

# ADDRESS TO NSW LABOR LAWYERS

7 NOVEMBER 2012

## PROPOSED AMENDMENT TO THE RIGHT TO SILENCE

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### **Introduction**

Hi everyone. Thanks for coming along tonight. I won't take up too much of your time.

What I propose to do is give you an overview of the proposed amendment and the significance of it.

Now, in a room full of lawyers who are also politically minded, it is likely that most of you have heard about the O'Farrell Government's proposal to abrogate an Accused person's right to silence.

But certainly in my conversations with people outside the law, very few are aware of the existence of this bill.

So, as a criminal defence barrister I don't know what I find more galling.

The fact of this proposed amendment.

Or, the manner in which the State Government is trying to rush this amendment through.

As you may know, the draft bill was only made available on 12 September of this year and had a time limit for comment expiring on 28 September.

That is a period of 16 days to allow all relevant stakeholders to make submissions concerning a proposal as fundamental and, in my view, alarming as this.

Not only that, as far as I am aware, there was a complete lack of consultation by the O'Farrell Government before the decision was made to even propose the amendments.

That is the context in which these amendments have been proposed. And I think it's important to appreciate that.

### **The proposed amendment**

Now, as it currently stands, section 89 of the Evidence Act essentially provides that no unfavourable inference can be drawn from an Accused person remaining silent during the course of an investigation.

Put another way, a person can exercise a right to silence on arrest and the fact of that silence cannot be used against him or her in criminal proceedings.

The proposed amendment by the State Government does not just attenuate this right to silence, it completely abrogates it.

The proposed amendment essentially provides that where an Accused person remains silent during the course of an investigation and then at trial raises some matter in his or her defence, an adverse inference can be drawn from the unreasonable failure of the Accused person to raise that matter earlier.

Put another way, if a person exercises silence on arrest, the fact of that silence may be used against him or her.

### **Significance of the proposed amendment**

This amendment represents a deliberate/wilful abrogation of a common law rule dating back to the 16<sup>th</sup> century.

By way of a side bar, during the late sixteenth century, the courts of the Star Chamber in England developed the practice of compelling suspects, often people charged as religious or political dissidents, to take an oath and to answer questions put by both the judge and the prosecutor. Failure to either take the oath or answer questions attracted severe sanctions, including torture.

It was in reaction to this oppressive and inquisitorial practice in the 16<sup>th</sup> century that the rule developed that a defendant has a right to silence.

That is the weight of history behind this principle that is now so brazenly being rescinded by the O'Farrell Government.

### **Reasons for the abrogation**

Where such a foundational principle is being deliberately abrogated, you would expect the reasons for doing so to be nothing short of compelling.

By my understanding, there are 3 primary reasons offered by the State Government to justify the course it has taken.

The first reason is to prevent the Prosecution from being taken by surprise at trial where an Accused person raises a particular defence.

The fallacy of that argument is that, as it currently stands, there are a number of provisions in the criminal legislation which compel a defendant to put the Prosecution on notice where he or she is running a particular defence.

For example:

- (i) There is no right to calling alibi evidence unless the Defence has given notice in writing to the Prosecution at least 42 days before trial.
- (ii) Where the Defence proposes to rely on the partial defence of substantial impairment to murder, the Defence is required to serve on the Crown particulars of the evidence proposed to be lead.
- (iii) Further there exists a residual statutory power of the District and Supreme Courts to order pre-trial disclosure, which if ordered, obligates the Defence to disclose in advance of the trial factual matters which are in dispute.

The second justification given for abrogating the right to silence is the difficulty facing police who are investigating the recent spate of drive by shootings in Sydney's west. The rationale appears to be if you abrogate the right to silence people will have to come forward.

Now, abrogating the right to silence will have no bearing on this issue as it is only once a person is charged with an offence that they have a right to silence. The proposed amendment goes nowhere in addressing this particular concern by the Government.

The third reason offered by the Government for curtailing the right is that it will prevent 'hardened criminals' from hiding behind what the Police Commissioner has perhaps dramatically described as 'a wall of silence'.

But the experience in the UK, where a similar proposal has been passed into law, indicates that abrogating the right to silence has been ineffective in securing confessions and convictions.

And this is verified in a recent report by NSW Law Reform Commission.

What we can conclude from all this is that the reasons put forward to abrogate this 16<sup>th</sup> century principle are hardly compelling. In fact they're barely reasons at all.

### **A few of the difficulties with the amendment**

Looking at the proposed amendment itself, there are a number of difficulties with it, which I will briefly outline.

The premise behind this amendment is flawed. The proposition that an adverse comment can be made where you rely at trial on something not raised on arrest is one that is wholly unreasonable.

There are countless reasons why an Accused person may exercise the right to silence. They may be tired, distressed, affected by drugs/alcohol. They may be motivated by a desire to protect others or have feelings of shame at behaviour which, whilst morally wrong, does not necessarily amount to criminal conduct. They may believe that the police have not revealed the full extent of the case against them, which is typically the case on arrest. There may be cultural factors which influence the decision to remain silent.

The point is this. Silence may be consistent with innocence but this amendment not only excludes that, it presumptively equates silence with guilt.

And it feeds into a further difficulty which is that it may force an Accused person to get into the witness box to explain his/her silence. Perhaps the unstated aim of this amendment is to compel Accused persons to give evidence. But as we all know the question for any jury in a criminal trial is whether the prosecution have proved its case beyond reasonable doubt and not why an Accused person has exercised a right to silence. This amendment runs the very real risk of distracting a jury from their only task.

## **Conclusion**

That's all I proposed to raise this evening.

There are other difficulties with this amendment including the inadequacy of the proposed safeguards and the inconsistency of the amendment with other parts of the Evidence Act and other jurisdictions as well as our obligations under various international treaties.

I suppose the key point is that this is a monumental shift on one of the foundational precepts of our criminal justice system. The Government's justification for it is weak. And the amendment is fraught with difficulty.

I encourage you all, if you haven't already, to read the submissions not only of the NSW Labor Lawyers but of the Bar Association and Council of Civil Liberties, both of which have come out very strongly against this proposal.

Thanks for your time.

**Samuel Pararajasingham**

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