

## **The Attack on the Right to Silence An English Method in the Antipodes 'SHOULD WE WORRY?'**

### **The Common Law**

Those people who look fondly upon the common law as a repository of hard won freedoms would be well advised to reflect upon its considerable vagaries. Most of the most cherished aspects of the CL as nurtured in the minds of its acolytes are quite recent. As late as the 19<sup>th</sup> Century [and not early in the century either] nobody wanted to hear from a defendant because it was assumed that he would only regurgitate a pack of lies because he had an interest [often his neck] in the proceedings. As a corollary of that view the defendant was not permitted to give evidence and his counsel could not make a closing address for him. His counsel was able to cross-examine witnesses and even call witnesses, but only the accused in-person could make a closing address. This is the origin of the 'Dock Statement', which has been abolished in NSW and everywhere else in the CL world.

Until the formation of the first police force in 1829 the investigation and prosecution of crime was a private and government matter so the methods of investigators varied dramatically. England had resort to trial by ordeal [picking up hot bars, boiling water] and trial by battle as well as the Low German custom of trial by jury. When the 4<sup>th</sup> Lateran Council prohibited clergymen from vindicating the ordeal as a means of determining the decision of God as to guilt or innocence, the legitimacy of trial by ordeal lapsed and trial by jury filled the void. Trial by battle [a Norman custom which was a type of appeal against a private prosecution for murder or rape brought after the defendant had been acquitted by a crown court] lapsed in practice for other reasons but was not prohibited until 1819 when Parliament reacted to a private prosecution in a case of *Ashford v Thornton* [(1818) 106 ER 149] in the previous year in which a defendant claimed "wager of battle" in answer to a private prosecution called "an appeal of murder" brought by the brother of the deceased called the 'Appellor' those halcyon days. Thornton [called the Appellee] was a bricklayer and was described as brutish and physically superior to the slightly built Ashford. After much judicially manoeuvring Ashford withdrew his process and Thornton left the court and later emigrated to America where he died in 1860. Ashford outlived him by a few years. The case created great controversy, as the original jury verdict of acquittal was not popular locally. Parliament acted with great haste to pass the act [59 Geo.III, Chapter 46] in 1819 abolishing the procedure completely as other persons [it is rumoured] were lining up to follow Mr Thornton's tactic.

Juries were originally presumed to know the facts before the case began and were expected to know the victim and the defendant: in stark distinction to modern juries. The use of torture to obtain confessions from defendants was never popular in England because of the common sense view that under torture a person would say anything required by the interrogator and in any event the legal principle, which gained acceptance in the 16<sup>th</sup> and 17<sup>th</sup> centuries, was that a defendant was incompetent to give

evidence at trial. This of course is quite different from the principle that a defendant was entitled to remain silent during pre-trial interrogation and the early 19<sup>th</sup> Century Courts did draw adverse inferences from silence during interrogation. You have to remember that the idea of “Rules of Evidence” is relatively modern and were developed from Judges Rules in the very early 20<sup>th</sup> Century. The participants would have regarded themselves to be governed by common sense. So the idea that we are protected by benevolent common law rules is fanciful and dangerous. One example is the procedure known as “Peine Forte et Dure” which provided that a defendant charged with a felony could refuse to enter a plea whereupon he was pressed to death unless he relented and entered a plea. The reason people took this course was to avoid one of the corollaries of conviction: confiscation of one’s estate. This was of course eventually considered as barbaric in the extreme but it was not abolished by statute till 1772 although it had fallen into disuse, as had other practices such as hanging, drawing and quartering.

### **THE ENGLISH SYSTEM**

After the Police force was established in England and took over the inquisitorial role which used to be undertaken by local justices of the peace, a caution was introduced by the Summary Jurisdiction Act of 1848 and by the Judges Rules which were codified in 1912 to the effect that a person who was going to be charged should be cautioned that he could remain silent if he so desired. If a suspect remained silent the only comment that could be made by a Judge to the Jury was that the suspect was entitled to remain silent at interview and the Jury must not hold the defendant’s silence against him or her. In 1972 the Criminal Law Revision Committee made a majority recommendation that a tribunal of fact draw such inferences as appear proper where the defendant relied on a fact at trial which he or she did not tell the police when questioned if the defendant could reasonably have been expected to mention the fact earlier. <sup>1</sup>Para2.55 NSW Law reform

Commission Report 95/2000 There were further Royal Commissions in 1981 and 1993 which did not recommend any change in the position but in 1988 the right to silence in Northern Ireland was modified by an Order in Council of the English Parliament.

Notwithstanding the scandal of various miscarriages of justice in Northern Ireland the English Parliament in 1994 adopted the earlier recommendations of the 1972 CLRC and substantially reduced the right of silence for suspects at interview with the passage of the Criminal Justice and Public Order Act 1994. This act should be considered in conjunction with the Police and Criminal Evidence Act 1984, which arose out of the Royal Commission on Criminal Procedure 1981 known as the Phillip’s Inquiry into police corruption. This Act, known as PACE provides that each suspect has access to legal representation at Police Stations at considerable public expense by a system of Duty Solicitors. S. 58 (1) says that “A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time.” There then follow many modifying provisions enabling delays of up to 36 and more and the usual complete exception for someone detained under terrorism provisions.

