The New South Wales Bar Association

99/154

28 September 2012

The Director
Criminal Law Review Division
Department of Attorney General and Justice
GPO Box 6
Sydney
NSW 2001

Dear Ms Musgrave

Re: the Right to Silence

Thank you for giving the New South Wales Bar Association the opportunity to respond to the Government's proposal to abridge the right to silence, albeit a very limited opportunity. The draft bill was only made available on 12 September 2012. The time limit for commenting on the draft bill is said to be 28 September 2012. Sixteen days is a very short period for the Bar Association to respond to a proposal as fundamental as this one, which undermines what the Bar Association regards as an essential right of Australians, that is, the right to silence.

I would like to express the Bar Association's concern about the lack of consultation by the government before the decision was made to propose the amendments to the *Evidence Act 1995* relating to the right to silence. The Bar Association was not consulted before the announcement of these proposed amendments. As far as the Association is aware, neither was the Law Society, the Legal Aid Commission, the Public Defenders, the Director of Public Prosecutions, the Crown Prosecutors and the Aboriginal Legal Service.

The current legislative scheme does not require reform

In his media release of 12 September 2012, the Attorney General explained the proposed amendments this way:

> Last month, the Government announced plans to allow juries and judges to draw adverse inferences against alleged criminals who refused to speak to police but later produce "evidence" at trial.[1]

[1] The Honourable Greg Smith SC MP, Media Release, 12 September 2012, available at http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/120912_changes_right_to_silence.pdf/$file/120912_changes_right_to_silence.pdf

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The example most frequently used in the media discussion of this proposal is evidence of an alibi, not disclosed at the time of the offence, but later relied on at trial.

In fact, defendants have no right to call alibi evidence unless they have given notice in writing no later than 42 days before the matter is listed for trial: s 150 *Criminal Procedure Act 1986*. This notice must include the name and address of any proposed alibi witness if known to the accused.

A defendant may call evidence where no or late notice has been given, with the leave of the Court. However, in the experience of the members of the Bar Association, judges will rarely give leave to rely on a late notice of alibi, without giving the prosecution an adjournment to investigate the alibi, and in particular, to give the police an opportunity to obtain statements from the proposed alibi witnesses.

Similarly, where the defence proposes to rely on the partial defence of substantial impairment to murder, the defence is required to serve on the Crown a notice indicating the name and address of the witnesses to be called, and the particulars of the evidence proposed to be given by the witness: s 151 *Criminal Procedure Act*. In practice, the effect of this provision is that the defence serves psychiatric reports relied on by the defendant prior to the trial.

Currently there is no statutory requirement for the defence to supply to the prosecution psychiatric reports where the defence of mental illness is relied upon. In practice, in almost every case where a defence of mental illness is relied upon, defence legal representatives will serve on the prosecution prior to trial a copy of any psychiatric reports to be relied upon by the defendant in an attempt to persuade the prosecution to accept a plea of not guilty by reason of mental illness.

In addition, there already exists a power of the District and Supreme Courts to order pre-trial disclosure, under Division 3 of Part 3 of the *Criminal Procedure Act*. If an order is made for pre-trial disclosure, the defence is obliged to disclose in advance of the trial, amongst other things, the factual matters which are in dispute, and to serve on the prosecution reports of any expert whom the defence proposes to call at the trial (s 143 *Criminal Procedure Act*). In practice, I am advised that only in a handful of cases has the prosecution made an application to the courts for pre-trial disclosure. This strongly indicates that there is no need for more extensive pre-trial disclosure.

Another justification given for the proposed limiting of the right to silence is the difficulty facing police investigating the recent spate of drive by shootings, because victims and eye-witnesses are not co-operating with the police.[2] The watering down of the right to silence will have no impact on these cases, because only people charged with crimes have the right to silence. An eye-witness to a crime, and indeed any person in possession of information which might be of material assistance to the police in apprehending an offender, who does not bring this information to the attention of the authorities, is liable to a criminal offence carrying 2 years imprisonment: s 316 *Crimes Act 1900*. If the person accepts a benefit for withholding the information, the penalty is 5 years.

