# Police Association of NSW Submission

## Parliamentary Inquiry into the Right to Silence

Prepared by Sandra Soldo

**December 2005**

## Introduction

The Legislation Review Committee is currently conducting a Parliamentary inquiry and is seeking comment on certain issues relating to the right to silence as highlighted in *"The right to silence", Discussion Paper No.1-21 September 2005.* In particular, the Committee is seeking comment in relation to the principles it should apply when considering bills that trespass on the right to silence.

The Police Association has been invited by the Committee to contribute to this inquiry in the form of a submission. As a body, which represents the rights and interests of police officers throughout New South Wales, the Police Association of NSW is particularly interested in this inquiry into the right to silence.

## The Right to Silence

The right to silence is a legal protection enjoyed by people undergoing police interrogation or trial in certain countries, including Australia. The right covers a number of issues centred on the right to refuse to answer questions. This includes the right to avoid self-incrimination and the right to not answer any questions. The right usually includes the provision that the judge or jury cannot make adverse comment or inferences about the refusal to answer questions before or during a trial or hearing.

This submission provides a detailed historical background to the origins of the right to silence both in the United Kingdom and New South Wales. The background paints a picture as to the social and legal climate that existed at the time the right to silence doctrine was adopted by the British legal system. Whilst the right to silence in England has performed well as a safeguard against the recurrence of a court system that yields terror and torture, many years have since past and society and the legal system of today is somewhat different. In recognition of this change, the Association whilst aware that the right to silence is a fundamental right enshrined in common law, does however support the philosophy behind the *Criminal Justice and Public Order Act* in regards to criminal proceedings whereby inferences can be drawn in certain circumstances. A more detailed discussion regarding this Act, which was introduced in the United Kingdom and Wales some 11 years ago, is contained later in this submission.

## Origins of the Right to Silence

Up until nearly 360 years ago, torture has been suffused throughout the English court systems. British historians have dated the origins of this treatment back to the 12$^{th}$ century. By the end of the middle ages, Roman law

began surfacing in various areas throughout England. James Heath asserted that this fascination was due to the fact that "*to the [English] medieval learned world, the Corpus Iurius (a 6th century Roman doctrine) seemed an illumination, a monument of rational striving after justice, a demonstration of divine beneficence*" (Heath, 12). This led to obvious acts of manipulation by the English followers as they strove to make the Roman material fully relevant to their own society.

The largest among these manipulations occurred with the concept of torture. While the *Corpus Iurius* "grants a fairly large commendation" for the use of torture, the translations were exploited and the meanings greatly exaggerated to make the doctrine seem even more pro-torture (Heath, 15). Expert opinion asserts that this was a major factor that contributed to the institution of torture in the English court system. These courtroom practices surfaced in England during the 13th century and lived on throughout the 14th century. They then cascaded into the 15th century by way of the secret hearings of the infamous Star Chamber.

In 1487 Henry VII reinvented this royal jurisdiction for the purpose of dealing with the "grave lawlessness of the citizens". According to Whitton, the chamber consisted of "*various Lords Spiritual and Temporal, being privy councillors, together with two judges of the court of Common Law, without the intervention of any jury*" (Whitton, 46). They met to hear the cases concerning "*riots, perjury, misbehaviour of sheriffs, and other notorious offences contrary to the laws of the land*" (Whitton, 47). Investigations consisted of secret interrogations of the accused and examinations of witnesses all coupled with an unrestricted use of torture. Whitton reported *"there is no doubt that for a long time the Crown asserted in all criminal cases the power to authorise and direct the use of torture without any limitations".* (Whitton, 46)

The Star Chamber lived on until 1640 when the Long Parliament invoked the Magna Carta to "*declare illegal the Star Chamber's procedures of administering an oath and obliging the witness to truly answer all questions*" (Whitton, 50). In conjunction with the wishes of the Parliament, the *Habeas Corpus Act of 1640* was created to put the Star Chamber to death. This abolition resulted in the emergence of the privilege pertaining to the right to silence. This right took hundreds of years and much evolution to develop into its present day form. Even as the right of the accused to testify disappeared and then later resurfaced in 1898, the right to be silent without the threat of torture was consistently granted to the accused.

