NSW Council for Civil Liberties Inc.

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The New South Wales Council for Civil Liberties (CCL) is one of Australia's leading human rights and civil liberties organisations. Founded in 1963, NSWCCL is a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. To this end the NSWCCL attempts to influence public debate and government policy on a range of human rights issues by preparing submissions to parliament and other relevant bodies. CCL is a Non-Government Organisation (NGO) in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Submission concerning the draft of the Evidence Amendment (Evidence of Silence) Bill 2012

We are appreciative of the invitation to comment on the exposure draft.

1. An irrational proposition: that silence implies guilt or prevarication.

The proposed bill will abolish the right of an accused person to decline to answer questions by police without any adverse inferences being drawn in a subsequent trial by the prosecution or the court. The abolition will apply to all serious indictable offences—those with five-year jail sentences.[1] The Police Association supposes that the change is common sense.

Well, it may be a commonly held view. But it is not good sense.

As the New South Wales Law Reform Commission argued,

> The crucial question is whether an inference of guilt or of recent fabrication should rationally be drawn from the failure to make timely disclosure. The failure to make timely mention of a matter might well reflect on whether the later assertion was true. The true issue is whether or not the explanation for that failure was *in fact* a consciousness of guilt. Even if the defendant acted completely unreasonably, if he or she was not motivated by a consciousness of guilt, the silence is irrelevant: it proves nothing.[2] [Emphasis in original]

In other words, for prosecutors or judges to imply that the silence of the accused under questioning by itself throws doubt on the veracity of testimony or supports his or her guilt of the accused would be to use irrational, or deliberately invalid, argument. As argued below, there are many other reasons why a person might fail to mention a fact that the defence later relies upon.

[1] The vast majority of offences.

[2] New South Wales Law Reform Commission, Report 95 (2000) at 2.111.

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2. The foundation of the right to silence.

Fundamentally, the right to silence is implied by the assumption of innocence and its corollary, the obligation of the prosecution to prove its case beyond reasonable doubt. To compel a defendant to speak on the penalty of suffering adverse comment to a jury is to require the accused to prove, at least partially, their innocence. An attack on the right to silence is an attack on the fundamental principles of criminal law.

3. The findings of the Law Reform Commission.

In its inquiry into the right to silence in the New South Wales Law Reform Commission found:

> 2.138 …the Commission has concluded that it is not appropriate to qualify the right to silence in the way provided by the English and Singapore legislation. 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 the 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 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. There are also logical and practical objections to the English provisions. An examination of the empirical data, moreover**,** does not support the argument that the right to silence is widely exploited by guilty suspects, as distinct from innocent ones, or the argument that it impedes the prosecution or conviction of offenders.[3]

4. The failure of arguments supporting the change.

Rights that have been accepted for a long period should not be removed unless there is evidence that they are leading to injustice—and that their removal will not create worse injustice. The arguments in favour of the change are not good. And there will be more false convictions if the change is adopted. Although in drafting the bill there has been an attempt to ensure that people are informed of what will happen if they do not tell the police of any defence they subsequently appeal to, that will not be enough to prevent serious harms arising, with significant financial cost to the State.

[3] New South Wales Law Reform Commission, Report 95 (2000) at 2.138

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i. The "bikie cone of silence".

The Premier and the Attorney General have given one kind of example, the "bikie cone of silence", where it is asserted that there have been problems. In order to try and break that silence, it is proposed to distort the trial process, with the near certainty of false convictions.

But the belief that removing the right to silence will overcome that problem is almost certainly mistaken. The mischief that the proposed changes are meant to attack is a supposed barrier to investigating crimes against *third* parties; it is the reluctance of a club/gang member to become a police informer. It is not a matter of charges against the person who remains mute. The proposed changes do not challenge the 'bikie cone of silence'; they do not force the reluctant police informer to accuse his friends. People who are not influenced by the section 316 of the Crimes Act (concealing a serious indictable offence), who from a mistaken sense of loyalty or fear of the consequences will not talk about what their fellow club/gang members have done, are not likely to change their minds for fear of what will happen when they themselves are in court.

ii. Ambush of the prosecution.

It has been claimed that criminals can use the right to silence to ambush the prosecution case—presenting an alibi or other defence for the first time during their trial, when it is too late for the police to collect countervailing evidence.

It is true that at present, under section 89 of the Evidence Act, neither a judge nor the prosecution can imply that evidence presented in court is dubious or that it implies guilt on the ground that the accused did not produce it during pre-trial questioning by police.

