

FACT SHEET: The Right to Silence and Pre-trial Disclosure in NSW

Links to Syllabus

New Special Caution

Police powers & Arrest

The new special caution given by police when arresting someone for a serious indictable offence, which carries a penalty of 5 or more years imprisonment:

“You are not obliged to say or do anything unless you wish to do so. But it may harm your defence if you do not mention when questioned something you rely on in court.”

Legislation

Detention, interrogation, rights of suspects

Evidence Amendment (Evidence of Silence) Act 2013

Modifies the right to silence when questioned by police for **serious indictable offences** (5 years+ in prison) if a person remains silent in the presence of their lawyer.

This Act amends the Evidence Act 1995 (NSW). Use this one in your extended response! A good way to say it is that this amendment to the Evidence Act 1995 (NSW) modified the right to silence. How did it modify it? See ‘Effect’ below.

Rights of Children when questioned or arrested

From the Evidence Amendment (Evidence of Silence) Act 2013 (NSW):

‘(5) This section does not apply:

(a) to a defendant who, at the time of the official questioning, is under 18 years of age or is incapable of understanding the general nature and effect of a special caution, or

(b) if evidence of the failure or refusal to mention the fact is the only evidence that the defendant is guilty of the serious indictable offence.’

Use of evidence

Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013

Makes the defence and prosecution provide details of their case to each other before the trial.

Police have stated that these laws will allow them to more effectively prosecute criminal gangs.

Effect

Role of juries

The judge may allow the jury to draw an ‘unfavourable inference’ if the accused does not mention when questioned by police, something they later rely on for their defence.

In plain speak: the jury is free to assume the defendant has made up a story after being questioned.

Damages the presumption of innocence and limits the right to silence.

Evaluate and Discuss

The extent to which the law balances the rights of victims, offenders and society

Benefits

May reduce the length and complexity of some trials by discouraging a defendant from raising new evidence

The defence cannot ‘surprise’ the prosecution with new evidence in the middle of the trial

Limitations

Defendants who are in a vulnerable state, confused, stressed, or have poor English, will not have the protection of the right to silence when questioned

Limits the advice lawyers can give their clients

Pre-trial disclosure of defence cases will increase costs for defence