

SILENCE RIGHTS

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I Introduction

A distinctive characteristic of criminal justice based on the English common law is the centrality of several fundamental principles. These include the presumption of innocence, the right to trial by jury, the requirement for the Crown to prove an allegation beyond reasonable doubt, the right to legal representation, the right to confront an accuser by cross-examination and the right to silence.¹ These principles are inter-locking and mutually reinforcing.

The integrity of this structure of principles has been challenged by significant changes which have been made to criminal justice in New South Wales by two statutes. The *Evidence (Evidence of Silence) Amendment Act 2013* (NSW) ('*Evidence of Silence Act*') and the *Criminal Procedure Amendment (Mandatory Pre-Trial Defence Disclosure) Act 2013* (NSW) ('*Defence Disclosure Act*') were passed in the New South Wales Legislative Assembly together on 19 March 2013 and the Legislative Council on 20 March 2013 and were assented to on 25 March 2013. They commenced on 1 September 2013.

The *Evidence of Silence Act* substantially affects the rights of suspects who are being questioned by police officers by adding section 89A to the *Evidence Act 1995* (NSW) ('*Evidence Act*'). The *Defence Disclosure Act* operates in two ways by amending sections 141 to 148 of the *Criminal Procedure Act 1986* (NSW) ('*CPA*'): as a 'backstop' for the *Evidence of Silence Act* to catch those who might avoid its operation and as a practical imposition upon not only the defence in a criminal case, but also upon the prosecution. This article analyses the legislation, locating it in its policing and political contexts with particular reference to its likely impact on Indigenous suspects and defendants.

II The Right to Silence

The 'right to silence' is a legal right only to the extent provided by Article 14(3)(g) of the *International Covenant on Civil and Political Rights* ('*ICCPR*'), which provides a right to an accused 'not to be compelled to testify against himself or to confess guilt'.

Otherwise the 'right' is acknowledged and protected by provisions such as section 89 of the *Evidence Act* and section 122 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ('*LEPRA*') and by common law principles applicable generally throughout Australia.

The expression really refers to a collection of immunities that suspects and defendants enjoy in the course of the criminal justice process: immunity from adverse consequences for lack of cooperation in the investigation process (including questioning), protection from self-incrimination, torture and mistreatment directed to obtaining confessions, and from being required to testify in proceedings against themselves. These immunities, which are corollaries of the fundamental principles noted above, are well established and supported in Australia by legislative provisions and by numerous decisions of the High Court.

A The Evidence of Silence Act

The *Evidence of Silence Act* is the New South Wales Parliament's contribution to a debate about the right to silence which has rumbled on for many years in the United Kingdom and Australia. For almost 50 years, the right to silence has been the target of claims that criminal justice needs to be 're-balanced' in favour of police and prosecution. It has become a symbolic issue, providing territory on which conflicts over

police powers, civil liberties, due process and crime control have been fought.

In England and Wales, the right to silence was substantially restricted by the *Criminal Justice and Public Order Act 1994* ('CJPO'). Section 34 of CJPO permits an adverse inference to be drawn where an accused fails to mention, when questioned under caution or when charged, facts later relied upon by him or her in court. The *Evidence of Silence Act* in New South Wales was inspired by and modelled on the Anglo-Welsh legislation: the suggested wording of the new New South Wales special caution is identical to the caution legislated in England and Wales in 1994.

The *Evidence of Silence Act* is restricted to cases involving a serious indictable offence, i.e. one punishable by a maximum penalty of five years imprisonment or more. It authorises an investigator to issue a special caution² to the effect that the suspect does not have to say or do anything, but it may harm his or her defence if they do not mention when questioned something later relied on in court, and that anything the person does say or do may be used in evidence. The investigator must have reasonable cause to suspect that the person has committed a particular serious indictable offence and must not give the special caution unless satisfied that the offence under investigation is a serious indictable offence. During a subsequent trial, unfavourable inferences may be drawn as appears proper from evidence that during official questioning in relation to the offence, the accused failed or refused to mention a fact: (a) that the accused could reasonably have been expected to mention in the circumstances existing at the time, and (b) that is relied on in his or her defence in that proceeding. Significantly, section 89A(2)(c) enables an effective special caution to be given only in the presence of an Australian legal practitioner who is acting for the defendant at that time.

III Disclosure

For a very long time it has been required of the prosecution in common law jurisdictions that it disclose to the defence, in a timely manner and on a continuing basis, all relevant material known to it – including evidence that it will rely upon, relevant material that may not be relied upon and relevant material that may be of assistance to the defence.³ That obligation is reinforced by legislation requiring New South Wales officers investigating alleged indictable offences to disclose to prosecutors 'all relevant information,

documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person'.⁴ There is also a body of case law that confirms these obligations.⁵

Before the *Defence Disclosure Act*, a suspect/defendant could remain silent and disclose nothing without any adverse formal consequences (although magistrates, juries and judges have always drawn their own conclusions from the suspect/defendant's silence) except in two important instances - the requirements for an accused person to disclose to the prosecution evidence of an alibi and of substantial impairment of mental functioning.

A The Defence Disclosure Act

This Act amends sections 141ff of the CPA. It applies to the trial of any indictable offence, not just serious indictable offences. It applies regardless of any application of the *Evidence of Silence Act* and the new section 89A of the *Evidence Act*.

Section 142 requires the prosecution to disclose certain things to the defence. Those provisions are largely uncontroversial and restate previous practice. However, codifying disclosure obligations in this way and prescribing the description and supply of information requires the prosecution to institute procedures and create paperwork that in many instances will be unnecessary and burdensome. It is hard to reconcile this with the government's commitment to reducing unnecessary administration and delays in the criminal process.

