

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

EVIDENCE (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL
AMENDMENTS) BILL 1994

EXPLANATORY MEMORANDUM

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

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE
HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED

EVIDENCE (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 1994

OUTLINE

This Bill -

repeals the *State and Territorial Laws and Records Recognition Act 1901* and most provisions of the *Evidence Act 1905*;

amends the *Acts Interpretation Act 1901*, *Crimes Act 1914*, *Federal Court of Australia Act 1976*, *Industrial Relations Act 1988* and *Judiciary Act 1903* consequentially upon the *Evidence Bill 1994*;

amends the *Australian Securities Commission Act 1989*, *Federal Court of Australia Act 1976*, *National Health Act 1953*, *Nursing Homes Assistance Act 1974*, *Defence Act 1903*, *Disability Services Act 1986*, *Federal Airports Corporation Act 1986*, *Fisheries Management Act 1991*, *Fishing Industry Research and Development Act 1987*, *Health Insurance Act 1973*, *Liquefied Petroleum Gas (Grants) Act 1980*, *Liquid Fuel Emergency Act 1984*, *Nuclear Non-Proliferation (Safeguards) Act 1987*, *States Grants (Petroleum Products) Act 1965*, *Telecommunications (Interception) Act 1979* and *Torres Strait Fisheries Act 1984* in consequence of the repeal of the *Evidence Act 1905*;

continues the application of provisions of Acts repealed or amended by the Bill in proceedings the hearing of which began before the repeal or amendment;

continues the operation of the present law in relation to -

- certain visual identification evidence in respect of an identification made before the commencement of section 114 or section 115 of the *Evidence Act 1994*;
- evidence of a statement made or act done during questioning by an official before the commencement of section 139 of the *Evidence Act 1994*; and

enables a procedural step on which a provision of the *Evidence Act 1994* depends to be taken before that Act comes into operation and, where such a step is taken before that time, provides for the expiry of time limits for further consequential steps after the commencement of that Act.

FINANCIAL IMPACT

2. The Bill is expected to have no impact on Commonwealth expenditure or revenue.

NOTES ON CLAUSES

Clause 1: Short Title

3. This clause provides for the short title of the Act.

Clause 2: Commencement

4. This clause provides that Parts 1, 2 and 3 of this Act commence on Royal Assent and that other clauses commence when specified provisions of the *Evidence Act 1994* commence, except that clauses 17 and 18 may be commenced on an earlier day by Proclamation. However, subsection 9(1), which relates to the *Australian Securities Commission Act 1989*, is to commence on Proclamation, which must not be made until certain amendments have been made to the laws of all States and the Northern Territory.

Clause 3: Repeals

5. This clause provides for repeal of the *State and Territorial Laws and Records Recognition Act 1901* and all provisions of the *Evidence Act 1905* which are not repealed by the *Evidence and Procedure (New Zealand) (Transitional Provisions and Consequential Amendments) Act 1994*.
6. The repeals to be effected by this clause (except that of Part 1 of the *Evidence Act 1905*) are to take effect on the earlier of a day fixed by Proclamation or 1 January 1995. Part I of the *Evidence Act 1905* is to be repealed immediately after the repeal (by this Act or the other repealing Act mentioned above) of all other provisions of the *Evidence Act 1905*.

Clause 4: Proceedings already begun

7. This clause provides that provisions of the *Evidence Act 1994* do not apply in proceedings the hearing of which began before the commencement of the relevant provisions. It also continues the application of the provisions of the *Evidence Act 1905* and the *State and Territorial Laws and Records Recognition Act 1901* which are repealed under clause 3 to proceedings the hearing of which began before the repeal.

Clause 5: Prior operation of notification provisions.

8. This clause provides that documents referred to in the provisions of the *Evidence Act 1994* listed in subclause 5(2) may be given or served before commencement of those provisions. The clause also provides, in relation to those provisions where

service of a document causes a period to commence during which some other action is to be taken, that the period expires at the later of 21 days after service and 7 days after commencement of the provision concerned.

Clause 6: Proof of voluminous or complex documents

9. This clause provides that for the purposes of paragraph 50(2)(b) of the *Evidence Act 1994*, which relates to proof of voluminous or complex documents, a reasonable opportunity to inspect or copy a document can be given before commencement of section 50 of that Act.

Clause 7: Notices for the purposes of sections 97 and 98 of the *Evidence Act 1994*

10. This clause provides, in effect, that notice of intention to adduce tendency evidence or coincidence evidence may be given before the commencement of sections 97 and 98 respectively of the *Evidence Act 1994*.