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[2] See for example, Imre Salusinszky, 'Barry O'Farrell reins in the right to silence', in The Australian, 15/8/2012, available at http://www.theaustralian.com.au/national-affairs/barry-ofarrell-reins-in-the-right-to-silence/story-fn59niix-1226450433751

The right to silence is a fundamental right that should not be curtailed

The Bar Association includes amongst its membership all serving Crown Prosecutors, Public Defenders, and barristers at the private bar who practice in criminal law. The Criminal Law Committee of the Bar Association contains members from each of these groups. There have been relatively few issues where the Committee has not been able to come to a unanimous view, for example on the issue of whether or not the Crown should retain a veto over an election for a judge alone trial. I am able to inform you that on the issue of limitations on the right to silence, the Committee's view is a unanimous one. The Committee unanimously opposes the proposed amendments.

The criminal justice system in New South Wales is based on the English common law system of criminal justice. That system of justice is rightly regarded as the gold standard of criminal justice. The fairness of criminal justice systems internationally is judged by compliance with or deviation from that standard of justice.

Most criminal law practitioners would regard that gold standard of criminal justice as based on a handful of fundamental principles. Because each of them is fundamental, they cannot be ranked in order of importance. One of them is the presumption of innocence. One of them is the right to trial by jury. One of them is the requirement for the Crown to prove an allegation beyond reasonable doubt. One of them is the right to legal representation. One of them is the right to confront an accuser by cross-examination. One of them is the right to silence.

In *Petty and Maiden v The Queen* (1991) 173 CLR 95 at 128-9 Gaudron J. said:

> 16. 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. The corollary of that - and it is equally fundamental - is that, insanity and statutory exceptions apart, it is never for an accused person to prove his innocence. See *Woolmington v The Director of Public Prosecutions* [1935] UKHL 1, (1935) AC 462. Therein lies an important aspect of the right to silence, which right also encompasses the privilege against incrimination.

In a recent judgment of the Supreme Court, *Regina v Sellar and McCarthy* [2012] NSWSC 934, Garling J. considered a related aspect of the right to silence, that is, the right of a person not to be required in evidence to incriminate himself. His Honour said (at paragraphs [146] to [149]):

> 146 It is a firmly established principle of the common law, for over 300 years, that no person can be compelled to incriminate himself: *Sorby v The Commonwealth* [1983] HCA 10; (1983) 152 CLR 281 at [5] per Gibbs CJ.
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> 147 The right to silence was described as:

> "... a freedom so treasured by tradition and so central to the judicial administration of criminal justice."

Hammond v The Commonwealth [1982] HCA 42; (1982) 152 CLR 188 at [3] per Brennan J.

148 It is a right which:

> "... derives from the privilege against self-incrimination. 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 and 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."

RPS v R [2000] HCA 3; (2000) 199 CLR 620 at [61]-[62] per McHugh J.

149 Windeyer J in *Rees v Kratzmann* [1965] HCA 49; (1965) 114 CLR 63 at [3], considered the question of a compulsory examination, which may breach the privilege against self-incrimination, saying:

> "There is in the common law a traditional objection to compulsory interrogations. Blackstone explained it: 'For at the common law *nemo tenebatur prodere seipsum*: and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men': *Comm.* iv 296.' The continuing regard for this element in the lawyers notion of justice may be, as has been suggested, partly a consequence of a persistent memory in the common law of hatred of the Star Chamber and its works. It is linked with the cherished view of English lawyers that their methods are more just than are the inquisitional procedures of other countries. But strong as has been the influence of this attitude upon the administration of the common law, of the criminal law especially... "

Later in the same case his Honour said (at paragraph [154] to [155]):

> 154 The privilege was described this way in the majority decision of the US Supreme Court in *Quinn v United States* (1955) 349 US 155 [99 L. Ed. 964] at 161-162:
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> > "The privilege against self-incrimination is a right that was hard-earned by our forefathers. The reasons for its inclusions in the Constitution - and the necessities for its preservation - are to be found in the lessons of history. As early as 1650, remembrance of the horror of Star Chamber proceedings a decade before had firmly established the privilege in the common law of England. ... The privilege, this Court has stated,

> 'was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions.'
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> Co-equally with our other constitutional guarantees, the Self-Incrimination Clause:
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> > 'must be accorded liberal construction in favor of the right it was intended to secure'.
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> > Such liberal construction is particularly warranted in a prosecution of a witness for a refusal to answer, since the respect normally accorded the privilege is then buttressed by the presumption of innocence accorded a defendant in a criminal trial. To apply the privilege narrowly or begrudgingly - to treat it as an historical relic, at most merely to be tolerated - is to ignore its development and purpose."

