



issues backgrounder

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NSW Parliamentary Research Service

Right to Silence

On 14 August 2012, the Premier of NSW, Barry O'Farrell, issued a [media release](#) entitled "Crime Crackdown: "Right to Silence" Law Toughened," outlining plans to make changes to the "right to silence." These changes included:

- An amendment to the *Evidence Act 1995* (NSW) to allow juries/judges to draw adverse inferences against a person who refuses to talk to the police when questioned but produces evidence at a later stage.
- A change to the caution currently given by police before they question someone:

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 that?

The media release indicated that this will be changed to:

You are not obliged to say or do anything unless you wish to do so. But it may harm your defence if you do not mention when questioned something which you later rely upon in court. Anything you do say and do may be given in evidence. Do you understand?

The media release stated that these proposed changes "reflect reforms made in Britain and Wales in 1994, and will apply to serious indictable offences." The term "serious indictable offence" is defined in section 4 of the [Crimes Act 1900 \(NSW\)](#), and also section 3 of the [Law Enforcement \(Powers and Responsibilities\) Act 2002 \(NSW\)](#) (or "LEPRA", as it is often referred to), as meaning "an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more."

On 12 September 2012, the NSW Attorney General, Greg Smith [announced](#) the release of an [Exposure Draft Evidence Amendment \(Evidence of Silence\) Bill 2012](#). The Attorney General has [invited submissions](#) on the Draft Bill. Submissions are to be sent to the Director of the Criminal Law Review Division of the Department of Justice and Attorney General. The closing date for submissions is 28 September 2012.

The Government has previously said it intends to introduce proposed legislation into the NSW Parliament in October 2012.

The purpose of this issues backgrounder is to assist members to locate material on the "right to silence." It is organised under the following headings:

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1 Exposure Draft Bill – A brief overview

The long title of the [Exposure Draft Evidence Amendment \(Evidence of Silence\) Bill 2012](#) states that it is a Bill for:

An Act to amend the *Evidence Act 1995* with respect to inferences that may be drawn from the silence during questioning by investigating officials of persons accused of serious indictable offences.

The Bill seeks to insert section 89A into the [Evidence Act 1995 \(NSW\)](#). Section 89A(1) will provide:

89A Evidence of silence in criminal proceedings for serious indictable offences

- (1) In a criminal proceeding for a serious indictable offence, such unfavourable inferences may be drawn as appear proper from evidence that, in answer to any question or in response to any representation in the course of the official questioning of the defendant in relation to the offence, the defendant failed or refused to mention a fact:
- (a) that the defendant could reasonably have been expected to mention in the circumstances existing at the time, and
 - (b) that is subsequently relied on by the defence in the proceeding.

Section 89A(2) sets out two steps that must take place before the drawing of an inference referred to in section 89A(1) is permissible.

The first step is set out in section 89A(2)(a), which provides that such an inference may only be drawn where a "supplementary caution was given to the defendant by an investigating official." The term "supplementary caution" is defined at section 89A(10) as meaning:

. . . a caution given to a person being questioned with the investigation of the commission, or possible commission, of a serious indictable offence that:

- (a) is given to the person subsequently to a standard caution in relation to that offence, and
- (b) indicates that, if the person does not say anything when questioned and fails or refuses to mention a fact subsequently on by the defence in any proceedings brought against the person for the offence, an inference may be drawn that may harm the person's defence.

It is unnecessary for a particular form of words to be used in giving a supplementary caution (section 89A(4)). Supplementary cautions must not be given unless the investigating officer is "satisfied that the offence concerned is a serious indictable offence" (section 89A(5)).

The second step is set out in section 89A(2)(b), which provides that a section 89A(1) inference may only be drawn where "the defendant was allowed the opportunity to consult an Australian legal practitioner about the effect of failing or refusing to mention such a fact." Section 89A(7) provides that a defendant will be "taken not to have been allowed an opportunity to consult an Australian legal practitioner if the defendant's means, and the circumstances, preclude the defendant from obtaining legal advice."

A section 89A(1) inference "cannot be drawn if it is the only evidence that the defendant is guilty of a serious indictable offence" (section 89A(3)).

Section 89A does not apply to defendants who are under 18 years of age or have a cognitive impairment (section 89A(6)). A non-exhaustive definition of the term "cognitive impairment" is provided by section 89A(10).

Schedule 1[3] of the [Exposure Draft Evidence Amendment \(Evidence of Silence\) Bill 2012](#) seeks to insert savings, transitional and other provisions into Schedule 2 of the [Evidence Act 1995 \(NSW\)](#). Proposed clause 24 provides that while section 89A will not apply in relation to hearings which began, or failures to mention facts in response to questions or representations that occurred prior to the insertion of the section, it will apply to "evidence of acts done in connection with the investigation of offences committed before the insertion of that section."

Proposed clause 25 requires a review of section 89A to be undertaken five years after the commencement of the clause, with the outcome of such a review to be tabled in both Houses of Parliament within twelve months after the end of the five year period.

The [media release](#) of 12 September 2012 quotes the Attorney General as saying "[t]he NSW Government is closing a legal loophole to stop criminals exploiting the system to avoid prosecution."

The media release also notes that:

The new law would apply only to adult defendants (over 18 years); would not apply to people with cognitive impairments; and would only apply to people who had had the chance to consult a lawyer about the implications of remaining silent.

