ASSESSING PRE-TRIAL SILENCE: THE LOGIC, CONSTRUCTION AND UTILITY OF SECTION 89A OF THE *EVIDENCE ACT 1995* (NSW)

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Complexity arises when prosecutors invite an adverse inference from a defendant's pre-trial silence under section 89A of the Evidence Act 1995 (NSW). Despite controversy surrounding this provision's enactment, there has been limited scholarship analysing its underlying logic and application in practice. This article explains how a defendant's pre-trial silence can logically support the prosecution case, albeit in limited ways. With reference to English cases concerning similar legislation, it then critiques the New South Wales courts' approach to section 89A. This analysis reveals issues with their consideration of legal advice to remain silent, which diverges from the English approach, and the scope of 'official questioning' that may enliven the provision. In all, section 89A inferences involve intricate reasoning and have limited probative value, calling into question whether this curtailment of the right to silence is worthwhile.

I INTRODUCTION

Over 10 years have passed since the introduction of section 89A of the *Evidence Act 1995* (NSW) ('*Evidence Act*').[1] The section permits 'unfavourable inferences' to be drawn against criminal defendants who fail to speak to police in certain circumstances.[2] It is unique to New South Wales' ('NSW') version of the Uniform Evidence Law. It departs from general statutory and common law prohibitions on adverse comment about a defendant's pre-trial silence, or silence during proceedings.[3] Other than the NSW Government and Police, most stakeholders in the criminal

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1 See *Evidence Amendment (Evidence of Silence) Act 2013* (NSW).

2 *Evidence Act 1995* (NSW) s 89A(1) ('*Evidence Act*').

3 Ibid ss 20, 89; *Petty v The Queen* (1991) 173 CLR 95, 99 (Mason CJ, Deane, Toohey and McHugh JJ) ('*Petty*').

justice system opposed the provision.[4] In 2000, the New South Wales Law Reform Commission recommended against introducing such a change.[5] Within the 16-day consultation on the draft bill in 2012, the Law Society of New South Wales, the New South Wales Bar Association (including Crown Prosecutors and Public Defenders), academics, and advocacy and community organisations made submissions opposing it.[6] Such opponents expressed concerns about the legislation's curtailment of the right to silence, the equivocal nature of silence, and the complexity of applying a similar English provision known to be 'a notorious minefield'.[7]

In the decade since, however, public discourse about section 89A has diminished. The legislation required the Attorney-General to review section 89A after five years to determine whether its policy objectives remained valid and whether the terms of section 89A remained appropriate for securing those objectives, and to table a report on this review in Parliament.[8] This does not appear to have been done. The only recorded parliamentary discussion about section 89A since its introduction is a query about the number of cases involving the 'unfavourable inference'.[9] At that time, there were none. Since then, a handful of cases have considered section 89A, but there has been limited analysis of the provision's underlying logic or how courts have interpreted and applied it in practice.[10] Considering the initial opposition to the legislation, the absence of any meaningful review of its

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4 Yvonne Marie Daly, 'The Right to Silence: Inferences and Interference' (2014) 47(1) *Australian and New Zealand Journal of Criminology* 59, 60 <https://doi.org/10.1177/0004865813497732> ('Inferences and Interference'); New South Wales Bar Association, Submission to NSW Department of Attorney-General and Justice, *Consultation on Evidence Amendment (Evidence of Silence) Bill 2012* (28 September 2012) 16.

5 New South Wales Law Reform Commission, *The Right to Silence* (Report No 95, July 2000) 65.

6 Law Society of New South Wales, Submission to New South Wales Department of Attorney-General and Justice, *Consultation on Evidence Amendment (Evidence of Silence) Bill 2012* (27 September 2012); New South Wales Bar Association (n 4); David Hamer et al, 'Submission on Exposure Draft: Evidence Amendment (Evidence of Silence) Bill 2012' (Research Paper No 14/20, Sydney Law School, The University of Sydney, February 2014); Shopfront Youth Legal Centre, Submission to New South Wales Department of Attorney-General and Justice, *Consultation on Evidence Amendment (Evidence of Silence) Bill 2012* (28 September 2012); New South Wales Council for Civil Liberties, Submission to New South Wales Department of Attorney-General and Justice, *Consultation on Evidence Amendment (Evidence of Silence) Bill 2012* (20 September 2012). See also Kingsford Legal Centre, Submission to New South Wales Department of Attorney-General and Justice, *Consultation on Evidence Amendment (Evidence of Silence) Bill 2012* (3 October 2012).

7 *Criminal Justice and Public Order Act 1994* (UK) s 34 ('*CJPOA*'); *R v Beckles* [2005] 1 WLR 2829, 2833 [6] (Lord Woolf CJ for the Court) ('*Beckles*'), quoting *R v B (Kenneth James)* [2003] EWCA Crim 3080, [20] (Dyson LJ). See above nn 4–6. See also Ashley Cameron, 'Common Sense or Unnecessary Complexity? The Recent Change to the Right to Silence in New South Wales' (2014) 19(2) *Deakin Law Review* 311 <https://doi.org/10.21153/dlr2014vol19no2art345>; Victor Chu, 'Tinkering with the Right to Silence: The *Evidence Amendment (Evidence of Silence) Act 2013* (NSW)' (2013) 17(25) *University of Western Sydney Law Review* 25; David Dixon and Nicholas Cowdery, 'Silence Rights' (2013) 17(1) *Australian Indigenous Law Review* 23.

8 *Evidence Act* (n 2) sch 2 pt 4 cl 25.

9 New South Wales, *Questions and Answers*, Legislative Assembly, 28 May 2015, 115 [0011].

10 *R v Jafary* [2016] NSWDC 41 ('*Jafary*'); *R v Egan* (2017) 26 DCLR (NSW) 164 ('*Egan*'); *Hogg v The Queen* (2019) 101 NSWLR 524 ('*Hogg*'); *CV v The King* [2022] NSWCCA 264 ('*CV*').

operation, and renewed calls for the repeal of the equivalent English legislation,[11] such analysis is worthwhile.

This article assesses section 89A in the light of the emerging case law, examining the section's logic, the courts' engagement with that logic and interpretation of the section, and the section's utility. This first Part contextualises the legislation. Part II argues that pre-trial silence can logically relate to the defendant's guilt[12] but is not very probative. Part III analyses the courts' interpretation of the requirement that the defendant 'could reasonably have been expected' to mention some fact, and Part IV analyses the requirement that they failed to do so 'during official questioning'.[13] These requirements present difficulties which cast doubt on the provision's worth, considering silence's limited evidential value. The conclusion discusses the path forward.

This article does not examine the meaning of 'reliance on' a fact in one's defence,[14] nor 'reasonable opportunity' to consult a solicitor about the provision,[15] because Australian cases have not considered these issues. The former may prove technical,[16] and the latter raises concerns about suspects' difficulties in understanding the provision.[17] Those concerns, along with section 89A's effect on lawyers' attendance at police interviews,[18] are ripe for empirical investigation.

A The Legislation

At its core, section 89A provides that:

> (1) In a criminal proceeding for a serious indictable offence, such unfavourable inferences may be drawn as appear proper from evidence that, during official questioning in relation to the offence, the defendant failed or refused to mention a fact –
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> (a) that the defendant could reasonably have been expected to mention in the circumstances existing at the time, and
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> (b) that is relied on in his or her defence in that proceeding.[19]

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11 Hannah Quirk, 'The Case for Restoring the Right to Silence' in JJ Child and RA Duff (eds), *Criminal Law Reform Now: Proposals and Critique* (Hart Publishing, 2019) 253 <https://doi.org/10.5040/9781509916801.ch-009> ('Restoring the Right to Silence'); Abenaa Owusu-Bempah, 'How to Reinstate the Right to Silence' in JJ Child and RA Duff (eds) *Criminal Law Reform Now: Proposals and Critique* (Hart Publishing, 2019) 270 <https://doi.org/10.5040/9781509916801.ch-009a>.

12 Cf *Egan* (n 10) 171 [40] (Williams ADCJ).

13 *Evidence Act* (n 2) ss 89A(1), (9).

14 Ibid s 89A(1).

15 Ibid s 89A(2)(d).

16 See, eg, Cameron (n 7) 335–41; David Ormerod and David Perry (eds), *Blackstone's Criminal Practice* (Oxford University Press, 33rd ed, 2023) 3355–6 [F20.10]; Ian Dennis, 'Silence in the Police Station: The Marginalisation of Section 34' [2002] (January) *Criminal Law Review* 25, 30–2; Hamer et al (n 6) 6.

17 See Dixon and Cowdery (n 7) 30–1; Quirk, 'Restoring the Right to Silence' (n 11) 262; Hannah Quirk, *The Rise and Fall of the Right of Silence* (Routledge, 2017) 62–7 ('*Rise and Fall*'); Ed Cape, 'Sidelining Defence Lawyers: Police Station Advice after *Condron*' (1997) 1(5) *International Journal of Evidence and Proof* 386, 398 n 32.

18 See Dixon and Cowdery (n 7); Emma Partridge, 'Right to Silence Law Drives Lawyers to Not Show Up for Clients at Police Stations', *The Sydney Morning Herald* (online, 21 July 2015) <https://www.smh.com.au/national/nsw/right-to-silence-law-drives-lawyers-to-not-show-up-for-clients-at-police-stations-20150721-gih4qf.html>.

19 *Evidence Act* (n 2) s 89A(1).

In short, defendants might be penalised for failing to mention some part of their defence to police. An investigating official must have administered a special caution to the suspect, explaining the legislation.[20] The caution must have been administered in the presence of the defendant's solicitor,[21] and the defendant must have been allowed reasonable opportunity to consult the solicitor about the section.[22] The provision does not apply if the defendant is under 18 years of age or is incapable of understanding the caution,[23] or if the inference is the only evidence of their guilt.[24]

Section 89A is based on section 34 of the *Criminal Justice and Public Order Act 1994* (UK) ('*CJPOA*').[25] The body of case law and commentary on that provision is much more extensive than that concerning section 89A and informs this article's analysis. The greater discourse on section 34 may be for two reasons. First, section 34 clashes with the right to a fair trial under the *European Convention on Human Rights* ('*ECHR*'), implemented into English law by the *Human Rights Act 1998* (UK),[26] resulting in several appeals to the European Court of Human Rights.[27] Secondly, the lack of a police station duty solicitor scheme[28] in NSW means that section 89A could be circumvented by the absence of a lawyer at police interviews.[29] The legislature accepted this – it is the defendant's 'choice' whether to bring legal counsel.[30] And solicitors themselves might refuse to attend interviews, either tactically or to avoid conflicts of interest if solicitors must testify as to the 'reasonableness' of their clients' silence.[31] Part III of this article expands on concerns that section 89A might affect the right to counsel.[32]

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20 Ibid ss 89A(2)(a), (9).
21 Ibid s 89A(2)(c).
22 Ibid s 89A(2)(d).
23 Ibid s 89A(5)(a).
24 Ibid s 89A(5)(b).
25 *CJPOA* (n 7) s 34. See Hamer et al (n 6) 2.
26 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 6 ('*ECHR*'); *Human Rights Act 1998* (UK) s 3(1).
27 See, eg, *Beckles v United Kingdom* [2002] I Eur Court HR 661; *Condron v United Kingdom* (2001) 31 EHRR 1. See also *Murray v United Kingdom* (1996) 22 EHRR 29.
28 New South Wales Law Reform Commission (n 5) [2.139]; Cameron (n 7) 316 n 22. See generally *Dietrich v The Queen* (1992) 177 CLR 292, 311 (Mason CJ and McHugh J).
29 See *Evidence Act* (n 2) s 89A(2)(c).
30 New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 18579 (Greg Smith, Attorney-General).
31 Dixon and Cowdery (n 7) 28–9.
32 See generally John D Jackson and Sarah J Summers, 'Seeking Core Fair Trial Standards across National Boundaries: Judicial Impartiality, the Prosecutorial Role and the Right to Counsel' in John D Jackson and Sarah J Summers (eds), *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms* (Hart Publishing, 2018) 99, 109–11; Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005) 266 <https://doi.org/10.1093/acprof:oso/9780199271207.001.0001>; Quirk, *Rise and Fall* (n 17) 86–7; Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) 247–50; *R v Samuel* [1998] QB 615, 630 (Hodgson J for the Court) ('*Samuel*'); Ed Cape and Matt Hardcastle, 'Recent Cases on Inferences from "Silence": What Is Left of the Right to Silence?' (2022) 10 *Criminal Law Review* 796, 804. See also Daly, 'Inferences and Interference' (n 4) 67–9; Dixon and Cowdery (n 7) 27–30; Cape (n 17); Simon Cooper, 'Legal Advice and Pre-trial Silence: Unreasonable Developments' (2006) 10(1) *International Journal of Evidence and Proof* 60 <https://doi.org/10.1350/ijep.2006.10.1.60>.

B Rationale

As canvassed above, the NSW Government's justifications for section 89A were controversial, and the opportunity to comment on the draft bill was brief.[33] The legislation was announced as part of a 'crime crackdown' following a series of gang-related shootings, where suspects and witnesses had supposedly adopted a 'code of silence' to frustrate investigations.[34] Sophisticated criminals were also said to escape conviction through 'ambush defences' – that is, by remaining silent until trial and springing fabricated defences upon the jury which came too late to disprove.[35] Nonetheless, empirical research disproved the claim that suspects' silence affected conviction rates.[36] Concomitant amendments to the *Criminal Procedure Act 1986* (NSW) were sufficient to resolve any such concern, by strengthening defence disclosure requirements.[37] These requirements provide more guidance as to which 'facts' the defence must mention than section 89A's notion of 'reasonably expected' facts.[38]

The provision might still be thought to expedite trials and improve the quality of evidence, by identifying material facts early in the investigation.[39] Yet this article highlights interpretative and evidential complexities which may distract juries and spawn unnecessary appeals.[40] The innocent may make errors under the pressure to speak early, and the guilty may lie instead of remaining silent.[41] Further, while Part II demonstrates that the provision could have a legitimate evidential function[42] – that is, pre-trial silence could indicate guilt – drawing that inference is far from the exercise in 'common sense' the Government touted it to be.[43]

Considering its rapid enactment despite such problems, it appears that section 89A had a political purpose, to unsettle stubborn suspects and give police greater

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33 See above nn 4–7 and accompanying text.

