

Lawyers



**THE RIGHT TO SILENCE
PARLIAMENT OF N.S.W.
LEGISLATION REVIEW COMMITTEE**

AUSTRALIAN LAWYERS ALLIANCE

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THE RIGHT TO SILENCE

Executive Summary

The Australian Lawyers Alliance submits as follows:

1. The Alliance supports the need for the right to silence in the Australian criminal justice system.
2. The Alliance asserts that protecting the right to silence is necessary for the protection of the rights of the individual.
3. The Alliance asserts that the protection of the right to silence is necessary for the preservation of the integrity of the Australian legal system.
4. The Alliance asserts that no adverse inference should be drawn from an individual's decision to exercise their right to silence.

The Australian Lawyers Alliance makes submissions to the Legislation Review Committee on broad principles concerning the right to silence. Accordingly, we will not be addressing the six questions in the committee's discussion paper, *The Right to Silence*.

1. The Alliance supports the need for the right to silence in the Australian criminal justice system

The Australian Lawyers Alliance recognises that there are three general heads under which the right to silence may be examined:

1. the right to silence when being questioned by police;
2. pre-trial disclosure; and
3. the right to silence at trial.

The Alliance asserts that the right to silence is an essential safeguard that was built into the Australian criminal justice system for the purpose of protecting the

rights and freedoms of the individual. The Alliance supports the view that the right to silence is a necessary device used in the pursuit of justice.

The right to silence is an essential cornerstone of the Australian criminal justice system. In the Australian legal system (and indeed Western democracy) the accused is entitled to a presumption of innocence. The presumption of innocence is fundamental to the Australian criminal justice system and the right to silence, along with the right not to incriminate oneself, is a product of the presumption of innocence. Therefore the right to silence forces the burden of proof on the prosecution, where it belongs.

2. The Alliance asserts that the protection of the right to silence is necessary for the protection of the rights of the individual

The Alliance asserts that the right to silence is a fundamental right of the individual in Australian democracy. The State, when investigating a crime, has resources that far outweigh the assets of most individuals. Consequently, the right to silence is not only a fundamental right of the accused, but is also an important tool that is necessary in order to balance the scales of justice.

Many individuals who are accused of a crime may not be able to articulate themselves in a satisfactory manner when under the pressure of a criminal investigation. These individuals may misrepresent themselves and their interest. Firstly, accused parties have the right not to incriminate themselves; however, in addition to this, if pressured to break their silence for fear of an adverse inference being drawn, it is likely that the distressed accused may provide erroneous evidence.

3. The Alliance asserts that the protection of the right to silence is necessary for the preservation of the integrity of the Australian legal system

The Alliance affirms that the State is in a position where it can gather evidence against an accused party. The defendant has a right not to contribute to the mounting of such evidence. If the defendant is guilty, then the evidence that the State has compiled should then be sufficient to incriminate him/her. One of the benefits of this process is that the police (and the State) then have an incentive to investigate a matter thoroughly, and are forced into a position where they need to find objective evidence. Consequently, the right to silence not only protects the rights of the individual, but also protects the integrity of the investigation against an accused. It is a logical conclusion to draw that the weakening of the right to silence may result in the weakening of the standard of evidence-gathering.

4. The Alliance asserts that no adverse inference should be drawn from an individual's decision to exercise their right to silence

The Alliance asserts that no negative inference should be drawn from an accused exercising his/her right to silence. Such inferences fail to acknowledge that there are many valid reasons why an accused may wish to exercise their right to silence. Examples of such reasons include, but are not limited to: people with a disability, non-English speakers, and those who fear police corruption or misinterpretation. There are many valid reasons why an accused person may remain silent when being questioned by police, during pre-trial disclosure and at trial. To allow adverse inferences to be drawn from an act of silence during any of these stages would erode the protection to the individual for which the safeguard was originally established.

In *Weissensteiner v The Queen* it was suggested by Mason CJ, Deane and Dawson JJ that “deficiency in the prosecution case may be sufficient to account for the accused remaining silent”.¹ An innocent defendant may legitimately remain silent if no clear and substantial case has been presented against them by the prosecution. As the burden of proof falls on the prosecution in criminal

¹ (1993) 178 CLR 217, 228.

cases, an accused individual may not wish to dignify the prosecution with a response.

Conclusion

The Australian Lawyers Alliance believes strongly in the importance of protecting individual rights and freedoms. The Lawyers Alliance supports the need for the right to silence in the Australian criminal justice system and recognises that fundamental rights granted to accused parties during an investigation exist for the purpose of balancing the limited resources of the individual against the expansive resources of the State. Further, the Alliance believes that no adverse inference should be drawn from an accused who wishes to exercise their right to silence. The right to silence is a fundamental right that should not be infringed upon. Any reduction of the right to silence will jeopardise the protection of the individual that the Australian criminal justice system has been designed to preserve.



WHO WE ARE

Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We have some 1,500 members and estimate that they represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

Corporate Structure

APLA Ltd, trading as the Australian Lawyers Alliance, is a company limited by guarantee that has branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by ten paid staff who are based in Sydney.

Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2005. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine *Precedent* is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.