The Watering Down Of The Right To Silence

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This paper is largely based upon papers Dina Yehia SC and I delivered at The Law Society of New South Wales Young Lawyers Seminar "Muting the right to silence – fundamentals" on 14 November 2012 and in the light of the second reading of the Evidence Amendment (Evidence of Silence) Bill 2013 on 13 March 2013. The Sydney Morning Herald published an article on 14 March 2013 entitled "Push for unpopular laws that reduce safeguards" in which it was noted that the state government was pushing ahead with new criminal laws despite the overwhelming opposition of the working group that was asked to consider them.

As I noted in my previous paper the proposed caution is almost identical to that currently administered in England and Wales, as can be seen below.

Proposed NSW Caution	**England And Wales**
You are not obliged to say or do anything unless you wish to do so. But it may harm your defence if you do not mention when questioned something you later rely on in court. Anything you do say and do may be given in evidence	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

The paper is intended to consider the consequences of the proposed amendments and in particular what it means for practitioners. That will require a consideration of the proposed changes and I will also give a perspective as to how the modification of the right to silence in the UK might not be so easily applied in New South Wales.

The Proposed Amendments

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The Evidence Amendment (Evidence of Silence) Bill 2013 proposes the insertion of section 89A into the Evidence Act 1995. Section 89A deals with evidence of silence in criminal proceedings for serious indictable offences. It provides:

(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 6 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 10 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* 13 *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.

Changes from the first draft

In the second reading speech on 13 March 2013 the Attorney General and Minister for Justice, Mr Greg Smith stated that as a result of the submissions received changes had been made to the bill to reflect issues raised and in particular the bill provided more detail regarding what amounts to an opportunity to consult an Australian legal practitioner and redefined those who were exempt from the provisions.

There are changes from the 2012 are the provisions in the 2103 Bill which are as follows:

(i) s 89A(2) (a) –(d) no unfavourable inference may be drawn unless the conditions set out in that section are met;

(ii) s 89A(2)(5) The section does not apply if the defendant is under the age of 18 or is “incapable of understanding the general nature and effect of a special caution”; and

(iii) “special caution” is the terminology now adopted in place of “supplementary caution”

What does it mean

In a nutshell it means that adverse conclusions can be drawn if accused people choose not to participate in police interviews but later rely on evidence that they could have raised at the time.

However, there is the requirement at s 89A(2)(c) and (d) requirement that the caution be given in presence of an Australian legal practitioner who was acting for the defendant at that time whom the defendant had been allowed a reasonable opportunity to consult with about the general nature and effect of special cautions.

Further it does not apply to persons under the age of 18 or those people incapable of understanding the general nature and effect of a special caution.

Some Issues Thrown Up By The Proposed Provisions

(1) The caution is complicated and may cause confusion on the part of suspects, particularly Aboriginal suspects

The main issue here is that the terminology adopted by the amending Act does not reflect the terminology of the relevant legislation governing the rights of suspects, particularly those who are being detained. There is a detailed legislative scheme governing detention and the rights of those detained post arrest for questioning contained in the *Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA).*

S 89A(5)(a) refers to :a person incapable of understanding the general nature or effect of a special caution whereas that detailed legislative scheme makes provision for a “vulnerable person”. The custody sergeant makes the determination of who is a vulnerable person. Why have the proposed amendments not taken account of that?

Accused A 'Vulnerable Person'

Vulnerable persons are defined as:

- children
- people with impaired physical or intellectual functioning
- Aboriginals and Torres Strait Islanders
- people from a non-English speaking background

(Regulation 24 LE (PAR) Regulations)

'Vulnerable persons' are entitled to have a support person present during any investigative procedure: Regulation 27 LE (PAR) Regulations. Before any investigative procedure starts, the custody manager at the police station must inform the 'vulnerable person' that he/she is entitled to have a support person present during any investigative procedure (reg 27).

Support Persons

If the 'vulnerable person' wishes to have a support person present, the custody manager must provide 'reasonable facilities' to enable a support person to be present (presumably access to a telephone) and allow the 'vulnerable person' to communicate privately with the support person: reg 27 LE (PAR) Regulations. This includes the right to make a phone call to a legal practitioner (reg 25 LE (PAR) Regulations).

