**The modified right to silence: the experience from England and Wales**

## Context

On 14 August 2012 the Premier Barry O'Farrell announced that his government intended to introduce changes to the Evidence Act 1995 that would toughen the law relating to the right to silence. The proposals have been set out in a draft Exposure Bill, the *Evidence Amendment (Evidence of Silence) Bill 2012* ('the Draft Bill'). At the time of writing this Bill has not yet been placed before parliament.

These proposals reflect changes introduced in England and Wales on 10 April 1995, by section 34 of the *Criminal Justice and Public Order Act 1994* ('the UK Act'). This paper will consider the legal impact of the UK Act and outline some of the issues that have arisen.

## Historical background

The Act was passed during John Major's second Conservative government (1992-7). It was part of what the government styled a 'crusade against crime'. A number of controversial provisions were enacted, including the provisions which abrogated the common law restrictions on passing comment on the right to silence. These provisions were in substantially the same terms as those enacted in relation to Northern Ireland 6 years previously, in the Criminal Evidence (Northern Ireland) Order 1988.

The proposals were not new; the origin of these provisions can be traced to recommendations made by the Criminal Law Revision Committee in its report from 1972. However, a Royal Commission on Criminal Justice (the 'Runciman Commission') which reported in 1993, that was established following a number of high-profile miscarriages of justice in the UK, expressly recommended against any change to the right to silence. Despite this recommendation, the government passed the Act the following year.

There was widespread opposition to the Act, including public demonstrations from civil liberty groups and others. However, public attention was largely focussed on the provisions other than those which affected the right to silence.

The then Home Secretary, Michael Howard, introduced the Bill in the Second Reading speech as "the most comprehensive package of measures to tackle crime ever announced by a Home Secretary". It was said to mark "a fundamental shift in the criminal justice system against the criminal and in favour of protecting the public".

In relation to the right to silence, the Home Secretary made the following comments:

> *The provisions will allow a court to draw proper inferences from a suspect's refusal to answer police questions in circumstances which cry out for an innocent explanation, if there is one, or from a defendant's refusal to give evidence in court. That does not mean that a suspect or defendant will be compelled to speak under threat of a criminal penalty. Defendants can still remain silent if they choose. In future, the judge and jury will be able to weigh up why the defendant decided to stay silent and the jury will be able to draw reasonable inferences from that silence. In short, it is not about the right to silence; it is about the right to comment on silence.*
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> *The present system is abused by hardened criminals. … I do not believe that the innocent have anything to fear from the changes. If there is a good reason for the suspect to remain silent, the jury will be able to consider it. But it is only right that, in a suitable case, the jury should know whether a person has remained silent or whether his story has changed. The current procedures can be and are abused by experienced criminals.*
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> *Hansard* HC Deb 11 January 1994 vol 235 cc20-122.

## The UK Act

Section 34 of the UK Act relevantly provides as follows.

> *(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 […] subsection (2) below applies.*
>
> *(2) Where this subsection applies—*
> *(a) […]*
> *(b) […]*
> *(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.*

## Comparison between the UK Act and the Draft Bill

*Application*

The UK Act applies to any offence; the Draft Bill only applies a serious indictable offence. The Draft Bill also does not apply to defendants under 18 or suffering from cognitive impairment.

*Official questioning*

Both the UK Act and the Draft Bill require there to be some form of official questioning before the provisions will be engaged. The UK Act applies to questioning at any time prior to charge. Silence at other times is not relevant to these particular sections.

The UK Act contains separate provisions which allow inferences to be drawn from the accused's silence at trial (s35) and also at the time of arrest, where the accused failed to explain the presence of an object, mark or substance, or his presence at a particular place (ss36 and 37).

*Legal Advice*

Both the UK Act and the Draft Bill provide that the provisions do not apply unless the accused has been given an opportunity to consult with a solicitor; s34(2A) of the UK Act and s89A(2)(b) of the Draft Bill. The Draft Bill confines such advice to advice on the effect of a failure or refusal to mention facts.

*Fails or refuses to respond*

The provisions in the Draft Bill will also be engaged where the Defendant 'refused' to mention a fact. The UK Act (in s34) only refers to a 'failure' to mention a fact.

The Draft Bill provides that the accused's failure to respond to a representation, as well as a question, can also engage the section. There is no similar provision in the UK Act.

