

Submission on Exposure Draft:  
*Evidence Amendment (Evidence of Silence) Bill 2012*

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## 1. Introduction

We are 17 legal academics from eight Australian Universities. We teach, research and publish in the areas of criminal law and procedure and evidence law. We oppose the proposed legislation for the following reasons:

- It places additional demands on police, without providing any benefit to the police investigation;
- It introduces unnecessary conflicts in the client-lawyer relationship;
- It is unnecessarily complicated, of unclear ambit and scope increasing trial complexity, without the promise of reducing incorrect acquittals;
- It creates inconsistency between the treatment of 'silence' pre-trial and during trial leading to legal incoherence and juror confusion;
- It will increase the costs of criminal justice without any countervailing benefit.

The proposed legislation would introduce a new s 89A for the *Evidence Act 1995*, allowing an adverse inference to be drawn, in certain circumstances, from a defendant's silence in police interview. This represents a radical departure from the current common law and legislation which provides full recognition of the right to silence and prohibits such an inference: *Petty and Maiden* (1991) 173 CLR 95; *Evidence Act* s 89. Whilst the proposal diminishes the rights of suspects and defendants, it is not clear that it will provide any benefits for police investigations or prosecutions, or increase community protection.

The proposed amendments purport to respond to the difficulties police encounter in investigating gang-related shootings and other violence in Sydney, and the challenges of prosecutors facing so-called 'ambush defences'. The Government presents the reforms as a 'common sense' way of

‘closing a legal loophole to stop criminals exploiting the system to avoid prosecution’ and ‘breaking the criminals’ code of silence’: AG’s Media Release, 12 September 2012. But there is no evidence that the current safeguards for defendants are ‘exploited’ in this way, nor that such a ‘code of silence’ commonly operates. Furthermore, the reference to ‘common sense’ is extremely misleading. These ‘common sense’ reforms raise complex practical and legal issues which may hamper police investigations, delay trials and generate numerous appeals.

## 2. Background: The Failure of the English Reforms

The Government bases its reform on s 34 of the English *Criminal Justice and Public Order Act 1994*. However, the English legislation is generally viewed as unsuccessful and problematic. In 1999 Professor Diane Birch conducted a cost-benefit analysis of the English provisions, concluding that ‘the demands on judge and jury of the complex edifice of statutory mechanisms are enormous in proportion to the evidential gains they permit’.<sup>1</sup> In 2001 Professor Roger Leng stated that ‘far from facilitating the exercise of common sense, the effect ... has been to introduce unnecessary complexity and to distort the process of fact-finding’.<sup>2</sup> Professor John Jackson drew a similar conclusion and wrote that the scheme called for more safeguards and greater regulation of police interviews: ‘To those who cavil at the added complexity there is a simple solution – abolish the silence provisions.’<sup>3</sup> In 2005 the English Court of Appeal, noting the flood of appeals generated by the legislation, described it as a ‘notorious minefield’: *Beckles* [2005] 1 WLR 2829 [6].

Few countries, apart from England, allow an inference from a suspect’s exercise of the right to silence. In the United States, the right to silence remains fully enshrined in the 5<sup>th</sup> Amendment of the Bill of Rights. In Europe the right to silence is considered to be inherent to the right of fair trial guaranteed by Article 6 of the European Convention on Human Rights: eg, *Murray v UK* (1996) 22 EHRR 29. Last year a review commissioned by the Scottish Government, headed by Lord Carloway, recommended against adoption of the English legislation, noting that had produced a scheme of ‘labyrinthine complexity’, but would have limited ‘utility’, at least without further substantial reforms in the areas of police disclosure and the provision of legal advice prior to police questioning: *Carloway Review* (2011) [7.5.24]-[7.5.25]. In 2000, the NSW Law Reform Commission opposed the adoption of the English approach not only because it would be inconsistent with the right to silence and presumption of innocence, but also because of ‘practical and logical objections’: NSWLRC Report 95, *Right to Silence* [2.138]. No other Australian jurisdiction allows this inference to be drawn.

## 3. Diminishing the Right to Silence

The ‘right to silence’, embracing a range of protections which operate pre-trial and during trial and which, is ‘a fundamental rule of the common law’: *Petty and Maiden* (1991) 173 CLR 95 (Mason CJ,

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<sup>1</sup> 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, 787.

