

The right to silence and undercover operations

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This article by **Dr David Craig** seeks to shed some light on the legal 'grey' area that exists between the right to silence and police undercover investigations.

While conducting doctoral research on international undercover operations, Federal Agent Craig attended undercover training courses in the United States (US) with the FBI and in Canada with the Royal Canadian Mounted Police. He also conducted interviews with undercover operatives and those that supervise undercover operations in the United States, Canada, United Kingdom and the Netherlands.

During the course of this research Dr Craig was privy to sophisticated and confidential undercover methodologies and tactics. This article does not disclose these. However, when researching material for this article, he was surprised and alarmed at the quantity and accuracy of publicly available information on undercover policing methodologies¹.

The tactics outlined within this article have been gleaned from publicly available reference material and legal cases within the public domain, and as such are already accessible to the general public.

Although the author is an operational federal agent with the AFP, the views and opinions expressed within this article are his own and do not represent those of the AFP.

The right to silence is both a highly protected and protective principle at the core of our justice system. It is clear that any statement obtained from a suspect as part of an overt investigation after the right to silence has been invoked is subject to the judicial discretion to exclude and is likely to be ruled inadmissible. However, the legal issues surrounding covert investigations where a suspect has previously exercised the right to silence are somewhat less clear and require further examination.

Evocation of the right to remain silent *prior* to an undercover operation

- *The United States*

In the United States the recently introduced *McDade Amendment*² requires Federal prosecutors to now comply with the bar and ethic rules of each State. The bar and ethic rules of virtually every State within the United States prohibit contact with an individual who is represented by counsel without first contacting the representing lawyer.³ As most organised

crime groups have a legal representative, this requirement limits the opportunity for covert operations against organised criminal groups and has effectively curtailed all undercover operations on suspects who are legally represented and have exercised the right to silence.

Federal prosecutors and Federal law enforcement officers are now effectively prevented from approaching, contacting or interviewing any suspects, potential witnesses or informants during the course of criminal investigations, if they are legally represented. This has effectively annulled the long-standing US Department of Justice policy that contact directly with a witness or informant is acceptable in certain pre-indictment instances.

Prior to the *McDade Amendment*, Federal agencies in the US often approached suspects for whom they had substantial proof of criminal offences. This approach often involved the bargaining of reduced sentences in return for a suspect's cooperation. The approaches were usually made to lower level criminals in order to introduce undercover operatives into criminal syndicates with the view to higher-level infiltration and to obtaining evidence against the syndicate leaders.

Two problems arise as a result of the requirement to abide by State bar and ethic rules. First the suspect is pre-warned by his legal representative of the intended approach and therefore may divulge the fact to others within the syndicate diminishing the chances of both a reduced sentence for the suspect and a successful infiltration. Secondly as many criminal groups rely on the same attorney there is a risk that information may be *leaked* to others that are represented by the same attorney resulting in personal injury or death of an operative.

In the US, the prosecutor is responsible for providing legal advice for the investigation, the ultimate responsibility for complying with the amendment rests with each prosecuting attorney. This responsibility extends to approaches to suspects by the investigating officers such as FBI or DEA agents. If the *McDade Amendment* is not complied with the attorney faces the possibility of being suspended or disbarred by the US Office of Professional Responsibility.



For this reason the practice of deploying undercover operatives to seek admissions from suspects who have invoked their right to silence has been substantially curtailed in the US. This amendment does not appear to assist law-abiding citizens, but it does appear to have substantially increased the protection for criminals and curtailed an otherwise effective and fair law enforcement strategy against organised crime groups. While law enforcement has lost this valuable tool to penetrate upwards within organised criminal groups, it appears that lower level criminals will to a substantial degree now lose the opportunity to cooperate with authorities and gain reduced sentences in so doing. Therefore it can be expected that they will now face the brunt of most undercover operations while their masters remain untouchable.

Due to the introduction of the *McDade Amendment* little can be drawn from the United States in relation to contemporary covert operations targeting suspects who have invoked their

right to silence. For this reason the remainder of the article focuses primarily on English and Australian cases.

The Situation in Australia

Substantial guidance for Australia on the point of admitting covertly obtained evidence subsequent to a refusal to answer police is provided by the recent High Court case of *Swaffield v R: Pavic v R*⁴. These two cases were heard together by the High Court of Australia.

Swaffield's Case

In September 1993 Swaffield was interviewed by police in relation to arson, break, enter and stealing offences that occurred at the Leichhardt rowing club in Rockhampton, Queensland on 7 March 1993. Swaffield invoked his right to silence at both of the police interviews and refused to answer any questions. Swaffield was then charged for the offences. At the committal hearing on 13 November 1993 the Queensland Police offered no evidence and Swaffield was discharged.