The Government is committed to trialling a telephone advice line staffed by lawyers to provide advice to suspects held for questioning by police.

The media release reports the following comment by the Attorney General:

The proposal will safeguard vulnerable people include juveniles and those with a mental illness, but ensure that hardened criminals will face the full force of the law and do not hide behind a wall of silence.

On [12 September 2012](#), in response to a Question Without Notice from Andrew Rohan, the Attorney General made the following statements regarding the [Exposure Draft Evidence Amendment \(Evidence of Silence\) Bill 2012](#):

These reforms will allow juries, magistrates and judges in judge-alone trials to draw an adverse inference against an accused who refuses to respond to questions put by investigating police, but who later produces evidence at trial in a bid to be found not guilty. This evidence must be evidence that the accused could reasonably have been expected to mention in the circumstances existing at the time. Under current law, juries are explicitly instructed by trial judges not to draw an adverse inference from such behaviour. However, the criminal justice system needs to be monitored constantly and corrected to ensure the balance between the rights of the accused and the rights of victims, and of keeping communities safe from crime . . .

The exposure bill to be released today will mean that silence comes with consequences and can no longer be used as a shield by criminals. The exposure bill contains the following safeguards. First, the section does not apply to an accused who is under 18 years of age or who is suffering from a cognitive impairment at the time of questioning. Secondly, a person cannot be convicted solely on the basis of an adverse inference arising from his or her silence. Thirdly, no inference can be drawn at trial for an accused's failure to mention facts if the accused was not given the opportunity to consult a legal adviser before being questioned . . .

I note that the Government will trial a telephone advice line by lawyers to provide advice about the caution to suspects held for questioning by police . . .

As a final safeguard, the amendments will be subject to statutory review after five years. As of now, any accused person will be given the following caution prior to any police questioning, and I am sure those opposite have heard this before, "You are not obliged to say or do anything unless you wish to do so, but whatever you do say may be used in evidence. Do you understand that?" Under the proposed reforms, if the police reasonably suspect the person of having committed a serious indictable offence and later want to rely on an adverse inference, they must give the following supplementary caution . . .

but it may harm your defence if you do not mention when questioned something you later rely on in court. Anything you do say or do may be given in evidence. Do you understand?" If an accused person remains silent, he or she can, of course, explain his or her silence to the judge or jury, who are best placed to consider the credibility of the behaviour [*interjections and other comments omitted*].

2 Meaning and history of the term "right to silence"

The term "right to silence" can have several meanings. In the High Court decision of [Azzopardi v The Queen \(2001\) 205 CLR 50, \[2001\] HCA 25](#), Gleeson CJ said (at paragraph [7]):

The right of silence is not, in this country, a constitutional or legal principle of immutable content. Rather, it is a convenient description of a collection of principles and rules: some substantive, and some procedural; some of long standing and some of recent origin.

In a [speech](#) delivered in 2009, the current Chief Justice of Western Australia, the Hon Wayne Martin, said the following about the term "right to silence":

The expression 'right to silence' is inaccurately used to describe, in a shorthand way, a group of loosely related immunities. They include the general immunity from punishment as a consequence of a refusal to answer questions or provide information, a particular immunity from answering questions which might incriminate, a general immunity (subject to exemptions) from having to disclose the evidence which will be relied upon by an accused person at trial, and an immunity from comments adverse to an accused person being made by a prosecutor as a consequence of that person not giving evidence at trial. These diverse immunities do not find their source in one spring of crystal clear water flowing through the various tributaries, streams and rivers that make up the justice system. Rather, they each have their own diverse historic origins and are subject to their own specific exemptions and limitations.

The proposals of the NSW Government relate only to changes to the inferences that may be drawn from an accused person's failure to respond to police interrogation, which is known as the "pre-trial" right to silence.

In [Petty and Maiden v The Queen \(1991\) 173 CLR 95, \[1991\] HCA 34](#), Gaudron J drew a link between this pre-trial right to silence and the fundamental principle that a person is innocent until they are proven to be guilty beyond reasonable doubt (at pp 128-129):

Although ordinary experience allows that an inference may be drawn to the effect that an explanation is false simply because it was not given when an earlier opportunity arose, that reasoning process has no place in a criminal trial. It is fundamental to our system of criminal justice that it is for the prosecution to establish guilt beyond reasonable doubt. The corollary of that – and it is equally fundamental – is that, insanity and statutory exceptions apart, it is never for an accused person to prove his innocence. Therein lies an important aspect of the right to silence, which also encompasses the privilege against incrimination (*footnotes omitted*).

Some have argued that the pre-trial right to silence has already been diminished or abrogated in a number of ways, including by certain provisions of the [Evidence Act 1995 \(NSW\)](#) and by pre-trial disclosure requirements (see for example [this paper](#) delivered to a Government Lawyers Convention on 18 October 2000 by former Public Defender and current District Court Judge John Nicholson SC. For more information about pre-trial disclosure, see below at part 4). Others have noted difficulties that arise in relation to the pre-trial right to silence and admissions

obtained in covert or undercover police operations (see for example B Hocking and L Manville, "[What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Fiction](#)" (2001) 1(1) *Macquarie Law Journal* pp 63-92, from p 86).

For further information about the content and historical background of the right not to respond to police questions see:

[Briefing Paper No 11/97: The Right to Silence](#) (1997), by Gareth Griffith, NSW Parliamentary Research Service, at pp 6-19.