<sup>2</sup> R Leng, ‘Silence pre-trial, reasonable expectations and the normative distortion of fact-finding’ (2001) 5 *International Journal of Evidence & Proof* 240, 241.

<sup>3</sup> J Jackson, ‘Silence and Proof: Extending the Boundaries of Criminal Proceedings in the United Kingdom’ (2001) 5 *International Journal of Evidence & Proof* 145, 173.

Deane, Toohey and McHugh JJ).<sup>4</sup> The right serves a number of related purposes. It 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 reduces the risk of wrongful convictions by preventing vulnerable and impressionable innocent suspects from having to provide the police with a false confession. 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.

The proposed s 89A would not abolish the right to silence. According to the European Court of Human Rights, upholding the corresponding English legislation, the right to silence is not absolute, and, if certain safeguards are provided, the Convention will not be infringed: *Murray v UK* (1996) 22 EHRR 29; *Adetoro v UK* [2010] ECHR 609. The suspect is not required to cooperate with police and answer their questions or volunteer information. But if they do exercise their right to silence, the consequence may be that an adverse inference is raised at trial, harming their defence. It is important to note that the adverse inference is not a sanction for failing to cooperate with police. The inference can only be drawn if it is 'proper': proposed s 89A(1).

Nevertheless, the threat of an adverse inference does place pressure on the suspect to talk to police – this is one of its stated goals – and this pressure is inconsistent with the suspect's right to silence. As a majority of the High Court stated in *Petty and Maiden* (1991) 173 CLR 95, '[t]o draw such an adverse inference would be to erode the right of silence or to render it valueless'. In *RPS v The Queen*, the majority held that to draw an adverse inference from silence at trial would be 'contrary to fundamental features of a criminal trial': (2000) 199 CLR 620 [32]; see also *Azzopardi v The Queen* (2001) 205 CLR 50. The majority in *Dyers v The Queen* (2002) 210 CLR 285 held that such adverse inferences were contrary to the accused person's right to silence and the presumption of innocence.

#### 4. Hampering Police Investigations

One of the main goals of the reforms is to facilitate police investigations, however there is no evidence that these proposals will achieve this aim. Indeed, the proposed reforms may bring with them procedural demands and unintended consequences which impede police investigations.

Professor John Jackson has argued that 'the police interview has been transformed by the [English] legislation into a formal part of the proceedings against an accused'.<sup>5</sup> The demands this places on police may outweigh any limited advantage they obtain from the reforms.

As the NSWLRC noted, 'empirical data does not support the argument that the right to silence is widely exploited by guilty suspects, as distinct from innocent ones': [2.138]. The problem that the proposed reform purports to address is small, and may be illusory. It should also be noted where a suspect does answer police questions, and then changes his or her story and presents a different version at trial, the current law allows adverse inferences to be drawn: *Petty and Maiden* (1991) 173 CLR 95. This is not inconsistent with the right to silence since the suspect did not invoke the right originally.

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<sup>4</sup> See also "Right to Silence", Issues Backgrounder, NSW Parliamentary Research Service, Number 4, September 2012, NSW Parliament, 5-6.

<sup>5</sup> Jackson, "Silence and Proof: Extending the Boundaries of Criminal Proceedings in the United Kingdom" (2001) 5 *International Journal of Evidence & Proof* 145, 172.

Perhaps, in connection with the current spate of gang-related crimes in Sydney, the right to silence has been invoked more widely. From the rights perspective, there is an immediate and familiar problem with introducing a general reform in response to 'exceptional' offending. Obviously non-exceptional offences will be caught in the same net. This process has been criticised for striking an imbalance between individual rights and security interests, part of a 'slippery slope' towards the large-scale erosion of protections for defendants who are not accused of 'exceptional' offences.<sup>6</sup>

At the same time, it can be doubted whether the reforms will provide much assistance to police in investigating the current spate of Gang-related crime. Clearly the reforms are limited to suspects. They will not help police in getting information from witnesses generally. And the reforms will not apply to all suspects, but are subject to a complex range of restrictions. The adverse inference is only available in respect of a 'serious indictable offence': proposed s 89A(3). And the section will not apply to a defendant 'under 18 years of age or who has a cognitive impairment'. Further, the inference will only be available where (a) a supplementary caution has been given, and (b) the defendant has had the opportunity to obtain legal advice: proposed s 89A(2). Each of these restrictions introduces procedural and regulatory complexity into the police investigation compounding the potential for police error.