In addition, s.76 (2) of PACE, which applies in the entire UK including Northern Ireland, imposes a duty on the prosecution to prove beyond a reasonable doubt that a confession was not obtained by oppression or “in consequence of anything said or done which was likely .....to render unreliable any confession which might be made by him in consequence thereof.” This stricture upon the prosecution only applies if objection is taken to the confessions admissibility on the grounds of ‘oppression’ or ‘unreliability’. This is very similar to the regime which operates in NSW and Australia generally with the difference that legal advice and representation at the police station are taken as normal in England and Wales [where section 58 of PACE applies].

The radical change to the right to silence was contained in the Criminal Justice and Public Order Act 1994 which applies to England, Wales, Scotland and Northern Ireland which I reproduce here as to sections 34 which applies to interviews at Police Stations, 35 which applies to the effect of an accused’s silence at trial, s.36 which applies to the effect of an accused’s failure or refusal to account for objects, substances or marks [eg.blood] and s.37 which applies to effect of an accused failure or refusal to account for his/her presence at a particular place [eg: a crime scene]. Each example allows for adverse inferences to be drawn against the accused and each constitutes an erosion of an accused’s right to silence although s.34 is the most relevant for our purposes. I include all four sections because it is important to understand the context of s.34 if we are comparing the UK situation with that of NSW. The relevant sections are as follows:

### *Inferences from accused’s silence*

#### **34 Effect of accused’s failure to mention facts when questioned or charged**

(1) Where, in any proceedings against a person for an offence, evidence is given that the accused—

(a) **at any time before he was charged** with the offence, **on being questioned under caution by a constable** trying to discover whether or by whom the offence had been committed, **failed to mention any fact relied on in his defence** in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

**being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned,** charged or informed, as the case may be, subsection (2) below applies.

(2) **Where this subsection applies—**

(a) a magistrates' court, in deciding whether to grant an application for dismissal made by

the accused under section 6 of the [1980 c. 43.] Magistrates' Courts Act 1980 (application for dismissal of charge in course of proceedings with a view to transfer for trial);

(b) a judge, in deciding whether to grant an application made by the accused under–

(i) section 6 of the [1987 c. 38.] Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or

(ii) paragraph 5 of Schedule 6 to the [1991 c. 53.] Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);

(c) the court, in determining whether there is a case to answer;

and

(d) **the court or jury, in determining whether the accused is guilty of the offence charged,**

**may draw such inferences from the failure as appear proper.**

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

(4) This section applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in subsection (1) above "officially informed" means informed by a constable or any such person.

(5) This section does not–

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or

(b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.

(6) This section does not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this section.

(7) In relation to any time before the commencement of section 44 of this Act, this section shall have effect as if the reference in subsection (2)(a) to the grant of an application for dismissal was a reference to the committal of the accused for trial.

### **35 Effect of accused's silence at trial**

(1) At the trial of any person who has attained the age of fourteen years for an offence, subsections (2) and (3) below apply unless—

(a) the accused's guilt is not in issue; or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;

but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.

(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

(4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.

(5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless—

(a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or

(b) the court in the exercise of its general discretion excuses him from answering it.

(6) Where the age of any person is material for the purposes of subsection (1) above, his age shall for those purposes be taken to be that which appears to the court to be his age.

(7) This section applies—

(a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this section;

(b) in relation to proceedings in a magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after the commencement of this section.

### **36 Effect of accused's failure or refusal to account for objects, substances or marks**

(1) Where—

(a) a person is arrested by a constable, and there is—

(i) on his person; or

(ii) in or on his clothing or footwear; or

(iii) otherwise in his possession; or

(iv) in any place in which he is at the time of his arrest,

any object, substance or mark, or there is any mark on any such object; and

(b) that or another constable investigating the case reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offence specified by the constable; and

(c) the constable informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark; and

(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence so specified, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies—

(a) a magistrates' court, in deciding whether to grant an application for dismissal made by the accused under section 6 of the [1980 c. 43.] Magistrates' Courts Act 1980 (application for dismissal of charge in course of proceedings with a view to transfer for trial);

(b) a judge, in deciding whether to grant an application made by the accused under—

(i) section 6 of the [1987 c. 38.] Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or

(ii) paragraph 5 of Schedule 6 to the [1991 c. 53.] Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);

(c) the court, in determining whether there is a case to answer; and

(d) the court or jury, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure or refusal as appear proper.

(3) Subsections (1) and (2) above apply to the condition of clothing or footwear as they apply to a substance or mark thereon.

(4) Subsections (1) and (2) above do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in subsection (1)(c) above what the effect of this section would be if he failed or refused to comply with the request.

(5) This section applies in relation to officers of customs and excise as it applies in relation to constables.

(6) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this section.

(7) This section does not apply in relation to a failure or refusal which occurred before the commencement of this section.

(8) In relation to any time before the commencement of section 44 of this Act, this section shall have effect as if the reference in subsection (2)(a) to the grant of an application for dismissal was a reference to the committal of the accused for trial.

### **37 Effect of accused's failure or refusal to account for presence at a particular place**

(1) Where—

(a) a person arrested by a constable was found by him at a place at or about the time the offence for which he was arrested is alleged to have been committed; and

(b) that or another constable investigating the offence reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence; and

(c) the constable informs the person that he so believes, and requests him to account for that presence; and

(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of those matters is given, subsection (2) below applies.

(2) Where this subsection applies—

(a) a magistrates' court, in deciding whether to grant an application for dismissal made by the accused under section 6 of the [1980 c. 43.] Magistrates' Courts Act 1980 (application for dismissal of charge in course of proceedings with a view to transfer for trial);

(b) a judge, in deciding whether to grant an application made by the accused under–

(i) section 6 of the [1987 c. 38.] Criminal Justice Act 1987 (application for dismissal of charge of serious fraud in respect of which notice of transfer has been given under section 4 of that Act); or

(ii) paragraph 5 of Schedule 6 to the [1991 c. 53.] Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);

(c) the court, in determining whether there is a case to answer; and

(d) the court or jury, in determining whether the accused is guilty of the offence charged,

may draw such inferences from the failure or refusal as appear proper.

