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10

The Right to Silence and Pre-trial Disclosure in New South Wales

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Terms of reference

On 1 August 1997 the Attorney General, the Hon JW Shaw QC MLC, referred to the Commission a review of the law relating to the right to silence. In conducting the review, the Commission was directed to consider (but was not limited to consideration of) the following issues:

(i) whether such a right should exist at all;

(ii) if so, the nature of any inference that should be able to be drawn from the exercise of that right;

(iii) the operation of s 20 of the *Evidence Act 1995* (NSW);

(iv) whether there should be any mandatory pre-trial or pre-hearing disclosure of the nature of the defence and of the evidence in support of that defence;

(v) if so, whether it should be possible to draw any inferences from the failure to disclose such defence or evidence, or the manner of such mandatory disclosure, or from any change in the nature of the defence or in the evidence in support of it;

(vi) the operation of the current mandatory defence disclosure provisions, including those in relation to alibi, and pursuant to the *Evidence Act 1995* (NSW);

(vii) whether changes to the current position with regard to prosecution pre-trial disclosure are needed; and

(viii) any related matter.

In undertaking this reference, the Commission was directed to consider the position in other Australian jurisdictions and other common law jurisdictions throughout the world.

Preface

This Research Report summarises empirical research conducted as part of the Commission's review of the right to silence and pre-trial disclosure in New South Wales. The Commission's recommendations for reform of the right to silence and pre-trial disclosure will be published in July 2000. The research was conducted during 1998 and 1999, using questionnaires completed by judges, magistrates, prosecutors, solicitors and barristers. The purpose of the research was to obtain information on the practical operation of the right to silence and pre-trial disclosure in New South Wales in the six months from 1 June 1998 to 30 November 1998.

The Commission gratefully acknowledges the work of Joanne Baker of the New South Wales Bureau of Crime Statistics and Research on this project. Joanne advised the Commission on the design and testing of the questionnaires, checked the analysis of the data provided by survey participants, and provided comments on drafts of this Research Report.

The Commission also acknowledges the assistance of Jacqueline Trad, Luke Versargie, Mark Ierace SC, Time Game SC and Warwick Charge, who assisted the Commission in identifying potential survey participants, and Des Mooney, Brad Ray, Gordon Ingram, Geoff Bates, Stephen Flower, Doug Humphreys and Colin Longhurst, who distributed the survey on behalf of the Commission.

Rosalind Dixon and Shannon Field worked on the distribution of the questionnaires. Rosalind Dixon also followed up completion of the questionnaires with numerous lawyers. Rebecca Young designed a database for collating and analysing the responses and, with Kathryn Sharpe, entered the responses into the database. This Research Report could not have been completed without their assistance.

This Research Report includes a number of references to submissions received by the Commission. A full list of all submissions received during the course of this reference is published as an appendix to the Commission's Final Report.

Peter Hennessy
Executive Director

1. Introduction

- The law in New South Wales
- Empirical research
- Purpose of this research
- Methodology
- Response rates
- Structure of this Research Report

1.1 The expression "the right to silence" describes a group of rights which arise at different points in the criminal justice system.[1] The Commission's reference on the right to silence covers the suspect's right to remain silent when questioned by police, pre-trial and pre-hearing disclosure duties and the accused person's right to remain silent at the hearing or trial.

THE LAW IN NEW SOUTH WALES

1.2 In New South Wales, suspects can not be compelled to answer police questions. At the hearing or trial, the judge or jury is prohibited from drawing adverse inferences where the accused remained silent during police questioning.[2]

1.3 Police prosecutors are required to serve a brief of evidence on the accused at least 14 days before Local Court hearings. In cases prosecuted in the District and Supreme courts by the Office of the Director of Public Prosecutions, the prosecution must disclose to the defence, as soon as practicable before the hearing or trial, all information relevant to any issue likely to arise at the hearing or trial.[3]

1.4 In the District and Supreme Courts, the defence is required to give the prosecution notice of intended alibi evidence. In murder trials, notice of the defence of substantial impairment by abnormality of mind is also required.[4]

1.5 Accused persons can not be compelled to testify at their hearing or trial. In certain situations, adverse inferences can be drawn from the accused's silence at the hearing or trial. There are restrictions on the type of adverse inferences which the court or jury can draw. In jury trials, there are also restrictions on judicial

1. *R v Director of Serious Fraud Office; ex parte Smith* [1993] AC 1 at 30-31 per Lord Mustill, with whom the other members of the House of Lords agreed.
2. See para 2.1.
3. See para 3.3.
4. See para 3.5.

comment on this issue, and a prohibition on comment by the prosecution.[5]

EMPIRICAL RESEARCH

1.6 Debate in the United Kingdom about modifying the right to silence in the context of police questioning has been informed by a considerable body of empirical research on the extent to which suspects remain silent during police questioning. This includes a number of empirical studies completed for the Royal Commissions on Criminal Procedure and Criminal Justice.[6]

1.7 However, there is very little Australian research on these issues.[7] There is no significant Australian research which examines the practical operation of the existing prosecution or defence pre-trial and pre-hearing disclosure obligations, or the extent to which accused persons remain silent at trial.

PURPOSE OF THIS RESEARCH

1.8 The purpose of the research was to obtain information on the practical operation of the right to silence and pre-trial and

5. See para 4.1.
6. Royal Commission on Criminal Procedure, *Report of the Royal Commission on Criminal Procedure* (London, 1981) at para 1.34-1.35, 4.43-4.36, Appendix A; Royal Commission on Criminal Justice, *Report of the Royal Commission on Criminal Justice* (London, 1993) at 53-54.
7. N Stevenson, "Criminal Cases in the NSW District Court: A Pilot Study" in J Basten, M Richardson, C Ronalds and G Zdenkowski (eds), *The Criminal Injustice System* (Australian Legal Workers Group (NSW) and Legal Service Bulletin, Sydney, 1982) at 108-109, 131-136 and 140-141. See also J Coldrey, "The Right to Silence Reassessed" (1990) 74 *Victorian Bar News* 25; J Coldrey, "The Right to Silence: Should it be Curtailed or Abolished?" (1991) 20 *Anglo-American Law Journal* 51.

pre-hearing disclosure in New South Wales in the six months from 1 June 1998 to 30 November 1998.

1.9 The Commission sought information on how often suspects remained silent when questioned by police, how often silence coincided with legal advice, and, where suspects were advised by solicitors to remain silent, the most frequent reasons for this advice. The Commission also sought participants' views on how the fact that a person remained silent when questioned by police affected the way suspects who were subsequently charged elected to plead, and the outcomes of trial and hearings.[8]

1.10 The Commission asked about the extent of compliance with existing pre-trial and pre-hearing disclosure requirements, and the reasons for non-compliance. The Commission also sought information on the incidence of voluntary, informal defence disclosure. The Commission asked about the incidence of "ambush" defences and how these defences affected the outcomes of hearings and trials. The Commission also sought the views of participants on the impact of disclosure on the efficiency of the criminal justice system.[9]

1.11 Finally, the Commission sought information on how often accused persons remain silent at their hearing or trial. Participants were asked how often silence at this stage coincided with legal advice. Defence lawyers who advised clients against testifying were asked their reasons for this advice. The Commission also sought participants' views on how the fact that the accused did not give evidence affected hearing and trial outcomes.[10]

1.12 The survey was designed to obtain qualitative and quantitative information about the practical operation of the right to silence and pre-trial disclosure during the survey period and to broaden the Commission's consultation process, by encouraging participants to express their views on these issues.

8. See Chapter 2.
9. See Chapter 3.
10. See Chapter 4.

1.13 There is a large body of English empirical work on the right to silence when questioned by police. Many of these studies were conducted by direct research methods, including observation of police interviews and analysis of transcripts and electronic recordings of interviews. The Commission did not have sufficient resources to undertake direct research of this kind. Our research instead relies on secondary information provided by police prosecutors, legal practitioners, judges and magistrates. This information was necessarily based on the recollections and impressions of participants. The Commission accepts that this method of data collection is a limitation of its research.

1.14 The overall response rate to the survey was 30%. The Commission also accepts that the results of the survey may not reflect the views of the judges, magistrates, police prosecutors and lawyers who did not return the questionnaires. However, the responses received were generally consistent, both within categories of participant, and across the various categories. This suggests that the survey findings are reliable.

METHODOLOGY

Development of questionnaires

1.15 A draft questionnaire was produced in October 1998. This was sent for comment to the following people:

- Justice Wood, the Chief Judge of the Common Law Division of the Supreme Court.
- Justice Blanch, the Chief Judge of the District Court.
- David Landa, the then Chief Magistrate of the Local Courts.
- Terry Buddin SC, the then Senior Public Defender.
- Nicholas Cowdery QC, the Director of Public Prosecutions.
- Dr Don Weatherburn, the Director of the New South Wales Bureau of Crime Statistics and Research.

- Dr David Dixon, Associate Professor at the University of New South Wales, who acted as an Honorary Consultant for the reference.

1.16 In November 1998, the comments received on this draft were incorporated into three separate questionnaires, with the assistance of Joanne Baker from the New South Wales Bureau of Crime Statistics and Research, who was engaged as a consultant on the project. The first questionnaire was for the judiciary and magistracy. This questionnaire is reproduced in Appendix "A" to this Research Report. The second was for prosecutors, and asked additional questions about police and prosecution disclosure which only prosecutors could provide. This questionnaire is reproduced at Appendix "B". The third questionnaire was for solicitors and barristers whose practice included criminal defence work. This questionnaire asked additional questions about legal advice and defence disclosure which defence lawyers could best answer. It is reproduced at Appendix "C".

1.17 Next, 18 judges, magistrates, Crown prosecutors, police prosecutors, barristers and solicitors participated in a trial of the draft questionnaires. The Commission received further valuable comments on the draft questionnaires during this process. These comments were also incorporated into the final version of each questionnaire.

Distribution of questionnaires

1.18 The questionnaires were distributed by mail and fax in December 1998. A covering letter outlined the purpose of the survey and explained that the Commission would treat the information provided by participants as confidential.

1.19 The judges' and magistrates' questionnaire was sent to judges of the Common Law Division of the Supreme Court, District Court judges and magistrates. Jacqueline Trad, Secretary of the Chief Magistrate's Statute Law Revision and Procedures Committee, assisted the Commission with this process.

1.20 The questionnaire for prosecutors was sent to Stephen Flower, the Crown Support Officer at the New South Wales Office of the Director of Public Prosecutions, who distributed it to Crown prosecutors. The prosecutors' questionnaire was also sent to a number of barristers at the private bar nominated by the New South Wales and Commonwealth Offices of the Director of Public Prosecutions. This questionnaire was also distributed to police prosecutors in each regional command of the New South Wales Police Service by Des Mooney (South), Gordon Ingram (North West), Geoff Bates (North) and Brad Ray (South West).

1.21 The defence questionnaire was sent to Doug Humphreys, Manager of the Criminal Law Branch of the Legal Aid Commission of New South Wales, who distributed it to solicitors employed in the Criminal Law Branch of the Legal Aid Commission. The defence questionnaire was also sent to all accredited criminal law specialists and relevant community legal centres. This questionnaire was also sent to numerous law firms and sole practitioners. Warwick Charge of the Criminal Law Branch of the Legal Aid Commission facilitated this, by providing the Commission with a list of all firms and individuals paid by the Legal Aid Commission for criminal law work in the six months from January 1998 to July 1998. This questionnaire was also distributed to public defenders by Colin Longhurst, then Clerk of Carl Shannon Chambers. The questionnaire for defence lawyers was also sent to a number of barristers nominated by Tim Game QC, Chair of the New South Wales Bar Association Criminal Law Committee.

Follow up process

1.22 Each questionnaire was given an identification number. This enabled the Commission to track which questionnaires were returned, whilst maintaining the confidentiality of participants in the survey. In February 1999, the Commission contacted those who were sent questionnaires but had not completed and returned them, reminding them to do so. This process increased the response rate for all three questionnaires.

RESPONSE RATES

1.23 The Commission received 330 completed questionnaires. The overall response rate was 30%. 33 magistrates (42%), 29 judges (40%), 190 defence lawyers (28%) and 78 prosecutors (25%) completed and returned questionnaires.

SUMMARY OF FINDINGS

Characteristics of participants

1.24 The Commission asked judges and magistrates who participated in the survey to estimate the number of pleas, hearings and trials they presided over during the survey period. Defence lawyers and prosecutors were asked to estimate the number of pleas, hearings and trials they conducted. The median number of pleas which judges presided over was 15, while the median number of hearings or trials presided over by judges who participated in the survey was 10. For magistrates, the median number of pleas was 800. The median number of hearings for magistrates was 150. The Commission notes that these medians are likely to include a large number of driving matters.

1.25 The median number of pleas conducted by prosecutors was 875, while the median number of hearings and trials conducted by prosecutors was 100. Once again, the Commission notes that these figures would include a large number of driving matters conducted by police prosecutors in the Local Courts. For defence lawyers, the medians were 28 pleas and 9 hearings or trials.

The right to silence when questioned by police

1.26 The main findings on the right to remain silent during police questioning are set out below.

- It was reported that suspects did not remain silent during police questioning in the majority of cases, although this happened sometimes.
- Participants reported that while some suspects who remained silent during police questioning had legal advice at this stage, most did not.
- Where suspects remained silent during police questioning, and had legal advice at this stage, defence lawyers reported that they had generally advised the client to remain silent.
- In cases where a suspect who remained silent during police questioning was charged with an offence, it was reported that their silence sometimes contributed to a not guilty plea or a decision not to enter a plea, although not in the majority of cases.
- It was reported that in some jury trials, the accused's silence during police questioning contributed to an acquittal, but again, this did not happen in the majority of cases.

1.27 The most frequent reason defence lawyers reported for advising clients to remain silent during police questioning was lack of disclosure by the police about the allegations. Defence lawyers reported that this tended to be temporary, strategic advice used to negotiate with investigating police for more information. Other common reasons included a lack of evidence against the client and the fact that investigating police indicated that the client would be charged regardless of whether he or she participated in an interview.

1.28 It was also commonly reported that this advice was given because the solicitor could not get adequate instructions from the client to give any other advice. Many defence lawyers reported that their advice to clients at this stage was usually given to clients they did not otherwise know, during brief telephone conversations, immediately before the police interview took place.

1.29 This advice also tended to be given to clients with problems understanding or responding to police questions, or even instructing the lawyer. This arose due to communication factors, for example where the client was affected by drugs or alcohol,

or had difficulty understanding or speaking English. It also arose due to personal characteristics of the client, for example where the client had a mental illness or an intellectual disability.

Pre-trial and pre-hearing disclosure

Police and prosecution disclosure

1.30 The main findings on disclosure by police and the prosecution are set out below.

- ☐ It was reported that disclosure by investigating police to prosecutors was generally adequate. Defence lawyers reported lower levels of satisfaction with disclosure by investigating police than other participants in the survey.
- ☐ Where disclosure by investigating police to the prosecution was inadequate, it was reported that this was caused by resource, training and administrative factors rather than deliberate concealment of relevant information by investigating police.
- ☐ Most participants reported that disclosure by the prosecution to the defence was generally adequate, although there was room for some improvement.
- ☐ It was reported that inadequate prosecution disclosure occurred due to non-disclosure by investigating police to prosecutors and resources and administrative problems.
- ☐ It was widely reported that police and prosecution pre-trial and pre-hearing disclosure improved the efficiency of the criminal justice system.

Defence disclosure

1.31 The main findings on defence disclosure are set out below.

- ☐ The compulsory notice requirements for alibi and substantial impairment by mental abnormality defences applied in a small number of cases. Overall, participants reported a high level of compliance with these notice requirements. Many

prosecutors indicated that the defence never or almost never provided alibi notices within the required time frame.

- Most participants reported that the defence did not generally voluntarily disclose substantial information about the defence case to the prosecution before the hearing or trial.
- It was reported that where voluntary defence disclosure occurred, it improved the efficiency of the criminal justice system.
- Most participants reported that "ambush" defences were not common.
- Where "ambush" defences were raised, participants reported that they did not contribute to an acquittal in a majority of cases, although this happened sometimes.

The right to silence at the hearing or trial

1.32 The main findings on the right to silence at the hearing or trial are set out below.

- Participants reported that it was rare for accused persons to remain silent at their hearing or trial.
- It was reported that most accused persons who exercised the right to silence at their hearing or trial were legally represented at this stage.
- Where accused persons remained silent at their hearing or trial, most defence lawyers reported that they advised the client to do so.
- It was reported that in some jury trials, the accused's silence at the hearing or trial contributed to an acquittal, but this did not happen in the majority of cases.

1.33 Defence lawyers reported that the most frequent reason for advising clients to remain silent at the hearing or trial was a concern that the client would perform poorly as a witness. This arose due to communication factors and personal characteristics, for example where the client had a mental illness

or an intellectual disability, or, while innocent, was likely to present as hostile, evasive or confused.

STRUCTURE OF THIS RESEARCH REPORT

1.34 This Research Report is divided into four chapters. Chapter 1 sets out the purpose of the Commission's research, the methodology used for the survey, and summarises the research findings. Chapter 2 deals with the right to silence when questioned by police. Chapter 3 discusses the Commission's research findings on pre-trial and pre-hearing disclosure by investigating police, the prosecution and the defence, including the incidence and effect of so-called "ambush" defences. Chapter 4 deals with the right not to give evidence.

2. The right to silence when questioned by police

- The law in New South Wales
- Jurisdictions which have modified the right to silence
- Empirical research
- The Commission's findings

THE LAW IN NEW SOUTH WALES

2.1 In New South Wales, suspects are entitled to remain silent when questioned by police. At the hearing or trial, the judge or jury is prohibited from drawing adverse inferences, including inferences about the accused's guilt, or credibility as a witness, from evidence that he or she did not answer police questions.[1]

JURISDICTIONS WHICH HAVE MODIFIED THE RIGHT TO SILENCE

2.2 The right to silence when questioned by police is recognised in all Australian jurisdictions and all other common law countries. The New South Wales prohibition on adverse inferences being drawn at the hearing or trial from the accused's silence applies in all other Australian States and Territories.[2]

2.3 In contrast to the Australian position, in Singapore, Northern Ireland, England and Wales, the court or jury is specifically permitted to draw strong adverse inferences from evidence that the accused person did not provide certain information to police when asked to do so. This applies when the accused fails, when questioned under caution, charged, or officially informed that he or she might be prosecuted, to mention a fact later relied on in defence, which he or she could reasonably have been expected to mention when questioned.

2.4 Adverse inferences are also permitted in these jurisdictions where, after arrest, the accused person fails or refuses to account for objects, substances or marks, or his or her presence, in circumstances which the police reasonably believe are attributable to participation in an offence. In jury trials in these countries, the

1. *Evidence Act 1995* (NSW) s 89.
2. *Petty v The Queen* (1991) 173 CLR 95; *Evidence Act 1995* (Cth) s 4 and 89.

judge and the prosecution can also comment to the jury on the adverse inferences which can be drawn in these situations.[3]

EMPIRICAL RESEARCH

2.5 There is a large body of empirical research on the extent to which suspects in England remain silent when questioned by police, but very little Australian data. There are a number of definitional and methodological difficulties with the empirical research.[4] For example, there is no commonly accepted definition, for the purpose of data collection, of what behaviour amounts to an incidence of silence during police questioning. Inconsistencies can arise in different researchers' interpretation of suspects' behaviour, including selective answering of questions, silence in response to questions which have previously been answered, evasive answers, temporary silences and silence in response to trivial or irrelevant questions.

2.6 The Commission's study relies on reporting by judges, magistrates, police prosecutors and lawyers. The definition of silence adopted by the Commission for this study is set out at paragraph 2.12.

