Our right to silence under grave threat

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American Supreme Court jurist Oliver Wendell Holmes once observed: "The life of the law has not been logic, it has been experience."

These are prescient words, as we read that with little reverence for hundreds of years of experience, Parliament is about to consider the Criminal Procedure (Reform and Modernisation) Bill, a monumental "reworking" of our criminal legal procedure, that leaves few important traditional principles undamaged.

Of these principles, the right to silence is often not easily understood by some in the population. If you can explain yourself, they innocently ask, then why not be required to so do?

The reality is that the criminal justice system has evolved cornerstone principles over hundreds of years to protect us all after the routinely horrible experiences of not having such protections.

Foremost of these is the right to silence, and the closely related right to be presumed innocent.

They reflect the typically huge imbalance of resources between the state and an accused person, and the inherent value in a free society of requiring the state to prove a case on its own merits and without forcing confessions.

The new bill requires a criminal defendant to advise the prosecution ahead of time of the defence(s) with which they will be defending themselves, or, as the bill innocuously but slyly dresses it up, "issue dispute identification" would be required of the defence.

The essentially unresearched idea here is that it will save time if the trial only addresses those points that are crucial to a person's guilt. If the defendant has to tip his hand, however, the balance between the parties is massively realigned in favour of the state. It becomes the defendant's job to help the prosecution out in convicting him or herself.

Currently prosecution witnesses have to testify without knowing exactly how the allegedly criminal incident will be explained by the defendant.

This is part of getting to the truth so that prosecution witnesses do not have the opportunity to "mould" (or less politely, add to, subtract from and otherwise misrepresent) their stories to better undermine the defence.

Not every conviction is secured with a shell case helped into a flower bed, but in many cases "additions" to the truth are too tempting for prosecution witnesses to resist.

The conviction on perverting justice charges in recent years of several police officers who have been unlucky enough to have been caught evidences the practice.

Even without prosecution witnesses moulding their evidence it means the police can cut corners knowing that anything that matters must be pointed out to them by the other team.

THE point of denying the prosecution foreknowledge of the defence case is that the court is in a much better position to judge just how reliable the evidence of prosecution witnesses really is.

If a witness can be shown to be wrong in some matter by contrary evidence, the court will probably also regard the witness as less reliable overall. These impressions are all part of getting at the truth.

If a lecturer wants to know what the student knows, he will set an exam. The student will not know ahead of time what is in it. It is precisely because the person being tested does not know what the examiner knows that the true extent of their knowledge can be probed.

Whether the examiner be a lecturer or a physician or a judge, the principle is the same.

At a personal level it matters to New Zealanders since, for example, any of us can suddenly be facing a traffic ticket or minor charge after a simple car accident.

This bill would make it more likely that we would be convicted. Indeed, the bill will mean nothing less than greatly increased convictions of the innocent - exactly the evil that the right to silence was entrenched into our law to avoid.

Last month the public discovered that it was about to write a cheque for some $350,000 to compensate one Aaron Farmer, who spent over two years in jail for a rape that he did not commit.

Just last week, we found out that we now have to find another $350,000 for Jaden Knight and Phillip Johnston, who wrongly spent nine months in jail for arson, which

offence they also did not commit.

How many more Aaron Farmers, Jaden Knights and Phillip Johnstons need there be?

There may be ill-informed populist sentiment in suggesting that the innocent have nothing to fear from losing the right to silence.

The experience, however, as Oliver Wendell Holmes observed, is that the law rests on its traditional pillars for very good reasons.

Without good reason, alas, this bill would tragically trample one of the very most important of those pillars.

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