(3) Subsections (1) and (2) do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in subsection (1)(c) above what the effect of this section would be if he failed or refused to comply with the request.

(4) This section applies in relation to officers of customs and excise as it applies in relation to constables.

(5) This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for his presence at a place which could properly be drawn apart from this section.

(6) This section does not apply in relation to a failure or refusal which occurred before the commencement of this section.

(7) In relation to any time before the commencement of section 44 of this Act, this section shall have effect as if the reference in subsection (2)(a) to the grant of an application for dismissal was a reference to the committal of the accused for trial.

The provisions of s.34 were interpreted in a case of R v Argent on 16 Dec 1996 [EWCA Crim 1728] which was an appeal from a manslaughter conviction from the Central Criminal Court of London. The case involved a stabbing outside an East London nightclub called the Lotus Club. There were witnesses who gave various versions and there was a police interview of the accused after his arrest. He had access to legal advice and declined to answer questions. There was however a second interview after he had been picked out of an ID parade with a positive ID. He was accompanied by an experienced solicitor [a Mr Ryan ] who advised him to remain silent and that if he did so there was a risk that adverse inferences would be drawn at the trial and that the decision to answer or remain silent was his alone. The appeal revolved inter alia around the accused's refusal at the 2<sup>nd</sup> interview. He later relied on facts which he did not mention at that interview such as: he did not have a knife, had no blood on his hands



and had his wife with him at all times so she could corroborate his version. It was held that the trial judge's comments to the Jury as to inferences were correct. In subsequent cases 5 principles were enunciated first in R v Cowan [1996] and which were approved of by the House of Lords in 2005 in a case of R v Becouarn. The five points are

1. The burden of proof remains on the prosecution.
2. The defendant has a right to remain silent.
3. An inference cannot, on its own, prove guilt.
4. The prosecution must establish a case before drawing any inferences from silence.
5. If the silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination, the jury may draw an adverse inference.

### SOLICITORS ADVICE

Various cases involved defendants relying upon legal advice to remain silent. It is quite clear that the intent of the legislation was and is that the advice of the solicitor can be accepted or rejected by the suspect. An interesting variation on the norm is a case of R v Knight [2003] CA, which involved the solicitor advising a suspect to create a narrative statement by the suspect himself to which he adhered to at trial. His advice to take that action was based upon his opinion that the suspect was an easily confused person. The defendant was acquitted.

However, it is apparent that the courts of the UK regard the mere advice of a solicitor to remain mute as not a good reason for silence. I quote the words of Lord Justice Laws in the matter of Jeffrey John Howell and The Queen [2003] EWCA Crim 1 at para. 24 "The kind of circumstances which may most likely justify silence will be such matters as the suspect's condition (ill-health), in particular mental disability; confusion; intoxication; shock and so forth – of course we are not laying down an authoritative list – or his inability genuinely to recollect events without reference to documents which are not to hand, or communication with other persons who may be able to assist his recollection. There must always be a soundly based objective reason for silence, sufficiently cogent and telling to weigh in the balance against the clear public interest in an account being given by the suspect to the police. Solicitors bearing the important responsibility of giving advice to suspects at police stations must always have that in mind."

This was a case involving an appeal to the Court of Appeal from a conviction for wounding with intent at the Swansea Crown Court in which the appellant gave a "no comment" interview to the police after conferring with and receiving advice from his solicitor. He relied upon a defence of self-defence at trial and gave as his reason for the 'no comment' interview the advice he had received from his solicitor. The solicitor did not give evidence at the trial but there was a witness statement from him in which he stated that before the police interview which was given under the s.34 caution, he gave advice to the appellant that "until we had full disclosure [referring to the lack of a

written statement from the injured party who was in hospital in a serious condition] from the officers we would give a ‘no comment’ interview. Mr Howel (the appellant) fully agreed....” The client then signed a document written out by the solicitor called “Record of agreed course in interview” which consisted of one sentence as follows: “After receiving legal advice I have decided to make a no comment reply on the basis there is no written statement from the injured party” followed by the appellant’s signature. This statement was not shown to the jury who were completely ignorant of it, nor was the solicitor called as a defence witness at the trial. In the appeal the statement of the solicitor appeared as well as a document of written instructions written by someone other than the accused but signed by him on the last day of evidence in the trial in which he stated that he did not want Mr Owens [the solicitor] called as a defence witness realizing that that the prosecution and the judge would tell the jury that his ‘no replies’ could be held against him.

In chief, the appellant said that he was advised to make no comment by the solicitor Mr Owens, because of lack of disclosure and was cross-examined by the Crown who put him through every single ‘no comment’ question and answer. At one stage the defendant, when it was put to him that he could have answered the questions if he wanted to despite that advice given by Mr Owens replied, perhaps with some exasperation, “Well, what was the point of me (sic) having a solicitor there, if I wasn’t going to actually take his advice?” When it was suggested to him that if he were an innocent man he would have “leapt at the chance to deny the allegations and give your side of the story” he responded by saying that he “kept to what Mr Owens had told me, a ‘no comment’ interview. That is why the gentleman was there representing me , sir.” His final response as quoted in the appeal is the somewhat plaintive remark “But I wouldn’t have objected to any of them if I hadn’t had a solicitor.” I cannot help but have some sympathy for Mr Howell whose appeal against conviction was dismissed. His sentence was 6 years.