Quinn was a case involving the refusal of a witness to answer questions put by the sub-committee of the Un-American Activities of the House of Representatives chaired by Senator McCarthy.

155 Frankfurter J expressed his views of the privilege in somewhat more colourful language in *Ullmann v United States* [1956] 350 US 422 [100 L. Ed. 511], which was also a case about the McCarthy committee, when he said at 426-428:

> "It is relevant to define explicitly the spirit in which the Fifth Amendment's privilege against self-incrimination should be approached. This command ... registers an important advance in the development of our liberty –
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> > 'one of the great landmarks in man's struggle to make himself civilized'.
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> > Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honour to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States.
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> > ...
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> > No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts, it was aimed at a more far-reaching evil - a recurrence of the inquisition and the Star Chamber, even if not in their

> stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies."

The right to silence has, literally for centuries, been regarded as a fundamental feature of our system of justice. Our system of justice is one which is admired the world over, and is one to which other nations aspire. In the Association's view, those who advocate a drastic curtailment of a fundamental feature of a criminal justice system must provide compelling reasons for doing so.

The right to silence has complex origins but has become 'a fundamental rule of the common law': *Petty and Maiden* (1991) 173 CLR 95 (Mason CJ, Deane, Toohey and McHugh JJ). It serves a number of different purposes. It reinforces the presumption of innocence. It recognises the power imbalance that often exists between police and suspect, setting a limit on police powers. It respects the privacy and integrity of the suspect. It reduces the risk of a vulnerable and impressionable innocent suspect providing the police with a false confession, resulting in a wrongful conviction. The right to silence is sometimes seen as a historical point of contrast between the English criminal justice system and that of continent Europe where, in some jurisdictions at least, it was not uncommon for inquisitors to obtain evidence and confessions through torture.

People exercise the right to silence for many reasons. They may be tired, distressed, or affected by drugs or alcohol at the time of the interview. They may be motivated by a desire to protect others, such as family members or friends. They may believe (sometimes correctly) that the police have not revealed all the evidence in their possession or are trying to trick them into incriminating themselves. They may be reluctant to give an explanation which will reveal illegal behavior not under investigation or legal but embarrassing behaviour of which they are ashamed. They may also simply be following legal advice which they have been given.[3]

The critical question for a jury to determine in a criminal trial should always be whether or not the prosecution has proved its case beyond any reasonable doubt, and should not be why the defendant exercised his right to silence. The risk of permitting an adverse inference to be drawn when an accused exercises his or her right to silence, is that the answer to the latter question might dictate the answer to be given to the former question. As the English Court of Appeal observed in *Regina v Bresa* [2005] EWCA Crim 1414, 'even in the simplest and most straightforward of cases ... it seems to require a direction of such length and detail that it seems to promote the adverse inference question to a height it does not merit'.

Other common law jurisdictions

Most jurisdictions, which have adopted the English common law system, have retained the right to silence. Notable exceptions are England, Wales, and Singapore.

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[3] For a discussion of reasons for silence, see the New South Wales Law Reform Commission, Discussion Paper 41, The Right to Silence (1998), paragraphs 3.62 to 3.74.

The current proposal is modeled on the *Criminal Justice and Public Order Act 1994* (UK). Section 34 of that Act permits an adverse inference to be drawn where a defendant fails to mention, when questioned under caution or charged, facts later relied upon by him or her in court.

However, the English legislation is generally viewed as unsuccessful and problematic. In 1999 Professor Diane Birch conducted a cost benefit analysis of the English provisions, concluding that 'the demands on judge and jury of the complex edifice of statutory mechanisms are enormous in proportion to the evidential gains they permit'.[4] In 2001 Professor Roger Leng indicated that 'far from facilitating the exercise of common sense, the effect ... has been to introduce unnecessary complexity and to distort the process of fact-finding'.[5] Professor John Jackson drew a similar conclusion and suggested that the scheme called for more safeguards and greater regulation of police interviews, adding: 'To those who cavil at the added complexity there is a simple solution – abolish the silence provisions.'

