The Shopfront

YOUTH LEGAL CENTRE

Police questioning and the right to silence

1 The right to silence

For a person who is suspected or accused of a criminal offence, the right to remain silent when questioned by police is a basic legal right.

The right to silence is closely related to the presumption of innocence. The prosecution must prove beyond reasonable doubt that the accused person is guilty. A suspect or an accused person does not have to assist the police, and nor do they have to prove their innocence. For this reason, answering police questions is voluntary in most situations.

For a summary of your rights when dealing with the police, and some of the situations when you may have to answer questions, see the separate document on *Police powers and your rights*.

2 Changes to the law in 2013

On 1 September 2013, some changes were made to the NSW *Evidence Act* which affect a suspect's right to silence when speaking with the police.

These changes allow courts to take a negative view of some suspects who choose to remain silent when questioned by police.

Before 1 September 2013, if you refused to answer police questions about your involvement in an alleged offence, this refusal could not usually be used to draw an "**unfavourable inference**" (sometimes also called a "negative inference" or "adverse inference") in court. This means that a magistrate, judge or jury could not assume you were guilty of an offence, or that any evidence you gave in court is untrue, simply because you chose not to answer police questions.

The recent changes mean that, in some situations, a court may draw an unfavourable inference against a suspect who has failed to answer police questions.

3 Who does the new law apply to?

The new law only applies to people who are:

- **18 or over** when questioned by the police; and
- being questioned by police about a "**serious indictable offence**" which the police have "reasonable cause to suspect" that the person has committed; and
- given a "**special caution**", while they have a lawyer present; and
- able to understand the nature of the "special caution".

A "**serious indictable offence**" is defined in the *Crimes Act* as an offence punishable by imprisonment for 5 years or more. This includes offences such as robbery, breaking and entering, stealing (even something of very low value such as a chocolate bar), unlawful use of a motor vehicle, property damage, assault occasioning actual bodily harm or supplying a prohibited drug. It does *not* include offences like offensive conduct, goods in custody, possession of a drug, breach of an AVO, or most traffic offences.

A "**special caution**" is explained below in part 4 of this document.

4 What do the police have to do?

If you are over 18, you are being interviewed by police about a serious indictable offence, and you are capable of understanding the consequences of not speaking to police, then the police must do certain things if they want a negative inference to be drawn later in court.

Before the police interview you, they must:

1. Offer you the opportunity to seek **legal advice**. Usually this will simply involve allowing you to contact a lawyer of your choice. However if you are under arrest and you are a "vulnerable person" (for example, you have a disability or mental illness), the police must try to assist you to get legal advice. If you are a Torres Strait Islander or Aboriginal person, they must contact the Aboriginal Legal Service.
2. Give you the "**general caution**" that they must give to all suspects. They usually say:

   "You are not obliged to say or do anything unless you wish to do so, but anything you say or do will be recorded and may be used as evidence in court. Do you understand that?"
3. Give you a "**special caution**". This needs to be given to you **in the presence of a lawyer** acting on your behalf. Your lawyer must be physically present, not on the phone. When giving you a special caution, the police do not have to use any particular words, but may say something like:

   "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 later rely on in court. Anything you do say and do may be given in evidence".

5 When can your silence be used against you in court?

An unfavourable inference may be drawn against you at court if:

- the law applies to you (see section 3 above); and
- the police have done everything they are required to do (see section 4 above); and
- you have been questioned or offered an interview by the police; and
- you have refused to answer police questions or failed to mention a fact that you are relying on in court; and
- the offence you are charged with is a serious indictable offence.

Before an unfavourable inference can be drawn, the court must consider whether:

- **you could reasonably have been expected to mention the fact** based on the circumstances at the time of the police questioning. For example, it might not be reasonable to expect you to answer questions or mention certain things if you are badly injured, suffering from shock, or very intoxicated.
- **you are relying on the fact in your defence**. As an accused person, it is not up to you to prove your innocence, and it is your choice whether to give evidence in court. Sometimes you might decide not to give evidence, but simply to test out the prosecution case and argue that they do not have enough evidence to prove your guilt beyond reasonable doubt. **Your failure to answer police questions, or to mention certain things to the police, can only be used against you if you choose to run a positive case in your defence.** Running a positive case usually means giving evidence, or calling other witnesses to give evidence in your case. If you or any of your witnesses give evidence about things that you did not mention to the police, the court could come to the conclusion that your evidence is "recent invention", i.e. that it is untrue and you have just made it up.
- **there is some other evidence that you are guilty of the offence**. You cannot be found guilty based only on your silence or your failure to mention something to the police.

