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The Attack on the Right to Silence

The NSW Government plans to undermine an accused person's right to silence. It is a multi-faceted plan. It involves putting pressure on someone to reveal their defence to the police. I also understand that the Government is likely to require the accused to disclose their defence to the prosecuting authorities and the courts ahead of the trial.

If the plan is achieved there will be a fundamental alteration in criminal procedure that will very significantly undermine an accused's rights and will disturb the current balance between the prosecution and the defence in the trial process. It will be the most significant change in criminal procedure in more than 100 years.

The details of the Government's proposals are imprecise. They are still being formulated. But we do know that one proposal intends to change the law governing the suspect's rights during questioning at a police station.

Tonight's seminar focuses on this proposal.

In September last year the Government circulated an "exposure draft" bill titled the "Evidence Amendment (Evidence of Silence) Bill 2012".

This Bill has not been presented to parliament. It seems that the Government has had some difficulties persuading the Upper House about its merits. But, it is likely that a Bill in similar form to the exposure draft will be presented to parliament in the sittings that commence next week. The Bill allows for an amended police caution with unfavourable inferences available to be drawn at trial if the accused fails or refuses to mention a fact in an interview that is subsequently relied upon at trial.

I also understand that the Government intends to introduce complementary legislation that will require defence disclosure prior to the trial.

These proposals are part of a developing landscape where the right to silence and the privilege against self incrimination are being disregarded and undermined — often in public but more commonly behind closed doors — in fora like:

ICAC

NSW Crime Commission

The Australian Crime Commission

The Police Integrity Commission

ASIC examinations

Royal Commissions

ASIO Questioning Warrants.

Currently there are a number of important cases being considered by the Court of Criminal Appeal where the DPP have received the transcript of the interrogation of the accused in camera at the NSW Crime Commission enabling the prosecuting authorities to gain potential and, probably real, advantage in its handling of the case knowing exactly what the accused is likely to say in their defence.

The Police Station Provision

The Evidence Act is to be amended so that in proceedings for a serious indictable offence unfavourable inferences may be drawn from the defendant's failure or refusal to mention a fact during questioning where the defendant could reasonably be expected to mention the fact and that the defence later relies on in proceedings. (s89A.)

A serious indictable offence is defined in the Interpretation Act as any indictable offence carrying a maximum penalty of 5 years or more. The measure will apply to nearly every trial in the District and Supreme Court and, potentially, in many cases dealt with summarily.

An adverse inference may only be drawn if the defendant has received both the usual caution in standard terms: "you do not have to say or do anything but anything you do or say will be recorded and may be used in evidence."

And a "supplementary caution" that: "if you do not say anything when questioned and fail or refuse to mention a fact that you subsequently rely on in court, an inference may be drawn that may harm your defence."

The provisions will not apply to people:

- under the age of 18; or
- to people who have a cognitive impairment.

An adverse inference would only be available where the defendant was allowed the opportunity to consult a lawyer about the effect of failing or refusing to mention a fact to the police. (s89A(2)(b)).

The High Court on the Right to Silence

The High Court has made it plain that the Right to Silence is a fundamental aspect of a fair trial. In *Petty and Maiden v The Queen* (1991) 173 CLR 95 at 128-9 Gaudron J. said:

"Although ordinary experience allows that an inference may be drawn to the effect that an explanation is false simply because it was not given when an earlier opportunity arose, that reasoning process has no place in a criminal trial. It is fundamental to our system of criminal justice that it is for the prosecution to establish guilt beyond reasonable doubt. ... it is never for the accused person to prove his innocence ... Therein lies an important aspect of the right to silence, which right also encompasses the privilege against incrimination."

Mason CJ, Deane, Toohey and McHugh JJ said in their judgment in the same case that the right to silence has complex origins but has become "a fundamental rule of the common law".

Brennan J described the right to silence in *Hammond v The Commonwealth* (1982) 152 CLR 188 as:

“... a freedom so treasured by tradition and so central to the judicial administration to criminal justice.”

