

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

EVIDENCE BILL 1993

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and new clauses to be moved on behalf of the Government



(Circulated by the authority of the Minister for Justice,  
the Honourable Duncan Kerr, MP)

## AMENDMENTS TO THE EVIDENCE BILL 1993

### OUTLINE OF AMENDMENTS

The amendments proposed by the Government follow its consideration, in consultation with the New South Wales Government, of the Interim Report of the Senate Standing Committee on Legal and Constitutional Affairs on the provisions of the Evidence Bill 1993, and testimony and submissions to that Committee.

2. The amendments will -

- amend clause 60 to enable evidence of a representation admitted because it is relevant for a non-hearsay purpose to be used for a hearsay purpose; and
- extend the application of clause 85, which renders certain admissions made by a defendant in a criminal proceeding inadmissible unless the circumstances in which they were made make it unlikely that their truth was adversely affected.

3. The other amendments make technical, drafting and other minor changes to the Bill.

#### Financial Impact Statement

4. The amendments are not expected to have a significant financial impact on Commonwealth expenditure or revenue.

Clause 2: Commencement

Amendment 1

5. This amendment substitutes '18 April 1995' for 1 January 1995 as the date on which the Act commences, if no earlier date is fixed by Proclamation.

Clause 4: Courts and proceedings to which Act applies

Amendment 2

6. This is a drafting amendment consequential upon Amendment 3.

Amendment 3

7. This amendment clarifies the application of the Bill in sentencing proceedings. It provides that the Act will not apply unless the court directs that the law of evidence is to apply in the proceedings. The courts must do so where either:

- a party applies for a direction in relation to proof of a fact that is or will be significant in the determination of the sentence; or
- it is appropriate to make a direction in the interests of justice.

Clause 5: Extended application of certain provisions

Amendment 4

8. This amendment is a drafting amendment consequential upon Amendment 46.

Clause 8: Operation of other Acts etc.

Amendment 5

9. This amendment replaces clause 8(1) in order to effect a drafting amendment. The amendment makes it clear that State and Territory laws applied in federal court proceedings by the *Judiciary Act 1903* will continue to so apply except where inconsistent with the Bill.

10. The amendment also replaces subclause 8(2) so that its language is similar to subclause 8(1) as proposed to be amended.

Amendment 6

11. This amendment is a drafting amendment consequential on Amendment 5, to make the language of subclause 8(4) similar to subclause 8(1), as proposed to be amended.

Clause 9: Effect of Act on other laws

Amendment 7

12. This amendment is a drafting amendment to clarify that the Bill does not affect a power of a federal court (as well as a power of an ACT court) to dispense with the operation of a rule of evidence or procedure in an interlocutory proceeding.

Amendment 8

13. This amendment preserves the operation of State and Territory bail laws in federal courts. Subclause 8(4) already preserves the operation of the (ACT) *Bail Act 1992* in proceedings before ACT courts and when a federal court is sitting in the ACT.

Clause 15: Compellability: Sovereign and others

Amendment 9

14. This amendment replaces paragraph 15(2)(b) in order to rectify 2 omissions in clause 15, which provides that a Member of a House of an Australian Parliament is not compellable as a witness if attending to give evidence would interfere with his or her attendance at a sitting of such a House, a joint sitting of such a Parliament or a meeting of a committee of such a House.

15. Firstly, the amendment limits that non-compellability, when attendance would interfere with attendance at a meeting of a committee of a House of a Parliament, to where the Member is a member of the relevant Committee.

16. Secondly, the amendment extends non-compellability for Members to where attending to give evidence would interfere with attendance at a meeting of a joint committee of a bicameral Parliament.

**Clause 18: Compellability of spouses and others in criminal proceedings generally**

**Amendment 10**

17. This amendment is a drafting amendment to subclause 18(2) to put beyond doubt that an objection to being required to give evidence for the prosecution under clause 18 can only be made by a person who is a spouse, de facto spouse, parent or child of the defendant when he or she is required to give evidence.

**Clause 20: Comment on failure to give evidence**

**Amendment 11**

18. This amendment replaces subclause 20(3) to make a drafting amendment similar to Amendment 10 (in relation to clause 18).