In this same case the appellant’s lawyers also referred to a case of *Condrón and ors v The United Kingdom* 2000 Crim.LR 679 [which involved an application to the ECHR claiming lack of a fair trial in violation of Article 61 for persons who were advised by their solicitor to remain silent because they were unfit to be interviewed because of (in his opinion) drug withdrawal symptoms]. The domestic court of appeal [1977 1 CAR 185] dismissed the appeals holding that the trial judge had been right to leave it open to the jury to draw an adverse inference from the appellants’ failure to answer questions, notwithstanding their solicitor’s advice. The ECHR found a violation of Article 6(1) holding [see para 19 of the Howell judgement] “that the term of the judge’s direction to the jury left them at liberty to draw an adverse inference even if they had been satisfied that the applicants remained silent *for good reason on the advice of their solicitor* (my italics)”.

At para 24 Lord Justice Laws sought to explain the “true impact of s.34 on cases like the appeal on hand” when he said of the section that “It empowers the jury to draw proper inferences from a failure to mention any fact relied on in his defence .....*being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention.* It seems to us that this provision is one of several enacted in recent years which has served to counteract a culture, or belief, which had been long established in the practice of criminal cases, namely that in principle a defendant may without criticism withhold any disclosure of his defence until the trial. Now, the police interview and the trial are to be seen as part of a continuous process in which the suspect is engaged from the beginning. Of course he retains a right to silence, which the statute protects: not in absolute terms, but by providing, in the words we have emphasised, that adverse inferences may be drawn only in those cases where he could reasonably have been expected to mention the facts in question.

His Lordship, in the penultimate paragraph of the judgement just before dismissing the appeal used the sentence “There was no soundly based objective reason for silence.” [para.26] .It is abundantly clear from this case and other authorities that a solicitor’s advice by itself is not in such a category. This is very much a cautionary tale for solicitors in NSW who may be asked to attend at police stations and advise suspects under the regime which is about to exist in NSW.

**The current PACE caution** The current caution used in the UK is contained in code C of the PACE codes of practice and has been made famous by its repetition in “The Bill” television series. It is as follows: “**You do not have to say anything but it may harm your defence if you do not mention when questioned something which you later rely upon in Court. Anything you do say may be given in evidence.**” This has been described as more of a threat than a caution and its meaning could be considered as obscure. One must consider that the provision of legal advice to all suspects by the state can be used as an excuse to abandon clear and plain English language on the basis that the language of the caution, however obscure and esoteric, has been or will be explained to the suspect by a lawyer. Some might consider that the lawyer is acting as an instrument of the state by way of facilitating the prosecution.

The English caution must be given before a constable puts questions to a suspect for the purpose of obtaining evidence and again on arrest and again at the beginning of each interview and again when charging a suspect which is the end of the inquiry process but remember that the inquiry process and the trial is seen as a ‘continuous process’ according to Lord Justice Laws. It could be fairly said that the defendant’s trial begins when he is first spoken to by the police and a defendant’s refusal to give evidence at his trial will be the subject of adverse comment via s.35 of CJ&PO Act.

The concept of a defence being a positive entity which should be exposed to the light of day at the earliest opportunity is the result of legislative creation which started with the

perceived need to change the law to deal with terrorism in Northern Ireland and gradually infected the whole of the UK. Vague motherhood statements in the Human Rights Act 1998 adopting the European Convention on Human Rights [ECHR] which prohibit torture and the enshrine the right to a fair trial sound good but the devil is in the detail as you have seen by our tour around the Criminal Division of the English Court of Appeal.

If a defence is seen as a conclusion which should be argued by its proponents as soon as possible, the necessary result is that those opposing that conclusion will be given the advantage, which they previously lacked, of being given the timely opportunity of marshalling arguments against that conclusion.

When a jury is told that it may draw an adverse inference against a defendant from his silence at interview or because he does not give evidence at his trial does that not promote the idea that if he had a defence that was worth tuppence he would have mentioned it to the police or paraded it before the jury at his trial. If that does not shift the burden of proof onto the defendant I stand amazed despite all semantic contortions of the English courts. If it quacks like a duck, flies like a duck and tastes like a duck then it ought to be called a duck; not an aquatic avian. When ordinary people are faced with impenetrable language affecting their liberties the cure is not to have a lawyer attempt to explain the effect of that language but to have that language replaced by plain English. It would be better if the caution was in blunt English somewhat along the lines of **‘You don’t have to talk to us but if you have a defence and don’t mention now, we will suggest to the Court that you made it up between now and your trial’**. What is misleading about that! So much for the English, now for NSW.

### **The ‘Reforms’ to the Evidence Act and the Criminal Procedure Act in NSW**

In 1997 the then NSW Police Commissioner Mr Peter Ryan, an Englishman, suggested that the question of an accused’s right to silence be examined. There was comment generated from the Law Society and the NSW Bar and referral to the NSW Law Reform Commission which resulting in a 2000 Report called ‘Report 95 (2000) –The Right to silence’ which I recommend you read as it considered the history of the issue in England and here in some detail. It set out the various reports which dealt with the issue in various states and by the Australian Law Reform Commission and it is fair to say that most, though not all, reports suggested that no change be made to a suspect’s right to silence at the police station.