Section 143 is a much more significant intervention. It includes a long and specific list of matters that the defence must disclose to the prosecution:

- (a) the name of any Australian legal practitioner proposed to appear on behalf of the accused person at the trial,
- (b) the nature of the accused person's defence, including particular defences to be relied on,
- (c) the facts, matters or circumstances on which the prosecution intends to rely to prove guilt (as indicated in the prosecution's notice under section 142) and with which the accused person intends to take issue,
- (d) points of law which the accused person intends to raise,
- (e) notice of any consent that the accused person proposes to give at the trial under section 190 of the *Evidence Act* in relation to each of the following:

- (i) a statement of a witness that the prosecutor proposes to adduce at the trial,
- (ii) a summary of evidence that the prosecutor proposes to adduce at the trial,
- (f) a statement as to whether or not the accused person intends to give any notice under section 150 ('Notice of alibi') or, if the accused person has already given such a notice, a statement that the notice has been given,
- (g) a statement as to whether or not the accused person intends to give any notice under section 151 ('Notice of intention to adduce evidence of substantial mental impairment').

The notice of the defence response is also to contain such of the following matters as the court orders:

- (a) a copy of any report, relevant to the trial, that has been prepared by a person whom the accused person intends to call as an expert witness at the trial,
- (b) if the prosecutor disclosed an intention to adduce evidence at the trial that has been obtained by means of surveillance, notice as to whether the accused person proposes to require the prosecutor to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,
- (c) notice as to whether the accused person proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecutor,
- (d) if the prosecutor disclosed an intention to tender at the trial any transcript, notice as to whether the accused person accepts the transcript as accurate and, if not, in what respect the transcript is disputed,
- (e) notice as to whether the accused person proposes to dispute the authenticity or accuracy of any proposed documentary evidence or other exhibit disclosed by the prosecutor,
- (f) notice of any significant issue the accused person proposes to raise regarding the form of the indictment, severability of the charges or separate trials for the charges,
- (g) notice of any consent the accused person proposes to give under section 184 of the *Evidence Act*.

Section 144 gives the prosecution a right of reply to the defence notice.

These provisions encourage greater case management by the courts, appearing in a division of the *CPA* entitled 'Case

management provisions and other provisions to reduce delays in proceedings'. It can be seen that they impose new and extensive disclosure obligations on the defence. Responding to familiar complaints from police about the imbalance of criminal justice, these provisions treat prosecution and defence as equals: but to do so ignores the fact that the state brings a criminal case against the individual and that a gross disparity in resources exists. Declining funding for legal aid generally and, via the Aboriginal Legal Service ('ALS'), for Aboriginal and Torres Strait Islander suspects and defendants specifically, will worsen this disparity.

The sting in the tail is that if the prosecution complies with the disclosure requirements and the defence does not, then (a) the court, or any other party with the leave of the court, may make such comment at the trial as appears proper, and (b) the court or jury may then draw such unfavourable inferences as appears proper.⁶ However, per section 148 of the *CPA*, the court may waive these provisions if it is in the interests of justice to do so.⁷ It will be significant and interesting to see how courts interpret section 148. As resources for legal aid become ever more stretched, what will the court expect of an unrepresented defendant or of a defendant represented by a severely under-funded organisation such as the ALS?

An uninformed member of the public would have assumed from media commentary on this proposal that the defence had no previous duty of disclosure and that 'ambush defences', involving evidence of an alibi not disclosed at the time of the investigation but later relied on at trial, were commonplace. Police spokesmen made thoroughly misleading comments on this. For example, Scott Weber (President of the New South Wales Police Association) told the *Daily Telegraph* that 'The whole purpose of the legislation is someone not going two to three years down the track and coming up with an alibi'.⁸ As noted above, the reality was very different. It should be a matter of some concern that a police spokesman is apparently so misinformed about longstanding disclosure obligations. Since long before the 2013 legislation, accused persons had no right to call alibi evidence unless they had given notice in writing no later than 42 days before the matter was listed for trial.⁹ This notice had to include the name and address of any proposed alibi witness, if known to the accused. Evidence of alibi could be called where no or late notice has been given, but only with the leave of the court which was rarely given without also giving the prosecution an adjournment to give the police an opportunity to investigate the alibi. These provisions have been in force for a decade and were

developments of similar provisions that have existed at least since federation. In the considerable experience of the second author, claims that alibi ambush is a major problem are mistaken and misleading.¹⁰

In addition, where the defence proposes to lead evidence of substantial impairment of mental functioning in partial defence to murder, the defence must provide notice of the name and address of the witness and the particulars of the evidence proposed to be given.¹¹ In practice, the effect of this provision has been that the defence serves psychiatric reports relied upon by the accused prior to the trial.

Where the defence of mental illness is relied upon, there is currently no statutory requirement for the defence to supply to the prosecution psychiatric reports. In practice, however, in almost every case where a defence of mental illness is relied upon, defence legal representatives will serve on the prosecution, prior to trial, copies of any psychiatric reports to be relied upon by the accused in an attempt to persuade the prosecution to accept a plea of not guilty by reason of mental illness. Again, the considerable experience of the second author is that this has rarely been a problem for the prosecution in New South Wales.¹²

Finally, the District and Supreme Courts already have the power to order pre-trial disclosure and other case management procedures under section 149E of the CPA, which empowers the court to 'make such orders, determinations or findings, or give such directions or rulings, as it thinks appropriate for the efficient management and conduct of the trial', including an order of disclosure. In practice, only in a handful of cases have the courts intervened in such pre-trial management. All this strongly indicates that there was no need for more extensive defence pre-trial disclosure or incursion upon the right to silence. The government's insistence on the need to shift from discretionary to mandatory disclosure¹³ is consistent with its directive approach to criminal justice and its distrust of judicial discretion in sentencing. However, it can also justifiably point to the New South Wales Law Reform Commission's recommendations on defence disclosure.¹⁴ By contrast to the right to silence (which most legal commentators defended), disclosure caused more division within the legal profession, with some strong statements in favour of change.¹⁵ Despite his Working Group on Trial Efficiency's warning that mandatory disclosure could be counter-productive (notably in increasing costs 'arising out of the need for the prosecution and defence to brief counsel

significantly in advance of the trial date'), the Attorney General chose to accept the recommendations of the minority members.¹⁶