2.7 There are also a number of methodological differences between the published research studies which make comparison of different findings difficult. Some studies, including those undertaken for the Royal Commission on Criminal Justice, examined the incidence of silence by all suspects interviewed by

3. *Criminal Procedure Code* (Singapore) s 123(1); *Criminal Evidence (Northern Ireland) Order 1988* (Eng) art 3; *Criminal Justice and Public Order Act 1994* (Eng) s 34.
4. D Dixon, *Submission 1* at 1-2; D Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon Press, Oxford, 1997) at 256-257; D Brown, *PACE Ten Years On: A Review of the Research* (Home Office, London, 1997) at 168-171; R Leng, "The Right to Silence Debate" in D Morgan and G Stephenson (eds), *The Right to Silence in Criminal Investigations* (Blackstone Press, London, 1994) 18 at 23-25. See also para 2.43.

police at particular stations.[5] Other studies, including the only published Australian research, have measured only the proportion of persons subsequently prosecuted who remained silent during police questioning.[6]

2.8 The Commission's research asked defence lawyers how often their clients, including clients they advised during police questioning and those the lawyer advised after this stage, remained silent when questioned by police. Judges, magistrates and prosecutors were asked how often the accused remained silent when questioned in pleas, hearings and trials they presided over or conducted during the period covered by the survey.

Australia

2.9 Australian research indicates that it is uncommon for suspects to remain silent when questioned by police. The only New South Wales study, conducted in 1980, concluded that 4% of suspects subsequently charged and tried in the Sydney District Court remained silent in police interviews.[7] Research conducted in 1988 and 1989 found that accused persons did not answer police questions in 7% and 9% respectively of prosecutions by the Victorian Office of the Director of Public Prosecutions.[8]

5. See para 2.10.
6. See para 2.9.
7. N Stevenson, "Criminal Cases in the NSW District Court: A Pilot Study" in J Basten, M Richardson, C Ronalds and G Zdenkowski (eds), *The Criminal Injustice System* (Australian Legal Workers Group (NSW) and Legal Service Bulletin, Sydney, 1982) at 108-109, 131-136 and 140-141.
8. J Coldrey, "The Right to Silence Reassessed" (1990) 74 *Victorian Bar News* 25 at 26-27; J Coldrey, "The Right to Silence: Should it be Curtailed or Abolished?" (1991) 20 *Anglo-American Law Journal* 51 at 54-55. Coldrey refers to these figures as a percentage of the number of "completed prosecutions" in the higher courts in Victoria (Coldrey (1990) at 26 and (1991) at 54).

United Kingdom, Singapore

2.10 The Northern Ireland and English research examining the number of suspects who remained silent when questioned by police has produced varying statistics. The lowest figure reached was 3%, while another study concluded that over 50% of suspects remained silent.[9] A study examining the effects of the 1994 English modifications to the right to silence described in paragraph 2.3 concluded that there was no significant reduction in the number of suspects who did not answer police questions after the law was changed.[10]

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9. New South Wales Law Reform Commission, *Criminal Procedure: Police Powers of Detention and Investigation After Arrest* (Report 66, 1990) at para 5.13; Australian Law Reform Commission, *Criminal Investigation* (Interim Report 2, 1975) at para 149; Royal Commission on Criminal Procedure, *Report of the Royal Commission on Criminal Procedure* (London, 1981) at para 4.43-4.46; Royal Commission on Criminal Justice, *Report of the Royal Commission on Criminal Justice* (London, 1993) at 53-54; G Black, "The Right Defence" [1989] *Legal Action* 9; Brown at 167-186; I Dennis, "The Criminal Justice and Public Order Act 1994 – The Evidence Provisions" [1995] *Criminal Law Review* 4 at 11-14; D Dixon, "Politics, Research and Symbolism in Criminal Justice: The Right of Silence and the Police and Criminal Evidence Act" (1991-1992) 20-21 *Anglo-American Law Review* 27 at 37-41; Dixon (1997) at 229-235 and 263-264; S Greer and R Morgan (eds), *The Right to Silence Debate* (Bristol and Bath Centre for Criminal Justice, 1990) at 38; Justice, *Right of Silence Debate: The Northern Ireland Experience* (1994) at 7-12; Leng at 18 at 19 and 22-28; S Odgers, "Police Interrogation and the Right to Silence" (1985) 59 *Australian Law Journal* 78 at 86-87; J Williams, "Inferences From Silence" (1997) 141 *Solicitors* 566; D Wolchover and A Heaton-Armstrong, "Labor's Victory and the Right to Silence – 2" (1997) 147 *New Law Journal* 1434 at 1434-1435; M Zander, "Abolition of the Right to Silence, 1972-1994" in Morgan and Stephenson at 147-148. See also T Smith, *Submission to Scrutiny of Acts and Regulations Committee, Victoria, Inquiry into the Right to Silence* at 7. Note that the research findings of Justice have been criticised: see Dennis at 13.
10. T Bucke and D Brown, *In Police Custody: Police Powers and Suspects' Rights Under the Revised PACE Codes of Practice* (Home

2.11 Singapore studies have also concluded that suspects rarely remain silent and that the number of suspects who remain silent has not materially fallen since the Singapore law was modified in 1974.[11]

THE COMMISSION'S FINDINGS

Incidence of silence when questioned by police

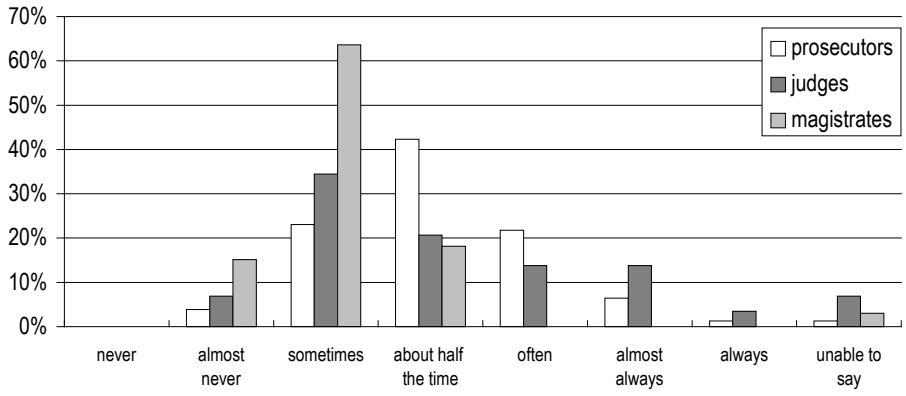
2.12 Throughout the questionnaires, the expression that the accused "remained silent when questioned by police" was defined as the accused person not providing substantial information about the defence case to police.

2.13 The Commission asked judges and magistrates how often, in pleas, trials and hearings they presided over, the accused person remained silent when questioned by police. Prosecutors were asked how often the accused remained silent during police questioning in pleas, hearings and trials they conducted. Responses to this question are set out in Table 2.1.

Table 2.1: How often accused persons remained silent when questioned by police (pleas, hearings and trials)

Office, London, 1997) at 32-36. Bucke and Browne chart the change from 55% of suspects confessing prior to the changes to 58% subsequently.

11. M Yeo, "Diminishing the Right to Silence: The Singapore Experience" [1983] *Criminal Law Review* 88; A Tan, "Adverse Inferences and the Right to Silence: Re-Examining the Singapore Experience" [1997] *Criminal Law Review* 471 at 473; Greer and Morgan at 50.

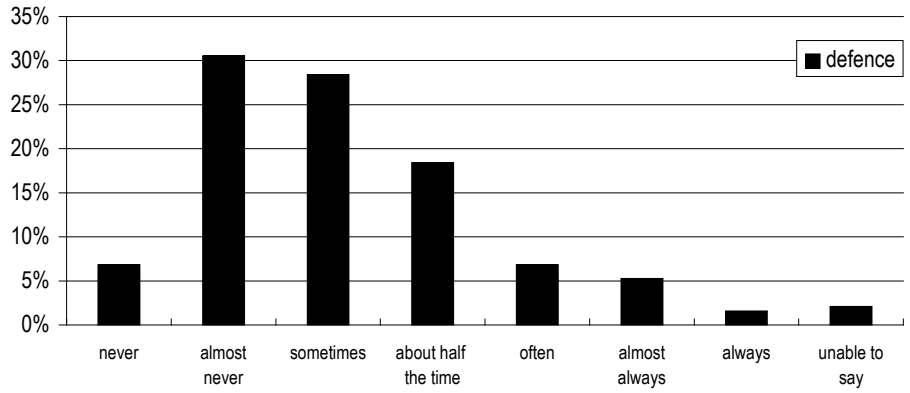


[all prosecutors (78), judges (29) and magistrates (33) answered this question]

2.14 The most common response by judges (35%) and magistrates (64%) was that the accused sometimes remained silent when questioned by police. Most prosecutors (42%) responded that the accused remained silent during police questioning about half the time.

2.15 Defence lawyers were asked how often their clients remained silent when questioned by police. The questionnaire for defence lawyers distinguished between clients whom the lawyer advised before or during police questioning and clients whom the lawyer did not advise at this stage. Tables 2.2 and 2.3 set out their responses.

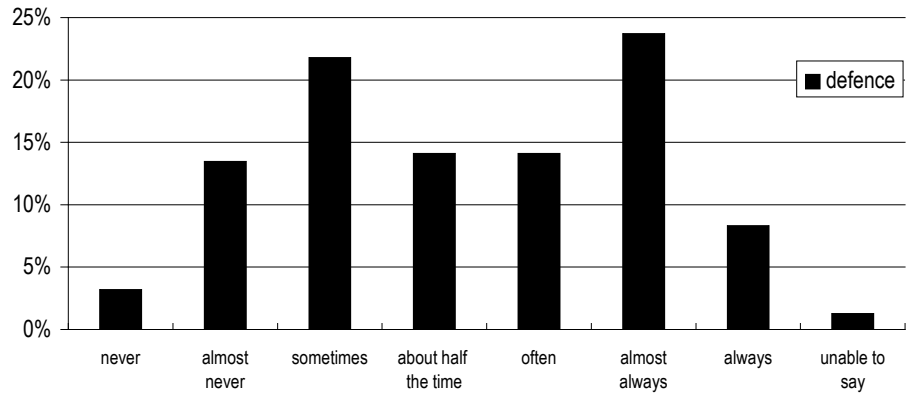
Table 2.2: How often clients remained silent when questioned by police, where the lawyer did not give advice at this stage



[all defence respondents (190) answered this question]

2.16 Most defence lawyers responded that where they did not advise the client before or during police questioning, the client almost never (31%) or sometimes (28%) remained silent.

Table 2.3: How often clients remained silent when questioned by police, where the lawyer gave advice at this stage



[156 of 190 defence respondents answered this question]

2.17 24% of defence lawyers responded that clients whom they advised before or during police questioning almost always remained silent. 22% of defence lawyers responded that clients whom they advised before or during police questioning remained silent sometimes, while 14% responded that clients almost never remained silent in this situation.

Summary

2.18 Judges, magistrates and prosecutors reported that in the majority of cases which proceeded to charge and plea, hearing or trial, the accused did not remain silent when questioned by police, although this sometimes occurred. Most defence lawyers reported that their clients almost never or sometimes remained silent during police questioning when the lawyer did not advise them at this stage. Where the lawyer advised the client at this stage, similar numbers of lawyers reported that the client sometimes remained silent, and almost always did so.

Legal advice

2.19 Critics of the right to silence when questioned by police argue that the right is exploited by offenders.[12] Offenders who obtain

12. P Cloran, *Submission* at 3; G Kellner, *Submission* at 1, 2; R Miller, *Submission* at 4; Police Association of New South Wales, *Submission 1* at 2-5; E Whitton, *Submission* at 5-6. See also England, Criminal Law Revision Committee, *Evidence (General)* (Report 11, 1972) at para 21, 30-31, 156; Working Group on the Right to Silence, *Report of the Working Group on the Right to Silence* (London, 1989) at para 157; *Sullivan v The Queen* (1967) 51 Cr App R 102 at 105 per Salmon LJ; I Alger, "From Star Chamber to Petty and Maiden: Police Attitudes to the Right to Silence", paper presented at session 24 of the *30th Australian Legal Conference* (Melbourne, 18-21 September 1997) at 8; G Davies, "Justice Reform: A Personal Perspective" [1996] *Bar News* (Summer) 5 at 10-11; K Marks, "'Thinking Up' About the Right to Silence and Unsworn Statements" [1984] *Law Institute Journal* 360 at 361; E Whitton, *Trial by Voodoo* (Random House, Milson's Point, 1994) chapter 4; C R Williams, "Silence in Australia: Probative Force and Rights in the Law of Evidence" (1994) 110 *Law Quarterly Review* 629 at 632; P Schramm, "The Right to Silence – Maintaining the Balance" [1998] *Police Journal* 8. N Papps, "You Have the Right to Remain Silent – But Maybe Not for Much Longer" *Adelaide Advertiser* (21 January 1998) at 1-2; E Whitton, "Privilege that Prevents Justice Being Done" *The Australian* (21 August 1997) at 11; J Woods,

legal advice before or during police questioning are one group often identified as especially likely to exploit the right to silence.[13]

2.20 Most English research has concluded that suspects who obtain legal advice are more likely to remain silent than suspects who do not.[14] English empirical work on the nature of legal advice to suspects before and during police questioning indicates that solicitors do not advise suspects to remain silent as a matter of course, that advice to remain silent is often a temporary strategy used to negotiate with police to disclose further information about the allegations, and that the quality of legal advice to suspects varies considerably.[15]

2.21 In England, suspects are entitled to free legal advice under a government-funded duty solicitor scheme. Approximately 34% of suspects obtain legal advice in the police station, either in person or by telephone, under this scheme.[16] It appears that the number of suspects who request and obtain legal advice at the police

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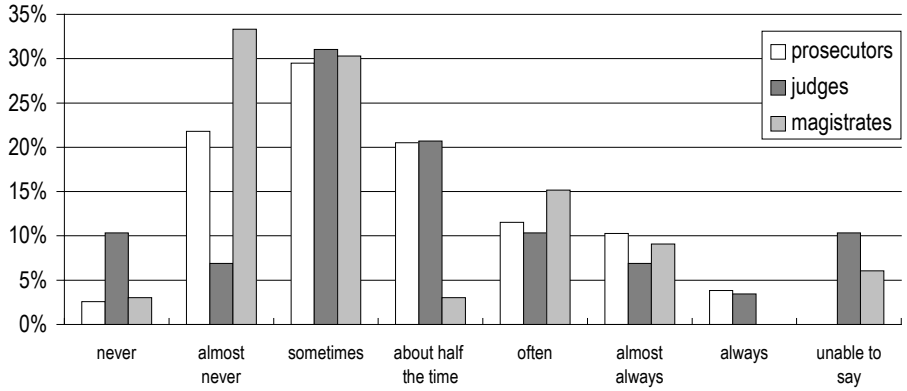
"Judge Calls for End of 'Right to Silence'" *Courier Mail (Brisbane)* (24 April 1997) at 8.

13. R Miller, *Submission* at 4.
14. Brown at 178-181; Greer and Morgan at 13 and 38; Report of the Royal Commission on Criminal Justice at 53, Bucke and Brown at 32-36. However, some research suggests that the provision of legal advice during police questioning does not significantly affect the rate of silence. See D Dixon, *Submission 2* at 1; M Aronson, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure* (AIJA, Melbourne, 1992) at 34-35; G Black at 9; Dixon (1991-1992) at 37; Dixon (1997) at 230.
15. D Dixon, *Submission 2* at 1; Aronson at 35; J Baldwin, "Police Interrogation: What are the Rules of the Game?" in Morgan and Stephenson at 66-76; Brown at 179-181 and chapter 6; Coldrey (1990) at 27; Coldrey (1991) at 56; Dixon (1991-1992) at 42-46; Dixon (1997) at 236-258; Greer and Morgan at 26.
16. Bucke and Brown at 19 and 24. The rate of legal advice varies considerably between police stations (Greer and Morgan at 68). Aspects of legal advice that are widely variable between police stations also include the way in which advice is provided (that is, telephone as opposed to face-to-face contact in a separate room), and the likelihood of legal advisers attending all interviews (Bucke and Brown at 20 and 32).

station has increased substantially since the introduction of the English reforms to the right to silence.[17] There is no substantive equivalent to this scheme in New South Wales, and it appears unlikely that there will be one in the foreseeable future.[18]

2.22 The Commission asked judges and magistrates how often, in pleas, hearings and trials they presided over, accused persons who remained silent when questioned by police had legal advice before or during police questioning. Prosecutors were asked how often this happened in pleas, hearings and trials they conducted. Their responses to this question are set out in Table 2.4.

Table 2.4: How often accused persons who remained silent when questioned by police had legal advice at this stage



[all prosecutors (78), judges (29) and magistrates (33) answered this question]

2.23 The most common response overall was that accused persons who remained silent during police questioning sometimes had legal advice. 31% of judges and 30% of prosecutors gave this response.

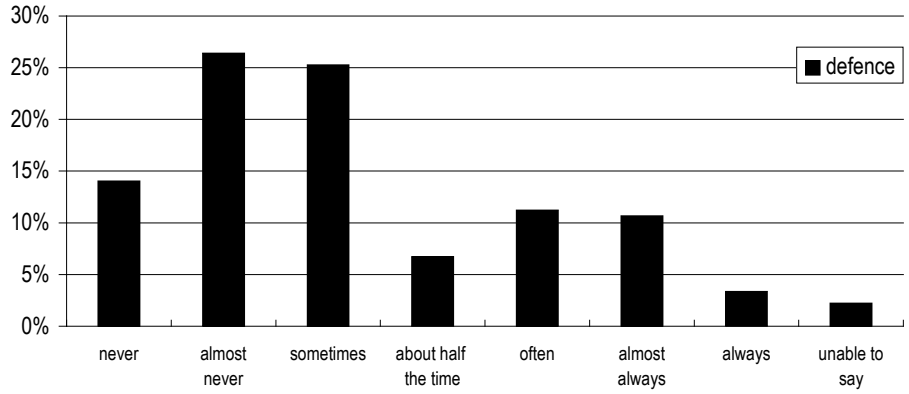
17. Bucke and Brown at 20; compare the earlier study by Zander which concluded that about 30% of suspects receive legal advice (Zander at 147); M F Adams, visit to the United Kingdom (June 1998).
18. Although the *Crimes Act 1900* (NSW) s 356N provides suspects with the right to access legal advice, there is no government funding for the provision of legal advice to suspects before or during police questioning.

Most magistrates (33%) responded that accused persons who remained silent almost never had legal advice.

2.24 Defence lawyers who advised clients before or during police questioning were asked how often, where the client remained silent when questioned, the lawyer advised the client to do this.[19] Most defence lawyers answered that where the client remained silent, they always or almost always advised this (36% and 33% respectively).

2.25 Defence lawyers were also asked how often clients whom they had taken on after police interviews, and who had remained silent when questioned by police, had other legal advice before or during police questioning. The responses to this question are set out in Table 2.5.

Table 2.5: How often suspect who remained silent had other legal advice during police questioning (defence lawyers who took on clients after police questioning)



[178 of 190 defence respondents answered this question]

19. Only defence lawyers were asked this question because judges, magistrates and prosecutors would be unlikely to have information about legal advice received by suspects.

2.26 Most defence lawyers responded that such clients almost never (26%) or sometimes (25%) had other legal advice in this situation.

Summary

2.27 Judges, magistrates and prosecutors reported that suspects who remained silent during police questioning in cases which proceeded to charge and plea, hearing or trial sometimes had legal advice at this stage, although not in the majority of cases. Most defence lawyers reported that where clients whom they had advised before or during police questioning remained silent at this stage, they had advised them to do so.