[Report 95: The Right to Silence](#) (2000), NSW Law Reform Commission, at paragraphs [2.3]-[2.7], which set out the history of the right to silence when questioned by police, and paragraphs [2.8]-[2.12], which set out the law of NSW.

[Petty and Maiden v The Queen \(1991\) 173 CLR 95, \[1991\] HCA 34](#) – sets out the common law position regarding the pre-trial right to silence. Note that this is now covered by section 89 of the [Evidence Act 1995 \(NSW\)](#) (see below at part 3)

[Azzopardi v The Queen \(2001\) 205 CLR 50, \[2001\] HCA 25](#) – this case concerned section 20(2) of the [Evidence Act 1995 \(NSW\)](#), which refers to comments that can be made regarding the failure of the defendant to give evidence in a criminal proceeding for an indictable offence, rather than to the pre-trial right to silence. However, McHugh J's judgment contains an account of the history of the right to silence in which he argues that, contrary to long-held beliefs that the "privilege [against self-incrimination] and the incidental right to silence were longstanding principles of the common law", dating back to the 17th Century, in fact the "self-incrimination principle . . . did not become firmly established as a principle of the criminal law until the mid-nineteenth century or later" (see from paragraph [118]). Justice McHugh refers to the work of R Helmholz et al in *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) ([catalogue record](#)) in support of this contention.

[Weissensteiner v The Queen \(1993\) 178 CLR 217, \[1993\] HCA 65](#), which refers to the distinction between the pre and at trial right to silence – see judgment of Mason CJ, Deane and Dawson JJ at paragraph [31] and judgment of Brennan and Toohey JJ at paragraph [1].

3 Legislation and other primary sources on the right to silence

Evidence Act 1995 (NSW): Section 89 of the [Evidence Act 1995 \(NSW\)](#) provides:

Section 89 Evidence of silence

- (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 a representation, put or made to the party or other person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.

- (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 consciousness of guilt, or
 - (b) an inference relevant to a party's credibility.

The Dictionary of the [Evidence Act 1995 \(NSW\)](#) defines the term "official questioning" as meaning "questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence."

Section 89 has not been amended since the commencement of the Act. For commentary on section 89, see Stephen Odgers SC, *Uniform Evidence Law* (10th ed, 2012) ([catalogue record](#)) at [1.3.5680]. Odgers considers that section 89 is narrower in its operation than the common law position. However, note that the effect of section 9 of the [Evidence Act 1995 \(NSW\)](#) is to retain the common law "except so far as [the] Act provides otherwise expressly or by necessary amendment" (see Odgers at [1.1.1100] and [R v Anderson \[2002\] NSWCCA 141 \(24 April 2002\)](#), cited by Odgers at [1.3.5680]).

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) (LEPRA): Part 9 of [LEPRA](#) contains provisions regarding the powers of police to question suspects, including section 122, which provides that police custody managers must caution people who are detained under Part 9 "as soon as practicable" that they do not have to say or do anything, but that anything they say or do may be used in evidence.

Criminal Procedure Act 1986 (NSW): The [Criminal Procedure Act 1986 \(NSW\)](#) contains provisions relating to pre-trial disclosure. These are discussed further below at part 4.2). The Act also sets out those offences that are to be dealt with on indictment and those that are to be dealt with summarily (see sections 5 and 6 and Schedule 1).

Police Code of Practice for "CRIME": The [Police Code of Practice for CRIME \(Custody, Rights, Investigation, Management and Evidence\)](#) sets out the powers and responsibilities of officers of the NSW Police Force when investigating offences. Under the heading "Questioning Suspects", CRIME states (at p 66):

You do not have any power to detain or arrest someone merely to question them.

All people have the Common Law right to silence, except where the law requires them to provide information.

Pages 67-68 of CRIME set out guidance in respect of the cautioning of people.

Criminal Trial Courts Bench Book: The [Criminal Trial Courts Bench Book](#), which is available on the website of the [Judicial Commission of NSW](#), contains a [suggested](#)

[direction](#) to be given to a jury in cases where an accused person has exercised their pre-trial right to silence.

4 Parliamentary and other material from NSW

Parliamentary Research Service Briefing Paper: [Briefing Paper No 11/97: The Right to Silence](#) provides an overview of key principles, and also sets out the background to and both sides of the debate regarding the changes to the law of England and Wales made in 1994.

Law Reform Commission Right to Silence Report: In 1997, following a proposal for reform of the justice system in NSW put forward by then Police Commissioner, Peter Ryan, the then Attorney General, Jeff Shaw, asked the NSW Law Reform Commission to undertake a review of the law relating to the right to silence.

In 2000, the NSW Law Reform Commission published [Report 95: The Right to Silence](#). [Chapter 2](#) of the report deals specifically with the right to silence when questioned by police. The Law Reform Commission's analysis of the case in favour of modifying the right to silence can be found at paragraphs [2.60]-[2.102]. The Commission's analysis of the case against modifying the right to silence when questioned by police can be found at paragraphs [2.103]-[2.135].

Ultimately, the Commission made the following recommendation:

Recommendation 1: The Commission recommends that s 89 of the Evidence Act 1995 (NSW) be retained in its current form. Legislation based on s 34, 36 and 37 of the Criminal Justice and Public Order Act (Eng) should not be introduced in New South Wales.