The custody manager is to inform the support person that he/she is not restricted to acting merely as an observer in the interview, but may assist and support the person being

interviewed, observe whether or not the interview is being conducted fairly, and identify communication problems with the person being interviewed: reg 30 LE (PAR) Regulations.
The caution should be repeated in front of the support person: reg 34 LE (PAR) Regulations. A copy of a summary of the suspect's rights while in custody (formerly called the part 10A document) should be given to the support person and any interpreter for the vulnerable person: reg 30 LE (PAR) Regulations.

Aboriginal or Torres Strait Islander Suspects

In addition to the rights referred to above, the custody manager of a police station must inform an Aboriginal or Torres Strait Islander in custody that he will inform an Aboriginal legal aid organisation that he is the suspect is in custody for an offence, and notify the Aboriginal legal aid organisation accordingly: reg 33 LE (PAR) Regulations This requirement does not depend on the accused making a request for an Aboriginal legal aid organisation to be contacted: see *Helmhout* (2001) 125 A Crim R 257.

(ii) The caution is only to be administered in relation to a serious indictable offence

As has been noted previously “serious indictable offence” is not defined in the Evidence Act but is in section 4 of the *Crimes Act 1900* as an offence that carries a term of imprisonment of 5 years or more. This is the same definition given in section 3 of the *Law Enforcement (Powers and Responsibilities) Act 2002 (LEPRA)*. However, it only has applicability in s 46AA, 46A, 87M, 90, 94 and more relevantly s 99(1)(c) – the power of an officer to arrest without warrant as well as in s 100 (power of any person to arrest) and in s 410B of that Act.

The introduction of this requirement is liable to lead to confusion and if the removal of the right to silence is viewed as a powerful tool for the police in the investigation of crime in a culture where there already exists a tendency to overstate the criminality of the alleged offending. This will lead to a further overstating the criminality to bring the suspect within the remit of the caution. What is the situation where a suspect is questioned in relation to a combination of serious indictable offences and non serious indictable offences?

(iii) The defendant had been allowed the opportunity to consult a layer

If, as has been reported in the press, the changes would cost Legal Aid an extra $6 million a year is such a requirement an option? What about Aboriginal Legal Services? Whilst there is good telephone advice available that cannot satisfy the requirement under the section because the special caution must be given in the presence of a practitioner and also such contact is not confidential.

Furthermore, there is no tradition of the provision of legal advice and assistance at the police station. In fact many practitioners, in my experience, are concerned that they themselves may be called to give evidence at trial and that may impact their capacity to appear for their client.

(iv) Non-compliance means that no unfavourable inference can be drawn.

However, that is diluted by the fact that if there is in fact no serious indictable offence before the Court the inference can still be drawn (s 89A(8)).

Issues For The Practitioner

Basically, the consequence of the amendments are a requirement for the provision of legal advice and assistance at the police station and the practitioner being physically present. As indicated there is no tradition of this in New South Wales albeit it is not unknown.

Some suspects appear incapable of exercising the right to silence which they presently have the benefit of.

The practitioner will have to advise the client as to the consequences of the special caution and make a judgment call as to whether the advice is to exercise the right to silence irrespective of the drawing of an unfavourable inference or to give an account.

Depending on funding and what approach legal aid take then expect to be on call on evenings and weekends and expect little remuneration for late nights and long hours at the police station.

When it comes to the admission of the ERISP then considerations will have to be given to applications to exclude. That is both in the Local Court and the District Court. It will serve to increase the time hearings will take.

How it works in England and Wales

In my previous paper I identified the differences between the arrest, detention and questioning of suspects in New South Wales and in England and Wales.

- **Arrest Of Suspects Without A Warrant**
- **Purpose of Arrest**
- **Detention Powers**
- **Provision of Legal Advice & Assistance**
- **The Crown Prosecution Service**

Frequently in England and Wales there is considerable disclosure by the police in terms of the evidence against a suspect which then enables a proper consideration of the exercise of the right to silence and the consequences of the exercise of that right. However, the courts have consistently held that the police are not under a general duty to disclose evidence to the suspect at the police station[2].

