

27 September 2012



The Director  
Criminal Law Review  
Department of Attorney General and Justice  
By Email: [lpclrd@agd.nsw.gov.au](mailto:lpclrd@agd.nsw.gov.au)

To The Director,

**Re: *Evidence Amendment (Evidence of Silence) Bill 2012***

Intellectual Disability Rights Service welcomes the opportunity to comment on the proposed *Evidence Amendment (Evidence of Silence) Bill 2012*.

**About us**

The Intellectual Disability Rights Service ('IDRS') is a community legal centre that provides legal services to people with intellectual disability throughout New South Wales. IDRS' services include the provision of telephone legal advice and legal representation in select matters. IDRS engages in policy and law reform work and community legal education with a view to advancing the rights of people with intellectual disability. IDRS also operates the Criminal Justice Support Network ('CJSN'), which supports people with intellectual disability when they come into contact with the criminal justice system, particularly at the police station and at court. CJSN volunteers support people with intellectual disability in at least 5 local courts in NSW every day.

IDRS' expertise derives from our significant experience with people with intellectual disability in the criminal justice system, including providing support persons and legal advice to them when they are arrested. As such, IDRS' focus in this submission is on the needs and interests of people with intellectual disability.

## **The experience of people with intellectual disability in the criminal justice system**

People with intellectual disability are significantly over-represented in the criminal justice system. The consequences for people with intellectual disability involved in the criminal justice system are severe. People with intellectual disability are known to have greater contact with the police, are more likely to be refused bail by the police, are sentenced to greater periods of incarceration and more likely to return to prison than people without such disabilities.

It is the experience of IDRS that people with intellectual disability are extremely vulnerable during police questioning. Being questioned or interviewed by the police can often be a daunting and traumatic experience for people with intellectual disability. As with other vulnerable groups, when the police interview a person with intellectual disability, there is a significant power imbalance between the parties. This often results in people with intellectual disability being unable to understand or assert their rights, which means that they will agree and want to speak to the police or give interviews with the police when they otherwise do not have to at law.

It is the experience of IDRS that people with intellectual disability can easily be confused by the police procedure and will agree to statements that they do not understand. Often this results in people with intellectual disability confessing to crimes that they did not commit which will lead, in turn, to unjust outcomes for both the alleged offender and the community as a whole.

### **Overview of the *Evidence Amendment (Evidence of Silence) Bill 2012***

IDRS is deeply concerned about the proposed Bill to amend the *Evidence Act 1995* that provides for unfavourable inferences to be drawn from the defendant's failure or refusal to mention a fact during questioning by the police.

IDRS believes that the proposed changes to the *Evidence Act 1995* amount to an unacceptable curtailment of a person's right to silence, the presumption of innocence and the burden of proof resting with the prosecution, all of which are undisputed fundamental pillars of Australia's criminal justice system. The proposed changes to

the *Evidence Act 1995* also breach a number of Australia's international legal obligations.

It is the belief of IDRS that any such amendments will significantly disadvantage people with intellectual disability, result in the likely further increase of incarceration of people with intellectual disability and will not serve the interests of the community. Accordingly, IDRS is opposed to the Bill in its entirety and the inclusion of any restrictions on a person's right to silence.

IDRS notes that the New South Wales Law Reform Commission in its inquiry into the right to silence concluded that:

*“it is not appropriate to qualify the right to silence in the way provided by the English and Singapore Legislation. The Commission considers 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 the fundamental principles concerning the appropriate relationship between the powers of State on the one hand and the liberty of the citizen on the other.”<sup>1</sup>*

## **Human Rights Framework**

In considering the *Evidence Amendment (Evidence of Silence) Bill 2012* IDRS believes it is important to acknowledge Australia's international human rights obligations.

Article 14 of the *International Covenant of Civil and Political Rights* (ICCPR) recognises the right to silence, presumption of innocence and burden of proof resting with the prosecution as fundamental elements to a fair trial.

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<sup>1</sup> New South Wales Law reform Commission, Report 95 ( 2000) at 2.138

## **IDRS Recommendations: *Evidence Amendment (Evidence of Silence) Bill 2012***

As previously stated IDRS is strongly opposed to the *Evidence Amendment (Evidence of Silence) Bill 2012* in its entirety. In the event that the new legislation proceeds, IDRS makes the following recommendations;

**i. Section 89A (2) the supplementary caution and section 89A (6) the application of the Act to exclude persons who have cognitive impairment**

IDRS agrees that it is important to exclude the application of s 89A to people with cognitive impairment. IDRS agrees it is important to acknowledge the vulnerabilities of such people, however, IDRS does not believe that subsection (6) will protect the interests of people with intellectual disability.