In May 1994 Swaffield became a target of a police undercover operation targeting drug dealers in the Rockhampton, Yeppoon and Zilzie areas of Central Queensland. On 11 and 16 August 1994 following instructions from his Controller and the case officer of the Leichhardt rowing club

investigation, Constable Marshall in an undercover capacity engaged Swaffield in incriminating conversations about his involvement with the Leichhardt rowing club offences. These conversations were recorded and Swaffield was again charged with those offences. At the trial Swaffield's counsel objected to the admissibility of the tape recordings based on the proposition that they had been made unfairly and in disregard of the *Judges' Rule* requiring a caution to be administered.

However, the trial judge admitted the recordings and Swaffield was convicted and sentenced. Swaffield appealed to the Queensland Court of Appeal against the arson conviction. The appeal was upheld on the grounds that the trial judge had wrongly admitted the taped conversations. The Crown then appealed to the High Court.

Pavic's Case

Andrew John Astbury and Steven Francis Pavic both held affections for the same woman. On 15 December 1995 after leaving a Christmas function at the woman's residence Astbury disappeared. A blood trail was found outside Astbury's house at Warrandyte. Astbury's body was later found in the Yarra River handcuffed to an electric motor casing.

On 18 December 1994 when questioned by police Pavic denied any involvement in the murder or disappearance of Astbury. On 3 January 1995 Pavic was interviewed at the Victorian police homicide squad office at St. Kilda Road Melbourne. Pavic was cautioned by the police and advised of his right to communicate with a legal practitioner. Following advice of a solicitor Pavic made no comment on the questions put to him by detectives. After being informed by one of the detectives that he believed that Pavic had committed Astbury's murder Pavic was allowed to leave.

On 4 January 1995, a garbage bag was recovered from a hollow log near where Astbury's body had been found. The bag was found to contain bloodstained clothing. A statement was taken from Lewis James Clancy on 9 January 1995 in which Clancy identified the recovered clothing as clothing he had previously left in Pavic's car. Clancy told police that Pavic had informed him that he had lost the clothing and offered to pay Clancy \$50 for them.

Although at this stage Clancy was not a suspect he was led by the police to understand that he was. Clancy agreed to wear recording equipment at the behest of the police to record a conversation with Pavic to clear his [Clancy's] name. Later on 9 January 1995 Clancy met Pavic and a number of inculpatory admissions were made by Pavic. Pavic was then arrested. At trial in March 1996, Pavic pleaded guilty to manslaughter, but was convicted of murder. After failing in an application to appeal to the Victoria Court of Appeal Pavic was granted special leave to appeal to the High Court.

High Court Deliberation

The High Court considered the matters concurrently as there were a number of similar factors to these cases. These were that:

Both Swaffield and Pavic had exercised their right to silence prior to the admissions being covertly recorded.

There was no illegality on the part of the police investigations.

There was no contention regarding the voluntariness of the confessions made.

In Swaffield's case the admissions were made to an undercover police officer and in Pavic's case to a personal friend who was working as an agent for the police.⁵

A crucial point in Pavic's case that was accepted by the majority of the High Court was that Clancy did not specifically elicit Pavic's admissions. In contrast, the court considered that Marshall had elicited Swaffield's admissions. When considering the circumstances of the admissions made by Swaffield to the arson offence, the court found that the trial judge did not give weight to Swaffield's right to silence. On this point Brennan CJ stated:

"In Swaffield's case, Constable Marshall, who was relatively a person in authority, deliberately represented himself not to be a police officer

in order to secure answers which Swaffield had earlier told police that he would not answer. True it is that Constable Marshall had adopted an undercover guise in order to pursue investigations into drug offences, not into the arson offence. There was nothing improper in Constable Marshall adopting that guise in order to obtain evidence of



drug offences, but Constable Marshall went outside the investigation into drug offences. He deliberately sought admissions relating to the arson which Swaffield had previously refused to make to the police, as he was entitled to do.”⁶

Similarly Justices Toohey, Gaudron and Gummow held that the trial judge should have excluded the admissions made by Swaffield because, “[They] were elicited by an undercover police officer, in clear breach of Swaffield’s right to choose whether or not to speak.”⁷ Kirby J concurred and was of the opinion that Marshall had conducted a covert interrogation of Swaffield. He stated:

“Having examined the transcripts, I have concluded that Constable Marshall did not speak to the accused as an acquaintance might have done, neutrally or indifferently, by his questions, he actively sought to elicit critical information...such an interrogation by an undercover police officer unfairly derogated from Mr Swaffield’s free choice to speak or be silent.”⁸

