John Wesley Hardin and the Right To Silence

By John Tippett, President, CLANT

In 1877 John Wesley Hardin was captured by Texas Rangers as he sat on a train at Pensacola, Florida. For the next 17 years he did his time in the State Penitentiary at Hunstville, Texas.

Hardin was one of the most notorious gunmen of America's Wild West. He was reputed to be a wizard with a six shooter and is believed to have shot dead forty men in gunfights.

During Hardin's sentence at Huntsville, he studied law and eventually passed his bar exams. He opened a law practice at Gonzales, Texas, where his particular interest was in the practice of commercial law. I suppose he had had enough of the criminal kind.

Later on he moved to El Paso but his success as a gunfighter seemed to deter potential commercial clients and his practice did not do well.

Not long afterwards, he was shot dead while he stood at the bar of the Acme Saloon. After his death some said that if his aggressive instincts had been channelled toward the law at an early age he might have ended up a much respected advocate.

What moral can we glean from this American tale? After all, the American experience is presently highly prized in political circles as a valuable source of ideas to tackle those 'darned varmints' who are skulking around Stuart Park and the Darwin City Mall.

Perhaps the story of John Wesley Hardin leads us to this conclusion: if you want to be a successful commercial lawyer don't be a gunfighter before you hang out your shingle.

Another character who would not be short on advice to the present government in its law and order push if he were alive today is Judge Roy Bean. The good judge hailed from Langtry, Texas. He described himself as "the Law west of the Pecos". Roy Bean knew Hardin well. Judge Bean's verdicts were very often controversial but he is remembered fondly for the humour with which he delivered the death penalty. Unfortunately, it has been revealed that not everyone he hanged was guilty of a crime. However, Judge Bean never let a little bit of innocence or the burden of proof come between him and a severe sentence. Law and order during that period of American history was based upon the old English system with its sheriffs and marshals as the primary legal functionaries.

One particular feature of the English system that was later to develop into a central precept of the Australian justice system was rarely referred to in the days of Judge Roy Bean. That feature is now usually described as the 'right to silence'.

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Judge Bean would have regarded the idea of the prosecution being required to discharge a burden of proof as simply far too inconvenient for the proper dispensation of justice. Besides, it means a lot of wasted time between the preferment of the charge and the delivery of the sentence. In a frontier community it is important to make sure that the scoundrels know that the law means business. Up here in the North, a long way from that place, Can-berra, the message has to be clear to the mums and dads who think they can bugger up in relation to property and get away with it. They will be sent to gaol!

Anyway, the right to silence, for the time being, remains as an important and fundamental precept of our administration of justice. I dearly hope it remains so for many reasons, lots of them unconcerned with the criminal justice system. However, rather than discuss something that, hopefully, most lawyers know something about, I want to draw some attention to the conclusions of the Royal Commission on Criminal Justice whose findings were handed down in the United Kingdom in 1993.

In the last paragraph of its report, the Royal Commission has the following to say:

'Ideological drift' and law reform

The logic of our findings is that the right to silence should be strengthened rather than further weakened or attenuated. The collective effect of 'reforms' in this area has been to adversely change the position of the accused in the criminal justice process without any empirical grounding or proper philosophical justification. In fact, the criminal justice process has been reshaped without attention being paid to its

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Alternative Dispute Resolution

By Pat McIntyre

Territory Dispute Resolution Forum?

Last edition I reported briefly on meeting of a broad based interest group at Montego's Meeting Room at Parap to discuss collaborative initiatives in ADR in the Northern Territory.

At the conclusion of that meeting the participants identified the following ideas that might usefully be explored to better promote conflict resolution:

- greater interaction between local bodies interested in ADR
- development of Northern Territory Public Service Register of Mediators
- promotion of professional associations and community education
- develop a practitioner mentoring scheme
- maintain continuing meetings of a wide ADR forum
- develop a data base of persons engaged in ADR
- explore the need for a national peak body
- explore the need for co-ordination of training and accreditation
- promote multi-sector collaboration and information and training sharing
- explore the idea of establishing an NT ADR Centre

The participants agreed to report back to their respective organisations for further input into these ideas and to then meeting again for further discussion.

A follow up meeting has nc been scheduled for 2.00 pm Thur day 18 June 1998 at Conferen Room, Department of Asian Rel tions, 76 The Esplanade Darwin. T contact person for those interested Tom Stodulka Telephone 8981 869

The specific agenda for this mee ing is to explore whether there support for a Territory Dispute Res lution Forum and if so the form tha might take.

Given the publication date of *Ba ance*, no doubt many practitione will have attended that meeting the time this article reaches you. that case I trust the meeting we well and that some of you will co tribute your reflections to this journ for our next issue!

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foundational principle, namely, that it has grown out of the duty upon the state to demonstrate its right to punish those believed to be involved in criminal activity. It is this principle which ultimately imposes strict standards of proof upon the Crown and prevents it from compelling the suspect to cooperate in the investigation or to testify. Whilst the Crown may, in seeking to discharge its burden of proof, utilise information voluntarily provided by the suspect, those who rely upon silence do no more than ask the state to discharge the burden imposed on it by law.

In this context, the integrity, autonomy and right to self respect of individuals arrested by the police, so vigorously defended by the Royal Commission on Criminal Procedure (1981) is already at risk in the practice and ideology of criminal justice today. The police have moved historically from a position in which they have no access to detained persons to one today in which they have unmediated access. Alongside this, citizens have moved from a position in which they were asked if they had anything to say, to one in which they may be held in detention until the police are satisfied that they have nothing left to say (Code C, para 16.1). Nothing could better symbolise the primacy given in policing to arrest over information-gathering, and the subversion of a 'right' to silence into a legal requirement to remain in police detention and interrogation until the police decide that no more can be wrung out of the arrestee.

Police power in the Northern Territory is probably far greater than ar where else in the country. There are mc police here *per capita* than in New Yo

A balance to police power and in vidual freedom is essential to maint what openness this community has le

A right to silence ensures that confession does not recover its crown the most important single item in criminal investigation. We have h plenty of time to see where that rc leads. Do I have to spell it out?