McHugh J in *RPS v R* (2000) 199 CLR 620 at [61]-[62] described the right having derived “from the privilege against self incrimination”. He said: “That privilege is one of the bulwarks of liberty. History, and not only the history of totalitarian societies, shows that all too frequently those who have a right to obtain an answer soon believe that they have a right to the answer that they believe should be forthcoming. Because they hold that belief, often they do not hesitate to use physical or psychological means to obtain the answer they want. The privilege against self-incrimination helps to avoid this socially undesirable consequence. ... The privilege exists to protect the citizen against official oppression.”

No adequate rationale

There has been no adequate reason advanced for undermining the right to silence in the police station. The Premier, the Attorney-General and various shock jock style commentators have offered views about why the amendment should apply. They are all misconceived.

(1) *Criminals refuse to speak at the police station but later produce “evidence” at the trial.*

The most frequently used example in media discussion is alibi evidence. But as you all know, it has been the law in this state for decades that the accused must give written notice of an alibi well in advance of the trial — including a list of witnesses’ names and contact details.

In any event, a review in 2000 of the English equivalent has demonstrated that since the introduction of the Justice and Public Order Act 1994, there has been no discernable increase in the number of people charged or convicted and no change in the proportion of suspects providing admissions (about 55% according to The Home Office Research Study, *The right of silence: the impact of the Criminal Justice and Public Order Act 1994.*)

This English study also found that, despite these measures, police officers were sceptical about their impact on “professional” criminals, who were still thought to be refusing to answer questions or were using a range of tactics to circumvent the provisions.

(2) *The proposal will help police investigate drive by shootings.*

It has been claimed that these measures will break the “wall of silence” surrounding the recent spate of drive by shootings.

But the measures will have no impact on those cases because they do not apply to eye-witnesses or anybody else that possesses information that might assist the police. The measures only apply to people who are charged with offences and who ultimately go to trial. It is already a criminal offence for eye-witnesses and others to fail to provide information to the authorities. Concealing a serious offence — s316 of the Crimes Act — carries a maximum penalty of 2 years and, if the person

accepts a benefit for withholding information, the maximum penalty is 5 years. This proposal will not help the police in the way it has been suggested.

There is no public utility in this measure

No one suggests that this change in the law will lead to an increased number of convictions. The NSW Law Reform Commission published a report about this topic in 2000. They found that the English experience provided no support for the argument that the right to silence was widely exploited by guilty suspects, as distinct from innocent ones. Nor did the right to silence impede the prosecution and conviction of offenders.

The NSWLRC found that it was not appropriate to qualify the right to silence as is currently proposed. They found the right to silence was “a necessary protection for suspects. Its modification ... would ... undermine fundamental principles concerning the appropriate relationship between the powers of the state on the one hand and the liberty of the citizen on the other, exacerbated by its tendency to substitute trial in the police station for trial by a court of law.” (The Right to Silence, 2000 para 2.138.)

The power imbalance in a police station

A police station is a remarkable place. In my early years of practice I was a very regular attender of police stations. I don't go there very often now, but every year or two someone still thinks it necessary for me to visit a police station for them.

No matter how much experience you have or how skilled you might be in your craft, you know that you are not on home territory in a police station. Lawyers are tolerated — not always with good grace or good manners.

For a suspect a police station is a very scary place. Police, often young and energetic, have the power to: interrogate or not, initiate criminal proceedings or not and to deprive or curtail a person's liberty or not — according to the exercise of their own judgment.

Police interviewers can be extremely foreboding — even when they are acting entirely within the law. It is not just the questioning that is difficult for a suspect; it is the context in which it takes place. Usually, the suspect is questioned after an arrest. Being arrested is a shocking experience. It is often meant to be a shock. Arrests are timed for police convenience — often late at night or early in the morning.