Clause 8: Requests under section 167 of the *Evidence Act 1994*

11. This clause provides that a party may make a request to another party under section 167 of the *Evidence Act 1994* before that section commences. Section 167 relates to determination of questions about previous representations, evidence of convictions and the authenticity, identity or admissibility of a document or thing.

Clause 9: Approval of persons for the purposes of section 171 of the *Evidence Act 1994*

12. This clause provides transitional arrangements relating to section 171 of the *Evidence Act 1994* and section 7J of the *Evidence Act 1905*. It provides that -

a person who was authorised by the Attorney-General under paragraph 7J(4)(b) of the *Evidence Act 1905* before the commencement of section 171 of the *Evidence Act 1994*; and

a person who, before the commencement of section 171 of the *Evidence Act 1994* is authorised by the Attorney-General under clause 9 itself,

will be taken to be an authorised person for the purposes of paragraph 171(3)(d) of the *Evidence Act 1994*.

13. An authorised person may, under both Acts, give evidence relating to business records where it would not be reasonably practicable, or would cause undue expense, to call as a witness a person who had a position of responsibility in relation to the making or keeping of the record.

Clause 10: Requests under section 173 of the *Evidence Act 1994*

14. This clause provides that a request under subsection 173(2) of the *Evidence Act 1994* may be made before section 173 commences. Subsection 173(2) enables a party to require another party which intends to adduce evidence relevant to the admissibility of evidence by affidavit or written statement, to call as a witness the deponent of the affidavit or the person who made the statement.

Clause 11: Agreements under section 191 of the *Evidence Act 1994*.

15. This clause provides that a reference to an agreement in paragraph 191(3)(a) of the *Evidence Act 1994* is taken to include an agreement entered into before section 191 of that Act commences. Section 191 provides for parties to a proceeding to agree that for the purposes of the proceedings a fact is not to be disputed.

Clause 12: Identifications already carried out

16. This clause provides that section 114 of the *Evidence Act 1994* does not apply in relation to an identification made before the commencement of section 114 and that section 115 of the *Evidence Act 1994* does not apply in relation to an identification made before the commencement of section 115. Section 114 makes inadmissible certain visual identification evidence adduced by the prosecution in a criminal proceeding. Section 115 makes inadmissible certain picture identification evidence adduced by the prosecution in a criminal proceeding.

Clause 13: Cautioning of persons

17. This clause provides that section 139 of the *Evidence Act 1994* does not apply with respect to a statement made or act done before the commencement of section 139. Section 139 deems certain evidence obtained during questioning by an official to have been obtained improperly if a caution was not administered in accordance with the section.

Clause 14: Amendments made by this Act

18. This clause provides that amendments (including repeals) made by Part 4 of this Act or the Schedule do not apply in proceedings the hearing of which began before the commencement of the amendment. The original provision continues to apply in relation to such proceedings.

Clause 15: Meaning of service by post

19. This clause amends section 29 of the *Acts Interpretation Act 1901* so that it does not affect the operation of section 160 of the *Evidence Act 1994*. Both sections

provide for a presumption in relation to service of documents by post. But for the amendment, section 29 would prevail over section 160 because of subsection 8(1) of the *Evidence Act 1994*.

Clause 16: Application of Crimes Act and Evidence Act

20. This clause amends subsection 88(2) of the *Australian Securities Commission Act 1989* to replace a reference to Part IIIA of the *Evidence Act 1905* by a reference to corresponding provisions of the *Evidence Act 1994*. Until the amendment takes effect Part IIIA of the *Evidence Act 1905* is to remain in force for the purposes of the operation of subsection 88(2) of the *Australian Securities Commission Act 1989*, and any State or Territory law that corresponds to that provision, despite the repeal of Part IIIA.

Clause 17: Identification parades

21. This clause makes two amendments to section 3ZM of the *Crimes Act 1914*. Section 3ZM sets out requirements for the holding of identification parades in relation to Commonwealth offences.

22. First, a new subsection 3ZM(2A) is inserted in the Crimes Act.

23. Paragraph 3ZM(2)(b) of the Crimes Act provides that an identification parade requested by a suspect must be held if it is reasonable in the circumstances to hold one.

24. New subsection 3ZM(2A) sets out factors that must be taken into account in deciding whether it is reasonable to hold such a parade. The factors are similar to those that must be taken into account by a court under subsection 114(3) of the *Evidence Act 1994* in deciding whether it was reasonable to hold an identification parade that included the defendant in a criminal proceeding.

25. Secondly, an amendment is made to subsection 3ZM(7) of the Crimes Act. That provision gives statutory force to the common law in relation to -

the admissibility of certain evidence (a suspect's refusal to take part in an identification parade, and in that event, alternative methods of identification); and

inferences which may be drawn from a refusal to take part in an identification parade.

