

**AUSTRALIAN CAPITAL TERRITORY**

**EVIDENCE (AMENDMENT) ORDINANCE 1990**

**EXPLANATORY STATEMENT**

No. 4 , 1990

The Ordinance amends the Evidence Ordinance 1971 to implement in the Territory uniform legislation agreed to in the Standing Committee of Attorneys-General -

- to provide for taking the evidence of a person outside the Territory, but within Australia, for the purposes of a civil or criminal proceeding in the Territory; and
- to provide for the taking of the evidence of a person in the Territory at the request of an interstate or foreign court in civil proceedings or at the request of an interstate or New Zealand court in criminal proceedings.

The adoption of the uniform legislation agreed to in the Standing Committee of Attorneys-General by the States and Territories will permit Australia to accede to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

The Ordinance also inserts in the Crimes Act 1900 of New South Wales, in its application to the Territory, a provision which makes it an offence to make a false statement when giving unsworn testimony when required to do so by an order of the Supreme Court of the Australian Capital Territory following a request from an interstate or foreign court or tribunal.

Details of the sections in the Ordinance are set out in the attachment.

Authorised by the  
Minister for Justice  
and Consumer Affairs

**ATTACHMENT**

**Details of proposed Evidence (Amendment) Ordinance 1990**

**Section 1 provides for the citation of the Ordinance.**

**Section 2 defines "Principal Ordinance" to mean the  
Evidence Ordinance 1971.**

**Section 3 repeals section 4 of the Principal Ordinance,  
which specifies the Parts into which the Ordinance is  
divided. This is a drafting amendment.**

**Section 4 inserts into the Principal Ordinance after  
Part XII new Parts XIIA (Examination of witnesses outside  
the Territory but within Australia) and XIIIB (Taking Of  
evidence for foreign and Australian courts). Details of  
the new sections contained in those Parts follow.**

**Part XIIA – Examination of Witnesses Outside the Territory  
But Within Australia**

**Section 85A – Application**

**Section 85A applies Part XIIA only in relation to an  
examination within Australia. References in that Part to a  
person or place outside the Territory are limited to  
persons or places within Australia.**

**Section 85B – Interpretation**

**Section 85B defines certain words and expressions for the  
purposes of Part XIIA.**

Section 85C – Supreme Court proceedings

Subsection 85C(1) enables the Supreme Court, in any civil or criminal proceeding before it, where it appears in the interests of justice to do so, to order that –

- (a) a person be examined on oath or affirmation at a place outside the Territory before a judge or officer of the Court or other appointee of the Court;
- (b) a commission be issued for the examination of a person on oath or affirmation at a place outside the Territory; or
- (c) a letter of request be issued to a judicial authority of a place outside the Territory to take evidence, or cause it to be taken.

A judicial authority is, under section 85B, a court or person prescribed as a judicial authority in respect of a place outside the Territory.

Subsection 85C(2) provides that in determining whether it is in the interests of justice to make an order, the Court is to have regard to –

- (a) the willingness or ability of the person to come to the Territory to give evidence in the proceeding;
- (b) whether the person's evidence would be material to any issue to be tried in the proceeding; and
- (c) whether, having regard to the interests of the parties, justice will be better served by making or refusing to make the order.

**Subsection 85C(3)** provides that when the Court orders a person to be examined, or orders the issue of a commission for the examination of a person, it may give directions with respect to where, when and how the examination is to be conducted, and any other relevant matter.

**Subsection 85C(4)** provides that where the Court makes an order for the issue of a letter of request, it may include in the order a request relating to the taking of the evidence, including examination, cross-examination or re-examination of a person, attendance and participation of the legal representatives of the parties, and any matter prescribed in the regulations.

**Subsection 85C(5)** provides that, subject to subsection 85C(6), the Court may, on such terms as it thinks just, permit a party to tender in the proceeding the evidence or a record of the evidence taken in an examination.

**Subsection 85C(6)** provides that evidence taken in an examination is not admissible if, at the hearing of the proceeding, the Court is satisfied that the person is in the Territory and is able to attend the hearing or, the evidence would not have been admissible had it been given or produced at the hearing.

**Subsection 85C(7)** enables the Court in the interests of justice to exclude otherwise admissible evidence taken in an examination.

**Subsection 85C(8)** defines evidence taken in an examination to include any document produced at the examination and any answers, however made, to any written interrogatories presented at the examination.

Section 85D – Inferior court proceedings

**Subsection 85D(1)** permits the Supreme Court to exercise the same power, to order the taking of evidence, the issue of a commission or the issue of a letter of request, in relation to proceedings before an inferior court as it could in relation to proceedings before itself. An inferior court is, under section 85B, any court of the Territory other than the Supreme Court.

**Subsection 85D(2)** gives to the inferior court the same powers given to the Supreme Court by section 85C in respect of the use in proceedings of evidence taken pursuant to an order.

Section 85E – Other proceedings

**Subsection 85E(1)** enables the Supreme Court, when making an order to obtain evidence outside the Territory for the purpose of committal proceedings, to also order that the evidence obtained may be tendered in a trial resulting from the committal proceedings, or in related civil proceedings.