Effect of silence

2.28 One of the most common criticisms of the availability of the right to silence at the police station is that offenders misuse the right to impede police investigations, avoid being charged and escape conviction. It is often argued that offenders who remain silent during police questioning are more likely to plead not guilty and less likely to be convicted than offenders in general.[20]

2.29 Research conducted in England suggests that the fact that an accused person remained silent during police questioning does not

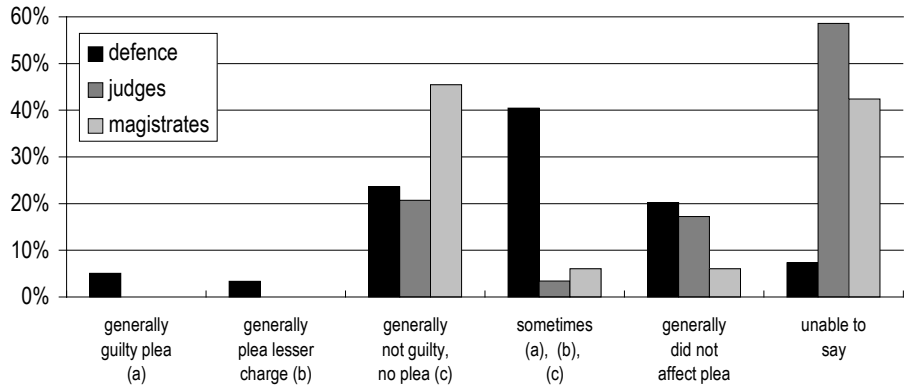
20. See para 2.19 and footnote 10 above; P Cloran, *Submission* at 4-5; L Davies, *Submission* at 2; B Hocking and L Manville, *Submission* at 10-15; G Santow, "Corporate Crime: Complex Criminal Trials-Commentary" (1994) 5 *Current Issues in Criminal Justice* 280 at 284; H van Leeuwen, "AG Proposes New Rules for White-Collar Trials" *Australian Financial Review* (28 February 1998) at 8; T Smith, *Submission to the Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 6; L Davies, *Submission* at 3-5; Whitton (1994) at 44; Police Association of New South Wales, *Submission 1* at 4; B Hocking and L Manville, *Submission* at 11; "Laws Welcome in Crime Fight (Editorial) *Northern Daily Leader* (12 November 1998) at 3.

generally increase the likelihood that he or she will plead not guilty, or be acquitted at trial.[21]

Pleas

2.30 Judges, magistrates and defence lawyers were asked how the fact that the accused remained silent during police questioning affected the plea in pleas, hearings and trials they presided over or conducted.[22] Their responses are set out in Table 2.6.

Table 2.6: How accused's silence when questioned by police affected plea



[178 of 190 defence respondents, all judges (29) and all magistrates (33) answered this question]

2.31 Most defence lawyers (40%) answered that their clients' silence sometimes contributed to a guilty plea, sometimes contributed to a plea to a lesser charge, and sometimes contributed

21. J Gallagher, *Submission* at 5; B Hocking and L Manville, *Submission* at 15. See also NSWLRC Report 66 at para 5.13; Report of the Royal Commission on Criminal Justice at 53-54; M Aronson and J Hunter, *Litigation, Evidence and Procedure* (6th ed, Butterworths, Sydney, 1998) at para 9.16 and 9.17; Brown at 181-184; Bucke and Browne at 34-36; Dennis at 12-14; Dixon (1991-1992) at 37 and 40-41; Dixon (1997) at 230 and 232-233; Greer and Morgan at 6, 14 and 67; Justice at 7-12; Leng at 26-29; Zander at 148.
22. Prosecutors were not asked this question as they would be unlikely to have information about the effect of the fact that the accused person remained silent when questioned on the plea.

to a not guilty plea or a decision not to plead. 46% of magistrates and 21% of judges responded that the accused person's silence when questioned by police generally contributed to a not guilty plea or a decision not to plead.[23] 55% of judges and 42% of magistrates responded that they were unable to answer this question, reflecting the limited information available to judges and magistrates about the reasons for pleas.

Outcomes of hearings and trials

2.32 Juries in New South Wales are generally aware that suspects are not required by law to answer police questions.[24] It is commonly argued that under the current position, juries attach too

23. Note however that a large number of judges responded that they were not able to say how the accused's silence affected the plea in pleas, hearings and trials they presided over.

24. Evidence which discloses that the accused remained silent during police questioning is admissible at trial in certain circumstances. See the decisions of the NSW Court of Criminal Appeal in *R v Astill* (NSW Court of Criminal Appeal, No 60754/91, 17 July 1992, unreported); *R v Reeves* (1992) 29 NSWLR 109 at 115 per Hunt CJ at CL, with whom the other members of the Court agreed; *R v Towers* (NSW Court of Criminal Appeal, No 60359/91, 7 June 1993, unreported) at 10 per Handley JA, with whom the other members of the Court agreed; *Yisrael v District Court* (NSW Court of Appeal, No 4011/95, 18 July 1996, unreported) at 7 per Meagher JA; *R v Mathews* (NSW Court of Criminal Appeal, No 60726/95, 28 May 1996, unreported) at 3 per Badgery-Parker J, with whom the other members of the Court agreed; *R v Keevers* (NSW Court of Criminal Appeal, No 60732/93, 26 July 1994, unreported) at 7-8 per Hunt CJ at CL, with whom the other members of the Court agreed; *Familiac v The Queen* (1994) 75 A Crim R 229 at 234 per Badgery-Parker J, with whom the other members of the Court agreed. This line of decisions of the NSW Court of Criminal Appeal was followed in Queensland in *R v Coyne* [1996] 1 Qd R 512 at 518-520. The whole record of interview may also be admissible in certain circumstances where the accused selectively answered police questions. See S Odgers, *Uniform Evidence Law* (3rd ed, LBC Information Services, Sydney, 1998) at para 89.3. See also M Zander and P Henderson, *Crown Court Study* (Royal Commission on Criminal Justice, Research Study No 19, London, 1993) at para 1.2.5.

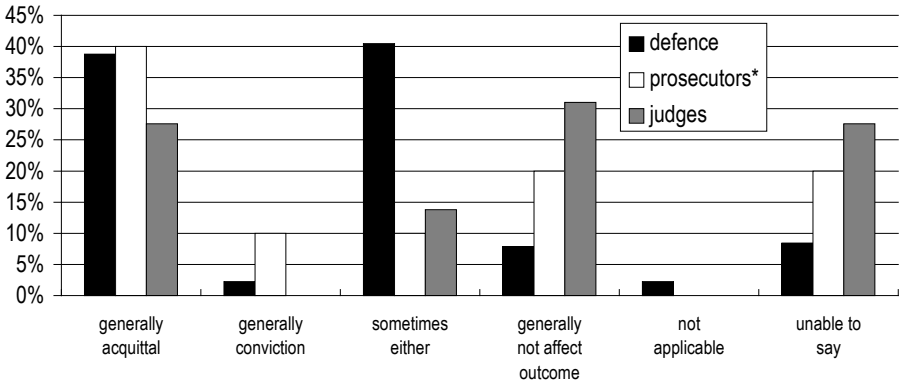
much significance to the fact that an accused person did not answer police questions, because they do not receive any guidance on this issue.[25]

2.33 The survey asked judges how the fact that the accused remained silent during police questioning affected the outcome of jury trials they presided over.[26] Crown prosecutors, barristers briefed by the Commonwealth and New South Wales Offices of the Director of Public Prosecutions and defence lawyers who had conducted jury trials were asked how the fact that the accused remained silent when questioned affected the outcome of these trials.[27] Their responses are set out in Table 2.7.

2.34 Juries in New South Wales are not required to give reasons for their decisions. Therefore, responses to these questions depended on judges' and lawyers' impressions of whether juries took the accused person's silence into account, and if so, in what way.

25. L Davies, *Submission* at 2 and 5; NSW Police Service, *Submission* at 1. See also D S Shillington, *Submission* at 2. See also J Black, "Inferences From Silence: Redressing the Balance? (1) [1997] *Solicitors Journal* 741 at 743; Coldrey (1990) at 28; Davies at 10; S Greer, "The Right to Silence: A Review of the Current Debate" (1990) 53 *Modern Law Review* 709 at 711; Greer and Morgan at 17; D Kurzon, "'To Speak or Not to Speak' The Comprehensibility of the Revised Police Caution (PACE)" (1996) 9 *International Journal for the Semiotics of Law* 3 at 3-4; Odgers (1985) at 84 and 94; F Vincent, *Submission to the Scrutiny of Acts and Regulations Committee, Victoria, Inquiry into the Right to Silence* at 6.
26. Magistrates were not asked this question as they do not preside over any jury trials.
27. Police prosecutors were not surveyed about this issue since they do not conduct jury trials.

Table 2.7: How accused's silence when questioned by police affected outcome of hearing or trial



[178 of 190 defence respondents, all judges (29) and all prosecutors* (20) answered this question]

* This figure includes all Crown prosecutors and barristers briefed by the Commonwealth and NSW Office of the Director of Public Prosecutions, but excludes police prosecutors.

2.35 The most common response by judges (31%) was that the accused's silence did not generally affect the outcome of the case. 28% of judges responded that the accused's silence generally contributed to an acquittal. Most prosecutors (40%) responded that silence generally contributed to the acquittal of the accused person. 40% of defence lawyers responded that silence sometimes contributed to acquittals and sometimes contributed to convictions, while 39% of defence lawyers responded that the accused's silence generally contributed to an acquittal. 28% of judges and 20% of prosecutors responded that they were unable to say how the accused's silence affected the outcome of the hearing or trial, reflecting a reluctance to speculate on the significance juries attributed to this.

Summary

2.36 Judges, magistrates and defence lawyers reported that, in cases where a suspect who remained silent during police questioning was charged with an offence, their silence sometimes contributed to a not guilty plea or a decision not to enter a plea, although not in the majority of cases. Similarly, judges,

prosecutors and defence lawyers reported that the accused's silence during police questioning contributed to an acquittal in some jury trials, but again, this did not happen in the majority of cases.

Reasons for advice to remain silent

2.37 Many submissions received by the Commission, and numerous commentators, have challenged the assumption that an innocent suspect would always answer police questions. It is argued that there are many reasons, entirely consistent with innocence, why a suspect would remain silent when questioned by police.[28]

28. R Jones, *Submission* at 2; P Cloran, *Submission* at 2; T Dalla, *Oral Submission*; Ethnic Affairs Commission, *Submission* at 1; J Fleming, *Submission* at 1; J Gallagher, *Submission* at 3; D Guilfoyle, *Submission* at 10; G Jones, *Oral Submission*; Kingsford Legal Centre, *Submission* at 2; Law Society of NSW, *Submission 1* at 2-8; C Levingston, *Submission* at 2; Marsdens, *Submission 1* at 1-3; NSW Council for Civil Liberties, *Submission* at 3; NSW Department of Community Services, *Submission* at 2; NSW Young Lawyers, *Submission* at 3; Legal Aid NSW, *Submission* at 1. See also ALRC, Report 2 (Interim) at para 148 and 149; Australian Law Reform Commission, *Evidence* (Interim Report 26, 1985) Volume 1 at para 756; Australian Law Reform Commission, *Evidence* (Report 38, 1987) at para 167; Report of the Royal Commission on Criminal Justice at 52 and 54; Victoria, Consultative Committee on Police Powers, *Report on s 460 of the Crimes Act 1958* (1986) at 11-12; Victoria, Scrutiny of Acts and Regulations Committee, *Inquiry Into the Right to Silence – Final Report* (1999) at para 2.1; Alger at 9; Coldrey (1990) at 27-28; Dixon (1997) at 264; Dennis at 12-13; Greer (1990) at 727-728; S Greer, "The Right to Silence, Defence Disclosure and Confession Evidence" (1994) 21 *Journal of British Law and Society* 102 at 104; J Jackson, "Interpreting the Silence Provisions: The Northern Ireland Cases" [1995] *Criminal Law Review* 587 at 595; Odgers (1985) at 84-85; A Palmer, "'Guilt and the Consciousness of Guilt' The Use of Lies, Flight and Other 'Guilty Behaviour' in the Investigation and Prosecution of Crime" (1997) 21 *University of*

2.38 The Commission asked defence lawyers who advised clients to remain silent during police questioning their reasons for giving this advice.[29] The most frequent response was that this advice was given due to the lack of police disclosure about the allegations in question. Many defence lawyers noted that often in this situation, advice to remain silent was a temporary strategy, used to negotiate with investigating police to obtain more information. The next most frequently cited reason for advising clients to remain silent when questioned by police was the lawyer's assessment that the police did not appear to have sufficient evidence.

2.39 Another frequently cited reason for giving this advice was that the investigating police indicated that the suspect would be charged whether he or she answered questions or not.

Melbourne Law Review 95; R Pattendon, "Inferences from Silence" [1995] *Criminal Law Review* 602 at 608-609; C R Williams at 648-650; J Williams at 566-567; J Wood and A Crawford, *The Right to Silence — The Case for Retention* (Civil Liberties Trust, London, 1989) at 25; Justice at 4, 15-16, 29-30; Greer and Morgan at 12 and 15-16; Aronson at 33; M Ierace, "Right to Silence — A Response to Justice Davies' Paper" [1999] *Bar News* (Spring) 33 at 34-36; T Smith, *Submission to the Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 4-5; F Vincent, *Submission to the Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 3 and 5-6; Criminal Bar Association of Victoria, *Submission to the Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 5.7; Bar Council of Victoria, *Submission to the Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* para 15, 19, 20-22, 41-44; J Black at 741; M Chaaya, "The Right to Silence Reignited: Vulnerable Suspects, Police Questioning and Law and Order in New South Wales" (1998) 22 *Criminal Law Journal* 82 at 88, 91; G Walsh, "The Right to Silence" (1999) 37(3) *Law Society Journal* 40 at 42.

29. Other participants in the survey were not asked this question as they would be unlikely to have information about reasons for legal advice given to suspects.

2.40 The next most frequent reason was that the lawyer could not obtain sufficient instructions from the client to give any other advice. Many defence lawyers emphasised that their clients could not afford to pay for their legal adviser to attend the police station before or during police interviews. As a result, advice tended to be given briefly by telephone immediately prior to the interview taking place:

> Most requests I get come from clients in custody, by telephone. There is therefore no ability to speak privately with the client and it is unwise to discuss the matter. Having insufficient detail of the client's position, I think the appropriate advice is to exercise the right to silence.

2.41 Other common reasons related to communication factors and personal and cultural characteristics which made it difficult for the client to understand the legal process they were involved in, instruct the lawyer, comprehend or respond to police questions:

> The majority of defendants are disadvantaged through poor English/poor cultural understanding of our legal system/intellectual disability/psychiatric condition/drug dependency. Many believe that police are corrupt and will trade bail/charges for confessions/admissions.

2.42 Several defence lawyers responded that they advised clients to remain silent where they or their client distrusted individual police involved in the investigation. They expressed concern that if their clients answered questions, the police would interfere with defence witnesses or change particulars of the allegations, such as the date or time that the offence was allegedly committed.

2.43 The Commission's view is that this is also likely to be an important reason why suspects who do not obtain legal advice before they are interviewed by police do not answer questions. Commentators have noted that, in this context, an antagonistic suspect who does not answer police questions can not necessarily be considered to be exercising a right to remain silent.[30]

30. See para 2.5 and footnote 4.

2.44 A very small number of defence lawyers indicated that they gave this advice due to their own distrust of police in general. Others stated they advised clients to remain silent because courts tended to view minor inconsistencies between the accused's responses to police questions and evidence in court as evidence that the accused was lying.

2.45 Another reason, which was cited less frequently, was that the client was adamant that he or she would not participate in a police interview. Other defence lawyers reported that they advised clients not to answer further police questions where the client had already given investigating police an explanation, either informally, before the official interview, or in the form of a statement prepared with the lawyer.

2.46 Several defence lawyers indicated that advice to remain silent was given to clients who told them that answering questions would incriminate another person, which the client refused to do. Others advised clients not to answer police questions where their answers, although true, were implausible and were unlikely to be believed by police. A small number of lawyers responded that they had occasionally advised silence to clients who were extremely embarrassed to answer questions.

2.47 A small number of defence lawyers responded that they advised clients to remain silent because their answers would amount to confessions, or assist the prosecution case. A handful stated that they advised clients to remain silent as a matter of course because the right to remain silent was a fundamental right available to all persons questioned by police.

3. Pre-trial and pre-hearing disclosure

- The law in New South Wales
- Other jurisdictions
- The Comission's findings

THE LAW IN NEW SOUTH WALES

3.1 Pre-trial and pre-hearing disclosure in New South Wales is regulated by a combination of common law, legislation and guidelines and rules issued by the Director of Public Prosecutions, the Bar Association and the Law Society. There are extensive requirements for disclosure by investigating police to the prosecution, and by the prosecution to the defence. In limited circumstances, the accused is also required to disclose information about certain defences to the prosecution before the hearing or trial.

3.2 In matters prosecuted by the Office of the Director of Public Prosecutions, investigating police are required to disclose to Crown prosecutors a brief of evidence, consisting of all material and information in their possession relevant to the proof of the charge. Police are also required to provide a written certificate notifying the Director of Public Prosecutions of the existence of all other material which might be relevant to either the prosecution or the defence.[1]

3.3 In most offences prosecuted in the Local Courts, the prosecution is required to disclose the brief of evidence to the defence at least 14 days before the hearing.[2] For offences prosecuted by the Office of the Director of Public Prosecutions, the prosecution is required to disclose to the defence all material which might be relevant to any issue likely to arise at the hearing or trial, including material relevant to either the guilt or innocence of the accused.[3]

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1. Office of the Director of Public Prosecutions, NSW, *Prosecution Guidelines*, March 1998, Guideline 11 and Appendix D; NSW Police Service, *Commissioner's Instructions*, Instruction 92.05, 92.07.
   Non-compliance with this requirement is a ground for police disciplinary action.
2. *Justices Act 1902* (NSW) s 66A-66H. Where evidence is not served in accordance with this requirement, the Court can adjourn the hearing or refuse to admit the evidence in question.
3. Law Society of NSW, *Solicitors' Rules*, r A66, A66A, A67; NSW Bar Council, *NSW Barristers' Rules*, r 66, 67; DPP Guidelines, Guideline 11. There is no sanction for breach of these

3.4 In addition to these requirements, the defence can subpoena the prosecution to disclose material in certain circumstances.[4]

3.5 In hearings and trials in the District and Supreme Courts, the defence is required to notify the prosecution of proposed alibi evidence.[5] In murder trials, the defence is also required to give notice of the intention to raise the defence of substantial impairment by abnormality of mind.[6]

OTHER JURISDICTIONS

3.6 Disclosure requirements vary considerably both within Australia and overseas. Victoria and the United Kingdom have enacted legislation imposing extensive, reciprocal disclosure duties on the prosecution and the defence, with a range of different sanctions for non-compliance.[7] In Queensland and the United Kingdom, the prosecution and the defence are required to give notice of proposed expert evidence and exchange copies of expert reports.[8] Disclosure of proposed alibi evidence is also required in all Australian States and Territories, as well as in the United Kingdom.[9]

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requirements, although professional complaints can be made to the Office of the Legal Services Commissioner, the Law Society of New South Wales and the New South Wales Bar Association.