*Unfavourable inferences*

Where the provisions of the UK Act apply, the Court is permitted to drawn such inferences as appear proper. The Draft Bill specifies that such *unfavourable* inferences as appear proper may be drawn.

*The supplementary caution*

The provisions in the Draft Bill will only operate where a supplementary caution has been given, which is defined in s89A(10).

In the UK Act, there is no such requirement. There is a requirement to give a 'special warning' before an inference can be drawn from silence on arrest, that is where an accused fails to account for the presence of objects or presence in a particular place (ss36 and 37).

The standard caution was revised to take account of the change to the right to silence. The current version of the caution 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 on in court. Anything you do say may be given in evidence.*

Note that the caution refers to 'something' relied on in Court, rather than (as in the section itself) a 'fact'; as to this, see *R v Webber*, below.

Note: If the Defendant does not actually understand the consequences of remaining silent, then this circumstance may be relevant to the reasonableness of his failure to mention facts. For this reason, during interview there is particular emphasis on checking whether the Defendant has understood the caution. He is often asked to explain his understanding of the caution in his own words.

**How the UK provisions have been interpreted**

The Lord Chief Justice in *R v Bowden* [1999] 2 Cr App R 176 noted that, as the provisions restricted a right recognised at common law, they 'should not be construed more widely that the statutory language permits.' A conviction cannot be based solely on the silence of an accused: *R v Cowan* [1995] 3 WLR 818.

In *R v Argent* [1997] 2 Cr App R 27 the Lord Chief Justice identified six conditions, which must be satisfied before the section is engaged and an inference can be drawn:

1) there had to be proceedings for an offence;
2) the failure had to occur before the person was charged;
3) the failure to answer had to occur during questioning under caution;
4) the questioning had to be directed at trying to discover whether or by whom the offence had been committed;
5) the failure had to be to mention any fact relied on in the person's defence in those proceedings;
6) the fact had to be one he could reasonably have been expected to mention, in the circumstances existing at the time.

In *Cowan,* the Court set out the essential elements of a direction to the jury, which have been further expanded by the Courts. The judge must identify to the jury the 'fact' which was not mentioned in interview: *R v Gill* [2001] 1 Cr App R 160. The judge must also advise the jury to reject any innocent explanation for failing to mention a fact before drawing an adverse inference: *Condron v UK* [2001] 31 EHRR 1 and *R v Beckles* [2004] EWCA 2766. The current Specimen Direction prepared by the Judicial Studies Board can be found in the Crown Court Benchbook (see Reference Materials, below).

*European law*

The European Court of Human Rights has been petitioned on a number of occasions in relation to the UK Act. It has been argued that the provisions offend against the Article 6 right to a 'fair trial'.

In *Murray v UK* [1996] 22 EHRR 29, (a case under the Northern Ireland provisions) a member of the IRA was convicted of conspiracy to murder, partly on the basis of an inference drawn from his refusal to answer questions. The ECHR held that the right to silence was not absolute, although a Defendant could not be found guilty on the basis of his silence alone.

*Condron v UK* [2001] 31 EHRR 1 the ECHR recognised that Court is required to perform a balancing act in relation to directing the jury on when to draw an inference from silence. In the particular circumstances of that case (see below) there had been a breach of Article 6 because the Judge had not warned the jury that they could only draw an inference of guilt if they rejected the innocent explanation.

### *'...failed to mention...'*

*Circumstances which 'cry out' for an explanation*

The Home Secretary stated in the second Reading speech that the provisions would "allow a court to draw proper inferences from a suspect's refusal to answer police questions in circumstances which cry out for an innocent explanation".

This appears to suggest that failure to mention minor, incidental, or tangential facts may not bring the provisions into operation. The Courts have not always interpreted section 34 in this way; see *R v Mohammed* (below).

*Failure vs. inconsistency*

Where a Defendant has given an account in interview, but gives an inconsistent account in evidence, this can amount to a 'failure' to mention the additional facts.

In *R v Maguire* 172 JP 417 it was pointed out that ordinarily a prosecutor would draw attention to inconsistencies between an account given by a Defendant in evidence and any account given previously, to demonstrate that the account is not credible. A s34 direction in these circumstances would be overly formal and not likely to be helpful.

However, in *R v Mohammad* [2009] EWCA 1871 the Court of Appeal did not find a misdirection where a direction on drawing adverse inferences was given to the jury in the following circumstances.