**Amendment 12**

19. This amendment replaces paragraph 20(5)(b) to correct an omission in the paragraph. As amended, the paragraph will refer to a parent or a child of a defendant in a criminal proceeding, as well as a spouse or de facto spouse of such a defendant.

**Amendment 13**

20. This amendment omits subclause 20(6) consequentially upon Amendment 11.

**Clause 21: Sworn evidence of witnesses to be on oath or affirmation**

**Amendment 14**

21. This amendment replaces subclause 21(2) by 2 new subclauses. The amendment, which removes an unintended result of the drafting technique used, ensures that a person who is called merely to produce a document or thing may be examined about action taken to comply with a subpoena.

**Clause 32: Attempts to revive memory in court**

**Amendment 15**

22. This amendment makes a drafting change to ensure there is consistency throughout clause 32 to references to use by a witness, while giving evidence, of a document to try to revive his or her memory about a fact or opinion.

**Clause 48: Proof of contents of documents**

**Amendment 16**

23. This amendment adds a subparagraph to paragraph 48(1)(f) to enable a party to adduce evidence of the contents of a public document by tendering a purported copy of the document that purports to have been printed by authority of an Australian Parliament, or a House or committee of such a Parliament. At present, clause 48 applies to such documents only if they are printed by a government or official printer.

**Clause 60: Evidence relevant for a non-hearsay purpose**

**Amendment 17**

24. This amendment replaces clause 60 with a new clause which permits use of evidence of a representation for a hearsay purpose (that is, to prove the existence of a fact that the person who made it intended to assert by the representation) if it is admitted because it is relevant for some other purpose. The new clause is similar to the corresponding clause in the Law Reform Commission's draft Bill and previous Commonwealth and NSW Evidence Bills.

**Clause 61: Exceptions to the hearsay rule dependent on competency**

**Amendment 18**

25. This amendment adds a subclause to clause 61 to provide that the exception to the hearsay rule for contemporaneous representations by a person about his or her health, feelings, sensations, intentions, knowledge or state of mind is not subject to the requirement that the person must have been competent to give evidence when the representation was made.

**Clause 65: Exception: criminal proceedings if maker not available**

**Amendment 19**

26. This amendment is related to Amendment 20. Together the amendments relocate 2 paragraphs of subclause 65(2) to a separate subclause, in order to remove an inconsistency between subclauses 65(2) and 65(5). This amendment omits from subclause 65(2) two exceptions to the hearsay rule for (some) 'first hand' hearsay evidence of a representation made in evidence in earlier proceedings by a person who is not available to give evidence in the present proceeding.

Amendment 20

27. This amendment is related to amendment 19. Together the amendments relocate 2 paragraphs of subclause 65(2) to a separate subclause, in order to remove an inconsistency between subclauses 62(2) and 65(5). This amendment inserts a new subclause into clause 65 providing for 2 exceptions to the hearsay rule, in identical terms to those omitted by Amendment 19 from subclause 65(2), except that evidence of the representation need not be given by a person who saw, heard or otherwise perceived the representation being made. Under subclause 65(5) evidence of such a representation may be given by production of a properly authenticated transcript. The requirement in subclause 65(2) that the evidence be given by a person who saw, heard or otherwise perceived the representation given in the earlier proceeding would negate the reception of authenticated transcripts.

Amendment 21

28. This is a drafting amendment consequential on Amendments 19 and 20.

Amendment 22

29. This is a drafting amendment consequential on Amendments 19 and 20.

Amendment 23

30. This is a drafting amendment consequential on Amendments 19 and 20.

Clause 67: Notice to be given

Amendment 24

31. This amendment makes a drafting amendment to subclause 67(1) consequential on Amendments 19 and 20.

Amendment 25

32. This amendment inserts a new subclause in clause 67 to require that notices to other parties of an intention to lead 'first-hand' hearsay evidence of a representation, where the person who made it is not available or is not to be called, must be given in accordance with any regulations or rules of court.

Clause 68: Objections to tender of hearsay evidence in civil proceedings if maker available

Amendment 26

33. This amendment amends clause 68 to extend the time limit for the making of objections under the clause from 7 days to 21 days. An objection may be made under clause 68 to the tender of 'first hand' hearsay evidence of a representation in a civil proceeding where the person who made the representation is available to give evidence, but is not to be called to do so.