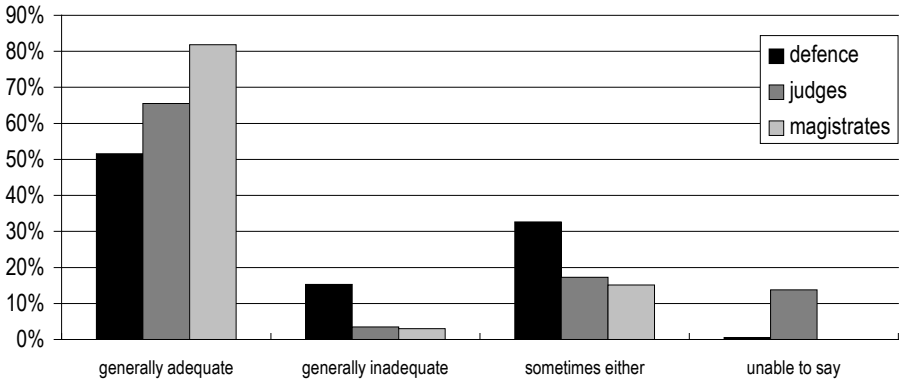
4. *Alistair v The Queen* (1984) 154 CLR 404.
5. *Criminal Procedure Act 1986* (NSW) s 48.
6. *Crimes Act 1900* (NSW) s 23A; *Criminal Procedure Act 1986* (NSW) s 48. Where these notice requirements are not complied with, the relevant evidence can only be admitted with the leave of the court.
7. *Crimes (Criminal Trials) Act 1999* (Vic); *Criminal Procedure and Investigations Act 1996* (Eng) Part 1. This Act applies in England and Wales.
8. *Criminal Code* (Qld) s 590B; *Crown Court (Advance Notice of Expert Evidence) Rules 1987* (Eng), r 3, as amended by the *Crown Court (Advance Notice of Expert Evidence) (Amendment) Rules 1997* (Eng) r 3; *Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997* (Eng) r 3 and 5.
9. *Crimes Act 1958* (Vic) s 399A and 399B; *Criminal Code* (WA) s 636A; *Criminal Code* (NT) s 331; *Criminal Code* (Tas) s 368A;

THE COMISSION'S FINDINGS

Police and prosecution disclosure

3.7 The Commission asked judges and magistrates to rate the general level of police and prosecution pre-trial and pre-hearing disclosure to the defence in pleas, hearings and trials they presided over. Defence lawyers were asked to rate the general level of police and prosecution disclosure in pleas, hearings and trials they conducted.[10] Their responses to this question are set out in Table 3.1.

Table 3.1: General level of police and prosecution pre-trial and pre-hearing disclosure



[all defence respondents (190), judges (29) and magistrates (33) answered this question]

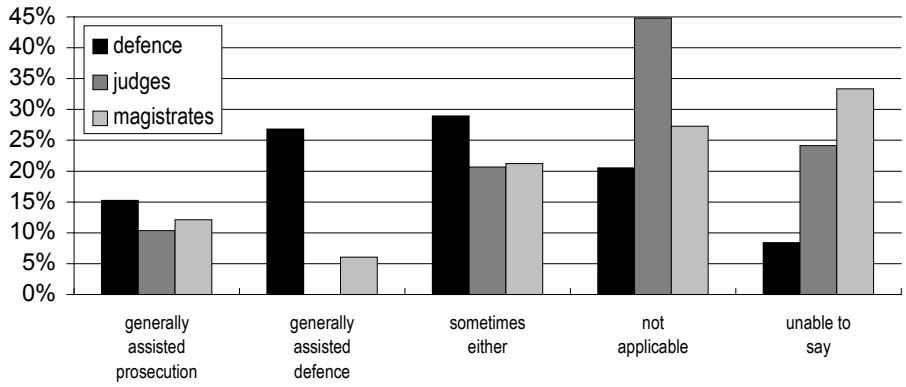
Crimes Act 1900 (NSW) s 406 (as it applies in the ACT); *Criminal Law Consolidation Act 1935* (SA) s 285C; *Criminal Code* (Qld) s 590A. In England and Wales, the alibi notice requirement is part of the reciprocal disclosure regime: *Criminal Procedure and Investigations Act 1996* (Eng) s 5(7), 74, 80.

10. This question was designed to capture general information about police and prosecution disclosure from judges, magistrates and defence lawyers who could not answer the more detailed questions discussed at para 3.11-3.39. Prosecutors were not asked this general question as it was assumed that they would be able to respond to the more detailed questions.

3.8 Overall, the most common response was that the level of police and prosecution pre-trial and pre-hearing disclosure was generally adequate. Magistrates were most likely to give this response, with 82% of magistrates responding that the level of pre-hearing disclosure by police and police prosecutors was generally adequate. Defence lawyers were least likely to respond that disclosure was generally adequate, and most likely to respond that the level of disclosure was sometimes adequate and sometimes inadequate. 33% of defence lawyers gave this response.

3.9 Judges, magistrates and defence lawyers were also asked about the type of material which was not disclosed by police and the prosecution to the defence. The responses to this question are set out in Table 3.2.

Table 3.2: Type of material not disclosed



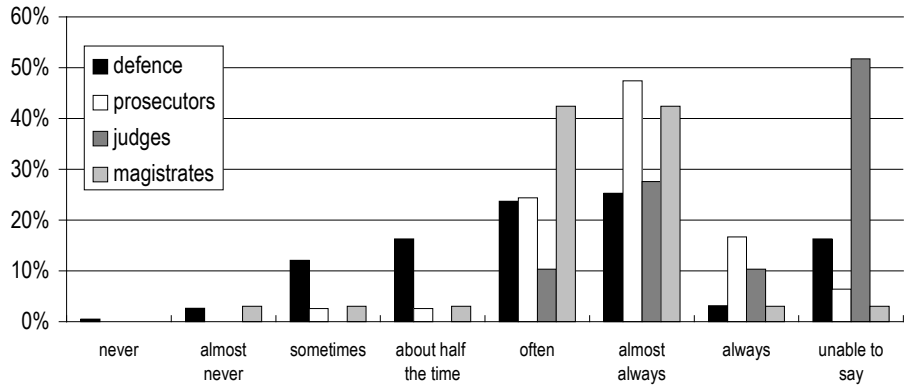
[all defence respondents (190), judges (29) and magistrates (33) answered this question]

3.10 Most judges, magistrates and defence lawyers responded that pre-trial and pre-hearing disclosure by police and prosecutors was always adequate. Most of those who answered this question on the basis that there were instances where disclosure was inadequate responded that the type of material not disclosed to the defence was sometimes material which assisted the prosecution and sometimes material which assisted the defence. 27% of defence lawyers responded that material which was not disclosed was generally material which assisted the defence case.

Disclosure by investigating police to the prosecution

3.11 Judges and magistrates were asked how often investigating police complied with their pre-trial disclosure obligations to the prosecution, in pleas, hearings and trials they presided over. Prosecutors and defence lawyers were asked this question in relation to pleas, hearings and trials they conducted. Their responses to this question are set out in Table 3.3.

Table 3.3: How often investigating police complied with their disclosure duties



[all defence respondents (190), prosecutors (78), judges (29) and magistrates (33) answered this question]

3.12 Overall, most participants responded that investigating police often or almost always satisfied these requirements. Prosecutors and magistrates reported the highest level of compliance. 47% of prosecutors and 42% of magistrates responded that investigating police almost always complied with these duties, while only 25% of defence lawyers gave this response.

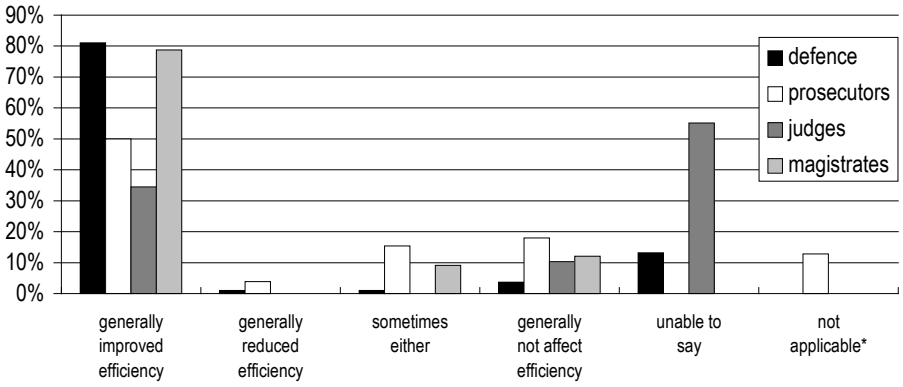
3.13 Prosecutors were asked the reasons investigating police did not comply with their disclosure duties.[11] The most common reasons involved resource constraints, particularly the high work loads of police officers and delays in receiving scientific reports. The next most common reason given was that individual police officers did not understand the obligation to provide disclosure, due to lack of training.

11. Other participants were not asked this question as they would be unlikely to have information about the reasons for non-disclosure.

3.14 Administrative problems were also cited as a common reason. In particular, prosecutors described communication breakdowns where police officers responsible for disclosure took leave or resigned from the police service. Other common reasons cited included human error, laziness by individual police, and the failure of investigating police to recognise the relevance of particular material, primarily due to inexperience.

3.15 All participants were asked how compliance with these duties affected the efficiency of the hearing or trial process. Their responses are set out in Table 3.4.

Table 3.4: Effect of police disclosure on efficiency



[all defence respondents (190), prosecutors (78), judges (29) and magistrates (33) answered this question]

* This category only relates to the prosecutors.

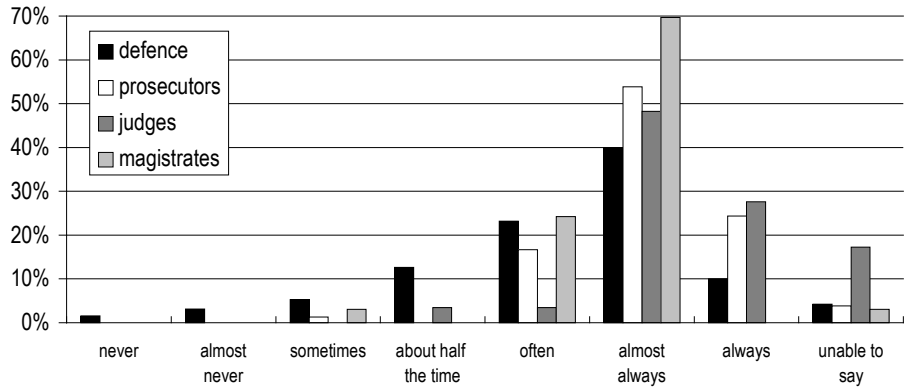
3.16 Most participants answered that police disclosure generally improved the efficiency of the process. Defence lawyers and magistrates were most likely to responded that these requirements improved efficiency. It was widely commented that disclosure by investigating police enabled the prosecutor to realistically assess the strength of the prosecution case. Prosecutors also reported that full and timely disclosure by investigating police enabled them to identify the need for further investigation while there was still time for this to be undertaken.

3.17 Many defence lawyers, especially barristers, also commented that police disclosure was important in avoiding miscarriages of justice.

Prosecution disclosure

3.18 All participants were asked how often the prosecution complied with its disclosure duties to the defence in pleas, hearings and trials they presided over or conducted. Their responses are set out in Table 3.5.

Table 3.5: Compliance with prosecution disclosure duties



[all defence respondents (190), prosecutors (78), judges (29) and magistrates (33) answered this question]

3.19 Overall, most participants responded that the prosecution almost always complied with its pre-trial and pre-hearing disclosure obligations. 13% of defence lawyers reported that the prosecution only complied about half the time. A further 10% of defence lawyers responded that prosecution pre-trial and pre-hearing disclosure requirements were complied with less than half the time.

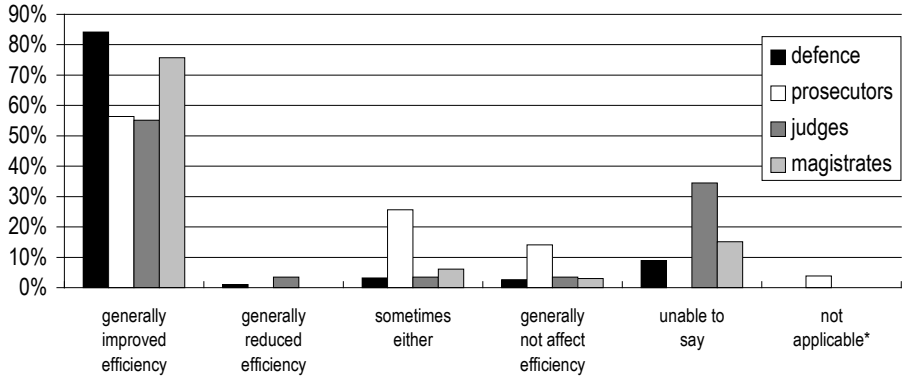
3.20 Prosecutors were asked for reasons for non-compliance with prosecution disclosure duties.[12] The most common reason given was that the prosecutor received an incomplete brief from the investigating police. Other common reasons were resources

12. Other participants were not asked this question as they would be unlikely to have information about the reasons for non-disclosure.

constraints, administrative problems, delays in obtaining expert reports and problems locating the accused person or identifying his or her solicitor. A small number of prosecutors stated that non-compliance was a result of inefficiency or uncertainty as to the scope of prosecution disclosure duties. Many prosecutors emphasised that non-compliance generally consisted of late disclosure rather than non-disclosure.

3.21 All participants were also asked about the effect of compliance with prosecution pre-trial and pre-hearing disclosure duties on the efficiency of the hearing or trial process. Their responses to this question are set out in Table 3.6.

Table 3.6: Effect of prosecution disclosure on efficiency



[all defence respondents (190), prosecutors (78), judges (29) and magistrates (33) answered this question]

* This category only relates to the prosecutors.

3.22 Most participants answered that prosecution disclosure generally improved the efficiency of the process. It was reported that disclosure assisted with pre-trial and pre-hearing preparation, improved the court listing process, shortened the length of hearings and trials and reduced the number of matters which proceeded to hearing or trial.

3.23 Many defence lawyers commented that prosecution disclosure made it easier for them to obtain instructions from their clients:

> Your client generally can not remember the facts or cannot instruct you or does not want to tell you. Disclosure takes you straight to what the issues and allegations are. Many good solicitors run their whole cases on briefs.
>
> Full disclosure allowed me to accurately inform and advise my client of the case against him or her. Early disclosure of the material allowed the client time to realistically assess his or her situation.

3.24 Many participants also stated that disclosure improved the efficiency of preparation for hearings and trials by enabling the real issues to be identified and focussed on earlier. This enabled proper, thorough preparation for the legal and factual issues and avoided time being wasted preparing for matters which were not ultimately contested. Defence lawyers reported that prosecution disclosure avoided the cost and delay of issuing subpoenas against the police.

3.25 It was also reported that prosecution disclosure resulted in fewer hearing and trial dates being vacated because the defence was not ready to proceed, and enabled the parties to estimate the length of hearings and trials more accurately, particularly where disclosure resulted in agreement that certain witnesses would not be required to given evidence. This improved the accuracy and efficiency of court listing:

> The prosecution in this court serves the brief of evidence before the matter is set for hearing. On the return date the defence advise how many prosecution witnesses are required. This helps the court in allotting time for the hearing.

A number of participants also commented that disclosure increased the likelihood of keeping to court-imposed timetables.

3.26 It was also widely reported that prosecution disclosure produced considerably shorter hearings and trials, and reduced the number of part-heard hearings. Disclosure enabled undisputed

evidence to be proved informally by agreement. Clarification of the issues reduced the number of witnesses, particularly police, expert and corroborative witnesses:

> Prosecution disclosure enable the defence to consent to matters in advance, for example I can tell the prosecution that I am satisfied with statements from particular prosecution witnesses and they do not have to give evidence. This never used to happen when I only got briefs on the day.

It was also reported that disclosure resulted in less and more focussed cross-examination of witnesses and more focussed and succinct submissions by counsel and, where applicable, summing up by the judge to the jury:

> One benefit is reduced court time in cross-examining prosecution witnesses, because you don't need to second guess the Crown.

Disclosure also shortened hearings and trials by reducing the amount of time spent hearing applications by the defence for adjournments in response to unanticipated prosecution evidence, and the number of adjournments granted.

3.27 Another common observation was that prosecution disclosure reduced the number of cases which proceeded to hearing or trial. It was reported that disclosure opened the way to earlier negotiations between the prosecution and the defence:

> Prosecution disclosure creates an atmosphere of being able to rely on your opponent and the police.
>
> Prosecution disclosure makes for better interaction between defence and prosecution teams.

3.28 This enabled weak prosecution cases to be identified, leading to no-bills and the withdrawal or substitution of charges. Many participants also commented that defence lawyers were more likely to advise clients to plead guilty at an earlier stage where the full prosecution case was known. Clients were also more likely to accept this advice. One police prosecutor estimated that 30% of defended matters are resolved as guilty pleas as a result of full

prosecution disclosure. One defence lawyer reported that at the Local Court level, this occurred in a majority of cases in the lawyer's practice.

> Where full prosecution disclosure occurs, I can be more confident of advising my client to plead guilty – I have less reason to run "loser" cases.

3.29 Many defence lawyers, particularly barristers, also emphasised the importance of prosecution disclosure in avoiding miscarriages of justice and as a way of balancing the disparity of resources between the prosecution and most accused persons.

3.30 26% of prosecutors responded that compliance with prosecution disclosure requirements sometimes improved efficiency and sometimes reduced efficiency. Prosecutors who responded in this way reported that on occasion, the defence tended to misuse prosecution disclosure as an opportunity to embark on a fishing expedition for further prosecution evidence using the subpoena process (often issued immediately before or during the hearing or trial, leading to delays).

3.31 Several police prosecutors who responded in this way observed that in the Local Courts, non-compliance usually consisted of late service of the brief. However, defence lawyers sometimes applied for and were granted adjournments, even though the late disclosure did not prejudice the accused. It was also reported that defence lawyers responded to prosecution disclosure by fabricating defence evidence to meet the prosecution case.

3.32 A number of police prosecutors, defence lawyers and magistrates observed that the time frame for prosecution disclosure in the Local Courts (14 days before the hearing) is too short. It was argued that 14 days is too late to have a positive effect on the efficiency of preparations for hearings in the ways discussed in paragraphs 3.23 to 3.28 above.

3.33 It was also argued that prosecution disclosure does not improve the efficiency of the pre-hearing process in the Local

Courts because police prosecutors are generally only allocated matters just prior to the hearing:

> In summary matters, it is unusual for a police prosecutor to have looked at the brief before the morning of the hearing – thereby minimising the effectiveness of pre-trial disclosure by the prosecution.

3.34 Several magistrates commented that where disclosure produces a guilty plea within 14 days of the hearing, it was too late to list another matter. They argued that listing improvements would occur if disclosure was required a longer period before the hearing.

3.35 Some judges and defence lawyers made similar comments in relation to the late briefing of Crown prosecutors in matters prosecuted by the Offices of the Director of Public Prosecutions. It was observed that often, Crown prosecutors were not assigned to cases early enough for the parties to discuss these issues until the day of the hearing or trial:

> There should be a greater level of communication between Crown prosecutors and defence lawyers. I often seek to have discussions but the matter has not been assigned so there is no communication. Often Crowns when changed will not adhere to previous arrangements made with the defence.
>
> The major problem is the way the DPP allocates Crowns. Crowns do not seem to get the brief until the last minute. Then non-disclosure is identified, leading to adjournments and trials being vacated. This is more of a problem in the city than country.

3.36 Several defence lawyers also reported that the late briefing of Crown prosecutors also meant that the opportunity to identify aspects of the prosecution case requiring further investigation before the hearing or trial was lost:

> The only problem with prosecution disclosure is that the prosecutor only gets to question investigating police about the case just prior to trial. Failure by police to disclose evidence or properly investigate often comes after much time has already been spent on defence preparation.

Summary

3.37 Overall, most participants responded that investigating police generally provided adequate disclosure to prosecutors, although defence lawyers reported lower levels of satisfaction with disclosure by investigating police than other participants in the survey. Where disclosure by investigating police to the prosecution was inadequate, it was reported that this was caused by resource, training and administrative factors rather than deliberate concealment of evidence by investigating police.

3.38 Most participants also reported that disclosure by the prosecution to the defence was generally adequate, although there was room for some improvement. It was reported that inadequate disclosure occurred due to non-disclosure by investigating police to prosecutors and resources and administrative problems.