34 Barry O'Farrell, 'Crime Crackdown: "Right to Silence" Law Toughened' (Media Release, 14 August 2012) <https://nswbar.asn.au/circulars/2012/aug/r2s.pdf>; Greg Smith, 'Call to Support Changes to Right of Silence' (Media Release, 12 September 2012) <https://web.archive.org/web/20121023011854/http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/120912_changes_right_to_silence.pdf/$file/120912_changes_right_to_silence.pdf>. See also Hamer et al (n 6) 1–2; Cameron (n 7) 322–3; Chu (n 7) 29.

35 New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 18537 (Greg Smith, Attorney-General); Chu (n 7) 31; Hamer et al (n 6) 1–2.

36 Hamer et al (n 6) 2–3; New South Wales Law Reform Commission (n 5) 64–5 [2.138].

37 See *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013* (NSW); *Criminal Procedure Act 1986* (NSW) s 146A; New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 18538, 18578, 18580–5 (Greg Smith, Attorney-General); Chu (n 7) 32; Hamer et al (n 6) 5.

38 See *Criminal Procedure Act 1986* (NSW) ss 143, 150. Cf *Evidence Act* (n 2) s 89A(1).

39 New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 18578 (Greg Smith, Attorney-General).

40 See also Diane J Birch, 'Suffering in Silence: A Cost-Benefit Analysis of Section 34 of the *Criminal Justice and Public Order Act 1994*' [1999] (October) *Criminal Law Review* 769, 772–4; Hamer et al (n 6) 2; Quirk, *Rise and Fall* (n 17) 121.

41 See Mike Redmayne, 'English Warnings' (2008) 30(3) *Cardozo Law Review* 1047, 1056.

42 See ibid 1051.

43 New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 18578 (Greg Smith, Attorney-General).

leverage in interviews.[44] Interview studies reveal that police have used the English legislation as a psychological weapon in the interview room, pressuring suspects to speak and to doubt their solicitors' advice to remain silent.[45] This raises the concern that the legislation could punish the innocent for failing to comply with a normative expectation of disclosure to police.[46]

C The Right to Silence

In establishing this norm, the legislature curtailed the right to silence. Section 89A overrides the common law prohibition on inferences from defendants' pre-trial silence, adopted by section 89 in ordinary cases[47] and considered a corollary of the right to silence, the presumption of innocence, and the prosecution's burden of proof.[48] These principles have long been regarded as fundamental to the common law system of criminal justice, and the right to silence has been described as a 'treasured' protection.[49] Such a right protects against oppression by the state and coercion by the police.[50] It respects human dignity, by protecting suspects' privacy and freedom of (non-)expression, and by sparing the guilty from the 'cruel trilemma' of self-accusation, lying to police, or punishment for remaining silent.[51] Section 89A clearly limits the right to silence, so the principle of legality is unlikely to restrict its operation.[52] However, Part IV suggests that legality may have some implications for the breadth of its application. And the legislation's rationale does not clearly outweigh the rationale for the right to silence, casting doubt on section 89A's worth.

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44 Chu (n 7) 39–40; Cameron (n 7) 345.

45 John D Jackson, 'Silence and Proof: Extending the Boundaries of Criminal Proceedings in the United Kingdom' (2001) 5(3) *International Journal of Evidence and Proof* 145, 165 <https://doi.org/10.1177/136571270100500301> ('Silence and Proof').

46 Roger Leng, 'Silence Pre-trial, Reasonable Expectations and the Normative Distortion of Fact-Finding' (2001) 5(4) *International Journal of Evidence and Proof* 240; Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford University Press, 3rd ed, 2022) 654 <https://doi.org/10.1093/oso/9780198824480.001.0001>.

47 *Evidence Act* (n 2) s 89.

48 *Petty* (n 3) 99 (Mason CJ, Deane, Toohey and McHugh JJ), 128–9 (Gaudron J). See also *Weissensteiner v The Queen* (1993) 178 CLR 217, 241–2, 245 (Gaudron and McHugh JJ) ('*Weissensteiner*'); *RPS v The Queen* (2000) 199 CLR 620, 653–4 [101] (Callinan J) ('*RPS*'); *Azzopardi v The Queen* (2001) 205 CLR 50, 64 [34] (Gaudron, Gummow, Kirby and Hayne JJ) ('*Azzopardi*'). See generally Quirk, *Rise and Fall* (n 17) ch 1.

49 New South Wales Bar Association (n 4) 3–6; *R v Seller* (2012) 269 FLR 125, 151 [147] (Garling J), quoting *Hammond v Commonwealth* (1982) 152 CLR 188, 203 (Brennan J). See also *Sorby v Commonwealth* (1983) 152 CLR 281, 288 (Gibbs CJ).

50 *Petty* (n 3) 107 (Brennan J); *RPS* (n 48) 643 [61]–[62] (McHugh J). See also Steven Greer, 'The Right to Silence: A Review of the Current Debate' (1990) 53(6) *Modern Law Review* 709, 713 <https://doi.org/10.1111/j.1468-2230.1990.tb01837.x>.

51 Hamer et al (n 6) 3; Roberts and Zuckerman (n 46) 623–7; Quirk, *Rise and Fall* (n 17) 10, 13–14; *Murphy v Waterfront Commission of New York Harbour*, 378 US 52, 55 (Goldberg J for the Court) (1964).

52 *Hogg* (n 10) 548–50 [96]–[101] (White JA). See generally *X7 v Australian Crime Commission* (2013) 248 CLR 92, 127 [71] (Hayne and Bell JJ), 153 [158]–[160] (Kiefel J).

II THE LOGIC OF THE INFERENCE

This Part examines the logic of the section 89A inference. It concludes that pre-trial silence can logically support the prosecution case, but that inferences from pre-trial silence often have limited probative value. Section 89A offers insufficient guidance on what inferences are available from evidence of silence and how these inferences work, and there are currently no suggested directions on section 89A in the Criminal Trial Courts Bench Book.[53] In the absence of such guidance, courts have made contradictory, and sometimes illogical, remarks about the nature and use of section 89A inferences.

A The Premise

The legislation's premise is that innocent people will generally declare their innocence at the earliest opportunity.[54] Bentham propounded this view: 'innocence claims the right of speaking, as guilt invokes the privilege of silence',[55] because the innocent person's 'most ardent wish' is 'to dissipate the cloud which surrounds his conduct, and give every explanation which may set it in its true light'.[56] Hence, it is suspicious for the accused to withhold an explanation from police but spring it upon the jury. This is related to the normative position that disclosure to police is desirable.[57] However, this is not the only way one might think about the relationship between suspects and police. Kent Greenawalt argued that people under police suspicion would recognise that the state has entered an antagonistic relationship with them and feel that they owe it fewer responsibilities.[58] People faced with accusations they consider to be unfounded might refuse questioning as an act of defiance consistent with 'angered innocence'.[59]

Nonetheless, the common law recognises that a defendant's silence can be suspicious in particular circumstances. This is so when the defendant fails to testify at trial, yet the prosecution case calls for a response in the form of facts peculiarly within the defendant's knowledge.[60] Hence, in *Weissensteiner v The Queen* ('*Weissensteiner*'), an inference from silence was drawn against the defendant

53 Judicial Commission of New South Wales, 'Silence: Evidence of', *Criminal Trial Courts Bench Book* (Web Page, September 2023) <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/silence-evidence_of.html>.

54 *R v Hoare* [2005] 1 WLR 1804, 1820–1 (Auld LJ for the Court) ('*Hoare*'); Redmayne (n 41) 1055, 1064. See also David Hamer, 'The Privilege of Silence and the Persistent Risk of Self-Incrimination: Part I' (2004) 28 *Criminal Law Journal* 160, 167 ('Silence Part I').

55 Jeremy Bentham, *A Treatise on Judicial Evidence* (Dumont, 1825) 241, quoted in Greer (n 50) 719.

56 Bentham (n 55) 241, quoted in Roberts and Zuckerman (n 46) 633.

57 See Leng (n 46) 240. See generally Quirk, *Rise and Fall* (n 17) 17; *Rice v Connolly* [1966] 2 QB 414, 419 (Parker CJ); Debra Gray and Christine Griffin, 'A Journey to Citizenship: Constructions of Citizenship and Identity in the British Citizenship Test' (2014) 52(2) *British Journal of Social Psychology* 299, 304–5 <https://doi.org/10.1111/bjso.12042>.

58 R Kent Greenawalt, 'Silence as a Moral and Constitutional Right' (1981) 23(1) *William and Mary Law Review* 15, 36–7. See also Redmayne (n 41) 1065.

59 Greenawalt (n 58) 20–2, 26–7. See also Quirk, *Rise and Fall* (n 17) 18.

60 See David Hamer, 'The Privilege of Silence and the Persistent Risk of Self-Incrimination: Part II' (2004) 28 *Criminal Law Journal* 200, 204–7 ('Silence Part II'); *Weissensteiner* (n 48); *Azzopardi* (n 48); *RPS* (n 48).

accused of murdering two people on a yacht where he was the only one who could give an exculpatory account – if one existed – of what happened on the yacht.[61] It may be logical to infer that innocent people would be more likely to break silence in a context where they alone could explain their innocence.[62]

Weissensteiner's reasoning is not readily transferable to the police station context.[63] The courtroom is a protected environment supervised by an impartial judge[64] and the final opportunity to declare one's innocence. Police questioning, by contrast, is a coercive process, in which the suspect may be confused and stressed.[65] It is no secret that police may withhold information, twist words and, at least before the introduction of mandatory recorded interviews,[66] fabricate confessions.[67] The right to silence is an important protection in this context.[68] Unlike the *Weissensteiner* scenario, where the prosecution presents its case before the defendant chooses whether or not to testify, police will not necessarily give enough away to call for a suspect's response,[69] nor does section 89A confine itself to facts only the defendant could explain.[70] Innocent people may prefer to present their defence before an impartial jury after obtaining detailed legal advice and greater knowledge of the prosecution's case.[71] The expectation of disclosure also overlooks the fallibility of human memory:[72] suspects may wish to consult other people or records rather than risk giving an unreliable account of their doings.

Accordingly, a Benthamite assumption that innocent suspects will *always* disclose their defence under questioning is unsound.[73] English cases on section 34 of the *CJPOA* recognise this. Considering the requirement that the accused

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61 *Weissensteiner* (n 48) 227–31 (Mason CJ, Deane and Dawson JJ).

62 Hamer, 'Silence Part II' (n 60) 205.

63 Jackson, 'Silence and Proof' (n 45) 150. See also New South Wales Law Reform Commission (n 5) 170.

64 See *Weissensteiner* (n 48) 231–2 (Brennan and Toohey JJ).

65 Roberts and Zuckerman (n 46) 618, 634; Cape and Hardcastle (n 32), 812; Cape (n 17) 397–8 n 32; Gisli H Gudjonsson, *The Psychology of Interrogations and Confessions* (John Wiley & Sons, 2003) chs 1, 3–4. See generally Quirk, *Rise and Fall* (n 17) ch 3.

66 *Criminal Procedure Act 1986* (NSW) s 281.

67 See, eg, Divya Sukumar, Jacqueline Hodgson and Kimberley Wade, 'Behind Closed Doors: Live Observations of Current Police Station Disclosure Practices and Lawyer–Client Consultations' [2016] 12 *Criminal Law Review* 900; David Dixon, 'Videotaping Police Interrogation' [2008] *University of New South Wales Faculty of Law Research Series* 28; *EM v The Queen* (2007) 232 CLR 67 ('*EM*'). See also Quirk, *Rise and Fall* (n 17) 15, 67–73; Greer (n 50) 713.

68 Greer (n 50) 713; John Jackson, 'Re-Conceptualizing the Right of Silence as an Effective Fair Trial Standard' (2009) 58 *International and Comparative Law Quarterly* 835, 853 ('Re-Conceptualizing the Right of Silence') <https://doi.org/10.1017/S0020589309001407>; Daly, 'Inferences and Interference' (n 4) 66–72. See also Roberts and Zuckerman (n 46) 635; *Petty* (n 3) 107 (Brennan J).

69 Quirk, *Rise and Fall* (n 17) 103–8; Birch (n 40) 777, citing Mike McConville and Jacqueline Hodgson, 'Custodial Legal Advice and the Right to Silence' (Research Study No 16, Royal Commission on Criminal Justice, 1993). See Daly, 'Inferences and Interference' (n 4) 73; Yvonne Daly, Ciara Dowd and Aimée Muirhead, 'When You Say Nothing at All: Invoking Inferences from Suspect Silence in the Police Station' (2022) 26(3) *International Journal of Evidence and Proof* 249, 255–8 <https://doi.org/10.1177/13657127221104649>. Cf *Criminal Justice Act 1984* (Ireland) s 19A, cited in Daly, 'Inferences and Interference' (n 4) 64.

70 *Hogg* (n 10) 549 [97] (White JA).