It is interesting to note that Justice Brennan distinguished between Marshall pursuing evidence of the drug offences and of the arson offence. Swaffield had not previously refused to answer questions regarding the drug offences and Brennan J acknowledged that there was nothing improper with Marshall attempting to secure evidence of those offences.⁹ Although Brennan J wrote a separate judgement explaining a minority opinion on the scope of the discretion to exclude evidence on the grounds of fairness, he was not contradicted by the other judges on this point. It is unfortunate that the remaining judges did not consider the distinction between Marshall’s attempt to obtain evidence of the arson offence and his attempt to obtain evidence of the drug offence. This may have provided some further guidance for future undercover operations. However, in the absence of such consideration, it appears at least from the judgement by Brennan J, to implicitly support active elicitation of statements from a suspect where it occurs *prior* to formal interview and in the *absence* of an exercised right to silence. However, the court clearly objected to Marshall seeking incriminating responses to questions about an offence for which Swaffield had previously exercised a right to silence.¹⁰ Brennan J reinforced the public interest in protecting a person’s right to silence and said that limitations should be maintained on police actions infringing on that right:

“There is a public interest in ensuring that the police do not adopt tactics that are designed simply to avoid the limitations on their inquisitorial functions that the courts regard appropriate in a

free society.”¹¹

The court concluded by dismissing both appeals, upholding the conviction of Pavic and affirming the acquittal of Swaffield.¹²

The current situation in Australia

On the basis of the court’s finding in *Swaffield*, it appears legal tricks and deceptive tactics may be employed by the police as long as that strategy does not involve deceiving the person out of the right to silence.

Clancy was an agent of the State as he was working for the police. Therefore the fact that Clancy was not a police officer, whereas Marshall was, had little impact on the legal status of who recorded the conversation. The major consideration impacting on admissibility in these cases hinged on whether the admissions were made as part of a conversation or as a result of a covert interrogation. Distinct from the conversations Marshall had with Swaffield, the conversation recorded by Clancy with Pavic was admitted because the court considered that he did not deliberately elicit the admissions made in the Pavic investigation. In arriving at this conclusion Justices Toohey, Gaudron and Gummow referred to the Canadian case of *Hebert*¹⁴ where McLachlin J stated:

“When the police use subterfuge to interrogate an accused after he has advised them that he does not wish to speak to them, they are improperly eliciting information that they were unable to obtain by respecting the suspect’s constitutional right to silence: the suspect’s rights are breached because he has been deprived of his choice. However, in the absence of eliciting behaviour on the part of the police, there is no violation of the accused’s right to choose whether or not to speak to the police. If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police.”¹⁵

Kirby J also referred to *Hebert* and agreed with the approach of the Canadian court towards police deception. Kirby J stated that although the approach expressed in *Hebert* was derived from the Canadian Charter of Rights and Freedoms, the test propounded in that case is consistent with the general approach taken under Australian law towards deception by law enforcement officials. Kirby J then stated:

“In the case of covertly obtained confessions, the line of forbidden conduct will be crossed if the confession may be said to have been elicited by police (or a person acting as an agent of the police) in unfair derogation of the suspect’s right to exercise a free choice to speak or to be silent.

Or it will be crossed where police have exploited any special characteristics of the relationship between the suspect and their agent so as to extract a statement which would not otherwise have been made.”¹⁶

It appears clear that in Australia, where there is a covert investigation of a suspect subsequent to exercising the right to silence it is likely that the admissions will be ruled inadmissible if the operative deliberately elicits the admissions.

It is suggested that *Swaffield* does not affect covert electronic monitoring and telephone interception techniques. This applies even in cases where a suspect has exercised the right to silence and is later recorded by such means. A recording made in these circumstances is the product of a passive technique where the person freely chose to speak. Consistent with the finding in *Swaffield*, a conversation so obtained does not transgress the person’s right to silence as there is no deliberate elicitation.

In Australian cases where the police use a covert approach specifically seeking confessions after a suspect has expressly declined to answer police questions, the courts may take the view that such a methodology is simply being employed to avoid the suspect’s right to silence. This occurred in *Pfenning*¹⁸ where the accused had twice informed the police that he did not wish to answer questions and his solicitor had also advised the same in writing. Notwithstanding this, the police arranged for a prisoner acting for the police to be placed in company with Pfenning who then obtained admissions. The trial judge in *Pfenning* rejected the evidence gained by this strategy stating that:

“It is as though the police, faced with a plain refusal to answer, sent in an undercover officer in disguise to interrogate the accused or otherwise inveigle him into making admissions. Anything said in response to such a stratagem in the circumstances described would have to be ruled inadmissible, and the result here must be the same.”¹⁹

When admissions are made to an undercover operative or person acting for the police by a suspect who has earlier exercised his right to silence the following factors will most likely be considered by the court with respect to admissibility.