The supplementary caution is more complex than the standard caution. Combining the two, it would run as follows: 'You have the right to remain silent. Anything you do say will be taken down and may be used in evidence against you at trial. It may harm your defence if you fail to mention something now which you later rely on at trial'. Unsurprisingly, English police have reported difficulty ensuring suspects understand all of this. The police should also ensure that the supplementary caution is only given in appropriate cases. Even if the investigating police are fully cognisant of restrictions in the proposed legislation, the precise classification of the offence(s) under investigation and the age or cognitive abilities of a suspect may not be clear at the time of interview. The proposed legislation expressly provides that the supplementary caution should not be given unless the investigating official is 'satisfied that the offence ... is a serious indictable offence': proposed s 89A(5). It would be misleading to warn a suspect of the possibility of an adverse inference from silence at trial where there was no possibility of the inference being drawn. Any evidence subsequently obtained may be excluded on the basis it was improperly obtained: *Evidence Act* s 138(2)(b).

As well as placing further demands on police in terms of the caution, the reforms will also shine a spotlight on the extent of police disclosure to suspects. In order to determine whether to draw an adverse inference from the suspect's lack of disclosure, regard must be had to the context of the interview, and the degree of police disclosure. Again, in Professor John Jackson's words, the effect of the reforms is that 'the police interview [becomes] a formal part of the proceedings against an accused'.<sup>7</sup> The interview will inevitably become more highly regulated and less governed by the strategic goal of maximising information from a suspect.

Many complexities arise from the requirement that, for an adverse inference to be drawn, the suspect must have had the opportunity to obtain legal advice: proposed s 89A(2)(b). This provision

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<sup>6</sup> A Loughnan, 'The Legislation We Had to Have? The Crimes (Criminal Organisations Control) Act 2009 (NSW) 20(3) *Current Issues in Criminal Justice* 457-465.

<sup>7</sup> Jackson, 'Silence and Proof: Extending the Boundaries of Criminal Proceedings in the United Kingdom' (2001) 5 *International Journal of Evidence & Proof* 145, 172.

leaves much scope for interpretation, but presumably it will operate more strongly than the current right to obtain legal advice prior to questioning: eg, *Law Enforcement (Powers and Responsibilities) Act 2001* s 123. The European Court of Human Rights has held no adverse inferences can be drawn from silence in police questioning unless the defendant had the opportunity for legal advice at the time: *Murray v UK* (1996) 23 EHRR 29. The proposed reforms will have the effect that the criminal justice system generally, and police in particular, will have to do more to enable the suspect to obtain legal advice. Obviously this will be very costly for the Government. At the police station, at best, the requirement of legal advice will mean greater delay before – and, in some cases at least, during – police questioning. But the difficulties for police are unlikely to end there. The English experience has been that the provision of legal advice often makes it more likely that the right to silence is exercised, notwithstanding the threat of an adverse inference. In part this appears to reflect the lawyer’s difficulty in becoming sufficiently informed about the police investigation and the client’s position to weigh up what is in the client’s best interests. Silence appears the safest option.

The English experience is that in other cases the reforms have had the effect that suspects who would formerly have remained silent now provide the police with a version of events. However, this may be a formal statement carefully prepared on legal advice so as to avert the risk of the adverse inference, while the suspect otherwise still refuses to answer police questions. In other cases, the police are told lies ‘which neither collapse under police interrogation, nor create realistic opportunities for further investigation’. Roger Leng concludes, ‘[w]hether or not the provision has any real effect in generating useful evidence must be doubted.’<sup>8</sup>

The problems that the proposed reforms present for the police are such that the police may come to rue the day. This raises the question whether the police have a power of election. Could they use the supplementary caution and threat of adverse inference strategically in some cases, while in other cases enjoying the relative simplicity of the old law? The proposed s 89A(5) does not appear to preclude this, but the prospect of differential treatment raises both practical issues and rule-of-law concerns. Without attempting to resolve the question here, the very fact that the question arises calls into question the wisdom and effectiveness of the reforms.