3.39 It was widely reported that police and prosecution pre-trial and pre-hearing disclosure improved the efficiency of the criminal justice system.

Defence disclosure

Alibi notice requirement

3.40 27% of participants in the survey presided over or conducted trials in the District or Supreme Court where the defence led alibi evidence. These judges, prosecutors and defence lawyers were asked how often the defence complied with the alibi notice requirement.[13]

3.41 Most defence lawyers responded that this requirement was always fulfilled. Most judges responded that the defence often complied with this requirement. Equal numbers of Crown prosecutors responded that the defence almost always, almost never or never complied.

3.42 These responses indicate that defence lawyers, judges and Crown prosecutors have different perceptions of the level of

13. See para 3.5.

compliance with this requirement. It is likely that one reason for this is different interpretations of what constitutes compliance with the requirement. A number of defence lawyers, who reported a high level of compliance with this requirement, commented that in hearings and trials they conducted, notice of proposed alibi evidence was always given, although sometimes late. On the other hand, several Crown prosecutors who responded that the defence never complied with this requirement observed that although notice was usually given, it was inevitably late.

3.43 Defence lawyers were asked for information on the reasons for non-compliance with this requirement.[14] The most common reason was that the lawyer had not obtained instructions from the client at the stage when the alibi notice was required. A number of lawyers commented that their clients were seldom represented within 30 days of their committal, which is when the alibi notice is required. A small number commented that although they were representing the client at this stage, they had difficulty obtaining clear instructions. One defence lawyer stated that in one case the reason for non-compliance was that the alibi defence arose for the first time during the trial.

Substantial impairment by abnormality of mind notice requirement

3.44 The defence of substantial impairment by abnormality of mind is only available for murder charges. As would be expected, only a very small number of survey participants presided over or conducted trials in which this defence was raised. These Supreme Court judges, Crown prosecutors and defence lawyers were asked how often the defence complied with the notice requirement for this type of evidence.[15] The majority of participants answered that the defence always complied with this requirement.

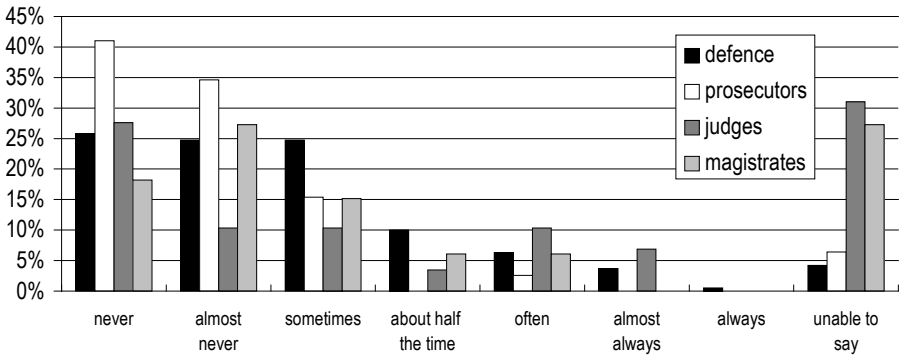
14. Only defence lawyers were asked this question as it is unlikely that other participants would have information about the reasons for non-compliance with the alibi notice requirement.
15. See para 3.5.

Voluntary defence disclosure

3.45 Throughout the questionnaires, the concept of voluntary defence disclosure was defined as the defence voluntarily disclosing substantial information about the defence case to the prosecution before the hearing or trial, other than through police interviews and the formal requirements for alibi and substantial impairment by abnormality of mind evidence.

3.46 All participants were asked how often voluntary defence disclosure occurred in hearings and trials they presided over or conducted. Responses to this question are set out in Table 3.7.

Table 3.7: Level of voluntary defence disclosure

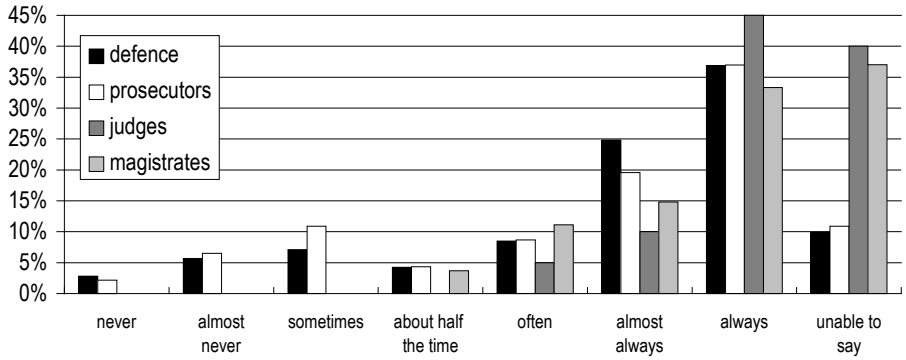


[all defence respondents (190), prosecutors (78), judges (29) and magistrates (33) answered this question]

3.47 Overall, most participants responded that the defence never or almost never provided voluntary defence disclosure. Most judges (28%) and prosecutors (41%) responded that this never occurred. Most magistrates responded that the defence almost never provided voluntary defence disclosure. Similar numbers of defence lawyers reported that the defence never, almost never, and sometimes did so.

3.48 ***Legal advice.*** Participants were asked whether, when voluntary defence disclosure occurred, the accused generally had legal advice at the time. Responses to this question are set out in Table 3.8.

Table 3.8: How often the accused had legal advice when voluntary defence disclosure occurred



[141 of 190 defence respondents, 46 of 78 prosecutors, 20 of 29 judges and 27 of 33 magistrates answered this question]

3.49 Overall, the most common response was that the accused was always or almost always represented when voluntary defence disclosure was provided. This result was consistent across all categories of participants. This finding indicates that defence disclosure was more likely where the accused was legally represented before the hearing or trial.

3.50 ***Type of material disclosed.*** It was reported that expert scientific reports and disclosure of the general nature of the defence were the most common material voluntarily disclosed by the defence. It was also reported that the defence sometimes volunteered that it did not intend to dispute particular aspects of the prosecution case. This was most common in relation to drug and property offences. For example, in relation to property offences, the defence sometimes disclosed that ownership was not in issue.

3.51 Disclosure of the intention to dispute the admissibility of particular prosecution evidence, such as the accused's electronically recorded statement to police, was also quite common. In jury trials, this enabled issues about the admissibility of evidence to be resolved before the jury was empanelled.

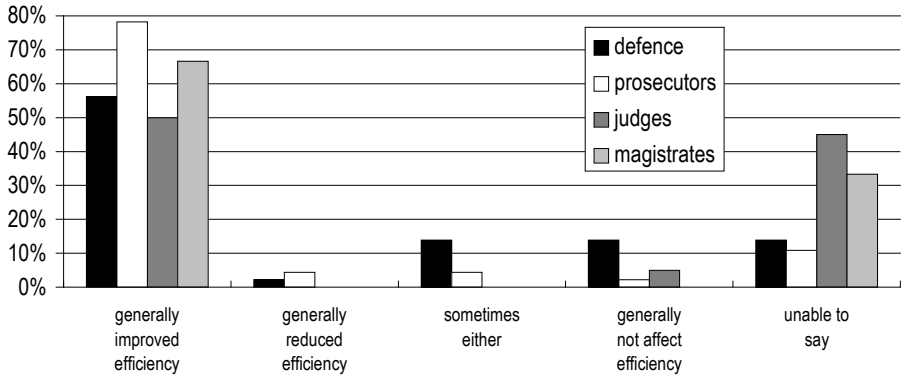
3.52 Numerous defence lawyers emphasised that voluntary defence disclosure was more likely to occur where the defence was confident that full police and prosecution disclosure had occurred. A number of magistrates also made this point.

> I work in the country mostly with the same Crowns. We live and work in the same community; a level of trust exists which allows our trials to be fought on the issues.
>
> I always ask the defence what the issues are. An answer can only be given if the brief has been served. The Local Courts could not function unless matters were shortened in this way. The prosecution and the defence are almost always co-operative and eager to assist.

3.53 A number of prosecutors and defence lawyers commented that experienced defence lawyers were more likely to voluntarily disclose information about the defence case to the prosecution before the hearing or trial.

3.54 ***Effect of voluntary defence disclosure.*** Participants were also asked how voluntary defence disclosure affected the efficiency of the hearing or trial process. Their responses are set out in Table 3.9.

Table 3.9: Effect of voluntary defence disclosure on efficiency of hearings and trials



[137 of 190 defence respondents, 46 of 78 prosecutors, 20 of 29 judges and 27 of 33 magistrates answered this question]

3.55 Most participants responded that voluntary defence disclosure generally improved the efficiency of the hearing or trial process. It was reported that voluntary defence disclosure improved the efficiency of pre-trial and pre-hearing preparations, the court listing process, shortened the length of hearings and trials and reduced the number of matters which proceed to hearing and trial, in the same ways described in paragraphs 3.23 to 3.28 in relation to prosecution disclosure. Police prosecutors also commented that defence disclosure of expert scientific reports gave them a better opportunity to understand this evidence fully:

> [Defence disclosure of expert evidence] allows the prosecutor time to appraise the content and relevance of complex medical and psychological reports rather than reading them on the run in court.

3.56 Several defence lawyers also responded that where defence disclosure was given, prosecutors tended to be more co-operative about bail and sentencing issues.

3.57 A minority of defence lawyers (14%) responded that disclosure sometimes improved efficiency and sometimes reduced efficiency. It was commented that defence disclosure tended to create further delays while further police investigations were undertaken.

3.58 On the other hand, several magistrates, prosecutors and defence lawyers stated that efficiency gains did not occur because police did not investigate information disclosed by the defence before the hearing or trial. For example, it was reported that where the defence disclosed the identity of defence witnesses, the prosecution often did not arrange for statements to be taken from these witnesses. While some prosecutors commented that police resources constraints were responsible for this, others reported that defence disclosure often occurred too late to be of any use.

3.59 Several defence lawyers reported that the prosecution responded to voluntary defence disclosure by preparing objections to the admissibility of the disclosed aspects of the defence case, where objection would not otherwise be taken. It was also

commented that the prosecution modified its case to meet the disclosed information.

Summary

3.60 The compulsory notice requirements for alibi and substantial impairment by mental abnormality defences applied in a small number of cases. While overall, participants reported a high level of compliance with these notice requirements, many prosecutors indicated that the defence never or almost never complied with the timing of the alibi notice requirement.

3.61 Most participants reported that the defence did not generally provide voluntary defence disclosure. It was reported that where voluntary defence disclosure occurred, it improved the efficiency of the criminal justice system.

Defences raised for the first time at the hearing or trial

3.62 One of the most common arguments for introducing compulsory defence disclosure duties is that accused persons frequently "ambush" the prosecution with defences raised for the first time at the hearing or trial. It is argued that such defences frequently are fabricated, and that this practice denies the prosecution an opportunity to investigate such defences, leading to the acquittal of offenders.[16]

16. L Davies, *Submission* at 4; E Elms, *Submission* at 2; B Kennedy, *Submission* at 2; Police Association of New South Wales, *Submission 1* at 4. See also New South Wales Law Reform Commission, *Criminal Procedure: Procedure from Charge to Trial 1: Specific Problems and Proposals* (Discussion Paper 14, 1987) at para 5.11; Royal Commission on Criminal Procedure, *Report of the Royal Commission on Criminal Procedure* (London, 1981) at para 8.22; Working Group on the Right to Silence, *Report of the Working Group on the Right to Silence* (London, 1989) at para 101 and see para 20 and 93; Royal Commission on Criminal Justice, *Report of the Royal Commission on Criminal Justice* (London, 1993) at 97; G Davies, "Justice Reform: A Personal Perspective" [1996] *New South Wales Bar Association Bar News* (Summer) 5 at 11; *R v Alladice* (England, Court of Appeal, 12 May 1988, unreported). One

3.63 The term "ambush defence" has no generally accepted meaning. For the survey, the Commission focussed on defences with the following characteristics:

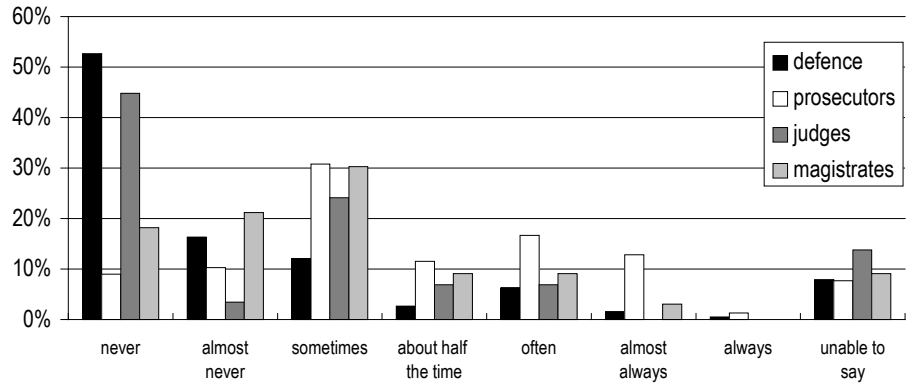
- ☐ the defence was raised for the first time at the hearing or trial;
- ☐ the accused could have disclosed information about the defence during police questioning;
- ☐ a competent prosecutor could not have anticipated the defence; and
- ☐ the late disclosure of the defence hampered the prosecution or benefited the defence.

Incidence of defences raised for the first time at the hearing or trial

3.64 Judges and magistrates were asked how often in trials and hearings they presided over, the accused raised a defence with these characteristics. Prosecutors and defence lawyers were asked how often this occurred in hearings and trials they conducted. Responses to this question are set out in Table 3.10.

Table 3.10: "Ambush" defences

submission argued that the defence was entitled to surprise the prosecution at trial: Mt Druitt Community Legal Centre, *Submission* at 2 and another submission argued that while defence disclosure assists the credibility of the defence, the accused person should be entitled to choose whether to disclose the defence case: R Jones, *Submission* at 2.



[all defence respondents (190), prosecutors (78), judges (29) and magistrates (33) answered this question]

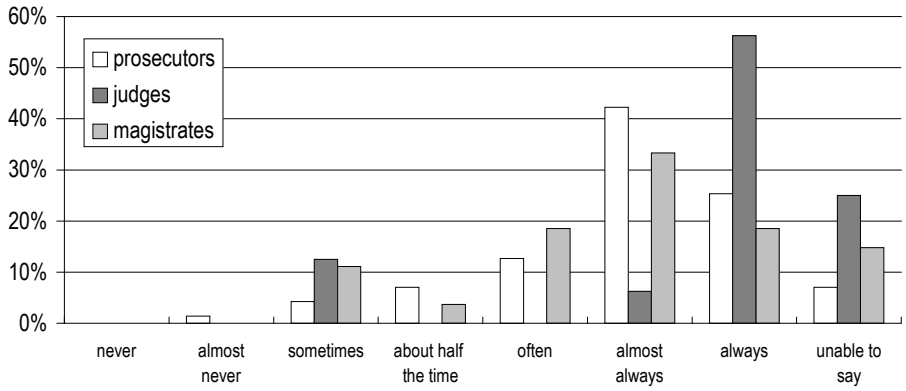
3.65 Overall, the most common response to this question was that "ambush" defences never arose. Most defence lawyers and judges responded that such defences were never raised. Most magistrates (30%) and prosecutors (31%) responded that such defences are sometimes raised. A further 29% of prosecutors responded that the accused often or almost always raised a defence with these characteristics.

Legal representation

3.66 Judges, magistrates and prosecutors were also asked whether, in hearings and trials they presided over or conducted, the accused generally had legal representation when a defence with these characteristics was raised at the hearing or trial.[17] Responses to this question are set out in Table 3.11.

Table 3.11: How often accused was legally represented where he or she raised "ambush" defence

17. Defence lawyers were not asked this question as it was implicit that where defence lawyers provided information about ambush defences in hearings and trials they conducted, the accused was always legally represented.



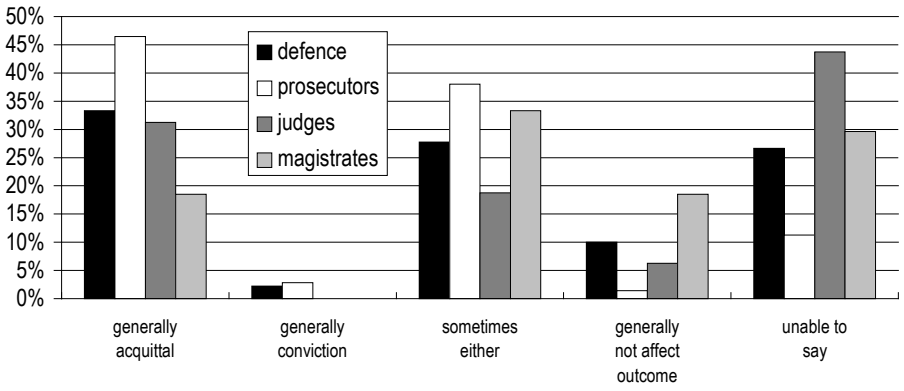
[71 of 78 prosecutors, 16 of 29 judges, and 27 of 33 magistrates answered this question]

3.67 Most judges, magistrates and prosecutors answered that the accused was always or almost always legally represented in this situation.

Effect on the outcomes of hearings and trials

3.68 Participants were asked how defences with these characteristics generally contributed to the outcome of hearings and trials. Judges, prosecutors and defence lawyers' responses to this question depended on their impressions of what significance magistrates and juries attributed to such defences. Their responses are set out in Tables 3.12.

Table 3.12: Effect of "ambush" defences on hearing and trial outcomes



[90 of 190 defence respondents, 71 of 78 prosecutors, 16 of 29 judges and 27 of 33 magistrates answered this question]

3.69 Overall, 36% of participants responded that defences with these characteristics generally contribute to the acquittal of the accused. 31% responded that such defences sometimes contributed to acquittals, sometimes contributed to convictions, and sometimes did not affect trial outcomes. Prosecutors were more likely than judges, magistrates or defence lawyers to respond that such defences generally contributed to acquittals. 47% of prosecutors gave this response, compared to 33% of defence lawyers, 31% of judges and only 19% of magistrates.

Summary

3.70 Participants reported that "ambush defences" did not occur in the majority of cases. Where such a defence was raised, participants considered that most contributed to the acquittal of the accused.

4. The right to silence at trial

- The law in New South Wales
- Jurisdictions which have modified the right to silence
- The Commission's findings

THE LAW IN NEW SOUTH WALES

4.1 In New South Wales, accused persons can give evidence at their hearing or trial, but can not be compelled to do so.[1] The court can draw unfavourable inferences where the accused does not testify and, in jury trials, the judge, defence counsel and counsel for any co-accused can comment on the accused's silence. There are statutory and common law restrictions on the nature of comment which the judge can make. Prosecution comment is prohibited.[2]

JURISDICTIONS WHICH HAVE MODIFIED THE RIGHT TO SILENCE

4.2 The right to remain silent at trial is recognised in all common law countries. However, the law on adverse inferences and comment where the accused does not give evidence varies considerably, both within Australia and overseas. Victoria and the Northern Territory prohibit judicial and prosecution comment.[3] In South Australia, Western Australia and Tasmania, only prosecution comment is prohibited.[4] In these jurisdictions, judicial comment is regulated by the common law. The law in Queensland is regulated exclusively by the common law.