The right to silence in England has acted as a safeguard against the recurrence of a court system that yields terror and torture. The right has been recognised by other countries as well. In fact, "*Most former English colonies adopted the privilege against self incrimination as part of their system of criminal procedure*" (Hemholz, 2). In the United States the fifth amendment of the Constitution of the United States provides that no person "*shall be compelled in any criminal case to be a witness against himself*". In Australia the right is also offered to its citizens.

## Burden of Proof

The fear of a tyrannical court system is not the only driving force behind the fight to maintain the right to silence. Supporters of the right also point to the doctrine of the onus of proof. During criminal proceedings the prosecution always has the obligation to provide any and all evidence against the defendant. No assistance can be expected from the accused in proving the Crown case. This concept was initiated in the courts of England. Subsequently, during the inception of the Australian court system, this obligation was carried over to Australia.

Since its introduction in Australia, the concept of the onus of proof has been codified by way of common law. The High Court Decision for *Weissensteiner v. The Queen* reinstated this common law stance. According to the facts from the case, the defendant was accused of murdering two people. During trial the defendant chose not to give or call any evidence. After a guilty verdict was handed down, the defendant appealed on the grounds that the trial judge violated the defendant's right to silence. According to the appellant that violation occurred in the judge's final directory speech to the jury. The subject matter of the speech concerned the silence of the accused during trial. On a further appeal that was brought before the justices of the High Court of Australia, the speech of the trial judge was declared constitutional and the appeal was dismissed. In their decision, Judges Mason, Deane and Dawson specifically agreed with the statement made by the judge that

> *"The crown bears the onus of satisfying beyond reasonable doubt that the accused is guilty of the offence with which he is charged. The accused bears no onus. He does not have to prove anything…you cannot infer guilt simply from his failure to do so".*

The High Court Justices based this opinion on prior case law. They cited Windeyer J in *Bridge v. The Queen* as follows, "*an accused person is never required to prove his innocence: his silence can never displace the onus that is on the prosecution to prove his guilt beyond reasonable doubt."*

Thus, the supporters of the right to silence argue that the accused cannot be required to answer any questions since the onus of proof resides wholly and completely on the side of the prosecution. Limiting the right to silence would shift the burden to the accused.

## The Criminal Justice and Public Order Act

The right to silence during questioning and trial was changed substantially in the U.K 1990's. In 1994, the *Criminal Justice and Public Order Act* modified the right to silence for any person under police questioning in England or Wales. The Act permits the court hearing charge against a person to draw

such inferences as appear proper from the fact of the person's silence in the following circumstances:

- Failure to mention a fact when questioned under caution before charge which is relied on in the person's defence.
- Failure on being charged with an offence or informed of likely prosecution, to mention a fact which it would have been reasonable for the person to mention at the time.
- Failure or refusal to account for objects, substances or marks found on the person, in or on the person's clothing or otherwise in the person's possession, in the place where the person was arrested.
- Failure or refusal after the person's arrest to account for the person's presence at a place at or about the time the offence is alleged to have been committed.

No inferences can be drawn, however, if the person was not given an opportunity to consult a solicitor, prior to being questioned, charged, informed of a prosecution, or requested to explain the matters referred to above.

Before inferences can be drawn in the last two cases the officer should first have explained in ordinary language, amongst other things, the nature of the offence, the possibility of adverse inferences being drawn and that a record is being made of the interview which could be used in the trial. This is in addition to the caution, which is now worded as follows:

> *"You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence".*

Supporters of the Act argued that 'professional' criminals were exploiting the existing law, while innocent people would rarely exercise their right. Changing the law would improve police investigations and adequate safeguards existed to prevent police abuse. Opponents claimed that innocent people may reasonably remain silent for many reasons, and that changing the law would introduce an element of compulsion, and were in clear conflict with the existing core concepts of the presumption of innocence and the burden of proof.