The English Court of Appeal in a joint judgment said that s. 34 had been justifiably described as 'a notorious minefield': *Regina v Beckles* [2005] 1 WLR 2829 (at para [6]). The English Court of Appeal considered the conditions which should be established before the adverse inference is drawn in *Regina v Argent* [1997] 2 Cr App R 27. The complexity of the requirements can be judged from this passage in the joint judgment (at 32-3):

> What then are the formal conditions to be met before the jury may draw such an inference? In our judgment there are six such conditions. The first is that there must be proceedings against a person for an offence; that condition must necessarily be satisfied before section 34(2)(d) can bite and plainly it was satisfied here. The second condition is that the alleged failure must occur before a defendant is charged. ... The third condition is that the alleged failure must occur during questioning under caution by a constable. … The fourth condition is that the constable's questioning must be directed to trying to discover whether or by whom the alleged offence had been committed … The fifth condition is that the alleged failure by the defendant must be to mention any fact relied on in his defence in those proceedings. That raises two questions of fact: first, is there some fact which the defendant has relied on in his defence; and second, did the defendant fail to mention it to the constable when he was being questioned in accordance with the section? Being questions of fact these questions are for the jury as the tribunal of fact to resolve. …. The sixth condition is that the appellant failed to mention a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned. The time referred to is the time of questioning, and account must be taken of all the relevant circumstances existing at that time. 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,

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[4] DJ Birch, 'Suffering in Silence: A Cost-Benefit Analysis of s 34 of the *Criminal Justice and Public Order Act 1994*', [1999] Crim LR 769, 787.

[5] R Leng, 'Silence pre-trial, reasonable expectations and the normative distortion of fact-finding' (2001) 5 *International Journal of Evidence & Proof* 240, 241.

> tiredness, knowledge, personality and legal advice are all part of the relevant circumstances; and those are only examples of things which may be relevant.

The European Court of Human Rights has considered, in a number of decisions, the effect of article 6 of the *European Convention on Human Rights*, which (in summary) guarantees a right to trial before an independent court and the presumption of innocence. In *Murray v The United Kingdom* (1996) 22 EHRR 29 the Court said (at [45]):

> Although not specifically mentioned in Article 6 (art. 6) of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6) (see the Funke judgment cited above, loc. cit.). By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6 (art. 6).

Although the Court has not said that there is a direct inconsistency between Article 6 of the *Convention*, and s 34 of the *Criminal Justice and Public Order Act*, in a number of cases the European Court of Justice has held that on the facts of particular cases, the direction should not have been given, or the direction was erroneous, because of Article 6. *Condron v The United Kingdom* (2001) 31 EHRR 1 was a case where the two accused were heroin addicts. They were arrested while withdrawing from heroin. The accused were advised by a solicitor not to take part in an interview with police. A direction was given to the jury in terms of s. 34. They were convicted. Their appeal against conviction was upheld. The Court said (at 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 applicants' silence at the police interview could only sensibly be attributed to their having no answer or none that would stand up to cross-examination.

In 2011 Lord Carloway produced a report for the Scottish government, which considered at length the experience of the reduced right to silence in England and Wales.[6] He concluded (at pp. 327-8):

> 7.5.24 On the point of principle, it can be said with force that current Convention jurisprudence permits a statutory scheme in which adverse inference can operate. However, judging from the experience in England and Wales, the scheme would have to be of labyrinthine complexity. For it to have any utility, there would require to be a system whereby, in advance of interview, the suspect were provided with far more information on the case against him/her than is presently given or capable of being given in many cases, if the maximum period for questioning is to be as recommended. Solicitors would require to be afforded sufficient time to consider that information. This is

[6] The Carloway Review, 17/11/2011, available on the internet at http://www.scotland.gov.uk/About/Review/CarlowayReview

> unlikely to be a feasible option, at least in custody cases, without further extension of time limits. It also harks back to what has already been alluded to; that this type of system is effectively moving part of the trial out of the court room and into the police station. Rather, as appears to be the position in some inquisitorial systems, what occurs in the police station becomes almost determinative of the case.

Later Lord Carloway said (at p. 328):

> 7.5.26 In summary and in answer to the two questions, the introduction of adverse inference would not fit well with the presumption of innocence, the right to silence and the privilege against self-incrimination as understood and applied in Scotland. Instead of promoting efficiency and effectiveness, it would bring unnecessary complexity to the criminal justice system.