It should be noted that ambush defences are currently addressed in other ways. The *Criminal Procedure Act 1986* (NSW) ss 150 and 151 currently requires that the defendant give prior notice of their intention to rely on an alibi or substantial mental impairment. There are also provisions in that Act for case management including pre-trial disclosure (see s 143 for matters the defence must disclose). These provisions address some of the supposed problems targeted by the Government’s silence reforms, but they have the advantage of not putting the accused under pressure at the police interview to make disclosures without proper legal advice and without full disclosure of the Crown Case. At the same time, these provisions do not call for greater regulation of police questioning of suspects. These existing provisions are not perfect, however, they appear far less problematic than the proposed silence reforms.

## 5. Availability of the Adverse Inference at Trial

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<sup>8</sup> Leng, ‘Silence pre-trial, reasonable expectations and the normative distortion of fact-finding’ (2001) 5 *International Journal of Evidence & Proof* 240, 255.

The proposed reform aims to strengthen the position of police at interview. The way that it does this is to enable police to caution the suspect that their silence may lead to an inference being drawn against them at trial. But when might the inference be drawn? The Government relies upon the common sense notion that if you are innocent you have nothing to hide and should just 'trust the police'. On this view, silence almost always points to guilt. But this is unhelpfully simplistic. Even where a suspect fails to volunteer incriminating evidence this does not point to guilt. The suspect may, for example, have threatened the victim. It is understandable that a suspect may not want to make this evidence available to police, particularly if the suspect's previous dealings with the police have been less than amicable.

The proposed legislation restricts the availability of the adverse inference in various ways, some general, some specific. Each of these restrictions raises its own difficulties and complexities.

The adverse inference may only be drawn where the defendant failed to disclose 'a fact ... subsequently relied upon by the defence in the proceeding' (proposed s 89A(1)(b)). What counts as a fact "relied upon" by the defence? If the defendant does not advance a positive defence at trial, but simply puts the prosecution to proof, the adverse inference will be unavailable. In such a case the defendant has not held anything back and it appears unsustainable to suggest that the defendant remained silent out of concern that his or her account would not withstand scrutiny, or in order to gain the advantage of an ambush defence at trial. Arguably the defendant said nothing to police simply because the defendant had nothing to say.

The expression in the proposed s 89A(1)(b) – 'fact[s] ... subsequently relied upon' – appears broad enough to cover facts that emerge through prosecution witnesses as well as defence witnesses: *Bowers* [1988] Crim LR 817. However, it may be difficult in the former case determining whether the defendant sufficiently 'relies' upon them: *Cambridge* [1994] 1 WLR 971. Difficult cases may also arise where the defence raises speculative or theoretical explanations for the prosecution evidence, for example, in closing statement: *Nickelson* [1999] Crim LR 61.

The inference may not be available from the silence of vulnerable defendants who have a particular need for the protection provided by the right to silence. However, the legislation gives express recognition only to limited classes of vulnerable defendants. The provision has no application to defendants who were under 18 at the time of questioning or suffer a cognitive impairment (proposed s 89A(6)). This is extremely narrow in comparison with the definition of "vulnerable persons" under the *Law Enforcement (Powers and Responsibilities) Regulations 2005*, Reg. 24, which also includes Indigenous people, and people from non-English speaking backgrounds, who are over-represented in the criminal justice system. Further, the definition of "cognitive impairment" in the proposal is narrower than that proposed in the recent NSW Law Reform Commission report, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report 135. That report details the significant over-representation of people with such impairments in the criminal justice system; a finding which will also limit the scope of the proposed s89A, since the proposal cannot apply to defendants impaired in this way.