Sometimes an arrest is at gunpoint. Always an arrest is accompanied by actions that make it clear that the suspect is no longer a free agent. People who are arrested, hand-cuffed and locked in a cell are not in a good condition to be able to make important decisions about what to say in their defence.

No everybody who is arrested is a “hardened criminal”.

Rajeevan's arrest: Sydney accountant Arumugam Rajeevan, was on his way to lobby a NSW senator in July 2007 when federal police removed him from his car at gunpoint, demanding he lie face down outside the senator's office with his hands cuffed behind his back. He was held in that state outside the senator's office for over an hour.

This ordinary, hard-working, decent Australian citizen would never, see him self as anti-social.

As the Member for Dobell learnt recently, an arrest is usually accompanied by intrusive physical searches including strip searches.

People are often drunk or under the influence of drugs. They feel unwell. They are afraid of what their family will think. Some disadvantaged communities are especially vulnerable in police custody. Aboriginal suspects are particularly vulnerable and ill-equipped to make judgments about what to say or not to say to police.

Police do not disclose their hand

When police arrest someone they have already got a body of evidence pointing toward their guilt. Usually, they have detailed statements from witnesses, maybe forensic evidence, phone taps and listening device tapes. But they are very protective of this information. They guard it closely to their chests.

The suspect is never given an opportunity to review the evidence against them prior to an interview or to even be given a summary of the key evidence against them. At best, they are told the nature of the charges. In some cases they are told where, when and how they are said to have offended. But they are given very little detail about the evidence underpinning the charges.

When a suspect does participate in an interview, the questions often roam far and wide. There is a plethora of questions about peripheral issues of varying degrees of importance. The police know that a suspect claiming innocence is entirely unlikely to break down and confess. So, knowing the texture and detail of the brief, the police probe the side issues. If a suspect gets a detail wrong or if they attempt to obscure something, a trap has been sprung that will ultimately lead a prosecutor to submit that the accused's answers were not credible or worse, they demonstrate a consciousness of guilt.

But, as a trial judge is required to direct the jury in relation to such "consciousness of guilt" lies, the jury have to first be satisfied that there were in fact deliberate lies. In any event, there are many reasons why people lie other than from a consciousness of guilt. They might be scared. They could be covering up some different unworthy or illegal act. They may be protecting others. They may just be ashamed of having been found in compromising circumstances.

The example of the young man with 3 alibis

Not everybody who gives false evidence in an interview is telling a lie.

Many years ago I represented an 18 year-old youth who was charged with arson. When he was arrested he gave the police an alibi. The police disproved it. They re-interviewed him and confronted him with the falsity of his alibi. He gave them a different alibi. They disproved it.

I met him in Long Bay with his trial looming. He maintained his innocence. I asked him for more particulars. He didn't have any. I expressed doubts about his prospects at trial and left him to think about his position. A week later, he asked me if the offence occurred on cracker night. I asked why? He said, "if it was on cracker night I

couldn't have done it. I stole a car, got caught and was locked up in Gosford Police Station.”

The offence occurred on cracker night. He had a water-tight alibi. The proceedings were discontinued.

My client's memory was faulty. He was probably overwhelmed by his contact with the police. He would have been well advised not to speak with the police at all. This kind of disconnect with the investigating police is common.

Difficult enough as it is to draw inferences from demonstrated untruths, the ability to safely draw an adverse inference from silence is enormous. This is especially so when the suspect is left in the dark about important aspects of the prosecution's evidence. How can an adverse inference be drawn when an accused fails to address a fact in his interview when they are likely to be blithely unaware of its importance at the time?

In England the police provide much more information to the accused prior to being interviewed. They have a culture of continuous disclosure by the police to the defence. Police disclose evidence to the defence as it comes to hand. Police disclosure is supervised by prosecutors. In those circumstances the legal practitioner is able to advise the suspect in the light of the evidence against the suspect which has been disclosed to the police. Interviews are often suspended if a question is put concerning a fact not previously disclosed.

