David Shoebridge MLC
Member of the NSW Legislative Council

Evidence Amendment (Evidence of Silence) Bill 2012 Greens NSW Submission

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Removal of the right to silence as proposed by the government will affect the most vulnerable in our society, serving only to marginalise them further. There is no credible evidence in support of the proposed removal of this right.

Importantly the right to silence is not simply a right that criminals choose to exercise to avoid being found guilty, it is a right that all free people should have when faced by intrusive questioning from police and other prosecutorial officials. The government is not proposing to remove this right from criminals; the plan is to remove the right from everyone.

It is remarkable that a notionally 'conservative' government is proposing to change such a fundamental part of the legal system in this society. The right to silence came about when individuals and society began to baulk at the practice of star chambers and ecclesiastical tribunals that regularly resorted to torture and physical punishment to force confessions from defendants.

In response, the common law developed principles and rights that protected individuals from the oppressive use of state and church power. As no less authority than Blackstone stated some four centuries ago:

> "It is only by a firm adherence to the rule as so stated that effect is given to the policy of the common law that a suspect's fault (is) not to be wrung out of himself, but rather to be discovered by other means, and other men."[1]

The ratonale behind the right was restated by the majority of the High Court in Petty and Maiden v. The Queen [1991] HCA 34 (1991) 173 CLR 95[2]:

> "A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played. That is a fundamental rule of the common law which, subject to some specific statutory modifications, is applied in the administration of the criminal law in this country. An incident of that right of silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right of silence or to render it valueless."

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[1] *Blackstone's Commentaries*, vol.IV, p 296.
[2] *Petty and Maiden v. The Queen* [1991] HCA 34 (1991) 173 CLR 95

Given the Government has announced its intention to legislate to remove the right to silence it is somewhat disingenuous for it to be proceeding with this consultation as though it was engaging with the community on the principles at stake. Nevertheless the Greens NSW have chosen to engage with the department on the subject and hope that a balanced review is possible.

If, as appears likely, the Government's intention is to legislate the reform regardless of the submissions received, then the Greens NSW strongly support increased legislative protections including a guaranteed commitment to fund increased legal representation for those being questioned by the authorities.

Despite the government's proffered comparison with legal change in England, there is no genuine comparison between the modern NSW and English criminal law jurisdictions. There are two reasons for this.

The first is that English defendants have the protection of the *Human Rights Act 1998* that incorporates the right to a fair trial found in the European Convention on Human Rights. In NSW there is no equivalent protection and no Bill of Rights.

The second reason is that in England, accused people have the right to legal representation when being questioned by police. This allows them to make rational and informed decisions about how and when to remain silent and when to give explanations and details to police. The current Bill proposes only to remove the right to silence and not to increase access to legal aid or provide genuine rights protection through a Bill of Rights or similar.

In summary NSW is proposing to adopt England's increased police powers, but ignore the balance in that system of a Bill of Rights and adequate legal representation.

General principles

The right to silence has long been a central principle in English and then Australian criminal law.

The most recent review of the issue was undertaken by the NSW Law Reform Commission in 1995 in Report 95: The Right to Silence. That review, which was far more extensive than the current internal departmental review, strongly concluded the right should be maintained. Nothing has changed since to detract from this conclusion.

The Law Reform Commission identified a number of concerns within those jurisdictions where the right to silence has been modified – notably that it is likely to reduce the overall efficiency of the criminal justice system as well as allowing negative inferences are drawn from a defendant's silence in many cases where the inference is unjustified. [3]

[3] Law Reform Commission Report 95: The Right to Silence, at 2.103.

There are many reasons why an innocent person may exercise their right to silence, reasons for silence consistent with innocence are identified in the Law Reform Commission report as including:

- Attitudes towards police such as generalised fear or mistrust.
- Cultural characteristics which may lead suspects to remain silent particularly in relation to subjects involving domestic abuse and sexual assault.
- Personal characteristic including gender, age, mental disorders or acquired brain injuries.
- Communication factors such as language skills, impairment by alcohol or even tiredness.
- Police disclosure – meaning the extent to which police may put matters to a person – this can be highly variable and will depend on the stage of the investigation and even the familiarity of the questioning officer with the relevant facts and law.
- Protection of or fear of others
- Other reasons including difficulty remembering distant events for instance.[4]

The proposal to allow an adverse inference to be drawn from silence in police questioning occurs regardless of there being an explanation by the defendant for their silence. This will mean that even where a person had a good reason to remain silent – for instance they were intoxicated and wanted to sober up before answering questions - the prosecution may still be able to seek an adverse inference. The likely effect is that every person, guilty and innocent, will be under considerable pressure to provide information and make disclosures that may be taken as admissions.