There are more general restrictions on the adverse inference. It may only be drawn from non-disclosed facts where 'the defendant could *reasonably have been expected* to mention' those facts, and where the inference otherwise appears '*proper*': proposed s 89(1). What counts as "reasonable" here? There are all sorts of reasons why the defendant may not have mentioned exculpatory facts to

the police. Suppose a defendant is arrested in a drug raid on premises found to contain large amounts of prohibited drugs. The defendant refuses to answer police questions and is charged with serious drug supply charges. At trial the defendant denies being a supplier and claims he was merely there to purchase drugs. To avoid an adverse inference under s 89A, the defendant may argue that he was silent: (a) because he has a speech defect and is inarticulate; (b) out of shock and embarrassment; (c) because he did not want to reveal that he was a purchaser of drugs; (d) to protect his drug supplier, X; (e) to protect himself from recrimination or retaliation as an informer; (f) all of the above. At trial, these reasons individually or in combination could defeat the reasonable expectation that the defendant would have mentioned the facts to the police, and may make the inference improper.<sup>9</sup>

## 6. Demands on Police Disclosure

English experience suggests that one reason for an adverse inference not being drawn is a lack of police disclosure: *Imran and Hussain* [1997] Crim LR 754; *Roble* [1997] Crim LR 449. Silence per se carries no meaning. It is only when silence is viewed in context that meaning can be given to it. A key element in the context of a suspect's silence is what the police have put to the suspect. The proposed legislation recognises that the suspect is not simply expected to volunteer information. Silence can only be the basis of an adverse inference if it was in response to a 'question or ... representation in the course of the official questioning': proposed s 89A(1). What is it, precisely, that the suspect has failed to respond to? This context is crucial for determining whether 'the defendant could reasonable have been expected to mention' the relevant fact: proposed s 89A(1)(a).

Logically, if the suspect faces a bare allegation, and is not made aware of any details, the suspect's silence may be considered consistent with his or her innocence. Without details of the allegation from the police, an innocent suspect may have nothing to say to police. An innocent suspect may not deign to respond to what appears to be an unsubstantiated allegation.

This focus on police disclosure also seems appropriate from the perspective of fairness. If the police have held back inculpatory material from the defendant, why should the defendant be penalised for holding back exculpatory material from the police?

Of course, questions about the level of police disclosure will not be limited to the trial. They will have ramifications for police practice. The proposed 89A will add new layers of complexity to police calculations as to how most effectively to interview a suspect.

## 7. Legal Advice to Remain Silent

As discussed above, the availability of an adverse inference at trial from a defendant's silence in police interview turns upon many different considerations. This has ramifications not only at trial, but also back in the police station. A suspect will obviously want to determine the wisest course of action – whether it is best for them to exercise the right to silence, or to speak to police. This will involve weighing up the cost of answering police questions against the cost of the adverse inference, should it be drawn. The European Court of Human Rights has held that this is something on which a suspect will require legal advice. Without this, no adverse inferences can be drawn: *Murray v UK*

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<sup>9</sup> For English and European case references, see Leng, 'Silence pre-trial, reasonable expectations and the normative distortion of fact-finding' (2001) 5 *International Journal of Evidence & Proof* 240, 253.

(1996) 23 EHRR 29. This is also the case under the proposed legislation. An adverse inference 'may only be drawn if, before the relevant question or representation was put or made to the defendant ... the defendant was allowed the opportunity to consult an Australian legal practitioner about the effect of failing or refusing to mention such a fact': proposed s 89A(2)(b).

Clearly, then, the adverse inference will not be available if the defendant did not have the 'opportunity' to obtain legal advice during questioning. The obvious question is, what counts as an 'opportunity' to consult a lawyer? The proposed 89A(7) provides that 'a defendant is taken not to have been allowed an opportunity ... if the defendant's means ... preclude[d] the defendant'. And so, the Government will foot the bill in the vast majority of cases. The Government has suggested it will trial a telephone legal advice line. But it is doubtful whether this could adequately deal with the complex questions flagged above that the adverse inference presents. The question whether or not silence would raise the inference is not all or nothing, arising only at the outset of the interview. It may arise repeatedly throughout the interview in connection with particular allegations and questions. European Court authority suggests that the legal advice should normally be available throughout the interview: *Murray v UK* (1996) 22 EHRR 29, 69; *Averill v UK* 31 EHRR 36; *Beckles v UK* (2003) 36 EHRR 13. Suppose, having briefly availed himself or herself of the Government's telephone legal advice line, the suspect remains silent and at trial the prosecution calls for an adverse inference. The defence may argue the legal advice was insufficient to satisfy the requirement in s 89A(2)(b). Even if this provision were satisfied, the defence may argue that the advice was so limited that it 'could [not] reasonably have been expected' that the defendant would answer police questions, and that it would not be 'proper' to draw the inference: s 89A(1).