71 New South Wales Law Reform Commission (n 5) 170.

72 Cape and Hardcastle (n 32) 806–8.

73 See above n 56.

could reasonably have been expected to mention a fact,[74] courts have heeded such factors as the accused's infirmity or distress in the police station,[75] legal advice to remain silent,[76] an unwillingness to disclose other prejudicial conduct,[77] a desire to protect others,[78] inadequate disclosure by police,[79] or mistrust of police and belief in the right to silence.[80] However, later decisions grant the Benthamite assumption considerable force. In *R v Howell* ('*Howell*'), Laws LJ emphasised that the public interest in disclosure can only be overridden by 'sufficiently cogent' reasons for silence such as the accused's ill-health, omitting to mention factors like suspicion of police.[81] And in *R v Hoare* ('*Hoare*'), the Court of Appeal reiterated the premise that innocent suspects would profess their innocence early and queried 'why on earth' they should keep quiet, even on advice from a solicitor, unless they might wrongly inculpate themselves by reason of some infirmity.[82]

This may underestimate the prevalence of mistrust in the police. The American *Miranda* rights caution has become a cliché of western popular culture.[83] That caution suggests that speaking to police is risky: 'anything said *can and will be used against* the individual in court'.[84] Against this background, one American law professor's lecture advising students never to speak to police has become a viral phenomenon.[85] The notoriety of the *Miranda* caution is likely to have consequences for Australians' perceptions of police and expectations about the right to silence.[86] Traditionally, a caution about the consequences of foregoing the right to silence has also been considered an important matter of fairness in Australia.[87] That it is now the failure to say something that can be used against a suspect in NSW may

74 *CJPOA* (n 7) s 34(1).

75 See, eg, *R v Argent* [1997] 2 Cr App R 27, 33 (Lord Bingham CJ for the Court) ('*Argent*').

76 See, eg, ibid (Lord Bingham CJ for the Court); *R v Bowden* [1999] 4 All ER 43 ('*Bowden*'); *R v Betts* [2001] 2 Cr App R 16 ('*Betts*'); *R v Knight* [2004] 1 WLR 340 ('*Knight*'); *R v Howell* [2005] 1 Cr App R 1 ('*Howell*'); *Hoare* (n 54); *Beckles* (n 7).

77 See, eg, *R v Taylor* [1999] Crim LR 77.

78 See, eg, *R v Mountford* [1998] EWCA Crim 3534 ('*Mountford*').

79 See, eg, *Argent* (n 75).

80 See, eg, *R v McGuinness* [1998] EWCA Crim 2911. See generally Leng (n 46) 253; Birch (n 40) 777. See also Hamer, 'Silence Part I' (n 54) 174–5; Cameron (n 7) 326; Quirk, *Rise and Fall* (n 17) 18.

81 *Howell* (n 76) 14 [24] (Laws LJ for the Court). See Cape and Hardcastle (n 32) 799; Quirk, *Rise and Fall* (n 17) 114.

82 *Hoare* (n 54) 1820–1 [53] (Auld LJ for the Court).

83 Ronald Steiner, Rebecca Bauer and Rohit Talwar, 'The Rise and Fall of the *Miranda* Warnings in Popular Culture' (2011) 59(2) *Cleveland State Law Review* 219; Yvonne Daly et al, 'Human Rights Protections in Drawing Inferences from Criminal Suspects' Silence' (2021) 21(3) *Human Rights Law Review* 696, 721 <https://doi.org/10.1093/hrlr/ngab006>.

84 *Miranda v Arizona*, 384 US 436, 469 (Warren CJ) (1966) (emphasis added).

85 Regent University Law School, 'Don't Talk to Police' (YouTube, 21 March 2012) <https://www.youtube.com/watch?v=d-7o9xYp7eE>.

86 Daly et al (n 83) 721. See also 'Getting Arrested: The Right to Remain Silent and "Miranda Rights" in Australia', *LY Lawyers* (Web Page, 10 July 2022) <https://lylawyers.com.au/the-right-to-silence-do-i-have-to-answer-any-questions-asked-by-police/>; Poppy Morandin and Jimmy Singh, '*Miranda* Rights: Do You Have the Right to Remain Silent in Australia?', *Criminal Defence Lawyers Australia* (Web Page, 4 January 2023) <https://www.criminaldefencelawyers.com.au/blog/miranda-rights-you-have-the-right-to-remain-silent-in-australia/>.

87 *EM* (n 67) 130–1 (Kirby J).

come as a surprise to many.[88] Further, high-profile incidents of police brutality have catalysed negative public sentiments towards the police both in the United States and in Australia.[89] In Australia specifically, the Black Lives Matter movement has assumed significance in relation to First Nations people's discrimination at the hands of police and deaths in custody.[90] There is also substantial empirical research indicating that First Nations, culturally and linguistically diverse, and LGBTQIA+ communities, along with youth generally, have lower levels of trust in Australian police due to perceived discriminatory treatment.[91]

This means that drawing an inference from the premise that innocent suspects will speak to police is a delicate exercise. However, for an inference from silence to be probative, it is not necessary that innocent people would *always* disclose their defence to police. So long as silence *could* shed light on the odds of the accused's guilt, it is relevant to the question of guilt.[92] And so long as the accused would be more likely to disclose a fact to police if innocent than if guilty, the failure to mention that fact favours the conclusion of guilt.[93] Self-preservation generally provides innocent suspects one more reason to disclose information, and guilty suspects one more reason to remain silent.[94] The innocent person may avoid prosecution by disclosing a compelling defence, or that defence may better persuade the jury having been

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88 See above n 86.

89 Ashlin Oglesby-Neal, Emily Tiry and KiDeuk Kim, 'Public Perceptions of Police on Social Media: A Big-Data Approach to Understanding Public Sentiment toward the Police' (Research Report, Urban Institute Justice Policy Center, February 2019); Kristine Levan and Kelsey Stevenson, '"There's Gonna Be Bad Apples": Police–Community Relations through the Lens of Media Exposure among University Students' (2019) 8(2) *International Journal for Crime, Justice and Social Democracy* 83 <https://doi.org/10.5204/ijcjsd.v8i2.1039>; Georgia Curran et al, 'Justice for Walker: Warlpiri Responses to the Police Shooting of Kumunjayi Walker' (2022) 33(S1) *Australian Journal of Anthropology* 17, 27–30 <https://doi.org/10.1111/taja.12446>; Chris Cunneen, *Defund the Police: An International Insurrection* (Bristol University Press, 2023) ch 1 <https://doi.org/10.1332/policypress/9781447361664.003.0001>.

90 Curran et al (n 89); Cunneen (n 89) 11–12. See also Sarah Schwartz, 'Paying for Freedom: Community Payment of Fines as Collective Resistance to Australia's Criminalisation of Race and Class' (2024) 47(1) *University of New South Wales Law Journal* 38 <https://doi.org/10.53637/BSVS6856>.

91 Ben Bradford et al, 'The Space Between: Trustworthiness and Trust in the Police among Three Immigrant Groups in Australia' (2022) 12(2) *Journal of Trust Research* 125 <https://doi.org/10.1080/21515581.2022.2155659>; Julia Quilter et al, 'Children and COVID-19 Fines in NSW: Impacts and Lessons for the Future Use of Penalty Notices' (Research Report, University of Wollongong Australia, University of Technology Sydney and University of New South Wales, 2024) 58; Toby Miles-Johnson, 'Confidence and Trust in Police: How Sexual Identity Difference Shapes Perceptions of Police' (2013) 25(2) *Current Issues in Criminal Justice* 685 <https://doi.org/10.1080/10345329.2013.12035990>; Mohammed M Ali, Kristina Murphy and Elise Sargeant, 'Advancing Our Understanding of Immigrants' Trust in Police: The Role of Ethnicity, Immigrant Generational Status and Measurement' (2023) 33(2) *Policing and Society* 187 <https://doi.org/10.1080/10439463.2022.2085267>. See generally Cunneen (n 89).

92 *Evidence Act* (n 2) s 55. See also David Hamer, 'The Continuing Saga of the *Chamberlain* Direction: Untangling the Cables and Chains of Criminal Proof' (1997) 23(1) *Monash University Law Review* 43, 49 ('Cables and Chains'); David Hamer, '"Hoist with His Own Petard?" Guilty Lies and Ironic Inferences in Criminal Proof' (2001) 54(1) *Current Legal Problems* 377, 399 n 133 <https://doi.org/10.1093/clp/54.1.377> ('Guilty Lies'); Andrew 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 *Melbourne University Law Review* 95, 98.

93 Redmayne (n 41) 1057. See also Hamer, 'Silence Part I' (n 54) 165–6.

94 Redmayne (n 41) 1064; Hamer, 'Silence Part I' (n 54) 169–71.

disclosed before.[95] The guilty may remain silent to avoid divulging incriminating information or subjecting a disprovable defence to scrutiny. The special caution affects the probability of a suspect's silence, too.[96] Innocent people who hear the caution and know that they have something exculpatory to say may well disclose it to avoid the adverse inference. Guilty people may accept the adverse inference if silence prevents their cover story from falling apart under investigation. However, some guilty suspects may fabricate defences during questioning to avoid an adverse inference, instead of remaining silent.[97]

So, while it is not *certain* that innocent suspects would disclose facts to police,[98] it seems *more likely* that innocent suspects would than guilty ones – but perhaps not much more likely. The premise of the legislation is valid in this qualified way.[99] This means that pre-trial silence can logically favour a conclusion of guilt, but the resulting inference may not be very probative.[100] Defendants' innocent explanations for silence may outweigh the conclusion of guilt, precluding an adverse inference.[101]

B Available Inferences

Section 89A does not specify what inferences may 'appear proper' from evidence of silence, clouding the logic involved.[102] The English provision has drawn criticism for inviting speculation about the accused's reasons for silence without a sufficient evidential basis.[103] Indeed, while pre-trial silence can logically support a conclusion of guilt, complex reasoning underlies that conclusion. A comparison with common law inferences from lies is useful. To establish those inferences, it must be found that the accused knowingly said something false, did so out of consciousness of guilt, and this consciousness of guilt indicates actual guilt of the charged offence (rather than, say, fear based on some other indiscretion).[104] An inference that pre-trial silence indicates guilt also involves a series of intermediate conclusions: the suspect failed to mention information to police; they did so deliberately; they did so because they had nothing exculpatory to say or were conscious of their guilt; and that equates to actual guilt. Perhaps concerned with the difficulty of proving these steps, English courts applying section 34 of the *CJPOA* have required juries to be *sure* that the accused has no innocent explanation for their silence, and that the only sensible explanation for their silence is that they had no answer to give.[105] Strictly speaking, this is not

95 Cape and Hardcastle (n 32) 805.
96 Redmayne (n 41) 1055–6.
97 Ibid 1056.
98 Cf Bentham (n 55) 241.
99 See above nn 54–6 and accompanying text.
100 See, eg, Birch (n 40) 772–3; Cameron (n 7) 325–6; Daly, Dowd and Muirhead (n 69) 268; Owusu-Bempah (n 11) 272; Quirk, *Rise and Fall* (n 17) 122.
101 Redmayne (n 41) 1057–8. See also Quirk, *Rise and Fall* (n 17) 125.
102 *Evidence Act* (n 2) s 89A(1).
103 Cape (n 17) 401–2.
104 Hamer, 'Guilty Lies' (n 92) 382.
105 See, eg, *R v Chenia* [2004] 1 All ER 543, 562 [55], 570–1 [92] (Clarke LJ for the Court) ('*Chenia*'); *R v Petkar* [2004] 1 Cr App R 22, 287–8 [60]–[62] (Rix LJ for the Court) ('*Petkar*'). See also Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (June 2023) [17-9].

necessary for the inference to be probative of guilt – the silence need only be *better* explained by guilt than by innocence, and the intermediate conclusions more likely than not.[106] The standard of proof applicable to section 89A is discussed below. For now, it suffices to note that the cautious English approach reflects concern that the reasoning process underlying the inference is fraught with difficulty.

Given this difficulty, a more tentative inference than guilt may sometimes be appropriate. The accused's pre-trial failure to mention a fact might sometimes undermine that fact without indicating the accused's guilt. The reasoning becomes that the accused did not have the relevant fact to say during their interview but invented it for proceedings. Some English authorities treat this as the default inference under section 34 of the *CJPOA*.[107] This might be thought odd – if it can be inferred that a defendant fabricated part of their defence, it is tempting to conclude that they did so in self-preservation, aware of their guilt. But consciousness of wrongdoing need not equate to guilt of the charged offence.[108] And innocent people fearing conviction may lie to embellish their defence or distance themselves from the crime.[109] Therefore, two inferences are possible under section 89A, matching those precluded under section 89 in the ordinary case: one provides evidence of the accused's guilt,[110] while the other simply damages their credibility.[111] Determining the preferred inference will require close consideration of the accused's explanations for silence.

This also reflects how defendants' silence during proceedings is equivocal.[112] There is confusion over whether such silence can be put to a 'strong' or 'weak' use, that is, whether it can strengthen the prosecution case or simply indicate that the accused's defence leaves it undamaged.[113] Section 20(2) of the *Evidence Act* compounds this confusion, permitting comment on the accused's failure to testify but not an inference of the accused's guilt or consciousness of guilt – arguably, a *pro-defence* comment is required.[114] With section 89A, the language of an 'unfavourable inference' suggests that a 'strong' use of pre-trial silence is permissible, holding silence positively against the accused through the inference of guilt detailed above. But the qualification that the inference must be 'proper' supports the point that a

English judicial practice is to instruct juries to be 'sure' rather than to use the phrase 'beyond reasonable doubt', but each phrase has the same meaning: at [5-1], citing *R v Desir* [2022] EWCA Crim 1071.

106 Redmayne (n 41) 1059–60.

107 See, eg, *R v Condron* [1997] 1 WLR 827, 837 (Stuart-Smith LJ for the Court); *R v Roble* [1997] Crim LR 449. See also Cape (n 17) 401.

108 See above n 104.

109 Redmayne (n 41) 1056; Hamer, 'Guilty Lies' (n 92) 384; *R v Ahmed* [1993] Crim LR 946; *R v Harris* (1990) SASR 321, 323 (King CJ).

