

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

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*(As read a first time)*

**ABORIGINES AND ISLANDERS (ADMISSIBILITY OF  
CONFESSIONS) BILL 1981**

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THE SENATE

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*(Presented pursuant to leave granted and read 1<sup>o</sup>, 5 March 1981)*

(SENATOR BONNER)

**No 34**

**A BILL**

**FOR**

**An Act relating to the Admissibility of Confessions made by  
Aborigines and Islanders and to related Matters**

5 BE IT ENACTED by the Queen, and the Senate and the House of  
Representatives of the Commonwealth of Australia, as follows:

**Short title**

1. This Act may be cited as the *Aborigines and Islanders (Admissibility of  
Confessions) Act 1981*.

10 **Commencement**

2. This Act shall come into operation on the day on which it receives the  
Royal Assent.

**Interpretation**

15 3. (1) In this Act, unless the contrary intention appears—

“Aborigine” means a person who—

- (a) is a descendant of an indigenous inhabitant of Australia; and
- (b) claims, and is acknowledged by the community with which he is  
associated, to be such a person;

“authorized person” means—

- (a) a Magistrate or Justice of the Peace;
- (b) a Minister of Religion registered under Division 1 of Part IV of the *Marriage Act* 1961;
- (c) a person authorized under a law of a State or Territory to practise medicine; 5
- (d) a representative of a body or association providing welfare or social services;
- (e) a representative of an organization providing legal aid for prescribed persons; or 10
- (f) a person included in a class of persons declared by the regulations to be a class of persons to whom this paragraph applies;

“interview”, in relation to a person, includes asking the person questions in the course of investigating an offence;

“offence” means an offence against a law of the Commonwealth or of a State or Territory; 15

“officer” means a member of the Australian Federal Police, a police force of a State or Territory or any person whose duties under a law of the Commonwealth or of a State or Territory include the investigation or prevention of offences; 20

“Pacific Islander” means a person who—

- (a) is a descendant of an indigenous inhabitant of a Pacific island;
- (b) entered Australia, or is descended from a person referred to in paragraph (a) who entered Australia, before 31 March 1904; and
- (c) claims, and is acknowledged by the community with which he is associated, to be such a person; 25

“prescribed person” means—

- (a) an Aborigine;
- (b) a Torres Strait Islander; or
- (c) a Pacific Islander; 30

“serious offence” means an offence punishable by imprisonment for a term exceeding 6 months;

“sound recorder” means an apparatus capable of recording sound;

“Territory” means an internal Territory;

“Torres Strait Islander” means a person who— 35

- (a) is a descendant of an indigenous inhabitant of the Torres Strait Islands; and
- (b) claims, and is acknowledged by the community with which he is associated, to be such a person.

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(2) A reference in this Act to a prescribed person shall, in relation to any duty owed by an officer to a prescribed person, be read as including a reference to a person whom the officer has reasonable grounds for believing is a prescribed person.

5 (3) For the purposes of this Act, a person is under restraint in respect of an offence if he is in the company of an officer for a purpose connected with the investigation of that offence and the officer would not allow him to leave if he wished to do so, whether or not the officer has reasonable grounds for believing that he has committed the offence and whether or not he is in lawful  
10 custody in respect of the offence.

**Application of Act**

4. (1) This Act binds the Commonwealth and each State.

(2) This Act shall not be taken to exclude or limit the operation of any law of a State providing for procedures for the interviewing of a person suspected of committing an offence to the extent that that law is capable of operating concurrently with the provisions of this Act.  
15

(3) This Act does not derogate from the authority of any person, whether under a law of the Commonwealth or of a State or Territory, to require a person to disclose his name or place of residence.

20 **General admissibility of confessions**

5. (1) A confession made to an officer by a prescribed person is not admissible in evidence in proceedings against the person for an offence unless—

- (a) the confession was made voluntarily;
- 25 (b) the person understood the effect of the confession at the time it was made; and
- (c) all provisions of this Act applicable to the obtaining of, and subsequent dealings with, the confession have been complied with.

