

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**EVIDENCE (AMENDMENT) BILL (NO. 3) 1993**

**EXPLANATORY MEMORANDUM**

**Circulated by authority of the Attorney General**

### **Outline**

The purpose of this Bill is to abolish any rule of common law or statute which allows an accused person in criminal proceedings to make an unsworn statement or to give unsworn evidence.

This Bill repeals the statutory provision enabling unsworn statements to be made, section 405 of the *Crimes Act 1900*, and it inserts a new provision in the *Evidence Act 1971* abolishing the right to make such statements. The Bill amends section 70 of the Evidence Act to provide that only gratuitous attacks upon the credibility of the prosecutor or prosecution witnesses are grounds for the loss of the protection provided to the accused by the limitations upon cross-examination contained in subsection 70(1).

### **Revenue/Cost Implications**

This Bill is intended to be budget neutral.

### **Formal Clauses**

**Clauses 1, 2 and 3** are formal requirements. They comprise the short title of the Bill, a commencement provision and a definition of the Principal Act.

### **Insertion**

**Clause 4** inserts a new section, section 68A, in the *Evidence Act 1971*. This section is a statement abolishing any right, derived from common law or statute, of an accused person to make an unsworn statement in criminal proceedings. Subsection 68A(2) ensures that the Bill does not affect the right of young children to give unsworn evidence, which is established by section 64 of the Act.

### **Questioning of accused as to prior convictions and general reputation**

**Clause 5** provides that only gratuitous attacks upon the credibility of the prosecutor or prosecution witnesses are a ground for the loss of the protection provided by subsection 70(1) of the Act. This provision provides that the prosecution is not allowed to ask the accused questions in cross-examination relating to the accused's criminal record or reputation, if the questioning is asked merely for the purpose of showing that the accused has a propensity to commit a related type of crime, is of bad character or for the purpose of attacking his or her credibility. Subsection 70(2) provides 4 exceptions to this shield against such questioning. One of these, paragraph 70(2)(c), enables such questioning if the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or a witness for the prosecution.

This amendment is regarded as necessary to ensure a fair trial for accused persons who, prior to the abolition of unsworn statements, would have used unsworn testimony to truthfully allege impropriety by the prosecution or its witnesses, without risking the operation of paragraph 70(2)(c). As the accused will now have to make such allegations as part of his or her sworn evidence, the prosecution will be prevented from responding by asking questions in cross-examination related to the accused's prior convictions or bad character, unless the following circumstances exist:

- (a) the imputations made by the accused are not necessary for the establishment of the defence;

- (b) the questioning by the prosecution is relevant to the accused's credibility as a witness; and
- (c) it is in the interests of justice and the circumstances of the case for such questioning to be allowed.

These additional requirements are also to be exercised subject to the overriding judicial discretion to prevent such questioning contained in subsection 70(2).

This provision is also considered desirable as a consequence of potentially broad judicial interpretations of paragraph 70(2)(c) as to what amounts to imputations on the character of the prosecutor or prosecution witnesses.

#### **Repeal**

Clause 6 makes a consequential amendment to the *Evidence Act 1971*. Section 76H of the Act at present restricts the content of unsworn statements in certain sexual offence proceedings. Section 76H will no longer be necessary as the Bill abolishes any right of the accused to make an unsworn statement.

#### **Amendment of *Crimes Act 1900***

Clause 7 repeals section 405 of the *Crimes Act 1900*. Section 405 is the statutory provision enabling an accused person to make an unsworn statement in criminal proceedings.

#### **Application**

Clause 8 provides that the substantive provisions of this Bill, Clauses 4,5 and 6, do not apply to criminal proceedings that began before those provisions were commenced. The time at which an offence was committed or alleged to have been committed is not relevant in determining the applicability of these amendments.