Notably, no other jurisdiction in Australia has adopted the English model for limiting the right to silence.

The NSW Law Reform Commission Report

The NSW Law Reform Commission considered the question of the curtailment of the right to silence in Report 95, '*The Right to Silence*', in 2000.[7]

The Law Reform Commission concluded (at paras 2.138 to 2.139):

> 2.138 For the reasons discussed above, 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 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.
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> 2.139 There is in this State an additional practical problem with importing the English law. A fundamental requirement of fairness in any obligation imposed to reveal a defence when questioned by police is that legal advice be available to suspects to ensure that they understood the significance of the caution and the consequences of silence. This has been acknowledged in the United Kingdom. Provision of duty solicitors to give the necessary advice is

[7] Available on the Internet at http://www.lawlink.nsw.gov.a u/lrc.nsf/pages/r95chp2

impossible within presently available legal aid funding. Significant increases in legal aid funding appear to be unlikely and, in the Commission's view, could not be justified (on financial grounds alone) unless there were significant advantages that can clearly be demonstrated for the effectiveness of investigations and the administration of justice.

The right to silence should not be curtailed

The Bar Association regards the right to silence as a fundamental feature of our system of justice, which should not be curtailed unless there are very powerful reasons for so doing.

The evidence is that even if it is assumed that there is a problem with defendants exercising the right to silence, it is a slight one. The NSW Law Reform Commission observed that (footnotes omitted):

> 2.15 Australian research indicates that most suspects do not remain silent when questioned by the police. A majority of the judges, magistrates, legal practitioners and police prosecutors surveyed by the Commission for this reference reported that, while suspects sometimes remained silent when questioned by police, this did not occur in the majority of cases. This was supported in submissions received by the Commission and at a seminar on the right to silence conducted by the Commission as part of Law Week 1998.
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> 2.16 Empirical research conducted by the New South Wales Bureau of Crime Statistics and Research in 1980 concluded that 4% of suspects subsequently charged and tried in the Sydney District Court remained silent in police interviews. Research undertaken by the Victorian Office of the Director of Public Prosecutions in 1988 and 1989 found that suspects did not answer police questions in 7% to 9% of prosecutions.[8]

The suggested rationale for the curtailment of the right to silence, is that it will prevent 'hardened criminals' from hiding behind 'a wall of silence'.[9] The NSW Law Reform Commission, having considered all the evidence, concluded that (footnotes omitted):

> 2.63 Research conducted in Australia and overseas indicates that suspects rarely remain silent when asked questions by police. It follows therefore that modifying the right to silence would be unlikely to significan tly increase prosecutions or convictions. Most judges who participated in the Commission's survey expressed the view that the defendant's silence when questioned by police did not generally affect trial outcomes. Most defence lawyers surveyed who conducted jury trials thought that silence sometimes contributed to acquittals and sometimes to convictions. On the other hand, most prosecutors who conducted jury trials thought that silence at the police station *did* generally contribute to the acquittal of defendants.

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[8] Available on the Internet at http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r95chp2

[9] The Honourable Greg Smith SC MP, Media Release, 12 September 2012, available at http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/120912_changes_right_to_silence.pdf/$file/120912_changes_right_to_silence.pdf

> 2.64 The overseas empirical data suggests that, where a suspect does not answer police questions, this does not reduce the likelihood of the suspect being charged, pleading guilty, or being acquitted at trial. To the contrary, some research studies suggest that the likelihood of a suspect being charged and convicted increases where the suspect remains silent. Anecdotal accounts indicate that there is no evidence that the English modifications to the right to silence have led to any increase in guilty pleas or convictions.

To deal with this perceived slight problem, with a proposal which, based on the overseas evidence, will be ineffective, the government risks opening up what the English Court of Appeal agreed could be described as a 'notorious minefield'[10].

Problems with the proposed legislation

(a) Potential conflict with the International Covenant on Civil and Political Rights

I have discussed above the difficulties encountered by English courts because of the potential conflict between s 34 *Criminal Justice and Public Order Act* and the *European Convention on Human Rights*.

Australia is not a signatory to the *European Convention on Human Rights*. However Australia is a signatory to the *International Covenant on Civil and Political Rights*. Article 14 of that Covenant is relevantly very similar to the Article 6 of the *European Convention on Human Rights*. Article 14 goes somewhat further, in that Article 14 (3) (g) states that:

> (3) In the determination of any criminal charges against him, everyone shall be entitled to the following guarantees, in full equality:
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> ...
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> (g) Not to be compelled to testify against himself or to confess guilt.

