
TINKERING WITH THE RIGHT TO SILENCE: THE *EVIDENCE AMENDMENT (EVIDENCE OF SILENCE) ACT 2013 (NSW)*

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ABSTRACT

In March 2013, the New South Wales ('NSW') Parliament passed the *Evidence Amendment (Evidence of Silence) Act 2013 (NSW)* ('*Evidence Amendment Act*'), qualifying the long-standing absolute right to silence. This paper seeks to analyse this recent law reform and argues that it is highly problematic and unnecessary for three reasons. First, the reform is a response to perceived problems in the criminal justice system that are arguably illusory. Even if the problems are manifest, it is unclear whether the reform would be effective in resolving them. Second, the qualification of the right to silence is beset with philosophical difficulties associated with the inappropriate undermining of fundamental legal principles including the presumption of innocence. Third, the reform is complicated to apply and introduces into NSW significant practical difficulties that are observable in the other (few) jurisdictions which have similarly restrained the right to silence, in particular England and Wales. This paper concludes that in light of such glaring difficulties and problems, which were made clear to the government by virtually every major criminal law stakeholder in the form of submissions strongly opposing the reform, the *Evidence Amendment Act* cannot be considered a genuine attempt at law reform in the sense of making changes to improve the law. Rather, it is arguable that the reform is an example of ill-conceived and populist legislation by a NSW government attempting to appear 'tough' on crime in response to recent media coverage of the activities of organised crime gangs operating in Sydney.

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I INTRODUCTION

The right to silence is generally considered a fundamental legal right, protected in virtually every major common law jurisdiction. The right ensures that suspects being questioned by police and defendants in a criminal trial can remain silent without any detrimental legal consequence. It exists as a protection of individual liberty, preventing the State from compelling a person to provide information or confessing to an offence, as occurred in more ancient times, often in response to torture. In this way, the right to silence also serves to strengthen other fundamental legal rights in most common law jurisdictions, including the presumption of innocence and the privilege against self-incrimination. No suspect or defendant may be compelled to speak in his or her own defence since it is the State that must prove guilt. However, despite its fundamental importance, in March 2013, the NSW Parliament passed the *Evidence Amendment Act*, significantly affecting the right. Under the new legislation, the right to silence is no longer absolute in NSW. Rather, in some circumstances, an adverse inference may be drawn by the court against defendants who elect to remain silent during police questioning and who fail or refuse to mention a fact that they ought reasonably have mentioned and which is later relied on in their defence.

The reform has generated significant controversy. This is understandable given that its effect is to intrude upon a long-held and fundamental legal right. However, arguably more importantly and no doubt because of this, the reform is highly controversial since its enactment occurred despite strong opposition from numerous experts and virtually every major stakeholder in the criminal justice system. The reform was also enacted despite contrary recommendations from the NSW Law Reform Commission ('NSWLRC') and even a recent Scottish report that advised against similar legislative change in that jurisdiction. Given this particular context, this paper seeks to examine the restrictions placed on the right to silence in NSW. After summarising the main elements of the reform and outlining the government's rationale behind them, this paper will argue that the reform does not achieve any of the government's stated rationales, thus rendering it unnecessary. Moreover, the reform introduces into NSW a range of philosophical and practical difficulties. For example, it arguably complicates criminal proceedings, extending their duration and public expense. To support this argument, the effect of similar reforms in England and Wales in 1994, will be analysed. These reforms have been generally regarded as problematic, if not disastrous. Considering the government's persistence in supporting and

implementing the *Evidence Amendment Act*, given the overwhelming opposition amongst all major stakeholders, and with knowledge of the detrimental impact similar reforms have had in England and Wales, this paper concludes by suggesting that the passing of the Act reflects *political* motives rather than any genuine endeavour by the government to reform the right to silence. The Act is arguably the product of a government attempting to appear tough on crime in response to negative publicity about organised crime gangs operating in Sydney.