The position in NSW is at the present time –which means until the amending acts [which have been passed by Parliament and received the royal assent on 25 March 13] are proclaimed- is as set out in s.89 of the Evidence Act 1995 which codifies the common law principles enunciated by the High Court in *Petty v The Queen* (1991) 173 CLR 95.

The existing s.89 which is not being repealed but will be made subject to a new section 89A, provides that (1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:

(a) to answer one or more questions, or

(b) to respond to a representation,

(2) Evidence of that kind is not admissible if it can only be used to draw such an inference.

(3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.

(4) In this section:

**inference** includes:

(a) an inference of consciousness of guilt, or

(b) an inference relevant to a party's credibility.

The amending section reads as follows:

Insert after section 89:

89A Evidence of silence in criminal proceedings for serious indictable offences

(1) In a criminal proceeding for a serious indictable offence, such unfavourable inferences may be drawn as appear proper from evidence that, during official questioning in relation to the offence, the defendant failed or refused to mention a fact:

(a) that the defendant could reasonably have been expected to mention in the circumstances existing at the time, and

(b) that is relied on in his or her defence in that proceeding.

(2) Subsection (1) does not apply unless:

(a) a special caution was given to the defendant by an investigating official who, at the time the caution was given, had reasonable cause to suspect that the defendant had committed the serious indictable offence, and

(b) the special caution was given before the failure or refusal to mention the fact, and

(c) the special caution was given in the presence of an Australian legal practitioner who was acting for the defendant at that time, and

(d) the defendant had, before the failure or refusal to mention the fact, been allowed a reasonable opportunity to consult with that Australian legal practitioner, in the absence of the investigating official, about the general nature and effect of special cautions.

(3) It is not necessary that a particular form of words be used in giving a special caution.

(4) An investigating official must not give a special caution to a person being questioned in relation to an offence unless satisfied that the offence is a serious indictable offence.

(5) This section does not apply:

(a) to a defendant who, at the time of the official questioning, is under 18 years of age or is incapable of understanding the general nature and effect of a special caution, or

(b) if evidence of the failure or refusal to mention the fact is the only evidence that the defendant is guilty of the serious indictable offence.

(6) The provisions of this section are in addition to any other provisions relating to a person being cautioned before being investigated for an offence that the person does not have to say or do anything. The special caution may be given after or in conjunction with that caution.

**Note:** See section 139 of this Act and section 122 of the [\*Law Enforcement \(Powers and Responsibilities\) Act 2002\*](#) .

(7) Nothing in this section precludes the drawing of any inference from evidence of silence that could properly be drawn apart from this section.

(8) The giving of a special caution in accordance with this section in relation to a serious indictable offence does not of itself make evidence obtained after the giving of the special caution inadmissible in proceedings for any other offence (whether or not a serious indictable offence).

(9) In this section:

**"official questioning"** of a defendant in relation to a serious indictable offence means questions put to the defendant by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of the serious indictable offence.

**"special caution"** means a caution given to a person that is to the effect that:

(a) the person does not have to say or do anything, but it may harm the person's defence if the person does not mention when questioned something the person later relies on in court, and

(b) anything the person does say or do may be used in evidence.

**Note:** The Commonwealth Act does not include this section.

### **[3] Schedule 2 Savings, transitional and other provisions**

Omit clause 1 (1). Insert instead:

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

### **[4] Schedule 2, Part 4**

Insert after clause 22:

#### **Part 4 - Provisions consequent on the enactment of the Evidence Amendment**

## **(Evidence of Silence) Act 2013**

23 Definition In this Part:

**"amending Act"** means the *Evidence Amendment (Evidence of Silence) Act 2013* .

24 Evidence of silence in criminal proceedings for serious indictable offences

(1) Section 89A, as inserted by the amending Act, does not apply in relation to a proceeding the hearing of which began before the insertion of that section.

(2) Section 89A, as inserted by the amending Act, does not apply in relation to any failure or refusal to mention a fact before the insertion of that section.

(3) Section 89A, as inserted by the amending Act, extends to evidence of anything done or omitted to be done in connection with the investigation of offences committed before the insertion of that section.

25 Review of policy objectives of amending Act

(1) The Minister is to review section 89A to determine whether the policy objectives of the amending Act remain valid and whether the terms of section 89A remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the commencement of this clause.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

In tandem with this amendment is the Criminal Procedure Amendment (Mandatory Pre-Trial Defence Disclosure) Bill 2013 ,which is at the same stage in the legislative process: it will become law on proclamation. The provisions of the Amendments are as follows:

### **SCHEDULE 1 – Amendment of Criminal Procedure Act 1986 No 209**

#### **[1] Section 136 Directions for conduct of proceedings**

Omit “, including a direction as to the time by which notice of the prosecution case is to be given under section 137 and notice of the defence response is to be given under section 138”.

#### **[2] Section 137 Notice of prosecution case to be given to accused person**

Omit the section.

#### **[3] Section 138 Notice of defence response to be given to prosecutor**

Omit the section.

#### **[4] Section 139 Pre-trial hearings**

Omit section 139 (3) (c). Insert instead:

(c) determine the timetable for pre-trial disclosure under section 141,

#### **[5] Sections 141-143**

Omit the sections. Insert instead:

##### 141 Mandatory pre-trial disclosure

(1) After the indictment is presented or filed in proceedings, the following pre-trial disclosure is required:

(a) the prosecutor is to give notice of the prosecution case to the accused person in accordance with section 142,

(b) the accused person is to give notice of the defence response to the prosecution's notice in accordance with section 143,

(c) the prosecution is to give notice of the prosecution response to the defence response in accordance with section 144.