However, the lack of disclosure may be a reason to advise the client to exercise a right to silence and that may constitute a good reason for the client to rely upon that legal advice.

Recent cases on disclosure highlight the culture of resistance to disclosure in New South Wales and the legislature's tolerance of this.

Secondly since the mid 1980s, in the England and Wales, there have been considerable changes to the prosecution of offences and more importantly to decision making insofar as criminal charges are concerned. This has been in a state of flux for some years with CPS lawyers being available in police stations. However, CPS Direct is the national service that provides police officers and other investigators across England and Wales with access to charging decisions from the Crown Prosecution Service.

There is a network of CPS Prosecutors based throughout England and Wales, linked to the police via IT and telephony. Police officers and other investigators call a single national number and are connected to the next available Prosecutor. It operates twenty-four hours, seven days a week, 365 days a year.

In England and Wales section 34 of the Criminal Justice and Public Order Act 1994 permits 'proper' inferences to be drawn from the failure of an accused to mention facts relied on in their defence (a) on being questioned under caution or (b) on being charged or officially warned that he or she might be prosecuted, provided that in the circumstances at the time the accused should reasonable have been expected to mention those facts.

[2] *R v Imran and Hussain* [1997] Crim LR 754 and *R v Nottle* [2004] EWCA Crim 599

Section 36 permits proper inferences to be drawn from a failure to account for any object, substance or mark on their person, clothing or footwear, or otherwise in their possession or in any place in which they were at the time of their arrest, where a constable reasonably believes that the presence of the object etc. may be attributable to their participation in a specified offence, and informs them of that belief.

Section 37 permits proper inferences to be drawn from the failure of an accused to account for their presence at the place, and at the time, that they were when they were arrested where a constable reasonably believes that the presence of the person at that place and at that time may be attributable to their participation in the offence for which they have been arrested and informs that belief.

Silence cannot by itself prove guilt – section 38.

Of importance to the practitioner here the fact that an accused was advised by a lawyer not to mention facts or advised not to provide an account to the police does not, of itself, prevent inferences from being drawn[3]. However, the European Court of Human Rights held that the fact that an accused was advised by their lawyer to remain 'silent' must be given appropriate weight by the trial court. The approach from recent authorities[4] is that a court or jury may be more likely to conclude that reliance on legal advice was reasonable if there were soundly based objective or good reasons for that advice. Good reasons may include:

- Little or no disclosures by the police so that the solicitor cannot usefully advise the client
- Case so complex or relates to matters so long ago that no sensible immediate response is feasible

The following are unlikely to be regarded as good reasons:

[3] *R v Condron* [1997] 1 Cr App R 185
[4] *R v Howell* [2003] Crim LR 405; *R v Hoare & Pierce* [2004] EWCA Crim 784; and *R v Beckles* [2004] EWCA Crim 2766

- A belief by the solicitor that the detention is unlawful
- The absence of a written statement from the complainant
- A belief that the complainant may withdraw the complaint
- A belief that the police intend to charge whatever the suspect says in interview

The Law Society of England and Wales has publications for its members on advising on silence when providing police station advice. They contain strategies and ethical guidance for those providing advice and assistance at the police station. Issues such as legal professional privilege are live issues particularly when you have advised a client to take a certain course in a recorded interview.

One stumbling block

If there is no real tradition or any real desire on the part of practitioners to attend at the police station to advise and assist their client or there is no scheme implemented by Legal Aid the provisions simply cannot work.

Conclusion

The consequences of the proposed amendments are of great significance for the practitioner. The proposed amendments are proceeding despite overwhelming opposition from all sectors of the criminal justice system.

I think the interesting question is, perhaps, who has or are likely to have lawyers at the police station? Perhaps the answer is (1) those people the police and government are targeting, namely “bikies, gangsters, and those who participate in organised crime”; and also let us not forget white collar criminals, the wealthy and , dare I say, politicians.

Perhaps that then is the upshot of the whole palaver. Without lawyers attending at the police station then the amendment is of little relevance or applicability to most suspects – one can but hope.