4.3 In Singapore, Northern Ireland, England and Wales, the court or jury can draw very strong inferences where the accused does not give evidence, including inferences of guilt which, combined with an independent prima facie case, can be sufficient to meet the burden of proof.[5] The judge and the prosecution can

1. *Evidence Act 1995* (NSW) s 12, 17, 20.
2. *Evidence Act 1995* (NSW) s 20(2); *Weissensteiner v The Queen* (1993) 178 CLR 217 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ, Gaudron and McHugh JJ dissenting.
3. *Evidence Act 1939* (NT) s 9(3); *Crimes Act 1958* (Vic) s 399(3).
4. *Evidence Act 1929* (SA) s 18(1)II; *Evidence Act 1906* (WA) s 8(1)(c); *Evidence Act 1910* (Tas) s 85(1)(c).
5. *Criminal Evidence Act (Northern Ireland) 1923* (Eng) s 1; *Criminal Evidence (Northern Ireland) Order 1988* (Eng) Art 4; *Murray v*

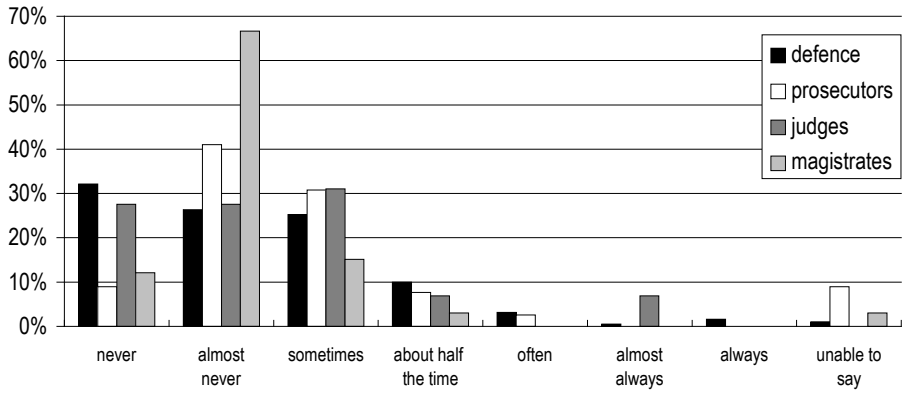
comment to the jury on the adverse inferences which can be drawn.

THE COMMISSION'S FINDINGS

Incidence of silence at trial

4.4 The Commission asked judges and magistrates how often, in hearings and trials they presided over, the accused exercised the right to remain silent at his or her hearing or trial. Prosecutors and defence lawyers were asked this question in relation to hearings and trials they conducted. Responses to this question are set out in Table 4.1.

Table 4.1: How often accused persons remained silent at hearing or trial



[all defence respondents (190), prosecutors (78), judges (29) and magistrates (33) answered this question]

United Kingdom (1996) 22 EHRR 29; *Criminal Evidence Act 1898* (Imp) (61 & 62 Vic) s 1; *Criminal Justice and Public Order Act 1994* (Eng) s 35; *Criminal Procedure Code* (Singapore) s 189, 196.

4.5 Overall, the most common response was that accused persons almost never remained silent at their hearing or trial. Most defence lawyers responded that this never happened. Most magistrates and prosecutors responded that accused persons almost never remained silent at the hearing or trial. For judges, the most common response was that they sometimes remained silent.

Unsworn statements and silence

4.6 Until 1994, accused persons charged with indictable offences in New South Wales who were tried in the District and Supreme Courts had the option of giving unsworn evidence at their trial.[6] While the removal of the right to give unsworn evidence applied to any person charged on or after 10 June 1994,[7] the right to give unsworn evidence continues to apply in a small number of trials where the accused was charged before this date. Many submissions and several commentators have argued that removal of the right to give unsworn evidence has increased the importance of the right not to testify.[8]

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6. The right to give unsworn evidence was abolished by s 404A of the *Crimes Act 1900* (NSW), since replaced by the *Criminal Procedure Act 1986* (NSW) s 95.
7. *Crimes Legislation (Unsworn Evidence) Amendment Act 1994* (NSW) s 2, Sch 1(5); New South Wales, *Government Gazette* No 78 of 10 June 1994 at 2756.
8. Marsdens, *Submission 1* at 4. See also A Palmer, "Silence in Court — the Evidential Significance of an Accused Person's Failure to Testify" (1995) 18 *University of New South Wales Law Journal* 130 at 141 and 143; E Stone, "Calling a Spade a Spade: The Embarrassing Truth About the Right to Silence" (1998) 22 *Criminal Law Journal* 17 at 22; *R v Mora* (Vic, Court of Appeal, No 0189/95, 30 May 1996, unreported) at 2-4; Law Institute of Victoria, *Submission to the Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 2.2.4; T Smith, *Submission to the Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 2-3, 13-14; Victorian Bar, *Submission to the Victorian Scrutiny of Acts and Regulations Committee, Inquiry*

4.7 The Commission asked judges, Crown prosecutors and defence lawyers how often, in trials they presided over or conducted, the accused had the option of giving unsworn evidence.[9] The majority responded that the accused never or almost never had this option.

4.8 Judges, Crown prosecutors and defence lawyers were also asked how often, in trials they presided over or conducted, where the option of giving unsworn evidence was available to the accused, he or she remained silent. Overall, the most common response was that where the accused person had the option of giving unsworn evidence, he or she never exercised the right to silence. This response was consistent across all categories.

4.9 This finding suggests that accused persons who had the option of giving unsworn evidence were less likely to remain silent at the hearing or trial than accused persons in general. However, this conclusion can only be tentatively drawn, due to the small number of participants in the survey who presided over or conducted trials where the option of unsworn evidence was available to the accused.

Legal representation and advice

4.10 Judges, magistrates and prosecutors were asked how often, in pleas, hearings and trials they presided over or conducted, the accused person was represented at the hearing or trial.[10] Responses to this question are set out at Table 4.2.

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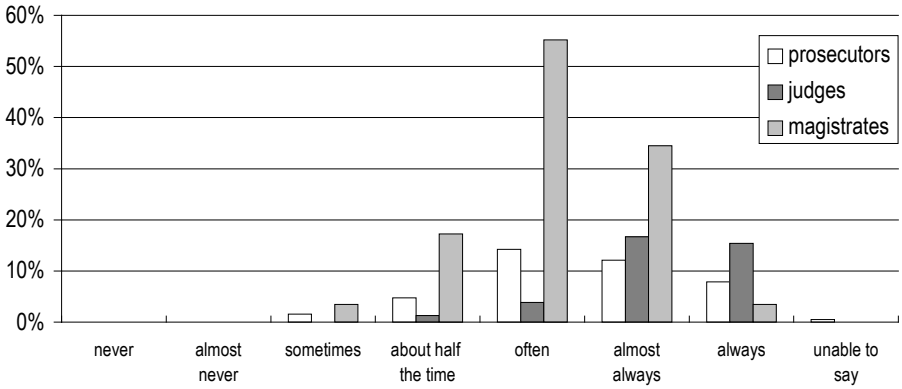
into the Right to Silence at para 67; Victoria Legal Aid, *Submission to the Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 5.

9. Magistrates and police prosecutors were not surveyed on this issue as the option of giving unsworn evidence did not extend to the Local Courts.
10. Defence lawyers were not asked this question as it is implicit that where defence lawyers provided information about hearings or trials they conducted, the accused was legally represented.

Table 4.2: How often accused were persons legally represented at pleas, hearings and trials



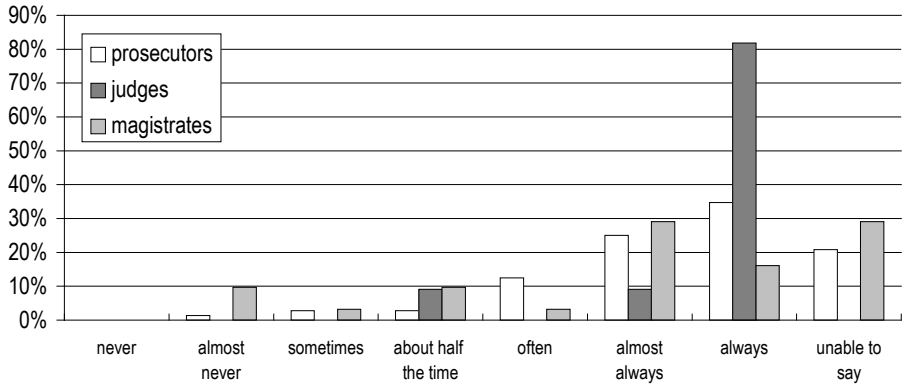
[all prosecutors (78), judges (29) and magistrates (33) answered this question]

4.11 The most common response was that accused persons were often or almost always legally represented at their plea, hearing or trial. Most judges responded that the accused was almost always or always legally represented (45% and 41% respectively). Most magistrates (49%) and prosecutors (35%) responded that the accused was often represented. It is likely that this difference between judges on the one hand and magistrates and prosecutors on the other hand reflects the higher number of unrepresented accused persons in the Local Courts.

4.12 Judges, prosecutors and magistrates were also asked whether, in hearings and trials they presided over or conducted where the accused did not testify, he or she was generally legally represented at this stage.[11] Their responses are set out in Table 4.3.

11. Defence lawyers were not asked this question as it is implicit that where defence lawyers provided information about accused persons who did not give evidence at hearings and trials they conducted, the accused was legally represented.

Table 4.3: How often accused persons who remained silent at the hearing or trial were legally represented at this stage



[72 of 78 prosecutors, 22 of 29 judges and 31 of 33 magistrates answered this question]

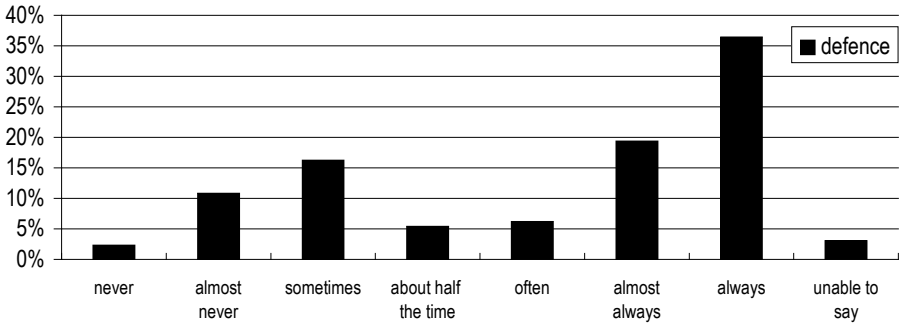
4.13 Overall, most judges, magistrates and prosecutors responded that accused persons who remained silent at their hearing or trial almost always or always had legal representation. Most judges and prosecutors responded that accused persons who did not give evidence always had legal advice, while most magistrates (30%) responded that the accused almost always had legal advice.

4.14 These findings indicate that accused persons who did not give evidence at their hearing or trial were likely to be legally represented at this stage. The findings also suggest that accused persons who remained silent at their hearing or trial were more likely to be legally represented than accused persons in general.

4.15 Defence lawyers who represented clients who did not give evidence at their hearing or trial were asked how often they advised their clients against testifying.[12] Their responses are set out in Table 4.4.

12. Other participants were not asked this question as they would be unlikely to have information about legal advice to accused persons.

Table 4.4: How often accused persons who remained silent at trial were advised to do so



[129 of 190 defence respondents answered this question]

4.16 Most defence lawyers responded that they always or almost always advised clients who remained silent at the hearing or trial to do so. 16% of defence lawyers answered that they sometimes advised clients who remain silent against testifying and a further 11% answered that they almost never advised this.

Effect of silence on outcomes of hearings and trials

4.17 A common argument for modifying the right to silence at the hearing or trial is that the right not to give evidence contributes to the acquittal of offenders.[13] It is also frequently argued that, unless

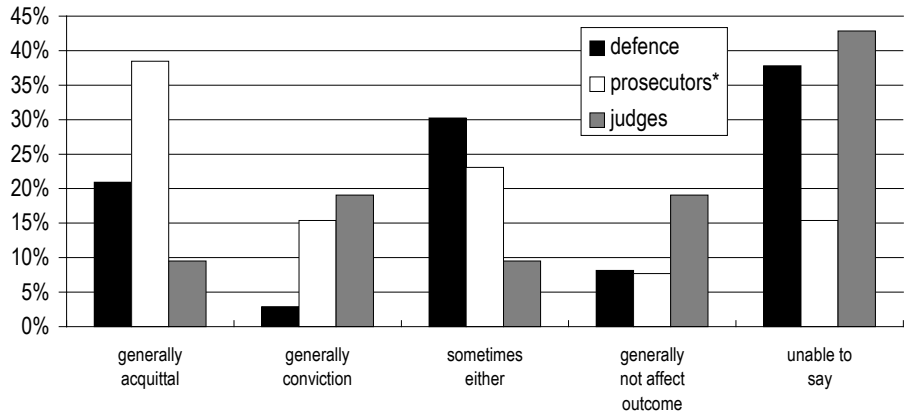
13. T Cleary, *Submission* at 1; E Whitton, *Submission* at 5-6. See also G Davies, "Justice Reform: A Personal Perspective" [1996] *Bar News* (Summer) 5 at 10-11; England, Justice Evidence Committee, *The Accused as a Witness* (HMSO, 1968) at 3-5; I Alger, "From Star Chamber to Petty and Maiden: Police Attitudes to the Right to Silence", paper presented at session 24 of the *30th Australian Legal Conference* (Melbourne, 18-21 September 1997) at para 31; E Whitton, *The Cartel* (Herwick Pty Ltd, Sydney, 1998) chapters 18 and 19.

guided by judicial direction, juries will place too much weight on the fact that the accused did not give evidence.[14]

4.18 The survey asked judges how the fact that the accused remained silent at the hearing or trial contributed to the outcome of trials they presided over.[15] Crown prosecutors, barristers briefed by the New South Wales and Commonwealth Offices of the Director of Public Prosecutions and defence lawyers were asked how the accused's silence contributed to the outcome of jury trials they conducted.[16] Their responses to this question depended on their impressions of the significance juries attributed to the accused's silence, since juries in New South Wales do not give reasons for their decisions. Responses to this question are set out in Table 4.5.

14. Police Association of New South Wales, *Submission 2* at 4. See also *Weissensteiner v The Queen* (1993) 178 CLR 217 at 224-225 per Mason CJ, Deane and Dawson JJ and at 234 per Brennan and Toohey JJ; Australian Law Reform Commission, *Evidence* (Report 26, (Interim) 1985) at Volume 1 para 258; Alger at para 29; J Black, "Inferences From Silence: Redressing the Balance? (1)" [1997] *Solicitors Journal* 741 at 743; M Weinberg, "The Right to Silence — Sparing the Judge From Talking Gibberish", paper presented at session 24 of the *30th Australian Legal Convention* (Melbourne,
18-21 September 1997) at para 56; C R Williams, "Silence in Australia: Probative Force and Rights in the Law of Evidence" (1994) 110 *Law Quarterly Review* 629 at 640 and 652; Victorian Bar *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 60, 70. Smith J of the Supreme Court of Victoria, gives examples of trials where the jury has asked the judge whether any, and if so, what, significance they should attach to the fact that the defendant has not testified: T Smith, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 1-2, 16.
15. Magistrates were not asked this question as they do not preside over jury trials.
16. Police prosecutors were not surveyed about this issue as they do not conduct jury trials.

Table 4.5: Effect of accused's silence on hearing and trial outcomes



[172 of 190 defence, 13 of 20* prosecutors and 21 of 29 judges answered this question]

* This figure includes all Crown prosecutors and barristers briefed by the Commonwealth and NSW Office of the Director of Public Prosecutions, but excludes police prosecutors.

4.19 Most respondents responded that they were unable to say how the accused's silence contributed to the outcome of the hearing or trial, reflecting a reluctance to speculate on the significance which juries attributed to the silence of the accused. The Commission has previously noted that it is not possible to assess the validity of the argument that juries tend to misuse the fact that the accused did not give evidence except by speculation, since New South Wales juries do not give reasons for their decisions.[17]

4.20 Overall, the most common response by participants who were able to answer this question was that where the accused did not testify, this sometimes contributed to an acquittal, and sometimes contributed to a conviction. Most judges responded either that the accused's silence did not affect the outcome of the trial or that it generally contributed to a conviction (19% each). Only 10% of judges reported that silence generally contributed to acquittals.

17. New South Wales Law Reform Commission, *The Right to Silence* (Discussion Paper 41, 1998) at para 5.26.

4.21 Most Crown prosecutors and barristers briefed by the New South Wales and Commonwealth Offices of the Director of Public Prosecutions (39%) responded that silence generally contributed to acquittals. 23% of this group responded that silence sometimes contributed to the acquittal of the accused and sometimes to a conviction. The most common response for defence lawyers was that the accused's silence sometimes contributed to an acquittal and sometimes contributed to a conviction (30%). 21% of defence lawyers responded that the accused's silence generally contributed to an acquittal.

Reasons for advice to remain silent

4.22 A number of submissions received by the Commission, and numerous commentators, have challenged the assumption that an accused person who was innocent would always give evidence. It is argued that there are many reasons why an innocent accused person would remain silent at his or her hearing or trial.[18]

18. Ethnic Affairs Commission, *Submission 1* at 1; *Submission 2* at 2; D Guilfoyle, *Submission* at 10; Marsdens, *Submission 2* at 5; National Childrens and Youth Law Centre, *Submission* at 2; NSW Young Lawyers, *Submission* at 6; Youth Justice Coalition, *Submission* at 6. See also Royal Commission on Criminal Justice, *Report of the Royal Commission on Criminal Justice* (London, 1993) at 56; *R v Friend* (1997) 2 All ER 1011; D Birch, "Commentary on Napper" [1996] *Criminal Law Review* 591 at 593; S Greer, "The Right to Silence: A Review of the Current Debate" (1990) 53 *Modern Law Review* 709 at 710 and 727; J Jackson, "Interpreting the Silence Provisions: The Northern Ireland Cases" [1995] *Criminal Law Review* 587 at 601; Justice at 21; G Nash, "The Right to Silence" (1994) 91 *Victorian Bar News* 62; Palmer at 141; S Nash, "Silence as Evidence: A Commonsense Development or a Violation of a Basic Right?" (1997) 21 *Criminal Law Journal* 145 at 146; S Nash and S Solley, "Limitations on the Right to Silence and Abuse of Process" (1997) 61 *Journal of Criminal Law* 95 at 96; R Pattendon, "Inferences From Silence" [1995] *Criminal Law Review* 602 at 607; S Sharpe, "Vulnerable Defendants and Inferences From Silence" (1997) 147 *New Law Journal* 842 at 842-

4.23 The Commission asked defence lawyers who advised clients to remain silent at their hearing or trial their reasons for giving this advice.[19] The most frequent reason given for this advice was the lawyer's concern that the accused, for reasons not related to guilt or innocence, would perform poorly as a witness. This arose due to communication factors. It also arose due to the client's personal characteristics, for example where the client had a mental illness or an intellectual disability, or, while innocent, was likely to present as hostile, evasive or confused.

4.24 The next most frequently cited reason for this advice was the lawyer's assessment that the prosecution case was very weak, rendering it unnecessary for the accused to give evidence.

4.25 The next most common reason was that the lawyer was concerned to protect the client from the harmful effect of giving evidence, particularly cross-examination. Following this, the next most frequent reason was that the accused had previously answered police questions, either during police questioning or in a written statement.

4.26 A number of defence lawyers reported that they advised clients to remain silent because courts tended to view minor inconsistencies between the accused's responses to police questions and evidence in court as evidence that the accused was lying.[20]

843; Stone at 22, C R Williams at 636 and 637-638; Criminal Bar Association, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 6.11; Law Institute of Victoria, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 2.1.2; T Smith, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at 2; Victorian Bar, *Submission to Victorian Scrutiny of Acts and Regulations Committee, Inquiry into the Right to Silence* at para 14, 15, 58, 62.

19. Other participants were not asked this question as they would be unlikely to have information about the reasons for advising accused persons against giving evidence.
20. See also para 2.44.

