

## **Evidence Amendment (Evidence of Silence) Act 2013**

The *Evidence Amendment (Evidence of Silence) Act 2013* is a significant piece of legislation that solicitors who practice in the area of criminal law should be aware of. A solicitor should consider the legislation and the effects of the legislation before contemplating advising a client or attending a police station.

### **Legislative provisions**

The *Evidence Amendment (Evidence of Silence) Act 2013* amends the *Evidence Act 1995* so that in proceedings for a serious indictable offence (maximum penalty of 5 years or more) 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.

Section 89A(1) provides that an unfavourable inference may be drawn in relation to the failure or refusal to mention a fact during official questioning. Section 89A(1) does not require the failure or refusal to be in relation to a specific question or representation from the investigating official. An unfavourable inference may be drawn simply as a result of not mentioning a fact at the time of police questioning that is later relied on at trial. The onus is on the defendant to mention the fact.

A number of preconditions must be satisfied before it is open to a court to draw an unfavourable inference or to leave the issue to a jury. These include:

- Section 89A(2)(a) specifies that, for subsection (1) to apply, the special caution is to be given by an investigating official who has reasonable cause to suspect that the person has committed a serious indictable offence.
- Section 89(2)(b) requires the special caution to be given before the defendant fails or refuses to mention a fact later relied on at trial.
- Section 89A(2)(c) provides that the special caution must be given in the presence of an Australian legal practitioner who is acting for the defendant at the time.

In the Second Reading Speech the Attorney General confirmed that while "presence" is not defined,

"...its everyday interpretation means that the solicitor must be physically present. They are not present if they are simply in contact by telephone or some other electronic means."

During the Second Reading debate the Attorney General also said in response to the possibility that no one will have their lawyer present at the police station:

"If so, no-one will suffer. If they do not have their lawyers present they cannot be given the caution. That is the point we are trying to make.

...

Lawyers may decide it is not in the best interests of their clients to attend the police station because it will trigger the provision."

- Section 89A(2)(d) stipulates that the defendant must also be allowed a reasonable opportunity to consult with the legal practitioner in the absence of the investigating official about the general nature and effect of the special caution. The opportunity must be given before the failure or refusal to mention a fact.
- Section 89A(4) provides that the special caution may only be given in circumstances in which the investigating official is satisfied the offence is a serious indictable offence.

- Section 89A does not apply to defendants who, at the time of official questioning, were under 18 years of age or were incapable of understanding the general nature and effect of the special caution (section 89A(5)(a)).

### **Matters to consider**

Solicitors will need to consider whether it is in their client's best interests to be physically present at the police station. If a solicitor is present during the special caution they need to be aware of the potential conflict of interest that may arise, and carefully contemplate whether they can continue to act in the matter. If the solicitor continues to act, the potential for conflicts of interest to arise in the future should also be borne in mind for the duration of the matter, including the possibility of the solicitor becoming a witness in the case.

Solicitors are only in a position to give proper advice when they are fully apprised of the case against their client. Solicitors will need to be confident of the accuracy of disclosure and the circumstances of their client before giving advice about the effects of exercising the right to silence. Solicitors should be aware that a defendant who receives a special caution has no statutory right to disclosure by police – there is no right to disclosure of a Police Fact Sheet, a Court Attendance Notice, or any of the prosecution evidence before the special caution is given.

Solicitors who do not regularly practice in the area of criminal law will need to carefully consider the advice they give to clients, especially if it is out of hours. If possible such solicitors should seek advice or clarification from a criminal law practitioner before advising a client and especially before attending a police station.