NSW Right to Silence Reforms

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Associate Professor David Hamer, Sydney Law School, University of Sydney
(david.hamer@sydney.edu.au)

The proposed reforms raise many concerns. They interfere a long standing human right. And there is no empirical evidence that this interference is needed. The Government claims that the right to silence is being exploited by career criminals mounting ambush defences, but this claim is unsubstantiated. Empirical evidence is that the vast majority of suspects do not exercise the right to silence, and there is no evidence that the situation is different with professional criminals. Further, defendants that exercise the right to silence are no more likely to be acquitted than those that cooperate. (Eg, Runciman Royal Commission, 1993.)

But in my talk today I want to focus on another set of major problems with the reforms. They introduce considerable complexity at all stages of criminal procedure, and with little benefit. The reforms, modelled on English reforms introduced in 1994, allow the jury to draw an inference from the defendant's failure to answer police questions at interview. The Government has said that it is 'common sense' to allow this inference, on the basis innocent defendants would assist police. Silence equates with guilt.

However, as is so often the case, the reference to 'common sense' conceals considerable complexity. The English experience shows that the adverse inference from silence is far from robust. For the inference to be drawn, considerable care is required – by the police, by the trial judge, by the jury, and very often by the Court of Appeal. And for all the care that it requires, the inference generally offers little evidential benefit. In England there is a virtual consensus that the costs of the reforms vastly outweigh the benefits. (Eg, DJ Birch, 'Suffering in Silence: A Cost-Benefit Analysis of s 34 of the *Criminal Justice and Public Order Act 1994*', [1999] Crim LR 769.)

So let us focus on the adverse inference at the heart of the reforms. Far from being a simple matter of common sense the inference is subject to numerous restrictions. Some of these flow from the logic of the inference. But they also reflect the fact that the inference is inconsistent with the right to silence. As Lord Bingham CJ said in *Bowden* [1999] 1 WLR 823, since the reforms 'restrict rights recognised at common law as appropriate to protect defendants against the risk of injustice, they should not be construed more widely that the statutory language requires'. These safeguards are too numerous to outline fully here. I will just focus on a few of the major restrictions. And I apologise for descending into legal complexity here, but that really is my point.

1. The defendant's failure to mention a matter in interview can only give rise to an adverse if the police first gave him the new extended caution: proposed s 89A(2)(a) – 'You have the right to remain silent, but it may harm your defence if you fail to mention something now which you later rely on in court. Anything you do say will be taken down and may be used in evidence against you.' This restriction is appropriate. Without the new caution suspects may not be aware of the new

restrictions on the right to silence. However, the new caution is complex and doubts may arise as to whether many accused really understand it. This leads to a second restriction on the inference.

2. The inference will be unavailable from a defendant's silence in interview unless the defendant had the opportunity to consult a lawyer: s 89A(2)(b). This reflects authority of the European Court of Human Rights: eg, *Beckles v UK* (2003) 36 EHRR 13. Of course, legal advice is always strongly desirable where a suspect is being interviewed by police in connection with serious charges. Where the failure to answer any police questions may raise an adverse inference the interview carries greater weight and legal advice is even more important. Note that the European authorities recognise that advice will be required throughout the interview and not only prior to interview. It is doubtful whether the Government's proposed telephone advice line would be sufficient.

3. The inference does not arise simply from the defendant's silence. The inference will only arise where the defendant relies upon a fact at trial that was not mentioned in official questioning: s 89(1)(b).

If the defendant does not mount a positive defence at trial, the inference will be unavailable (eg, *Moshaid* [1998] Crim LR 420). For example, in *Smith* [2011] EWCA Crim 1098, the defendant faced charges of being a party to an attempted robbery – a mugging. The defendant gave a no comment interview. At trial he admitted being there, but said he was a bystander. The CA held that there was no scope for the drawing of an adverse inference because he did not mount a positive defence.

It will sometimes be a difficult question whether the defence does rely upon a fact at trial. Defence counsel will have to be careful in cross-examination. Facts that are put to a prosecution witness, even if not accepted by the witness, may be viewed as part of the defence. This may occur, for example, where defence counsel suggests to a sexual assault complainant that she fabricated the allegations out of jealousy. The trial judge may need to clarify with defence counsel whether the defence is making a positive assertion, or whether this is merely a speculative probing of the prosecution case (eg *Webber* [2004] 1 WLR 404 (HL); *Nickolson* [1999] Crim LR 61).