But on the one hand, a defendant who has an alibi is required to produce it at the committal hearing—if this is not done, adverse inferences can and will be drawn; or the evidence may be rejected entirely. And on the other, even if the law is changed, experienced defendants could say nothing before their trials, but then dismiss their lawyers and claim to have been badly advised—hence with new lawyers, they are producing their defences.

The real potential for ambush is that of a defendant, and it lies in the way that Police would interview a suspect. It is not a stretch to imagine that Police would be very economical with the facts, so that a suspect would have little inkling of the significance of an answer to a particular question. If there is any weight to the Police Association's view that suspects should reveal their whole defences while being questioned, the corollary would seem to be that the Police should be equally as forthcoming, and make a complete disclosure to the suspect of the facts that are at hand. To do otherwise would be to consign a suspect to a Kafkaesque maze that is designed to render a suspect confused and vulnerable. There have been too many sad cases where Police have taken advantage of intellectually challenged persons; that same sense of bewilderment is what would confront a suspect who is fully competent, if the changes were implemented.

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iii. The view that silence suggests guilt.

It is also contended that only criminals would refuse to answer questions—an innocent person would deny police accusations and offer an explanation for circumstances which suggest guilt.

But the supposition that only a guilty person has a reason for not speaking freely to police is absurd. An arrest is often made in the small hours (when people are at home). For most, it is the first time they have encountered anything of the kind. People may confused, upset, or in shock. Anyone from a culture were police are distrusted—including Aboriginal people, but also many migrants—is likely to resist questioning, or to react badly when questioned. They may be terrified, especially if they come from a country where a knock in the night commonly leads to disappearance and death. Aboriginal people, as the Royal Commission into Aboriginal people in custody found, find custody oppressive, and are likely to be amenable to suggestion, especially we might add, where bail is a bait. Anybody may be emotional, panicked, inarticulate or confused. They may be affected by alcohol or drugs.

Most people do not have enough knowledge of the law to guide them as to whether to admit to a crime, nor the consequences of doing so, or what else to say. In these circumstances, they are likely to say the wrong thing. Also, in the memories of many adults in NSW there is lodged the spectacle of the Wood Royal Commission. Its findings did not engender confidence in the integrity of the NSW Police Force. Any suspect in custody would, not unreasonably, be suspicious of the Police process and be reluctant to be totally frank.

People newly arrested will have difficulty in remembering the past clearly without thinking about it in calmer circumstances. They are likely to give confused or conflicting answers, on which police will pounce. They may exaggerate, or give partially untrue answers.[4] They may fail to mention matters which would demonstrate their innocence because they are embarrassed, or for reasons which have nothing to do with the crime concerning which they are being questioned-to protect their partners or children, for example. They may even admit to a crime in an attempt to protect their children or spouses from suspicion. Police may pressure them into confession on promise of bail.

Those most vulnerable will be people who have not been locked up before. Already, there have been cases where suspects have confessed to crimes that they could not have committed. There will be more false confessions and mistaken convictions.

Then there will be the usual consequences of people being put in prison.

The Commission also comments in similar fashion on these matters, as follows:

[4] They may for instance assert what they think *must* have been the case, rather than what they remember.

Reasons for silence consistent with innocence

2.115 Many submissions and commentators challenged the view, outlined in paragraph 2.61 above, that an innocent suspect would always deny an accusation levelled by the police and offer an explanation for the circumstances or conduct which created the suspicion. However, there are a number of considerations that might lead a person not to speak at all or unguardedly to police when he or she is suspected or accused of committing a crime. Persons in such a position might well, of course, wish immediately to exculpate themselves but there is no reason to suppose that all innocent persons would adopt this approach.

2.116 It is reasonable that innocent persons faced with a serious accusation might wish to consider their situations carefully before making any disclosure, especially where the circumstances appear suspicious but it cannot be assumed that they are rational and articulate. In many cases, suspects may be emotional, perhaps panicked, inarticulate, unintelligent, easily influenced, confused or frightened or a combination of these. They may be unable to do themselves justice. Such persons may be well advised to hold their peace, at least at an early stage. They may, of course, have something to hide, but that something may simply be shameful and not a crime, or it may implicate others for whom they feel responsible. The supposition that only a guilty person has a reason for not speaking freely to investigating police is an unreasonable assumption.