The key problem is that the Bill fails to take into account the fact that in most matters, vulnerable people such as people with intellectual disability are not identified as having a disability at the time of official questioning. Vulnerable people will usually not identify themselves as having a disability. Currently, in accordance with the provisions set out in the *Law Enforcement Powers and Responsibilities Act 2002* (LEPRA), the police are required to provide a support person to vulnerable people when they are interviewed by the police. It is IDRS' experience that the majority of our clients never receive such support because they are not identified as having a disability. In 2011-12 IDRS was called upon to provide support to 360 defendants who attended court. Very few of these people had a support person at the police station when arrested. Further, they are not often identified as having a disability when the matter goes to court.

IDRS believes that modifying the law to include the giving of a supplementary caution in circumstances where people with intellectual disability are not identified by the police, will lead many people with intellectual disability to be encouraged to give a statement to the police and potentially result in people with intellectual disability being disadvantaged or giving false confessions.

In IDRS' experience, people with intellectual disability are not able to assert their right to silence and understand the caution as it currently stands. People with intellectual disability are often anxious or afraid and keen to cooperate with the police. People with intellectual disability are vulnerable to leading questions, they are likely to simply agree with whatever the police put to them to the point of agreeing to alleged facts that are incorrect or admitting to offences they might not even have committed.

IDRS believes that the use of the supplementary caution will only serve to exacerbate these concerns.

In the event that a person who is issued with a supplementary caution is later identified as having a cognitive impairment where they were not identified at the police station, there appears to be no provision in the current Bill for the exclusion of the evidence obtained by the police during questioning after the supplementary caution has been given. IDRS strongly believes that in the event that a person is identified at a later stage as having a cognitive impairment, that all evidence arising from the police interview should be determined inadmissible.

*Recommendation 1*

- Exclusion of the application of s89A should not rely on recognition by police that a person has one of the impairments.
- In the event that a person who is issued with a supplementary caution is identified at a later stage as having a cognitive impairment, all evidence arising from the police interview should be determined inadmissible

**ii. Section 89A (2) (b) “The opportunity to consult an Australian Legal Practitioner”**

IDRS is deeply concerned about the wording of section (2) subsection (b) which provides that inferences may be drawn only if the “defendant was allowed the opportunity to consult an Australian legal practitioner about the effect of failing or refusing to mention such a fact”

The legislation only provides for an “opportunity to consult,” not any positive obligation on the police to ensure that a person does have access to a lawyer.

It is IDRS experience that many of our clients are not able to receive legal advice when they are arrested or interviewed by the police. Many of our clients do not know how to contact a lawyer. Even if they do know how to contact a lawyer, disadvantaged clients cannot afford to pay for a lawyer and currently there is no provision for all persons to have access to free legal advice 24hrs per day. In many rural and remote areas no solicitors are available.

IDRS considers the availability of legal advice to be so important we have established a volunteer pool of solicitors who will provide advice to people with intellectual disability who are under arrest after hours. This service, however, is unfunded and relies on volunteers. People with intellectual disability only get access to this service when the police recognise that the person has a disability and call the number. We believe that most adults with intellectual disability who are arrested do not get access to legal advice at present.

Although subsection (7) may remedy these situations in some limited circumstances, IDRS believes that the wording of the section is too vague and uncertain. Subsection (7) is also insufficient as it places the onus on the person with the disability to show that their “means and the circumstances precluded the defendant from obtaining the legal advice”.

IDRS believes that a solicitor should be provided at the government's expense. Where such support is not provided police records of interview should be inadmissible as evidence.

Even if access to legal advice is made available to the person, IDRS believes that this will not remedy the injustice of a person's silence being used against them. Where clients do have the opportunity to get legal advice many vulnerable clients will not appreciate the need for such advice.

IDRS also believes that it will be impossible for a solicitor to give appropriate advice under these circumstances. Often advice is given over the telephone in circumstances where the alleged offender is not in a private place, the charges are unclear and the evidence against the suspect mostly unknown. The proposed changes will force the alleged offender to talk about his case over the phone to the solicitor before receiving advice where the conversation can be overheard.

#### Case Study: Questioning by Police of Person with Intellectual Disability

*M was a young man with mild intellectual disability.*

*M was left a note by the police to attend the police station.*

*M voluntarily attended the police station wishing to help the police out with their enquiries. He was not identified by the police as having a disability. No support person was arranged for M.*

*M subsequently agreed to an interview with the police, agreed that he understood the caution, and agreed to a number of forensic procedures being undertaken. M declined the opportunity to get legal advice. He did not know how to contact a lawyer and in any event did not understand he was being questioned in relation to an alleged offence.*

*M was questioned about an alleged incident that occurred 4 months*

*previously. M could not remember the time the police were talking about so he gave a lengthy interview with a range of responses that he thought the police were looking for. Primarily as a result of M's interview, M was subsequently charged with a number of larceny offences.*

*It was not until later at Court that support persons in M's life were able to supply evidence that showed it was not possible for M to have committed the offence as he was with his disability workers at the time in a completely different area. Although M had important information relevant to his defence he was not able to remember or express himself properly to explain to the police.*

*M was lucky to have support people later in the court proceedings to help him but many clients do not have this support.*

#### *Recommendation 2*

- There should be a positive obligation on the police to ensure that a suspect actually is able to consult a lawyer for legal advice
- There should be a solicitor available to the suspect at the government's expense to provide legal advice
- If no advice is given or no lawyer is available, any evidence that arises from the police interview following the supplementary caution should be inadmissible.