## The New South Wales Experience

The right to silence has had a colourful history in New South Wales. The right to silence first surfaced in NSW as a version carbon copied from England. However, the *Criminal Law and Evidence Act 1891* altered the State's criminal court procedure, subsequently making it impossible for England's version of the right to function in NSW. The Act declared the accused to be a "competent but not compellable witness". Not only did this grant the accused the right to testify at trial, but also it also expressly guaranteed the defendant the right to remain silent at trial.

Since the inception of the *Criminal Law and Evidence Act 1891*, whilst at no point has the right ever been outright denied jury inferences and judicial comments have flickered in and out of admissibility. The last piece of NSW legislation that has altered the right to silence is the *Evidence Act 1995.*

## Right to Silence During Police Questioning

In NSW, "*it is not an offence to refuse to answer questions, including incriminating questions, asked by other persons or bodies*" (NSW LRC, 22). During a trial, neither the judge nor the prosecution are permitted to comment on this silence. This was originally regulated by the common law decision of *Petty and Maiden v. The Queen.* Since this High Court decision was handed down in 1991, NSW has gone on to codify this common law right to silence during police questioning. As a reflection of the pre-existing common law, *The Evidence Act 1995 (NSW)* s89 provides that:

> (1) *In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:*
> *(a) to answer one or more questions, or*
> *(b) to respond to representation,*
> *put or made to the party or the person in the course of official questioning.*
>
> (2) *Evidence of that kind is not admissible if it can only be used to draw such an inference.*
>
> (3) *Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.*
>
> (4) *In this section:*
>
> ***Inference** includes:*
> *(a) an inference of conscious guilt, or*
> *(b) an inference relevant to a party's credibility.*

### Right to Silence at Trial

In the courts of NSW, a defendant must never be compelled to testify. Every witness is granted the right to refuse to testify. Subsequently, the issue that arrises surround the permittance of commentary from the trial judge and the prosecution. The *Criminal Evidence Act 1995* guides NSW in this controversial question. The Act explicitly prohibits any comment from the

prosecution, and limits the type of comment that the trial judge may deliver to the jury.

The *Criminal Evidence Act 1995 s20* provides that:

*"The judge or any party (other than the prosecutor) may comment on a failure to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned".*

Much dispute has arisen over the specific message that the trial judge is permitted to direct towards the jury when the accused exercises his or her right to silence. The *Criminal Evidence Act 1995* prohibits the trial judge from directing the jury to believe that the silence can be equated with guilt. The judicial comment may begin with a reminder that the defendant is entitled to remain silent. After that the judge should point out that the prosecution bears the onus of proof and that above all the silence of the accused cannot be regarded as a sign of guilt. The judicial explanation also complies with the common law ruling that resulted from *Weissensteiner v. The Queen.*

**Q1. To what extent, if any, should information obtained in breach of the privilege against self-incrimination be subject to immunity from use in proceedings relating to the imposition of a civil penalty or civil, administrative or disciplinary proceedings?**

and

**Q2. To what extent, if any, should evidence derived from information obtained in breach of the privilege against self-incrimination should be subject to immunity from use in proceedings against the person compelled to provide the information?**

In relation to both of these questions, the Association chooses to answer by discussing in some detail the advice that we provide to our members regarding inquiries following a death or injury.

Increasingly, police are scrutinised about all aspects of their duties. This is particularly true when there has been a death or serious injury. When the time comes for the officer to be interviewed, the Association recommends that the officer ask the interviewing police whether or not they are being interviewed on the basis that they are suspected of committing a criminal offence. If the answer is 'yes', then the officer should ask if they are to be cautioned. If the officer is cautioned, the Association recommends that the officer should decline to answer any questions.