The legal advice requirement raises another issue that has much exercised the English courts. What if the legal advice is for the suspect to remain silent? Would such legal advice in itself mean that the defendant 'could [not] reasonably have been expected to mention' a fact, so that the adverse inference would be unavailable: proposed s 89A(1)(a)? On one view, it appears reasonable for a suspect to follow his or her lawyer's advice. But if legal advice to remain silent provided an *automatic block* to the adverse inference, this would 'make a mockery of the legislation'.<sup>10</sup> The defendant should not be allowed to shield behind the legal advice where the real reason for silence was that the suspect was guilty and had no innocent responses to police questions. On the other hand, does not appear appropriate to view legal advice to remain silent as *irrelevant* to whether the adverse inference should be available.

The position of the English courts is not entirely clear,<sup>11</sup> but there is authority that it should be asked whether the defendant genuinely followed the legal advice in remaining silent, and whether it was reasonable for the defendant to do so: *Beckles* [2005] 1 WLR 2829; *Bresa* [2005] EWCA Crim 1414. But this approach raises a number of concerns. The suggestion that the defendant may not be justified in relying on legal advice could undermine the lawyer's position and damage the lawyer-client relationship. An exploration of the content and basis of the legal advice may raise difficult questions regarding the admissibility of hearsay evidence, and the waiver or loss of client legal privilege. Finally, this approach also presents the dramatic and distracting prospect of the defendant's legal adviser being put in the witness box.

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<sup>10</sup> Simon Cooper, 'Legal advice and pre-trial silence' (2006) 10 E&P 60, 67.

<sup>11</sup> See Simon Cooper, 'Legal advice and pre-trial silence' (2006) 10 E&P 60.

## 8. Further Complexities: Judge or Jury? Confusion and Prejudice

As discussed above, it will often not be straightforward whether an adverse inference from a defendant's silence in police interview is open. A further dimension to these questions is – who decides? Is it up to the trial judge to determine whether the inference is open, or should this be left to the jury.

In some cases it will be clear that the adverse inference is not open – if for example, the defendant was not 18 at the time: proposed s 89A(6). In such a case it would be appropriate for a trial judge to direct the jury that an adverse inference was not open. In other cases the availability of the inference may hinge upon a fact that is concrete, but disputed, for example, whether the defendant was provided with the supplementary caution, or whether the defendant suffers a cognitive impairment: proposed s 89A(2)(a) & (6). It may be appropriate for the trial judge to settle such questions on the voir dire: s 189.

However, many cases will be more difficult. Is the difference between what was said in police interview and what is now presented at trial sufficient to raise the inference? Fresh exculpatory facts have emerged at trial from prosecution witnesses, but does the defendant rely upon them? More generally, with what stringency should the trial judge act as gatekeeper with regards to the adverse inference? This is a question on which different views may be taken depending, among other things, on the respective level of faith one has in judges and juries. But in the context of silence and the adverse inference there are additional variables. Consider the question whether it was reasonable for the defendant not to mention certain exculpatory facts in police interview. 'Reasonableness' is often said to be exactly the kind of judgement that a jury is equipped to make. But where reasonableness turns upon the degree of police disclosure, or the adequacy of legal advice, this starts to have much more of a technical legal flavour and the judge would be better placed to provide an answer.

Whether or not the judge should permit the prosecution to invoke the adverse inference may raise issues beyond the proposed s 89A. The defence may seek to exclude the prosecution argument on the grounds it poses a risk of unfair prejudice, jury confusion or would be waste of time: *Evidence Act* ss 135, 137. In *Cook* the NSWCCA held that flight evidence should be excluded because the defendant's 'innocent explanation' revealed that he had committed other offences similar to the charged offence posing the risk of prejudicial tendency reasoning: [2004] NSWCCA 52. This style of defence argument may also succeed against a s 89A adverse inference; a defendant may argue that she remained silent because she was concerned that she would reveal her guilt of other offences.