For a discussion of the rationale underpinning this recommendation, see paragraphs [2.136]-[2.139] of [Chapter 2](#). The Commission stated that it had received 60 submissions as part of its review of the right to silence. It indicated that a number of submissions had been in favour of allowing adverse inferences to be drawn at trial in cases where the defendant has refused to answer police questions. However, the Commission noted that some of these submissions had indicated that their position was "conditional upon increased protections for suspects" [2.136].

The Commission said it considered that:

2.138 . . . the right to silence is an important corollary of the fundamental requirement that the prosecution bears the onus of proof, and a necessary protection for suspects. Its modification along the lines provided for in England and Wales and Singapore would, in the Commission's view, undermine fundamental principles concerning the appropriate relationship between the powers of the State on the one hand and the liberty of the citizen on the other, exacerbated by its tendency to substitute trial in the police station for trial by a court of law. There are also logical and practical objections to the English provisions. An examination of the empirical data, moreover, 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.

Finally, the Commission concluded that one of the key features of the system in England and Wales is that suspects there have a statutory right to legal advice:

- 2.139 There is in this State an additional practical problem with importing the English law. A fundamental requirement of fairness in any obligation imposed to reveal a defence when questioned by police is that legal advice be available to suspects to ensure that they understood the significance of the caution and the consequences of silence. This has been acknowledged in the United Kingdom.²³⁹ Provision of duty solicitors to give the necessary advice is impossible within presently available legal aid funding. Significant increases in legal aid funding appear to be unlikely and, in the Commission's view, could not be justified (on financial grounds alone) unless there were significant advantages that can clearly be demonstrated for the effectiveness of investigations and the administration of justice.

Parliament of NSW, Legislation Review Committee: In 2005, the Legislation Review Committee produced a [discussion paper](#) on the Right to Silence. The purpose of the discussion paper was to seek "comment in relation to the principles it should apply when considering bills that trespass on the right to silence." The discussion paper contains information about the right to silence in Australian law, international human rights law and the law of some other jurisdictions, including England and Wales, the United States, New Zealand, Canada and South Africa. In 2006, Legislation Review Committee produced a [further paper](#) summarising the responses it had received to the discussion paper.

Selected recent Parliamentary and related material:

Parliamentary Debates (Legislative Assembly), [Question Without Notice from Dr Geoff Lee and response from Premier](#) (Tuesday, 14 August 2012).

Parliamentary Debates (Legislative Assembly), [Motion](#) and [Urgent Motion](#) of Troy Grant - other speakers include Paul Lynch and Bryan Doyle (Tuesday, 14 August 2012).

Article by the Attorney General, "[Breaking a legal shackle to help convict criminals](#)", *Daily Telegraph*, (Thursday, 16 August 2012).

Article by the Member for Dubbo, Troy Grant, "[Silence is a privilege too often abused](#)", *Daily Liberal* (Thursday, 23 August 2012), p 11.

[Media release](#) entitled "O'Farrell trashes 400 year old right to silence", David Shoebridge (NSW Greens) (14 August 2012).

Selected recent stakeholder comment:

Article by Scott Weber, NSW Police Association, [Police News](#), (April 2012), p 25.

[Media release](#) entitled "Government's "right to silence" proposal deeply flawed", NSW Law Society (15 August 2012).

[Save the Right to Silence petition](#) – see NSW Bar Association [Inbrief](#) (17 August 2012) and the [website](#) of the NSW Council for Civil Liberties.

4.1 Empirical research – how often is silence relied upon in NSW?

There appears to be a limited amount of data available regarding how often people questioned by police in NSW exercise their right to silence. It seems that such data is difficult to obtain. In *Interrogating Images: Audio Visually Recorded Police Questioning of Suspects* (2007) ([catalogue record](#)), D Dixon and G Travis "report the results of a series of empirical studies of electronically recorded interviews with suspects" (see Chapter 2). In relation to the right to silence, they note (at p 93):

Like other researchers (McConville & Hodgson 1993: Leng 1993), we found that identifying and counting instances when the right to silence is exercised is a more difficult and subjective task than many may expect. There is considerable potential for expanding or contracting the category of silence, as close examination in some variations of non-response reveals. While superficially trivial, these matters are of considerable potential significance when policy makers seek empirical evidence on which to base possible legal changes. The most contested area is when a suspect answers some, but not all, questions. The way in which some interviewers in our samples questioned suspects made it difficult to determine whether or not the suspect should be regarded as having refused to answer a specific question.

Similar difficulties appear to have been encountered by those who conducted studies on the use of the right to silence in the United Kingdom prior to the 1994 changes to the law. For more information on these definitional and methodological problems, see [Briefing Paper No 11/97: The Right to Silence](#), at pp 28-29, and also Home Office Research Study 199, [The Right of Silence and the Impact of the Criminal Justice and Public Order Act 1994](#) (2000) by T Bucke, R Street and D Brown at 30.

Dixon and Travis include the following table in *Interrogating Images*, (Table 9.3, p 96):

Was a question not answered and this non-response was a refusal?	Interviews (N=175) %
Yes, one question	3
Yes, some questions	10
Yes, all questions	3
Undecided	6
No refusal	67
Unknown	10

The authors make the following comments regarding this table (pp 96-97):

As this table indicates, while only 3% of suspects refused to answer any questions, 16% refused to answer at least one. Which figure attracts attention will depend on the interest and purpose of the reader. We define 'non-response' as either silence or a clear refusal to answer a question ('no comment'). We do not include evasive responses. Doing so would increase the non-response rate, but it would involve subjective, even speculative, assessment of what is an acceptable answer to a question.