#### **iii. Section 89A (4) Particular form of words of the caution**

IDRS believes that in the event that a supplementary caution is given, a proscribed form of words should be used.

The proscribed form of words used should include a statement about a person's ability to receive legal advice.

*Recommendation 3*

- A proscribed form of words should be used in the supplementary caution.
- The proscribed form of words used should include a statement about a person's ability to receive legal advice.

**iv. Section 89A (1) "Evidence of silence in criminal proceedings for serious indictable offences"**

No definition of "serious indictable offences" is given in the proposed legislation. In the *Crimes Act 1900* (NSW) "serious indictable offence" means an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more.

IDRS believes that the application of the proposed legislation to "serious indictable offences" is an unjustifiably broad application of the legislation. Many offences including non-violent offences fall within this definition, for example non-violent public order offences, larceny and property damage.

*Recommendation 4*

- Section 89A should only be applied to a much narrower range of serious offences.

**v. Section 89 A (10) Definition of Cognitive Impairment**

IDRS believes that the definition of cognitive impairment should be amended to include persons with borderline intellectual disability.

Intellectual disability is conventionally defined as consisting of three elements: an IQ below 70, deficits in adaptive functioning, and acquirement of the disability before age 18. In the context of offenders, there is a strong

argument for including people with borderline intellectual disability, that is, an IQ of up to 80.

IDRS believes that the requirement that only people with “severe mental illness” be covered under the definition of cognitive impairment is inappropriate. It is unclear what is meant by “severe mental illness,” however, IDRS is concerned that this definition will exclude many vulnerable people with a mental impairment that makes them vulnerable during police questioning. A separate category should be included concerning mental impairment.

To promote consistency of definitions in the legislation, IDRS recommends that a similar definition should be used to the definitions recommended in the NSW Law Reform Commission’s report to the Government on People with Cognitive and Mental Health Impairments in the Criminal Justice System - Diversion.

#### *Cognitive impairment*

(a) Cognitive impairment is an ongoing impairment in comprehension, reason, adaptive functioning, judgement, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind.

(b) Such cognitive impairment may arise from, but is not limited to, the following:

- (i) intellectual disability
- (ii) borderline intellectual functioning
- (iii) dementias
- (iv) acquired brain injury
- (v) drug or alcohol related brain damage

(vi) autism spectrum disorders.<sup>2</sup>

### *Mental Health Impairment*

(a) Mental health impairment means a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgment or behaviour, so as to affect functioning in daily life to a material extent.

(b) Such mental health impairment may arise from but is not limited to the following:

(i) anxiety disorders

(ii) affective disorders

(iii) psychoses

(iv) severe personality disorders

(v) substance induced mental disorders.

(c) “Substance induced mental disorders” should include ongoing mental health impairments such as drug-induced psychoses, but exclude substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances.<sup>3</sup>

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<sup>2</sup> NSW Law Reform Commission Report (2012) People with cognitive and mental health impairments in the criminal justice system: Diversion - Report 135 at 5.122

<sup>3</sup> NSW Law Reform Commission Report (2012) People with cognitive and mental health impairments in the criminal justice system: Diversion - Report 135 at 5.129

*Recommendation 5*

- There should be a separate category of exemption from the application of s89A for mental health impairment
- To promote consistency in legislation, the same definitions for cognitive impairment and mental health impairments should be used as those outlined in the NSW Law Reform Commission's report to the Government on People with Cognitive and Mental Health Impairments in the Criminal Justice System - Diversion.

**vi. Other vulnerable people**

IDRS believes that the protection provided by section 89A subsection (6) is far too narrow.

Although the focus of our submission is on people with intellectual disability, IDRS believes that other vulnerable people such as Aboriginal and Torres Strait Islanders and people from CALD backgrounds should also be excluded from the application of this part as these groups have historically been shown to be equally vulnerable during police questioning.

*Recommendation 6*

- Aboriginal and Torres Strait Islanders and people from CALD backgrounds should also be included as people to whom s 89A will not apply

**vii. Review of Policy objectives Part 4 (25) (2)**

IDRS believes that a 5-year period for review is too long, particularly given the significant concerns IDRS has about the proposed legislation. IDRS believes that a 2-year period of review is much more appropriate.

*Recommendation 7*

- There should be a 2-year period of review

Please contact our office if you have any further questions.

Yours faithfully,

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