Aboriginal Legal Service
Central South Eastern Zone Conference
4 May 2013

RIGHT TO SILENCE

Discussion Paper

PART 1: YOU GOT A MENTION IN THE SECOND READING SPEECH

"For example, the provisions will not prevent a vulnerable person from being provided with the assistance of a support person during any investigative procedure; nor will they apply to Indigenous people who have exercised their right to speak to the Aboriginal Legal Service over the telephone.[1]"

PART 2: SOME INTERESTING QUOTES

"The development of the right to remain silent at trial is frequently attributed to the practices of the English Courts of the Star Chamber and High Commission. During the late sixteenth century, these courts developed the practice of compelling suspects to take an oath known as the "ex-officio oath" and, without formal accusation, to answer questions put by both the judge and the prosecutor. Failure to either take the oath or answer questions attracted severe sanctions, including torture."[2]

"The Commission considers the right to silence is an important corollary of the fundamental requirement that the prosecution bears the onus of proof, and a necessary protection for suspects. Its modification along the lines provided for in England and Wales and Singapore would, in the Commission's view, undermine fundamental principles concerning the appropriate relationship between the powers of the State on one hand and the liberty of the citizen on the other, exacerbated by it's tendency to substitute trial at the police station for trial by a court of law.[3]"

---

[1] Greg Smith. Second Reading Speech 13 March 2013
[2] Law Reform Commission Discussion Paper 41 (1998) The Right to Silence. Para 2.7.
[3] NSW Law Reform Commission Report 95 "The Right to Silence" 2000

"The right to silence is a key pillar of our legal system, developed over more than 400 years of English common law. Removing it undermines procedural fairness and creates an unjust legal system. The freedom to remain silent is a vital safeguard against state tyranny and it should never be removed.[4]"

The Majority of the High Court of Australia:
"Such an erosion of the fundamental right should not be permitted. Indeed, in a case where the positive matter of explanation or defence constitutes the real issue of the trial, to direct a jury that it is open to them to draw an adverse inference about its genuineness from the fact that the accused had not previously raised it would convert the right to remain silent into a source of entrapment.[5]"

What the High Court are getting at here is that explaining that a person has a right to silence but then explaining the qualification to that right can actually produce unfairness, particularly in circumstances where an accused could certainly understand the "you have the right to remain silent" part of the caution but not the qualification contained in the "special caution." Some might argue that it would be better not start the caution explaining the right to remain silent if it is the case that such silence could prejudice the accused at trial.

PART 3: THE ARGUMENT FOR AND ARGUMENTS AGAINST

1. The Argument for.

Despite significant research I have only been able to find one. Because I am not sure that I understand it I will reproduce it in full and you can take what meaning from it you wish…. like a good folk song.

"The NSW Government is closing a legal loophole to stop criminals exploiting the system to avoid prosecution," Mr Smith said.

---

[4] Simon Breheny in article "IPA condemns attack on right to silence" in Media Release, Rule of Law 21 March 2013
[5] In the leading authority of Petty v Maiden v R [1991] HCA 34, the majority of Mason CJ Deane, Toohey and McHugh JJ.

"This is a common sense reform that will have widespread community support - it's time the Opposition backed police whose efforts in dealing with recent criminal activity have been frustrated by suspects using silence as a shield against the criminal justice system.[6]"

There is no explanation how this will stop "criminals avoiding prosecution." One would think that if the person is about to undertake a record of interview in the presence of a legal practitioner of his/her choice the decision to charge based on evidence obtained by investigating police has already been made.

2. The Arguments Against

Interested parties were apparently given about 16 days to formulate a response to the draft bill[7]. If they were read, the concerns were certainly not addressed in the Second Reading Speech. Below are some of those arguments attributable to those interested parties who made submissions:

Associate Professor Hamer and Others (The Nerd Faction)[8]

a. Places additional demands on police without any benefit to police investigation.
b. Unnecessary conflicts in client-lawyer relationship.
c. It is unnecessarily complicated, of unclear ambit and scope increasing trial complexity, without the promise of reducing incorrect acquittals.
d. It creates inconsistency between the treatment of "silence" pre-trial and during trial leading to legal incoherence and juror confusion.
e. It will increase the costs of criminal justice without any countervailing benefit.