II EVIDENCE AMENDMENT (*EVIDENCE OF SILENCE*) ACT 2013 (NSW)

A *An Overview of the Reform*

The *Evidence Amendment Act* amends the *Evidence Act 1995* (NSW) (*'Evidence Act'*), significantly changing the law regarding the right to silence. Prior to the reform, s 89 of the *Evidence Act* provided a general prohibition on using the silence of an accused as evidence in criminal proceedings. In particular, the making of an adverse inference in relation to a defendant who remained silent during a police interview was precluded. Passed in March 2013, the *Evidence Amendment Act* qualifies the general prohibition in s 89, making it subject to a newly inserted s 89A. Under this new section, the general right to remain silent in the pre-trial stage of criminal proceedings without legal consequences is limited, such that:

unfavourable inferences may be drawn as appear proper from evidence that, during official questioning in relation to the offence, the defendant failed or refused to mention a fact that the defendant could reasonably have been expected to mention in the circumstances existing at the time, and that is relied on in his or her defence in that proceeding.¹

From the section's wording, it is clear that the legislature intended to confer a discretion to draw an adverse inference from silence during a police interview. Indeed, the section refers simply to a defendant's failure or refusal 'to mention a fact' during a police interview, thereby *not* requiring 'the failure or refusal to be in relation to a specific question or representation' from the interviewer.² This gives the section a wide ambit and places a strong (and new) onus 'on the defendant to mention all relevant facts' *per se* when being interviewed.³

¹ *Evidence Act* s 89A(1).

² New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 86 (Greg Smith).

³ *Ibid.*

Despite this wide ambit, the operation of s 89A is dependent upon the fulfilment of two threshold criteria. First, the section does not apply automatically to all suspects being interviewed at a police station, but only those whom the police *reasonably* suspect have committed a serious indictable offence.⁴ Second, the ability to draw an adverse inference is dependent upon the interviewer *first* administering a special caution,⁵ which has the effect of conveying to the defendant the fact that they need not say or do anything, but that it may harm their defence should they fail or refuse to mention something later relied on in court.⁶

Finally, the application of s 89A is limited by certain safeguards designed to protect the accused from being subject to the formation of an inappropriate unfavourable inference by the court. For example, the section only applies to facts 'that the defendant could *reasonably* have been expected to mention in the circumstances existing at the time'.⁷ Also, in order to protect vulnerable defendants, s 89A does not apply to juvenile defendants or anyone 'incapable of understanding the general nature and effect'⁸ of the special caution. It is also a requirement that the special caution be given 'in the presence of an Australian legal practitioner...acting for the defendant'⁹ at the time. Importantly, the defendant is also to be allowed, in private, 'a reasonable opportunity to consult with that...legal practitioner...about the general nature and effect'¹⁰ of the special caution. While the legislation does not define presence, in his second reading speech, the Attorney-General noted that this required actual *physical* presence, with 'contact by telephone or some other electronic means'¹¹ being insufficient. Finally, the section does *not* apply 'if evidence of the failure or refusal to mention the fact is the *only* evidence that the defendant is guilty'.¹² In this way, a safeguard is introduced to ensure that individuals would not be convicted solely upon the prosecution's reliance on the adverse inference drawn from the accused's silence.

In short, the *Evidence Amendment Act* significantly reforms the law regarding the right to silence in NSW, rendering that right no longer

⁴ *Evidence Act* s 89A(2)(a).

⁵ *Ibid.*

⁶ *Ibid* s 89A(9).

⁷ *Ibid* s 89A(1)(a) (emphasis added).

⁸ *Ibid* s 89A(5)(a).

⁹ *Ibid* s 89A(2)(c).

¹⁰ *Ibid* s 89A(2)(d).

¹¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 86 (Greg Smith).

¹² *Evidence Act* s 89A(5)(b) (emphasis added).

absolute, at least in the context of a police investigation. Now, in appropriate circumstances, an unfavourable inference may be drawn against a defendant who fails to mention a fact during a police interview that they ought reasonably to have disclosed, if that fact is later relied on in court. In passing the Act, NSW became the first Australian jurisdiction to restrict the right to silence. NSW now joins England, Wales and Singapore as the only other major common law jurisdictions to have similarly modified the right to silence.¹³

B *Government Rationale*

The NSW government justified the reform to the right to silence as being a beneficial amendment necessary to 'crackdown' on crime.¹⁴ In particular, the government portrayed the reform as an important measure aimed at 'closing a legal loophole to stop criminals exploiting the system to avoid prosecution'.¹⁵ It was argued that 'higher end' criminals, such as members of organised crime gangs, were exploiting their former absolute right to silence by refusing to cooperate with police and by refusing to disclose any information, thereby frustrating the investigative process.¹⁶ By hiding 'behind a wall of silence', these criminals were able to, at times, escape prosecution.¹⁷ Therefore, a key rationale for the reform was to encourage suspects to disclose relevant information during the investigative process.