As Dixon (1997:ch6 [\[catalogue record\]](#)) argued, suspects' reasons for refusing to answer questions are more complex than is often assumed: attempted evasion of guilt is only ever one possible motive. Some suspects in our sample provided reasons for their non-cooperation. Twenty-six

suspects were involved in the 28 sample 1 ERISPs in which there was at least one refusal to answer. Eleven of these offered reasons for their refusal. These were: the suspect had received legal advice to remain silent (2); it was not a convenient time to answer questions (1); the story had been told to police previously and did not need to be repeated (2); the suspect did not know the answer (2); the suspect was concerned about possible negative repercussions (4); and 'Everything was done illegally' (1). This last suspect offered the Adopting Officer a list of complaints that accounted for his problem with the ERISP and his lack of cooperation with police . . . (*footnotes omitted*).

Other available research is now very dated. A paper published by BOCSAR in 1980 contained the results of a review of District Court files. The sample covered "all persons who had their cases finally dealt with by the Sydney District Court in the six week period 9th November – 14th December 1989." The review found that:

In the study cases, few defendants exercised their right to remain silent at any stage during the interrogation and an even fewer number exercised their right at the outset and continued the silence for the duration of the entire period of the interrogation (p 109).

The value of this finding is counteracted by both the age of this research and the different context in which the contemporary justice system operates. For example, it was also found that 41% of defendants had made admissions before being informed of their right to silence, and that police did not necessarily always inform a person of this right before asking questions. The paper notes:

The absence of a caution in such cases is partly explicable because of the vagueness of the Police Instructions which, in effect, only require a caution to be administered when the person is arrested or "to be charged" (p 111).

This paper is held by the Parliamentary Library. It is available upon request, but is not for loan ([catalogue record](#)).

In association with [Report 95: The Right to Silence](#), the NSW Law Reform Commission also published [Research Report 10: The Right to Silence and Pre-Trial Disclosure in NSW](#). This Research Report sets out the results of a study commissioned by the Law Reform Commission "to obtain information on the practical operation of the right to silence and pre-trial and pre-hearing disclosure in New South Wales in the six months from 1 June 1998 to 30 November 1998" (see paragraph [1.8]). The Commission's findings in relation to the exercise of the right to silence are set out in [Chapter 2](#) of Research Report 10.

4.2 Pre-trial disclosure

Some of the discussion regarding the need for a change to the right to silence when questioned has referred to the problem of what are sometimes called "ambush defences", where defendants raise issues at their trial that they could have raised earlier, leaving the prosecution with inadequate time to prepare, and, potentially, increasing the likelihood that they will be acquitted because the prosecution is unable to meet the requisite standard of proof.

As noted above, the [Criminal Procedure Act 1986 \(NSW\)](#) contains a number of provisions setting out requirements in relation to pre-trial disclosures that either must

be made or can be ordered by the court by both the defence and the prosecution. Most of these provisions are set out in Division 3, Part 3 of Chapter 3 of the Act. Section 134(1) sets out the purpose of Division 3:

- (1) The purpose of this Division is to reduce delays in proceedings on indictment by:
 - (a) requiring certain pre-trial disclosure by the prosecution and the defence, and
 - (b) enabling the court to undertake case management where suitable in those proceedings, whether on its own motion or on an application by a party in the proceedings.

Division 3 was initially inserted in the [Criminal Procedure Act 1986 \(NSW\)](#) by the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* (NSW). The scheme initially adopted was replaced in 2009 by the *Criminal Procedure Amendment (Case Management) Act 2009* (NSW). The Department of Attorney General and Justice is currently undertaking a [review](#) of Division 3, Part 3 of Chapter 3 of the Act "to determine whether the Division has been effective in reducing delays in criminal proceedings prosecuted on indictment, and the cost impacts of the procedures."

Notice of alibi: Division 4 of Part 3, Chapter 3 also contains relevant provisions. Included amongst these is section 150, which requires the accused in matters being dealt with on indictment to provide notice regarding an alibi they intend to rely upon at least 42 days prior to trial:

Section 150 Notice of alibi

- (1) This section applies only to trials on indictment.
- (2) An accused person may not, without the leave of the court, adduce evidence in support of an alibi unless, before the end of the prescribed period, he or she gives notice of particulars of the alibi to the Director of Public Prosecutions and files a copy of the notice with the court.
...
- (4) The court may not refuse leave under this section if it appears to the court that, on the committal for trial of the accused person, he or she was not informed by the committing Magistrate of the requirements of subsections (2), (3) and (7) and, for that purpose, a statement in writing by the committing Magistrate that the accused person was informed of those requirements is evidence that the accused person was so informed.
...
- (7) A notice under this section must be given in writing to the Director of Public Prosecutions, and may be given by delivering it to the Director, by leaving it at the Director's office or by sending it in a letter addressed to the Director at the Director's office.
- (8) In this section:
evidence in support of an alibi means evidence tending to show that, by reason of the presence of the accused person at a particular place or in a particular area at a particular time, the accused person was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.
prescribed period means the period commencing at the time of the accused person's committal for trial and ending 42 days before the trial is listed for hearing.

