

1999

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

EVIDENCE (AMENDMENT) BILL 1999

EXPLANATORY MEMORANDUM

CIRCULATED BY AUTHORITY OF

**GARY HUMPHRIES MLA
ATTORNEY-GENERAL**

EVIDENCE (AMENDMENT) BILL 1999

Explanatory Memorandum

Outline

The *Evidence Act 1971* (the Principal Act) provides rules relating to the admission of evidence in the courts of the Territory which apply to all proceedings, civil and criminal, except where specifically provided otherwise.

The Evidence (Amendment) Bill 1999 (the Bill) amends the Principal Act to:

- enable an ACT court or tribunal to direct that evidence be taken, or a submission be made, from a place interstate, by audio visual link or audio link;
- enable evidence to be given or a submission to be made, to an interstate court or tribunal, by audio visual link or audio link, from a place in the ACT; and
- enable an ACT court or tribunal to direct that a person appear before it or evidence be given or a submission be made to it, from a place in the ACT other than the courtroom where the court is sitting.

The use of audio and audio visual technology has the potential to enable access to court services at reduced cost and inconvenience to parties. It will enable a court to receive evidence from witnesses who reside in distant locations, including expert witnesses. The legislation will only operate as between participating jurisdictions.

Within the Territory, the legislation will be applied to, for example, enable a bail hearing to be conducted using the technology without requiring a remanded

person to be present in the courtroom. The person will remain at the remand centre and appear by audio visual link.

Financial Impact

The Bill is not expected to have an impact on ACT expenditure or revenue. The legislation operates only to the extent that appropriate equipment is available. The Bill does not impose an obligation on the Territory to install additional equipment.

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Notes on clauses

Formal Provisions

Clauses 1, 2 and 3 are formal provisions setting out the short title of the Bill, commencement arrangements and providing that a reference to the "Principal Act" in the Bill, is a reference to the *Evidence Act 1971*.

Insertion

Clause 4 inserts after Part XII of the Principal Act a new Part XIIAA titled 'Use of Audio Visual Links and Audio Links'.

PART XIIAA - USE OF AUDIO VISUAL LINKS AND AUDIO LINKS

Division 1 - Preliminary

Interpretation

New section 85AA defines the following terms used in the new Part XIIAA - 'audio link', 'audio visual link', 'participating State', 'recognised court', 'State', 'Territory court' and 'tribunal'.

Transitional provision

New section 85AB provides that new Part XIIAA applies to proceedings whether or not they were commenced before or after the commencement of the Part.

Application of Part

New section 85AC provides that the new Part XIIAA is not intended to exclude or limit the operation of any law of the Territory which relates to the taking of evidence or making of a submission outside the Territory for the purposes of a proceeding in the Territory.

Division 2 - Use of interstate audio visual links or audio links in proceedings before Territory courts

Application of Division

New section 85AG provides that Division 2 applies to any proceedings before a Territory court. 'Territory Court' is defined in **new section 85AA** to include a court, constituted under a law of the Territory, a Royal Commission appointed under the *Royal Commissions Act 1994*, a Judicial Commission appointed under the *Judicial Commissions Act 1994*, a arbitrator or umpire conducting proceedings in accordance with the *Commercial Arbitration Act 1986*, and a tribunal of the Territory.

Territory courts may take evidence and submissions from outside the Territory

New subsection 85AE(1) enables a Territory Court, where an application is made by a party to the proceedings, or of its own motion, to direct that evidence be taken or a submission made by audio visual link or audio link from a participating State.

New subsection 85AE(2) provides that a Court cannot direct that evidence be taken or a submission received by audio visual link or audio link unless satisfied that:

- the necessary facilities are available, or can reasonably be made available;
- the evidence or submission can more conveniently be given or made from the participating State; and
- the making of the direction is not unfair to any party opposing the making of the direction.

New subsection 85AE(3) is intended to enable the Territory court to exercise, in the participating State, powers that under the law of the participating State, the participating State permits the Territory court to exercise in the participating State for the purposes of this legislation. The law in the participating State will enable the Territory court to exercise in the participating State powers similar to those which this Bill enables a participating State court to exercise in the Territory, such as prohibiting or restricting the publication of evidence given in the proceeding.

New subsection 85AE(4) authorises the court to, at any time, vary or revoke a direction made under this Division, either of its own motion or on the application of a part to the proceeding.

Legal practitioners entitled to practise

New section 85AF is a provision to enable an interstate legal practitioner who may be representing a person who is giving evidence by audio visual or audio link in Territory proceedings to appear in proceedings before a Territory court for the purpose of representing that person.

Division 3 - Use of interstate audio visual links or audio links in proceedings in participating States

Application of the Division

New section 85AG provides that Division 3 applies to any proceeding before a recognised court. A 'recognised court' is defined in **new section 85AA** to mean a court or tribunal of a participating State that is authorised by the provisions of an Act of that State to direct that evidence be taken or a submission made by audio link or audio visual link from the Territory.

Recognised courts may take evidence or receive submissions from persons in the Territory

New section 85AH authorises a recognised court, in relation to proceedings before that Court, to take evidence or receive submissions by audio visual link or audio link from a person in the Territory.

Powers of recognised courts

New subsection 85AI(1) authorises a recognised court to exercise any of its powers, except its powers to punish a person for contempt or to enforce or execute its judgements or process, in connection with taking evidence or receiving submissions by audio visual link or audio link.