If the officer is cautioned and indicates that he or she wishes to exercise their right to silence, and hence does not wish to answer any questions about the

death or injury under investigation, the officer can still be directed by the investigators to answer questions. If this occurs the Association recommends that the officer should ensure that he or she include in any response to a directive memorandum or in any record of interview conducted with them, something like the following as contained in the "*Know your rights and obligations*" information booklet as produced by the Police Association of NSW:

> "*Before answering any questions in this record of interview (Or in this reply to the directive memorandum served on me) I wish the following to be recorded. You have advised me that you are investigating (the death of or injuries suffered by.....) at (.....) on (.....). Prior to this record of interview being commenced (or this directive memorandum being served on me) you commenced an interview with me, and you cautioned me. When I exercised my privilege against self-incrimination you terminated that interview and you then told me that you intend to Departmentally interview me about the same matter. You have also told me, that this interview is under the provisions of the Police Service Act (NSW) and I am directed to answer your questions (or prepare a reply to the directive memorandum served on me). I wish it known that I object to participating in this record of interview and answering any of your questions, (or responding to the directive Memorandum) and any answer I make hereafter, and anything I do, is not made or done of my free will, but because I am compelled to do so by your direction. I also wish it understood that I will object to this record of interview (or directive memorandum and my response) and anything that derives from them, being admitted into evidence, or otherwise being used in any criminal, disciplinary, civil, or any other proceedings that are taken against me. I will take the same objection at any Coronial Inquest that may be held in relation to this matter. I will also object to any other person giving evidence about the contents of this document, or anything that derives from the information contained in it*".

**Q3. What obligations, if any, should be placed on officials to inform persons compelled to provide information of their rights?**

The Miranda Warning is given by police in the United States of America to suspects whom they have detained or arrested and intend to question. The Miranda Warnings were mandated by the 1966 United States Supreme Court decision in the case of *Miranda v. Arizona*. They are a means of protecting a criminal suspect's Fifth Amendment right not to be subjected to coerced self-incrimination. Though every U.S jurisdiction has its own regulations regarding what, precisely, must be said to a person when they are arrested, the typical warning is as follows:

> *"You have the right to remain silent. If you give up that right, anything you say can and will be used against you in a court of law. You have*

*the right to an attorney and to have an attorney present during questioning. If you cannot afford an attorney, one will be provided to you at no cost. During questioning, you may decide at any time to exercise these rights, not answer any questions or make any statements"* (Wikipedia).

The courts have since ruled that the warning must be 'meaningful' so it is usually required that the suspect be asked if he understands his rights. Sometime, firm answers of "yes" are required. An arrestee's silence is not a waiver. Evidence has been ruled inadmissible because of an arrestee's poor knowledge of English and the failure if arresting officers to provide the warning in the arrestee's language. Also, because of various education levels, officers must make sure the suspect understands what the officer is saying. It may be necessary to 'translate' to the suspect's level of understanding. Courts have ruled this admissible as long as the original waiver is said and the 'translation' is recorded either on paper or on tape (Wikipedia). A confession not proceeded by a Miranda Warning (where one is necessary) cannot be admitted as evidence against the confessing party in normal judicial proceedings.

The current caution used in NSW is:

*"You are not obliged to say or do anything unless you wish to do so, but whatever you say or do may be used in evidence. Do you understand?"*

**Q4. Should a person be required to object to providing an answer in order to have immunity on the use of that answer?**

The Fifth Amendment to the United States Constitution, which is part of the Bill of Rights, guarantees several protections related to legal procedure. Many of these guarantees stem from English common law.

The Fifth Amendment protects witnesses from being forced to incriminate themselves. To "plead the Fifth" or to "take the Fifth" is to refuse to answer a question because the response could form incriminating evidence. Fifth Amendment protections apply wherever and whenever an individual is compelled to testify. The Fifth Amendment's protections often relate to police interrogations and confessions by suspects.

The Association is of the view that in circumstances whereby a person is compelled or directed to provide an answer, that there should be a general immunity on the use of that answer in civil circumstances, with the exception of internal disciplinary proceedings (example 181D).

**Q5. What procedural safeguards, if any, should be provided where officials have power to compel the provision of self-incriminating information?**

Particularly in relation to hearings or inquiries conducted by the Police Integrity Commission (PIC), Independent Commission Against Corruption (ICAC) and the New South Wales Crime Commission (NSWCC); there are special legislative provisions, which can require police to do certain things. For example, police can be compelled to:

(a) prepare a statement of information
(b) produce documents and records
(c) attend to give evidence.