110 Cf *Evidence Act* (n 2) s 89(4)(a).

111 Cf ibid s 89(4)(b).

112 *Weissensteiner* (n 48) 228 (Mason CJ, Deane and Dawson JJ); *RPS* (n 48) 634 [33] (Gaudron ACJ, Gummow, Kirby and Hayne JJ); *Azzopardi* (n 48) 62 [21] (Gleeson CJ). See also Cameron (n 7) 326, citing Palmer (n 92) 106–7.

113 See, eg, *Weissensteiner* (n 48) 244–5 (Gaudron and McHugh JJ); *Azzopardi* (n 48) 64–5 [34] (Gaudron, Gummow, Kirby and Hayne JJ); *RPS* (n 48) 632–3 [27] (Gaudron ACJ, Gummow, Kirby and Hayne JJ). Hamer, 'Silence Part II' (n 60) 212–15.

114 *Evidence Act* (n 2) s 20(2). See *RPS* (n 48) 656 (Callinan J); *Azzopardi* (n 48) 52.

'weak' section 89A inference might sometimes be appropriate, only affecting the accused's credibility.[115] Notably, these 'strong' and 'weak' section 89A inferences function differently to those from an accused's silence during proceedings. This is because they concern the shift from the accused's pre-trial silence about a fact to mentioning that fact at trial,[116] not the accused's complete failure to testify. While a 'weak' use of silence during proceedings infers that undelivered testimony leaves the prosecution case undamaged,[117] a 'weak' section 89A inference actively discredits the accused. Further, a 'strong' section 89A inference probably also undermines the previously unmentioned fact, while actively strengthening the prosecution case too.

Australian courts have not delineated section 89A inferences in this way. *R v Jafary* ('*Jafary*') suggested, with appropriate circumspection, that the relevant inference 'will be a matter of debate in each particular case where the issue arises'.[118] In *R v Hogg* ('*Hogg*'), the inference was that the accused had fabricated his alibi.[119] In *R v Egan* ('*Egan*'), the judge made contradictory remarks about what significance the accused's pre-trial silence concerning self-defence could have.[120] On the one hand, he claimed that evidence of pre-trial silence 'cannot and does not equate to the guilt of that person, but it may go to issues of credibility, reliability and character'.[121] Logically, as discussed above, silence may at least *indicate* guilt through intermediate conclusions.[122] The judge's comment only contemplates inferences of fabrication, perhaps with implications about the accused's character. But he previously stated that the unfavourable inference 'goes to the accused's state of mind at the time that he struck the victim' – whether he felt threatened by the victim and responded with reasonable force.[123] This suggests taking the inference further than 'issues of credibility': not only did the accused lie about self-defence, but that lie sheds light on his mens rea. This is closer to a 'strong-use' inference. Interestingly, it suggests that a strong-use inference might be treated with more finesse than a general inference of guilt – it may bear on specific elements, especially mental elements, of the offence, or even a defence. This is a novel suggestion which may ameliorate concerns about establishing guilt from pre-trial silence.

In *CV v The King*, there was confusion over whether a section 89A inference was available.[124] The accused spoke in his interview but did not mention elements of a dispute with his accuser, which he raised at trial.[125] Ultimately, the prosecution

115 See Hamer, 'Silence Part I' (n 54) 165.
116 See Ormerod and Perry (n 16) 3355–6 [F20.10]; *R v Smith* [2011] EWCA Crim 1098; *R v Moshaid* [1998] Crim LR 420; *R v Khan* [2020] EWCA Crim 163.
117 See Hamer, 'Silence Part II' (n 60) 204.
118 *Jafary* (n 10) [21] (Norrish DCJ).
119 See *Hogg* (n 10) 538 [50] (White JA).
120 *Egan* (n 10).
121 Ibid 171 [40] (Williams ADCJ).
122 See above nn 104–6 and accompanying text.
123 *Egan* (n 10) 171 [37] (Williams ADCJ).
124 *CV* (n 10).
125 Ibid [15]–[16], [25]–[30] (Beech-Jones CJ).

disavowed reliance on section 89A and attacked the accused's credibility based on his prior inconsistent statements.[126] This shows that scenarios which raise section 89A may overlap with those that raise other inferences, especially lies inferences.[127] English courts have taken a cautious approach to these scenarios, suggesting that the jury should be directed on the *most* appropriate inference, or occasionally given a combined direction.[128] This approach avoids the risk of prejudicial treatment of the accused's pre-trial conduct,[129] in the sense of affording it more weight than deserved.[130]

In summary, an inference of guilt may be open through section 89A. Nonetheless, where the facts do not support the successive conclusions required for that inference,[131] a weaker inference about credibility may be preferred.

C Proof

Section 89A does not indicate the relevant standard of proof for the adverse inference, further clouding the logic. Stephen Odgers suggests that the prosecution should prove the preconditions concerning the special caution and the defendant's capacity[132] on the balance of probabilities on the voir dire, while the jury should determine the matters in subsection (1) concerning questioning, reasonable expectation, and reliance on facts.[133] Strictly speaking, these preconditions are distinct from the standard of proof applicable to the inference proper – the conclusion that the accused's pre-trial silence was attributable to fabrication or guilt – and to the intermediate inferences underlying that conclusion, such as the accused's consciousness of guilt.[134] The only Australian judicial pronouncement on this matter comes from Williams ADCJ in *Egan*, stating that '[the section 89A inference] is an inference that has to be proved beyond a reasonable doubt'.[135] This is wrong and skews the logic of the inference.

Shepherd v The Queen [No 5] ('*Shepherd*') considered the standard of proof applicable to inferences.[136] The case rejected the proposition that facts underlying an inference of guilt must themselves be proved beyond reasonable doubt, because that proposition is inconsistent with the cumulative nature of proof.[137] Dawson J employed the useful metaphor of 'cables' and 'chains' of proof.[138] Cables of proof operate where multiple items of evidence cumulatively support an inference of the

126 Ibid [33], [44]–[45].
127 See Quirk, *Rise and Fall* (n 17) 125.
128 See Ormerod and Perry (n 16) 3365–6 [F20.26]; *R v Hackett* [2011] 2 Cr App R 3; *R v Wainwright* [2021] EWCA Crim 122; *R v Dabycharun* [2021] EWCA Crim 1923. Cf *R v Taskaya* [2017] EWCA Crim 632.
129 See Quirk, *Rise and Fall* (n 17) 125.
130 *Festa v The Queen* (2001) 208 CLR 593, 609–10 [51] (McHugh J) ('*Festa*').
131 See above nn 104–7 and accompanying text.
132 *Evidence Act* (n 2) ss 89A(2), (4)–(5).
133 Ibid s 89A(1); Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 18th ed, 2023) 700–2 [EA.89A.60]. See also *Evidence Act* (n 2) ss 189, 142.
134 See above nn 104–7 and accompanying text.
135 *Egan* (n 10) 171 [40].
136 (1990) 170 CLR 573 ('*Shepherd*').
137 Ibid 578–81 (Dawson J, Mason CJ agreeing at 575, Toohey J agreeing at 586, Gaudron J agreeing at 586).
138 Ibid 579.

accused's guilt.[139] Because there are multiple 'strands' of reasoning in this cable, no particular strand has to prove guilt beyond reasonable doubt by itself, and no individual inference needs to be proved to any particular standard.[140] Rather, each reasoning strand moves the needle towards the conclusion of guilt, as it were, and the strands' combined strength may prove that conclusion beyond reasonable doubt.[141] As such, other than the factual elements of an offence, it only makes sense to claim that a fact must be proved beyond reasonable doubt if that fact is a step in an indispensable inference towards a conclusion of guilt – what might be thought of as a link in a chain of reasoning.[142] This would be the case if only one item of evidence supports the accused's guilt, through a single line of reasoning.[143]

An inference under section 89A, however, cannot constitute a sole chain of reasoning towards a conclusion of the accused's guilt. This is because subsection (5)(b) provides that section 89A does not apply if the accused's silence is the only evidence of their guilt. Other evidence must support that conclusion,[144] such that any inference would comprise but one strand in the jury's reasoning towards guilt. This being so, it is illogical to require the section 89A inference or any step within it to be proved beyond reasonable doubt. So long as the accused's silence is better explained by guilt than by innocence, it will favour a conclusion of guilt and lend the prosecution's case some support.[145] Likewise with a 'weak' inference – so long as pre-trial silence about a fact is better explained by that fact's falsity than its truthfulness, it casts some doubt on that fact's credibility. So, a balance of probabilities standard better suits section 89A's logic.

The practice emerging around section 89A jury directions suggests that courts have embraced the logically incorrect view that the inference must be proved beyond reasonable doubt. In *Hogg*, the trial judge followed the stringent English approach, asking the jury to be assured that 'the *only* sensible reason' for the defendant's silence was that he had not yet thought of an alibi.[146] The appellant argued for an even more stringent direction, requiring the jury to find that '*in truth* [the defendant] had no answer'.[147] The Court suggested that this made no material difference,[148] though both versions suggest proof beyond reasonable doubt.[149] It is

139 Ibid. See also Hamer, 'Cables and Chains' (n 92) 45–6. Probabilistically speaking, an item of evidence supports an inference of the accused's guilt if that evidence would more likely be found in a scenario where the accused is guilty rather than if they were innocent: at 49. See also above n 106 and accompanying text on evidence supporting a conclusion of guilt if 'better explained' by guilt than innocence.

140 See Hamer, 'Cables and Chains' (n 92) 45, 61, 72.

141 Ibid 60.

142 Ibid 76; *Shepherd* (n 136) 579, 581 (Dawson J, Mason CJ agreeing at 575, Toohey J agreeing at 586, and Gaudron J agreeing at 586). See also *R v Bauer* (2018) 266 CLR 56, 98 [86] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). Cf *Jury Directions Act 2015* (Vic) ss 61–2.

143 See Hamer, 'Cables and Chains' (n 92) 46.

144 Cameron (n 7) 316–17.

145 Redmayne (n 41) 1057.

146 *Hogg* (n 10) 533 [34] (White JA) (emphasis added).

147 Ibid 538 [52] (emphasis added). See *Petkar* (n 105) 284–5 [51] (Rix LJ for the Court).

148 *Hogg* (n 10) 552 [116] (White JA).

149 See Daly, Dowd and Muirhead (n 69) 268.

important to remember that the English direction developed in a different context to NSW. The English courts were especially concerned with fairness given the clash between section 34 of the *CJPOA* and the *ECHR*,[150] also directing juries that the inference must be a '*fair* and proper conclusion'.[151] Further, the English Court of Appeal has held that inferences must be proved beyond reasonable doubt,[152] unlike the Australian approach under *Shepherd*.[153] Logically, the section 89A direction need only require the jury to find that, on balance, the *better* explanation for the accused's silence is guilt rather than innocence (for a 'strong' inference), or fabrication rather than truthfulness (for a 'weak' inference).

D Circularity

This approach alleviates concerns that the inference entails circular reasoning.[154] The English case of *R v Mountford* ('*Mountford*') suggested that circularity arises if the accused's explanation for their silence would, if accepted, necessarily entail their innocence.[155] The accused was arrested at his friend's apartment for a drug supply offence and gave a 'no comment' interview.[156] At trial, he claimed that his friend was the dealer, and that he had not mentioned this before because he wanted to protect his friend.[157] In a separate interview, the friend claimed that the accused was guilty.[158] The Court of Appeal decided that section 34 of the *CJPOA* had 'no mileage' in the circumstances.[159] The jury could not reject the accused's reason for silence without first deciding whether his friend was the dealer, which would essentially resolve the case.[160] John Jackson has suggested that such circularity is inevitable: juries could only properly draw inferences from silence where they know the reason for silence; inferring guilt requires a jury already to be convinced of guilt.[161] The inference is 'merely an *ex post facto* rationalisation of what the trier of fact is already convinced of'.[162]

This circularity is not as inevitable as Jackson suggests. It seems to arise from the English courts' insistence that the jury be *sure* that the accused has no innocent

150 See above nn 26–7 and accompanying text. See also Jonathan Hall, 'Simplifying the Adverse Inference Direction' (2019) 8 *Criminal Law Review* 684.

151 Judicial College (n 105) [17-9] (emphasis added). See, eg, *Petkar* (n 105) 284–5 [51] (Rix LJ for the Court); *R v McGarry* [1999] 1 WLR 1500, 1506 (Hutchinson LJ for the Court). See also Hall (n 150) 692–3; Quirk, *Rise and Fall* (n 17) 122.

152 Hamer, 'Guilty Lies' (n 92) 382–3; *R v Burge* [1996] 1 Cr App R 163, 174 (Kennedy LJ for the Court). See also Daly, Dowd and Muirhead (n 69) 268.

153 See above n 137.

154 See Ormerod and Perry (n 16) 3363–4 [F20.24]; Birch (n 40) 777–8. Judicial College (n 105) [17-6].

155 *Mountford* (n 78) [21]–[23] (Henry LJ for the Court).

156 Ibid [3]–[5].

157 Ibid [10].

158 Ibid [7].

159 Ibid [21]–[23].

160 Ibid [21].

161 John D Jackson, 'Interpreting the Silence Provisions: The Northern Ireland Cases' [1995] (August) *Criminal Law Review* 587, 600 ('Interpreting the Silence Provisions'). See also Daly, Dowd and Muirhead (n 69) 265.

162 Jackson, 'Interpreting the Silence Provisions' (n 161) 600.

explanation for their silence, proving the inference beyond reasonable doubt.[163] However, the logic of the inference does not require the jury to reject the accused's explanation with certainty before treating silence as suspicious and adding it to the cumulative 'cable' of evidence of guilt.[164] The accused may offer a *plausible* innocent explanation for their silence, but one that is not entirely convincing or is discredited by other evidence, such that the silence remains better explained by guilt than by innocence under the premise that innocent suspects will more likely disclose facts than guilty ones.[165] An accused does not compellingly explain their pre-trial silence by arguing that they knew that they were innocent and trusted that the truth would come out in the courtroom. That explanation does entail their innocence, but it likely does not outweigh the view that their pre-trial silence was suspicious.