As identified in a petition against the proposed change: "An individual's right to silence under interrogation from police has been a fundamental civil and human right recognised in our legal system since at least the 1700s and firmly accepted as part of Australian law since at least 1824. It is a right fought for and attained in reaction to Star Chamber trials, witch-hunts and other inquisitorial processes."[5]

The right to silence is also part of a package of rights that protect people from being forced to incriminate themselves (some legal scholars view them as a single right against self incrimination with a variety of forms). Such a right only has effect where not speaking, i.e. exercising your right to silence, cannot be used against you.

[4] Law Reform Commission Report 95: The Right to Silence, at 2.104.
[5] http://www.communityrun.org/petitions/save-the-right-to-silence

The proposed change has the potential to change fundamental elements of the criminal justice system in NSW going even so far as shifting the burden of proof in practice. As Mr Dowd from the Law Society has said on this issue: "It is an essential tenet of the criminal justice system that the prosecution has to prove its case beyond reasonable doubt. It is not the responsibility of the accused to prove his or her innocence".[6]

Practical Considerations

There are also compelling investigatory reasons not to remove the privilege. As Professors Sediment and Stein concluded in their game theory analysis of the right to silence,[7] having the right to silence available prevents the "polluting of the pool" of genuinely innocent explanations with fabricated explanations and in doing so allows the police to give greater credibility to innocent explanations they receive. This operates by criminals assessing their position which often leads to a guilty person:

> [Preferring] not to make any move because any move entails a substantial probability of worsening his position. On the one hand, if he were to opt for silence, he would subsequently find it difficult to challenge the prosecution's evidence. Moreover, the police and prosecution would infer his factual guilt and would therefore devote more time and effort to securing his conviction. On the other hand, the police might use evidence unknown to the suspect to expose a lie, increasing the likelihood of conviction.
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> ...
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> Therefore, total silence is often the optimal choice for a guilty suspect. However, the strategy of total silence exacts a virtually certain price: the police and prosecution will believe that the suspect is guilty and proceed accordingly.
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> ...
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> In sum, a suspect who opts for silence relies on uncertainty and doubt to obtain release or exoneration. This "raise-a-doubt" strategy distinguishes the suspect from those suspects who insist on their innocence.
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> A guilty suspect's first move is therefore a choice between two types of damage: pretrial damage that the suspect will almost certainly incur if he opts for total silence and trial damage that the suspect may incur if he opts for lies at any stage of his interrogation. [8]

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[6] http://www.lawsociety.com.au/about/news/643841

[7] *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, Harvard 114 Harvard Law Review 430 (2000) http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=alex_stein

[8] *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, Harvard 114 Harvard Law Review 430 (2000) http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=alex_stein

As the authors then conclude, removing the right to silence will inevitably harm innocent defendants.

> By exercising the right to silence, a guilty suspect abandons the lying alternative that would have involved perjurious pooling with innocents. Any such pooling might impair the credibility of statements given by innocent suspects. By refraining from perjuriously pooling with innocents, a guilty suspect minimizes the risk of wrongful conviction faced by an innocent suspect. Bentham's argument breaks down because it ignores the fact that guilty suspects' perjured statements impose negative externalities on innocent suspects. These negative externalities are avoided when guilty suspects exercise the right to silence and thus confer positive externalities on innocent suspects. [9]

The further erosion of a right to silence when questioned by police and the move towards a requirement to self incriminate is inconsistent with obligations Australia has as a state party to the International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of the Child.

The Government's Media comment on this subject

The government's media comment on this proposed change has been misleading and inflammatory. These statements put into question the commitment the Government has to public consultation about this proposal.

The Attorney General made the following statement in a media release: "The NSW Government is closing a legal loophole to stop criminals exploiting the system to avoid prosecution." In Parliament the Attorney General said that "the exposure bill ... will mean that silence comes with consequences and can no longer be used as a shield by criminals."[10]

That the right to silence is identified by the Attorney as a "legal loophole" is a serious cause for concern. These statements are also inconsistent with the evidence available on the use of the right to silence which does not show a systematic abuse by serious criminal elements like that which is claimed.