IV Problems in Legislative Restriction of the Right to Silence

The legislation in England and Wales which New South Wales used as its model has been shown to be unsuccessful in reaching its objectives and problematic in its unintended effects, including increasing work for the courts.¹⁷ Similar findings of unmet goals and unwelcome side-effects have been reported from the two other common law jurisdictions which have restricted the right to silence in this way, Northern Ireland¹⁸ and Singapore.¹⁹ The English Court of Appeal in a joint judgment in *R v Beckles*²⁰ said that (the Anglo-Welsh) section 34 had been justifiably described as 'a notorious minefield'.²¹ An indication of the complexity involved is that a leading general text on the law of evidence devotes some twenty pages to an introductory overview.²² Andrew Choo suggest that 'the considerable difficulties involved in administering the provisions that restrict the right to silence are wholly disproportionate to any benefits to the prosecution that the provisions bring'.²³ Choo quotes the Court of Appeal in *R v Bresa*:²⁴ 'it is a matter of some anxiety that, even in the simplest and most straightforward of cases... (CJPO section 34) seems to require a direction of such length and detail that it seems to promote the adverse inference to a height it does not merit'.²⁵

The complexity of the requirements to be satisfied before the adverse inference is drawn is illustrated in the earlier case of *R v Argent*.²⁶ The court noted a number of conditions which had to be met before the jury could draw an inference. Several of these are straightforward matters regarding the process. However, the fifth and sixth conditions are more significant and complex:

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

This provision has allowed defence lawyers a wide scope in raising arguments that an inference would be inappropriate. As Leng points out, judges and jurors are being asked not to draw a simple ‘common sense’ inference from a suspect’s silence, but rather from a failure, possibly on legal advice, to mention ‘specific facts later relied upon in court’.²⁷ The suspect may not have been silent at all, but rather may have spoken at length,²⁸ requiring a detailed comparison of what is said in a police interview and in court.²⁹ Below, we will note the political role which appeals to ‘common sense’ play in criminal justice. Here, we echo Leng’s insistence that such appeals disguise the substantial legal complexity of the issues in play.

If the New South Wales government is really so concerned to increase the efficiency of the court process, then reproducing a measure which has become a lawyer’s playground in England and Wales is a strange way to go about it. Ignorance cannot be claimed as an excuse: the New South Wales Bar Association’s was one of several submissions on the proposed legislation which drew attention to problems experienced in England and Wales.³⁰ Notably, the Bar Association quoted the Carloway Review’s warning to Scotland not to follow the Anglo-Welsh example:

judging from the experience in England and Wales (a statutory scheme in which adverse inferences can operate) would have to be of labyrinthine complexity ... Instead of promoting efficiency and effectiveness, it would bring unnecessary complexity to the criminal justice system³¹

It is also significant to note the difference between police attitudes to disclosure in England and Wales compared to New South Wales. In the former,

There is a culture of continuous disclosure by police to the defence of the basis upon which the investigating official

has reason to suspect the person has committed the offence. Police make disclosures as evidence against the defendant comes to hand. Police disclosure is supervised by CPS (Crown Prosecution Service) prosecutors ... In the UK the Court of Appeal has recognised police disclosure as fundamental to the silence provisions scheme, holding that the police must provide to the duty solicitor sufficient details of the prosecution case to enable them to advise their clients properly.³²

While this paints a somewhat rosy picture of English policing practice, there is certainly a distinct contrast with that in New South Wales, where

[t]he concept of police disclosure to defence lawyers is alien to the experience of what happens in practice between police and criminal defence lawyers ... In general terms, defence lawyers have little confidence in the consistency of quality of police disclosure ... For example, Fact Sheets, which should summarise the police case, often do not objectively reflect the evidence but rather contain subjective interpretation and assumption.³³

Clearly, if there is to be ‘equality of arms’ between prosecution and defence, much needs to be changed in policing practice before more compulsory defence disclosure would be justified.

The New South Wales legislation may generate further problems. It assumes that investigators know what the offence is that their suspect will eventually be charged with. While this will usually be the case, matters may emerge during questioning which shift the focus of investigation. Alternatively, prosecutors may disagree with investigators about the appropriate charge. It is not difficult to predict disputes over the investigators’ suspicion that the suspect had committed the specific offence and about the timing of the special caution.

V Legal Advice and the Right to Silence

The New South Wales legislation was considerably complicated by an attempt to respond to a major problem encountered by the Anglo-Welsh legislation in the context of the United Kingdom’s obligations under the *European Convention on Human Rights* (‘ECHR’). The European Court of Human Rights has ruled that an inference of guilt can only be drawn from a failure to mention something later

used as defence evidence if the suspect had legal advice.³⁴ Subsequent English case law has focused on the implications of legal advice to suspects.

Commentary on the Evidence of Silence Bill pointed to the potential for criticism that the right to a fair trial was infringed if inferences were drawn against a defendant who had not had access to legal advice while being questioned by police. Consequently, the New South Wales legislation significantly circumscribes the restriction on the right to silence, effectively reproducing the *CJPO* in the context of the *ECHR*. The new caution must be given in the physical presence of an Australian legal practitioner who was acting for the suspect at the time. The suspect must have a reasonable opportunity to consult with the legal practitioner about the general nature and effect of special cautions. This means that, in the course of a normal arrest, the suspect will be given the standard caution - that he or she does not have to do or say anything. It is only at the police station, with a lawyer present, that the special caution can be given. As noted above, the links between legal advice, alleged unreasonable failure to mention something later raised in court, and unfavourable inferences have caused considerable problems in the courts of England and Wales. They will now have to be explored in the New South Wales courts and presumably not before long, in the High Court of Australia.

