



19 February 2010

SUPPLEMENTARY LEGAL CONSULTATION ISSUE ADVERSE INFERENCE FROM DEFENDANT'S FAILURE TO GIVE EVIDENCE

INTRODUCTION

1. In the Criminal Procedure (Simplification) Project paper dated 21 December 2009 (at paragraph 227) we indicated that we would consult on possible legislative reform to codify the law about comment that may be made and inferences that may be drawn from failure of a defendant to give evidence.
2. The Criminal Procedure (Simplification) Project proposes that a Judge or prosecutor may invite the jury to draw such inference about the guilt of the defendant as is proper in the circumstances from his or her failure to identify issues in dispute before trial.
3. Some preliminary feedback on this proposal suggested that, if such a law were enacted, a statutory provision that allows a similar inference to be drawn from a defendant's silence at trial should be considered.
4. We have concluded that, as such reform is not necessary for the purposes of the Criminal Procedure (Simplification) Project, it be considered as part of the review of the Evidence Act 2006.

BACKGROUND

5. Section 32 of the Evidence Act 2006 provides that a fact-finder cannot be invited to infer guilt from a defendant's silence before trial¹. Section 33 of the Evidence Act provides that in a criminal proceeding no person other than the defendant or the defendant's counsel or the Judge may comment on the fact that the defendant did not give evidence at his or her trial. In addition, section 67(5) of the Summary Proceedings Act provides that an informant shall not make any adverse comment if a defendant refrains from giving evidence².

¹ The Criminal Simplification project proposes repeal of the section 32(1)(b) Evidence Act 2006 prohibition on inviting the fact finder to draw an inference as to guilt from failure to disclose a defence before trial, in light of the proposed requirement for the defence to disclose issues in dispute before trial.

² The Criminal Simplification project proposes repeal of the prohibition in section 67(5) and 366 (2) Crimes Act on adverse comment on a failure of a defendant to call a spouse to give evidence.

Not Government policy

6. A number of New Zealand Bill of Rights Act 1990 (NZBORA) provisions are relevant. Section 23(4) provides the right of arrested and detained persons to refrain from making a statement. Section 25(c) provides the right to be presumed innocent until proved guilty according to law, and section 25(d) specifies the right not to be compelled to be a witness or to confess guilt.
7. New Zealand and overseas courts have held that it is not contrary to those rights for a fact-finder to draw a logical inference from a defendant's failure to give evidence in circumstances when he or she would be expected to do so.
8. In *Trompert v Police*³ the NZ Court of Appeal adopted the reasoning of Adams J in *Purdie v Maxwell*⁴ that where a prima facie case is established, the court is entitled to take into account the failure of the accused to give or call evidence where such evidence could provide the explanation that the accused might be expected to give if he or she were innocent.
9. *Trompert* was decided prior to the enactment of NZBORA. Subsequent to its enactment the Court of Appeal has reaffirmed the applicability of the *Trompert* reasoning: see *R v Butcher*⁵, where Cooke P noted that the law "certainly allows an inference adverse to an accused to be drawn if he remains silent at a trial in the face of evidence pointing to his guilt".
10. Further, the Court of Appeal stated in *R v Hines(No.3)*⁶:

Silence is evidence of nothing. It is incapable of proving or disproving a fact. If there is a gap in the evidence it cannot be filled by drawing an inference from the accused not giving evidence. Similarly it must be made crystal clear that silence from an accused can never be relied on as establishing guilt so as to warrant neglecting assessment of the whole of the evidence presented. On the other hand, in the assessment process, in appropriate circumstances, the evidence tending to prove guilt may be accorded greater weight by an inference drawn from the absence of any answer or explanation from the accused.

11. The Court of Appeal has also held that the availability of inferences from an accused's election not to give or call evidence does not impinge upon the right in s23 of NZBORA to refrain from making a statement. In *R v Clarke*⁷ the Court of Appeal held:

The existence of circumstances from which an adverse inference may be drawn does not amount to an involuntary statement for the purposes of s 23 of the New Zealand Bill of Rights Act. It cannot be said to give rise to any presumption contrary to the provisions of s 25 of that Act, nor can it properly be said to amount to a compulsion to give evidence.

12. Subsequent to *Clarke*, it was argued before the Court of Appeal that the availability of the same inference contravened the right against self incrimination in s 25(d) of NZBORA: *Drain v Police*⁸. Counsel for the appellant in *Drain* argued that the *Trompert* principle effectively compelled an accused

³ [1985] 1 NZLR 357 (CA)

⁴ [1960] NZLR 599.

⁵ [1992] 2 NZLR 257 at 268.

⁶ (1998) 16 CRNZ 236.

⁷ CA417/93, 16 December 1993.

⁸ (1994) 11 CRNZ 576.

to provide an explanation in evidence, or else be faced with the weight of the inference from his silence. The Court rejected this argument, adopting the reasoning in *Clarke* and stating:

There is a facile attraction in the proposition that because inferences may be drawn against an accused who remains silent at trial, there is a compulsion on him or her to give evidence. Such reasoning is fallacious ... Once the true nature of the principle is understood, it can be seen that subparas 25(c) and (d) of the Bill of Rights Act can have no application.