In fact, research undertaken by the NSW Parliamentary Library identifies only "a limited amount of data available regarding how often people questioned by police in NSW exercise their right to silence. It seems that such data is difficult to obtain".[11] In this context it is hard to see how there could be any measure of support for the Government's claims that the right is being abused.

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[9] *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, Harvard 114 Harvard Law Review 430 (2000)
http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=alex_stein

[10] http://www.parliament.nsw.gov.au/Prod/parlment/hanstrans.nsf/V3ByKey/LA20120912?open&refNavID=HA4_1

[11] http://bulletin.ph.nsw.gov.au/Prod/parlment/publications.nsf/0/D659A5838F9BFA27CA257A78001A8ED9/$File/Right+to+Silence+-+Issues+Backgrounder.pdf

Comments were also made by members of the Government that this change was necessary to address the use of 'ambush defences'. The Law Reform Commission report on the subject thoroughly discredited this argument as follows: “this argument is not supported by the research, which suggests that the incidences of defences raised for the first time at trial which succeed is between 1.5% and 5%". This research also suggests that a defendant who raises an ‘ambush defence’ is more likely to be convicted than acquitted.

There is no ambush under present law

In any event the existing law does not allow for 'ambush defences'. Section 150 of the *Criminal Procedure Act* requires defendants to give notice of alibi defences in compulsory pre-trial disclosureto the Director of Public Prosecutions and the court.

The notice under that subsection must include any alibi witness’ name and address or, if the other person’s name or address is not known to the accused person at the time he or she gives notice, any information in his or her possession that might be of material assistance in finding the other person. If the notice is not given, the evidence cannot be lead without leave of the Court.

If there was some legitimate concern in the government that leave was being too readily granted by the Court in the absence of a s150 notice then a rational and limited response would be to allow an adverse inference to be drawn where s150 had been breached.

Consideration in detail of proposed Bill

The Bill proposes to insert a new Section 89A into the Evidence Act. This is in Part 3.4 Admissions and comes after the existing section 89 Evidence of silence.

The Bill allows magistrates and juries considering serious indictable offences to draw an "unfavourable inference against an accused who fails to mention facts when questioned by police but later seeks to rely on those facts by way of defence at their trial, subject to the accused having been properly cautioned and afforded an opportunity to obtain legal advice".

The accused is to volunteer information to the police where “in the circumstances existing at the time of questioning, the accused could reasonably have been expected to mention" the material. Clearly it is intended that this will cover direct questions thereby removing the right to silence from those being questioned.

What is not clear however is the extent to which it is intended to create a positive requirement to disclose other information, due to the fact of it being related to an offence. If, for example, an accused was at his/her relatives place, but does not tell police that it was because there was a cousin’s party, does this allow an adverse inference to be drawn?

Schedule 1[3] of the draft bill inserts savings and transitional provisions into the *Evidence Act 1995.* This includes a proposed clause 24 that specifies that though s89A will not apply

to existing hearings it can apply to offences that occurred before the commencement of the section. This retrospective effect is contrary to established legal principles in relation to criminal law. No explanation has been provided for this imposition.

The legislation is structured so that the inference may only be drawn in the circumstances where the supplementary caution was given per s89A(2)(a) AND where "the defendant was allowed the opportunity to consult an Australian legal practitioner about the effect of failing or refusing to mention such a fact." Proposed s89A(7) provides that a defendant will be "taken not to have been allowed an opportunity to consult an Australian legal practitioner if the defendant's means, and the circumstances, preclude the defendant from obtaining legal advice."

There is no detail on what "consult" means. Does this include speaking to a lawyer who refuses to act? Does it include getting general telephone advice for 5 minutes and then facing four hours of interrogation unrepresented?

Detail is not provided to clarify what would constitute "an opportunity" – it could for instance be covered by the mere fact of the police giving a person an opportunity to make a call to a lawyer. This is not an adequate protection.

If the government was serious about protecting the rights of accused the inference would not be able to be drawn unless the accused was not only given the opportunity to consult with a lawyer but in a situation to "be represented by a competent lawyer during questioning". The Greens NSW would urge the government to consider such an amendment to the Bill.