(2) Pre-trial disclosure required by this section is to take place before the date set for the trial in the proceedings and in accordance with a timetable determined by the court.

**Note:** Practice notes issued by the court will guide determinations of the timetable for pre-trial disclosures and related matters.

(3) The court may vary any such timetable if it considers that it would be in the interests of the administration of justice to do so.

(4) The regulations may make provision for or with respect to the timetable for pre-trial disclosure.

##### 142 Prosecution's notice

(1) For the purposes of section 141 (1) (a), the prosecution's notice is to contain the following:

(a) a copy of the indictment,

(b) a statement of facts,

(c) a copy of a statement of each witness whose evidence the prosecutor proposes to adduce at the trial,

(d) a copy of each document, evidence of the contents of which the prosecutor proposes to adduce at the trial,

(e) if the prosecutor proposes to adduce evidence at the trial in the form of a summary, a copy of the summary or, where the summary has not yet been prepared, an outline of the summary,



- (f) a copy of any exhibit that the prosecutor proposes to adduce at the trial,
- (g) a copy of any chart or explanatory material that the prosecutor proposes to adduce at the trial,
- (h) if any expert witness is proposed to be called at the trial by the prosecutor, a copy of each report by the witness that is relevant to the case,
- (i) a copy of any information, document or other thing provided by law enforcement officers to the prosecutor, or otherwise in the possession of the prosecutor, that would reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the accused person,
- (j) a list identifying:
  - (i) any information, document or other thing of which the prosecutor is aware and that would reasonably be regarded as being of relevance to the case but that is not in the prosecutor's possession and is not in the accused person's possession, and
  - (ii) the place at which the prosecutor believes the information, document or other thing is situated,
- (k) a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness,
- (l) a copy of any information, document or other thing in the possession of the prosecutor that would reasonably be regarded as adverse to the credit or credibility of the accused person,
- (m) a list identifying the statements of those witnesses who are proposed to be called at the trial by the prosecutor.

(2) The regulations may make provision for or with respect to the form and content of a statement of facts for the purposes of this section.

(3) In this section,

**"law enforcement officer"** means a police officer, or an officer of one of the following agencies:

- (a) the Police Integrity Commission,
- (b) the New South Wales Crime Commission,
- (c) the Independent Commission Against Corruption.

143 Defence response

(1) For the purposes of section 141 (1) (b), the notice of the defence response is to contain the following:

- (a) the name of any Australian legal practitioner proposed to appear on behalf of the accused person at the trial,
- (b) the nature of the accused person's defence, including particular defences to be relied on,
- (c) the facts, matters or circumstances on which the prosecution intends to rely to prove guilt (as indicated in the prosecution's notice under section 142) and with which the accused person intends to take issue,
- (d) points of law which the accused person intends to raise,
- (e) notice of any consent that the accused person proposes to give at the trial under section 190 of the [Evidence Act 1995](#) in relation to each of the following:

- (i) a statement of a witness that the prosecutor proposes to adduce at the trial,
- (ii) a summary of evidence that the prosecutor proposes to adduce at the trial,
- (f) a statement as to whether or not the accused person intends to give any notice under section 150 (Notice of alibi) or, if the accused person has already given such a notice, a statement that the notice has been given,
- (g) a statement as to whether or not the accused person intends to give any notice under section 151 (Notice of intention to adduce evidence of substantial mental impairment).
- (2) The notice of the defence response is also to contain such of the following matters (if any) as the court orders:
  - (a) a copy of any report, relevant to the trial, that has been prepared by a person whom the accused person intends to call as an expert witness at the trial,
  - (b) if the prosecutor disclosed an intention to adduce evidence at the trial that has been obtained by means of surveillance, notice as to whether the accused person proposes to require the prosecutor to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,
  - (c) notice as to whether the accused person proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecutor,
  - (d) if the prosecutor disclosed an intention to tender at the trial any transcript, notice as to whether the accused person accepts the transcript as accurate and, if not, in what respect the transcript is disputed,
  - (e) notice as to whether the accused person proposes to dispute the authenticity or accuracy of any proposed documentary evidence or other exhibit disclosed by the prosecutor,
  - (f) notice of any significant issue the accused person proposes to raise regarding the form of the indictment, severability of the charges or separate trials for the charges,
  - (g) notice of any consent the accused person proposes to give under section 184 of the [Evidence Act 1995](#) .

#### **[6] Section 144**

Omit “ -court-ordered pre-trial disclosure ” from the heading to the section.

#### **[7] Section 145 Dispensing with formal proof**

Omit “section 143 (d)” from section 145 (2). Insert instead “section 143 (1) (c)”.

#### **[8] Section 146A**

Insert after section 146:

146A Drawing of inferences in certain circumstances

- (1) This section applies if:
- (a) the accused person fails to comply with the requirements for pre-trial disclosure imposed by or under this Division on the accused person, or
  - (b) the accused person is required to give a notice under section 150 (Notice of alibi) and fails to do so.
- (2) **If this section applies:**
- (a) the court, or any other party with the leave of the court, may make such comment at the trial as appears proper, and
  - (b) the court or jury may then draw such unfavourable inferences as appear proper.
- (3) **A person must not be found guilty of an offence solely on an inference drawn under this section.**
- (4) Subsection (2) does not apply unless the prosecutor has complied with the requirements for pre-trial disclosure imposed by or under this Division on the prosecution.
- (5) This section does not limit the operation of section 146.

