

MEDIA RELEASE

For Immediate Release

22/03/2013

RULE OF LAW
INSTITUTE OF AUSTRALIA

Media Contact: RoLIA CEO, Kate Burns 0423 392 061
Level 4 131 Macquarie Street, Sydney NSW 2000
www.ruleoflaw.org.au | info@ruleoflaw.org.au

HANDS OFF THE RIGHT TO SILENCE

The Rule of Law Institute of Australia (RoLIA) condemns the amendments passed by the New South Wales Parliament that whittle away the presumption of innocence in criminal trials.

These amendments provide that a person who chooses to exercise the right to remain silent when questioned about a serious criminal offence may be found guilty at trial if that person later raises an explanation not mentioned when initially questioned.

The right to remain silent when being investigated is a fundamental principle of our system of justice, alongside the presumption of innocence until proven guilty. It is the “golden thread” that runs through our common law system of criminal justice, as well as international human rights law, civil law and Sharia law.

The High Court has previously stated that to draw an adverse inference about the genuineness of a defence “from the fact that an accused person has not previously raised it would be to convert the right to remain silent into a source of entrapment”. It is enshrined in section 89 of the Evidence Act 1995 (NSW) which currently states that in criminal proceedings “an inference unfavourable” to a person must not be drawn from the fact that the person did not answer a question put to that person during the investigation of an offence.

Yet these convoluted amendments to section 89 provide exactly that. If a person who has been given a “special caution” by an investigating official in the presence of their lawyer does not mention a fact later relied upon at trial, the jury can draw a negative inference about the genuineness of that fact or defence.

Until now, no jurisdiction in Australia has tampered with the principle that no person is required to incriminate themselves. The criminal justice system is based on the presumption of innocence. It is up to the prosecution to prove guilt beyond reasonable doubt. An accused person is entitled to remain silent from the time of questioning until the conclusion of the trial. This reflects the vastly different resources available to governments to prosecute crimes and accused persons to defend themselves. The amendments put New South Wales out of step with the every other other State, and the federal criminal justice system.

They put lawyers in a bind too, impinging on their ability to properly represent their clients. There are plenty of good reasons why lawyers tell their clients to remain silent during questioning. Being questioned is a highly stressful event and volunteering information at that stage is unlikely to assist the client. Better to respond in a calmer context with time for sound advice and reflection, so the client can make a considered decision. Lawyers who do accompany a client to questioning will be in the invidious position of having their presence endangering their client’s right to silence. To avoid this, lawyers are likely to advise their clients by phone not to answer questions and keep away from the police station themselves.

According to Police Commissioner Andrew Scipione, the amendments are intended to overcome the “wall of silence” police encounter when investigating organised crime and overcoming “surprise alibis” but it will do nothing of the sort. The police will not breach the wall of silence as members of organised crime will not have a lawyer present when questioned. And the police may risk losing cooperation when those who are not members of organised crime realise their right to silent is undermined. Hard cases are no excuse for bad law, let alone for removing a fundamental underpinning of our criminal justice system: the right to silence.

**Please contact RoLIA’s CEO, Kate Burns,
on 0423 392 061 for further information.**