2.117 ***Attitudes towards police.*** Some suspects remain silent because they hold an extremely negative, uncooperative, fearful or distrustful attitude towards the investigating police or the police force in general. This view was also expressed by several submissions and commentators.

2.118 ***Cultural characteristics***. Cultural characteristics may also influence whether an innocent suspect remains silent when questioned by police. It is clear that Aboriginal suspects are more likely to answer police questions than the general population. This has led to the creation of specific rules regulating police questioning of Aborigines in several jurisdictions. Cultural factors may also lead suspects to remain silent. For example, certain cultures discourage discussion of domestic abuse and sexual assault. It was submitted that silence may be a normal and positive communication in some cultures, in a way which is not generally understood in New South Wales. The Commission accepts that some cultural factors may well affect whether a suspect remains silent when questioned by police.

2.119 ***Personal characteristics.*** English research indicates that women are much more likely than men to answer police questions and that juveniles are more likely than adult suspects to respond to police questions. One submission stated that a significant problem with the *Young Offenders Act 1997* (NSW), which provides for a system of

warnings, cautions and youth justice conferences as alternatives to the prosecution of young offenders, is that it effectively precludes young suspects from relying on the right to silence because they are required to make admissions before being eligible to be punished under the alternative regime which the Act establishes for indictable offences.

2.120 Personal characteristics such as mental disorders and illnesses, intellectual and developmental disabilities, acquired brain injuries and low intelligence make it difficult for suspects to communicate clearly with police when questioned. The Intellectual Disability Rights Service stated in its submission that it is common practice for its solicitors to advise suspects to remain silent during police questioning because of the risk of their clients giving inaccurate answers and making false confessions. Although unreliable confessions may subsequently be successfully challenged, this would not adequately protect suspects who spend time on remand or in custody.

2.121 Research conducted for the Royal Commission on Criminal Justice concluded that the average IQ of suspects questioned was in the bottom 5% of the general population. Research carried out for the Commission in 1995 revealed that 23% of persons who appear in New South Wales Local Courts have either an intellectual disability or a borderline intellectual disability.

2.122 These characteristics also affect suspects' ability to understand or exercise other rights when questioned by police, including the right to a support person, to legal advice and, where required, to an interpreter. This clearly compounds the problems discussed above.

2.123 ***Communication factors.*** Numerous other factors also affect the ability of suspects to communicate with police. These include language skills and education levels. A suspect's ability to communicate may also be compromised by the effects of alcohol and other drugs. A suspect who is arrested late at night is likely to be tired and disoriented.

2.124 ***Police disclosure.*** Frequently the police investigation will be developing and incomplete at the time the suspect is interviewed. The matters being put to him or her may well, therefore, be vague, confused, or wrong. The police may not reveal enough detail about the allegations to enable the suspect to answer or to warrant explanation. Lack of police disclosure was the most frequent reason for advising clients to remain silent reported by defence lawyers who participated in the Commission's survey for this reference. Many lawyers noted that this advice was often a temporary strategy pending disclosure by investigating police of more information. A recent study of English solicitors, advising suspects in the light of the amendments to the law in England, also concluded that this is a common reason for legal advice to remain silent.

The English Court of Appeal has held that the extent of police disclosure of the evidence against the suspect is a factor which the jury should consider in assessing the reasonableness of legal advice to the suspect to remain silent. This exposes yet another issue that may be subject to extensive litigation at the trial.

2.125 ***Protection of or fear of others.*** The desire to protect others, particularly family members and friends whom the suspect knows or believes is or may be responsible for or involved in the offences concerned, is another reason for silence which is consistent with innocence. In a research study conducted for the Royal Commission on Criminal Justice at least 12% of suspects exercised the right to silence for this reason. Alternatively, a suspect may remain silent for fear of being labelled a police informer or for fear of reprisal by the offender.

2.126 ***Other reasons.*** In other situations police may ask the suspect very specific questions, about events which allegedly occurred many years ago or whilst the suspect was intoxicated or otherwise distracted, which place unrealistic demands on the suspect's memory. .The suspect may feel unable to sort out the facts or fear making a mistake due to the pressure of police questioning. The suspect may reasonably want to think about the circumstances, refresh his or her memory, or obtain legal advice. A suspect may decline to answer police questions in order to conceal conduct of which he or she is embarrassed or ashamed, to conceal illegal behaviour which is not under investigation, or merely due to shock and confusion at the allegations.