- To what extent has the person’s right to silence been breached?
- Were admissions made as part of a general conversation or a deliberate covert interrogation?

The situation in England and Wales

A similar strategy to that employed in the investigation in *Pfenning*²⁰ was used as part of

Operation Axe in England.²¹ *Operation Axe* was established to investigate a series of armed robberies by an Asian crime gang. During *Operation Axe*, Jason Bailey and Steven Smith were arrested and both exercised their right to silence. They were charged and remanded in custody.

A plan was devised by the police which involved placing Bailey and Smith into the same cell and recording their conversations. It is usual police practice to separate co-offenders in police cells to prevent them fabricating defences for use in interview or trial. The practice also allows each suspect the freedom to cooperate with the police without the intimidation of the other suspect.

To circumvent Smith and Bailey’s suspicion at being placed into the same cell an argument was staged in front of Smith and Bailey between the CID officers and the custody officer about placing the two together. In a heated exchange the CID officer protested at the custody officer’s decision to place the two into the same cell. The custody officer finally won the argument due to the



apparent lack of empty cells and Smith and Bailey were placed into the same cell which at the time was being electronically monitored.

Initially Smith and Bailey discussed whether the argument had been staged and both revealed that their solicitors had advised them of police tactics such as recording their conversations. This raises ethical questions on the part of the legal representatives; however, these are not examined in this forum. Nonetheless both Smith and Bailey were convinced of the argument and both men commenced to freely discuss the robberies and what they would say at trial.

At trial, over defence objections against the admission of the tapes, Smith and Bailey were convicted at the Nottingham Crown Court and sentenced to four and seven years respectively.

*Bailey and Smith*²² went to the Court of Appeal. The Court of Appeal rejected the argument that the incriminating conversations should have been excluded under s 78 of the Police and Criminal Evidence Act 1984 (UK).²³

The court dismissed the appeal and ruled that the tapes were correctly admitted at trial stating that "...[They] saw no reason to decry the police's conduct in the present case nor to doubt the essential fairness of this evidence having been held admissible."²⁴ In making this finding the court did acknowledge that:

"...[S]ome might well think it odd and perhaps even unsatisfactory that alongside a rigorously controlled legislative regime governing the detention, treatment and questioning of those in police custody [reference to P.A.C.E], parallel covert investigations of this nature could legitimately continue"²⁵

There are significant differences between the covert tactics utilised in the cases of *Pfenning* and *Bailey and Smith*. It is suggested these differences resulted in the different conclusion of the courts in each case. While both cases involved trickery and deception subsequent to an invoked right to silence, in the former case it was the police that elicited the admissions via their agent. Whereas in *Bailey and Smith* the suspects were simply tricked into a situation where they themselves chose to have a conversation. Although the police deliberately orchestrated the circumstances which resulted in *Bailey and Smith* being placed in the same cell, the incriminating conversation occurred independent of any direct police elicitation.

Different police tactics were used in the investigation of *Bailey and Smith* from those used to investigate *Swaffield* and *Pavic*. However, on the point of active elicitation of admissions following the evocation of the right to silence, the finding in *Bailey and Smith* appears consistent with *Swaffield*.

The right to silence during an undercover operation

- *England*

As previously mentioned, under s 66 of Police and Criminal Evidence Act 1984 (UK) there is a Code of Practice outlining acceptable and appropriate conduct by police in obtaining evidence. There is a requirement under Paragraph 10.1 of the Code for police to caution suspects. An English case that considered the issue of the right to silence during an undercover operation was *R v Christou and Wright*.²⁶ As previously mentioned, this operation was mounted by police who set up Stardust Jewellers, a jewellery shop that was prepared to buy and sell second hand jewellery. The shop was fitted with electronic recording equipment and staffed by undercover police.

Several people used Stardust Jewellers to sell stolen jewellery. As a result of this operation *Christou and Wright* were prosecuted. It was argued in the Court of Appeal that the recorded conversations should have been excluded under s 78 of the Police and Criminal Evidence Act 1984 (UK) as no caution had been administered by the undercover police. The Lord Chief Justice in *Christou and Wright*²⁷ stated:

"...what is clear is that it [the requirement for police to administer a caution] was intended to protect suspects who are vulnerable to abuse or pressure from police officers or who may believe themselves to be so. Frequently, the suspect will be a detainee. But the Code will also apply where a suspect, not in detention, is being questioned about an offence by a police officer acting as a police officer for the purpose of obtaining evidence. In that situation, the officer and the suspect are not on equal terms. The officer is perceived to be in a position of authority; the suspect may be intimidated or undermined."²⁸

It was held that the appellants in *Christou and Wright* were not *questioned* by the undercover police officers and that the conversations were on equal terms. Further to this, there was no intimidation or pressure exerted by the undercover police because at the time the conversations were recorded the suspects did not perceive them to be persons in authority. The court concluded that the Code was not intended to apply in such a circumstance.²⁹ It appears from this finding that, in England, where there is no direct questioning by the operative and the operative is not perceived by the suspect to be in authority, there is no requirement to caution.