Another situation where there is no scope for the inference is where the defendant belatedly agrees with aspects of the prosecution case. For example, in the mugging case, *Smith*, mentioned above, the defendant's concession that he was present at the crime scene could not give rise to an adverse inference. Similarly, in *Betts and Hall* [2001] EWCA Crim 224, the defendant conceded at trial that he did have a connection with the victim; in *Chivers* [2011] EWCA Crim 1212, the defendant admitted that two stab wounds must have been inflicted in different locations. The inference will not be available on the basis that the defendant should have made such concessions earlier. The effect of the inference is to throw doubt on factual claims that the defendant has held back. If the prosecution agrees with these claims there is no room for the inference: *Webber*.

4. As I said, the inference may arise where the defendant relies upon a fact at trial that was not previously mentioned. Quite a few English cases have considered whether, while not answering

police questions, the defendant can avoid the adverse inference by the provision of a prepared statement. It is clear that this strategy can succeed: eg, *Knight* [2003] EWCA Crim 1977; *Turner* [2003] EWCA Crim 3108. The disclosure provided by the defendant may be sufficient. The fact that the defendant wished to avoid being questioned does not provide a foundation for the inference.

This strategy is not without risks. The defendant will need to provide evidence to prove his account at trial. The prepared statement does not serve this evidential role. And there is the risk that the defendant or his witnesses in the witness box will provide elaborations that are missing from the prepared statement. The issue will then arise whether these additions are sufficient for the inference to arise. Provided that the initial statement covered the essentials, the fact that peripheral detail was added at trial may not raise the prospect of an adverse inference.

In *Parradine* [2011] EWCA Crim 656 the defendant's prepared statement referred to his friend who was with him at the time of the alleged attack, but provided no name. He only identified the friend at a later stage by which time the friend could not be found. The court took the view that this omission could give rise to the adverse inference. The defendant's reluctance to identify the friend was inconsistent with his innocent version of events, and it hampered the police and prosecution in testing his defence.

5. So far I have mentioned several prerequisites for the inference to be available. The defendant must have been properly cautioned, and had access to legal advice. The defendant must have relied on a fact at trial not mentioned in interview. Even if these requirements are all satisfied, the inference may still not be available.

The inference will only be available if 'the defendant could reasonably have been expected to mention' the fact at interview: s 89A(1)(a). The logic of the inference is that the defendant did not answer police questions because he had no answer, or none that would withstand scrutiny. If there was some other 'innocent' reason for silence, the inference should not be drawn.

Innocent reasons for silence are diverse. The suspect may be too vulnerable to be subjected to police interview. The proposed section spells out that the inference is not available for suspects under 18 or suffering a cognitive impairment: s 89A(6). But there are many other sources of vulnerability – eg, mental illness not covered by narrow legislative definition, physical illness, under the influence of drugs or withdrawal symptoms, or suffering communication difficulties for cultural reasons – such as being from an indigenous or NES background.

Another possibility is that the defendant, at the time of questioning, may simply not have been in a position to mention the facts. The allegations may be too complex to respond to immediately. It may have been necessary for the defendant to check records or otherwise refresh his memory. However, it might then be expected that the defendant would provide the information once this has occurred.

Another possibility is that the defendant, at the time of questioning, may have withheld facts in order to protect others, either out of love (eg, family or friends) or out of fear (eg, gang members). A court may expect such claims to be substantiated by evidence: *Cowan* [1996] QB 373.

6. Another explanation for a defendant's silence at interview has presented courts with considerable difficulties. This is the claim that the defendant remained silent on legal advice.

On the face of it, this looks like a reasonable reason to remain silent. Surely the defendant should be entitled to follow legal advice. The concern arises though that if legal advice is considered a reasonable explanation for silence, this may render the reforms 'wholly nugatory' (*Condron* [1997] 1 WLR 827; see also *Beckles*). Further, the legal advice may have been given, or may have been relied upon by the defendant, for the reason that the defendant had no answers for the police, or none that would withstand scrutiny.