#### **[9] Section 147 Disclosure requirements are ongoing**

Insert after section 147 (2):

- (3) An accused person may, with the leave of the court, amend the notice of the defence response given under section 143 if any information, document or other thing is obtained from the prosecution after the notice of the defence response was given that would affect the contents of that notice.
- (4) The accused person must give the amended notice of the defence response to the prosecutor.

#### **[10] Section 148 Court may waive requirements**

Insert “, but only if the court is of the opinion that it would be in the interests of the administration of justice to do so” after “Division” in section 148 (1).

#### **[11] Section 148 (4) and (5)**

Insert after section 148 (3):

- (4) The court is to take into account whether the accused person is represented by an Australian legal practitioner when considering whether to make an order under this section.
- (5) The court is to give reasons for the making of an order under this section.

## **[12] Section 149 Requirements as to notices**

Insert after section 149 (5):

(6) A reference in this section to a notice includes a reference to an amended notice.

## **[13] Schedule 2 Savings, transitional and other provisions**

Insert at the end of clause 1 (1):

*Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013*

## **[14] Schedule 2**

Insert at the end of the Schedule with appropriate Part and clause numbering:

### **Part - Provisions consequent on enactment of Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013**

Definition In this Part,

**"amending Act"** means the *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013* .

Case management provisions

(1) An amendment of Division 3 of Part 3 of Chapter 3 by the amending Act applies only in respect of proceedings in which the indictment was presented or filed on or after the commencement of the amendment.

(2) Accordingly, a provision of Division 3 of Part 3 of Chapter 3, as in force before its amendment by the amending Act, continues to apply in respect of proceedings in which the indictment was presented or filed before the commencement of the amendment.

Review of policy objectives of amending Act

(1) The Minister is to review the amendments made by the amending Act to determine:

(a) whether they have been effective in reducing delays in proceedings on indictment, and

(b) whether they have been effective in promoting the efficient management and conduct of trials, and

(c) whether the interests of justice have been affected in relation to parties to proceedings on indictment, and

(d) the cost impacts of the procedures.

(2) The review is to be undertaken as soon as possible after the period of 2 years from the commencement of this clause.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 2 years.

**Passage through Parliament** It is not fruitful to embark upon a discussion of how the Bills proceeded through firstly the LC and the LA except to say that one minor party changed its view from nay to yea in the LC and both Bills passed the lower house on 19 March 2013 and received Royal Assent on 25 March 2013. Neither Act is yet in force but will be when proclaimed.

**Commencement** The CP amendments for Mandatory Pre Trial Disclosure will apply to proceedings in which the indictment is presented or filed after commencement of the amending Act. These amendments all affect Part 3 Division 3 of the Criminal Procedure Act which means that they only apply to Trials in the District or Supreme Courts.

The Provisions of the Evidence Amendment (Evidence of Silence) Act does not apply ‘in relation to a proceeding the hearing of which began before the insertion of that section’ [s.24 (1)] but the subsequent subsection (3) make it clear that the amendments extend to anything done or omitted to be done in connection with the investigation of offences which occur before the insertion of the new section although subsection (2) says that the amending section 89A ‘does not apply in relation to a failure or refusal to mention a fact before the insertion of that section’. Here the distinction is between the failure or refusal to *mention* a fact and *anything done or omitted to be done* which I imagine go to subsections (6), (7) and (8) of s.89A.

### **Differences between the Exposure Draft of the Evidence of Silence Bill and the Act as passed.**

The Exposure draft Bill detailed a supplementary caution [separately defined from what was described a “standard caution” being given to a defendant as a precondition of the adverse inference and provided as another precondition that a defendant was “allowed the opportunity to consult an Australian Legal Practitioner about the effect of failing or refusing to mention such a fact”. It was later stated that a defendant would be taken not to have been allowed such an opportunity if his means and the circumstances preclude the defendant from obtaining legal advice.

The Bill as passed provides that the “unfavourable” inferences cannot be drawn unless the defendant had firstly received a ‘special caution’ rather than a ‘supplementary caution’ and had had a ‘reasonable opportunity’ to consult with a lawyer in private about ‘the general nature and effect of special cautions’ and that the special caution was given in the presence of the same lawyer ‘who was acting for the defendant at that time’.

### **Important features of the Evidence of Silence Amendments.**

1. The provisions only apply to criminal proceedings for “serious indictable offences” which are defined in s.4 of the Crimes Act as indictable offenses punishable by life imprisonment or for a term of 5 or more years. This extends to many offences, which are indictable but commonly dealt with in the Local Court.
2. The word “unfavourable” used to describe the inferences that may be drawn differs from the English legislation, which only describes the inferences as ‘as appear proper’. This means that it is quite clear that we are discussing adverse inferences and the use of the word ‘unfavourable’ is used in s.38 of the Evidence Act, which can give some guidance for future debate about that word.
3. Section 89A is more concise than the English legislation but uses many common terms which means that, initially at least, Courts may seek guidance from English judicial decisions although of course they are not bound by them.
4. The provisions do not apply to Children [-18] or persons incapable of understanding the special caution.
5. The provisions do not apply if the failure or refusal is the only evidence against the defendant. This follows the line of authorities in England.
6. The provisions as to legal advice are contained in the one act, which is more convenient than the English method of spreading the relevant provisions all over the shop.
7. Although 89A(3) says that a particular form of words need not be used for the special caution the definition subsection [9] begs the words which could be used verbatim and which are the same as the English caution albeit in the 3<sup>rd</sup> person.
8. There is a grandfather clause to review whether the policy objectives have been achieved after 5 years. The objective of the Bill was described in Parliament as designed to prevent professional criminals from taking refuge in silence. This of course presumes that there is something ‘unsporting’ about remaining mute.
9. How the effect of the amendment could be measured in any proper empirical scientific manner is beyond me as there are so many dynamic factors in a trial that it is probably impossible to isolate any single factor and measure its effect.
10. The amendment will, I believe, impose extra duties and liabilities on solicitors who are brave enough to attend at police stations to advise on the ‘special caution’: but I will return to that issue later in this paper.