13. The European Court of Human Rights has similarly held that drawing an adverse inference from an accused's silence was not unreasonable, nor in breach of s 6 of the European Convention⁹.

POSSIBLE SCOPE OF LEGISLATIVE REFORM

14. If it were thought desirable to legislate to allow an inference to be drawn from a defendant's silence at trial, there are a number of issues as to the scope and form of reform. Should it:

- relate only to silence at trial or include pre-trial silence;
- relate only to the defendant's silence, or include his or her failure to call others to testify;
- simply codify *Trompert*;
- make a number of consequential amendments to section 33 of the Evidence Act.

Pre-trial silence or only silence at trial?

15. The *Trompert* decision relates only to silence at trial. Arguably suspects faced with allegations from the Police, potentially in a coercive or stressful environment, and not having a full appreciation of the case against them, are in a far more vulnerable position than at trial. In our view, it would be inappropriate to provide in legislation that an adverse inference may be drawn from pre-trial silence.

16. As Rishworth notes in relation to pre-trial silence and the *Trompert* principle:¹⁰

One might be tempted to say that such silence has significance in terms of the *Trompert* principle, since the innocent could be expected to vigorously deny false accusations. But that would be completely to subvert the principle, which operates only when circumstantial evidence calls for an explanation that the accused could be expected to give and has not given. The *Trompert* principle does not contemplate that the mere making of allegations can count as circumstances requiring such an explanation.

⁹ *Averill v United Kingdom* (2001) 31 EHRR 36. The Court held that drawing such inferences did not contravene the fair trial rights embodied in Art 6(1), or the presumption of innocence in 6(2).

¹⁰ Rishworth & others *The New Zealand Bill of Rights* (2003), 657.

17. Further, as Butler & Butler note¹¹, in referring to the European Court of Human Rights decision in *Averill v United Kingdom*¹²:

The ECtHR cautioned that whenever an accused has exercised his or her right to silence prior to trial a national Court should be sensitive to reasons for that stance. For example, if an accused remained silent before the arrival of his or her lawyer, then an adverse inference might be illegitimate as silence in those circumstances was rational and not consistent with guilt.

Only the defendant's silence or failure to call others to testify

18. The *Trompert* principle arguably extends to a failure to call others in circumstances where so doing might be expected to assist the defendant's case if he or she were innocent. In *Trompert* the Court of Appeal endorsed Adams J statement of the law in *Purdie v Maxwell* which extended to an accused's failure to give by his own evidence "or otherwise" an explanation that might be expected of an innocent person.

19. However, given that we suggest that any reform in this area be limited to only trial silence and given that section 33 of the Evidence Act currently prohibits comment only in relation to the defendant's failure to give evidence, it is our view that any possible codification should be confined to a failure by the defendant to give evidence on his or her own behalf.

20. While we recognise that the New Zealand case law is not entirely consistent on point (see, for example, *R v T*¹³), we prefer the view expressed by the Court of Appeal in *R v Konnerth*¹⁴ that while comment by a prosecutor about a witness not being called by the defence may amount to improper conduct, it does not fall within the specific prohibition in section 366 of the Crimes Act (as now specified in section 33 of the Evidence Act). This is because the core rationale of the prohibition is the right to silence, which in turn reflects the privilege against self-incrimination. That is based on the particular interest in ensuring that defendants are not *personally* compelled to impug themselves.

21. Having regard to the above discussion, it is our view that if codification is to be undertaken in this area, it should be limited to the defendant's failure to give evidence and should not extend to the defence's failure to call others to give evidence at trial.

Codify Trompert without change to section 33 Evidence Act

22. If reform is considered desirable, there is the option of codifying the *Trompert* principle, but leaving section 33 of the Evidence Act untouched. That would provide a statutory rule allowing an adverse inference to be drawn by the fact-finder from a defendant's failure to give evidence in circumstances where an innocent person would be expected to give evidence, while leaving the law about commenting on such failure as currently provided in section 33. This

¹¹ Butler & Butler *The New Zealand Bill of Rights-A Commentary* (2005), 925.

¹² (2000) 33 EHRR, 264.

¹³ CA 255/05, 24 November 2005, at para 36.

¹⁴ CA 149/06, 20 June 2006, at para 13.

Not Government policy

would, of course, confine the ability to comment on the failure to the defendant, his or her counsel, or the judge.

Make amendments to the Evidence Act to align with proposals in Bill Plan about adverse inferences from failure to identify issues in dispute

23. Another option is to undertake a more far reaching reform by amending section 33 of the Evidence Act (or providing a new section in that Act) to provide:

- that the fact finder may draw any inference as to guilt that it is proper to draw in the circumstances from a defendant's silence at trial; and
- that the prosecution may invite the jury to draw an adverse inference as to guilt from that silence.