**Subsection 85E(2)** gives the Supreme Court, when making an order to obtain evidence outside the Territory for the purpose of a criminal proceeding other than a committal proceeding, to also order that the evidence may be tendered in related civil proceedings.

**Subsection 85E(3)** gives the court hearing the criminal trial or related civil proceeding a discretion whether or not to admit evidence obtained pursuant to an order under proposed subsections 85E(1) or (2).

**Subsection 85E(4)** provides that the evidence may not be used if, when it is tendered, the person who gave the evidence

is in the Territory and able to attend the hearing, or if the evidence would be inadmissible, if given or produced at the hearing.

**Subsection 85E(5)** enables the court in the interests of justice to exclude otherwise admissible evidence taken pursuant to an order under this section.

**Subsection 85E(6)** defines 'related civil proceeding' in section 85E, in relation to a criminal proceeding, to mean any civil proceeding relating to a cause of action arising from the same subject matter.

**Section 85F – Variation or revocation of orders**

**Section 85F** permits the Supreme Court to vary or revoke an order for the obtaining of evidence outside the Territory.

**Section 85G – Exclusion of evidence in criminal proceeding**

**Section 85G** provides that Part XIIA does not affect the power of a court hearing a criminal proceeding to exclude evidence obtained illegally, or evidence that would operate unfairly against the defendant.

**Section 85H – Operation of other laws**

**Section 85H** preserves the operation of any other law of the Territory that provides for examination of witnesses outside the Territory for the purposes of a proceeding in the Territory.

**Section 85I – Regulations and Rules of court**

**Subsection 85I(1)** permits the Attorney-General to make regulations, for implementing Part XIIA which deals with the examination of witnesses outside the Territory but within Australia.

**Subsection 85I(2)** enables the Supreme Court to make Rules, not inconsistent with regulations made under subsection 85I(1), with respect to its practice and procedure in proceedings for orders for obtaining evidence outside the Territory.

**Subsection 85I(3)** preserves the operation of any other law providing a power to make regulations or rules.

**Part XIIB – Taking of Evidence for Foreign and Australian Courts**

**Section 85J – Interpretation**

**Section 85J** defines certain words and expressions for the purposes of Part XIIB.

**Section 85K – Power of Supreme Court**

**Section 85K** enables the Supreme Court to obtain evidence in the Territory at the request of a court or tribunal outside the Territory, for the purpose of a proceeding before that court or tribunal.

**Subsection 85K(2)** provides that an order may only be made in respect of a criminal proceeding at the request of an Australian or New Zealand court.

**Subsection 85K(3)** sets out some of the matters that an order under subsection 85K(1) may provide for. These matters are the examination of witnesses, inspection, photographing and detaining property, taking samples and conducting experiments, and conducting medical examinations, including taking and testing blood samples.

**Subsection 85K(4)** enables an order under subsection 85K(1) to set out the actions a person is to take to obtain evidence, being actions that could be taken to obtain evidence for a proceeding in the Supreme Court.

**Subsection 85K(5)** enables an order to require a person to give testimony, other than on oath, if so requested by the requesting court.

**Subsection 85K(6)** prevents an order under subsection 85K(1) requiring a person to state what documents relevant to the proceeding are or have been in his possession, custody or control, or to produce documents other than particular documents specified in the order.

**Subsection 85K(7)** provides that a person required by an order made under subsection 85K(1) to attend at any place is entitled to the same conduct money and payment for expenses and loss of time as a witness in the Supreme Court.

#### Section 85L – Privilege of witnesses

**Subsection 85L(1)** preserves privileges a witness has not to give evidence, either in similar proceedings in the Territory, or where the requesting court exercises jurisdiction.

**Subsection 85L(2)** provides that a claim to a privilege alleged to exist where the requesting court exercises jurisdiction will not be recognised unless the claim is supported by a statement contained in the request or is conceded by the applicant for the order.

**Subsection 85L(3)** provides that where such a claim is not so supported or conceded, the person may be required to give the evidence to which the claim relates, but that evidence shall not be sent to the requesting court if that court upholds the claim of privilege.

**Subsection 85L(4)** defines giving evidence to include answering a question or producing a document.

Section 85M - Operation of other laws

Section 85M preserves the operation of any other law of the Territory that provides for taking of evidence in the Territory for the purpose of a proceeding outside the Territory.

Section 85N - Rules of court

Section 85N enables the Supreme Court to make Rules with respect to how applications for an order for evidence to be obtained in the Territory are to be made, the circumstances in which an order for such evidence to be obtained may be made, the manner in which the Court shall refer to the requesting court a claim for a privilege not to give evidence and any incidental matters.

Clause 5 - Amendment of Crimes Act 1900 (NSW) in its application to Territory

Section 5 inserts a new section 334 into Part VII of the Crimes Act 1900 of New South Wales in its application to the Territory.

Proposed section 334 of the Crimes Act 1900 (NSW) in its application to the Territory - False statement in evidence on commission.

Section 334 makes it an offence punishable by imprisonment for 3 years for a person when giving testimony, otherwise than an oath, pursuant to an order made under subsection 85K(1) of the Principal Ordinance, to make a statement which the person knows to be false in a material particular or which is false in a material particular and which the person does not believe to be true.