Further, *Mountford* might be a special case:[166] the accused and his friend's accounts were at odds with each other, so rejecting the accused's innocent explanation – that the friend was guilty – implicates the accused. By contrast, rejecting an explanation that the accused assumed the truth would come out at trial need not entail the accused's guilt. Yet on another view, even in *Mountford* any doubts the jury had about the defendant's account should have entitled them to treat his silence as somewhat suspicious without making a definitive finding of guilt.[167] The inference necessarily involves scrutiny of, and speculation about, the accused's motives. Arguably, *Mountford*'s approach unnecessarily restricts the inference[168] to situations where there is no reasonable doubt about the accused's reason for silence. Perhaps that is desirable from a rights perspective and to avoid the risk of juries treating pre-trial silence prejudicially,[169] but it is not logically necessary.[170]

The foregoing analysis suggests that logical inferences may be drawn from pre-trial silence more readily than some decisions and commentators suggest. This may seem an odd conclusion in an article that is critical of the legislation. However, this conclusion contemplates that the inference need only be minimally favourable to the prosecution's case for it to be logically sound. The many reasons why an innocent person may remain silent suggest that the inference will often have limited probative value.[171] It then becomes a question whether that minimally probative evidence is warranted considering the section's implications for rights and the complexity of trials. The trial judge could perform a gatekeeping function in this connection, excluding evidence of pre-trial silence if it would be

163 See, eg, *Chenia* (n 105) 571 [92] (Clarke LJ for the Court); Redmayne (n 41) 1059–60. See also Daly, Dowd and Muirhead (n 69) 268; *Egan* (n 10) 171 [40] (Williams ADCJ).

164 Redmayne (n 41) 1059–60; Clare Barsby, 'Evidence (Case Comment)' [1999] (July) *Criminal Law Review* 575, 576.

165 See Redmayne (n 41) 1059–60; Birch (n 40) 778; James Richardson, 'Inferences from Silence' (1999) 19 *Criminal Law Week* 1, 2.

166 See Ormerod and Perry (n 16) 3363–4 [F20.24]; *Chenia* (n 105) 556–7 [34]–[35] (Clarke LJ for the Court).

167 Barsby (n 164) 576; *R v Webber* [2004] 1 WLR 404, 415–16 [26] (Lord Bingham for the Court).

168 See Dennis (n 16) 37.

169 See Daly, Dowd and Muirhead (n 69) 267–8. See also *Festa* (n 130) 609–10 [51] (McHugh J).

170 See Barsby (n 164) 576.

171 See above n 100.

'prejudicial', 'misleading or confusing', or an 'undue waste of time'.[172] Indeed, the trial judge must exclude evidence whose probative value is outweighed by the risk of prejudice to a criminal defendant.[173] While the trial judge takes evidence 'at its highest' for this purpose, this involves an assumption only that the evidence of silence is truthful and reliable, not an acceptance of the inference invited from the evidence of silence.[174] That is, the judge would assume that the accused did fail during official questioning to mention the fact relied on in their defence, but the judge could still consider silence to be equivocal.

Further, an excessively restrictive direction on silence inferences – which the above suggests is logically unnecessary – could have a counterintuitive effect. Jonathan Hall has suggested that the length of the direction under section 34 of the *CJPOA* risks evidence of silence assuming 'far greater prominence in a jury's mind than is likely to be merited'.[175] A reasonable direction might simply instruct the jury that, to the extent that they think that the accused's failure to mention a fact is better explained by guilt than by innocence, they may consider it to add a proportionate amount of support to the prosecution case. They could be briefed on the steps involved in that reasoning. They should be instructed that any innocent explanations for the accused's silence may weaken that inference or indeed outweigh guilty explanations, such that no inference can be drawn at all.

The next Parts turn to specific interpretational challenges that section 89A has posed for NSW courts, which further impede the clear-sighted drawing of the inference.

III REASONABLE EXPECTATION

This Part explores section 89A's requirement that the 'defendant could reasonably have been expected to mention [the relevant fact(s)] in the circumstances existing at the time'.[176] It argues that tests for 'reasonable expectation' may operate prejudicially to the defendant.[177] It then focuses on the significance of legal advice to remain silent within this inquiry, this being a key issue in *Hogg*.[178] Legal advice to remain silent is problematic for section 89A: if it always justifies silence, the legislation could easily be nullified. But judicial solutions to this problem have proved challenging under the *CJPOA*.[179] The approach endorsed in *Hogg* raises

172 *Evidence Act* (n 2) s 135.
173 Ibid s 137.
174 See David Hamer, 'The Unstable Province of Jury Fact-Finding: Evidence Exclusion, Probative Value and Judicial Restraint after *IMM v The Queen*' (2017) 41(2) *Melbourne University Law Review* 689, 696–9 ('Evidence Exclusion'); *IMM v The Queen* (2016) 257 CLR 300, 314 [48], 315 [52] (French CJ, Kiefel, Bell and Keane JJ).
175 Hall (n 150) 685.
176 *Evidence Act* (n 2) s 89A(1).
177 See *Festa* (n 130) 609–10 [51] (McHugh J).
178 *Hogg* (n 10).
179 Cape (n 17); Cooper (n 32); Desmond Wright, 'The Solicitor in the Witness Box' [1998] (January) *Criminal Law Review* 44; Redmayne (n 41) 1060; Quirk, *Rise and Fall* (n 17) 123. See, eg, *Betts* (n 76); *Howell* (n 76); *Hoare* (n 54); *Beckles* (n 7).

problems concerning the logic of the inference, but the alternative raises concerns about trust in the legal profession. While the previous Part suggested that section 89A might have a legitimate, if limited, evidential purpose, these problems suggest that it may come at too great a cost.

A The Logic of 'Reasonableness'

Before turning to legal advice, it is necessary to explain the importance of interpreting the 'reasonable expectation' requirement consistently with the logic of the inference. Per that logic, with inferences of guilt, the accused's being 'reasonably expected' to mention a fact implies that they would more likely have mentioned it to police if innocent than if guilty. With credibility inferences, it means that they would more likely have mentioned the fact if it were true rather than fabricated. Considering section 34 of the *CJPOA*, Roger Leng has argued that there is a tension between the legislation's normative purpose – to encourage suspects' disclosure to police – and normal human behaviour.[180] To give the provision a legitimate evidential function, the 'reasonable expectation' test should consider 'whether ordinary people sharing any particular relevant characteristics of the accused would have mentioned the relevant defence fact'.[181] It should not penalise defendants simply for failing to comply with an expectation that suspects *should* disclose facts to police.[182] Some English cases appear to do the latter.[183] *Hoare*, for instance, puzzlingly suggested that '*regardless of* [*their*] *guilt or innocence*', if suspects avail themselves of legal advice to remain silent 'to impede the prosecution case against [them] … the advice is not truly the reason for not mentioning the facts'.[184] One wonders why, in an adversarial legal system, innocent people should not be entitled to frustrate efforts to prosecute them.[185] In suggesting that an inference might be drawn in this circumstance, the Court prioritised enforcing the norm that innocent suspects *should* speak over an evidential inquiry into whether they *would*.[186]

Two points follow from the need to interpret the 'reasonable expectation' test consistently with the logic of the inference. First, the 'reasonable expectation' test should not just consider whether ordinary people would have mentioned the fact, but whether ordinary *innocent* people would have (or truthful people, for inferences of fabrication).[187] Assuming that self-preservation is inherent to human psychology, it might otherwise be thought that guilty people act 'reasonably' in withholding defences out of concern that they would fall apart under police investigation.

Second, the test for reasonable expectation must involve subjective considerations about the accused. These influence whether they would speak to

180 Leng (n 46).
181 Ibid 246.
182 Ibid 246–7; 254–6. See also Quirk, *Rise and Fall* (n 17) 123.
183 See Leng (n 46) 248–54.
184 *Hoare* (n 54) 1821 [54] (Auld LJ for the Court) (emphasis added).
185 See Quirk, *Rise and Fall* (n 17) 136.
186 See above n 182.
187 Cf Leng (n 46) 246.

police if innocent, potentially weighing against the assumption that self-preservation in the face of the special caution would usually prompt innocent suspects to do so. Australian courts have not formulated their own test for 'reasonable expectation'. However, *Hogg* quoted from Lord Bingham CJ in *R v Argent*, heeding this concern:

> The courts should not construe the expression 'in the circumstances' restrictively: matters such as time of day, the defendant's age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice are all part of the relevant circumstances. When reference is made to 'the accused' attention is directed not to some hypothetical, reasonable accused of ordinary phlegm and fortitude but to the actual accused with such qualities, apprehensions, knowledge and advice as he is shown to have had at the time.[188]

While adhering to the logic of the inference, this inquiry presents difficulties. Many factors which disincline suspects from speaking to police may be prejudicial to those suspects, though they do not prove guilt of the charged offence.[189] Distrust of police may entail past interactions with the criminal justice system; intoxication making them uncooperative when interviewed may reflect poorly on their character. The jury might not appreciate the stresses of the police station and may overlook factors disinclining innocent suspects from speaking.[190]

Cultural considerations complicate matters further. As canvassed above, empirical research suggests that minority groups are less willing to speak to police, perhaps due to greater suspicion of police or cultural differences.[191] The assumption that innocent suspects would more likely speak may not apply to First Nations suspects. Diana Eades has analysed how prosecutors exploit differences in communicative culture when cross-examining First Nations defendants.[192] Relevantly, in First Nations cultures, silence can indicate respect and thoughtfulness before answering a question, not an inability or unwillingness to respond.[193]

Accordingly, the reasonable expectation requirement must manage numerous difficult factors, including cultural considerations. This complicates trials and presents a risk of unfair prejudice,[194] especially against defendants of minority backgrounds and First Nations suspects.[195]

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188 *Hogg* (n 10) 543 [84] (White JA), quoting *Argent* (n 75) 33 (Lord Bingham CJ for the Court). See also Quirk, *Rise and Fall* (n 17) 122–3.

189 Quirk, 'Restoring the Right to Silence' (n 11) 259.

190 Redmayne (n 41) 1060. See also Quirk, *Rise and Fall* (n 17) 123.

191 See above n 91. See also Quirk, *Rise and Fall* (n 17) 18; Coretta Phillips and David Brown, *Entry into the Criminal Justice System: A Survey of Police Arrests and Their Outcomes* (Home Office Research Study No 185, 1998) 183–6.

192 Diana Eades, 'Cross Examination of Aboriginal Children: The *Pinkenba* Case' (1995) 3(75) *Aboriginal Law Bulletin* 10.

193 Ibid 11. See also Diana Eades, 'Communication with Aboriginal Speakers of English in the Legal Process' (2012) 32(4) *Australian Journal of Linguistics* 473 <https://doi.org/10.1080/07268602.2012.744268>; Diana Eades, *Courtroom Talk and Neocolonial Control* (Mouton de Gruyter, 2008); Diana Eades, *Aboriginal Ways of Using English* (Aboriginal Studies Press, 2013).

194 See *Festa* (n 130) 609–10 [51] (McHugh J).

195 See Chu (n 7) 37; Dixon and Cowdery (n 7).

B Reliance on Legal Advice

The reasonable expectation inquiry becomes especially problematic when suspects rely on legal advice to remain silent.[196] If doing so is always 'reasonable', lawyers could tactically advise silence to avoid an adverse inference, thereby 'driving a coach and horses through [the provision]'.[197] Lawyers need not avoid interviews to circumvent section 89A by precluding the special caution.[198] But if suspects could be penalised for following legal advice in a manner considered 'unreasonable', this could undermine the solicitor-client relationship and the value of legal advice.[199] Lawyers who would otherwise consider silence to be their clients' best option must now balance the risk of an adverse inference against the risk of cooperation with police.[200] This is a difficult decision, often made quickly without full knowledge of the case.[201] Suspects advised to remain silent may also doubt their advice.[202] If cross-examined on the reasons for that advice at trial, they could inadvertently waive legal professional privilege.[203] Solicitors might then be called as witnesses against their own clients.[204] Indeed, when section 89A was being introduced, Legal Aid NSW warned that its lawyers 'will not provide advice on the effect of the silence provisions at the time of official questioning because of the risk of conflict of interest at trial'.[205] Yet this leaves suspects in the dark about this complex legislation and discourages legal representation in serious criminal cases where the accused's liberty is at stake.[206]

Such concerns have long troubled English courts considering section 34 of the *CJPOA*.[207] The NSW Court of Criminal Appeal considered these issues in *Hogg*.[208] The case highlights the difficulty of formulating an approach to legal advice to remain silent that preserves the logic of section 89A and has regard to the accused's right to counsel.[209] This difficulty, the risk of prejudice to the accused, and the effect the provision might have on trust in the legal profession do not seem justified by the limited inferences it might permit.