At PIC, ICAC and the NSWCC, witnesses are compelled to give evidence and answer questions. In other words, there is no privilege against self-incrimination. However, when giving evidence or preparing a statement of information, or producing documents and records, even though it is under compulsion, there are legislative provisions that give witnesses some protection against the evidence being used against them in any subsequent criminal and civil proceedings. Depending on which particular Commission the officer is dealing with, the protection may not extend to disciplinary proceedings. Evidence given over objection at PIC can certainly be used in proceedings under section 181D of the *Police Service Act* – Loss of Commissioner's Confidence.

However, if a witness gives false evidence, or prepares and submits a false or misleading statement, or deliberately fails to produce all the documents or records that they are required to, or destroys them, then such conduct is a criminal offence and the protection against prosecution is not applicable. It is also an offence to provide false or misleading information to the ICAC, even if that information is given voluntarily.

As previously mentioned, the PIC contains the power to make police and other witnesses answer all questions. Notwithstanding this, one can also recognise and understand the need for servants of the government and others to be held accountable for their actions, hence the right of the Police Integrity Commission to make police officers answer questions on specific matters. What is a matter of concern for the Association, however, is the conduct of the PIC investigators who conduct those investigations using intimidation and any other tool made available to them. It is a fact that investigators have no right to compel those they are interviewing to answer all questions they are asked. The Association is greatly concerned with the current practice, which sees Police Officers being denied the right to have a lawyer present during their interviews and "informal discussions" with the investigators. The Police Officers only have a right to a lawyer through the Legal Representation Office (LRO) once a hearing commences. During the pre-hearing investigation stage, no such legal assistance is allowed to the police officer.

When police officers interview suspects, they maintain a written record of the interview, which is often also recorded, and, thus in doing so, the police

officers are being held accountable. It is our understanding that the Police Integrity Commission investigators are not accountable in the same way to the people of this State in relation to what exactly transpires in their interview or conversations with police and citizens. If the investigators are not held accountable by having to keep a record of conversations or interviews, and providing the police officer with a copy of the interview, how can one be sure of what is truly happening and that what is being reported to the Commission as a result of the information gathered by the investigators, is in fact true and correct?

Only once the hearing commences, does the Commissioner have the power to compel the police officer or citizen being questioned to answer all questions asked. However, if the police officer or citizen offers a general objection before answering, this serves to protect them in so far as the evidence they provide can only be used in that room - it cannot be used outside as evidence against them in any criminal proceeding. Unfortunately, for police officers that are coerced and intimidated into answering the questions of the Police Integrity Commission investigators, they are not afforded the same protection. The evidence they provide to the investigators can later be used against them in criminal proceedings.

The Police Integrity Commission investigators do perform and hence satisfy the Act objective of investigating incidents of serious police misconduct and corruption. However, a breach of the right to silence must be made fully accountable and not just to the head of the Police Integrity Commission, Attorney-General or Premier of NSW, but to a Joint Parliamentary Committee with newly extendable functions and powers that would allow a fully objective and, if necessary, critical examination of the processes at work in the Police Integrity Commission with regard to this issue. Until this happens, police officers cannot be treated in a truly fair and just manner in the Police Integrity Commission investigation process. What we are advocating is a system of accountability for the Police Integrity Commission on this issue, not an objection to their right to intrusively demand and receive an answer from police officers and citizens.

If the Police Integrity Commission is lawfully entitled to breach a police officer's or citizen's right to silence, then it must be demanded that they be made fully accountable for every word and act when they breach that right.

The Association would like to thank the Legislative Review Committee for inviting us to contribute to this Parliamentary Inquiry regarding the right to silence. We look forward to our further involvement in relation to this important issue in the future.

## Bibliography

Heath, James. Torture and English Law. Greenwood Press, London, 1982.

Hemholtz, R.H. The Privilege Against Self-Incrimination. The University of Chicago Press, Chicago, 1997.

Morgan, David and Stephenson, Geoffrey (eds). Suspicion and Silence. Blackstone Press Limited, London, 1994.

Whitton, Evan. Trial by Voodoo. Random House, Australia, 1994.

"The Right to Silence in England", myWiseOwl.com

"Miranda Warning", Wikipedia.org/wiki