Another case that considered the issue of whether police should administer a caution when conducting covert duties was the English case of *Bryce* which was handed down by the Court of Appeal one month after *Christou and Wright*. In *Bryce*, an undercover officer had an unrecorded conversation with the defendant about a stolen car which the defendant was selling. The operative asked some crucial and incriminating questions that went to the vital issue of the guilty knowledge. Even though *Bryce* was an obvious suspect and the conversation had been designed to extract incriminating statements he was not cautioned by the officer. The court upheld the appeal in favour of *Bryce*. In addition to the court's concern about reliability, the court also objected to the lack of a caution.

Lord Taylor of Gosforth C.J. in delivering the judgment in *Bryce* emphasised the importance of the right to silence and the limitations placed on covert questioning by the police. He stated:

“It would be wrong for police officers to adopt or use an undercover pose or disguise to enable themselves to ask questions about an offence uninhibited by the requirements of the Code and with the effect of circumventing it”.³²

A recent case providing guidance on the admission of covertly obtained evidence in England is *Smurthwaite and Gill*.³³ Separately, both Susan Gill and Keith Smurthwaite unwittingly solicited undercover operatives Black and Webster who were posing as contract killers to murder their spouses. At trial both prosecution cases depended heavily on conversations between the defendants and the undercover operatives which were covertly tape recorded. Over defence objections the tapes were admitted and subsequently Smurthwaite and Gill were convicted of soliciting murder and sentenced to six years and five years imprisonment respectively.

Although these cases had separate trials, due to the similarities both cases went before the English Court of Appeal to be heard concurrently. At appeal the defence alleged that the operatives acted as *agent provocateurs* in inciting the accused to solicit the murder and that the evidence was obtained by trick. On this point Lord Taylor stated:

“There was, of course, as the learned judge recognised, an element of entrapment and a trick inherent in the use of an undercover officer to pose as a killer. But, given that basic deception, the tapes showed Webster to have taken a minimal role in the planning... Throughout the two tapes, the conversation was punctuated at intervals by laughter inconsistent with the story of fear and intimidation the appellant told the jury.”³⁴

It was noted by the court that the undercover operatives acted more as *passive listeners* rather than persons persuading or coercing the appellants into an agreement to murder that they would not have otherwise entered.³⁵

The court acknowledged as did the defence that, in the 108 pages of transcript from the tapes between Webster and Smurthwaite, Webster may have crossed over to the *Bryce* side of the line from the *Christou and Wright* side by asking direct questions. This was an instance on the tape where Webster initiated the conversation and stated:

Webster: “I do know that you have a shotgun for instance...”

Appellant: “I do yes, but it is registered...”

Webster: “I am just thinking in the lines of sort of an accident involving that”.³⁶

However, the court was satisfied that Webster was not seeking information he did not already have and was simply maintaining the cover necessary for his role. This appears to indicate that there is additional leeway given by English courts if an operative asks questions of the suspect that are in keeping with his undercover character or role.

When considering whether the undercover operative should have cautioned *Smurthwaite*³⁷ when he became a suspect, Lord Taylor stated:

“Since the only evidence likely to be available to prove this charge was that obtained undercover, Webster clearly had to consider whether there was not merely sufficient evidence to bring a charge, but ‘sufficient’ evidence for it to succeed’, bearing in mind that the appellant might well deny (as he did in fact) that, despite what he had said orally, he had a serious intention to have his wife killed.”³⁸

With regard to cautioning during covert operations, it appears there are two important factors that can be drawn from *Christou and*

Wright, Bryce and Smurthwaite and Gill which impact on the parameters of covert operations in England. These are that there is no requirement to caution if:

- There is equality in the relationship between the suspect and the operative; and
 - The operative does not conduct a covert interrogation of the suspect in a deliberate attempt to circumvent the requirements of the Code.
- *Australia*

In regard to the investigation of Commonwealth offences, the requirement to caution a suspect in Australia exists under s 23F(1) of the Crimes Act 1914 (Cth). Under this provision, before a suspect who is *under arrest* is questioned, the investigating official must caution the person that, “he or she does not have to say or do anything, but anything the person does say or do may be given in evidence.”