(2) For the purposes of sub-section (1), a confession that is obtained from a person in consequence of—

- 30 (a) the use of physical violence, or of a threat of physical violence, to any person; or
- (b) the making of a promise, threat or other inducement of any kind (not being physical violence or the threat of physical violence) likely to cause the person to make a confession that is untrue,

35 shall not be taken to have been made voluntarily.

**Cautioning of suspects**

6. Where an officer suspects that a prescribed person may have committed a serious offence, the officer shall not ask him any questions or ask, or cause, him to do anything in connection with the investigation of the offence, unless  
40 the officer has first cautioned him in accordance with section 15.

**Cautioning of persons under restraint**

7. Where an officer has a prescribed person under restraint in respect of an offence, the officer shall not ask him any questions or ask, or cause, him to do anything in connection with the investigation of the offence, unless the officer has first—

- (a) informed him of the fact that he is under restraint and of the offence in respect of which he is under restraint;
- (b) cautioned him in accordance with section 15; and
- (c) informed him that he may communicate with a relative or friend.

**Communication by person under restraint with relative or friend**

8. (1) Subject to sub-section (2), an officer shall, at the request of a prescribed person who is under restraint in respect of an offence, cause reasonable facilities to be provided to enable him to communicate with a relative or friend of his choice.

(2) An officer may refuse a request under sub-section (1) for the provision of facilities for communicating with a person if the officer believes, on reasonable grounds, that it is necessary to prevent the person under restraint from communicating with that person for the purpose of preventing—

- (a) the escape of an accomplice of the person under restraint; or
- (b) the loss, destruction or fabrication of evidence relating to the offence.

**Notification to legal aid organization that person is under restraint**

9. Where an officer has a prescribed person under restraint in respect of a serious offence, the officer—

- (a) shall forthwith inform him that, unless he objects to a representative of the organization being so notified, a representative of a specified organization providing legal aid for prescribed persons will be notified that he is under restraint in respect of the offence; and
- (b) shall, unless the person has so objected, notify a representative of the organization accordingly.

**Records of interviews**

10. (1) An officer shall not interview a prescribed person for the purpose of ascertaining whether the person has committed a serious offence unless—

- (a) an authorized person is present during the interview;
- (b) at the commencement of the interview and in the presence of an authorized person, the officer cautions the prescribed person in accordance with section 15; and
- (c) the authorized person is satisfied that the prescribed person understands the effect of the caution.

(2) Where an officer conducts an interview referred to in sub-section (1), he shall—

- (a) cause the interview to be recorded by means of a sound recorder; or

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(b) where it is not reasonably practicable to comply with paragraph (a), make, or cause to be made, while the interview is being held, or, where this is not reasonably practicable, as soon as practicable after the interview is completed, a record, in writing, setting out—

- 5
- (i) the questions asked of, or by, the person during the interview and the answers given by, or to, the person to those questions;
  - (ii) particulars of any statement made by the person orally during the interview otherwise than in answer to a question;
  - 10 (iii) whether the person wrote out any statement during the interview and, if so, the time when he commenced to write out the statement and the time when he completed writing out the statement;
  - (iv) whether a caution was given to the person as required by paragraph (1) (b);
  - 15 (v) the time when the interview was commenced and the time when completed; and
  - (vi) if the interview was interrupted, the time or times when it was interrupted and the time or times when it was recommenced.

(3) An officer who makes, or causes to be made, a record of an interview with a person in accordance with paragraph (2) (b), shall add, or cause to be added, at the end of the record a certificate as to the extent to which the record is a full and correct record of what happened during the interview and, unless the person is unable to read the record—

- 20
- (a) show the record to the person and ask him—
    - 25 (i) to read the record and make any alteration or correction to it he wishes to make and add to it any further statement that he wishes to make;
    - (ii) to sign, or apply his mark to, the certificate set out at the end of the record; and
    - 30 (iii) if the record extends over more than one page—to initial or apply his mark to each page that is not signed or marked by him; and
  - (b) if the person refuses, fails or appears to fail to comply with that request—certify, under his hand, on the record as to what he has done in pursuance of this sub-section and as to the matters in respect of which the person refused, failed or appeared to fail to comply with the request.