Moreover, it was suggested that the right to silence was being abused by defendants as a strategic mechanism to keep undisclosed for as long as possible, relevant information that their defence would subsequently rely upon in court. The objective of this strategy was to effectively ambush the prosecution by producing undisclosed evidence in court, thereby disadvantaging prosecutors at trial.¹⁸ There was also a suggestion that it was common for defendants to rely upon the right to silence and then present 'evidence which suddenly appears at a trial...designed to get the accused off'.¹⁹ The government argued that this tactic not only affected the prosecution, but also delayed the course

¹³ New South Wales Bar Association, Submission to Criminal Law Review Division Department of Attorney General and Justice, 28 September 2012, 6.

¹⁴ Premier of New South Wales, 'Crime Crackdown: "Right to Silence" Law Toughened' (Media Release, 14 August 2012) 1.

¹⁵ Attorney-General of New South Wales, 'Call to Support Changes to Right to Silence' (Media Release, 12 September 2012) 1.

¹⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 86 (Greg Smith).

¹⁷ Attorney-General of New South Wales, above n 15, 2.

¹⁸ David Shoebridge MLC, The Greens, Submission to Criminal Law Review Division Department of Attorney General and Justice, 28 September 2012, 6.

¹⁹ Premier of New South Wales, above n 14, 1.

of criminal proceedings. The reform, which would prevent this strategy, was therefore supported by the government as a piece of legislation that would 'help to reduce delays in the criminal justice process and...promote fairness to...[the] prosecution'.²⁰

Therefore, the reform was justified by the government as addressing the problems caused by sophisticated criminals who were using the right to silence to impede upon both police investigations and the work of the prosecution. The reform created what was considered a new police power. Indeed, the *Evidence Amendment Act* does not compel the application of s 89A in all circumstances when its threshold criteria and safeguards are satisfied. Rather, the police may use their discretion in applying s 89A when they believe it necessary to break down a specific 'wall of silence', as opposed to the blanket application 'in all cases in which a serious indictable offence is being investigated'.²¹ In other words, although the ultimate effect of the section is to change the evidentiary impact of silence at trial, should the prosecution decide to make the required submissions with respect to silence, it is the actions of the police which are scrutinised in order to attract s 89A. The police must decide whether the circumstances exist for them to administer the special caution, being one of s 89A's threshold requirements. The government considered the reform to be 'common sense'²² and noted explicitly that it was being modelled on similar reforms made in England and Wales in 1994.

III A CLOSER LOOK AT THE EVIDENCE AMENDMENT ACT

Having outlined the main features of the *Evidence Amendment Act* and the government's rationale behind its implementation above, this paper now turns to a closer examination of the reform in order to discuss its limitations and difficulties. The purpose of this is to demonstrate that the reform to the right to silence in NSW does not achieve any of its stated objectives and is so problematic that the *Evidence Amendment Act* could *not* have been supported by a government attempting to *genuinely* improve the law in any meaningful way. This section of the paper will first examine how the reform does not achieve any of its stated objectives, before turning to consider the philosophical and practical difficulties that the reform has unnecessarily introduced into NSW.

²⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 92 (Greg Smith).

²¹ *Ibid* 87.

²² Premier of New South Wales, above n 14, 1-2.

A Rationale Meets Practice

As summarised above, in supporting the new s 89A, the government argued that the section was necessary to deal with the problem of sophisticated criminals exploiting their right to silence by creating a wall of silence, frustrating the progress of police investigations. Then, at trial, these defendants would mount an ambush defence, suddenly breaking their silence and disclosing information designed to prove their innocence.²³ Ultimately, so the argument went, criminals escaped justice due to their exploitation of the right to silence. Therefore, the ability to draw adverse inferences from silence during police questioning would encourage more suspects to speak to the police and confess to the crimes they commit, or at least provide valuable information. Upon closer examination however, the validity of the government's arguments are highly questionable.