---

[6] Media Release by Hon Greg Smith SC MP 12 September 2012
[7] New South Wales Bar Association submissions dated 28 September 2012 under the hand of (then) President Bernard Coles QC.
[8] "Submissions on Exposure Draft: Evidence Amendment (Evidence of Silence) Bill 2012. Associate Professor David Hamer, Sydney Law School, Unvisited of Sydney as well as 16 other law academics from 8 Australian Universities.

The Shopfront Youth Legal Centre[9]

f. No demonstrated need for amendment. Will not assist in lack of co-operation of victims and witnesses in South-Western Sydney shootings.
g. Erosion of fundamental right of criminal justice.
h. Arrested persons likely to be at their most vulnerable in terms of emotional stress, intoxication, lack of sleep etc. Not fair to make important decisions with serious implications at that time.
i. The "hardened criminals" targeted under the legislation will actually be at an advantage as opposed to the "unsophisticated and vulnerable."
j. Bill does not afford those considered "vulnerable persons" under Part 9 of LEPRA protection.
k. Serious indictable offences cover a vast range of offences and hardly targets hardened criminals.

Bar Association of NSW[10]

a. Section 150 Criminal Procedure Act already requires early disclosure of alibi.
b. Witnesses and Victims of drive-by shootings who withhold information can already be prosecuted pursuant to Section 315 Crimes Act 1900.
c. With the exception of England and Wales and Singapore, other common law countries have retained an absolute right to silence.
d. Research indicates the English system has largely failed.
e. Potential conflict with International Covenant on Civil and Political Rights similar to English problems with European Convention on Human Rights.
f. Potential constitutional problems.

[9] "Comments on Evidence Amendment (Evidence of Silence) Bill 2012," Authored by Jane Sanders.
[10] New South Wales Bar Association submissions dated 28 September 2012 under the hand of (then) President Bernard Coles QC.

PART 4: THE NEWS (GOOD AND BAD)

The Good News (1)

The proposed Section 89A Evidence Act does not propose to sanction torture from an accused exercising their "right" to remain silent.

The Good News (2)

The proposed amendments to Section 89A Evidence Act are not likely to affect the amount of work you have to do in any meaningful way in the short term. This is because as Section 89A (2) (c) provides that no adverse inference can be drawn unless the "special caution" was given in the presence of an Australian Legal Practitioner who was acting for the defendant at the time.

The significance of this provision is obvious.

The Bad News (1)

For any of you with thriving, lucrative practices based on attending the police station when your client is arrested for a serious indictable offence, you had better think about a second job.

The Bad News (2)

This will be the thin end of the wedge and expect the legislation to look very different in the future. This will be probably in five years when the Ministerial Review of the policy objectives of the amendments is due to be conducted and a report tabled to Parliament within 12 months of that time.

The reason for this pessimism is that invariably the report will detail that the caution has been rarely used as the circumstances contained within Section 89A(2)(c) will rarely have been met.

It is also significant that the original draft bill[11] did not have a Section 89A(2)(c). Rather, the draft Section 89A(2)(b) provided that the

[11] Evidence Amendment (Evidence of Silence) Bill 2012

inference could be drawn if “the defendant was allowed the opportunity to consult an Australian legal practitioner about the effect of failing or refusing to mention such a fact”

The difference between this original proposal and the 2013 bill cannot be understated. Had the original version become law, the inference could be drawn even if someone had been allowed the “opportunity” to consult with a legal practitioner. It would seem that if such an opportunity was refused an adverse inference could be drawn. It is unclear whether being “allowed the opportunity” would be satisfied by the police handing over the phone at 4AM in the morning at the police station for the accused to speak with the answering machine of the law firm of his choice or whether the obligation would be on the police to do more than this. Perhaps they could have legally trained and admitted police prosecutors to man a 24 hour hotline to provide advice about whether the accused person should exercise there right to silence or alternatively cooperate with their fellow police officers investigating the offence and answer their questions.

PART 5: PLAGIARISING THE UK LEGISLATION

The legislation seems to have been based on the provisions of the Criminal Justice and Public Order Act 1994 (UK).