2.127 One submission argued that the defendant has the opportunity to tell the court at trial the reasons for remaining silent when questioned by police. The New South Wales Police Service even argued in favour of a regime where the judge or magistrate could require the defence to explain why the defendant exercised the right to silence when questioned by police. Such a requirement would involve abolition rather than modification of the right of silence and is not justified.

2.128 Many of the reasons for remaining silent when questioned by police are also relevant to the decision not to give evidence at trial. In addition, many of the reasons for silence discussed above involve complex considerations which may not be readily understood by juries in the absence of expert psychological or sociological evidence. Conversely, some of these reasons may pre-dispose a jury to over-empathising with the defendant. It must be borne in mind that the trial is about the guilt or otherwise of the defendant; what did or did not occur at the police station is very much a secondary issue.

2.129 Finally, as Justice Smith of the Supreme Court of Victoria has pointed out, to draw adverse inferences from silence on police questioning in the absence of explanation by the defendant places him or her under considerable pressure to give

evidence at trial in order to provide an explanation for exercising the right to silence when questioned by police.

The Commission also argued[5] that if the right to silence were removed, accused people would probably be forced to get into the witness box and, 'if the suspect be your typical suspect, would be no match for a reasonably competent prosecutor even if he or she be innocent'. 'This may be an unstated aim of those who would argue for change – that is, in effect, to compel accused persons to give evidence.'

Those least vulnerable will be career criminals.

5. Providing legal advice.

It is true that in the United Kingdom, the Criminal Justice and Public Order Act 1994 provided that a court may draw adverse inference from a failure to mention any fact relied upon by the defence if that matter could have reasonably been mentioned to the investigating police officer. But in the United Kingdom, a duty solicitor is available at every police station, to draw the charges and to supervise the disclosure of the case before interviews are required. It is true, the bill requires that a solicitor's advice is to be obtained, by telephone if necessary, about the need to answer questions. Yet it is clear from the above arguments that more advice is needed than can be given over the telephone. The bill does not even require that the accused person understand the caution; not that he or she acknowledge that it is understood.

There is apparently no intention of introducing the full UK scheme here. And the United Kingdom has its Bill of Rights and is subject to the European Court of Justice.

By contrast there is no Bill of Rights in Australia, and the assistance of a solicitor is expensive. Here a solicitor costs $300 and hour—so only wealthy people can afford to get one out of bed. (Drug lords would have no problem.) Worse, no solicitor is available in remote districts. Many towns are hours' drive away from solicitors—Cobar, Wilcannia and Brewarrina, for example. Police moreover have a habit of discouraging people from seeing advice from lawyers before or while they are questioned. They are also known to question suspects at times when no lawyer is available.

If those whom police question are to be denied the right to silence, then a legal practitioner should be provided, at government expense, throughout the questioning. It should be required that the practitioner be one with experience in the criminal law. But even an experienced criminal lawyer could not properly advise unless he/she knew the circumstances of the case alleged and thus the potential importance of a particular "fact".

[5] at 2.129

Where such support is not provided police records of interview should not be acceptable as evidence.

6. The costs.

Attempting to avoid false convictions under the proposed regime will mean longer trials, as the Law Reform Commission argued.

> 2.113 What happened in the police station is a frequent subject of evidence. Since the jury must consider whether it is fair to use the defendant's silence adversely, it is necessary that they be given a complete picture of the relevant surrounding circumstances, concerning not only communications with the police but also the defendant's situation. This introduces a substantial area of time consuming disputation which will be almost certainly peripheral to the real issues in the case for very marginal gain.
>
> One of the concomitant problems – to name but one – is that it has to be evaluated by the jury very much second-hand. As anyone with any experience knows, even with complete candour by all parties and the best will in the world, the version of events that comes to be presented in Court is edited, not only by limits of understanding, perception and recollection but by the trial process itself, sometimes quite markedly and unrealistically and, indeed, unfairly to both the police and the defence. In many cases this does not matter, but in many it will.

The proposed change then will not lead to the truth being discovered. It will not break the resolve of people who, from a mistaken sense of loyalty or fear of the consequences refuse to "rat" upon their mates. The "bikie cone of silence" will not be broken by this proposed law, whatever its proponents say.

But there will instead be mistaken convictions on the basis of false confessions or inadequate, confused answers to questions.

Where false convictions are recorded, the community will be the poorer for innocent people spending time in jail. There will be further costs in the efforts to get those convictions reversed.

Most seriously, respect for the law and the rule of law will be eroded.

The proposed change is not good sense.

Martin Bibby
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