New subsection 85AI(2) provides that the laws of the participating State (including the rules of court) that apply to the proceeding in that State, also apply to the practice and procedure of the recognised court in taking the evidence and receiving submissions by audio visual or audio link from a person in the Territory.

New subsection 85AI(3) provides that where the recognised court exercises its powers, the place in the Territory where evidence is given or a submission is made is taken to be part of the Court.

Orders made by recognised court

New section 85AJ provides that, without limiting the operation of ***new section 85AI***, a recognised court may when taking evidence or receiving submissions by audio visual and audio link:

- direct that the proceeding or part of it be conducted or continued in private;
- require a person leave the place in the Territory where evidence is being or will be given or submissions are being or will be made; and
- prohibit or restrict the publication of evidence or the name of any party or witness.

Enforcement of order

New subsection 85AK(1) is intended to ensure orders of a recognised Court can be enforced by treating such an order as if, subject to the Supreme Court Rules, the order had been made by the Supreme Court and can be enforced by that Court.

New subsection 85AK(2) provides that, without limiting the operation of ***new subsection 85AK(1)***, a person who contravenes an order is taken to be in contempt of the Supreme Court and is punishable accordingly, unless he or she establishes that the contravention should be excused.

Privileges, protection and immunity of participants in proceedings in courts of participating States

New subsections 85AL(1) to (3) confer on a judge or person presiding, a legal practitioner or a witness in proceedings in a recognised court, where evidence is received or submissions are made by audio visual or audio link, the same privileges, protection and immunities as those participants would have in proceedings before the Supreme Court.

Recognised court may administer oath in the Territory

New subsection 85AM(1) authorises a recognised court to administer an oath or affirmation to a witness in the Territory, in accordance with the practice and procedure of the recognised court, for the purpose of obtaining evidence by audio visual link or audio link.

New subsection 85AM(2) provides that for the purposes of Territory law evidence given by a person under oath or affirmation administered in accordance with ***new subsection 85AM(1)*** is testimony given in a judicial proceeding.

Assistance to recognised court

New section 85AN authorises an officer of a Territory court to be present, at the request of a recognised court, at the place where a witness is giving evidence or making a submission by audio visual link or audio link and to facilitate the proceeding as directed by the recognised court.

Contempt of recognised courts

New section 85AO is intended to ensure that conduct which, if it occurred in a Territory court could be treated as contempt of a Territory court, is punishable as an offence where it occurs while evidence is being given or a submission is being made to a recognised Court by audio visual link or audio link. The conduct

set out in the Bill is conduct which is well established as being capable of amounting to contempt at common law. An offence punishable by 3 months imprisonment is provided.

Division 4 - Use of audio visual links or audio links between Territory courts and places in the Territory

Application of this Division

New section 85AP provides that Division 4 applies to any proceeding before a Territory court.

Use of link in proceedings

New subsection 85AQ(1) authorises a Territory court, subject to any rules of the court which may apply, on the application by a party to a proceeding before the court or of its own motion, to direct that a person appear before, or give evidence or make a submission to, that court by audio visual link or audio link from any place in the Territory outside the courtroom or place where the court is sitting.

New subsection 85AQ(2) provides that a Territory court can only make such a direction where satisfied that:

- the necessary facilities are available, or can reasonably be made available;
- the evidence or submission can more conveniently be given or made from the place outside the courtroom or place where the Court is sitting; and
- the direction is not unfair to any party opposing the making of the direction.

New subsection 85AQ(3) enables the Territory court to vary or revoke a direction made under Division 4, at any time, either by its own motion or on the application of a party to the proceedings.

Division 5 - Protection of certain communications and documents in criminal proceedings

Application of this Division

New section 85AR provides that Division 5 applies to a communication made or a document transmitted, by audio visual or audio link, between an accused person and his or her legal representative during the course of proceedings in relation to which an audio visual or audio link is being used pursuant to the provisions of the Evidence Act or a provision of another Act.

Protection of confidentiality

New section 85AS provides that, without limiting any other protection that may apply, a communication or a document to which this Division applies, is as confidential and as inadmissible in any proceedings as it would be if the communication took place or the document was produced while the accused person and his or her legal representative were in each other's presence.

This provision and proposed **new section 85AT** are intended to ensure that private conversations between an accused person and his or her legal representative, where they are not in each other's presence, are as private as they would be if the communications occurred where those persons were in each other's presence. The provisions will ensure that otherwise privileged discussions remain privileged.

Application of Listening Devices Act 1992

New section 85AT provides that the *Listening Devices Act 1992* applies to a communication by audio visual or audio link, or a document transmitted, between an accused person and his or her legal representative to which this Division applies, as if:

- in the case of a communication - the communication were a private communication within the meaning of the Act; and
- in the case of a document:
 - any data, text or visual images in the transmitted document were words spoken to or by a person in a private conversation within the meaning of the Act; and
 - a reference in that Act to the use of a listening device to overhear, record, monitor or listen to a private conversation includes a reference to reading the document.

Division 6 - Costs and Expenses

Power to Order Payment of Costs

New section 85AU authorises a Territory Court to make such orders as it considers just for the payment of incurred expenses in relation to taking evidence or making submission by audio visual link or audio link, including any amounts prescribed under section 85AV.

Regulations

New section 85AV authorises the Executive to make regulations prescribing the amounts, or the manner of calculating amounts, payable to the Territory court in respect of the cost of, or incidental to, the provision of an audio or audio visual or audio link and ancillary equipment for the purposes of this part.

This section also provides a capacity for the court to make an order for payment to the court to recoup expenses incurred by the court in providing linking technology.