Difficulties arise when s 23F(1) of the Crimes Act 1914 (Cth) is applied to covert operations. This is because a broad definition of arrest exists under s 23B(2) of the Crimes Act 1914 (Cth) which, on a literal reading may extend to some



suspects who are in the company of a covert operative without having been formally arrested. Under s 23B(2) of the Crimes Act 1914 (Cth) a person is considered under arrest when in the company of an investigating official for the purpose of being questioned, if:

- (a) “the official believes that there is sufficient evidence to establish that the person has committed a Commonwealth offence that is to be the subject of the questioning; or
- (b) the official would not allow the person to leave if the person wished to do so; or
- (c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so...”

Clearly ss 23B(2)(b) and 23B(2)(c) of the Crimes Act 1914 (Cth) would rarely apply to covert operations and are not further examined.

A debatable point when applying 23B(2) of the Crimes Act 1914 (Cth) to covert operations is whether the suspect is being questioned by the operative. It is clear that in undercover operations a covert operative is in the presence of a suspect to obtain evidence of an offence. It may be argued that anything the operative says that evokes an incriminating response from the suspect is a form of covert questioning. Therefore, the suspect is in the company of an operative for the purpose of being questioned, which satisfies one of the requirements under 23B(2) of the Crimes Act 1914 (Cth). It is suggested that such a claim would be strengthened if the operative asked the suspect direct and incriminating questions. In such a case it may be interpreted that the undercover operation was then being utilised to circumvent the requirements under 23F(1) of the Crimes Act 1914 (Cth). Although this is contrary to comments made by Brennan J in *Swaffield*, in the absence of clear guidance by the High Court, it is suggested this may successfully be argued.

There is also a requirement under s 23B(2)(a) for the investigating official (in this case the operative) to believe there is sufficient evidence to establish the suspect has committed a Commonwealth offence. In many cases an undercover operation is only commenced when the police hold strong suspicions of a suspect’s guilt and may have grounds enough to charge the suspect, but which fall short of being sufficient to convict. It follows from this, that an operative would in most cases believe that there is sufficient evidence to charge the suspect. Considering this, and accepting the argument that a suspect could be considered as being in the company of an operative for the purpose of being questioned; it is suggested that s 23B(2)(a) *could* apply to covert

investigations. If this is the case, an operative is required to caution a suspect prior to asking any questions by virtue of s 23F(1) of the Crimes Act 1914 (Cth).

It is a ludicrous proposition to expect an undercover operative to caution a suspect right at the point when the person is about to make admissions in relation to the offence for which the operation was initially commenced. To circumvent problems with the requirement to caution, some State legislative provisions have been introduced in Australia to specifically allow an exemption from issuing a caution during a covert operation.⁴¹ However, no such provision exists under Commonwealth legislation. The absence of an exempting legislative provision necessitates an examination of judicial consideration of cases where cautioning during a covert operation was in issue.

A case that examined the issue of cautioning during covert operations was that of O’Neill. In this case *O’Neill*⁴² was suspected of murdering her husband and was covertly recorded by Lally, a close friend. The recording was made at the behest of the police after Lally had reported to the police that O’Neill had confided incriminating information to her. On appeal the admission of the tape recording was challenged on the basis that O’Neill was a suspect at the time the recording was made and should therefore have been cautioned. The majority of the court found there was no improper police conduct. Specifically on cautioning Dowsett J stated:

“It cannot be said that because Lally was acting covertly on behalf of the police, there was inequality in the relationship between her and the appellant which might suggest to the appellant that she was under an obligation to speak. No question of involuntariness or unfairness arose from the fact that the appellant was not warned. The police are not obliged to be absolutely frank in investigating crime. Indeed, the law providing for the use of listening devices is statutory authority to the contrary. Although we might all prefer that friendship not be exploited for ulterior purposes, the public interest in detecting and punishing crime outweighs social nicety.”⁴³

In *Swaffield*⁴⁴ Justices Toohey, Gaudron and Gummow referred to *O’Neill* and to *Herbert*⁴⁵ and *Broyles*⁴⁶ of the Supreme Court of Canada when considering the right to silence. After reviewing these decisions they indicated that the vital issue is whether or not the admissions were elicited from the accused. Also in *Swaffield*, as previously mentioned, Justice Brennan distinguished between Marshall pursuing evidence of the drug offences and of the arson offence. *Swaffield* had not previously refused to answer questions regarding the drug

offences and Justice Brennan acknowledged that there was nothing improper with Marshall attempting to secure evidence of these offences.⁴⁷ However, the court was critical of Marshall obtaining evidence on the arson offence for which he had previously exercised the right to silence.⁴⁸ It is somewhat unfortunate that Brennan CJ was the only judge to draw a distinction between Marshall's questioning of Swaffield in relation to the arson and the drug offences. Further consideration by the court on this point could have provided much needed guidance for future undercover operations in Australia. However, as the majority did not contradict Brennan CJ on that point, it appears the court implicitly acknowledged that Australian courts will permit a certain degree of covert questioning where the right to silence has *not* previously been exercised. However, it also appears clear from *Swaffield* that Australian courts will only admit covertly obtained evidence after the right to silence has been exercised, when there is no active elicitation by the operative.