4.27 A number of defence lawyers also reported that they advised clients against testifying where the client indicated that giving evidence would entail incriminating another person, which the client wished to avoid. Others gave this advice to avoid exposing their client to cross-examination as to their criminal record or outstanding charges.[21]

4.28 A small number of defence lawyers reported that they occasionally advised a client to remain silent where the person feared that their safety, or the safety of their family, friends or associates, would be endangered if they gave evidence. A very small number of defence lawyers responded that they advised clients to remain silent because their evidence would assist the prosecution case or because the client was guilty.

21. Note that the *Evidence Act 1995* (NSW) s 103 and 14 restrict the circumstances in which accused persons can be cross-examined on any negative aspect of character or misconduct on the basis that it is relevant to credibility.

Appendices

- Appendix A
  Questionnaire for Judges and Magistrates
- Appendix B
  Questionnaire for Prosecutors
- Appendix C
  Questionnaire for Defence Lawyers

NEW SOUTH WALES LAW REFORM COMMISSION

The Right to Silence

Questionnaire for Judges and Magistrates

COMPLETING THE QUESTIONNAIRE

We would like you to answer this questionnaire on the basis of the cases which you have presided over in the last 6 months (ie 1 June 1998 to 30 November 1998).

CONFIDENTIALITY

All information you provide in the questionnaire will remain completely confidential.

No individuals who participate in the study will be identified and only aggregate information will be reported upon.

RETURNING THE QUESTIONNAIRE

Please return the completed survey in the next two weeks, either by mail, dx or fax. (*mail*) GPO Box 5199 Sydney 1044; (*dx*) DX 1227 Sydney; (*fax*) (02) 9228 8225.

If you have any questions, please contact either Peter Hennessy or Ailsa Goodwin at the

NSW Law Reform Commission on (02) 9228 8230.

1. In the last 6 months:

(A) Approximately how many criminal cases did you preside over?

1_____ Pleas

2_____ Hearings/trials

(B) Which jurisdiction did you preside in? *Tick one box only*.

1☐ Local courts

2☐ Children's courts

3☐ District Court

4☐ Supreme Court

Go to next Q

2. In the criminal cases (pleas and hearings/trials) you presided over in the last 6 months,

how often (if at all) was the accused legally represented at trial? *Tick one box only*.

1☐ Never [0%]

2☐ Almost never [approx 1-10%]

3☐ Sometimes [approx 11-40%]

4☐ About half the time [approx 41-59%]

5☐ Often [approx 60-89%]

6☐ Almost always [approx 90-99%]

7☐ Always [100%]

8☐ Unable to say/don't know
Go to next Q

POLICE QUESTIONING AND THE RIGHT TO SILENCE

3. In the criminal cases (pleas and hearings/trials) you presided over in the last 6 months,
how often did the accused exercise the right to silence during police questioning,
in the sense of refusing to provide substantial information about the defence case
to police? *Tick one box only*.
1☐ Never [0%] *Go to Q 7*
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

Please answer questions 4 and 5 in relation to only those cases where the accused exercised the right to silence during police questioning, in the sense of refusing to provide substantial information about the defence case to police.

4. Did the accused generally have legal advice or representation during police questioning or not? *Tick one box only*.
1☐ Never [0%]
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

5. In your view, how (if at all) did the accused's exercise of the right to silence during police questioning generally affect the accused's decision as to how to plead?
Tick one box only.
1☐ Generally contributed to a 'guilty' plea
2☐ Generally contributed to a plea to a lesser charge
3☐ Generally contributed to a 'not guilty' plea or no plea
4☐ Sometimes contributed to a 'guilty' plea, sometimes contributed to a plea to a lesser charge, sometimes led to a 'not guilty' plea or no plea
5☐ Generally did not affect the plea
6☐ Unable to say/don't know
Go to next Q

Please answer question 6 in relation to only those cases you presided over in the last 6 months where the accused was tried by a jury.

6. In your view, where the accused pleaded not guilty, how (if at all) did their exercise of the right to silence during police questioning generally contribute to the outcome of the hearing/trial? *Tick one box only*.
   1☐ Generally contributed to the acquittal of the accused
   2☐ Generally contributed to the conviction of the accused
   3☐ Sometimes contributed to the acquittal of the accused, sometimes contributed to their acquittal
   4☐ Generally did not affect the outcome of hearings/trials
   5☐ Not applicable — all accused persons who appeared before me pleaded guilty
   6☐ Not applicable — I did not preside over any jury trials
   7☐ Unable to say/don't know
   Go to next Q

POLICE AND PROSECUTION PRE-TRIAL DISCLOSURE

7. In the criminal cases (pleas and hearings/trials) you presided over in the last 6 months, how would you describe the level of police and prosecution pre-trial disclosure to the defence? *Tick one box only*.
   1☐ Generally adequate
   2☐ Generally inadequate
   3☐ Sometimes adequate, sometimes inadequate
   4☐ Unable to say/don't know
   Go to next Q

8. Where the level of police and prosecution pre-trial disclosure to the defence was inadequate, was the material which was not disclosed to the defence: *Tick one box only*.
   1☐ Generally material which assisted the prosecution case
   2☐ Generally material which assisted the defence case
   3☐ Sometimes material which assisted the prosecution case, sometimes material which assisted the defence case
   4☐ Generally material which assisted the prosecution case
   4☐ Not applicable — police and prosecution disclosure was always adequate
   5☐ Unable to say/don't know
   Go to next Q

In NSW, DPP guidelines require extensive disclosure by investigating police to Crown prosecutors, while police guidelines require briefs to be forwarded to police prosecutors.

9. In the criminal cases (pleas and hearings/trials) you presided over in the last 6 months, how often did the **investigating police** fulfil their pre-trial disclosure obligations? *Tick one box only*.
   1☐ Never [0%] *Go to Q 11*
   2☐ Almost never [approx 1-10%]
   3☐ Sometimes [approx 11-40%]
   4☐ About half the time [approx 41-59%]

5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

10. Where the **investigating police** fulfilled their pre-trial disclosure obligations, how (if at all) did this affect the efficiency of the hearing/trial process? (For example, disclosure affected the time at which the issues were identified, the time needed for preparation, the length of the hearing/trial, the number of adjournments sought or granted, the accuracy of estimated hearing/trial lengths for court listing purposes.) *Tick one box only*.
    1☐ Generally improved the efficiency of the process
    2☐ Generally reduced the efficiency of the process
    3☐ Sometimes improved the efficiency of the process and sometimes reduced the efficiency of the process
    4☐ Generally did not affect the efficiency of the process
    5☐ Unable to say/don't know

    Please describe how pre-trial disclosure by the investigating police affected the efficiency of the hearing/trial process.

    Go to next Q

Crown and police prosecutors are required by legislation to serve briefs of evidence on the defence, while Crown prosecutors are also required to disclose details of the prosecution case to the defence under the DPP guidelines.

11. In the criminal cases (pleas and hearings/trials) you presided over in the last 6 months, how often did the **prosecution** fulfil its pre-trial disclosure obligations
    to the defence? *Tick one box only*.
    1☐ Never [0%] *Go to Q 13*
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

Please note this question continues over the page.

12. Where the **prosecution** did fulfil its pre-trial disclosure obligations, how (if at all) did this affect the efficiency of the hearing/trial process? (For example,

disclosure affected the time at which the issues were identified, the time needed for preparation, the length of the hearing/trial, the number of adjournments sought or granted, the accuracy of estimated hearing/trial lengths for court listing purposes.) *Tick one box only.*

1☐ Generally improved the efficiency of the process
2☐ Generally reduced the efficiency of the process
3☐ Sometimes improved the efficiency of the process and sometimes reduced the efficiency of the l process
4☐ Generally did not affect the efficiency of the process
5☐ Unable to say/don't know

Please describe how prosecution pre-trial disclosure affected the efficiency of the hearing/trial process.

Go to next Q

DEFENCE PRE-TRIAL DISCLOSURE

In trials for indictable offences in NSW, the defence is required to give the prosecution notice that it intends to lead alibi evidence. In murder trials, the defence is required to give notice that it will lead evidence that the accused suffered from substantial impairment by abnormality of mind (formerly called diminished responsibility) at the time of the offence. However, there are no general defence disclosure requirements.

Please answer questions 13, 14, 15 and 16 if in the last 6 months you presided over any hearings/trials for indictable offences.

13. Did you preside over any criminal trials for indictable offences in the last 6 months where the defence led alibi evidence? *Tick one box only.*
    1☐ No *Go to Q 15*
    2☐ Yes *Go to next Q*

14. Did the defence comply with the notice requirements for this type of evidence? *Tick one box only.*
    1☐ Never [0%]
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

15. Did you preside over any murder trials in the last 6 months where the defence led evidence that the accused was suffering from substantial impairment by abnormality of mind at the time of the offence? *Tick one box only*.

1☐ No *Go to Q 17*

2☐ Yes *Go to next Q*

16. Did the defence comply with the notice requirements for this type of evidence?
Tick one box only.
1☐ Never [0%]
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

17. In the criminal cases you presided over in the last 6 months, how often did the defence provide pre-trial disclosure of substantial information about the defence case to the prosecution (other than through police questioning of the accused and the formal requirements for alibi and diminished responsibility evidence) on a voluntary basis? *Tick one box only*.
1☐ Never [0%] *Go to Q 20*
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

Please answer questions 18 and 19 in relation to only those cases where the defence voluntarily disclosed substantial information about the defence case to the prosecution, other than through police questioning of the accused and the formal requirements for alibi and diminished responsibility evidence.

18. Did the accused generally have legal advice or representation at this time or not?
Tick one box only.
1☐ Never [0%]
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

19. Where the defence volunteered substantial information about the defence case to the prosecution (other than through police questioning of the accused and the formal requirements for alibi and diminished responsibility evidence) how (if at all) did this affect the efficiency of the hearing/trial process? (For example, disclosure affected the time at which the issues were identified, the time needed for preparation, the length of the hearing/trial, the number of adjournments sought or granted, the accuracy of estimated hearing/trial lengths for court listing purposes.) *Tick one box only*.
    1☐ Generally improved the efficiency of the process
    2☐ Generally reduced the efficiency of the process
    3☐ Sometimes improved the efficiency of the process and sometimes reduced the efficiency of the process
    4☐ Generally did not affect the efficiency of the process
    5☐ Unable to say/don't know

    Please describe how voluntary defence pre-trial disclosure, other than through the formal requirements for alibi and diminished responsibility evidence, affected the efficiency of the hearing/trial process.

    Go to next Q

20. In the criminal cases you presided over in the last 6 months, how often did the prosecution and defence reach agreement pre-trial concerning admissions or informal proof of matters not in issue? *Tick one box only*.
    1☐ Never [0%]
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

THE RIGHT TO SILENCE AT TRIAL

21. In the criminal hearings/trials you presided over in the last 6 months, how often
    (if at all) did the accused exercise the right to silence at trial? *Tick one box only*.
    1☐ Never [0%]
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]

7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

22. In the criminal hearings/trials you presided over in the last 6 months, how often
(if at all) did the accused have the option of giving an unsworn statement?
Tick one box only.
1☐ Never [0%] *Go to Q 24*
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

23. In those hearings/trials where the option of giving an unsworn statement **was** available to the accused, how often (if at all) did the accused exercise the right to silence at trial? *Tick one box only*.
1☐ Never [0%] *Go to Q 24*
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Not applicable — there were no cases where the option of giving unsworn evidence was available to the accused
9☐ Unable to say/don't know
Go to next Q

24. In those hearings/trials where the option of giving an unsworn statement **was not** available to the accused, how often (if at all) did the accused exercise the right to silence at trial? *Tick one box only*.
1☐ Never [0%]
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Not applicable — the option of giving unsworn evidence was available to the accused in all cases
9☐ Unable to say/don't know
Go to next Q

Please answer questions 25 and 26 in relation to only those hearings/trials where the accused exercised the right to silence at trial.

25. Did the accused generally have legal representation at the hearing/trial or not? *Tick one box only*.
    1☐ Never [0%]
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

Please answer question 26 in relation to only those cases you presided over in the last
6 months where the accused was tried by a jury.

26. In your view, how (if at all) did the accused's decision to exercise the right to silence at trial contribute to the outcome of the hearing/trial? *Tick one box only*.
    1☐ Generally contributed to the acquittal of the accused
    2☐ Generally contributed to the conviction of the accused
    3☐ Sometimes contributed to the acquittal of the accused, sometimes contributed to the conviction of the accused
    4☐ Generally did not affect the outcome of the trial
    5☐ Not applicable — all accused persons who appeared before me pleaded guilty
    6☐ Not applicable — I did not preside over any jury trials
    7☐ Unable to say/don't know
    Go to next Q

27. In the criminal hearings/trials you presided over in the last 6 months, how often did the defence raise a defence with all of the following characteristics:
    - The defence was raised for the first time at the hearing/trial;
    - The defence involved evidence which could have been disclosed by the accused during police questioning;
    - Competent prosecutors could not have anticipated that the defence would be raised on the information available to them; and
    - The late disclosure of the defence hampered the prosecution (for example by making it impossible for the defence to be fully investigated) or benefited the defence (for example because the defence had extra time to prepare).

    Tick one box only.
    1☐ Never [0%] *End of questionnaire*
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]

6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

28. Did the accused generally have legal representation when such a defence was raised or not? *Tick one box only*.
1☐ Never [0%]
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

29. How (if at all) did such a defence contribute to the outcome of the hearing/trial? *Tick one box only*.
1☐ Generally contributed to the acquittal of the accused
2☐ Generally contributed to the conviction of the accused
3☐ Sometimes contributed to the acquittal of the accused, sometimes contributed to the conviction of the accused
4☐ Generally did not affect the outcome of the hearing/trial
5☐ Unable to say/don't know

End of questionnaire

NEW SOUTH WALES LAW REFORM COMMISSION

The Right to Silence

Questionnaire for Prosecutors

COMPLETING THE QUESTIONNAIRE

We would like you to answer this questionnaire on the basis of the cases which you have conducted in the last 6 months (ie 1 June 1998 to 30 November 1998).

CONFIDENTIALITY

All information you provide in the questionnaire will remain completely confidential.

No individuals who participate in the study will be identified and only aggregate information will be reported upon.

RETURNING THE QUESTIONNAIRE

Please return the completed survey in the next two weeks, either by mail, dx or fax. (*mail*) GPO Box 5199 Sydney 1044; (*dx*) DX 1227 Sydney; (*fax*) (02) 9228 8225.

If you have any questions, please contact either Peter Hennessy or Ailsa Goodwin at the

NSW Law Reform Commission on (02) 9228 8230.

1. In the last 6 months:

(A) Approximately how many criminal cases did you conduct?

1_____ Pleas

2_____ Hearings/trials

(B) Which jurisdiction/s did you prosecute cases in? *Tick all relevant jurisdictions and indicate which (if any) jurisdiction you mainly prosecuted in.*

1_____ Local courts

2_____ Children's courts

3_____ District Court

4_____ Supreme Court

Go to next Q

2. In the criminal cases (pleas and hearings/trials) you conducted in the last 6 months, how often (if at all) was the accused legally represented at trial? *Tick one box only*.

1☐ Never [0%]

2☐ Almost never [approx 1-10%]

3☐ Sometimes [approx 11-40%]

4☐ About half the time [approx 41-59%]

5☐ Often [approx 60-89%]

6☐ Almost always [approx 90-99%]

7☐ Always [100%]

8☐ Unable to say/don't know
Go to next Q

POLICE QUESTIONING AND THE RIGHT TO SILENCE

3. In the criminal cases (pleas and hearings/trials) you conducted in the last 6 months,
how often did the accused exercise the right to silence during police questioning,
in the sense of refusing to provide substantial information about the defence case
to police? *Tick one box only*.
1☐ Never [0%] Go *to Q 6*
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

Please answer questions 4 and 5 in relation to **only** those cases where the accused exercised the right to silence during police questioning, in the sense of refusing to provide substantial information about the defence case to police.

4. Did the accused generally have legal advice or representation during police questioning or not? *Tick one box only*.
1☐ Never [0%]
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

5. In your view, where the accused pleaded not guilty, how (if at all) did their exercise of the right to silence during police questioning generally contribute to the outcome of the hearing/trial? *Tick one box only*.
1☐ Generally contributed to the acquittal of the accused
2☐ Generally contributed to the conviction of the accused
3☐ Sometimes contributed to the acquittal of the accused,
sometimes contributed to their conviction
4☐ Generally did not affect the outcome of hearings/trials
5☐ Not applicable — all accused persons I prosecuted pleaded guilty
6☐ Unable to say/don't know
Go to next Q

POLICE AND PROSECUTION PRE-TRIAL DISCLOSURE

In NSW, DPP guidelines require extensive disclosure by investigating police to Crown prosecutors, while police guidelines require briefs to be forwarded to police prosecutors.

6. In the criminal cases (pleas and hearings/trials) you conducted in the last 6 months,
how often did the **investigating police** fulfil their pre-trial disclosure obligations to the prosecution? *Tick one box only.*
   1☐ Never [0%]
   2☐ Almost never [approx 1-10%]
   3☐ Sometimes [approx 11-40%]
   4☐ About half the time [approx 41-59%]
   5☐ Often [approx 60-89%]
   6☐ Almost always [approx 90-99%]
   7☐ Always [100%] Go *to Q 8*
   8☐ Unable to say/don't know
   Go to next Q

7. Where the **investigating police** did not fulfil their pre-trial disclosure, please explain why these obligations were not met.

   Go to next Q

8. Where the **investigating police** fulfilled their pre-trial disclosure obligations, how (if at all) did this affect the efficiency of the hearing/trial process? (For example, disclosure affected the time at which the issues were identified, the time needed for preparation, the length of the hearing/trial, the number of adjournments sought or granted, the accuracy of estimated hearing/trial lengths for court listing purposes.) *Tick one box only.*
   1☐ Generally improved the efficiency of the process
   2☐ Generally reduced the efficiency of the process
   3☐ Sometimes improved the efficiency of the process and sometimes reduced the efficiency of the process
   4☐ Generally did not affect the efficiency of the process
   5☐ Not applicable — investigating police did not fulfil pre-trial disclosure
   6☐ Unable to say/don't know

   Please describe how pre-trial disclosure by the investigating police affected the efficiency of the hearing/trial process.

Go to next Q

Crown and police prosecutors are required by legislation to serve briefs of evidence on the defence, while Crown prosecutors are also required to disclose details of the prosecution case to the defence under DPP guidelines.

9. In the criminal cases (pleas and hearing/trials) you conducted in the last 6 months,
how often did the **prosecution** fulfil its pre-trial disclosure obligations to the defence? *Tick one box only*.
1☐ Never [0%]
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%] Go *to Q 11*
8☐ Unable to say/don't know
Go to next Q

10. Where the **prosecution** did not fulfil its pre-trial disclosure obligations, please explain why these obligations were not met. (For example, the brief was not forwarded to the prosecution in time for pre-trial disclosure to the defence.)

Go to next Q

11. Where the **prosecution** fulfilled its pre-trial disclosure obligations, how (if at all) did this affect the efficiency of the hearing/trial process? (For example, disclosure affected the time at which the issues were identified, the time needed for preparation, the length of the hearing/trial, the number of adjournments sought or granted, the accuracy of estimated hearing/trial lengths for court listing purposes.) *Tick one box only.*
1☐ Generally improved the efficiency of the process
2☐ Generally reduced the efficiency of the process
3☐ Sometimes improved the efficiency of the process and sometimes reduced the efficiency of the process
4☐ Generally did not affect the efficiency of the process
5☐ Not applicable — prosecution did not fulfil pre-trial disclosure
6☐ Unable to say/don't know

Please describe how prosecution pre-trial disclosure affected the efficiency of the hearing/trial process.

Go to next Q

DEFENCE PRE-TRIAL DISCLOSURE

In trials for indictable offences in NSW, the defence is required to give the prosecution notice that it intends to lead alibi evidence. In murder trials, the defence is required to give notice that it will lead evidence that the accused suffered from substantial impairment by abnormality of mind (formerly called diminished responsibility) at the time of the offence. However, there are no general defence disclosure requirements.

