



New South Wales

Evidence Amendment (Evidence of Silence) Bill 2013

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

The *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Bill 2013* is cognate with this Bill.

Overview of Bill

The object of this Bill is to amend the *Evidence Act 1995* so that in proceedings for a serious indictable offence an unfavourable inference may be drawn from the defendant's failure or refusal to mention a fact during official questioning that the defendant could reasonably have been expected to mention and that is later relied on by the defence in the proceedings.

Such an inference will not be able to be drawn unless, before the questioning, a special caution was given to the defendant in the presence of a legal practitioner acting for the defendant.

Such an inference will also not be able to be drawn if it is the only evidence that the defendant is guilty of the offence.

The Bill will not apply to a defendant who, at the time of the questioning, is under 18 years of age or incapable of understanding the general nature and effect of a special caution.

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 *Evidence Act 1995* (the *Principal Act*) to achieve the object described in the Overview above.

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

Schedule 1 [3] enables the making of regulations of a savings and transitional nature consequent on the enactment of the proposed Act.

Schedule 1 [4] inserts savings and transitional provisions into Schedule 2 to the Principal Act.

First print



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No. , 2013

A Bill for

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) Bill 2013*.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Evidence Amendment (Evidence of Silence) Act 2013</i> .	3
2 Commencement	4
This Act commences on a day or days to be appointed by proclamation.	5

Schedule 1	Amendment of Evidence Act 1995 No 25	1
[1] Section 89 Evidence of silence generally		2
	Omit “In a” from section 89 (1). Insert instead “Subject to section 89A, in a”.	3
[2] Section 89A		4
	Insert after section 89:	5
89A Evidence of silence in criminal proceedings for serious indictable offences		6 7
(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:	8 9 10 11
(a)	that the defendant could reasonably have been expected to mention in the circumstances existing at the time, and	12 13
(b)	that is relied on in his or her defence in that proceeding.	14
(2)	Subsection (1) does not apply unless:	15
(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	16 17 18 19
(b)	the special caution was given before the failure or refusal to mention the fact, and	20 21
(c)	the special caution was given in the presence of an Australian legal practitioner who was acting for the defendant at that time, and	22 23 24
(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.	25 26 27 28 29
(3)	It is not necessary that a particular form of words be used in giving a special caution.	30 31
(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.	32 33 34

- (5) This section does not apply: 1
- (a) to a defendant who, at the time of the official questioning, 2
is under 18 years of age or is incapable of understanding 3
the general nature and effect of a special caution, or 4
 - (b) if evidence of the failure or refusal to mention the fact is 5
the only evidence that the defendant is guilty of the serious 6
indictable offence. 7
- (6) The provisions of this section are in addition to any other 8
provisions relating to a person being cautioned before being 9
investigated for an offence that the person does not have to say or 10
do anything. The special caution may be given after or in 11
conjunction with that caution. 12
- Note.** See section 139 of this Act and section 122 of the *Law 13
Enforcement (Powers and Responsibilities) Act 2002.* 14
- (7) Nothing in this section precludes the drawing of any inference 15
from evidence of silence that could properly be drawn apart from 16
this section. 17
- (8) The giving of a special caution in accordance with this section in 18
relation to a serious indictable offence does not of itself make 19
evidence obtained after the giving of the special caution 20
inadmissible in proceedings for any other offence (whether or not 21
a serious indictable offence). 22
- (9) In this section: 23
- official questioning** of a defendant in relation to a serious 24
indictable offence means questions put to the defendant by an 25
investigating official who at that time was performing functions 26
in connection with the investigation of the commission, or 27
possible commission, of the serious indictable offence. 28
- special caution** means a caution given to a person that is to the 29
effect that: 30
- (a) the person does not have to say or do anything, but it may 31
harm the person's defence if the person does not mention 32
when questioned something the person later relies on in 33
court, and 34
 - (b) anything the person does say or do may be used in 35
evidence. 36
- Note.** The Commonwealth Act does not include this section. 37

[3] Schedule 2 Savings, transitional and other provisions	1
Omit clause 1 (1). Insert instead:	2
(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.	3 4 5
[4] Schedule 2, Part 4	6
Insert after clause 22:	7
 Part 4 Provisions consequent on the enactment of the Evidence Amendment (Evidence of Silence) Act 2013	 8 9 10
23 Definition	11
In this Part:	12
<i>amending Act</i> means the <i>Evidence Amendment (Evidence of Silence) Act 2013</i> .	13 14
24 Evidence of silence in criminal proceedings for serious indictable offences	15 16
(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.	17 18 19
(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.	20 21 22
(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.	23 24 25 26
25 Review of policy objectives of amending Act	27
(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.	28 29 30 31
(2) The review is to be undertaken as soon as possible after the period of 5 years from the commencement of this clause.	32 33

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Schedule 1 Amendment of Evidence Act 1995 No 25

- (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. 1
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