

Passed by both Houses



New South Wales

Evidence Amendment (Evidence of Silence) Bill 2013

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2013*



New South Wales

Evidence Amendment (Evidence of Silence) Bill 2013

Act No , 2013

An Act to amend the *Evidence Act 1995* with respect to inferences that may be drawn from the silence during official questioning of persons accused of serious indictable offences.

See also the *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013*.

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Evidence Amendment (Evidence of Silence) Act 2013*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Evidence Act 1995 No 25

[1] Section 89 Evidence of silence generally

Omit “In a” from section 89 (1). Insert instead “Subject to section 89A, in a”.

[2] Section 89A

Insert after section 89:

89A Evidence of silence in criminal proceedings for serious indictable offences

- (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:
 - (a) that the defendant could reasonably have been expected to mention in the circumstances existing at the time, and
 - (b) that is relied on in his or her defence in that proceeding.
- (2) Subsection (1) does not apply unless:
 - (a) a special caution was given to the defendant by an investigating official who, at the time the caution was given, had reasonable cause to suspect that the defendant had committed the serious indictable offence, and
 - (b) the special caution was given before the failure or refusal to mention the fact, and
 - (c) the special caution was given in the presence of an Australian legal practitioner who was acting for the defendant at that time, and
 - (d) the defendant had, before the failure or refusal to mention the fact, been allowed a reasonable opportunity to consult with that Australian legal practitioner, in the absence of the investigating official, about the general nature and effect of special cautions.
- (3) It is not necessary that a particular form of words be used in giving a special caution.
- (4) An investigating official must not give a special caution to a person being questioned in relation to an offence unless satisfied that the offence is a serious indictable offence.

- (5) This section does not apply:
- (a) to a defendant who, at the time of the official questioning, is under 18 years of age or is incapable of understanding the general nature and effect of a special caution, or
 - (b) if evidence of the failure or refusal to mention the fact is the only evidence that the defendant is guilty of the serious indictable offence.
- (6) The provisions of this section are in addition to any other provisions relating to a person being cautioned before being investigated for an offence that the person does not have to say or do anything. The special caution may be given after or in conjunction with that caution.
- Note.** See section 139 of this Act and section 122 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.
- (7) Nothing in this section precludes the drawing of any inference from evidence of silence that could properly be drawn apart from this section.
- (8) The giving of a special caution in accordance with this section in relation to a serious indictable offence does not of itself make evidence obtained after the giving of the special caution inadmissible in proceedings for any other offence (whether or not a serious indictable offence).
- (9) In this section:
- 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.
- special caution** means a caution given to a person that is to the effect that:
- (a) the person does not have to say or do anything, but it may harm the person's defence if the person does not mention when questioned something the person later relies on in court, and
 - (b) anything the person does say or do may be used in evidence.

Note. The Commonwealth Act does not include this section.

[3] Schedule 2 Savings, transitional and other provisions

Omit clause 1 (1). Insert instead:

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

[4] Schedule 2, Part 4

Insert after clause 22:

Part 4 Provisions consequent on the enactment of the Evidence Amendment (Evidence of Silence) Act 2013

23 Definition

In this Part:

amending Act means the *Evidence Amendment (Evidence of Silence) Act 2013*.

24 Evidence of silence in criminal proceedings for serious indictable offences

- (1) Section 89A, as inserted by the amending Act, does not apply in relation to a proceeding the hearing of which began before the insertion of that section.
- (2) Section 89A, as inserted by the amending Act, does not apply in relation to any failure or refusal to mention a fact before the insertion of that section.
- (3) Section 89A, as inserted by the amending Act, extends to evidence of anything done or omitted to be done in connection with the investigation of offences committed before the insertion of that section.

25 Review of policy objectives of amending Act

- (1) The Minister is to review section 89A to determine whether the policy objectives of the amending Act remain valid and whether the terms of section 89A remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the commencement of this clause.

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- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.