Hogg was an appeal against a conviction for sexual assault. The appellant declined to be interviewed on arrest. At trial, he gave evidence of an alibi. During examination-in-chief, he stated that he had refused the interview '[o]n advice from [his] legal representative'.[210] The prosecution did not challenge this in cross-examination, but the trial judge ruled that an inference was open that the appellant's alibi was a

196 *Beckles* (n 7) 2843 [43] (Lord Woolf CJ for the Court); Cameron (n 7) 342; Chu (n 7) 36.
197 *Beckles* (n 7) 2843 [43] (Lord Woolf CJ for the Court).
198 See *Evidence Act* (n 2) s 89A(2)(c); Dixon and Cowdery (n 7) 28–9.
199 Roberts and Zuckerman (n 46) 652; Cape (n 17) 402; Cooper (n 32) 67–8.
200 Quirk, *Rise and Fall* (n 17) 110.
201 Ibid.
202 Roberts and Zuckerman (n 46) 654.
203 Wright (n 179); Quirk, *Rise and Fall* (n 17). See, eg, *Bowden* (n 76).
204 Wright (n 179).
205 Dixon and Cowdery (n 7) 28.
206 See above n 32.
207 Cameron (n 7) 342 n 229. See above n 76.
208 *Hogg* (n 10).
209 See above n 32. See also *Samuel* (n 32) 630 (Hodgson J for the Court); Cape and Hardcastle (n 32) 804.
210 *Hogg* (n 10) 531 [26] (White JA).

fabrication.[211] On appeal, the appellant successfully overturned his conviction and was acquitted. Relevantly, the rule in *Browne v Dunn*[212] required the prosecution to challenge the appellant's reliance on legal advice and to put it to him that his evidence was a fabrication before inviting the jury to draw that inference.[213] White JA also considered what test should apply if the prosecution were to challenge the appellant's reliance on legal advice.[214] Given the decision rested on *Browne v Dunn* grounds, these remarks are obiter dicta, but they illustrate the reasoning Australian courts might employ – and the difficulties they must confront – when considering section 89A's application to legal advice to remain silent.

White JA's analysis drew on the English *CJPOA* case law, focusing on *Hoare*.[215] *Hoare* sought to reconcile two approaches to legal advice. One assessed the 'genuineness' of the accused's reliance on the advice; the other the 'reasonableness' of that reliance.[216] White JA ultimately favoured the 'genuineness' approach.[217] However, both approaches present difficulties. Arguably, the reasonableness approach better serves the logic of the inference, though it is more problematic for the legal profession and suspects' rights. This dilemma casts serious doubt on section 89A's worth.

1 Genuineness

Kay LJ articulated the 'genuineness' approach in *R v Betts* ('*Betts*'): the test is 'whether or not the advice was truly the reason for not mentioning [during a police interview] the facts' relied on at trial.[218] If it is plausible that the advice was the true reason for the defendant's silence, then no adverse inference can be drawn on this approach.[219] Expressed in this way, the genuineness test promises to preserve trust in the legal profession. Suspects who truly rely on their lawyers' advice to remain silent can be confident that this decision is safe, because 'it is not the quality of the decision [to follow legal advice] but the genuineness of the decision that matters'.[220] There is less need to interrogate the reasons why the advice was given, which could raise problems with legal professional privilege.[221] By contrast, under the 'reasonableness' approach discussed below, genuineness 'is not the end of the matter', and suspects may need to worry whether following their lawyers'

211 *R v Hogg* (District Court of New South Wales, Townsden DCJ, 9 February 2018).
212 (1893) 6 R 67. See *MWJ v The Queen* (2005) 222 ALR 436, 448 [38] (Gummow, Kirby and Callinan JJ).
213 *Hogg* (n 10) 551–2 [110], [113]–[115], 553 [120]–[121] (White JA), 556–7 [142]–[145] (Wilson J).
214 Ibid 545–7 [87]–[92], 551 [111]–[112] (White JA).
215 *Hoare* (n 54).
216 See Cameron (n 10) 342; Ormerod and Perry (n 16) 3361 [F20.18].
217 *Hogg* (n 10) 551 [112] (White JA).
218 *Betts* (n 76) [54] (Kay LJ for the Court), quoted in *Hogg* (n 10) 545 [87] (White JA).
219 *Betts* (n 76) 270 [53] (Kay LJ for the Court).
220 Ibid, quoted in *Hogg* (n 10) 545 [87] (White JA).
221 See above n 203.

advice is really their best option.[222] Accordingly, the genuineness approach may be preferable in principle,[223] especially to preserve confidence in the right to counsel.[224]

However, the genuineness approach raises problems with the logic of the inference and its inquiry into whether the accused's silence is more consistent with guilt than with innocence. While some of the Court's remarks in *Betts* go towards resolving these problems, the promised benefits of the test then become less clear. For one, the Court glossed over the problem that guilty suspects who gratefully accept advice to remain silent might be thought to have 'genuinely' relied on advice, though their silence is consistent with guilt. Instead, the Court claimed that suspects do not 'genuinely' rely on legal advice to remain silent if they simply followed the advice 'as a convenient way of disguising [their] true motivation for not mentioning facts'.[225] An adverse inference may then lie open. On its own, this is inconsistent with the logic of the inference. Suspects might have personal reasons for remaining silent, besides being advised to do so by their lawyers, which are consistent with innocence: a desire to protect others; to avoid disclosing embarrassing conduct; and so on.[226] But the Court made another point which brings the question of the accused's 'true motivation' back in line with the inference's logic. It is that the suspect's reliance on legal advice to remain silent '[disguises their] true motivation for not mentioning facts' – and is accordingly considered not to be 'genuine' – if they 'had no, or no satisfactory, answer to give' during their interview.[227] This is a necessary step in the inference's reasoning, because it suggests the suspect's guilt, or at least their invention of the relevant response if raised at trial. However, courts express the 'no answer' element with some looseness, between 'no satisfactory answer', 'no adequate explanation' or none that would stand up to questioning, or 'no satisfactory explanation to give consistent with innocence'.[228] Properly, a strong inference might query whether a suspect had 'no innocent explanation' during an interview, suggesting their guilt; a weak one might query whether they had 'no truthful explanation' for withholding facts. Including these considerations within the genuineness test restores the inference's logic, though the test may drift from the 'genuineness' of the accused's reliance on legal advice towards their underlying motivation for accepting it.

Further, this presents a practical problem which casts doubt on the promised benefits of the genuineness test. How could the jury determine whether the accused, advised to remain silent, had no answer to give during their interview?

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222 *Beckles* (n 7) 2844–5 [46] (Lord Woolf CJ for the Court); Roberts and Zuckerman (n 46) 654.

223 Quirk, *Rise and Fall* (n 17) 128; Tom Rees and Diane Birch, '*Criminal Justice and Public Order Act 1994* s 34: Silence of Defendant at Interview' [2003] (June) *Criminal Law Review* 405, 408.

224 See above n 32.

225 *Betts* (n 76) 270 [53]–[54] (Kay LJ for the Court).

226 See above nn 75–80 and accompanying text.

227 *Betts* (n 76) 270 [53]–[54] (Kay LJ for the Court).

228 Ibid 270 [53]–[55]; *Hoare* (n 54) 1820 [51] (Auld LJ for the Court). See also *Hogg* (n 10) 547 [89] (White JA).

The jury cannot read the accused's mind[229] to ascertain whether they genuinely relied on advice or had no answer to give. The genuineness test supposedly avoids examining the accused and their solicitor on the reasons for advice – which may expose privileged information[230] – though doing so could assist. The jury should not employ circular reasoning, concluding that the accused had no answer to give because they suspect the accused is guilty, as this destroys the value of the inference.[231] Yet the only other way to infer that the accused had no answer is via the premise that innocent suspects with something exculpatory to say would more likely raise it than not.[232] That is, the circumstances so strongly called for the accused to mention the relevant fact that they would have been 'reasonably expected' to mention it if innocent or truthful, notwithstanding their invocation of advice. Their silence would then suggest that they had no answer to give, so their invocation of advice was disingenuous. Accordingly, inferring whether the accused 'genuinely' relied on legal advice cannot practically be done without reference to the logic underpinning section 89A, which demands considerations of reasonableness. This approach reflects the High Court's recognition that juries must often infer subjective facts about the accused by evaluating their conduct objectively in the circumstances.[233]

2 Reasonableness

The English Court of Appeal rejected the genuineness test in *Howell*.[234] In part, the decision rested on normative considerations: the Court cited the 'clear public interest' in disclosure to police, which can only be overridden by 'sufficiently cogent and telling' reasons for silence.[235] Yet the Court seemed to recognise the problem the genuineness test poses for the logic of the inference. Laws LJ explained that matching the genuineness approach to the statutory language involves an assumption that genuine reliance on legal advice to remain silent is a 'circumstance' in which it is never reasonable to expect suspects to mention a fact.[236] This might be thought true: Leng argued that most people would follow legal advice, good or bad, so attaching evidential significance to the decision to follow it is unsound.[237] However, this would give lawyers licence to 'shield' guilty suspects with nothing

229 See *Pemble v The Queen* (1971) 124 CLR 107, 120–1 (Barwick CJ). See also Andrew Hemming, 'Reasserting the Place of Objective Tests in Criminal Responsibility: Ending the Supremacy of Subjective Tests' (2011) 13 *University of Notre Dame Law Review* 69, 74–5; *R v Clare* [1994] 2 Qd R 619, 632–3 (Fitzgerald P); *Cutter v The Queen* (1997) 143 ALR 498, 501–3 (Brennan CJ and Dawson J), 509–11 (Kirby J).

230 See above n 203.

231 See Jackson, 'Interpreting the Silence Provisions' (n 161) 600.

232 See above n 99 and accompanying text.

233 See above n 229. See also Hemming (n 229) 70–1; *R v Winner* (1995) 79 A Crim R 528, 542 (Kirby ACJ); *Stanton v The Queen* (2003) 77 ALJR 1151, 1153 [5] (Gleeson CJ, McHugh and Hayne JJ).

234 *Howell* (n 76).

235 Ibid 13–14 [24] (Laws LJ for the Court). See Cape and Hardcastle (n 32) 798.

236 *Howell* (n 76) 13–14 [24] (Laws LJ for the Court). See also Cape (n 17) 396; Quirk, *Rise and Fall* (n 17) 128.

237 Leng (n 46) 249. See also Quirk, *Rise and Fall* (n 17) 126; David Wolchover, 'An Obituary for Inferences on Police Station Silence' [2002] (6) *Archbold News* 3, 4.

to say until they can compose a defence.[238] But if courts should accordingly query whether suspects really had no answer, this cannot practically be done except by reference to reasonableness. Hence, the Court was correct to hold that legal advice will not always make it reasonable for a suspect to omit some fact, and that the question must be brought back to 'all the circumstances':

> The kind of circumstance which may most likely justify silence will be such matters as the suspect's condition (ill-health, in particular mental disability; confusion; intoxication; shock, and so forth) … There must always be soundly based objective reasons for silence, sufficiently cogent and telling to weigh in the balance against the clear public interest in an account being given by the suspect to the police.[239]

Of course, framing the question in normative terms is not the best way to achieve a sound, evidential inquiry.[240] But the last sentence in this passage might be reframed in terms of the premise of the inference: there must be sufficiently cogent reasons to weigh against the assumption that an innocent person warned about withholding some part of their defence would, on balance, disclose that part of their defence.[241] Ordinarily, a suspect's legal advice to remain silent *will* weigh strongly against that assumption.[242] Inferences should be confined to situations where the expectation of disclosing the fact is so strong that the premise of the inference still, on balance, wins out. This might be so if the relevant facts are central to the accused's defence, would be very compelling if true and in no way prejudicial to the accused, and the accused has no relevant infirmity or mistrust of the police. If an accused charged with murder only discloses at trial that they thought that the victim had a knife, and they claim that their solicitor told them not to say so to police, one might well query whether following that advice was reasonable, or rather a cover until the accused could come up with a compelling story – in that sense, not genuine, either. This suggests that the reasonableness approach is sound.

3 Reconciling the Approaches

In *Hoare*, the Court of Appeal saw no inconsistency between the genuineness and reasonableness approaches.[243] This is correct insofar as inferring that the accused did not genuinely rely on legal advice involves considerations of reasonableness. However, some of the Court's remarks, along with the test's evolution after *Hoare*, are troubling.

The Court observed that evidence of legal advice was not the end of the matter even in *Betts*, if the accused did not *truly* rely on the advice.[244] The overall question 'is whether regardless of advice, genuinely given and genuinely accepted, an accused has remained silent not because of that advice but because he had no

238 See *Betts* (n 76) 270 [54] (Kay LJ for the Court).
239 *Howell* (n 76) 14 [24] (Laws LJ for the Court).
240 See above n 46.
241 See above nn 94, 96 and accompanying text.
242 See above n 237 and accompanying text.
243 *Hoare* (n 54) 1820 [51] (Auld LJ for the Court), quoted in *Hogg* (n 10) 545 [88] (White JA).
244 *Hoare* (n 54) 1820 [51] (Auld LJ for the Court), quoted in *Hogg* (n 10) 545 [88] (White JA).

or no satisfactory explanation to give'.[245] The above suggested that this is right. Yet the Court's view of genuineness is troubling because it rested on normative grounds.[246] The Court emphasised that the provision is meant to flush out innocence at an early stage.[247] Hence, if suspects 'genuinely' rely on legal advice inasmuch as they believe that they are entitled to use it to frustrate the investigation, then (regardless of innocence or guilt!) they do not *truly* rely on the advice and might be penalised.[248] Properly, the reasoning should be that because the accused's failure to mention the fact was so unreasonable – because it was so much more likely that an innocent or truthful suspect would mention it – it can be inferred that their invocation of advice was not genuine. The relevant fact can then be (somewhat) doubted, perhaps lending (some) support to a conclusion of the accused's guilt. So, while the Court rightly emphasised that the reasonable expectation test remains key,[249] it did not clearly spell out the logic.