The Bill provides a modest limitation on its application where those under 18 or with a cognitive impairment are concerned. There is however no limitation on the operation of the provision for a person who may not have understood the warnings, or have been so substantially intoxicated at the time of the interaction that they had no real grasp of the effect of the warning.

The proposed clause 25 inserts a requirement for a review of s89A five years after its commencement. The report from such a review must then be tabled in Parliament within 12 months. Past practice of the NSW Parliament with similar provisions in terrorism laws and other draconian criminal laws shows this is no protection at all. Not once has any such review led to the removal of the punitive laws.

The supplementary caution

Under this Bill the existing caution issued by police – that a person does not have to say or do anything but anything they say or do may be used in evidence – will be accompanied in some instances by a supplementary caution.

This means that a person being questioned in relation to the commission of a serious indictable offence is given the standard and then supplementary caution. The first gives a

right to silence and the second "indicates that, if the person does not say anything when being questioned and fails or refuses to mention a fact subsequently relied on by the defence in any proceedings brought against the person for the offence, an inference may be drawn that may harm the person's defence".

This double standard is confusing to most lawyers, it will almost certainly produce greater confusion and ongoing mistakes by accused persons when they face police interrogations.

Studies have shown that the understanding of the existing right to silence among the general population is very low. This more complicated version is likely to engender further substantial confusion and run the risk of causing serious miscarriages of justice. This concern is amplified when you consider the highly emotional circumstances many people find themselves in when being questioned by police.

The levels of comprehension of the warning are of particular concern when considered in the context of the population cohort most likely to be questioned. According to the Law Reform Commission report:

> "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.. and 23% of persons who appear in New South Wales Local Courts have either an intellectual disability or a borderline intellectual disability".[12]

These are the people that will have to comprehend and then act upon the new confused and harsh regime. Given this, it is almost impossible to see how it will produce just outcomes.

International comparison

As noted above one of the reasons given publicly for this change is that England made similar changes in 1994. There are a number of differences between the change proposed in this bill and the scheme in England. There are also a number of lessons to be learned from the UK experience about the danger of removing this right.

The most notable difference between the Australian and British system is identified in a petition against the proposed change:

> "Removal of the protection in Britain in 1994 was balanced by a guarantee of immediate access to free legal advice and representation at every police station. In NSW, Legal Aid is very limited. An arrested person must usually arrange a private lawyer at their own expense and many are questioned without legal advice or a lawyer present. People who decline to give a written statement may agree to talk to police without realising the video tape (ERISP) will be used in evidence against them,

[12] Law Reform Commission Report 95: The Right to Silence, at 2.121.

> including of their body language in how they answered a question (or did not answer it)."[13]

Judicial interpretation in England is split on the operation of their warning. This produces additional complexity and lack of certainty. As identified by one correspondent to my office:

> "For the past 4-5 years there has been a split in judicial interpretation. The original line of cases: R v Argent, Condron & Condron, Roble, McGarry, Gayle, and Pointer were often helpful as to what to consider in what circumstances an inference should not be drawn, and to direct a jury NOT to draw an inference. However there are a line of cases developed by Lord Justice Laws [who in his 1st reported judgement seemed to think that the very fact of being arrested means a suspect must talk] & Lord Auld which go against this."[14]

What constitutes a relevant "fact relied on" has also not always been clear in the English system. What is apparent is that in most cases identifying what facts are relied on needs to understand the evidence available, the elements of the offence and the suspect's account in relation to these.

As pointed out in correspondence from a practicing English lawyer with my office "suspects often don't realise what is important" and will forget to mention significant details that support their innocence while being potentially trapped into providing other details that is more consistent with the police view of events.

In short the tests used by English Court before allowing a negative inference to be drawn are confusing, contradictory and complex.

Conclusion

The Greens NSW urge the government to reconsider this move. If the issue sought to be addressed is the perceived laxity in Courts upholding the existing s150 of the *Criminal Procedure Act* then this can be cured by allowing adverse inferences to be drawn in circumstances where s150 has been breached.

In the absence of a Bill of Rights and insufficient legal aid, this change will produce unfair and unjust outcomes and degrade the state's criminal justice system.

David Shoebridge

[13] http://www.communityrun.org/petitions/save-the-right-to-silence
[14] Correspondence received from Anil Bhatt, 19 September 2012

David Shoebridge MLC
Member of the NSW Legislative Council

NSW Greens Justice Spokesperson