



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: rbg655598

8 October 2012

The Honourable Paul Lynch MP
Shadow Attorney General
100 Moore Street
LIVERPOOL NSW 2170

Dear Mr Lynch,

Evidence Amendment (Evidence of Silence) Bill 2012

As you will be aware, the Government has released an exposure draft *Evidence Amendment (Evidence of Silence) Bill 2012* which seeks to amend the right to silence when questioned by police. The Law Society's Criminal Law Committee (Committee) submission on the draft Bill is enclosed for your consideration.

The Committee is completely opposed to the proposed legislation which seeks to remove a fundamental pillar of the rule of law without any evidentiary support. The Committee is concerned that the amendments will lead to an increase in the length and complexity of trials, and result in numerous appeals, creating a cost burden on the criminal justice system and the taxpayer without any associated benefit.

From the perspective of solicitors, the proposed amendments create an intolerable ethical dilemma. The Committee is of the view that in the majority of cases solicitors will find themselves in the position of having to tell the suspect that they cannot give advice.

The Human Rights Committee is concerned that the proposed amendments breach Australia's human rights obligations under *the International Covenant on Civil and Political Rights*.

The Law Society would appreciate the opportunity to discuss the proposed legislation with you in further detail.

Yours sincerely,

Justin Dowd
President



Our Ref: JD:rg:Criminal:647493
Direct line: 9926 0310

27 September 2012

Director
Criminal Law Review
NSW Department of Attorney General and Justice
GPO Box 6
SYDNEY NSW 2001

Dear Sir/Madam

Evidence Amendment (Evidence of Silence) Bill 2012

Thank you for seeking the Law Society's views on the exposure draft of the *Evidence Amendment (Evidence of Silence) Bill 2012*. The Criminal Law Committee (Committee) has reviewed the provisions of the draft Bill which propose amendments to the right to silence when questioned by police.

The Committee notes the exceptions which will apply where a person is under 18 years of age or has a cognitive impairment and the requirement that the suspect be allowed an opportunity to consult a legal practitioner. However, the Committee continues to have concerns about the application of the proposals and does not consider that these safeguards can overcome the fundamental issues which arise. This view is informed by the operation of the comparable system which has been in place in the United Kingdom since the mid-1990s.

The right to silence is an important pillar of the rule of law and has been enshrined in the common law for hundreds of years. In *Petty & Maiden v The Queen*,¹ Justice Gaudron made the point that the right to silence when questioned by police necessarily follows from the fundamental principle that the prosecution bears the burden of proof of the alleged crime beyond reasonable doubt and that it is not for an accused person to prove his or her innocence.

A fundamental principle of the criminal justice system should only be modified if there are valid reasons to do so. The Government's primary justification for the amendments is that they are necessary to prevent "hardened criminals" from hiding behind a "wall of silence".² The Committee does not consider this argument to be persuasive.

¹ (1991) 173 CLR 95 at 128-9.

² The Hon Greg Smith SC MP, Attorney General, Media Release, *Call to Support Changes to Right to Silence*, 12 September 2012.

Research conducted in Australia indicates that most suspects do not remain silent when questioned by police.³ The NSW Law Reform Commission concluded that the evidence “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”.⁴ The Committee therefore submits that modifying the right to silence is unlikely to lead to an increase in convictions or prosecutions and is unnecessary.

There are many reasons why people may exercise the right to silence when questioned by investigating police. They may be in shock or confused by the allegations, affected by drugs or alcohol, inarticulate or have poor English. It is invalid to assume that only a guilty person has a reason to remain silent when questioned by police.

The Committee is also concerned about the impact the amendments would have on Aboriginal offenders. There is often a cultural and presentation problem in a record of interview at the time of arrest of an Aboriginal person, which can be corrected at trial if the person has spent time preparing to give evidence.

In its report on the right to silence, the NSW Law Reform Commission recommended that section 89 of the *Evidence Act 1995* be retained in its current form and that legislation based on the United Kingdom model should not be introduced in NSW.⁵ The Commission considered that the United Kingdom experience indicates that modifying the right to silence when questioned by police will cause uncertainty in the law and an increase in the length, complexity and cost of trials. It is also likely to lead to a substantial increase of appeals against conviction,⁶ increasing the cost burden on the criminal justice system and on taxpayers. The Law Reform Commission concluded that “rather than enhancing efficiency, modifying the right to silence when questioned by police would be likely to reduce the efficiency of police investigations, trials and the criminal justice system in general”.⁷

In relation to the role of legal practitioners, the Committee is concerned that the proposed amendments would create an intolerable ethical dilemma for solicitors. Solicitors are only in a position to give proper advice when they are fully apprised of the case against their client, and have had the opportunity in a considered way to speak to their client and take instructions. It is only at this stage that a solicitor could advise his/her client about the effects of exercising the right to silence. It is difficult to conceive of a situation where a solicitor could properly advise a client about the effects of the legislation on the telephone or even face to face at the police station. The Committee is of the view that in the majority of cases solicitors may find themselves in the position of having to tell the suspect that they cannot give advice.

The Committee also notes that it would be very difficult for a solicitor to continue to act having given advice on the effects of the legislation due to the potential for conflicts of interest in the future, such as having to give evidence of the reasons for advising the person to remain silent.

³ Report 95 (2000), *The Right to Silence*, New South Wales Law Reform Commission, paras 2.15-2.16.

⁴ *Ibid*, para 2.138.

⁵ *Ibid*, Recommendation 1.

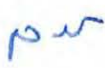
⁶ *Ibid*, para 2.80.

⁷ *Ibid*, para 2.74.

The Law Society's Human Rights Committee has also reviewed the draft Bill and is concerned that the proposed amendments breach Australia's human rights obligations under *the International Covenant on Civil and Political Rights*. In particular, the Human Rights Committee submits that the proposed amendments to section 89 breach Article 14(2), the presumption of innocence. The draft provisions are also inconsistent with the rights of an accused under Article 14(3)(b) and (g) which provide that an accused shall have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing, and that an accused shall not be compelled to testify against himself or to confess guilt.

The Law Society would appreciate the opportunity to discuss the proposed legislation with you in further detail.

Yours sincerely



Justin Dowd
President