THE UNIVERSITY OF NEW SOUTH WALES

KINGSFORD LEGAL CENTRE

3 October 2012

Penny Musgrave
Director
Criminal Law Review
Department of Attorney General and Justice
GPO Box 6
Sydney 2001

By email: lpclrd@agd.nsw.gov.au

Dear Ms Musgrave,

Right to silence laws in NSW

Kingsford Legal Centre (KLC) is writing to oppose the proposed changes to the right to silence in the Evidence Amendment (Evidence of Silence) Bill 2012. We are opposed to these changes because they:

- would erode the right of the accused to a fair trial;
- are not based on any empirical-based research;
- do not have the appropriate safeguards for vulnerable people; and
- will not be combined with adequate legal representation.

About Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government Areas since 1981. KLC provides general advice on a wide range of legal issues and undertakes casework for many clients who, without our assistance, would be unable to afford a lawyer. In 2011 KLC provided 1818 legal advices and opened 388 new cases. KLC also has a specialist employment law service, a specialist discrimination law service (NSW wide) and an Aboriginal Access Program. In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

The right to a fair trial

KLC opposes the Bill because it undermines the system of a fair trial. The right to silence is a fundamental tenet of justice for most Westminster countries. It acts to protect citizens from excess exercises of state authority. We are concerned that the changes would, in effect, reverse the presumption of innocence because of the pressure on the accused to provide a defence when they are taken into custody. This could potentially lead to miscarriages of justice as many people, especially first time offenders who may be very nervous, could panic when questioned by the police. There is a significant possibility that the proposed changes may be challenged in the High Court on the basis that using silence against the accused without legal advice would deny them a fair trial.

Lack of empirical support

Empirical evidence does not suggest that the change in the law will produce the desired results. Research conducted in 2000 by the NSW Law Reform Commission concluded that the empirical data does not support the argument that the right to silence is widely exploited by guilty suspects nor does it impede the prosecution and conviction of offenders. We are not aware of any subsequent research that supports the changes.

Further, in its 2006 review of the right to silence, the NSW Parliament Legislation Review Committee has concluded that there was an overwhelming majority support for maintaining the right to silence.[1]The Legislation Review Committee recommended principles to be applied when considering future bills. Of particular relevance is the recommendation that the right to silence should not be abrogated "unless such abrogation is justified by, and in proportion to, an object in the public interest". There is no evidence that the proposed changes are justified and proportionate to a public interest objective.

The main aim of the amended legislation appears to be to assist the police in being able to procure information from an accused. In addition to there being a lack of evidence to support this, the trial process already addresses adequately a failure to cooperate during sentencing by providing a positive incentive for the accused to assist the police during their investigations. Judicial officers take into account the effect of the accused's participation on both the time and expense of legal proceedings, and they have the discretion to take this into account by way of a reduced sentence. A lack of cooperation by an accused is better addressed in this sense, as a positive inducement to cooperate. It does not affect the rights of a person in the same way as allowing an inference to be made against a person for choosing to remain silent.

Absence of appropriate safeguards for vulnerable people

For the reasons outlined above, KLC does not support these changes being made in any form. We also note that the Bill in its current form lacks appropriate safeguards and certainty for vulnerable people. While section 89A(10) provides an exemption for an accused with cognitive impairments, this will rely on police identifying that a person has a cognitive impairment. Police are currently required to call a support person to assist a person with an intellectual disability but often fail to do this. In practice, it is unlikely that accused with cognitive impairments will be identified. We refer to the Intellectual Disability Rights Service's submission for more detail on the impact of the proposed reforms on people with intellectual disability.

We are also concerned that there is no exception or safeguards for other groups of vulnerable people, such as Aboriginal and Torres Strait Islanders and people from culturally and linguistically diverse backgrounds. For example, it would be unjust that a non-English speaking accused should have an inference drawn against them when they may not have understood the implication of remaining silent or of breaking their silence under the duress of the supplementary caution specified by section 89A(2)(a).

[1] Legislation Review Committee, Parliament of New South Wales, *The Right To Silence*, Report No 4 (2006).

Lack of Legal Representation

We are also concerned that the changes will not provide for access to adequate legal advice prior to questioning.

The "opportunity to consult an Australian legal practitioner" (section 89A(2)(b)) is inadequate and uncertain. The "opportunity to consult" does not place a positive obligation on police to ensure a person has access to a lawyer. While subsection (7) states that "opportunity" does not include where "the defendant's means, and the circumstances, preclude the defendant from seeking legal advice", it is not clear what is meant by this and how this will work in practice.

We note that the Attorney General has proposed to trial a telephone advice line by lawyers to give an accused access to a legal practitioner as required by s 89A(2)(b).[2] However, the Bill does not include a requirement for such a service nor does there appear to be money allocated in the budget for the advice line.

More importantly, a telephone advice service would be insufficient to ensure defendants have access to adequate legal representation. Communication around complex issues is difficult over the telephone and it would also be difficult for the legal practitioner to assess the state of the accused including the identification of a cognitive impairment specified in s 89A(10). A telephone advice service would fall far short of the publicly funded legal advice service that has been established in the United Kingdom to advise people in similar circumstances. Similar reforms have been in place in Britain since 1994 and consequently the British government now funds a duty solicitor at every police station to give the accused legal advice before they are questioned.

We note that even if legal advice were made available to people at every police station, this would not address our primary concern that the proposed changes undermine a right to a fair trial.

If you would like more information, please call us on (02) 9385 9566. We are happy to discuss this issue with you further.

Yours sincerely,
KINGSFORD LEGAL CENTRE

Edwina MacDonald	Glenn Condie	Damien Wang
Solicitor	Student Law Clerk	Student Law Clerk

[2] New South Wales, *Questions Without Notice*, *Hansard*, 12 September 2012, 15056–8 (Greg Smith).