In other cases, the defence may argue that the adverse inference at best has low probative value, but that it opens up disputed factual issues that are peripheral to the main issues in the case, wasting time, and distracting or confusing the jury. As Roger Leng indicates, argument over the adverse inference 'requires the jury to shift their focus, away from the alleged offence and the immediate proceedings in court, and to the interview and its surrounding circumstance. At this point the jury must consider a number of matters which would not have otherwise concerned them.'<sup>12</sup> These may range from the defendant's intelligence to the defendant's prior dealings with police, and

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<sup>12</sup> R Leng, 'Silence pre-trial, reasonable expectations and the normative distortion of fact-finding' (2001) 5 *International Journal of Evidence & Proof* 240.

from the degree of police disclosure to the detail of communications between the defendant and the defendant's lawyer.

The time-consuming complexity presented by the adverse inference is not limited to the additional evidence that may be put before the court. It also has ramifications for trial judge directions. The trial judge will not only have to try to ensure that the jury understands the operation of the adverse inference, but will also have to guard against the jury being distracted or confused by the peripheral issues. The adverse inference will present yet another topic on which juries will need careful instruction: see *Webber* [2004] 1 WLR 404 [27], [29]; *Allan* [2004] EWCA Crim 2236; *Condrón v UK* (2001) 31 EHRR 1 [61]; *Birchall* [1998] EWCA Crim 177. However, the direction itself may then become part of the problem. As the English Court of Appeal observed in *Bresa* [2005] EWCA Crim 1414, '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'.

The proposed reforms offer fertile ground for legal argument at trial, and a 'minefield' of possible grounds of appeal: *Beckles* [2005] 1 WLR 2829 [6]. Are they worth it? Keep in mind that adverse inference attempts to give meaning to silence which, on its face, is inscrutable. It would be rare that silence could support an inference of any strength. While the proposed s 89A may throw some doubt on an 'ambush defence', its strength would primarily be assessed by reference to the evidence that supports or contradicts it more directly. English and European authorities suggest that the inference can play no more than a supporting role in the prosecution case: *Doldur*, *The Times* (7 May 1999). The prosecution must be able to construct a prima facie case without it: *Argent* [1997] 2 Cr App R 27, 35. A defendant cannot be convicted solely or mainly on the basis of an adverse inference from silence: *Murray v UK* (1996) 22 EHRR 29 [47]. Further, the jury should be directed that the inference can only be drawn if they are satisfied that the only sensible explanation for the silence was that he or she had no answer to give that would withstand scrutiny: *Condrón* [1997] 1 Cr App R 185; *Condrón v UK* (2001) 31 EHRR 1. The proposed s 89A(3) provides, less clearly, that the 'inference cannot be drawn if it is the only evidence that the defendant is guilty of the serious indictable offence'. All of this means that there is little scope for the adverse inference to be drawn and, at most, it will play a limited role. This slight benefit does not appear worth the time-consuming complexity that the inference may create at trial and on appeal.

#### 9. Inconsistency with Treatment of Silence at Trial

The proposed amendments deal only with the situation of a defendant exercising the right to silence pre-trial. They make no change to the law relating to a defendant's silence at trial. This presents the risk of inconsistency and confusion.

Common law and current legislation precludes an adverse inference both from a defendant's pre-trial silence and the defendant's silence at trial – the defendant's election not to testify. With regard to silence at trial see: *Evidence Act* s 20; *RPS* (2000) 199 CLR 620; *Azzopardi v The Queen* (2001) 205 CLR 50; also *Dyers v The Queen* (2002) 210 CLR 285 with respect to the defendant's failure to call certain witnesses.

The effect of the reforms will be that pre-trial silence and silence at trial will be treated inconsistently. This is bad for the coherence of evidence law and is likely to confuse juries. In a case

where the defendant has exercised the right to silence in police interview and at trial, a jury may be directed that an adverse inference can be drawn from the former, but not the latter. This makes no sense. If anything, an inference appears more open from silence at trial – the defendant in court is generally less vulnerable than a suspect in a police interview room, and by the time that the defendant decides whether or not to testify the prosecution should have made full disclosure. Note that after prohibiting the inference from pre-trial silence in *Petty and Maiden* (1991) 173 CLR 95, the High Court left open some scope for an adverse inference from a defendant's silence at trial in *Weissensteiner* (1993) 178 CLR 217, and s 20 *Evidence Act* is far less unequivocal than s 89.

In this respect also, the proposed reforms are badly thought out and are likely to cause more problems than they solve.