Section 89A(2)(c) of the *Evidence Act* makes it a precondition of drawing an inference against the accused that at the time of questioning he or she was allowed the opportunity to consult a lawyer (physically present) about the general nature and effect of special cautions; that is, about the consequences of failing or refusing to mention a fact later relied upon by the accused and which could reasonably have been expected to have been disclosed at the time. This puts the suspect's lawyer (usually at this stage a solicitor) in a dilemma. If the lawyer tells the suspect 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 justification for such a direction being given if the right is exercised. However, if the lawyer simply tells the suspect that he or she may exercise his or her common law right to silence, the situation is less clear. While the legislation merely requires the suspect to have had a 'reasonable opportunity to consult with (a lawyer) ... about the general nature and effect of special cautions',³⁵ it is not easy to know what approach the New South Wales courts would take where a suspect is advised by his lawyer to exercise his right to silence and

follows this advice.³⁶ While criticism of the lawyer may be expected, adverse consequences for the defendant who follows legal advice may be considered unfair. An inference may only be drawn from a failure or refusal to mention a fact if 'the defendant could reasonably have been expected to mention (it) in the circumstances existing at the time'.³⁷ In England, courts investigate the reasonableness of the defendant's reliance on the lawyer's advice: this may involve the lawyer being called to give evidence, creating an acute conflict of interest and preventing him or her from continuing to represent the defendant.³⁸ In consequence, Legal Aid New South Wales stated that its lawyers 'will not provide advice on the effect of the silence provisions at the time of official questioning because of the risk of conflict of interest at trial'.³⁹ The ALS takes a similar approach.

The requirement of a legal practitioner's presence is much more problematic in New South Wales than it would be in England and Wales. In the latter jurisdiction, suspects in police custody have had a right to free legal advice since the *Police and Criminal Evidence Act 1984* ('*PACE*'). This right has been given substance by the provision of legal aid and the organisation of duty solicitor schemes.⁴⁰ The effect has been that legal advisors have become commonplace in police stations, with 48% of suspects in the latest research study having received their advice.⁴¹ In great contrast, the right to legal advice in New South Wales has been largely insubstantial: while *LEPRA* provides such a right, the lack of either public funding for legal advice at police stations or the organisation of duty solicitor services means that very few suspects in New South Wales police stations see legal practitioners before being charged.⁴² In practice, non-Indigenous suspects who do so are the small minority who have an arrangement with (and resources to afford) a solicitor who will come to the station. Typically, this happens when a suspect goes to a station for an arranged interview, rather than immediately following an arrest.

The only group whose right to legal advice has any substance is Aboriginal and Torres Strait Islander people. The *Law Enforcement (Powers and Responsibilities) Regulation 2005* provides in clause 33 that

[i]f a detained person is an Aboriginal person or a Torres Strait Islander, then, unless the custody manager is aware that the person has arranged for a legal practitioner to be present during questioning of the person, the custody manager must (a) immediately inform the person that a

representative of the Aboriginal Legal Service (NSW/ACT) Limited will be notified: (i) that the person is being detained in respect of an offence and (ii) of the place at which the person is being detained, and (b) notify such a representative accordingly.

This does not, of course, mean that every Aboriginal person or Torres Strait Islander detained in New South Wales police stations is advised in person by a legal practitioner. Underfunding of the ALS makes that a pipe dream. However, practitioners advising Indigenous clients do need to be aware that their presence will make the client liable to the special caution.

A cynical commentator might well conclude that the surreptitious purpose of the *Evidence of Silence Act* was to deter suspects – particularly the ‘organised criminals’ who are of such concern to the authorities – from obtaining legal advice. The government was certainly aware that some suspects ‘given the effect of these provisions, may not bring their lawyer to the police station. This is their choice’.⁴³ When the *Evidence of Silence Act* was implemented, a senior defence lawyer advised that

It will never be in the interests of the accused for a lawyer to attend a police station with a suspect who is about to be interviewed about a serious criminal offence. You might want to give the accused advice over the phone either to speak or not to speak to the police (no longer a simple question) but attending the police station may invite a direction adverse to your client.⁴⁴

It might have been thought that deterring such lawyers from police stations was what the police wanted: if, as is so often claimed, lawyers are responsible for suspects not answering questions, the lawyers’ absence should have facilitated police investigations. However, this would apparently be to overestimate the foresight of those involved. Police were soon heard complaining that ‘when police officers are trying to question offenders (sic) for serious or indictable offences, we’re finding that lawyers aren’t turning up, or they’re giving advice over the phone. And yet again the right of silence is being used’.⁴⁵ Apparently fearing reds under the beds, the *Daily Telegraph* claimed that this ‘loophole’ was deliberate: ‘The Attorney-General Greg Smith’s department, which has been criticised for being Left-leaning, is understood to have been behind the loophole’.⁴⁶ At the time of writing, it seems possible that the New South Wales government will seek

to amend the legislation, removing the requirement that a lawyer should be physically present for the special caution to be given and providing that advice by telephone will be enough to trigger use of the special caution. Allowing the special caution without the physical presence of a lawyer would almost certainly lead to appeals against conviction on the basis that a fair trial was impossible.⁴⁷ It may well be, therefore, that access to lawyers will be limited by cutting off the supply to suspects by bleeding the ALS’ budget dry.