The [Criminal Trial Courts Bench Book](#) contains a [suggested direction](#) to be given by the court where an accused person seeks to rely upon an alibi. Note 1 to this direction states:

Notice of an alibi must be given by the accused: *Criminal Procedure Act 1986*, s 150. The accused requires leave from the court to introduce alibi evidence if notice is not given within the prescribed period. A court should be slow to refuse a leave application under s 150(2) unless prejudice arises such as is incapable of being addressed without significant disruption of the trial: *R v Skondin* [2005] NSWCCA 417 at [47].

The statutory requirement relating to the disclosure of alibi evidence predates the inclusion of Division 3, Part 3 of Chapter 3 – see NSW Law Reform Commission [Report 95: The Right to Silence](#) at paragraphs [3.19]-[3.20].

Background to 2001 amendments to the Criminal Procedure Act 1986: The 2001 amendments to the [Criminal Procedure Act 1986 \(NSW\)](#) attracted criticism from some stakeholders regarding their potential implications for certain aspects of "due process", including the right to silence (see for example the second reading debate in the Legislative Council on [6 December](#) and [7 December](#) 2000). Also see Parliamentary Research Service [Briefing Paper No 12/2000: Pre-Trial Defence Disclosure: Background to the Criminal Procedure Amendment \(Pre-Trial Disclosure\) Bill 2000](#) by Gareth Griffith, which sets out the debate surrounding the changes.

The Law Reform Commission had considered the issue of pre-trial disclosure in [Chapter 3](#) of [Report 95: The Right to Silence](#), prior to the making of the 2001 amendments.

In 2004, Legislative Council Standing Committee on Law and Justice conducted an [inquiry](#) into the operation of the 2001 pre-trial disclosure amendments. Amongst other issues, the Committee had been asked to review the impact of the changes on the right to silence. However, in its [second report](#), the Committee noted (at [4.36]):

It appears to the Committee that there are still strong divisions as to the impact of pre-trial disclosure orders on the three doctrines examined in this section, as encountered by the Law Reform Commission in its review of the right to silence.¹³⁹ The Committee notes, however, that the majority of inquiry participants expressed the view that the new pre-trial disclosure orders do not impact negatively on the right to silence, the burden of proof and the presumption of innocence. The Committee is aware that any impact that they may have is difficult to gauge at this stage due to the small number of orders made. The Committee has therefore not formed its own view on this issue.

The Committee's [first report](#) had been delivered in 2002, but the Committee had concluded at that time that "the limited use of pre-trial disclosure orders to date precludes an effective assessment of the Amendment Act and the system of pre-trial disclosure" in NSW.

5 Select material from other Australian jurisdictions

Queensland Law Reform Commission, [Report No 59: The Abrogation of the Privilege against Self-Incrimination](#) (2004).

Northern Territory Law Reform Committee, [Report on the Right to Silence](#), Report 25 (2002).

Law Reform Commission of Western Australia, [Project 92: Review of the Criminal Justice System Final Report](#) (2000), see [Chapter 24: The 'Right to Silence'](#).

Parliament of Victoria, Scrutiny of Acts and Regulations Committee, [The Right to Silence Final Report](#), (March 1999).

Parliament of Victoria, Scrutiny of Acts and Regulations Committee, [The Right to Silence: Examination of the Issues \(Issues Paper\)](#) (June 1998).

Australian Law Reform Commission, [Report 2: Criminal Investigation](#) (1975), see [Chapter 5: Questioning and the Right to Silence](#).

6 Select material from England and Wales

[Criminal Justice and Public Order Act 1994](#). See sections 34-37, which make provision for the drawing of "such inferences as appear proper" from an accused person's silence before and during trial, and also from the failure of an accused person to properly account for "objects, substances or marks" either on their person/clothing/footwear or in their possession or in any place they are at the time of their arrest, and from the failure of an accused person to account for their presence at a particular place.

[Police and Criminal Evidence Act 1984](#) (known as "PACE"). See [section 58](#), which refers to access to legal advice.

Home Office webpage with links to [PACE Codes of Practice](#), which the webpage states, together with the *Police and Criminal Evidence Act 1984*, "provide the core framework of police powers and safeguards around stop and search, arrest, detention, investigation, identification and interviewing detainees."

Home Office webpage with information on [police custody](#).

[Legal Guidance](#), which is prepared by the Crown Prosecution Service to provide guidance to prosecutors (see the [User Guide](#)) contains information regarding [Adverse Inferences](#). This section includes the following guidance regarding when adverse inferences will not be drawn under section 34 of [Criminal Justice and Public Order Act 1994](#) (which deals with the effect of accused's failure to mention facts when questioned or charged):

What prevents Section 34 applying?

- No adverse inferences can be drawn if the police have made up their mind to charge. Under the provisions of Code C paragraph 11.6, questioning must cease once the investigating officer/custody sergeant is of the view that there is a realistic prospect of conviction, and any interview after that point should not take place - *Pointer* [1997] Crim.L.R. 676. (But note that if the officer still has an open mind to the involvement or otherwise of the suspect, an interview can proceed even if there is clear evidence of guilt - *Gayle* [1999] Crim.L.R. 502, CA).