Under s. 138 (3) (f) of the *Evidence Act*, one of the matters which a Court may take into account, in determining whether or not to exercise the discretion to exclude illegally or improperly obtained evidence, is:

> (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights*;

Under the proposed legislation, where an investigating officer gives a 'supplementary caution', it is likely to be in the following terms:

> You are not obliged to say 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.[11]

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[10] Regina v Beckles [2005] 1 WLR 2829.

The NSW Law Reform Commission said of a similar type of caution (footnotes omitted):

> 2.132 The Commission received a number of submissions which argued that many suspects cannot understand the caution, and are likely to interpret it as pressuring or threatening. Modifying the consequences of remaining silent when questioned would, of course, require changes to this caution. The Law Society of New South Wales suggested that it would be difficult to devise a caution to reflect the modified position and which suspects would be able to understand. In England and Wales, the revised caution states:
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> > 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.
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> 2.133 Research which examined the way ordinary members of the public interpreted this caution concluded that 60% of people felt that the caution was pressuring or threatening. 80% of people felt that the second sentence of the caution, when read alone, had this effect. Research undertaken in Northern Ireland indicates that defence lawyers overwhelmingly believe that suspects do not comprehend the caution introduced in 1988 to accompany the Northern Ireland provisions, most reporting that suspects believed the caution meant that there was an obligation to answer any question put by the police.

There can be no doubt, that where a suspect takes part in an interview with police after the 'supplementary caution' is given, it will be argued that the interview should be excluded under the discretion under s 138 *Evidence Act* because of a breach of the *International Covenant on Civil and Political Rights.*

(b) Possible Constitutional Problems

An essential character, fundamental duty and obligation of any court exercising judicial power to which Chapter III applies is the application of "*the relevant law to the facts as found in the proceedings conducted in accordance with the judicial process*": *Bass v Permanent Trustee Co Limited* (Bass) (1999) 198 CLR 334 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at [56]; cited with approval by French CJ in *Cesan v The Queen; Mas Rivadavia v The Queen* (2008) 236 CLR 358 at [70] (with emphasis added to the words "*in accordance with the judicial process*"). Likewise in *International Finance Trust Company Ltd and Another v NSW Crime Commission and Others* (2009) 240 CLR 319 at [88], Gummow and Bell JJ identified as a starting point for consideration of the case presented by the appellants a passage in the reasons of Crennan J in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [175] where her Honour referred inter alia to the same passage in *Bass* at [56].

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[11] Proposed s. 89A (10) of the Amendment of the Evidence Act Bill, the Honourable Greg Smith SC MP in Hansard, 12/9/2012.

In *Bass* the Court endorsed the judgment of Gaudron J in *Nicholas v The Queen* (1998) 193 CLR 173 (Nicholas) at 208-209 at [74] where she held:

> "In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedure which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law..."

It is fundamental to the due administration of justice that a person should not be convicted of a criminal offence save after a fair trial according to law: *Wilde v The Queen* (1988) 164 CLR 365 at 375, *Jago v District Court* (1989) 168 CLR 23 (Jago) at 56; *The Queen v Glennon* (1992) 173 CLR 592 at 623; *Subramaniam v The Queen* (2004) 79 ALJR 116 [26]-[27]; *Dietrich v The Queen* (1992) 177 CLR 292 at 326, 362. Essential requirements of a fair trial of an indictable criminal offence include proof beyond reasonable doubt, the presumption of innocence and the prosecution putting its whole case before the defence needs to make answer to the charge: *Shaw v The Queen* (1952) 85 CLR 365 at 379-380 (per Dixon, McTiernan, Webb and Kitto JJ), applied in *Killick v The Queen* (1981) 147 CLR 565 at 568-569.

The proposed legislation promotes the drawing of an "unfavourable" inference, including "an inference of consciousness of guilt" (s89A (1) and (10)) from failure or refusal to mention "a fact" in the circumstances set out by the legislation. It may be that such legislation is inimical to the exercise of judicial power in an impartial way. The essential character of a court and the nature of judicial power necessitate that a court not be authorised to proceed in a manner that departs to a significant degree from the methods and standards which have in the past characterised judicial process, in this case, fair trial as an aspect of judicial power.