While the government's main justification for the reform was that the right to silence had become a 'loophole' that was being exploited, this claim was never substantiated. In fact, on the contrary, the NSWLRC noted in 2000 that:

[a]n examination of the empirical data...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.²⁴

Twelve years later, Hamer et al reiterated this finding, noting that 'there is no evidence that the current safeguards for defendants are "exploited"...nor that...a "code of silence" commonly operates'.²⁵ Therefore, at the outset, significant issues existed regarding the efficacy of the government's reform in dealing with an arguably non-existent problem. Moreover, even if it were *assumed* that such a problem existed, it is highly questionable as to the positive impact the new s 89A would actually have. Indeed, a 2000 study by the United Kingdom Home Office ('UKHO'), assessing the impact of a similar section introduced in England and Wales in 1994, suggests that its impact was negligible in those jurisdictions. The study concluded that in comparing the periods before and after 1994:

²³ The Greens, above n 18, 6.

²⁴ New South Wales Law Reform Commission, *The Right to Silence*, Report No 95 (2000) [2.138].

²⁵ David Hamer et al, Submission to Criminal Law Review Division Department of Attorney General and Justice, September 2012, 2.

...there have not been changes in the proportions of suspects charged, the level of guilty pleas or the proportion of defendants who are convicted, which can be related to the introduction of the provisions. The rate at which suspects provide admissions during police interviews also appears to have remained static.²⁶

These conclusions cast doubt on the effectiveness of introducing the ability to draw adverse inferences from silence during the pre-trial stage. Interestingly, the UKHO study also noted that the police were sceptical as to whether the 1994 reform actually had any impact on 'professional' criminals, in terms of encouraging their cooperation and responsiveness with police during questioning.²⁷ It was also noted that those who had chosen to remain silent *continued* to do so, irrespective of the threat of an adverse inference.²⁸ This is important given that the NSW government claimed to be targeting this very group of 'higher end' recalcitrant criminals.

Similarly, it is questionable as to what impact the *Evidence Amendment Act* would have in dealing with the problem of defendants mounting 'ambush defences', an issue the NSWLRC noted *rarely* occurred in the first place.²⁹ This is because in NSW significant mechanisms already exist to promote pre-trial disclosure, reducing the potential for the defence to strategically surprise the prosecution at trial. The *Criminal Procedure Act 1986* (NSW), for example, requires the defence to provide the prosecution with notice of its 'intention to adduce evidence of substantial mental impairment' in a murder trial.³⁰ The same Act also requires the defence to give written notice of an intention to provide evidence of an alibi at least '42 days before the trial is listed for hearing'.³¹ Moreover, the Act empowers the court with the discretion to order additional pre-trial disclosures should it 'be in the interests of the administration of justice to do so'.³² Given the availability of existing mechanisms ensuring that the possibility of an ambush defence is minimised, it is difficult to see what additional impact the new s 89A would have on what is a very minor and *infrequent* problem.

In light of this analysis, it appears that the *Evidence Amendment Act* is unnecessary in NSW. First, the problems that the legislation was introduced to alleviate arguably do not exist. Second, even if those

²⁶ Tom Bucke, Robert Street and David Brown, *The Right of Silence: The Impact of the Criminal Justice and Public Order Act 1994*, Home Office Research Study 199 (2000) 71.

²⁷ *Ibid* 72.

²⁸ *Ibid*.

²⁹ New South Wales Law Reform Commission, above n 24, [3.102].

³⁰ *Criminal Procedure Act 1986* (NSW) s 151.

³¹ *Ibid* s 150.

³² *Ibid* s 141.

problems *do* exist, it is questionable whether the legislation will solve them. This disjunction between the legislation's stated rationale and actual practical impact casts doubt over whether the government genuinely intended to improve the law regarding the right to silence in NSW.