Section 34 of that Act provides as follows:

“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.

Section 37 of the same Act is in similar terms and applies to silence at trial. Other provisions relate to inferences to be drawn when provided with certain exhibits. The provisions in Australia are not as far-reaching in that they relate only to "official questioning." Other legislative provisions (particularly Section 281 of the Criminal Procedure Act 1986) dictate that it is likely that the police will only attempt to administer the special caution when the accused is participating in an E.R.I.S.P.

As you can see from the similarities between the UK Section 34(1)(b) and our Section 89A(1)(a), the legislators in NSW were not too inventive with the construction of Section 89A. They have swapped the positions of the phrases "circumstances existing at the time" and "could reasonably have been expected to mention" and that seems to have done the trick.

Fortunately this lack of inventiveness means that we can look towards the cases in England and Wales when predicting the likely jurisprudence that will arise as a result of this bill being passed in NSW.

PART 6: SOME INTERESTING UK CASES

R v Argent [1997] 2 Cr App R 27

6 preconditions before adverse inference drawn from accused failure to answer questions at police station:

1. Proceedings against person for an offence.
2. Failure to mention the fact must relate to a failure to mention the fact before or at charge.
3. Failure must have been while under caution.
4. Question must have been directed at discovering whether offence committed or by whom offence committed.
5. Fact must be relied on in defence at trial.
6. Fact must satisfy the "reasonably have been expected to mention when so questioned," test.

Also authority for proposition that although disclosure of police case not necessary before interview, in circumstances where police provide inadequate disclosure it may be that reliance on solicitor advice to remain silent is OK.

R v Cowan [1996] Q.B. 373

5 preconditions before adverse inference from silence at trial can be drawn;

1. Burden of proof direction.
2. Right to remain silent direction.
3. Silence of itself cannot prove guilt direction.
4. Direction re satisfaction of prima facie case before adverse inference from silence can be considered.
5. Direction re silence being only "sensibly" attributable to accused having no answer or none that would stand up to cross-examination.

Bowers [1998] Crim LR 817

The fact relied on need not be in the defendant's own evidence. Reliance can be through the evidence of other witnesses or even through cross-examination of prosecution witnesses or the defendant or his witnesses.

Imran and Hussein [1997] Crim LR 754

No need for police to disclose material that would establish a prima facie case if accepted.

R v Becouarn [2005] UKHL 55

No requirement for Judge to give a direction that lies may be attributable to other reasons apart from inability to give an explanation.

Murray (John) v UK (1996) 22 EHRR 29.

Legal advice must be made available, even in terrorist cases.

Taylor [1999] Crim LR 77 CA.

Adverse inferences can be drawn even if there is evidence that the accused told a third party of the fact at a time proximate to the police interview.

Condron v The United Kingdom (2001) 31 EHRR 1

Para 61. "In the Court's opinion, as a matter of fairness, the jury should have been directed that it could only draw an adverse inference if satisfied that the applicant's silence at the police interview could only sensibly be attributed to their having no answer or none that would stand up to cross-examination."

R v Argent [1997] 2 Cr App R 27

The weight that the jury would attach to the failure to answer questions is a matter for them to resolve in the exercise of their collective common sense and experience.

Legal advice cases

R v Beckles [2005] 1 WLR 2829

Jury must engage two stage process where evidence that accused relied on legal advice to remain silent:

1. Did accused genuinely rely on the advice?
2. Was it reasonable for the defendant to rely on the advice?

R v Robie [1997] CLR 449; R v Carl Anthony Robinson [2003] EWCA 2219

Legal advice to remain silent was unlikely to provide adequate explanation for the decision to remain silent in the absence of any reason given for that advice. It is for the jury to consider whether the defendant could reasonably be suspected to mention the facts later relied on.

R v Howell [2003] EWCA Crim 01

There must always be soundly based objective reasons for silence, sufficiently cogent and telling to weigh in the balance against 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 bear that in mind. A prepared statement is not enough to displace an adverse inference.

R v Bowden [1999] 4 All ER 43

Privilege not waived if accused gives evidence that he was merely advised to be silent but is waived if he explains the reason for the advice.

Troy Edwards

Barrister

Forbes Chambers