R v Beckles ('*Beckles*') interpreted *Hoare* in a troubling way.[250] *Hoare* emphasised that suspects should not have to 'second-guess' their lawyers' advice – the issue is the reasonableness of the suspect's decision to remain silent, not the quality of their lawyers' advice.[251] Admittedly, the Court suggested that the 'explanation for the advice' might be relevant, which still raises concerns about legal professional privilege,[252] but it correctly focused on inferring whether the accused had no answer to give.[253] In *Beckles*, the Court took *Hoare* to impose a two-stage test:

> If the jury consider that the defendant genuinely relied on the advice, that is not necessarily the end of the matter. It may still not have been reasonable for him to rely on the advice, or the advice may not have been the true explanation for his silence.[254]

This skews the logic. The conclusion on genuineness must be inferred from considerations of reasonableness. Claiming that an accused's reliance might be genuine *but then* unreasonable, rather than inquiring whether the accused's reliance was genuine through considerations of reasonableness, invites the jury to punish decisions they consider to be foolish.[255] On this view, suspects may well need to be 'better lawyers than their lawyers' and second-guess their advice.[256] There is a heightened risk that the jury will overlook subjective features of the accused which may produce irrational behaviour under interrogation, such as confusion, naivety,

245 *Hoare* (n 54) 1821 [55] (Auld LJ for the Court).
246 See Quirk, *Rise and Fall* (n 17) 123–4.
247 *Hoare* (n 54) 1821 [54] (Auld LJ for the Court).
248 Ibid.
249 Ibid 1820 [52], 1822 [59].
250 *Beckles* (n 7).
251 *Hoare* (n 54) 1821–2 [58] (Auld LJ for the Court).
252 Ibid. See Cameron (n 7) 343.
253 *Hoare* (n 54) 1821 [55] (Auld LJ for the Court).
254 *Beckles* (n 7) 2844 [46] (Lord Woolf CJ for the Court). See also 'Adverse Inferences', *The Crown Prosecution Service* (Web Page, 2 August 2018) <https://web.archive.org/web/20231219192129/https://www.cps.gov.uk/legal-guidance/adverse-inferences>.
255 See Cooper (n 32) 69.
256 Roberts and Zuckerman (n 46) 654.

or inexperience with the legal system.[257] So, the approach to legal advice under section 34 of the *CJPOA* is in an unsatisfactory state.

4 Hogg's Position

Responding to these authorities in *Hogg*, White JA favoured the genuineness approach, though his comments were equivocal:

> I respectfully doubt whether the reasonableness of reliance on the solicitor's advice, as distinct from the genuineness of reliance on that advice, is the relevant question; although of course an asserted reliance on a solicitor's advice that is unreasonable would raise the question as to whether reliance on the advice as the reason for not answering questions was genuine. It is in that sense that [in *R v Hoare*] the jury was to be asked whether in the exercise of their collective common sense it was reasonable for the accused to respond to questions or whether the accused's true reason for not doing so was that he had no adequate explanation to give …[258]

There is merit to this approach. Inasmuch as it favours the genuineness test, it minimises the risk of penalising the accused for following advice in a manner the jury deems foolish, correcting *Beckles*' misstep.[259] However, the qualification about an asserted, unreasonable reliance demonstrates that legal advice cannot be isolated from the question of whether the accused could reasonably be expected to mention a fact. It indicates that legal advice to remain silent will not always outweigh the premise that some facts would more probably be disclosed if the accused were innocent. This being so, the more logical approach is to treat legal advice as one (very strong) factor within the test of reasonableness, keeping that premise in focus.

As this was obiter, the issue of legal advice remains unresolved in Australia. What can be said, given the *Browne v Dunn* point,[260] is that legal advice to remain silent will prima facie make it reasonable for an accused person to remain silent in an interview. This may provide scope for tactical lawyering to circumvent section 89A. The onus is on the prosecution to disprove reliance on the advice.[261] For now, this may involve imputing that the accused's reliance was not genuine. But if that means imputing that the accused had no answer to give, problems arise. Reaching that conclusion either requires interrogating the basis for the legal advice, which is undesirable, or deductive reasoning from the premise of the inference, which necessitates considerations of reasonableness. A future case may well decide that the language and logic of section 89A require reasonableness to be central. This poses some risk that juries might penalise defendants for foolish decisions where other factors were at play, such as stress or confusion. Properly, when defendants attribute their silence to legal advice, adverse inferences should only be drawn if the relevant fact would be so compelling and obvious to mention if true that following advice not to would appear to be unreasonable and *therefore* disingenuous.

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257 See Cape (n 17) 397–8 n 32; Gudjonsson (n 65) ch 3.

258 *Hogg* (n 10) 551 [112].

259 Cf *Beckles* (n 7) 2844 [46] (Lord Woolf CJ for the Court).

260 See above n 213.

261 RA Hulme, 'Annual Criminal Appeal Review 2020' (Conference Paper, Supreme Court of New South Wales, 10 September 2020) 18.

Subjective characteristics of the accused may complicate this reasoning, limiting the inference's probative value. Given this, the intricacies revealed above suggest that section 89A is not worth the trouble.

IV OFFICIAL QUESTIONING

This Part analyses NSW courts' interpretation of the requirement that the accused omitted the relevant fact(s) 'during official questioning in relation to the offence'.[262] It argues that they do not always grasp how the logic of the inference requires consideration of the questions put to the accused. The assumption that innocent suspects would proffer exculpatory information has greater force if a compelling case is put forward – innocent suspects might not grace trivial accusations with a response.[263] The direction in *Hogg* acknowledged that the prosecution case should call for an answer, but this was not clearly tied to considerations of questioning.[264] Two approaches are suitable, perhaps depending on whether 'official questioning' is left to the trial judge's assessment – under the *CJPOA*, it is, but in Odgers' view of (the differently structured) section 89A, it is not.[265] If the trial judge evaluates 'official questioning', it could perform a gatekeeping function by signifying questions which might elicit a response from the accused, screening out inferences where this precondition is not met. Alternatively, official questioning could be interpreted broadly, but the questions put to the accused form 'circumstances' affecting the reasonable expectation of mentioning facts, assessed by the jury.[266] This approach would underscore that the reasonable expectation test is the holistic application of the logic of the inference, but the purpose of the 'official questioning' requirement becomes unclear. It might perform some procedural role, such as ensuring that evidence of silence derives from formal scenarios subject to safeguards like recording.[267]

A Background

Section 89A(9) provides that:

> ***official questioning*** of a defendant in relation to a serious indictable offence means questions put to the defendant by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of the serious indictable offence.[268]

The reference to questions 'put to' the defendant might suggest specific inquiries about the offence. Some cases involve arguments that no 'official

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262 *Evidence Act* (n 2) s 89A(1)(a).
263 See above n 59.
264 *Hogg* (n 10) 533–4 [34] (White JA). See also *Petkar* (n 105) 284–5 [51] (Rix LJ for the Court); Hall (n 150) 685–92; Quirk (n 17) 122.
265 See Judicial College (n 105) [17-9]. But see Odgers (n 133) 700–1 [EA.89A.60]. See *Evidence Act* (n 2) s 89A(1). Cf *CJPOA* (n 7) ss 34(1)–(2).
266 *Evidence Act* (n 2) s 89A(1). See Odgers (n 133) 700–1 [EA.89A.60].
267 See *Criminal Procedure Act 1986* (NSW) s 281; *R v Sharp* (2003) 143 A Crim R 344, 349 [17] (Howie J).
268 *Evidence Act* (n 2) s 89A(9) (emphasis in original).

questioning' takes place if the accused refuses to be interviewed, or to answer any questions in an interview, after being cautioned.[269] In *Jafary*, Norrish DCJ was sympathetic to this argument.[270] In *Egan*, Williams ADCJ rejected it.[271] The following contends that the approach in *Jafary* pays better attention to the logic of the inference. The approach in *Egan* imposes an exacting standard of disclosure out of step with realistic expectations about human behaviour. Even if Norrish DCJ's view of 'questioning' does not prevail, his alternative argument that the reasonable expectation test should consider the questions put to the accused is compelling.

In *Jafary*, the accused did not reply when asked whether he understood the special caution and replied 'no' when asked whether he would 'like to provide an interview about the alleged sexual assault of [the victim]'.[272] Norrish DCJ held that there was no relevant official questioning in respect of which the accused's 'silence' might engage section 89A, since only preliminary questions were asked.[273] Even if 'official questioning' had occurred, the accused could not 'reasonably' have been expected to mention any particular fact in circumstances where questioning ceased after the accused exercised his 'right' not to be interviewed.[274]

In *Egan*, the accused raised self-defence at trial after failing to mention it to police.[275] In his interview, he was administered the special caution and indicated that he understood it.[276] He then agreed that the interviewing officer could put the allegation to him, leading the officer to ask whether he had punched the deceased.[277] The accused gave a 'no comment' reply and said 'no' when asked whether he wished to 'answer any questions that [police] may have in relation to this matter'.[278] Citing *Jafary*, the defence submitted that no official questioning had occurred because the defendant had refused to be interviewed.[279] Williams ADCJ rejected that argument.[280] He adopted a broad view of questioning and did not proceed to the question of reasonableness.

B *Jafary*'s Narrow Approach

Norrish DCJ's reasoning is compelling overall, though objections could be raised to his interpretation of 'questioning' as requiring more than preliminary questions. That interpretation does find support in the English case of *R v Johnson* ('*Johnson*'), which held that a suspect who had been administered the caution in a detention cell but refused to attend an interview had not been 'questioned':

269 *Jafary* (n 10); *Egan* (n 10). See also *R v Reaiche* (New South Wales District Court, 20 July 2016).
270 *Jafary* (n 10).
271 *Egan* (n 10).
272 *Jafary* (n 10) [3]–[5] (Norrish DCJ).
273 Ibid [10], [12], [18].
274 Ibid [11], [19]–[20].
275 *Egan* (n 10) 167 [10] (Williams ADCJ).
276 Ibid 166–7 [8]–[9].
277 Ibid 167 [9].
278 Ibid.
279 Ibid 167 [11], 171 [41].
280 Ibid 168–9 [21].

'No question was, in fact, put. What occurred was a precursor to that stage of the process.'[281] The Court of Appeal thought that the terms of the *CJPOA* caution, which match section 89A, reinforced this conclusion.[282] The caution preserves the right to silence inasmuch as 'the person does not have to say or do anything'.[283] But 'if the person does not mention [something] *when questioned*',[284] then *that* may harm their defence – that is, the questioning which enlivens an adverse inference is something that *might* happen, *after* the caution and choice to be interviewed.[285]

This interpretation accords with the principle of legality – that legislation should only be read to curtail rights when it does so with 'irresistible clearness',[286] and that where 'constructional choices are open, [statutes should be construed] so that they … encroach as little as possible upon fundamental rights'.[287] However, White JA in *Hogg* rejected the proposition that legality should confine section 89A to *Weissensteiner*-type scenarios involving facts peculiarly within the defendant's knowledge, or prompted by specific questions, as opposed to scenarios of 'mere silence', because section 89A clearly curtails the right to silence.[288] The caution could simply indicate that while suspects need not speak, consequences may follow from that choice.[289] Allowing suspects to circumvent an inference simply by refusing an interview could drive another 'coach and horses' through the section.[290] Indeed, *Johnson*'s preservation of the right to silence only goes so far. On the one hand, the Court held that in refusing to leave his cell, the suspect 'was in an emphatic way exercising his right to silence'.[291] Since no relevant questioning enlivened section 34 of the *CJPOA*, the 'common law provided protection to an offender who did not wish to answer questions'.[292] But on the other hand, police could have put questions to the accused in his cell to avoid frustrating the legislation.[293] On this view, it is doubtful that suspects could invoke the right to silence to circumvent section 89A unless police cease questioning entirely. Accordingly, while Norrish DCJ may be correct that 'official questioning' involves more than a mere invitation to be interviewed, suspects cannot invoke the right to silence to avoid an adverse inference if officers proceed with questioning anyway. But Norrish DCJ's alternative

281 *R v Johnson* [2005] EWCA Crim 971, [27] (Treacy J for the Court) ('*Johnson*'). See also Ormerod and Perry (n 16) 3357 [F20.14]; Cape and Hardcastle (n 32) 801.
282 *Johnson* (n 281) [27] (Treacy J for the Court). See *Police and Criminal Evidence Act 1984 (PACE) Code C 2023* (UK) [10.5] ('*PACE Code C*'). Cf *Evidence Act* (n 2) s 89A(9).
283 *Evidence Act* (n 2) s 89A(9); *Johnson* (n 281) [27].
284 *Evidence Act* (n 2) s 89A(9) (emphasis added). Cf *PACE Code C* (n 282) [10.5].
285 *Johnson* (n 281) [27] (Treacy J for the Court).
286 *X7 v Australian Crime Commission* (2013) 248 CLR 92, 127 [71] (Hayne and Bell JJ), 153 [158] (Kiefel J). See also *Evidence Act* (n 2) s 9(1).
287 *Tajjour v New South Wales* (2014) 254 CLR 508, 545 [28] (French CJ).
288 *Hogg* (n 10) 535–7 [42]–[48], 548–50 [96]–[101] (White JA). See *Weissensteiner* (n 48).
289 *Evidence Act* (n 2) s 89A(9). Cf *Johnson* (n 281) [27] (Treacy J for the Court).
290 See above n 197.
291 *Johnson* (n 281) [29] (Treacy J for the Court).
292 Ibid [30].
293 Ibid [32]–[33].

argument – that there may be no 'reasonable expectation' to mention a fact given no specific questions[294] – is compelling, and *Egan* was wrong to overlook it.