B *Philosophical Difficulties: Undermining Fundamental Principles*

Furthermore, the *Evidence Amendment Act* significantly undermines longstanding, fundamental criminal law principles. The right to silence, which first existed at common law, has traditionally been viewed as vital protection for a defendant, safeguarding their liberty and ensuring that the State is not able to compel an accused person to provide information.³³ In this way, the protection addresses the significant power imbalance between the defendant and the State while also ensuring that an accused does not have to face the injustice of being forced to incriminate themselves.³⁴ Moreover, the right to silence is a principle that coexists and supports other fundamental rights at criminal law. In particular, the presumption of innocence, which is the 'golden thread' that runs through the criminal law.³⁵ A defendant is entitled to remain silent because there is no requirement that they prove their own innocence. Rather, the onus is on the State to prove guilt beyond reasonable doubt.³⁶ As Hamer et al noted, the right to silence:

...reinforces the presumption of innocence. It preserves a privilege against self-incrimination. It mitigates the power imbalance that often exists between police and suspect. ... It respects the privacy and integrity of the suspect. It avoids presenting the guilty suspect with a cruel trilemma of options: (1) accuse yourself of a crime; (2) mislead police, committing a further offence; or (3) remain silent and face compulsion.³⁷

Therefore, the right to silence is an essential criminal law principle, both in its own right as a protection for the accused vis-à-vis the State, and also as a principle that supports other significant rights. It is this significance which is attached to the right that leads one to question whether the government genuinely intended to reform the law, in the sense of attempting to change the law for the better. By qualifying the right to silence, the *Evidence Amendment Act* erodes the fundamental

³³ *RPS v The Queen* (2000) 199 CLR 620, 643; *Rees v Kratzmann* (1965) 114 CLR 63, 80.

³⁴ *Petty and Maiden v The Queen* (1991) 173 CLR 95, 128-9.

³⁵ *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481.

³⁶ *Petty and Maiden v The Queen* (1991) 173 CLR 95, 128-9.

³⁷ David Hamer et al, above n 25, 3.

principles and protections that the right embodies. Indeed, the majority of the High Court, in *Petty and Maiden v The Queen* went so far as to state that the ability to draw an adverse inference from silence would 'erode the right of silence or...render it valueless'.³⁸

In enacting s 89A, the NSW government supported an amendment that undermines fundamental principles of criminal law. In fact it is arguable that the reforms have re-introduced problems that the right to silence sought to mitigate. For example, the power imbalance between an accused and the State is wider than ever. This is because, while the legislation acts to encourage defendants to reveal information and cooperate with the police during an investigation, there exists no corresponding requirement for the police to disclose any information to the defendant. This discrepancy in the duty to disclose exacerbates the general power imbalance between the accused, the police and the State. Therefore, it appears that the NSW government, in enacting the *Evidence Amendment Act*, has introduced reforms that significantly undermine important legal principles, based upon a questionable rationale as discussed above.

C Practical Difficulties

Having considered the theoretical difficulties raised by the reforms, in terms of unnecessarily undermining important criminal law principles, this paper will now examine the new s 89A's practical difficulties. It will suggest that the section is arguably overly complex and raises significant issues in terms of confusion, uncertainty, delay in and cost of criminal proceedings. This section will begin first by examining practical difficulties, before focussing on two specific issues: implications of s 89A for lawyers and vulnerable defendants. Finally, the experience of England and Wales post-1994 will be briefly considered to illustrate these issues in practice.

1 General Issues

In recommending to the Scottish government that it retain the absolute right to silence in its criminal law, Lord Carloway's recent 2011 report suggested that modifying the right to draw adverse inferences would unnecessarily burden Scottish law with practical difficulties, including 'unduly complex rules' with 'little practical benefit'.³⁹ This finding is applicable in NSW. The *Evidence Amendment Act* arguably complicates

³⁸ (1991) 173 CLR 95, 99.

³⁹ Lord Carloway, *Reforming Scots Criminal Law and Practice: The Carloway Report*, Scottish Government Consultation Paper (2011) [10.10].

the law in two ways. First, with its numerous and complex threshold requirements, the actual drawing of an adverse inference is unnecessarily difficult. Second, this difficulty translates to more complicated criminal proceedings, the burdening of juries and the lengthening of trials.

