

CRIMINAL LAW JOURNAL

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EDITORIAL

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ARTICLES

THE PRIVILEGE OF SILENCE AND THE PERSISTENT RISK OF SELF-INCRIMINATION: PART II

David Hamer

In its most recent decisions the High Court has laid down three requirements for an adverse inference from the accused's failure to testify to be open. First, the expected exculpatory testimony should concern facts that are additional to the prosecution case. Secondly, they should be facts that the accused has peculiar knowledge of. And thirdly, the inference is only open where there is no direct prosecution evidence. The first two of these requirements are found to also have some support in other jurisdictions, and can be understood as providing some guarantee of genuine probative value. However, the third requirement has no clear rationale, and appears unique to the High Court. Even where these requirements are satisfied, the High Court has imposed further restrictions on the comments that the trial judge may make about the inference. These are inconsistent with the logic of the inference, and preclude the trial judge from giving the jury sensible guidance on its operation200

APPLYING *SWAFFIELD*: COVERTLY OBTAINED STATEMENTS AND THE PUBLIC POLICY DISCRETION

Andrew Palmer

In *R v Swaffield; Pavic v R* (1998) 192 CLR 159, the High Court held that a confession which had been actively elicited by the police from a suspect, who had previously exercised his or her right to silence, should be excluded on public policy grounds. Beyond that narrow factual situation, however, the decision provided very little guidance as to the acceptability of covert methods of obtaining confessional material. In the six years since *Swaffield*, intermediate appellate courts and trial judges have had to grapple with a much wider range of investigative methods.217

CODIFICATION OF THE CRIMINAL LAW

Matthew Goode

This article is an edited version of a paper delivered to a conference convened by the Irish Law Reform Commission on the question of the desirability of the codification of the criminal law generally, and the codification of the general part of the criminal law in particular. It rehearses previous accounts by the author of the Model Criminal Code Officers' Committee (MCCOC) process in Australia and argues why codification of the criminal law should replace the current ad hoc mix of statutory or common criminal law. Particular attention is paid to (a) the politics of criminal law reform and (b) the importance of teamwork and collaboration with Parliamentary Counsel in the task.....226

EXCESSIVE FORCE USED IN MAKING AN ARREST: DOES IT MAKE THE ARREST IP SO FACTO UNLAWFUL?

Dan Meagher

The purpose of this article is to consider whether or not the use of excessive force in effecting an arrest makes the arrest ipso facto unlawful at common law. With a dearth of appellate court authority on point in either Australia or the United Kingdom, the question is presently open. It is my argument that as force is not a minimum condition of an arrest, its excessive use will not, therefore, make unlawful an otherwise lawful arrest. This conclusion is a matter of some import. It exposes an arrester to civil and possibly even criminal liability for assault but not to an action for false imprisonment. It may also have *practical* repercussions for the possible discretionary exclusion of evidence on public policy grounds. In theory, it should not matter whether excessive force made an arrest unlawful or not, for the public policy discretion permits a judge to exclude evidence illegally or *improperly* obtained. But common sense suggests that a judge may not be so likely to exclude evidence when the relevant conduct amounts only to police impropriety not illegality237

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