Because of these risks, the courts have sought to test the defendant's reliance on legal advice. The law on this is complex and unsettled, and I won't go into detail here. The Court of Appeal in one line of cases has required that defendant's reliance on the legal advice be 'genuine' (eg, *Betts & Hall*). In another line of cases, it appears that the CA has gone further and required that the defendant's reliance on the legal advice be 'reasonable' (eg, *Howell* [2003] EWCA Crim 1).

The application of these tests, particularly the stronger one, raises further problems and concerns. For the court to question the reasonableness of the defendant relying on legal advice may damage the lawyer-client relationship. In seeking to satisfy the tests, the defendant may have to provide evidence of the basis and content of the advice. This may involve the lawyer entering the witness box (eg, *Roble* [1997] Crim LR 449), and the waiver of legal professional privilege, opening up cross-examination on confidential communications (eg, *Bowden*; *Condron v UK* (2001) 31 EHHR 1).

7. I want to mention one final possible innocent explanation for a defendant remaining silent at the police station. The defence may claim that the defendant did not answer police questions because of insufficient disclosure by the police of the case against him. Courts may accept that it is quite appropriate for a suspect not dignify a bare unsubstantiated allegation with a response. It may appear that the police interview is just a fishing expedition. Further, without knowing the nature of the case against him, the suspect may not know what to say in response.

However, there will be limits to the extent of police disclosure that the courts demand for the inference to be open. In *Howell* Laws LJ suggested that the absence of a written statement from the complainant was not a good reason for the defendant not answering police questions, provided that the details of the complaint had been disclosed by the police orally.

UK and Irish Commentators have noticed that the effect of s 34 has been to bring the police interview under the spotlight to such an extent that it can be viewed as an extension of the trial. To determine whether an adverse inference should be drawn, the trial court may need to scrutinise whether the defendant had legal advice, and the content of the legal advice, whether the defendant received and understood the extended caution, and how much disclosure the police provided. It may not only be the defendant that requires legal advice in the police station; to withstand this scrutiny, the police themselves may often feel the need for legal advice.

8. At trial, these restrictions on the drawing of the inference will first have to be addressed by the trial judge. She will need to determine whether the inference is available for the jury to draw. In some cases this will call for a voir dire, adding to the length and expense of the trial. If trial judge concludes that the requirements are not satisfied, she will have to decide whether to direct the jury not to draw the inference (a *McGarry* direction: [1999] 1 Cr App R 377), or whether this would only serve to draw attention to the late defence. In *Smith*, the defence was one of bare denial. There would have been little danger in directing the jury not to draw any adverse inference from the defendant's exercise of his right to silence.

9. If the trial judge considers that the inference is open for the jury to draw, then she will have to give the jury careful direction. The direction should cover many of the restrictions on the operation of the inference mentioned above. The jury will have to be directed that to draw the inference they must be satisfied that the defendant has relied upon facts that were not mentioned in questioning. Further, that they must have rejected the defendant's proffered reasonable explanation for silence. To draw the inference they should be satisfied that there is no sensible explanation for the silence other than that the defendant had no answer to the police questions or none that would withstand scrutiny. The inference must be proper and should be drawn only if the prosecution's case is 'so strong that it clearly calls for an answer by him' (eg, *Parchment* [2003] EWCA Crim 2428, following *Condron v UK*). A special direction will be required where the proffered explanation is that the defendant's silence was on legal advice. (See generally *Petkar* [2003] EWCA Crim 2668.)

A leading UK text comments that this direction is 'easily one of the most lengthy and complicated' directions in the *Crown Court Bench Book* (Roberts & Zuckerman, *Criminal Evidence* 2nd ed, 2010, 571). Together with commentary, the direction takes up 10 pages. This leads to a further problem. In *Bresa* [2005] EWCA Crim 1414, the Court of Appeal noted that 'even in the simplest and most straightforward of cases ... it seems to require a direction of such length and detail that it seems to promote the adverse inference question to a height it does not merit'.

Overall, the reforms in England have opened up what the Court of Appeal describes as a 'notorious minefield': *Beckles* [2005] 1 WLR 2829.This is a minefield that NSW criminal law can and should avoid.