Clause 69: Exception: business records

Amendment 27

34. This amendment makes a drafting amendment to clause 69 to align it more closely with the definition of 'business' in Part 2 of the Dictionary.

Clause 82: Exclusion of evidence of admissions that is not first-hand

Amendment 28

35. This amendment replaces paragraph 82(b) to correct two unintended effects of paragraph 82(b). The purpose of clause 82 is to prevent 'secondhand' or more remote hearsay evidence being given of an admission (for example, where X might testify that Y said Z made an admission). It applies the hearsay rule to evidence of an admission unless it is given orally by a person who witnessed the admission (paragraph 82(a)) or is contained in a document in which a person asserts that he or she witnessed the admission (paragraph 82(b)). The present paragraph 82(b), to be replaced by the amendment, would have permitted some 'secondhand' hearsay evidence of an admission and would have excluded evidence of an admission made, rather than recorded, in a document.

Clause 85: Criminal proceedings: reliability of admissions by defendants

Amendment 29

36. This amendment replaces subclause 85(1) in order to widen the application of clause 85. As amended, clause 85 will apply to evidence of an admission which was made by a defendant in a criminal proceeding in the course of questioning by an investigating official in connection with the commission or possible commission of an offence, or which was made as a result of an act of another person capable of



influencing the prosecution process. Under clause 85 such an admission is inadmissible unless the circumstances in which it was made make it unlikely that its truth was adversely affected.

#### Amendment 30

37. This amendment makes a drafting amendment consequential on Amendment 29.

#### Amendment 31

38. This amendment omits subclause 85(4), which was included in the Bill as a drafting device because both clauses 84 and 85 deal with, amongst other things, threats made to a person who has made an admission. The subclause is unnecessary. Its omission will prevent an inference being drawn that other exclusionary provisions in the Bill (for example, clause 90 and provisions in Part 3.11) are overridden by clause 85.

#### Clause 87: Admissions made with authority

#### Amendment 32

39. This amendment omits subclause 87(1). This amendment and Amendment 33 make drafting changes to clause 87 to clarify its operation.

#### Amendment 33

40. This amendment amends subclause 87(2). This amendment and Amendment 32 make drafting changes to clause 87 to clarify its operation.

#### Clause 114: Exclusion of visual identification evidence

#### Amendment 34

41. This amendment replaces subclause 114(2). This amendment, and Amendments 35, 36, 37 and 38, are drafting amendments to make the language of clause 114 align more closely with that of Part 1AA of the *Crimes Act 1914*, which was enacted earlier in 1994. The effect of the amendments is to make explicit some matters already provided in clause 114. In particular, the amendments -

- state expressly that visual identification evidence can be given by the prosecutor if the defendant refused to take part in an identification parade;

- state expressly that it would not have been reasonable to have held an identification parade if it would have been unfair to the defendant to have held such a parade; and
- separate out the 2 concepts contained in the present formulation of a 'refusal to co-operate in the conduct of an identification parade' into its constituent elements of a refusal to take part in the parade and a failure, once the parade has commenced, to co-operate in its conduct.

#### Amendment 35

42. This amendment amends subparagraph 114(3)(c)(i) as part of drafting amendments to clause 114. Details are set out in relation to Amendment 34.

#### Amendment 36

43. This amendment amends subparagraph 114(3)(c)(i) as part of drafting amendments to clause 114. Details are set out in relation to Amendment 34.

#### Amendment 37

44. This amendment inserts a new subclause 114(3A) as part of drafting amendments to clause 114. Details are set out in relation to Amendment 34.

#### Amendment 38

45. This amendment amends paragraph 114(4)(a) as part of drafting amendments to clause 114. Details are set out in relation to Amendment 34.

Clause 115: Exclusion of evidence of identification by pictures.

#### Amendment 39

46. This amendment inserts 2 new subclauses in clause 115. New subclause 115(4A) provides that picture identification evidence adduced by the prosecutor is not admissible if the defendant was, when the pictures were examined, in custody unless:

- the defendant refused to take part in an identification parade;
- the defendant's appearance had changed significantly between the time the offence was committed and the time he or she was taken into custody; or
- it would not have been reasonable to have held an identification parade that included the defendant.

47. This new subclause is consistent with Part 1AA of the Crimes Act, which was enacted earlier in 1994.

48. New subclause 115(4B) applies the relevant provisions of clause 114 to determine whether it was reasonable to have held such an identification parade for the purposes of new subclause 115(4A).