C *Egan*'s Broad Approach

It is unclear whether Williams ADCJ disagreed with *Jafary* in principle or distinguished it on the facts. He did note that 'all that had happened [in *Jafary*] was that the special caution had been given and that was the end of the matter', suggesting a factual distinction.[295] The allegation in *Egan* was, after all, put (slightly) more directly to the accused.[296] However, Williams ADCJ also disagreed with *Jafary* in placing any qualifiers on the definition of official questioning, such as 'relevant'.[297] The definition he adopted was broad:

> In my view, official questioning is not restricted to questions solely relating to matters of fact surrounding a crime or a suspect. Official questioning involves the lead up to, and the giving of a special caution, and what then follows thereafter.[298]

Williams ADCJ was concerned that the legislation would be frustrated if the accused's refusal to be interviewed would preclude an adverse inference.[299] His comment that adverse inferences may be open 'even if the facts are not fully explored in the interview' echoes section 89A's Second Reading speech, which noted that the suspect's omission of a fact need not be in relation to a particular representation by police.[300] This imposes an exacting requirement on suspects to disclose any fact they might advance at trial, subject to the difficult test of 'reasonableness'.[301] Yet this seems to be the view of English cases after *Johnson*.[302] While they do not overrule the proposition that no inference should be drawn from 'the exercise of the right to silence simpliciter',[303] they hold that so long as some questioning occurs, and the suspect is invited to give their account, no specific questioning need occur before an adverse inference is open.[304]

Arguably, this approach elides the 'official questioning' and 'reasonable expectation' requirements.[305] In remarking that 'on the facts now known, self-defence must have been on the accused's mind', Williams ADCJ perhaps implied that genuine self-defence would be so obvious to mention that there was a reasonable expectation of doing so.[306] But he did not engage with the alternative reasoning in *Jafary*, that

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294 *Jafary* (n 10) [11], [19]–[20] (Norrish DCJ).
295 *Egan* (n 10) 168 [16] (Williams ADCJ).
296 See ibid 167 [9]. Cf *Jafary* (n 10) [4] (Norrish DCJ).
297 *Egan* (n 10) 168–9 [21] (Williams ADCJ). Cf *Jafary* (n 10) [10], [12], [17]–[18] (Norrish DCJ).
298 *Egan* (n 10) 171 [36] (Williams ADCJ).
299 Ibid 171 [35]. Cf *Johnson* (n 281) [32]–[33] (Treacy J for the Court).
300 *Egan* (n 10) 171 [36] (Williams ADCJ); New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 18579 (Greg Smith, Attorney-General).
301 See Cape and Hardcastle (n 32) 809–12; Quirk, *Rise and Fall* (n 17) 128.
302 *R v Green* [2019] 4 WLR 80 ('*Green*'); *R v Harewood* [2021] EWCA Crim 1936 ('*Harewood*'). See Ormerod and Perry (n 16) 3357 [F20.14], 3360 [F20.18]; Cape and Hardcastle (n 32) 801–2.
303 *Harewood* (n 302) [35], [43] (Popplewell LJ for the Court). Cf *Johnson* (n 281) [29]–[30] (Treacy J for the Court).
304 *Green* (n 302) [20] (Males LJ for the Court); *Harewood* (n 302) [39] (Popplewell LJ for the Court).
305 Cape and Hardcastle (n 32) 802.
306 *Egan* (n 10) 170 [30].

the accused could not 'reasonably' be expected to mention a fact if 'questioning' ceased after his refusal to be interviewed.[307] Norrish DCJ suggested that in such circumstances, there would be nothing that could reasonably elicit an answer from the accused, no proposition to comment on.[308] The opportunity to raise any specific 'fact(s)', save for a general denial of wrongdoing, would have passed.[309]

This is largely compelling – it is unlikely that suspects would proffer information after officers agreed to terminate an interview, so a 'reasonable expectation' to mention facts could hardly arise. But it is too simplistic to suggest that no evidential significance could attach to a suspect's outright refusal to speak as a purported exercise of the right to silence.[310] There is force to Williams ADCJ's suggestion that some defences are so obvious that an innocent defendant could reasonably be expected to mention them regardless of an interview's scope.[311] English cases recognise that the reasonable expectation to mention 'central facts' is greater.[312] On balance, self-preservation would make suspects with an extremely compelling defence more likely to volunteer it.[313] Countervailing factors like the accused's timidity could rebut that view. Norrish DCJ's analysis comes in as one of those countervailing factors: suspects might not wish to dignify vague or brief questioning with a response, or know what to say. Or, they may have something to say but not wish to disclose it unless forced to by specific questions, perhaps to avoid disclosing embarrassing conduct. While charges were ultimately dropped, reporting of the *Egan* trial suggests that this might have been so: the accused testified that he was frightened and had previously tried to distance himself from the offence by denying that he hit the victim at all.[314] So, he had some motivation to withhold self-defence, because it required admitting that he struck the victim.

Accordingly, Norrish DCJ is correct that the questions put to the accused inform the reasonable expectation test. To the extent that Williams ADCJ did not consider this, Norrish DCJ's approach is preferable. But some defences may be so obvious to mention that Norrish DCJ's view that no significance can be attached to refusing an interview is too simplistic without further consideration of the facts.

Notwithstanding his comments about legality,[315] obiter comments by White JA in *Hogg* indicate that a superior court might still hold that specific questions should be put to the accused before an adverse inference can be drawn:

> The definition of 'official questioning' … makes it clear that it refers to questions put to the defendant by an investigating official. I have reservations as to whether

307 *Jafary* (n 10) [11], [19]–[20] (Norrish DCJ).
308 Ibid [11]–[12].
309 Ibid [19].
310 Cf ibid [19]–[20].
311 See above n 306.
312 *Harewood* (n 302) [40] (Popplewell LJ for the Court).
313 See above n 94.
314 See Dom Vukovic, 'Tyson Egan Breaks Down to Kyle Watkins' Parents, Apologises for Fatal Punch', *ABC News* (online, 4 December 2017) <https://www.abc.net.au/news/2017-12-04/man-who-fatally-punched-best-friend-apologises/9225244>; Dom Vukovic, 'Tyson Egan Trial: Jury Fails to Reach Verdict over Death of Kyle Watkins', *ABC News* (online, 6 December 2017) <https://www.abc.net.au/news/2017-12-06/coffs-harbour-one-punch-hung-jury/9233458>.
315 See above n 288.

> any question was put to the accused by [the official] other than whether the appellant understood that he was under arrest … However, it was not a ground of appeal that there was no official questioning within the meaning of s 89A because no questions were put to the appellant in relation to the serious indictable offence to which [the official] referred, or to the offence with which he was charged.[316]

White JA's scepticism that relevant questions were 'put to' the accused recalls the thinking in *Jafary*. At least from these remarks, he did not seem concerned that a refusal to be interviewed might frustrate the legislation.[317]

Accordingly, the scope of 'official questioning' remains unclear. It might signify some relevant, rather than preliminary, questions, but it would not appear to be an exacting precondition. At the very least, the reasonable expectation test should consider what questions were put to the accused.

D In Relation to 'the' Offence

In the above passage, White JA distinguished between the offence to which the officer referred and that with which Hogg was charged.[318] Hogg was arrested for, and (supposedly) questioned about, the offence of sexual intercourse with a child between the age of 10 and 16,[319] but as it was later discovered that the girl had turned 16 by the time of the alleged offence, he was indicted for sexual assault.[320] This raises the issue of whether questioning must relate to the precise offence at issue in proceedings. If, for practical reasons, this need not be so, it must be acknowledged that it could affect the reasonableness of the accused's conduct.

The first ground of appeal in *Hogg* was that, per section 89A(2)(a), the investigating official at the time of the special caution must have had reasonable cause to suspect the *particular* offence charged on the indictment.[321] White JA doubted this, because it would render the provision useless where, for instance, an accused was cautioned in relation to inflicting grievous bodily harm, but the victim later died, and the offence was upgraded to murder.[322] On his view, section 89A(2)(a) only required the investigating official to have reasonable cause to suspect the serious indictable offence in respect of which the caution was issued.[323] In any event, since the official already suspected Hogg of a more serious offence involving the same conduct as that with which he was charged, he would have had reasonable cause to suspect that other offence, too.[324] Accordingly, White JA's conclusion is sound insofar as the appellant contended that the investigating official must reasonably suspect the offence ultimately charged.

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316 *Hogg* (n 10) 550 [102].
317 Cf *Egan* (n 10) 171 [35] (Williams ADCJ).
318 See above n 316.
319 *Hogg* (n 10) 529 [22], 550 [103] (White JA).
320 *Crimes Act 1900* (NSW) ss 61D(1), 66C, as repealed by *Crimes (Amendment) Act 1989* (NSW). See *Crimes Act 1900* (NSW) sch 11 pt 1 cl 2.
321 *Hogg* (n 10) 535 [40] (White JA). See *Evidence Act* (n 2) s 89A(2)(a).
322 *Hogg* (n 10) 550 [105].
323 Ibid 550 [106] (White JA).
324 Ibid 550–1 [106].

However, the appellant did not technically contend that the offence in relation to which an accused is *questioned* must be the same as that with which they are charged (though that may necessarily follow from the argument about the special caution).[325] A literal reading of section 89A(1) suggests that this, at least, must be so: inferences can be drawn 'in a criminal proceeding for a serious indictable offence' after failure to mention a fact 'during official questioning in relation to *the* offence'.[326] The definite article in the latter phrase indicates that the same offence which is the subject of proceedings is contemplated as the subject of questioning.[327] One argument for this interpretation is that suspects might have different things to say in their defence if the allegations put to them in questioning vary from the charges laid at trial.[328] For Hogg, this did not matter: his alibi would apply to either sexual offence. But it would matter in White JA's example of grievous bodily harm upgraded to murder.[329] A person arrested for, and questioned about, grievous bodily harm would not stand to gain from mentioning facts relevant to extreme provocation.[330] But if the prosecutor upgrades the charge to murder at trial after the victim's death, they could theoretically invite an adverse inference if the defendant were then to raise extreme provocation. Accordingly, problems may arise if 'official questioning' could concern a different, if closely related, offence to the one at issue in proceedings.

However, given the fluidity of prosecution until the relevant facts are ascertained, the better view may be that the 'offence' need only refer to the same underlying conduct. Charges are, after all, legal constructs.[331] But defences are too, and the vagaries of their application to different offences may elude suspects, especially as the case against them evolves.[332] Accordingly, if the circumstances do not make it clear to a suspect that particular facts may assist in their defence, there should not be a reasonable expectation of disclosing those facts. A change in charges may produce this outcome. Likewise, as argued above, juries must consider the nature and strength of the case communicated through police questioning in deciding whether the accused could be reasonably expected to mention some fact(s).

Accordingly, 'official questioning' is a slippery element of section 89A. *Egan* treated the requirement loosely and did not require an accused to be prompted about the relevant fact. *Hogg* also failed to consider properly the consequences of cautioning and interviewing the accused about a different offence to that with which they are charged. Courts must consider the effect of what questions are put to the accused to ensure that sound inferences flow from section 89A.

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325 But see Odgers (n 133) 698 [EA.89A.30].
326 *Evidence Act* (n 2) s 89A(1) (emphasis added).
327 See also ibid s 89A(2)(a). Cf *Hogg* (n 10) 550 [106] (White JA).
328 See Cape and Hardcastle (n 32) 800.
329 *Hogg* (n 10) 550 [105].
330 *Crimes Act 1900* (NSW) s 23.
331 See Palmer (n 92) 107.
332 Daly, 'Inferences and Interference' (n 4) 67.

V CONCLUSION

This article has presented a fresh analysis of section 89A considering the emerging case law. It reveals that the courts have yet to reach a satisfactory understanding of the provision. This is in no small part due to the provision's drafting. Part II indicated how section 89A offers insufficient guidance about the inferences that may be drawn, the steps to be proved in drawing those inferences, and how to go about that proof. This has left courts uncertain about the significance of pre-trial silence, though it may provide (limited) evidence of guilt. Part III argued that tests for 'reasonable expectation' risk unfair prejudice against the accused. This requirement presents considerable difficulty when suspects are advised to remain silent. *Hogg* diverged from the English approach, which adheres to the logic of the inference but raises concerns about trust in the legal profession. Part IV revealed that the scope of 'official questioning' presents difficulties and intersects with the problem of reasonableness. This issue remains an open question following *Hogg*.

What, then, is to be done? The provision's repeal seems unlikely, though this may simplify the law. If the political purpose of section 89A was to unsettle stubborn criminals, its repeal might suggest a concession to criminals' rights.[333] The *CJPOA* provision has withstood years of criticism, though calls for its repeal are redoubling.[334] The fact that section 89A was meant to be reviewed leaves some hope.[335] But assuming that section 89A is retained, Part II argued that underneath its problems, the logic of drawing inferences from pre-trial silence is sound, limited though those inferences may be. The best way forward may be to develop a robust interpretation of the provision that ensures that this logic is observed.

This may entail amendment or new judicial guidelines, given the absence of suggested directions on section 89A in the Criminal Trials Bench Book.[336] The legislature walked back on including a definition of the inferences that may be drawn, not wanting to constrain courts.[337] However, it may be helpful to provide a nonexclusive list of inferences and the intermediate conclusions those inferences entail. This could reflect the English Crown Court Compendium's guidance, which, consistently with Part II's analysis, lists a range of inferences from fabrication to guilt.[338] Not all the English directions are helpful, however. An excessively lengthy direction is undesirable,[339] as is the direction that the jury must be 'sure' of the inference beyond reasonable doubt.[340] This introduces circularity and may suggest an unwarranted seriousness about what ought to be a relatively minor inference. For a strong inference, the jury should be directed that if the accused's silence is

333 See Leng (n 46) 255–6.
334 Quirk, 'Restoring the Right to Silence' (n 11); Owusu-Bempah (n 11).
335 See above n 8.
336 See above n 53.
337 New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 18580 (Greg Smith, Attorney-General).
338 Judicial College (n 105) [17-5].
339 Hall (n 150).
340 See above n 105 on English courts' use of the phrase 'being sure' in relation to the criminal standard of proof.

better explained by their guilt than innocence, it provides proportionate support for a conclusion of guilt. For a weak inference, if the silence is more consistent with the falsity of the defence than its truth, it casts proportionate doubt on its credibility. If the accused's innocent explanations for silence are, on balance, persuasive, then no inference can be drawn. A definition of reasonable expectation could be added, to clarify that it entails a greater likelihood of the accused disclosing a fact if innocent or if truthful, considering all the circumstances subjectively. The scope of questioning could be clarified. And with legal advice, an inference should only be drawn if the expectation to mention a fact is so strong that it outweighs the view that the accused could reasonably and genuinely have been advised not to mention it. Such changes could bring clarity to this intricate, and problematic, provision.