



New South Wales

Evidence Amendment (Evidence of Silence) Bill 2012

Explanatory note

Overview of Bill

The object of this Bill is to amend the *Evidence Act 1995* (the *Principal Act*) so that in proceedings for a serious indictable offence unfavourable inferences may be drawn from the defendant's failure or refusal to mention a fact during questioning by the officials who investigated the offence that, in the circumstances existing at the time, the defendant could reasonably have been expected to mention and that is later relied on by the defence in the proceedings.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be proclaimed.

Schedule 1 Amendment of Evidence Act 1995 No 25

Schedule 1 [2] inserts proposed section 89A into the Principal Act to achieve the object described in the Overview of the Bill above.

Schedule 1 [1] makes a consequential amendment to section 89 of the Principal Act.

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Explanatory note

Schedule 1 [3] inserts savings and transitional provisions into Schedule 2 to the Principal Act.

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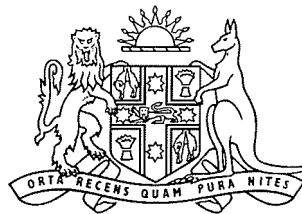
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No ,

A Bill for

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

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Evidence Amendment (Evidence of Silence) Bill 2012

Clause 1

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Evidence Amendment (Evidence of Silence) Act 2012*.

2 Commencement

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

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Evidence Amendment (Evidence of Silence) Bill 2012

Schedule 1 Amendment of Evidence Act 1995 No 25

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, in answer to any question or in response to any representation in the course of the official questioning of the defendant 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 subsequently relied on by the defence in the proceeding.
- (2) Such an inference may be drawn only if, before the relevant question or representation was put or made to the defendant:
 - (a) a supplementary caution was given to the defendant by an investigating official who had reasonable cause to suspect that the defendant had committed the serious indictable offence, and
 - (b) the defendant was allowed the opportunity to consult an Australian legal practitioner about the effect of failing or refusing to mention such a fact.
- (3) Such an inference cannot be drawn if it is the only evidence that the defendant is guilty of the serious indictable offence.
- (4) It is not necessary that a particular form of words be used in giving a supplementary caution.
- (5) An investigating official must not give a supplementary caution to a person being questioned in relation to the commission, or possible commission, of an offence unless satisfied that the offence concerned is a serious indictable offence.

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Amendment of Evidence Act 1995 No 25

Schedule 1

- (6) This section does not apply to a defendant who, at the time of the official questioning, is under 18 years of age or who has a cognitive impairment.
- (7) For the purposes of subsection (2) (b), a defendant is taken not to have been allowed an opportunity to consult an Australian legal practitioner if the defendant's means, and the circumstances, preclude the defendant from obtaining legal advice.
- (8) The provisions of subsection (2) are in addition to, and do not derogate from, any requirement imposed by law on an investigating official apart from this section to caution a person being investigated for an offence or to allow such a person to consult a legal practitioner.
- (9) Nothing in this section precludes the drawing of any inference from evidence of silence that could properly be drawn apart from this section.
- (10) In this section:
 - cognitive impairment* includes any of the following:
 - (a) an intellectual disability,
 - (b) a developmental disorder (including an autistic spectrum disorder),
 - (c) a neurological disorder,
 - (d) dementia,
 - (e) a severe mental illness,
 - (f) a brain injury.

inference includes:

- (a) an inference of consciousness of guilt, or
- (b) an inference relevant to a party's credibility.

official questioning of a defendant in relation to a serious indictable offence means questions put or representations made 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.

standard caution means a caution that a person does not have to say or do anything but that anything he or she does say or do may be used in evidence.

supplementary caution means a caution given to a person being questioned in connection with the investigation of the

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Evidence Amendment (Evidence of Silence) Bill 2012

Schedule 1 Amendment of Evidence Act 1995 No 25

commission, or possible commission, of a serious indictable offence that:

- (a) is given to the person subsequently to a standard caution in relation to that offence, and
- (b) indicates that, if the person does not say anything when being questioned and fails or refuses to mention a fact subsequently relied on by the defence in any proceedings brought against the person for the offence, an inference may be drawn that may harm the person's defence.

Note. The Commonwealth Act does not include this section.

[3] Schedule 2 Savings, transitional and other provisions

Insert after clause 22:

Part 4 Provisions consequent on the enactment of Evidence Amendment (Evidence of Silence) Act 2012

23 Definition

In this Part:

amending Act means the *Evidence Amendment (Evidence of Silence) Act 2012*.

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 is made:
 - (a) in answer to any question, or
 - (b) in response to any representation.
- (3) Section 89A, as inserted by the amending Act, extends to evidence of acts 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

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Amendment of Evidence Act 1995 No 25

Schedule 1

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.
- (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.