24. Such approach would more closely align potential codification of *Trompert* with the proposals with regard to identifying issues in dispute.

IS IT LOGICALLY NECESSARY TO ALIGN THE LAW REGARDING INFERENCE FROM FAILURE TO GIVE EVIDENCE AT TRIAL WITH THE PROPOSALS FOR PRE-TRIAL FAILURE TO IDENTIFY ISSUES IN DISPUTE?

25. There is a fundamental difference between not identifying issues in dispute pre-trial and not giving evidence at trial. Putting aside the obvious timing issue, requiring a defendant to identify issues in dispute is not akin to a requirement that he or she provide evidence.

26. In the Discussion Document Identification of the Issues in Dispute¹⁵, dated May 2009, we identified a number of reasons why we do not consider that a statutory requirement to identify issues in dispute infringes the right to silence, engages the privilege against self incrimination, or reverses the onus of proof.

27. In contrast, we think that a statutory requirement for a defendant to give evidence at trial would engage and contravene those rights. This paper does not propose that any such requirement be introduced. But even a more modest statutory authority allowing a prosecutor to invite the fact-finder to draw an adverse inference from a defendant's silence at trial, or to attempt to simply codify key aspects of *Trompert*, would engage the relevant NZBORA rights and might, depending on the scope of the legislative reform, contravene those rights.

THE NEED FOR LEGISLATIVE REFORM IN THE SIMPLIFICATION PROJECT

28. The current judicial approach in New Zealand, as recognised by the Court of Appeal in *R v Haig*¹⁶, is appropriately cautious and applies the *Trompert* principle conservatively. As a result, judges seldom comment adversely when an accused has failed to give evidence.

¹⁵ <http://www.justice.govt.nz/policy-and-consultation/crime/documents/Criminal-Procedure-Simplification-Project/Consultation-Identification-of-the-issues-in.pdf>

¹⁶ (2006) 22 CRNZ 814, at para 104.

29. It is true that the case law is not entirely consistent as to the circumstances in which adverse comment can be made about a defendant's failure to give evidence, or as to the nature of the comment that may be made. There is therefore no indication of a significant problem with the operation of the common law and no real suggestion that it encroaches on NZBORA rights. We therefore do not think that it is so defective as to require remedial codification in the context of this project.
30. In any case, any codification would need to retain sufficient flexibility and discretion for the court to ensure that the provisions were applied in a fair and just way, in light of the factual circumstances of each individual case. The resulting legislation would arguably be little more precise than the current rules at common law and would therefore do little to advance the interests of clarity or fairness.
31. There is also a risk that codifying the ability of the Court or counsel to comment on the failure of the defence to give or call material evidence, may lead to an increase in the frequency of such comments in circumstances where they are inappropriate and would breach relevant rights under NZBORA. In other words, there is no guarantee that the current conservative approach of the courts would be maintained.

CONCLUSION

32. It is unnecessary to codify any aspect of *Trompert* to ensure consistency with the proposed reforms on adverse inferences from a failure to identify issues in dispute. It is our view that if any statutory reform touching on the defendant's right to silence were to be contemplated, it should be approached in a comprehensive manner consistent with the scheme of the Evidence Act 2006. The Criminal Procedure (Simplification) Project does not lend itself to that kind of comprehensive consideration of this aspect of the law of evidence.
33. Under section 202 of the Evidence Act 2006, the Minister of Justice must ask the Law Commission to report on the operation of the Evidence Act approximately every five years, and recommend any amendments that may be necessary. The first report is likely to be due at the end of 2012.
34. While we have formed no final view as to whether codification of any aspect of the common law about comment that may be made or inferences that may be drawn from a defendant's silence at trial is desirable, it is more appropriate that any such consideration take place in the context of that review.
35. We do, however, propose the repeal of section 67(5) of the Summary Proceedings Act in the proposed Criminal Procedure Bill. We indicated in the December 2009 Consultation Paper on the Criminal Procedure (Simplification) Project our intention to repeal the part of section 67(5) that prohibits adverse comment on a defendant's failure to call a spouse to give evidence.

If that occurs, the remaining part of section 67(5) in substance would simply repeat section 33 of the Evidence Act 2006, which prohibits the

prosecution from commenting on the defendant's failure to give evidence. No useful purpose is served by having the same statutory prohibition in two different Acts.

Questions for Discussion

Comment on any issue raised in this paper is welcomed. In particular we seek your views on the following questions:

1. Do you agree that if the proposals in the Bill Plan regarding adverse inferences that may be invited and drawn from the defence's pre-trial failure to identify issues in dispute are enacted that would not necessitate a corresponding codification of the *Trompert* principle?
2. Do you agree that, if any statutory reforms are considered desirable in this regard, it is a matter best dealt as part of the review of the Evidence Act 2006?
3. Do you agree with the proposed repeal of section 67(5) of the Summary Proceedings Act?

COMMENTS

Please provide written comments on this paper by 31 March 2010 to either:

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