26. The intention of subsection 3ZM(7) is to preserve certain specific common law rules from being affected by Part IAA of the Crimes Act. However, the effect of

subsection 3ZM(7) is to make the common law prevail over the *Evidence Act 1994* (because of section 8 of that Act), any future State or Territory legislation similar to that Act and also existing State and Territory evidence legislation.

27. The amendment to subsection 3ZM(7) will ensure that the Crimes Act does not affect the determination of the matters stated in paragraphs 3ZM(7)(a),(b) or (c), rather than giving statutory force to the common law in relation to those matters.

Clause 18: Identification by means of photographs

28. This clause makes three amendments to section 3ZO of the *Crimes Act 1914*. Section 3ZO provides rules for showing witnesses photographs or pictures for identification purposes when a suspect is in custody for a Commonwealth offence, or is otherwise available to take part in an identification parade.

29. First, a new paragraph (aa) is inserted in subsection 3ZO(1).

30. Subsection 3ZO(1) sets out a general rule that a witness should not be shown photographs or pictures for identification purposes where a suspect is in custody for a Commonwealth offence or is otherwise available to take part in an identification parade. Exceptions are provided where the suspect has refused to take part in a parade or holding one would be unfair to the suspect or unreasonable in the circumstances.

31. New paragraph 3ZO(1)(aa) provides a further exception enabling a witness to be shown photographs or pictures where the suspect's appearance has changed significantly since the offence was committed. A similar exception applies under paragraph 115(4)(a) of the *Evidence Act 1994* to the requirement in that Act that picture identification evidence adduced by the prosecutor in a criminal proceeding is not admissible if the defendant was in police custody when the pictures were examined and the picture of the defendant that was examined was made before he or she was taken into custody.

32. Secondly, a new subsection 3ZO(1A) is inserted.

33. Subparagraph 3ZO(1)(b)(ii) of the Crimes Act provides an exception to the general rule referred to above where the holding of an identification parade would be unreasonable in the circumstances.

34. New subsection 3ZO(1A) sets out factors that must be taken into account in deciding whether it is unreasonable in the circumstances to hold such a parade. The factors are similar to those that must be taken into account by a court under

subsection 114(3) of the *Evidence Act 1994* in deciding whether it was reasonable to hold an identification parade that included the defendant in a criminal proceeding.

35. Thirdly, a new paragraph (ba) is inserted in subsection 3ZO(2).

36. Subsection 3ZO(2) sets out rules that apply when a police officer shows a witness photographs or pictures for identification purposes.

37. New paragraph 3ZO(2)(ba) provides that the photographs or pictures shown to the witness must not suggest they are photographs or pictures of persons in police custody. A similar requirement applies to picture identification evidence adduced by the prosecutor under subsection 115(3) of the *Evidence Act 1994*.

Clause 19: Cautioning person under arrest

38. This clause amends section 23F of the *Crimes Act 1914* so that it accords with section 139 of the *Evidence Act 1994*. Both sections relate to cautioning of persons.

Clause 20: Right to remain silent etc not affected

39. This clause amends section 23S of the *Crimes Act 1914* (which preserves certain rights, powers and obligations protective of an accused person) to reflect the changes to the law relating to the admission of a confession made by a person made by Part 3.4 of the *Evidence Act 1994*.

Clause 21: Oaths and affirmations

40. This clause repeals subsections 44(2) and (3) of the *Federal Court of Australia Act 1976*. These subsections, which provide for oaths and affirmations in the Federal Court, are made redundant by the *Evidence Act 1994*.

Clause 22: Rules of Court

41. This clause amends paragraph 59(2)(u) of the *Federal Court of Australia Act 1976* consequentially upon the repeal of provisions of the *Evidence Act 1905* to be effected under this Act.

Clause 23: Oaths and affirmations

42. This clause repeals subsections 474(2) and (3) of the *Industrial Relations Act 1988*. These subsections provide for oaths and affirmations in the Industrial Relations Court and are made redundant by the *Evidence Act 1994*.

Clause 24: Oaths and affirmations

43. This clause repeals subsections 77F(2) and (4) of the *Judiciary Act 1903*. These subsections, which provide for oaths and affirmations in the High Court, are made redundant by the *Evidence Act 1994*.

Clause 25: Judicial notice of signature of Secretary

44. This clause amends section 139 of the *National Health Act 1953* consequentially upon the repeal of the *Evidence Act 1905*.

Clause 26: Judicial notice of signature of Secretary

45. This clause amends section 32 of the *Nursing Homes Association Act 1974* consequentially upon the repeal of the *Evidence Act 1905*.

Clause 27: Other consequential amendments

46. This clause amends the Acts specified in the Schedule as set out in the Schedule.