Here interview in a police station is a form of trial by ambush.

Legal advice

The current proposal will only operate if the defendant was allowed the opportunity to consult a lawyer about the effect of failing or refusing to mention a fact.

In a press release in September 2012 the Attorney-General Greg Smith suggested that this advice will be given by lawyers via a telephone advice service. Clearly the government cannot afford the English safeguard of stationing a duty solicitor in every police station 24 hours a day.

Yet even the idea of a telephone advice service has proved to be impracticable. The Legal Aid Commission simply has not got the money to conduct such a service. They are in the process of sacking lawyers because of inadequate funding. Nor is there any alternative government resourced telephone hotline that could adequately provide this advice.

Even if the funds could be found, it is extremely doubtful that lawyers could give any meaningful advice to a faceless client on the telephone without the foggiest idea about the case, state of the client, state of the prosecution's evidence and the nuances of the investigation. The LAC's experience with the Youth Hotline for juvenile offenders has shown that there is no real privacy allowed to the suspect to consult with the lawyer. The telephone call is often made in the presence of the investigating police.

The LAC has shown no willingness to engage in the government hotline scheme.

The Law Society has suggested that it is difficult to conceive of a situation where a solicitor could properly advise a client about the effects of the legislation on the phone or even face to face without being properly apprised of the case against their client and having had the opportunity to speak with their client in a considered way and to take proper instructions. In a majority of cases lawyers would simply have to tell the suspect that they can not give them advice.

There are also problems about lawyers having a conflict of interest and with threats to legal professional privilege.

Under the proposal, a judge will need to consider directing the jury about drawing adverse inferences if the accused failed to mention a fact that the defendant could reasonably have been expected to mention in the circumstances existing at the time of the interview. It is likely, therefore, that the jury will need to hear evidence about all the circumstances existing at the time of the interview including evidence about what legal advice they received and whether it was reasonable to follow that advice.

This is likely to lead to a waiver of legal professional privilege. Evidence from lawyers about what advice was given will lead to questions about what instructions their client gave them when the advice was given.

The privileged nature of the professional relationship between a lawyer and client is another fundamental legal tenet threatened by these proposals.

My colleague, Tom Molomby, has been giving some thought to the advice he might give to a suspect if this legislation comes into effect. He is thinking about providing his clients with a written document along these lines:

“If an innocent person is arrested or being treated with suspicion by police, something has gone wrong.

There are ways in which it can go even more wrong.

If the police want to question you, they are very unlikely to tell you what they have been told or who told them. If you tell them anything, and that gets back to someone who is setting you up, that person could change their story to get around anything in what you say that does not fit. You might even find details of activities that you reveal becoming part of their story in an attempt to make it more plausible. History, through the Wood Royal Commission and otherwise, shows that both police and others can be behind false allegations.

In short, the result of innocent people playing their hand can be that it is used against them.

Another problem is that a discussion or interview on the run is not always the best way to recall events accurately. It is quite easy to forget detail, or get it confused, in trying to recall things in immediate response to questions. But that is the way interviews are conducted. They are also recorded on sound and video. The result often is that when people who have given an interview come to trial, changes to their story either by way of detail added, or corrections to what they said, are ruthlessly analysed and treated with great suspicion as the signs of a guilty person who is trying to tell a better story to get out of trouble.

My firm advice to you is to say nothing.”

Conclusion

There is no demonstrated need for this amendment to the law. No other state or territory in Australia has such a provision.

Singapore has adopted the English provision. But it has been studiously ignored in most other common law jurisdictions. It hasn't even made it across the border to Scotland where a damning report in 2011 ruled it out of question. Lord Carlway, the report's author, described such schemes as being “of labyrinthine complexity”.

The Bar Association agrees with the Scots. Should the state profit from the ignorance of suspected persons where ignorant suspects could accidentally incriminate themselves in the way a more studied villain would not? We will be seeking to convince our law-makers that this provision is unnecessary and we would be better off without it.

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