press. Other related books published by The Federation Press include:

- *Uniform Evidence Law: Text & Essential Cases*, by Peter Bayne (2003, ISBN 1862874581, PB, 656pp, rrp \$77.00)
- *Criminal Laws New South Wales*, 3rd edition, by David Brown et al (2001, ISBN 1862873852, PB, 1548pp, rrp \$110.00)
- *Sir Francis Forbes: First Chief Justice of New South Wales 1823-1837*, by JM Bennett (2001, ISBN 1862874085, HB, 192pp, rrp \$49.50)
- *Sir James Dowling: Second Chief Justice of New South Wales 1837-1844*, by JM Bennett (2001, ISBN 1862873917, HB, 232pp, rrp \$49.50)
- *Reminiscences of a Colonial Judge*, by James Sheen Dowling, edited by Anthony Dowling (1996, ISBN 1862871752, HB, 240pp, rrp \$39.95)
- *Debt, Seduction and Other Disasters: the Birth of Civil Law in Convict New South Wales*, by Bruce Kercher (1996, ISBN 1862872007, PB, 260pp, rrp \$27.44).

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befitting his widely ascribed title of “democrat”. Alex’s involvement on a multitude of committees saw that he had ample opportunities to ensure that justice was done, whether it was through his work on the Law Reform Commission, or achieving a fair deal for the caretakers of the Adelaide University Law School.

His involvement with the media was one of the achievements of which he was most proud. His interest in journalism was first realised when he was a student at university, and he went on to become a contributor to *The Sun* and *The Age*. In Adelaide, he at one time wrote a regular column for the *Sunday Mail*, and was a familiar face when comment was needed about constitutional and electoral issues, both in the print media and on television. Besides contributing his legal expertise, he also strove to ensure that the institution of the media itself remained free. This is typified by Alex giving his services to the editor of the Adelaide paper, *The News*, who had been threatened with prosecution for criminal libel as result of comments made about the infamous Rupert Maxwell Stuart case.

Alex’s enduring legacy, however, is in the body of work published in his capacity as a legal historian. His book, *An Australian Legal History*, was first printed in 1982, and viewed Australia’s legal history and laws from a unique Australian vantage. Before this the predominant view was to treat Australia’s laws as a mere sub-set of English laws. It is not too high an accolade to credit Alex as being the main founder of legal history in Australia. His work has done much to foster the widespread teaching of legal history as a separate subject in universities around the nation.

Alex continued to write passionately until the time of his death, his most recent publication being a collaborative project with the Malaysian Government in producing *A Source Book on Malaysian Constitutional Law*. But perhaps more than his professional work, those who knew Alex will remember him for his ability to discourse on virtually any subject. His propensity to talk about anything and everything for hours on end will never be forgotten, as that was an integral part of the “essence” of Alex.

At the end of our coffee sessions my cappuccino would be long gone, but his would remain, cold and deflated. He would suddenly realise that he had been too busy talking to drink it, and would swill it in one swift gulp. We would get up to leave, but then he would remember something else he wanted to tell me. With a gleam in his eye, away he would go again, and I would begin to wonder if our conversation would ever end.

His death at the age of seventy has come as a shock. Although he was retired, he remained as active as ever, and was undertaking numerous projects, including his research and writing on Ned Kelly (which will be published posthumously). His vitality, eclectic knowledge, enthusiasm and passion never waned, and he touched the lives of many people from different walks of life. We will miss him.

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