As described above, despite s 89A's wide ambit, its operation is dependant on the satisfaction of two threshold criteria and limited by certain safeguards. It is unquestionable that these criteria are crucial in ensuring that s 89A is only applied in appropriate cases. For example, when the defendant is an adult who understands the meaning and effect of the special caution.⁴⁰ However, this does not detract from the fact that these criteria and safeguards, albeit necessary, are complex in application. For instance, one safeguard provides that an adverse inference may only be drawn if a defendant relies on facts at trial that they *reasonably* could have mentioned during the police interview but did not.⁴¹ Significant difficulty exists in establishing what constitutes 'reasonable'. Is it reasonable to expect a defendant to disclose information that may embarrass him or her, implicate or incriminate others in another offence? Some defendants may be particularly shy and reserved in character, or hold a distrustful attitude towards police.⁴² These variables, which require individual consideration, unnecessarily complicate the application of s 89A. Moreover, proceedings themselves could arguably become complicated and extended if the defence were to challenge the application of s 89A threshold criteria or by arguing that the safeguards in the section were not met. It has been argued that such considerations burden juries with complex issues and takes the focus 'away from the alleged offence and the immediate proceedings...to the [police] interview and its surrounding circumstances'.⁴³ As Hamer et al note, this 'time-consuming complexity'⁴⁴ attributable to s 89A is not worth the already questionable benefit the amendment brings.

2 Lawyers

A further practical difficulty associated with s 89A relates to the safeguard that the defendant be allowed a reasonable opportunity to consult their lawyer about the meaning and effect of the special

⁴⁰ *Evidence Act* s 89A(5)(a).

⁴¹ *Ibid* s 89A(1)(a).

⁴² New South Wales Law Reform Commission, above n 24, 55–61.

⁴³ Roger Leng, 'Silence Pre-trial, Reasonable Expectations and the Normative Distortion of Fact Finding' (2001) 5(4) *International Journal of Evidence and Proof* 240, 253.

⁴⁴ David Hamer et al, above n 25, 10.

caution.⁴⁵ Clearly, a lawyer in these circumstances would only be 'in a position to give proper advice when...fully apprised of the case against their client' and after 'having had the opportunity in a considered way to speak to their client and take instructions'.⁴⁶ It is difficult to see how this would be possible, particularly in the circumstances of a police interview, when a defendant might have only recently engaged the lawyer and the police case against the suspect is still developing. A lawyer in this position would arguably be *unable* to provide fully considered advice. Even if this were possible, significant difficulties exist if the advice provided is that the defendant remain silent. As noted above, s 89A only applies in circumstances where the defendant relies on information in court that was not disclosed during the interview but *reasonably* should have been.⁴⁷ Serious issues now arise as to whether it may be considered reasonable in the circumstances for a defendant to follow legal advice to remain silent. While this may seem intuitively reasonable, it raises a practical difficulty when lawyers merely advise clients to remain silent, thereby making 'a mockery of the legislation' and rendering it inapplicable.⁴⁸ The alternative is that the reasonableness of the reliance on legal advice be tested. This raises even greater problems. As Hamer et al note, '[t]he suggestion that the defendant may not be justified in relying on legal advice could undermine the lawyer's position and consequently damage the lawyer-client relationship'.⁴⁹ In order to test 'reasonableness', juries may have to consider the advice given and its surrounding circumstances, intruding upon lawyer-client privilege.⁵⁰ Further, the lawyers themselves may be required to provide evidence in open court as to the reasons for advising their client to exercise the right to silence.⁵¹ In this way, s 89A presents significant difficulties for a defendant's lawyer. Should the reasonableness of legal advice be challenged, the section inappropriately undermines the role of lawyers while introducing added complexity to proceedings.

3 *Vulnerable Defendants*

A second practical difficulty relates to the safeguard that s 89A does not apply 'to a defendant who, at the time of the official

⁴⁵ *Evidence Act* s 89A(2)(d).

⁴⁶ Law Society of New South Wales, Submission to Criminal Law Review Division Department of Attorney General and Justice, 27 September 2012, 2.

⁴⁷ *Evidence Act* s 89A(1)(a).