- No adverse inference can be drawn if the case is so complex or related to matters so long ago, that silence would be justified as no sensible immediate response was appropriate.
- No adverse inferences can be drawn if the facts in question were not known to the defendant at the time when he failed to disclose them. *Nickolson* [1999] Crim. L.R. 61. Refer to [Pre-interview Disclosure](#) below in this chapter.
- No adverse inferences can be drawn unless legal advice is offered or made available from the initial stages of interrogation. This principle applies to terrorism cases. *Murray (John) v UK* (1996) 22 E.H.R.R. 29; *Averill v UK* [2001] 31 E.H.R.R. 3 and section 58 Youth Justice and Criminal Evidence Act 1999.
- The language of section 34, (and subsections 36 and 37) indicate that adverse inferences cannot be drawn if the defendant faces trial on a different offence from that with which he was charged or given warning of prosecution (section 34) or which was originally specified when he was cautioned (section 36) or arrested (section 37). In the light of the charging program, such a situation should now be a rare occurrence.
- A bare admission of facts in the prosecution case, or a mere suggestion or hypothesis are not facts relied on by the defence for the purposes of section 34. *Betts and Hall* [2001] 2 Cr.App.R. 16. Mere suggestion or hypothesis cannot be a foundation for adverse inferences. *Nickolson* [1999] Crim. L.R. 61.

Both *Murray (John) v UK* and *Averill v UK* are authority for the proposition that adverse inferences cannot be drawn from silence during questioning unless legal advice was offered or made available in the initial stages of interrogation. These cases were decisions of the [European Court of Human Rights](#).

[Report of the Royal Commission on Criminal Justice](#) (1993) – In particular Chapter 4: "The Right of Silence and Confession Evidence" contains an outline of both sides of the debate, as well as a discussion of empirical evidence from studies undertaken in the United Kingdom into the exercise of the right to silence.

Home Office Research Study 199, [The Right of Silence and the Impact of the Criminal Justice and Public Order Act 1994](#) (2000) by T Bucke, R Street and D Brown.

7 Books

D Brown et al, *Criminal Laws: Materials and commentary on criminal law and process of New South Wales* (5th ed, 2011), in particular 3.6.3 "A right to silence?" [catalogue record](#).

D Dixon, *Law in Policing* (1997), in particular Chapter 5: The Legal (Non)Regulation of Custodial Interrogation in New South Wales and Chapter 6: "Silent Suspects and Police Questions" [catalogue record](#).

S Easton, *The Case for the Right to Silence* (2nd ed, 1998) [catalogue record](#).

R Hayes and M Eburn, *Criminal Law and Procedure in New South Wales* (3rd ed, 2009) [catalogue record](#).

R Helmholtz et al, *The Privilege Against Self-Incrimination: Its Origins and Development* (1997) [catalogue record](#).

D Morgan and G Stephenson (eds) *Suspicion and Silence: The Right to Silence in Criminal Investigations* (1994) – see for example Chapter 1: "The Right to Silence Debate" by R Leng, which sets out the debate over the pre-trial right to silence in the United Kingdom at the time the Government was considering the amendments made in 1994 to the right to silence [catalogue record](#).

S Odgers SC, *Uniform Evidence Law* (10th ed, 2012) [catalogue record](#).

8 Select journal articles

There are many journal articles regarding the right to silence. The list below includes just a few, but the Parliamentary Library can provide access to many more. Where links are not provided below, the articles are available on the AGIS or APAIS Informit and HeinOnline databases, which can be accessed from the Parliamentary Library [database page](#) on Parliament's intranet. For assistance locating these articles and other articles, please contact the Library.

H Dale, "[I'll Take the Fifth on That](#)" (2008) 52(1-2) *Quadrant* pp 57-59 (AGIS Plus Text (Informit)).

G L Davies "Justice Reform: A Personal Perspective" [\(1996\) \(Summer\) Bar News](#) pp 5-12.

G L Davies "[The Prohibition against Adverse Inferences from Silence: A Rule without Reason? - Part I](#)" (2000) 74 *Australian Law Journal* pp 26-41.

G L Davies "[The Prohibition against Adverse Inferences from Silence: A Rule without Reason? - Part II](#)" (2000) 74 *Australian Law Journal* pp 99-105.

D Dixon, "[Common Sense, Legal Advice and the Right to Silence](#)" (1991) *Public Law*, pp 233-254.

D Dixon, "Politics, Research and Symbolism in Criminal Justice: The Right of Silence and the Police and Criminal Evidence Act" (1991) 20 *Anglo-American Law Review* pp 27-50 (HeinOnline, [database page](#)).

D Dixon, "[The Myth of the Right to Silence](#)" (1995) 6(1) *Polemic* pp 13-16.

D Hamer, "[Does Silence Imply Guilt](#)" *Precedent* (2006) pp 5-7 (APAIS Full Text (Informit), [database page](#)).

G Heydon, "[When silence means acceptance: Understanding the right to silence as a linguistic phenomenon](#)" (2007) 32(3) *Alternative Law Journal* pp 149-153 (AGIS Plus Text (Informit))

B Hocking and L Manville, "[What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Fiction](#)" (2001) 1(1) *Macquarie Law Journal* pp 63-92.

M Ierace, "[Right to Silence: A response to The Honourable Justice G L Davies' paper](#)" (1999) (Spring) *Bar News* pp 33-36 (AGIS Plus Text (Informit)).