Broadening the *Evidence of Silence Act* to include advice via telephone would have very significant implications for the ALS which provides extensive advice via its Custody Notification Service (‘CNS’).⁴⁸ Police dissatisfaction with the involvement of the ALS has been illustrated by cases in which ‘arresting officers said they had not contacted the ALS because they knew that the ALS would have advised (the suspect) to remain silent’⁴⁹ or in which ‘the police had arranged for the accused to attend for [an] interview outside office hours knowing that no one would be present at the ALS office’.⁵⁰ Tactics such as this encouraged the ALS to establish its Custody Notification Service, ensuring that advice and support to detained Aboriginal and Torres Strait Islander people is available around the clock.

As if its deepening funding problems were not enough,⁵¹ the ALS will now have to face difficult questions about whether to attend police stations and, if they do, how to support Indigenous suspects who are detained there. Simply advising suspects not to participate in police interviews may no longer be a good option in cases involving alleged serious indictable offences. The ALS would have to try to consult extensively with the suspect and to explain the implications of the special caution. As noted below, this will be very difficult. If the *Evidence of Silence Act* deters the ALS from attending police stations, suspects will have to be advised via the CNS. However, as a means of providing legal advice, use of the telephone is very problematic. There are often problems of privacy and confidentiality.⁵² More fundamentally, lawyers need to see (and be seen by) their clients in order to assess their condition and to establish relations of trust and confidence.

It would be most unfortunate if an outcome of the new legislation is to obstruct communication between the ALS and Indigenous suspects: it should not be forgotten that the New South Wales regime for the detention and treatment of suspects was ‘due, in part, to the recommendations of the

Royal Commission into Aboriginal Deaths in Custody to have legislation requiring (the) Aboriginal Legal Service to be notified upon arrest or detention of Aboriginal persons'.⁵³ Contact between the ALS and Aboriginal and Torres Strait Islander suspects is often not primarily about advising on whether or not to cooperate with police questioning. Much more important is the assessment of the well-being of the detained person.⁵⁴

VI Understanding the Special Caution

The provisions of the *Evidence of Silence Act* do not apply to a person who, at the time of questioning, is under 18 years of age or is incapable of understanding the general nature and effect of a special caution. Notably, there is no specific recognition of the vulnerability of Aboriginal and Torres Strait Islander people in police custody.⁵⁵ The authorities appear to have assumed that those who could not understand the caution would be a small minority of suspects. Research on suspects' understanding of the caution used in England and Wales since 1994 indicates that this is incorrect: 'the caution simply does not fulfil its intended purpose of conveying the legal rights to its target population'.⁵⁶ Given that this legislation affects criminal procedure on the basis of an assumption that an oral warning to suspects is enough, the significance of this research must not be under-estimated. Researchers under the direction of Gisli Gudjonsson, the international doyen of interrogation research, investigated understanding of the caution among suspects detained at police stations and members of the public attending a job centre. Their findings should be of great concern to anyone who believes the special caution is an effective way of communicating information as a basis for crucial decisions by suspects:

Understanding of the caution is very limited among both suspects and their counterparts in the general population. Indeed, not one of our participants demonstrated complete understanding of the caution when presented in its entirety, as it is in ordinary police practice. Even when presented under conditions which aimed to maximise understanding, only 10% of suspects and 13% in the general population understood the caution fully. The second sentence, which addresses the modification to right to silence, was the most difficult. It was understood by only 10% of the suspects and 4.2% of the persons from the general population when the caution was presented in its entirety; and by 16.7% in each of the groups when presented sentence by sentence.⁵⁷

In addition, 'the method most often used by police to assess whether a suspect has understood the caution (by asking "do you understand?") is ineffective'.⁵⁸ It is also misleading, because 96.3% of participants stated that they understood the caution when, further inquiry revealed, only a small fraction did so. The structure of the key middle sentence - 'But it may harm your defence if you do not mention when questioned something that you later rely on in court' - is particularly difficult to understand.⁵⁹ Suspects and the general population are not alone in failing to understand the new caution: only half of a sample of police officers understood it.⁶⁰ It is worth noting that the research excluded suspects who needed the support of an interpreter: inclusion of suspects whose first language is not English (as is so often the case in New South Wales) would have made these results even worse.

Indigenous people will face particular problems with the special caution if research on experience with the standard caution is any guide.⁶¹ As Forster J noted in *R v Anunga*⁶², 'Some Aboriginal people find the standard caution quite bewildering, even if they understand that they do not have to answer questions, because, if they do not have to answer questions, then why are the questions being asked?'⁶³ In *R v Jako*,⁶⁴ Mildren J quoted this sentence from *Anunga*, and added: 'It is even more illogical and bewildering to tell some Aboriginal people that they are not obliged to answer questions, and then to insist on an answer to the question "do you understand that?" An intelligent person might think that this is all some ritual being played out by the police which apparently does not mean what it says'.⁶⁵ Simply asking an Aboriginal suspect if he or she understands the caution was said to be a 'ridiculous practice ... a complete waste of time'.⁶⁶ In *Anunga*, Forster J made clear what should be done:

Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, 'Do you understand that?' or 'Do you understand you do not have to answer the questions?' Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent.⁶⁷

These judicial comments were made about the comparatively simple standard caution. It seems likely that investigators or

lawyers will have great difficulty in explaining the new caution to many Aboriginal and Torres Strait Islander suspects.