⁴⁸ Simon Cooper, 'Legal Advice and Pre-trial Silence: Unreasonable Developments' (2006) 10 *International Journal of Evidence and Proof* 60, 67.

⁴⁹ Hamer et al, above n 25, 8.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

questioning...is incapable of understanding the general nature and effect of a special caution'.⁵² This is undoubtedly an important provision, ensuring that no adverse inferences are drawn against vulnerable suspects unable to understand the legal implications of remaining silent. This safeguard is an improvement of the earlier draft, pursuant to which s 89A would only have been inapplicable to defendants suffering a 'cognitive impairment'.⁵³ Excluding defendants who are unable to understand the implications of silence from the application of s 89A appears wider than the need to identify a particular type of cognitive impairment. However, it is arguable that the safeguard is extremely difficult to apply. While there may be clear cases of defendants who are incapable of understanding the effect of a special caution, such as, highly intoxicated suspects, in many circumstances, the application of the safeguard is unclear or at least subject to time-consuming complicated analysis and argument in court. Young adult suspects, for example, may appear to have understood the special caution, but may actually be overwhelmed by stress and confusion, especially if it is the first time they have been interrogated by police.⁵⁴ Further, studies indicate that given their unique cultural background, Aboriginal suspects tend to 'give the answer they think the police will want to hear',⁵⁵ which may include a statement that they understand the implications of silence, when in reality they are confused and do not. Given that young adults and Aboriginal people constitute a disproportionately large number of defendants within the criminal justice system, it may be seen how in many circumstances, the issue of whether s 89A is applicable may be unclear.⁵⁶ As a result, significant trial-time may need to be devoted to assessing whether s 89A should be operative. It is arguable that, given this inherent complexity in determining whether s89A is even applicable to a particular case, the section is overly difficult to apply, especially when considering its questionable rationale and impact.

4 *The UK Experience*

An examination of the experience in England and Wales following the 1994 introduction of s 34 of the *Criminal Justice and Public Order Act 1994* (UK), a provision materially similar to s 89A, reinforces the practical difficulties noted above. Almost all studies conducted as to

⁵² *Evidence Act* s 89A(5)(a).

⁵³ Evidence Amendment (Evidence of Silence) Bill 2012 (NSW) (Exposure Draft) sch 1 item 2.

⁵⁴ Michelle Lam, 'Remaining Silent: A Fundamental Right' (2012) *Law Society Journal* 17, 18.

⁵⁵ *Ibid.* See also, New South Wales Law Reform Commission, above n 24, [2.118].

⁵⁶ Hamer et al, above n 25, 6.

the effect of s 34 highlight the limited value that qualifying the right to silence has had in England and Wales in terms of fighting crime and securing convictions, contrasted with 'the significant expense and complexities introduced'⁵⁷ into the criminal justice system as a result. For example, a 1999 cost-benefit analysis of s 34 noted, in no uncertain terms, that:

...it is surely beyond argument that the demands on judge and jury of the complex edifice of statutory mechanisms [introduced by s34] are enormous in proportion to the evidential gains they permit.⁵⁸

The analysis concluded by urging policymakers to adopt the advantages of 'giving up the ghost and reverting to the common law rule' of an absolute right to silence.⁵⁹ Similarly, a 2001 study concluded that 'far from facilitating the exercise of common sense, the effect of s 34 has been to introduce unnecessary complexity'.⁶⁰ This complexity included the practical difficulties highlighted above. Trials were now being sidetracked by peripheral evidentiary considerations brought on by s34, with lawyers, juries and judges increasingly spending time on issues relating to the provision's application rather than 'the real issues in the case'.⁶¹ Ultimately, the increased practical difficulties associated with s 34 have lengthened cases by opening up more avenues for appeals, for example, over whether a threshold criterion or safeguard with respect to s 34 was properly applied.⁶² Even the English courts have arguably recognised the practical difficulties embodied in s 34. In *R v B (Kenneth James)* (2003), the Court of Appeal referred to the section as 'a notorious minefield' of complexity.⁶³ Astonishingly, in *R v Brizzalari (Michael)*, in response to this complexity, the Court went so far as to discourage 'prosecutors from too readily seeking to activate the provisions of section 34'.⁶⁴ In the words of the Court:

⁵⁷ New South Wales Law Reform Commission, above n 24, [2.114]. Example of studies conducted as to the effect of s 34 include, for example: Leng, above, n 43; Diane J Birch, 'Suffering in Silence: A Cost-Benefit Analysis of Section 34 of the *Criminal Justice and Public Order Act*' (1999) *Criminal Law Review* 769; John D Jackson, 'Silence and Proof: Extending the Boundaries of Criminal Proceedings in the United Kingdom' (2001) 5(3) *International Journal of Evidence and Proof* 145.

⁵⁸ Birch, above n 57, 787.

⁵⁹ *Ibid* 788.

⁶⁰ Leng, above n 43, 241.

⁶¹ *Ibid* 243.

⁶² Hamer et al, above n 25, 9–10.

⁶³ [2003] EWCA Crim 3080 (23 October 2003) [20] (Dyson LJ).

⁶⁴ [2004] EWCA Crim 310 (19 February 2004) [57].

...we would counsel against the further complicating of trials and summing-up by invoking this statute unless the merits of the individual case require that that should be done.⁶⁵

IV CONCLUSION: POLITICS AND POPULARITY?

Governments and legislatures commonly reform the law. Statutes are amended in the belief that changes will be beneficial to the overall aims and purposes of the legislation. However, in the case of the *Evidence Amendment Act*, it is unlikely that the NSW government supported the legislation due to the belief that it would benefit the State. In light of the numerous problems inherent in the *Evidence Amendment Act*, the conclusion must be reached that the government's modification of the right to silence cannot be considered a genuine attempt at legislative reform. No rational government would support an amendment in the face of such glaring problems. These problems are threefold. First, the government's very rationale for supporting the reform is questionable. Their claim that the right to silence was being exploited by criminals is doubtful. Even if the claim could be substantiated, it is uncertain whether introducing the ability to draw adverse inferences from silence would have any effect. Second, the amendment is beset with theoretical difficulties caused by its undermining of longstanding and fundamental criminal law principles such as the presumption of innocence. Finally, s 89A introduces into NSW a range of practical difficulties, unnecessarily complicating the law and its application in court. The NSW government was clearly aware of these problems, given that they were noted by almost every major criminal law stakeholder, from the NSWLRC to the Bar Association, in their strong opposition to the reform.⁶⁶

Finally, the only explanation for the *Evidence Amendment Act* is that it reflects political motives by a government attempting to appear tough on crime. Indeed, the reform occurred in the context of significant media coverage of organised 'bikie' crime gangs operating in Sydney.⁶⁷ This conclusion is not unique. Others have noted examples of the NSW government implementing legislation as part of 'populist...policies...

⁶⁵ Ibid.

⁶⁶ All major stakeholders within the NSW criminal justice system opposed the modification of the right to silence to include an adverse inference with respect to the silence. See, for example: New South Wales Law Reform Commission, above n 24; New South Wales Bar Association, above n 13; Law Society of New South Wales, above n 46. The only major stakeholder to support the reform was the New South Wales Police. See Premier of New South Wales, above n 14, 2.

⁶⁷ For a typical example of the media coverage, see Lisa Davies, 'Hundreds of Police Raid Sydney Bikies', *Sydney Morning Herald*, 12 March 2013. This news report, incidentally, was published during the month the *Evidence Amendment Act* was passed by Parliament.

facilitated by 'law and order' political rhetoric and widespread fear of crime'.⁶⁸ Garland, for example, has noted the tendency of governments to respond to the public's fear of crime and specific incidents with legislation 'more concerned to accord with political ideology and popular perception than with expert knowledge or the proven capacities of institutions'.⁶⁹ The *Evidence Amendment Act*, introduced despite its overwhelming problems, is arguably an example of such ill-conceived and politically motivated legislation.

⁶⁸ Arlie Loughnan, 'The Legislation We Had to Have?: The *Crimes (Criminal Organisations Control) Act 2009* (NSW)' (2009) 20 *Current Issues in Criminal Justice* 457, 457.

⁶⁹ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 112.