J Jackson, "Silence Legislation in Northern Ireland: The Impact After Ten Years" (2001) 6(2) *Journal of Civil Liberties* pp 134-149 (HeinOnline, [database page](#)).

A Ligertwood, "[The right to remain silent – Part I](#)" (2006) 87(2) *Police Journal* (South Australia) pp 34-37 (AGIS Plus Text (Informit)).

A Ligertwood, "[The right to remain silent – Part II](#)" (2006) 87(3) (June) *Police Journal* (South Australia) pp 24-27 (AGIS Plus Text (Informit)).

S Matters, "[Anything You Don't Say May Be Given in Evidence: Protecting the Interests of Justice or Emasculating A Fundamental Right?](#)" (1997/8) 4(1) *Deakin Law Review* pp 49-72 (AGIS Plus Text (Informit)).

T Parsons, "[The right to silence: reviewing the review](#)" (2006) 74(4) *Law Institute Journal*, pp 62-65 (AGIS Plus Text (Informit)).

P Plowden, "Right to Silence - Inference Drawn at Trial from Silence under Police Questioning under s.34 CJPOA - Defective Direction from Trial Judge - Conviction Upheld as Safe by Court of Appeal - Held Inference Not Itself in Breach of A6 - However Defective Direction Could Not Be Remedied by Appellate Court - Hence Breach A6 - *Condron v. United Kingdom* - European Court of Human Rights 35718/97" *Case Analysis* (2000) 5(2) *Journal of Civil Liberties* pp 253-262 (HeinOnline, [database page](#)).

9 Extra-judicial speeches

P Johnson and M Latham (Supreme Court of NSW) "[Criminal Trial Case Management: Why Bother?](#)", AIJA Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration Conference (7-9 September 2011).

W Martin (Chief Justice, of Western Australia), "[Current Issues in Criminal Justice](#)" speech in (2009) 36(5) *Brief* pp 27-33.

R McDougall (Supreme Court of NSW), "[The Privilege Against Self-incrimination: a time for reassessment](#)" 18 October 2008.

10 Select print and online media reports and opinion pieces from 2012

J Fife-Yeomans, "[Restrict right to silence demand](#)", *Daily Telegraph* (16 January 2012), p 6.

A Patty, "[Increased powers to combat shootings](#)", *Sydney Morning Herald*, (17 January 2012), p 2.

["Protecting the rule of law"](#), *Sydney Morning Herald*, (Wednesday, 18 January 2012), p 12.

S Weber, N Cowdery, R Cotterell-Jones and M Bagaric, "[Should the right to silence be removed?](#)" *Sydney Morning Herald* (Saturday, 21 January 2012), p 35 ("The Question" feature, News Review).

A Patty, "[Right to silence law changed](#)" *Sydney Morning Herald* (Tuesday, 14 August 2012), online.

A Clennell, "[Old Barry to give crims the silent treatment](#)", *Daily Telegraph* (Wednesday, 15 August 2012), p 2.

S Gerathy, "[Police back changes to right to silence laws](#)", ABC News website, (Wednesday, 15 August 2012).

R Olding, "[House Shots: Police admit weapons are too available](#)", *Sydney Morning Herald* (Wednesday, 15 August 2012), p 2.

A Patty, "[Right to remain silent at risk under O'Farrell's legal crackdown](#)", *Sydney Morning Herald* (15 August 2012), p 1.

A Patty "[Right to remain not quite so silent: lawyers react](#)" *Sydney Morning Herald* (Wednesday, 15 August 2012), online edition.

T McDonald, "[NSW to change the right to silence](#)", AM radio program, ABC (Wednesday, 15 August 2012).

I Salusinszky, "[O'Farrell reins in the right to silence](#)", *The Australian* (Wednesday, 15 August 2012), p 3.

J Corbett, "[Say piece, hold peace](#)", *Newcastle Herald* (Thursday, 16 August 2012), p 10.

D Dixon, "[On the right to silence, all the rhetoric is deafening](#)", *Sydney Morning Herald* (Thursday, 16 August 2012), p 11.

"[Tougher laws for accused criminals on Grant's agenda](#)", *Daily Liberal* (Friday, 17 August 2012), p 14.

P Ackerman, "[Silent majority will have no fear of speaking up](#)", *Daily Telegraph* (Friday, 17 August 2012), p 40.

J Dowd, "[Right to silence change is bad law](#)", *The Australian* (Friday, 17 August 2012), p 30 (Legal Affairs).

H Aston, "[This particular Bill needs a little more thought](#)", *Sun Herald* (Sunday, 19 August 2012), p 77.

C Waterstreet, "[Shouting out our right to silence](#)", *Sun Herald* (Sunday, 19 August 2012), p 79.

"[ALS backs the right to silence](#)", *Koori Mail* (Wednesday, 22 August 2012), p 3.

["Making some noise over loss of silence"](#), *Western Advocate* (Wednesday, 22 August 2012), p 3.

R French, "[No silence on rights](#)", *Newcastle Herald* (Wednesday, 22 August 2012), p 10.

M Morri, "[Sydney shooting victims forced to talk](#)", *Daily Telegraph* (Saturday, 8 September 2012), p 2.

M Morri and D Ongaro, "[Silent and deadly](#)", *Daily Telegraph* (Saturday, 8 September 2012), p 41.

["Fears over right to silence changes"](#), ABC News online (Tuesday, 11 September 2012).

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