

1985

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

SENATE

EVIDENCE AMENDMENT BILL 1985

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister
representing the Attorney-General).

EVIDENCE AMENDMENT BILL 1985

General Outline

The Evidence Amendment Bill 1985, which amends the Evidence Act 1905, has two main purposes:

- (1) to expand the class of persons who may give ancillary evidence relevant to the admission of business records under Part IIIA; and
- (2) to provide for the taking of evidence abroad for use in civil or criminal proceedings in Commonwealth courts, State courts exercising federal jurisdiction, courts of the Northern Territory exercising jurisdiction conferred or vested by an Act, and in courts of other Territories. These provisions apply principles which superior courts have developed in relation to the taking of evidence overseas for use in proceedings before them. The Bill, however, is not intended as a codification of those principles.

In criminal cases where the Commonwealth is the applicant for an order, it would be reasonable for the Commonwealth to provide assistance to the defendant in cases of hardship where in all the circumstances it is reasonable for such assistance to be granted. This would be done within the existing guidelines for financial assistance. The costs involved cannot be quantified but the occasions when such provision will be made are likely to be few.

NOTES ON CLAUSES

Clause 1 - Short title, etc.

Formal

Clause 2 - Commencement

The legislation will come into operation on a date to be fixed by Proclamation.

Clause 3 - Ancillary evidence

This clause deals with the class of persons, other than those concerned with the making or keeping of business records, who may give evidence of their information and belief ancillary to the admissibility of those records for the purposes of Part 111A of the Principal Act. Where it would not be reasonably practicable or would be unduly expensive for such evidence to be given by the person concerned with the making or keeping of business records, the evidence may be given outside Australia by a Diplomatic or Consular Officer, or in or outside Australia by a sergeant or more senior officer of the Australian Federal Police or by a person authorised by the Attorney-General.

Clause 4 - New Part 111B

Clause 4 will insert into the Principal Act a new Part - "Part 111B - Examination of Witnesses Abroad" (proposed sections 7T-7Z).

Proposed Section 7T - Interpretation

This provision defines certain words and expressions for the purposes of the proposed Part IIIB. The effect of the definitions is as follows:

Definition of 'Australia' :	includes the External Territories in the definition of Australia.
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Definition of 'examination' : this ensures that references to "examination" in the Part include whatever types of proceedings are conducted in overseas courts to give effect to letters of request.

Definition of 'inferior court' : determines which courts are not competent to direct the taking of evidence in a foreign country on their own order : see proposed section 7W.

Definition of 'superior court' : determines which courts are competent to direct the taking of evidence in a foreign country on their own order for use in proceedings pending before such courts or inferior courts : see proposed sections 7V and 7W.

Proposed Section 7U - Extension to External Territories

Part 111B will extend to the External Territories. This will enable courts in the External Territories to obtain evidence for use in civil or criminal proceedings.

Proposed Section 7V - Proceedings in superior courts

Proposed sub-section 7V(1) will enable a superior court on the application of a party in any civil or criminal proceeding before the court to order, where it appears in the interests of justice to do so, that in relation to a person outside Australia -

- (a) the person be examined on oath or affirmation at any place outside Australia before a judge or officer of the court or other appointee of the court;

- (b) a commission be issued for the examination on oath or affirmation at any place outside Australia,
- (c) a letter of request be issued to the judicial authorities of a foreign country to take the evidence, or cause it to be taken.

Proposed sub-section 7V(2) provides that when considering such an application, the matters to which the court is to have regard are to include -

- (a) the willingness or ability of the person to come to Australia to give evidence;
- (b) whether the person's evidence would be material to any issue in the proceedings;
- (c) whether, having regard to the interests of the parties, justice will be better served by the grant or the refusal of the order.

Proposed sub-section 7V(3) provides that when a court orders the person to be examined, or orders a commission for the examination to be issued, it may give directions as to the procedure to be followed in and in relation to the examination, including directions as to time, place and manner of the examination.

Proposed sub-section 7V(4) provides that where a court makes an order for the issue of a letter of request, it may include in the order a request as to any matter relating to the taking of the evidence, including examination, re-examination and cross examination (whether the evidence is given orally, on affidavit or otherwise), the attendance and, as appropriate, participation of the legal representatives of the parties, and any matter prescribed in the regulations.

Proposed sub-section 7V(5) provides that a court may on such terms as it thinks fit permit a party to tender in the proceeding the evidence or a record of the evidence taken in an examination.

Proposed sub-section 7V(6) provides that evidence taken in an examination is not admissible if it appears to the court at the hearing of the proceeding that the person is in Australia and able to attend the hearing or if it would not have been admissible if it had been given or produced at the hearing.

Proposed sub-section 7V(7) enables a court in the interests of justice to exclude from the proceeding otherwise admissible evidence taken in an examination.

Proposed sub-section 7V(8) enables the power vested in a court under sub-section (1) to be exercised in chambers.

Proposed sub-section 7V(9) provides that a reference in the section to evidence taken in an examination includes any document produced at the examination and any answers, however made, to any written interrogatories presented at the examination.

Proposed section 7W - Proceedings in inferior courts
This provision permits specified superior courts to exercise the same power to make orders as to the taking of evidence, the issue of a commission or the issue of a letter of request and ancillary matters in relation to proceedings before related inferior courts and on the application of a party to those proceedings as they could in relation to proceedings before themselves.

Proposed sub-section 7W(1) provides that the related superior court for the purposes of a civil or criminal proceeding before an inferior court in a State or Territory (other than a court of summary jurisdiction under the Family Law Act 1975) is the Supreme Court of that State or Territory.

Proposed sub-section 7W(2) provides that for the purposes of a court of summary jurisdiction exercising jurisdiction under the Family Law Act 1975 the related superior court is -

- (a) if the proceeding takes place in Western Australia - the Family Court of Western Australia;
- (b) if the proceeding takes place in the Northern Territory - the Supreme Court of the Northern Territory; or
- (c) if the proceeding takes place in another State or Territory - the Family Court of Australia.

Proposed sub-section 7W(3) gives to the inferior court the powers given to the superior court by section 7V in respect of the use of evidence taken in an examination as defined in that section.

Proposed sub-section 7W(4) provides that the powers vested in a court under sub-section (1) or (2) may be exercised in chambers.

Proposed section 7X - Exclusion of evidence in criminal proceedings

This provision states that Part 111B does not affect the power of a court in a criminal proceeding to exclude illegally - obtained evidence or evidence which would operate unfairly against a defendant.

Proposed section 7Y - Operation of other laws

This provision makes it clear that Part 111B is not intended to exclude or limit the operation of other laws applying to proceedings which provide for the examination of witnesses outside Australia.

Proposed section 7Z - Regulations and rules of court

This provision enables the Governor-General to make regulations, particularly for and in relation to the practice and procedure of a superior court. It also extends the power of an authority to make rules for the practice and procedure of a superior court, particularly in proceedings for the making of an order. The section does not affect any power to make regulations or rules under any other Act.