(4) Where a person interviewed by an officer is unable to read the record of the interview, or refuses or fails to read, or appears to the officer not to read, the record when it is shown to him in accordance with sub-section (3), the officer shall—

- 40
- (a) read the record to him;
  - (b) ask him whether he would like to correct, alter or add anything to the record;

- (c) permit him to correct, alter or add to the record, or make any corrections, alterations or additions to the record that he requests the officer to make;
- (d) ask him to sign, or apply his mark to, the certificate at the end of the record; and 5
- (e) certify under his hand, at the end of the record, what he has done in pursuance of this sub-section.

(5) Where a record of an interview is made in accordance with paragraph (2) (b), the officer by whom the record of the interview is made or caused to be made shall— 10

- (a) afford the authorized person present during the interview an opportunity to read the record;
- (b) ask the authorized person—
  - (i) to certify, under his hand, on the record whether the record is a full and correct record of what happened at the interview; and 15
  - (ii) to state on the record particulars of any respect in which the record is not, in his opinion, such a full and correct record; and
- (c) afford the authorized person the opportunity to add to the record any other comment he may wish to make concerning the conduct of the interview. 20

### Written statements

11. (1) Where an officer is informed by a prescribed person who is under restraint in respect of an offence that the person wishes to make a statement in writing, the officer—

- (a) shall, before the person writes out the statement, inform him that he is not obliged to make any statement unless he wishes to do so, but that, if he does, it may be given in evidence; 25
- (b) shall cause him to be furnished with any writing materials necessary for writing out the statement; and
- (c) shall ask him to set out at the commencement of the statement the terms of the caution given to him under paragraph (a). 30

(2) Where a statement made under sub-section (1) is provided to an officer, the officer shall certify at the end of the statement what the officer has done in pursuance of this section in relation to the statement and shall then—

- (a) show the statement to the person who has made it and ask him— 35
  - (i) to read the statement and make any correction or alteration to it that he wishes to make and add to it any further statement that he wishes to make;
  - (ii) to sign the certificate set out at the end of the statement; and
  - (iii) if the statement extends over more than one page—to initial 40
    - each page that is not signed by him; and

- (b) if the person refuses, fails or appears to fail to comply with that request—certify on the statement what he has done and in respect of what matters the person refused, failed or appeared to fail to comply with the request.

- 5 (3) Where a person under restraint refuses to read, or appears to the officer not to read, a statement when it is shown to him in accordance with sub-section (2), the officer shall—
- (a) read the statement to him;
- 10 (b) ask whether he would like to correct, alter or add anything to the statement;
- (c) permit him to correct, alter or add to the statement, or make any corrections, alterations or additions to the statement that he requests the officer to make;
- (d) ask him to sign the certificate at the end of the statement; and
- 15 (e) certify, under his hand, at the end of the statement, what he has done in pursuance of this sub-section.

**Functions of authorized persons in relation to written statements**

20 12. (1) Where a person provides a statement to an officer under section 11, the officer shall take all such reasonable steps as are practicable to ensure that an authorized person complies with this section in relation to the statement.

(2) An authorized person shall, as soon as practicable after the statement has been provided to the officer—

- 25 (a) show the statement to the person who has made it and ask him to read the statement and make any correction or alteration to it that he wishes to make and add to it any further statement that he wishes to make; and
- 30 (b) if the person refuses, fails or appears to fail to comply with that request in any respect—certify on the statement what he has done in pursuance of this section and in respect of what matters the person refused, failed or appeared to fail to comply with the request.

(3) An authorized person may, before performing the functions conferred on him by sub-section (2) in relation to a statement made by a person, inquire of the person—

- 35 (a) whether that person made the statement;
- (b) whether the matters set out in the statement are true; and
- (c) whether he has any complaint concerning his treatment by an officer or any other person or whether any threat or promise or other inducement has been made that led him to state any of the matters set out in the statement.