12. Did you conduct any hearings/trials for indictable offences in the last 6 months where the defence led alibi evidence? *Tick one box only*.
    1☐ No *Go to Q 14*
    2☐ Yes *Go to next Q*

13. Did the defence comply with the notice requirements for this type of evidence? *Tick one box only*.
    1☐ Never [0%]
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

14. Did you conduct any murder trials in the last 6 months where the defence led evidence that the accused was suffering from substantial impairment by abnormality of mind at the time of the offence? *Tick one box only*.
    1☐ No *Go to Q 16*
    2☐ Yes *Go to next Q*

15. Did the defence comply with the notice requirements for this type of evidence? *Tick one box only*.
    1☐ Never [0%]
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

16. In the criminal cases you conducted in the last 6 months, how often did the defence provide pre-trial disclosure of substantial information about the defence case to the prosecution (other than through police questioning of the accused and the formal requirements for alibi and diminished responsibility evidence) on a voluntary basis? *Tick one box only*.
    1☐ Never [0%] *Go to Q 19*
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

Please answer questions 17 and 18 in relation to only those cases where the defence voluntarily disclosed substantial information about the defence case to the prosecution, other than through police questioning of the accused and the formal requirements for alibi and diminished responsibility evidence.

17. Did the accused generally have legal advice or representation at this time or not?
    Tick one box only.
    1☐ Never [0%]
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

Please note this question continues over the page.

18. Where the defence volunteered substantial information about the defence case to the prosecution (other than through police questioning of the accused and the formal requirements for alibi and diminished responsibility evidence) how (if at all) did this affect the efficiency of the hearing/trial process? (For example, disclosure affected the time at which the issues were identified, the time needed for preparation, the length of the hearing/trial, the number of adjournments sought or granted, the accuracy of estimated hearing/trial lengths for court listing purposes.) *Tick one box only*.
    1☐ Generally improved the efficiency of the process
    2☐ Generally reduced the efficiency of the process
    3☐ Sometimes improved the efficiency of the process and sometimes reduced the efficiency of the process

4☐ Generally did not affect the efficiency of the process
5☐ Unable to say/don't know

Please describe how voluntary defence pre-trial disclosure affected the efficiency
of the hearing/trial process.

Go to next Q

19. In the criminal cases you conducted in the last 6 months, how often did the prosecution and defence reach agreement pre-trial concerning admissions or informal proof of matters not in issue? *Tick one box only*.
1☐ Never [0%]
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

THE RIGHT TO SILENCE AT TRIAL

20. In the criminal hearings/trials you conducted in the last 6 months, how often (if at all) did the accused exercise the right to silence at trial? *Tick one box only*.
1☐ Never [0%]
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

21. In the criminal hearings/trials you conducted in the last 6 months, how often (if at all) did the accused have the option of giving an unsworn statement? *Tick one box only*.
1☐ Never [0%]
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]

6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

22. In those hearings/trials where the option of giving an unsworn statement **was** available to the accused, how often (if at all) did the accused exercise the right to silence at trial? *Tick one box only*.
1☐ Never [0%]
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Not applicable — there were no cases where the option of giving unsworn evidence was available to the accused
9☐ Unable to say/don't know
Go to next Q

23. In those hearings/trials where the option of giving an unsworn statement **was not** available to the accused, how often (if at all) did the accused exercise the right to silence at trial? *Tick one box only*.
1☐ Never [0%]
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Not applicable — the option of giving unsworn evidence was available to the accused in all cases
9☐ Unable to say/don't know
Go to next Q

Please answer questions 24 and 25 in relation to only those hearings/trials where the accused exercised the right to silence at trial.

24. Did the accused generally have legal representation at the hearing/trial or not? *Tick one box only*.
1☐ Never [0%]
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know

Go to next Q

25. In your view, how (if at all) did the accused's decision to exercise the right to silence at trial contribute to the outcome of the trial? *Tick one box only.*
    1☐ Generally contributed to the acquittal of the accused
    2☐ Generally contributed to the conviction of the accused
    3☐ Sometimes contributed to the acquittal of the accused, sometimes contributed to the conviction of the accused
    4☐ Generally did not affect the outcome of the trial
    5☐ Unable to say/don't know
    Go to next Q

26. In the criminal hearings/trials you conducted in the last 6 months, how often did the defence raise a defence with **all** of the following characteristics:
    - The defence was raised for the first time at the hearing/trial.
    - The defence involved evidence which could have been disclosed by the accused during police questioning.
    - Competent prosecutors could not have anticipated that the defence would be raised on the information available to them.
    - The late disclosure of the defence hampered the prosecution (for example by making it impossible for the defence to be fully investigated) or benefited the defence (for example because the defence had extra time to prepare).

    Tick one box only.
    1☐ Never [0%] *End of questionnaire*
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

27. Did the accused generally have legal representation when such a defence was raised or not? *Tick one box only.*
    1☐ Never [0%]
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

28. How (if at all) did such a defence contribute to the outcome of the hearing/trial?
Tick one box only.

1☐ Generally contributed to the acquittal of the accused
2☐ Generally contributed to the conviction of the accused
3☐ Sometimes contributed to the acquittal of the accused, sometimes contributed to the conviction of the accused
4☐ Generally did not affect the outcome of the hearing/trial
5☐ Unable to say/don't know

End of questionnaire

NEW SOUTH WALES LAW REFORM COMMISSION

The Right to Silence

Questionnaire for Defence Lawyers

COMPLETING THE QUESTIONNAIRE

We would like you to answer this questionnaire on the basis of the cases which you have conducted in the last 6 months (ie 1 June 1998 to 30 November 1998).

CONFIDENTIALITY

All information you provide in the questionnaire will remain completely confidential.

No individuals who participate in the study will be identified and only aggregate information will be reported upon.

RETURNING THE QUESTIONNAIRE

Please return the completed survey in the next two weeks, either by mail, dx or fax. (mail) GPO Box 5199 Sydney 1044; (dx) DX 1227 Sydney; (fax) (02) 9228 8225.

If you have any questions, please contact either Peter Hennessy or Ailsa Goodwin at the
NSW Law Reform Commission on (02) 9228 8230.

1. In the last 6 months:

(A) Approximately how many criminal cases did you conduct?

1_____ Pleas
2_____ Hearings/trials

(B) Which jurisdiction/s did you prosecute cases in? *Tick all relevant jurisdictions and indicate which (if any) jurisdiction you mainly prosecuted in.*

1_____ Local courts
2_____ Children's courts
3_____ District Court
4_____ Supreme Court

Go to next Q

POLICE QUESTIONING AND THE RIGHT TO SILENCE

2. During the last 6 months, did your practice include giving advice to clients being questioned by police? *Tick one box only.*

1☐ No *Go to Q 6*
2☐ Yes *Go to next Q*

Please answer questions 3, 4 and 5 in relation to **only** those clients to whom you gave advice during police questioning.

3. How often did your clients exercise the right to silence when questioned by police, in the sense of refusing to provide substantial information about the defence case
to police? *Tick one box only.*
1☐ Never [0%] *Go to Q 6*
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

4. Of the clients who exercised the right to silence during police questioning, how often did you advise them to do so? *Tick one box only.*
1☐ Never [0%] *Go to Q 6*
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

Please note this question continues over the page.

5. What were your reasons for advising clients to exercise the right to silence? *Number the reasons in the spaces provided from 1 to 14, where 1 is the most frequent.*
1_____ Insufficient information provided by police about the alleged offence
2_____ Insufficient evidence about the alleged offence
3_____ Communication issues (for example, client's language difficulties, low IQ, intellectual disability, client's ability to communicate impaired by alcohol or drugs)
4_____ Police advised that client would be charged whether or not he or she answered questions
5_____ Client feared incriminating others
6_____ Client's defence implausible
7_____ Answers would have amounted to admission of guilt
8_____ My distrust of individual investigating police officer/s
9_____ Client's distrust of individual investigating police officer/s

10_____ Client embarrassed by answers to questions
11_____ Client had previously provided an explanation to police
12_____ Client adamant that he or she wished to remain silent
13_____ Insufficient instructions from client
14_____ Other/s (please provide details)

Go to next Q

Please answer questions 6 and 7 in relation to **only** those clients to whom you did not give advice during police questioning.

6. In the criminal cases (pleas and hearings/trials) you conducted in the last 6 months,
how often did your clients exercise the right to silence during police questioning,
in the sense of refusing to provide substantial information about the defence case
to police? *Tick one box only*.
1☐ Never [0%] *Go to Q 10*
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

7. Where your clients exercised the right to silence during police questioning, in the sense of refusing to provide substantial information about the defence case to police, did they generally have legal advice or representation at the time or not? *Tick one box only.*
1☐ Never [0%]
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

8. In your view, how (if at all) did your clients' exercise of the right to silence during police questioning generally affect the decision as to how to plead? *Tick one box only*.

1☐ Generally contributed to a 'guilty' plea
2☐ Generally contributed to a plea to a lesser charge
3☐ Generally contributed to a 'not guilty' plea or no plea
4☐ Sometimes contributed to a 'guilty' plea, sometimes contributed to a plea to a lesser charge, sometimes led to a 'not guilty' plea or no plea
5☐ Generally did not affect the plea
6☐ Unable to say/don't know
Go to next Q

9. In your view, where your clients pleaded not guilty, how (if at all) did their exercise of the right to silence during police questioning generally contribute to the outcome of the hearing/trial? *Tick one box only*.
1☐ Generally contributed to the acquittal of my clients
2☐ Generally contributed to the conviction of my clients
3☐ Sometimes contributed to the acquittal of my clients, sometimes contributed to their conviction
4☐ Generally did not affect the outcome of hearings/trials
5☐ Not applicable — all my clients who exercised the right to silence during police questioning pleaded guilty
6☐ Unable to say/don't know
Go to next Q

POLICE AND PROSECUTION PRE-TRIAL DISCLOSURE

10. In the criminal cases (pleas and hearings/trials) you conducted in the last 6 months,
how would you describe the level of police and prosecution pre-trial disclosure to the defence? *Tick one box only.*
1☐ Generally adequate
2☐ Generally inadequate
3☐ Sometimes adequate, sometimes inadequate
4☐ Unable to say/don't know
Go to next Q

11. Where the level of police and prosecution pre-trial disclosure to the defence was inadequate, was the material which was not disclosed to the defence:
Tick one box only.
1☐ Generally material which assisted the prosecution case
2☐ Generally material which assisted the defence case
3☐ Sometimes material which assisted the prosecution case, sometimes material which assisted the defence case
4☐ Not applicable — police and prosecution disclosure was always adequate
5☐ Unable to say/don't know
Go to next Q

In NSW, DPP guidelines require extensive disclosure by investigating police to Crown prosecutors, while police guidelines require briefs to be forwarded to police prosecutors.

12. In the criminal cases (pleas and hearings/trials) you conducted in the last 6 months, how often did the **investigating police** fulfil their pre-trial disclosure obligations to the prosecution? *Tick one box only*.
    1☐ Never [0%] *Go to Q 14*
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

13. Where the **investigating police** fulfilled their pre-trial disclosure obligations, how (if at all) did this affect the efficiency of the hearing/trial process? (For example, disclosure affected the time at which the issues were identified, the time needed for preparation, the length of the hearing/trial, the number of adjournments sought or granted, the accuracy of estimated hearing/trial lengths for court listing purposes.) *Tick one box only*.
    1☐ Generally improved the efficiency of the process
    2☐ Generally reduced the efficiency of the process
    3☐ Sometimes improved the efficiency of the process and sometimes reduced the efficiency of the process
    4☐ Generally did not affect the efficiency of the process
    5☐ Unable to say/don't know

    Please describe how pre-trial disclosure by the investigating police affected the efficiency of the hearing/trial process.

    Go to next Q

Crown and police prosecutors are required by legislation to serve briefs of evidence on the defence, while Crown prosecutors are also required to disclose details of the prosecution case to the defence under DPP guidelines.

14. In the criminal cases (pleas and hearings/trials) you conducted in the last 6 months,
    how often did the **prosecution** fulfil its pre-trial disclosure obligations to the defence? *Tick one box only*.
    1☐ Never [0%] *Go to Q 16*
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]

7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

Please note this question continues over the page.

15. Where the **prosecution** did fulfil its pre-trial disclosure obligations, how (if at all) did this affect the efficiency of the hearing/trial process? (For example, disclosure affected the time at which the issues were identified, the time needed for preparation, the length of the hearing/trial, the number of adjournments sought or granted, the accuracy of estimated hearing/trial lengths for court listing purposes.) *Tick one box only*.
    1☐ Generally improved the efficiency of the process
    2☐ Generally reduced the efficiency of the process
    3☐ Sometimes improved the efficiency of the process and sometimes reduced the efficiency of the process
    4☐ Generally did not affect the efficiency of the process
    5☐ Unable to say/don't know

    Please describe how prosecution pre-trial disclosure affected the efficiency of the hearing/trial process.

    Go to next Q

DEFENCE PRE-TRIAL DISCLOSURE

In trials for indictable offences in NSW, the defence is required to give notice that it intends to raise alibi evidence. In murder trials, the defence is required to give notice
that it will lead evidence that the accused suffered from substantial impairment by abnormality of mind (formerly called diminished responsibility) at the time of the offence. However, there are no general defence disclosure requirements.

16. Did you conduct any hearings/trials for indictable offences in the last 6 months where the defence led alibi evidence? *Tick one box only*.
    1☐ No *Go to Q 19*
    2☐ Yes *Go to next Q*

17. Did the defence comply with the notice requirements for this type of evidence? *Tick one box only*.
    1☐ Never [0%]
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]

6☐ Almost always [approx 90-99%]
7☐ Always [100%] *Go to Q 19*
8☐ Unable to say/don't know
Go to next Q

18. Where the defence did not comply with the notice requirements for this type of evidence, please explain why these requirements were not met. (For example, late instructions from client.)

Go to next Q

19. Did you conduct any murder trials in the last 6 months where the defence led evidence that the accused was suffering from substantial impairment by abnormality of mind at the time of the offence?
1☐ No *Go to Q 22*
2☐ Yes *Go to next Q*

20. Did the defence comply with the notice requirements for this type of evidence? *Tick one box only*
1☐ Never [0%]
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%] *Go to Q 22*
8☐ Unable to say/don't know
Go to next Q

21. Where the defence did not comply with the notice requirements for this type of evidence, please explain why these requirements were not met.

Go to next Q

22. In the criminal cases you conducted in the last 6 months, how often did the defence provide pre-trial disclosure of substantial information about the defence case to the prosecution (other than through police questioning of the accused and the formal requirements for alibi and diminished responsibility evidence) on a voluntary basis? *Tick one box only.*
1☐ Never [0%] *Go to Q 25*
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]

4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

Please answer questions 23 and 24 in relation to **only** those cases where the defence voluntarily disclosed substantial information about the defence case to the prosecution, other than through police questioning of the accused and the formal requirements for alibi and diminished responsibility evidence.

23. Did your clients generally have legal advice or representation (whether yourself
or somebody else) at this stage or not? *Tick one box only*.
1☐ Never [0%] *Go to Q 25*
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]
8☐ Unable to say/don't know
Go to next Q

24. Where the defence volunteered substantial information about the defence case to the prosecution (other than through police questioning of the accused and the formal requirements for alibi and diminished responsibility evidence) how (if at all) did this affect the efficiency of the hearing/trial process? (For example, disclosure affected the time at which the issues were identified, the time needed for preparation, the length of the hearing/trial, the number of adjournments sought or granted, the accuracy of estimated hearing/trial lengths for court listing purposes.) *Tick one box only*.
1☐ Generally improved the efficiency of the process
2☐ Generally reduced the efficiency of the process
3☐ Sometimes improved the efficiency of the process and sometimes reduced the efficiency of the process
4☐ Generally did not affect the efficiency of the process
5☐ Unable to say/don't know

Please describe how voluntary defence pre-trial disclosure affected the efficiency
of the hearing/trial process.

Go to next Q

25. In the criminal cases you conducted in the last 6 months, how often did the prosecution and defence reach agreement pre-trial concerning admissions or informal proof of matters not in issue? *Tick one box only*.
1☐ Never [0%]
2☐ Almost never [approx 1-10%]
3☐ Sometimes [approx 11-40%]
4☐ About half the time [approx 41-59%]
5☐ Often [approx 60-89%]
6☐ Almost always [approx 90-99%]
7☐ Always [100%]

8☐ Unable to say/don't know
Go to next Q

THE RIGHT TO SILENCE AT TRIAL

26. In the criminal hearings/trials you conducted over the last 6 months, how often (if at all) did your clients exercise the right to silence at trial? *Tick one box only*.
    1☐ Never [0%] *Go to Q 29*
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

27. Of the clients who exercised the right to silence at trial, how often did you advise them to do so? *Tick one box only*.
    1☐ Never [0%] *Go to Q 29*
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

28. What were your reasons for advising clients not to testify?
    Number the reasons in the spaces provided from 1 to 9, where 1 is the most frequent.
    1_____ Avoid cross examination on prior convictions
    2_____ Avoid cross examination on outstanding charges
    3_____ Concerns about the clients' performance as a witness (for example, communication issues, client's personality)
    4_____ Concern about the harmful effect of cross examination on client
    5_____ Client feared for own safety or safety of family, friends or associates
    6_____ Client feared incriminating others
    7_____ Client had previously answered police questions about the alleged offence
    8_____ Weak prosecution case
    9_____ Other/s (please provide explanation over the page)

Go to next Q

29. In the criminal hearings/trials you conducted in the last 6 months, how often (if at all) did your client have the option of giving an unsworn statement? *Tick one box only*.
    1☐ Never [0%] *Go to Q 31*
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

30. In those hearings/trials where the option of giving an unsworn statement **was** available to your clients, how often did your clients exercise the right to silence at trial? *Tick one box only*.
    1☐ Never [0%]
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

31. In those hearings/trials where the option of giving an unsworn statement **was not** available to your clients, how often did your clients exercise the right to silence
    at trial? *Tick one box only*.
    1☐ Never [0%]
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

32. In your view, how (if at all) did the decision to exercise the right to silence contribute to the outcome of the trial? *Tick one box only*.
    1☐ Generally contributed to the acquittal of my clients
    2☐ Generally contributed to the conviction of my clients
    3☐ Sometimes contributed to the acquittal of my clients, sometimes contributed to their conviction

4☐ Generally did not affect the outcome of the trial
5☐ Unable to say/don't know
Go to next Q

33. In the criminal hearings/trials you conducted in the last 6 months, how often did the defence raise a defence with all of the following characteristics:
    - The defence was raised for the first time at the hearing/trial.
    - The defence involved evidence which could have been disclosed by your client during police questioning.
    - Competent prosecutors could not have anticipated that the defence would be raised on the information available to them.
    - The late disclosure of the defence hampered the prosecution (for example by making it impossible for the defence to be fully investigated) or benefited the defence (for example because the defence had extra time to prepare).

    Tick one box only.
    1☐ Never [0%] *End of questionnaire*
    2☐ Almost never [approx 1-10%]
    3☐ Sometimes [approx 11-40%]
    4☐ About half the time [approx 41-59%]
    5☐ Often [approx 60-89%]
    6☐ Almost always [approx 90-99%]
    7☐ Always [100%]
    8☐ Unable to say/don't know
    Go to next Q

34. In your view, how (if at all) did such a defence contribute to the outcome of the hearing/trial? *Tick one box only*.
    1☐ Generally contributed to the acquittal of my clients
    2☐ Generally contributed to the conviction of my clients
    3☐ Sometimes contributed to the acquittal of my clients, sometimes contributed to their conviction
    4☐ Generally did not affect the outcome of the hearing/trial
    5☐ Unable to say/don't know

End of questionnaire