In *Kable v DPP* (1996) 189 CLR 57 Gaudron J described the legislation under consideration as involving "the antithesis of the judicial process", one of the central purposes of which her Honour had said in *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497 is to protect "the individual from arbitrary punishment and the arbitrary abrogation of rights by ensuring that punishment is not inflicted and rights are not interfered with other than in consequence of the fair and impartial application of the relevant law to facts which have been properly ascertained" (at 106-107). Gummow J held (at 133, 134) that laws that sap both a Supreme Court's appearance of institutional impartiality and the maintenance of public confidence in the judiciary would be incompatible with Ch III of the Constitution. This would be particularly so where the judiciary was apt to be seen as "but an arm of the executive which implements the will of the legislature." Gummow J did not accept that the Constitution was "entirely silent as to the character or quality of the State Court system" (at 139). His Honour observed at 143: "The particular characteristics of the Supreme Court against detraction from which, or impairment of which, by the Act the appellant complains, are mandated by the Constitution itself."

The fundamental requirement that a trial be fair is entrenched in the Constitution by Chapter III's implicit requirement that judicial power be exercised in accordance with judicial process: *Dietrich v The Queen* (1992) 177 CLR 292 per Deane J at 326; per Gaudron J at 362. It is an aspect of judicial power. In *Katsuno v The Queen* (1999) 199 CLR 40 at 60 [35] Gaudron, Gummow and Callinan JJ considered that "a failure to observe the requirement of the criminal process in a fundamental respect" included the failure to observe mandatory provisions relating to the Constitution (see also French J in *Cesan v The Queen; Mas Rivadavia v The Queen* (2008) 236 CLR 358 at [87]-[88]).

In *SA v Totani* (2010) 242 CLR 1 French CJ said:

> "Courts and judges decide cases independently of the executive government. That is part of Australia's common law heritage, which is antecedent to the Constitution and supplies principles for its interpretation and operation. Judicial independence is an assumption which underlies Ch III of the Constitution, concerning the exercise of the judicial power of the Commonwealth. It is an assumption which long predates Federation... It is a requirement of the Constitution that judicial independence be maintained in reality and appearance for the courts created by the Commonwealth and for the courts of the States and Territories. Observance of that requirement is never more important than when decisions affecting personal liberty and liability to criminal penalties are to be made" (footnotes omitted).

See also Gummow J at [131]-[135], Hayne J at [226]-[229], Kiefel J at [481].

There are particular problems with the proposal in the legislation as the judiciary are directed that they may act in a manner inimical to the requirements of fundamental criminal trial process by directing a jury that unfavourable inferences may be drawn from a suspect's exercise of his/her right to silence. The unfavourable inferences extend to an inference of consciousness of guilt from silence. This is inimical to both the burden of proof and the presumption of innocence. As such, there are questions as to the constitutionality of the proposed section 89A.

(c) <u>Problems with the proposed section as drafted</u>

The proposed legislation makes it a precondition of drawing an inference against the defendant that at the time of questioning he or she was allowed the opportunity to consult a lawyer about the effect of failing or refusing to mention a fact later relied upon by the defendant (clause 89A (2) (b)).

The proposal puts the defendant's lawyer (usually at this stage a solicitor) in a dilemma. If the lawyer tells the defendant that he or she runs the risk of an adverse inference being drawn from the fact that he or she has exercised his or her right to silence, that provides a justification for such a direction being given. However, if the lawyer simply tells the defendant to exercise his or her common law right to silence, a proposed statutory pre-condition for the adverse inference is withdrawn.

It is not easy to know what approach NSW courts would take where a defendant is advised by his lawyer to exercise his right to silence and follows this advice. The

position of the English courts is not entirely clear,[12] but there is authority that it should be asked whether the defendant genuinely followed the legal advice in remaining silent, and whether it was reasonable for the defendant to do so: *Regina v Beckles* [2005] 1 WLR 2829; *Regina v Bresa* [2005] EWCA Crim 1414. But this approach raises a number of concerns. The suggestion that the defendant may not be justified in relying on legal advice could undermine the lawyer's position and damage the lawyer-client relationship. An exploration of the content and basis of the legal advice may raise difficult questions regarding the admissibility of hearsay evidence, and the waiver or loss of client legal privilege. Finally, this approach also presents the dramatic and distracting prospect of the defendant's legal adviser being put in the witness box.