(4) An authorized person who inquires of a person in pursuance of sub-section (3) in relation to a statement, shall record, in writing, at the end of the statement, the person's answers to those inquiries.

(5) For the purposes of performing any of the functions conferred upon him by this section, an authorized person may, and shall be permitted to, confer in private with the person who provided the statement. 5

**Records of interviews, statements, &c., to be produced for purposes of proceedings**

13. (1) Where an interview between an officer and a person is recorded under section 10 (2) (a), the officer shall deliver the recording immediately upon the completion of the interview into the custody of the authorized person present during the interview. 10

(2) Where an officer makes, or causes to be made, a written record of an interview under paragraph 10 (2) (b), or a person provides a written statement to an officer under section 11, the officer shall furnish to the authorized person present during the interview or to the authorized person who performed functions under section 12 in relation to the statement and to the person interviewed or who made the statement, as soon as practicable after the record is completed or the authorized person completes his functions in relation to the statement, a copy of the record or statement. 15  
20

(3) Where a transcript of the record contained in a recording made under paragraph 10 (2) (a), or a copy of such a recording, which is in the custody of an authorized person is required in connection with proceedings proposed to be instituted in respect of an offence, the authorized person shall, upon application made by the prosecutor or the person charged with the offence, make and deliver to him a transcript of the record so contained certified to be a true transcript of that record or a copy of the recording certified to be a true copy of the recording, as the case may be. 25

(4) Where proceedings in respect of an offence are instituted against a person interviewed by an officer and the interview was recorded under paragraph 10 (2) (a), the authorized person having custody of the recording shall, at the commencement of the hearing of the proceedings by a court, deliver the recording into the custody of the court, and the court shall hold the recording as if it were an exhibit in the proceedings. 30

(5) Where a recording is held by a court under sub-section (4), the court may, upon application made by any party to the proceedings, order that a transcript of the record contained in the recording, or of a part of that record, or that a copy of the recording, or of a part of the recording, be made and delivered to the party. 35

(6) Where it appears to a Court that a recording held by it under sub-section (4), or a transcript of the whole or a part of the record contained in such a recording, may contain matter that affects the person interviewed in a manner prejudicial to that person and that the matter may not be admissible, or should 40

not be admitted, in evidence in the proceedings, the court may, upon application being made to it or of its own motion—

- (a) ascertain, in closed court, the contents of the recording or transcript;
- 5 (b) determine, in closed court, whether the recording or transcript contains any matter that affects such a person in such a manner and, if it does contain any such matter, whether the matter is admissible in the proceedings, or should, if admissible, be admitted in the proceedings; and
- 10 (c) make an order prohibiting the publication of any such matter that is not admitted in evidence.

(7) Sub-section (6) does not authorize a court, when ascertaining or determining a matter referred to in sub-section (6) in closed court, to exclude a party to the proceedings concerned or a legal practitioner representing such a party.

15 (8) A recording of an interview between an officer and a person made under paragraph 10 (2) (a) shall be destroyed by the authorized person having the custody of the recording where proceedings for an offence have not been instituted against the person within 12 months of the day on which the recording was made.

20 (9) A person shall not make a transcript of a record, or of part of a record, contained in a recording made under paragraph 10 (2) (a), or a copy of such a recording, or of part of such a recording, except upon application made under sub-section (3) or in accordance with an order of a court made under sub-section (5).

Penalty: \$1,000 or imprisonment for 6 months.

25 (10) The cost of making and delivering, for the purposes of sub-section (3) or (5), a transcript of a record, or part of a record, contained in a recording or a copy of a recording, or part of a recording, shall be borne by the Commonwealth.

#### **Parts of interviews, &c.**

30 **14. (1)** Where part only of an interview to which section 10 applies is recorded by means of a sound recorder, sections 10 and 13 apply as if a part of the interview that was so recorded and a part of the interview that was not so recorded were each a separate interview.