6 Legal advice

If police want to interview you in relation to any criminal matter, you have the right to speak to a lawyer. **Legal advice is important.** A lawyer can help you understand your rights and responsibilities when speaking to the police and can also explain how these changes in law may affect your personal situation.

The following services may be able to provide free legal advice (usually by phone):

- The Legal Aid Hotline for under-18s (1800 10 18 10) is a free and confidential service, staffed by specialist children's solicitors. It is open from 9am to midnight on weekdays and 24 hours on weekends and public holidays. The Hotline will also advise people aged 18 and over if they are being interviewed by police about offences allegedly committed when they were under 18.
- There is no Legal Aid hotline for adults, but Legal Aid may be still able to assist in some cases, especially if the matter is serious.
- The Aboriginal Legal Service has a custody hotline. Although this number is not publicly available, the police have the number and must call it if they have an Aboriginal or Torres Strait Islander person under arrest.
- The Shopfront Youth Legal Centre can provide advice for homeless and disadvantaged young people aged 25 and under.
- The Intellectual Disability Rights Service has a roster of lawyers available to advise people with intellectual disabilities who are under arrest or being interviewed by the police.

7 Some scenarios

Phuong, aged 21, is involved in a fight and is arrested for affray and assault occasioning actual bodily harm. He is still quite intoxicated while he is at the police station, and does not participate in an interview.

At court, he gives evidence that he was attacked and was defending himself.

Assuming that the police offered Phuong an interview and gave him a special caution while he had a lawyer present, the court might be allowed to take into account Phuong's failure to tell the police his side of the story. However:

- if Phuong was intoxicated when he was offered a police interview, it may not have been reasonable to expect him to answer questions or provide a detailed version of events.
- although the court could possibly draw an inference that he has made up his version of events, the court cannot simply assume that Phuong is guilty because he did not answer police questions. The jury, judge or magistrate hearing the case must look carefully at *all* the evidence.

Jade is 19 and is questioned by police about a phone which she had hocked at a pawn shop. The police tell Jade that it had been stolen in a robbery the day before, and that she is a suspect in the robbery.

The police give Jade a special caution when her lawyer is present, and her lawyer then leaves the police station. The police start asking Jade questions, and she tells them she does not want to say anything.

Jade is charged with goods in custody and making a false statement to a pawnbroker. She pleads not guilty. At her hearing, she gives evidence that she bought the phone from a friend. It was brand new and still in the box, and she had no reason to suspect it was stolen.

The court cannot draw any negative inference from Jade's silence. Although she was originally a suspect for robbery (which is a serious indictable offence), and she was given a special caution with her solicitor present, she is not on trial for robbery. The offences that she is charged with are summary offences, not serious indictable offences, so this law does not apply.

Sione, aged 18, is asked to attend the police station to answer questions about a service station robbery that happened a few months ago when he was still 17 years old.

Sione attends the police station, accompanied by a lawyer, and the police give him the "special caution".

Sione goes into the interview room but tells the police he does not want to answer any questions. The police show him some CCTV footage, which they claim shows Sione robbing the service station. They ask "what can you tell us about that?", and Sione replies "no comment".

Sione is charged with robbery and pleads not guilty. At his trial, the only evidence to link him to the robbery is the CCTV footage, which is of very poor quality and does not show the offender's face.

Sione chooses not to give evidence in court, but simply to argue that the prosecution evidence is not enough to identify him as the offender.

Sione's failure to answer questions at the police station cannot be used against him because he is not giving evidence or relying on any fact as part of his defence. He is simply putting the prosecution to proof. The jury cannot assume that he is guilty just because he failed to answer police questions or because he chose not to give evidence at court.

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The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills in association with Mission Australia and The Salvation Army.

This document was last updated in January 2014 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.