Even if Indigenous suspects understand the caution, their response to it may not be reliable. As Dina Yehia notes: 'Deference to authority and a propensity to answer leading questions in the way ATSI suspects consider the questioner wants mean they may agree with a statement that is put to them by police'.⁶⁸ Similarly, Diana Eades observes: 'when Aboriginal people says "yes" in an answer to a question it often does not mean "I agree with what you are asking me". Instead, it often means "I think that if I say 'yes' you will see that I am obliging, and socially amenable and you will think well of me and things will work out between us"'.⁶⁹ Given the extensive police use of questions which begin with 'do you agree...?',⁷⁰ gratuitous concurrence is 'possibly the most serious disadvantage experienced by Aboriginal English speakers'.⁷¹ Some Aboriginal people's use of English causes substantial problem in their understanding of the police caution.⁷² Equally, Aboriginal people's silence 'can easily be interpreted as evasion, ignorance, confusion, insolence or even guilt', when it is in fact a culturally specific, positive use of silence in interpersonal interaction.⁷³

VII Widening Focus

Up to this point, this article has taken a critical perspective within the bounds of the debate about the *Evidence of Silence Act* and the *Defence Disclosure Act*. We now broaden the focus in order to consider the ways in which the problem of silent suspects has been defined and constituted. In part, this involves a familiar critique of the politics of criminal justice in New South Wales. However, it also involves a broader assessment of the construction of a socio-legal problem.

A Silence and Criminal Justice Politics

The *Evidence of Silence Act* provides a stark example of the poverty of criminal justice politics in New South Wales. Like the Anglo-Welsh legislation which ran counter to the recommendations of two Royal Commissions,⁷⁴ the New South Wales legislation represents a rejection of the 'overwhelming majority of the submissions' to both the New South Wales Legislation Review Committee⁷⁵ and submissions to the consultation on the 2012 Bills.⁷⁶ Most significantly, the legislation runs counter to the New South Wales Law Reform Commission's recommendation to preserve the right to silence.⁷⁷ Law Reform Commission

recommendations are not tablets of stone: but one might expect that there would be careful debate and collection of supporting evidence before they were dismissed. However, a familiar feature of New South Wales criminal justice politics is a very short period of limited consultation⁷⁸ and an initial Bill which was very poorly drafted.⁷⁹

The apparent immediate justification for this Act was frustration felt by investigators at non-cooperation regarding shootings in south-west Sydney. Some people who were targets (victims and/or witnesses) of shootings (some of whom were themselves suspected of being connected with drug distribution "turf wars") declined to assist police in their inquiries. The restriction of the right to silence, however, is really irrelevant to such cases, because only persons suspected of or charged with crimes have the right to silence. A victim of, or an eye-witness to, a crime or, indeed, any person in possession of information which might be of relevance to police in apprehending an offender, who does not bring it to the attention of the authorities, may commit an offence against section 316 of the *Crimes Act 1900* (NSW) of concealing a serious offence.⁸⁰ Charging a reluctant witness is very rare: more significantly, the flow of information to police is likely to depend on non-legal factors such as public confidence and trust in the police. In brief, the *Evidence of Silence Act* is irrelevant to the problem it was supposed to counter.

In arguing for restriction of the right to silence, the government and the police repeatedly appealed to 'common sense'. This use of 'common sense' (as if it is a trump) is a familiar feature of similar debates elsewhere.⁸¹ The New South Wales government's press release announcing the planned legislation appealed repeatedly to 'common sense': we were told by the Premier that 'the scales of justice will be tilted towards common sense'; the Attorney General stated that 'it is not common sense' to keep the current law (and that the 'common sense' of juries avoids miscarriages of justice) and the Police Commissioner insisted that '[t]his is a common sense approach'.⁸² In their second reading speeches in Parliament, the Attorney General and the Minister for Police and Emergency Services, both claimed that 'it is simply a matter of common sense that a jury should be allowed to consider drawing an unfavourable inference against such a defendant who relies on something at trial the defendant could have mentioned during questioning'.⁸³

Such appeals to common sense seek to stifle opposition or even discussion: who can argue against common sense?

However, this rhetorical device is problematic. We may legitimately appeal to common sense when claiming that something is familiar through everyday experience. But the police questioning of suspects is not a matter of everyday experience. Some commentators suggest that their own hypothetical response to (unlikely) contact with police should be regarded as 'common sense': such comments simply reflect 'an inability to conceive that there are other ways of experiencing the world than one's own'.⁸⁴ Most people rely on media fictions which do not represent the reality of investigative practice or suspects' response. Police have everyday experience, but extensive empirical research shows that they routinely misrepresent the extent to which suspects rely on the right to silence.⁸⁵ They do so not malevolently, but because, as will be suggested further below, the right to silence has become a political symbol of the claimed need to re-balance criminal justice in favour of police. Rather than this kind of 'common sense', we need 'good sense' as a foundation for public policy. It would be good sense to make major changes to criminal procedure on the basis of an evidence-based understanding of the issues rather than on fictional images and criminal justice politics. Unfortunately, a key component of appeals to 'common sense' is distrust of expertise:

Common sense is sense which is ... purported to be universally...true and to be universally applicable. It is common *sense* not only because it is the opposite of nonsense or falsehood, but because it is 'sensed'. It is truth which is not accessible to rational thought or argument. On the contrary, it is intuitive, instinctive and accessible only to the senses. It has to be experienced.⁸⁶

This is why governmental commitments to 'evidence-based policy' are so often hollow. In criminal justice politics, what counts is 'common sense', not evidence.

B Constructing the Problem of Silent Suspects

What is the nature of the problem that silent suspects cause the criminal process? Those who promoted the new legislation would argue that suspects routinely refuse to answer police questions, that doing so prevents their conviction, and that those associated with organised crime are particularly likely to avoid conviction by asserting the right to silence, and that the *Evidence of Silence Act* and the *Defence Disclosure Act* provide effective remedies. We argue that these claims are inaccurate and attempt to show why

people who should know better make such inaccurate claims.