### **Important features of the Pre-Trial Disclosure Amendments to the Criminal Procedure Act.**

1. The provisions only apply to trials and not to Local Court matters.
2. They expand upon the existing Prosecutor’s notice but only in minor ways but do require the prosecutor to specifically provide copies of any document or thing which could reasonably be regarded as adverse to the credit or credibility of the defendant.
3. The major change is that in the new s.143 the defence is now obliged to disclose the nature of the defence including ‘particular defences to be

- relied upon’ and ‘points of law which the accused person intends to raise’
4. The penalty for non-disclosure is that the court or any other party with the leave of the court may make “such comment at the trial as appears proper” and the court or jury may then draw such *unfavourable* inferences as appear proper. Note the use of the words “proper” and “unfavourable”.
  5. Following the English authorities there is express provision [146A(3)] that “a person must not be found guilty solely on an inference drawn under this section”.
  6. The grandfather clause in this Bill calls for a review after 2 years ,which differs from the cognate bill which provides for 5 years.

### **The Effect of both Bills?**

1. The traditional right to silence is almost but not quite dead. It is certainly emasculated.
2. The Onus of Proof advantage for the defence has been tipped so that the scales are now as even as they can be within a system which purports to adhere to the principle that the prosecution must prove its case ‘beyond a reasonable doubt’. It is no accident that judges have refused to explain those words beyond saying that they mean what they say. [The classic circular definition]. The meaning that the ordinary person takes from those words is, I suggest, that the proof required to convict a person is to the standard which the world considers reasonable and then some. In making that judgment, the juryperson is going to apply the standards which he sees at work in the courtroom as well as the standards of proof which he or sees operating in ordinary life. In today’s world where there is an unholy rush to condemn suspects in the press, I do not believe that defendants can be comforted by the expression as much as they could previously.

### **The position of the Solicitor who dares to go to the Police Station under the new regime. Is he in jeopardy of being called as a witness in a trial and is he liable for his negligent advice?**

Practitioners who find comfort in the common law doctrine of ‘Advocate’s immunity from suit’ should perhaps think again. This immunity was considered at the Standing Committee of Attorneys General in 2005 and while The Committee decided to take no action it did consider that in future discussion about the matter the only worthwhile factor to be taken into account was the question of public policy.

There has never been any doctrine of Advocate’s Immunity in the USA or Canada and it no longer exists in the UK. The leading Australian case is the High Court case of *D’Orta-Ekenaike v Victoria Legal Aid* 2005 HCA 12 which found that the doctrine existed in the case in question which involved a solicitor and barrister advising a defendant to plead guilty at committal to a rape charge. He was later allowed to withdraw that plea and was eventually acquitted. The decision in the HC was 6 to 1 with

H.H. Mr. Justice Kirby being the sole dissenter.

The Court reiterated its independent position referring to *Parker v The Queen* [111 CLR 610] where it declared that it would no longer consider itself bound to follow the decisions of the House of Lords and referred to the Australia Act. The Court found that s.10 of the Victorian Legal Profession Practice Act 1958 and s.442 of the Legal Practice Act 1996 (Victoria) preserved the proposition that “Nothing in this act abrogates any immunity for negligence enjoyed by legal practitioners before the commencement of this section” It was decided that the applicable time was the state of play in England in 1891 and that the immunity extended to “work which the advocate did out of court but was work which led to a decision which affected the conduct of the case at the subsequent trial.

I invite you to read the HC case and in particular the dissenting judgment and then look at the provisions of the NSW Legal Profession Act 2004 which does protect from liability bodies such as the Bar Council, The Law Society and Mediators for acts done in good faith (s.601) but it does state that Lawyers qua lawyers have no immunity from suit in any court (s.726). While this does not expressly abrogate any common law immunity from suit by advocates the troubling thing is that I can find no enactment preserving a common-law immunity for advocates in NSW. In the provisions of the Civil Liability Act 2002, which describe immunities for certain bodies and functionaries [Judges, courts and the like] there is no mention, in that context, of advocates.

Indeed there is in s. 50 of the CLA mention of a test for the liability of persons performing ‘professional services’, which does not mention an exception for the ‘professional services’ of an advocate.

Some might draw some comfort from s.3A of the CLA, which says that “A provision in this act that gives protection from civil liability does not limit the protection from liability given by another provision of this act or by *another act or law*.”

I don’t gain any comfort from those provisions. My argument is that while we may be sure that Advocate’s Immunity exists in Victoria, we cannot be sure about the situation in NSW.

### **Have English solicitors any advice, which might assist their antipodean cousins?**

The duty solicitor in Knight’s case [mentioned previously] advised a suspect accused of an indecent assault on a 10 year old daughter of a friend [touching her stomach while his other hand was down his trousers] not to answer police questions at interview because he might get confused when answering questions as he was a nervous person. The solicitor prepared a written statement, which was adopted by the defendant and to which he stuck to like a limpet at his trial. It was held that no inferences could be drawn and he was acquitted. Sounds more like good luck than good management to me.

Daniel T Smyth . April 2013