> M was charged with wounding with intent. The victim (V) had approached M in a service station to remonstrate with him about his driving. M reacted violently and slashed V's face with a knife, and a violent struggled followed between the two men and M's friend, X. M claimed he was acting in self-defence. When interviewed, M gave a prepared statement to police. At trial the prosecution asserted that M had relied on the following three facts:
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> 1) V had first said to him "you fucking cunt, I'm going to teach you how to drive".
> 2) V said "I'm going to kill you, I'm going to kill you".
> 3) M identified X at trial.
>
> Whereas in his prepared statement, M had said:
>
> 1) [V] was swearing and talking about my driving.
> 2) I thought [V] was going to kill me.
> 3) M declined to name X.

The Court of Appeal stated:

> *We have some sympathy for the contention that, so far as the first two matters are concerned, the Appellant was doing no more than putting flesh on the bones of the facts which he had already clearly set out … As to the failure to name the companion [X], it cannot be said that the prosecution suffered any prejudice, or that the Appellant gained any advantage by the refusal to mention him in interview. … Nevertheless, we are not prepared to say that the Recorder was wrong in law to give the jury a direction under s34. It was a finely balanced decision, and the Recorder was entitled to come to the decision he did.*

*Refusing to be interviewed*

In *R v Johnson* [2006] Crim LR 253, an inference could not be drawn under section 34(1)(a) where the Defendant refused to leave his cell to be questioned. In these circumstances there had been no 'questioning'. The situation may have been different if the questioning had been conducted in the cell itself.

*No failure if not aware of the fact*

Unsurprisingly, it is not a failure to mention a fact in an interview if the accused was not aware of the fact at that time and only became aware of it at a later stage: *R v Nickolson* [1999] Crim LR 61.

> N was convicted of indecently assaulting his stepdaughter. At trial the prosecution relied on evidence of seminal staining on the victim's nightdress. N suggested an explanation for the presence of this staining was that he had masturbated in the toilet, and that V, who went into the bathroom after him, may have come into contact with some of his semen. The Judge's decision to give a s34 direction was held to be plainly wrong. At the time of the interview, N had not been informed of the presence of semen on the nightdress. The Court held he could not be expected a fact of which he was unaware. The Court also noted that N was in effect putting forward a hypothesis at trial, rather than asserting a fact.

**"*...a fact relied upon in his defence...*"**

*True facts*

If a Defendant fails to mention a fact which is accepted by the Prosecution to be true, this does not engage the section: *R v Wisdom, R v Sinclair* (1999) (10 December, unreported).

*Facts which comprise the Defence*

*In R v Mountford* [1999] Crim LR 575 the Court of Appeal held that a direction was not appropriate where the fact which was not mentioned the basis for the whole defence, as the jury could not separate the tasks of determining whether to drawn an inference and deciding guilt. However, this reasoning was doubted, though not expressly overruled, by the House of Lords in *Webber* (below).

> M was convicted of possessing drugs with intent to supply to another, W. M gave a no comment interview. However, W gave an interview naming M as the supplier. At trial, M contended it was the W who was the supplier. His reason for failing to mention this to police was that he did not want to land W in trouble. The 'circularity' of the issue made a direction inappropriate; the question of whether to draw an inference could not be determined as an independent issue.

Section 34 of the Act only operates if there has been a reliance on a fact in proceedings that was not previously mentioned. Some forms of reliance are uncontroversial. A defendant who asserts a fact in testimony which is central to his defence will clearly have 'relied' on a fact. Conversely, if a Defendant calls no evidence and merely puts the prosecution to proof, he does not rely on a fact: *R v Devine, R v Webber* [2004] UKHL 1.

Putting the prosecution to proof can extend to probing the prosecution case, or suggesting a hypothesis to the jury: *R v Moshaid* [1998] Crim LR 420.

> M was charged with a co-defendant with supplying heroin. He exercised his right to silence and gave no evidence at trial. The main evidence against him was video footage, which was of poor quality. In submissions, his counsel suggested that the video showed the co-defendant supplying heroin. The Court of Appeal held that a s34 direction in these circumstances was not appropriate, as he had not relied on any fact in his defence but merely invited the jury to consider a hypothesis.

In *R v Webber* [2004] UKHL 1 the House of Lords considered what amounted to a 'fact relied on'.