Empirical evidence is always the best place to begin analysis of criminal justice. There has been very limited reliable empirical investigation of these matters in Australia. By contrast, very extensive research by academics and criminal justice institutions in Northern Ireland, England and Wales has been conducted both before (some of it by the first author of this article) and after the right to silence was restricted in those jurisdictions. Given the general similarities of the legal systems and the use of the Anglo-Welsh post-1994 caution as a model for the special caution introduced in New South Wales, the comparison is useful. There is no room here for an extensive review of the research from Northern Ireland, England and Wales. The results can be condensed into these points:

- frequency of the use of the right to silence is much less than is claimed by those calling for its restriction;
- those who exercise their right to silence and refuse to answer questions are not less likely to be charged or convicted than those who do answer questions;
- those identified as being connected with organised or professional crime do not use the right to silence at a higher rate than other suspects. If they do, they are no more likely to escape conviction; and
- the special caution will not increase the likelihood of conviction of professional criminals.⁸⁷

The focus on silence is inappropriate for two reasons. First, some of the few suspects who refuse to answer questions do not do so as a cunning legal ploy to save their defence to be sprung as an ambush in court. They do so for social, not legal, reasons: non-cooperation with police is an expression of their antagonism to police. Dixon provides an example of this kind of suspect: a young man who refused to answer questions even though (given the circumstances of his arrest) he had no chance of avoiding conviction.⁸⁸ It is not surprising that investigators find such suspects frustrating and annoying: but their intransigent rudeness is not a good reason to change the law.

Secondly, despite its title, the *Evidence of Silence Act* will not only affect silent suspects. As noted above, it also applies to suspects who do speak, often at great length, to police officers, but who in court seek to raise matters which were not mentioned in their interview. The legal context of such

tactics has been noted above: debate about the 2013 New South Wales legislation proceeded in apparent ignorance of the extant legal requirements regarding disclosure, notably of alibi evidence. However, there is also a contextual aspect: investigators have frequently told researchers that they welcome suspects who lie or tell half-truths in interview because – whatever the rules of evidence may say – courts will draw appropriate conclusions about the veracity of a defendant whose defence appears for the first time in court.⁸⁹ For this reason, the police union’s argument that sexual assault prosecutions are undermined by the right to silence⁹⁰ are unconvincing: a defendant who does not mention that sex was consensual until a trial is underway is unlikely to be believed.

Why is there such a disjuncture between the reality of criminal justice and the claims made by critics of the right to silence? Why do police officers, politicians and public commentators make claims about the exercise of this right which reliable academics and official research shows to be unfounded? As Dixon has argued previously,⁹¹ the right to silence has become a symbolic issue onto which anxieties and concerns about criminal justice have been loaded. In England and Wales, it provided the ground over which much broader battles about the fundamental commitments of the criminal process were fought. Much the same has happened in Australia. Very complex legal and political differences are condensed into arguments about the right to silence. It was a convenient symbol because critics were so easily able to appeal to a ‘common sense’ account of how people react to police questioning which, like most appeals to common sense, obscured more than it revealed. It hardly needs to be added that such ‘common sense’ is a particularly inappropriate guide to Indigenous suspects’ experience of the criminal justice process.

‘Moral panic’ is a familiar term applied to the way in which societies respond to perceived problems of crime or disorder. Very similar social processes emerge in proposed solutions to problems.⁹² A dramatic label is *de rigueur* – war on drugs, zero tolerance, tough on crime and the causes of crime and so forth. References to the ‘right to silence’ can be seen in the same way: removing the right to silence is seen as the obvious solution to complex problems; police, media commentators and politicians engage in a mutually reinforcing debate which floats free from the empirical reality of a specific issue in the criminal process, exactly because so much more than that specific issue is at stake.⁹³

Anxieties about crime and about who controls and defines the criminal process are played out in arguments about the right to silence.

Unfortunately, defenders of the right to silence often mirror the approach of its critics: they usually speak in rhetorical terms about the loss of ancient rights, while rarely mentioning that this fundamental right is so little used in practice.

This emphasis on the symbolic aspects of the right to silence debate is not to say that it has no practical significance, but rather that its most important practical significance is indirect. One aspect which is of particular concern is what this debate indicates about, and how it will affect, shifting practices in criminal investigation. In England and Wales, an important consequence of the miscarriage of justice cases which shamed the criminal process in the last quarter of the twentieth century was to shift investigators away from reliance on confessional evidence. Despite experiencing some very well-known miscarriages of justice cases, Australian criminal justice has not been so directly affected. Nonetheless, Australian police have drawn much from the Anglo-Welsh experience, with widespread use of the ‘investigative interviewing’ approach.⁹⁴ What is less recognised is that investigative interviewing involves a downgrading of reliance upon confessions: officers are expected to collect other evidence before interviewing suspects. Interview evidence is more useful as a means of testing a suspect’s story against other evidence – witness, DNA, CCTV, and other intelligence. This approach significantly changes the dynamic in an interview room. Dixon’s research on lawyers’ advice to English suspects on the right to silence showed that, far from being routine, silence was usually advised when investigators took a confrontational approach and/or would not or could not indicate their reasons for suspecting the client.⁹⁵ Put bluntly, if Australian criminal investigators are having such problems with suspects, they need to be trained to collect other evidence more effectively before they begin to interview.

The new legislation is regressive in that it encourages investigators to rely on obtaining confessions. It also shifts the balance in the interview room: suspects are to be told that they have to cooperate. Even those who would have talked to police anyway may feel that their relationship with investigators has shifted further from consensual to coercive.⁹⁶

VIII Conclusion

To those familiar with the *CJPO* in England and Wales, the introduction of the New South Wales *Evidence of Silence Act* seems like groundhog day. Once again, we see legislation which represents a significant challenge to the integrity of the principles structuring our criminal justice system and which is a product of short-term criminal justice politics, rather than considered investigation and evidence-based reform. There is no demonstrated need for the curtailment of the right to silence. On the available evidence, there is no reason to believe that it will achieve its stated objectives. On the contrary, the experience of the English legal system is that this legislation is likely to create another 'notorious minefield' for the courts. Such legislative blundering is likely to have multiple undesirable side-effects. One of these may well be harm to Indigenous suspects and to adversely impact the ALS whose task it is to advise and defend Aboriginal and Torres Strait Islander suspects.