The most important problem with the curtailment of the defendant's right to silence is that there is no requirement for the police to inform the defendant of the evidence against him or her. For example, it is standard practice in cases where the police know that the defendant's fingerprints have been found at a particular location (for example in a house-breaking case), for a police officer to ask the defendant if he or she has ever been in the street or suburb where the fingerprint was located. The defendant might well deny being in that street or suburb, having no idea of the significance with which the prosecution might later make of the answer.

The fact that a defendant has had access to legal advice does not really assist the defendant. The defence lawyer, at the time when the defendant is interviewed by the police, will normally have no more information about the evidence the police have against the defendant than the defendant himself or herself. This will particularly be so when the only contact between the lawyer and the defendant is over the telephone. In remote areas of New South Wales, where legal resources are scarce, access to lawyers by way of telephone will frequently be the only access to legal advice available, and this will disadvantage defendants in remote areas.

It is proposed that there be a trial telephone advice line staffed by lawyers to advise people of the implications of remaining silent.[13] This proposal may be contrasted with the English scheme, under which a government funded duty solicitor scheme was established. Under that scheme, specially trained solicitors attend police stations where defendants are in custody, advise them in person, and frequently sit in during interviews. A lawyer advising a defendant by telephone would have double limitations placed on his or her ability to advise the defendant. First, the solicitor's information about the evidence the police have against the defendant would be limited to the material which the police have decided to inform the defendant that they have in their possession. Secondly, the solicitor's information would again be limited to that much of the material which the defendant has managed to understand, remember, and pass on to the solicitor. Thirdly, it is rare for persons under arrest at a police station to have complete privacy when speaking by telephone with a solicitor. In order to give proper advice under the proposed legislative scheme, a solicitor may need to obtain instructions from a client about the allegation and would be inhibited from doing so unless police were prepared to allow an arrested person to be in the room (or enclosed cell) by themselves with a telephone.

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[12] See Simon Cooper, 'Legal advice and pre-trial silence' (2006) 10 E&P 60.

[13] The Hon. Greg Smith, Media Release, 12/9/2012.

The Bill states that the inference cannot be drawn where the inference was the only evidence that the defendant was guilty of a serious indictable offence (proposed s. 89A (3)). It would be a very unusual case where the only evidence against an accused was his silence. This provision does not go as far as common law developments about the use of an adverse inference. In Murray v The UK (1966) 22 EHRR 29 [47] it was held that the defendant cannot be convicted solely or mainly on the basis of an adverse inference from silence.

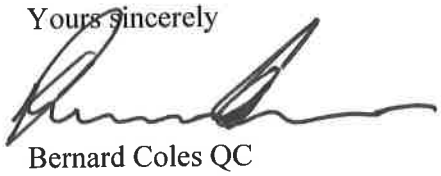
The Bill specifically states that the adverse inference provision does not apply to defendants who at the time of questioning, are under 18 years old or who have a cognitive impairment: proposed section 89A (6). This provision is both welcome and necessary, but there are other vulnerable groups in the community who are not protected, such as people with a limited understanding of English.

The proposed legislation only permits the supplementary caution, which triggers the possibility of an adverse inference direction, where an investigating official is satisfied that the offence concerned is a 'serious indictable offence' (clause 89A (5)). This phrase is not defined in the Bill, nor in the Evidence Act. Section 21 of the Interpretation Act (NSW) defines 'serious indictable offence' as any indictable offence carrying a maximum penalty of life or 5 years imprisonment or more. Most common Local Court offences will then be covered, including, for example larceny and assault occasioning actual bodily harm, both of which have maximum penalties of 5 years.

Conclusion

The government's proposal represents a significant deviation from the gold standard of criminal justice. The proposal is contrary to views expressed by the NSW Law Reform Commission. There is no demonstrated need for the curtailment of the right to silence. There is no evidence that the proposed amendments will affect the rate at which defendants plead guilty, or are convicted. The experience of the English legal system is that this proposal will lead to 'a notorious minefield'. The government should abandon this proposal, for which no relevant stakeholders (apart from the police) advocate.

Yours sincerely



Bernard Coles QC
President