Subsequent to the investigation of *Swaffield*, statutory provisions have been introduced in Queensland to exempt police officers from cautioning suspects when engaged in covert operations.⁴⁹ This circumvents prosecutorial problems associated with cautioning during undercover operations in relation to State law in Queensland. However, as previously mentioned, no such provision exists under Commonwealth legislation. It is therefore suggested, that similar provisions exempting police from cautioning are required for the covert investigation of Commonwealth offences.

Discussion

Australian courts have provided sufficient guidance with regard to questioning a suspect during a covert investigation after the suspect has exercised the right to silence. However, further refinement in Australia is necessary on the limitations of covert questioning in the absence of the right to silence being exercised. It was suggested that in light of *Swaffield* it appears that Australian courts will permit a degree of covert questioning where the right to silence has not been evoked. To what degree

Australian courts will permit an operative to covertly question a suspect who has not exercised the right to silence will be a matter for future judicial consideration.

In a situation where a drug syndicate leader or other significant criminal such as a murderer refuses to answer police questions at interview and months or years later confesses to an undercover officer or police informant, should that evidence be admissible? It is suggested that the interests of justice would be served by the admission of such evidence. However, it is not suggested that covert methods such as these be utilised specifically to circumvent the accused's right to silence. A factor that was not canvassed in any of the above cases was the impact of the passing of time on that right. This raises the question, does time eventually decay a person's right to silence and open the window of opportunity for a covert interrogation? Or is it the case that until expressly waived by a person that right remains indefinitely?



It is suggested that time should impact upon the right to silence with regard to covert investigations. For example a person who invokes the right to silence after committing a gross criminal act such as the murder of a child or rape should at some stage, be a valid target of a covert operation. If this is not the case in our society, then it is suggested that an inordinate amount of protection exists for those that choose to offend. For example consider the situation where a dangerous criminal formulates a letter notifying all Australian law

enforcement agencies that he or she has invoked the right to silence for all offences under State and Commonwealth legislation. In the absence of time decaying that right, it is likely that the criminal will never be successfully targeted by a covert investigation or brought to account for the illegal acts against society. There is little justice in this proposition particularly when in relation to violent and abhorrent acts. Considering the detrimental effect of the previously discussed *McDade Amendment* in the United States, it is suggested that justice is not served if protection from covert police investigation in infinitum is provided by a blanket notification of the right to silence.

Several serious crimes such as murder and sexual assault have been solved by covert police operations prior to the suspect being interviewed and the right to silence being exercised. As shown in *Swaffield*, significant difficulties arise when investigating a person who has invoked that right. It may be considered venturesome to undertake a covert investigation specifically targeting a person who has exercised the right to silence. However, law enforcement agencies owe it to the community they serve to pursue every available avenue towards bringing those responsible for crimes against the community to justice. The well-informed criminal who conceals himself in legal grey areas is a worthy target of a covert police investigation.

Conclusion

The influential cases of *Ridgeway* and *Swaffield*, in Australia and to a lesser degree the English cases *Bryce*, *Christou* and *Wright* and *Smurthwaite* and *Gill* have provided a degree of guidance on the parameters within which undercover operations must operate. Further judicial refinement of these parameters will be forthcoming as undercover operations persist in exposing serious criminals within our community. While it is currently unclear whether time decays the right to silence, it is hoped that when judicial consideration is given to this issue, the wider community interests will prevail.

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References

1. In addition to the following list of some published books disclosing undercover policing methodologies there are also hundreds of published articles. Publications see: Tak P J P et al, *Bijzondere Opsporingsmethoden*, The Hague, Netherlands, 1996; Alvarez, T, *Undercover Operations Survival in narcotic Investigations*, Charles C Thomas, Springfield (USA), 1993; Wilson J Q, *The Investigators Managing FBI and Narcotics Agents*, Basic Books, New York 1978; Pistone J D, *My Undercover Life in the Mafia*, Sidgwick & Jackson, London, 1988; Fijnaut C & Marx G T, *Police Surveillance in Comparative Perspective*, Kluwer Law International, London, 1995; Lyman M D, *Practical Drug Enforcement*, Elsevier, New York, 1993 and Den Boer M, *Undercover Policing and Accountability from an International Perspective*, European Institute of Public Administration, The Netherlands, 1997
2. Part of Public Law 105-277 (US). This law was introduced on 21 October 1998 and was brought about as a result of a proposal by Representative Joseph McDade (now retired), who had been the target of a long and unsuccessful federal prosecution.
3. *The National Association of Assistant United States Attorneys* (1/3/00) <<http://www.naousa.org.html>>
4. *Swaffield v R; Pavic v R* (1998) 192 CLR 159. Hereafter referred to as *Swaffield*.
5. *Swaffield v R; Pavic v R* (1998) 192 CLR 159 at 215, 203-4. Clancy was considered by the court as an agent of the state in line with *R v Broyles* (1991) 3 SCR 595.
6. *Swaffield v R; Pavic v R* (1998) CLR 159 at 185 per Brennan CJ.
7. *Ibid* at 129.
8. *Ibid* at 147
9. *Ibid* at 185 per Brennan CJ
10. See Note 4 per Brennan CJ, per Justices Toohey, Gaudron and Gummow and Kirby J.
11. *Ibid* at 185
12. The decision on *Swaffield* was unanimous, however, on *Pavic* the