> W was charged with others with conspiracy to murder V, a member of a rival gang. On arrest he denied presence at one incident and otherwise exercised his right to silence. He was identified by a witness at and identification parade. At trial, W did not give evidence. However, W's counsel adopted aspects of the cross-examination of a co-defendant.

The House of Lords held that the term 'fact' should be given a broad meaning, to include any exculpatory account given by the Defendant. Putting a specific and positive case to a witness was reliance, whether or not the witness accepted it – and even though such questions do not amount to 'evidence'. Asking questions to probe or test the prosecution case, or suggesting hypotheses, would not amount to reliance upon facts.

A defendant will therefore rely on a fact in the following circumstances:

a) giving evidence of a fact;
b) adducing evidence of it from another witness;
c) putting a fact to a prosecution witness, who accepts it;
d) putting a mater to a prosecution witnesses, who does not accept it;
e) where in submissions counsel adopts the cross-examination of a co-defendant.

***"a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention..."***

In *R v Argent* (above) the Lord Chief Justice held that a wide range of matters could be considered as part of the circumstances existing at the time. His Lordship said (at 33):

> *The courts should not construe the expression "in the circumstances" restrictively: matters such as time of day, the defendant's age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice are all part of the relevant circumstances; and those are only examples of things which may be relevant. When reference is made to "the accused" attention is directed not to some hypothetical, reasonable accused of ordinary phlegm and fortitude but to the actual accused with such qualities, apprehensions, knowledge and advice as he is shown to have had at the time.*

*Legal Advice*

Legal advice to remain silent does not of itself prevent the operation of section 34 – otherwise the section would be rendered nugatory: *R v Condron* [1997] 1 WLR 827.

The Court of Appeal in *R v Beckles* [2004] EWCA 2766 held that where legal advice has been advanced as the explanation for silence, the issue for the jury is whether this was the genuine reason for the accused's silence, as well as whether it was reasonable to remain silent. In other words, the accused may have chosen to remain silent not because he was advised to do so but because he had no explanation to give.

Where the Defendant relies upon legal advice given to him prior to interview to explain his silence, he may wish to call the solicitor who advised him to give evidence. The purpose of the evidence is to confirm the fact that such advice was given or to rebut an inference that the defence is a recent fabrication. For this reason the solicitor giving such advice will usually take a detailed account of what was said by the accused prior to interview, in case evidence needs to be given at a later stage.

The Court of Appeal in *R v Seaton* [2010] EWCA Crim 1980 considered the implications for legal professional privilege.

> S was charged with murder. He gave an account for his injuries in a prepared statement and then a different account at trial. He claimed he had told his solicitor the true reasons, although the solicitor made a mistake when recording them. He declined to call his solicitor to give evidence. The Court reviewed the authorities on this issue and gave the following guidance:
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> a) Legal professional privilege is of paramount importance.
> b) In the absence of waiver the accused cannot be asked questions which intrude on legal professional privilege.
> c) The accused can choose to waive privilege, for instance to rebut an inference of recent fabrication.
> d) The accused does not necessarily open up privilege generally by leading such evidence, although he cannot 'have his cake and eat it'.
> e) If the accused says he gave the same account to his solicitor and then fails to call the solicitor, comment can be made about this omission.
> f) An accused who merely asserts he was advised to remain silent does not waive privilege.
> g) An accused who gives evidence of the nature of the advice does waive privilege, at least to the extent of allowing questions which test whether that was the true reason for silence.

*Providing a prepared statement to police*

One method employed by solicitors seeking to avoid an adverse inference while controlling the information that was disclosed by the accused was to produce a prepared statement in interview.

The Court of Appeal in *R v Turner* [2004] EWCA Crim 3108 noted that providing a prepared statement does not give automatic immunity against an inference.

> *This Court notes a growing practice, no doubt on advice, to submit a pre-prepared statement and decline to answer any questions. This, in our view, may prove to be a dangerous course for an innocent person who subsequently discovers at the trial that something significant has been omitted. No such problems would arise following an interview where the suspect gives appropriate answers to the questions.*

An adverse inference cannot be drawn merely because a Defendant relies on a prepared statement and then refuses to answer police questions. It is not the failure to answer questions but the failure to mention facts that is relevant. The Court must compare the statement with the evidence given at trial, to determine whether he relied upon matters in evidence which were not mentioned in the statement: *R v Knight* [2003] EWCA 1977.

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