Clause 116: Directions to jury

Amendment 40

49. This amendment adds a new subclause to clause 116 to state expressly that it is not necessary for a particular form of words to be used in informing the jury about the special need for caution before accepting identification evidence.

Clause 120: Client legal privilege: unrepresented parties

Amendment 41

50. This amendment corrects an error in the definition of 'party' in clause 120 (which relates to litigation privilege for unrepresented parties).

Clause 130: Exclusion of evidence of matters of state

Amendment 42

51. This amendment makes a minor change to subclause 130(1) to enable a court to direct that (where the public interest so requires) information or a document that relates to a matter of state not be 'adduced as evidence', rather than not be 'admitted into evidence', in proceedings.

Amendment 43

52. This amendment makes a drafting amendment to subclause 130(4) consequential on Amendment 42.

Clause 131: Exclusion of evidence of settlement negotiations

Amendment 44

53. This amendment inserts a new paragraph in subclause 131(2) to provide a further exception to the prohibition on evidence of settlement negotiations being adduced. The new paragraph makes it clear that evidence of a communication or document made in connection with settlement negotiations can be adduced in proceedings to enforce a settlement agreement or in which the making of such an agreement is in issue.

Clause 142: Admissibility of evidence: standard of proof

Amendment 45

54. This amendment adds a new subclause 142(2) to require the court, when considering a question whether a fact necessary for deciding whether evidence should be admitted, or any other question under the Act, has been proved on the balance of probabilities, to take into account both the importance of the evidence in the proceeding and the gravity of the matters alleged in relation to the question.

Clause 154: Evidence of Parliamentary proceedings

Amendment 46

55. This amendment omits clause 154 and proposes insertion of a new clause 154. Minor amendments proposed to other clauses of the Bill make the present clause 154 unnecessary.

56. The proposed new clause, which is similar in form to subclause 153(1), provides a presumption that, unless the contrary is proved, a document purporting to be printed by authority of an Australian Parliament, or a House or committee of such a Parliament, is what it purports to be and was published on the day on which it purports to have been published. Such a presumption is already provided by subclause 153(1) in relation to such documents only if they are printed by a government or official printer. For technical reasons it is preferable to have a new clause rather than amend clause 153.

Clause 165: Unreliable evidence

Amendment 47

57. This amendment omits subclause 165(2), which sets out exceptions from the list in subclause 165(1) of examples of the kinds of evidence that may be unreliable. Clause 165 provides that the judge, where requested to do so by a party, must warn the jury about the possible unreliability of certain kinds of evidence and the need for caution in determining what weight to give to evidence of a kind that may be unreliable. Subclause 165(2) has given rise to some uncertainty. It is not necessary as a judge will be able, under subclause 165(4), to decline to give a warning if there are good reasons for not doing so.

Clause 171: Persons who may give such evidence

Amendment 48

58. This amendment makes a minor drafting amendment to paragraph 171(3)(d).

Clause 189: The *voir dire*

Amendment 49

59. This amendment inserts a new paragraph in subclause 189(1) so that clause 189 also applies to hearings to determine preliminary findings of fact for the purpose of determining whether particular evidence can be used against a person.

Clause 193: Additional powers

Amendment 50

60. This amendment replaces subclause 193(2) with 2 new subclauses. The amendment confers a wide power to make rules of court for the purposes of the Act, rather than the limited power conferred by the present clause.

Dictionary Part 1: Definitions

Amendment 51

61. This amendment replaces part of the definition of 'Commonwealth record' to provide that the definition extends to records of the Parliament and Parliamentary Committees as well as those of a House of Parliament.

**Amendment 52**

**62.** This amendment replaces the definition of 'criminal proceedings'. The effect of the amendment is to include bail proceedings within the definition.

**Amendment 53**

**63.** This amendment makes an amendment to the definition of 'public document' to provide that the definition extends to records of Australian Parliaments, foreign legislatures, and Houses and committees of such Parliaments and legislatures.

**Dictionary Part 2: Other expressions**

**Amendment 54**

**64.** This amendment replaces part of the definition of 'business' in order expressly to include proceedings of Australian Parliaments, foreign legislatures, and Houses and committees of such Parliaments and legislatures.