- court was split four to one (4:1) with Kirby J in dissent.
13. A similar finding was also found in *R v Pfennig* (No. 1) (1992) 57 SASR 507
14. [1990] 2 SCR 151
15. *Ibid* at 185.
16. *Swaffield v R; Pavic v R* (1998) CLR 159 per Kirby.
17. A warrant to intercept telephone or private conversations requires judicial approval (in some cases a Deputy President of the Administrative Appeals Tribunal is authorised [for warrants under s 219B(5) of the *Customs Act* 1901 (Cth) and s 45 *Telecommunications (Interception) Act* 1979 (Cth) and any supporting affidavit should detail the fact that the person has previously refused to answer questions to allow judicial consideration of the rights of the targeted person when considering whether to issue a warrant.
18. *R v Pfenning (No.1)* (1992) 57 SASR 507
19. *Ibid* at 514 quoted in Morgan-Payler B, 'Undercover Investigations and Confessions' (April 1997) *Criminal Law Journal* 4.1 at 4.4
20. See Note 14.
21. Tactic of placing an undercover operative in custody with a suspect, after the suspect had exercised the right to silence.
22. *Bailey and Smith* [1993] Crim L R 681
23. Section 78 of the *Police and Criminal Evidence Act* 1984 (UK).
24. See Note 22 at 684
25. *Ibid* at 681.
26. [1992] 1 QB 979. Hereafter referred to as *Christou* and *Wright*.
27. [1992] 1 QB 979
28. *Ibid* at 991. The code referred to in this quotation is under s 66 of P.A.C.E which is a 'Code' for acceptable and appropriate conduct by the police in the obtaining of evidence.
29. Choo A, 'Undercover Police Operations and What the Suspect Said (or didn't say)' (1995) *Journal of Current Legal Issues* 27 at 32
30. *R v Bryce* [1992] Crim L R 728
31. There was no contemporary record made of the conversation and there was considerable dispute in relation to what was actually said during *Bryce's* conversation with the police.
32. See Note 30 at 728. Code refers to the Code for acceptable and appropriate conduct by the police in the obtaining of evidence outlined under s 66 of the *Police and Criminal Evidence Act* 1984 (UK)
33. *R v Smurthwaite; R v Gill* [1994] 1 All ER 898
34. *Ibid* at 905. Webster was the undercover operative used against *Smurthwaite*.
35. See Note 33 at 909
36. *Ibid* at 905
37. In accordance with *Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers* – Code C.
38. See Note 33 at 906
39. When comparing this with the comments made by Brennan J in *Swaffield*, it appears the law in England on covert questioning is somewhat more restrictive than Australian law. Although the remaining judges did not contradict Brennan J, this issue did not receive consideration by the majority of the High Court. Until such consideration is given, no clear comparison may be drawn between Australia and England on this issue.
40. In relation to *overt* police activities s 23B(2) of the *Crimes Act* 1914 (Cth) avoids the investigating official relying upon the 'apparent consent' of the suspect to avoid arresting the person for the purpose of conducting an interview. An arrest under s 23B(2) also triggers certain rights under s 23 to protect the interests of the person being interviewed. For further discussion on the use of 'consent' by police see Dixon D, *Law in Policing, Legal Regulation and Police Practices*, Clarendon Press, Oxford 1997.
41. For example, s 227 *Police Powers and Responsibilities Act* 2000 (Qld).
42. *R v O'Neill* (1996) 2 Qd R 326
43. *Ibid* at 332 per Dowsett.
44. *Swaffield v R; Pavic v R* (1998) 192 CLR 159 at 203
45. (1996) 2 Qd R 505
46. (1991) 3 SCR 595
47. See Note 40 at 185 per Brennan CJ
48. *Ibid* at 203
49. Initially introduced by s 91 *Police Powers and Responsibilities Act* 1997 (Qld). Current exemption provided for by s 227 *Police Powers and Responsibilities Act* 2000 (Qld).