The *Evidence of Silence Act* is a depressing example of the way in which contemporary politics trivialises criminal justice. The priority of many politicians appears to be to pander to sections of the media rather than to exercise responsible judgement in the development of rational public policy. All too often, this involves a disingenuous response to expressions of opinion which have been shaped by previous fanning of popular fears of crime and concerns about criminal justice. In this law and order spiral, some police representatives play an unfortunately influential and poorly-informed role. Our recommendation ought to be modest: criminal justice reform should be conducted in a way that respects and maintains fundamental principles, relies on evidence, and learns appropriate lessons from similar legislative activity elsewhere. Unfortunately, current practice in New South Wales falls far short of what should be basic standards of good law reform.

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1 NSW Bar Association, Submission to Attorney General's Criminal

Law Review Division, *Re: The Right to Silence*, 28 September 2012, 3.

2 The special caution is not compulsory, raising the possibility of negotiations between investigators and defence lawyers over which caution will be given and the extent of the suspect's cooperation.

3 See *Civil Procedure Act 2005* ('CPA'), ss 137–140; Office of Director of Public Prosecution New South Wales, *Prosecution Policy and Guidelines*, Guideline 18; New South Wales Bar Association, *New South Wales Barristers' Rules* (2014); Law Society of New South Wales, *New South Wales Professional Conduct and Practice Rules 2013 (Solicitors' Rules)*; *R v Reardon (No 2)* (2004) 60 NSWCCA 197; *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42; *R v Stinchcombe* [1991] 3 SCR 326.

4 *Director of Public Prosecutions Act 1986* (NSW) s 15A(1).

5 See above n 3.

6 CPA s 146A.

7 CPA s 148.

8 See Andrew Clennell, 'Defence Lawyers Exploit Loophole in Right to Silence Laws', *The Daily Telegraph* (online), 15 October 2013 <<http://www.dailytelegraph.com.au/news/nsw/defence-lawyers-exploit-loophole-in-right-to-silence-laws/story-fni0cx12-1226739928098>>.

9 CPA s 150.

10 See also New South Wales Bar Association, above n 1, 2.

11 CPA s 151.

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13 New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 March 2013, 18856 (Michael Gallacher, Minister for Police and Emergency Services).

14 NSW Law Reform Commission, *Right to Silence*, Report 95 (2000) ch 3.

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- 18 John Jackson, 'Silence and Proof' (2001) 5 *International Journal of Evidence and Proof* 145; John Jackson, Martin Wolfe and Katie Quinn, *Legislating Against Silence: The Northern Ireland Experience* (Northern Ireland Office, 2000).
- 19 Meng Heong Yeo, 'Diminishing the Right to Silence: the Singapore Experience' [1983] *Criminal Law Review* 89; Alan Khee-Jin Tan, 'Adverse Inferences and the Right to Silence: Re-examining the Singapore Experience' [1997] *Criminal Law Review* 478. [2005] 1 WLR 2829.
- 20 New South Wales Bar Association, above n 1, 7.
- 21 Ian Dennis, *The Law of Evidence* (Sweet & Maxwell, 4th ed, 2010) ch 5; see also David Wolchover, *Silence and Guilt* (Lion Court Lawyers, 2001) and its updates available online, <http://www.davidwolchover.co.uk/silence_guilt.htm>.
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- 23 2005 EWCA 1414.
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- 25 [1997] 2 Cr APP R 27, 32–3.
- 26 Roger Leng, 'Silence Pre-trial, Reasonable Expectations and the Normative Distortion of Policing' (2001) 5 *International Journal of Evidence and Proof* 240, 252.
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- 32 Ibid 5–6.
- 33 *Murray v UK* (1996) 22 EHRR 29.
- 34 *Evidence Act 1995* s 89A(d).
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- 87 See Bucke, Street and Brown, above n 17; Dixon, above n 28; Susan Easton, *The Right to Silence* (Ashgate, 2nd ed, 1998); John Jackson, 'Recent Changes to the Right of Silence in Europe and the UK', in Ivana Bacik and Liz Heffernan (eds), *Criminal Law and Procedure: Current Issues and Emerging Trends* (First Law, 2009); Jackson, Wolfe and Quinn, above n 18; Michael McConville and Jacqueline Hodgson, *Custodial Legal Advice and the Right to Silence* (Royal Commission on Criminal Justice Research Study No 16, 1993); Roger Leng, *The Right to Silence in Police Interrogation* (Royal Commission on Criminal Justice Research Study No 10, 1993); Michael McConville, Jacqueline Hodgson, Lee Bridges and Anita Pavlovic, *Standing Accused* (Clarendon Press, 1994); Sanders, Young and Burton, above n 17, ch 5; Andrew Choo, *The Privilege against Self-incrimination and Criminal Justice* (Hart Publishing, 2013). The only significant empirical research on any of these matters in Australia is Dixon's study of audio-visually recorded questioning of suspects in NSW, which found that only 4% refused to answer any questions, a result very similar to that found by academic researchers in England and Wales: Dixon, above n 42.

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- 89 Ibid; Dixon, above n 42.
- 90 See Clennell, above 8; Weber, above n 45.
- 91 Dixon, above n 28, ch 6.
- 92 David Dixon and Lisa Maher, 'Policing, Crime and Public Health: lessons for Australia from the "New York miracle"' (2005) 5 *Criminal Justice* 115, 118.
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