35 **(2)** Where part only of an interview to which section 10 applies is recorded in writing, sections 10 and 13 apply as if a part of the interview that was so recorded and a part of the interview that was not so recorded were each a separate interview.

40 **(3)** Where an authorized person is present during part only of an interview to which section 10 applies, section 10 applies as if that part of the interview, and any other part of the interview were each a separate interview.

**Administering of caution**

**15. (1)** Subject to sub-section (2) and (3), where an officer is required under this Act to caution a person, the officer shall address that person in, or in terms having the effect of, the following words:—

“You are not obliged to say or do anything unless you wish to do so. However, should you say or do anything, it will be recorded and may be given in evidence. Do you understand what I have just said?” 5

**(2)** Where an officer has reason to believe that the effect of a caution given in pursuance of sub-section (1) is not understood by the person to whom it is given the officer shall take such action as is necessary to ensure, as far as is reasonably practicable, that the person understands the effect of the caution. 10

**(3)** Where the officer has reason to believe that a person cautioned pursuant to sub-section (1) does not understand the effect of the caution because of an inability to communicate or to comprehend the English language, the officer shall ensure that a person competent to act as an interpreter is present and acts as an interpreter for the purpose of putting the caution to the person. 15

**(4)** An authorized person may assist an officer for the purposes of sub-section (2) and act as an interpreter for the purposes of sub-section (3).

**(5)** Where a person has been cautioned by an officer in accordance with sub-section (1), the officer shall ask the person to sign, or apply his mark to, an acknowledgment in the form in the Schedule. 20

**(6)** Where an officer has taken action under sub-section (2) or (3), the officer shall endorse on the acknowledgment referred to in sub-section (5) details of the action so taken, and, whether or not, after the action was taken, the person cautioned understood, or appeared to understand, the effect of the caution given. 25

**(7)** Where it is necessary for a court, in proceedings against a person for an offence, to determine whether an officer has cautioned the person as required under this Act and there has not been produced in evidence an acknowledgment referred to in sub-section (5), signed by the person, and where required, endorsed in accordance with sub-section (6), the court shall, unless the contrary is proved, assume that the person was not so cautioned. 30

**(8)** A copy of the acknowledgment referred to in sub-section (5), endorsed, where required, in accordance with sub-section (6), shall be delivered, immediately after it has been completed, to the person cautioned and, if an authorized person was present when the caution was given, to that person. 35

**(9)** This section does not apply to a caution given to a person under sub-section 11 (1).

**Interpreter to act during interview of person unable to communicate in English**

5       **16. (1)** Where an officer who interviews a person under section 10 has reason to believe that the person is unable to communicate, with reasonable fluency, in the English language, the officer shall, before interviewing that person, or continuing to interview that person, ensure that a person competent to act as an interpreter is present and acts as an interpreter during the interview.

**(2)** An authorized person present during an interview may act as an interpreter for the purposes of sub-section (1).

**Offences by officers**

10       **17.** Where an officer contravenes or fails to comply with a provision of this Act that is applicable to him, the contravention or failure is not punishable as an offence against this Act unless a penalty is expressly provided in respect of the contravention or failure.

**Discretion in court to refuse to admit confessions**

15       **18. (1)** Where a confession was made in consequence of a contravention of, or failure to comply with, paragraph 7 (c) or section 8 or 9, a court may, in proceedings for an offence against the person who made the confession, refuse to admit the confession in evidence where it is satisfied that, having regard to the circumstances in which, or the means by which, the confession was obtained, it  
20 would be unfair to the person to admit the confession in evidence.

**(2)** Notwithstanding that, in proceedings for an offence against a person, a court has upheld the admissibility of a confession under this Act, the court may refuse to admit the confession in evidence against the person on any ground open to it, other than under this Act, whether under a law of the  
25 Commonwealth or of a State or Territory or at common law.

**Regulations**

30       **19.** The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Act.





