Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to make miscellaneous amendments to the *Evidence Act 1995* (***the Principal Act***) so as to implement (with some modifications and departures) the majority of the recommendations made by the Australian, New South Wales and Victorian Law Reform Commissions in their collaborative report on the review of the operation of the provisions of the Uniform Evidence Acts in force in New South Wales, the Commonwealth, the Australian Capital Territory and Tasmania (*Uniform Evidence Law: Report* (2005)) (***the Report***). The amendments are (with very minor exceptions) uniform with amendments contained in a model *Uniform Evidence Bill* endorsed by the Standing Committee of Attorneys General on 26 July 2007.

The Bill includes amendments to make the following key changes:

(a) **the hearsay rule**—to provide further guidance on the definition of hearsay evidence (for example, when an assertion is intended) and to clarify the operation of the exception in section 60 of the Principal Act for evidence relevant for a non-hearsay purpose,

(b) **the admissibility of expert evidence**—to enable a court to use expert opinion to inform itself about the competence of a witness and to provide a new exception to the credibility rule where a person has specialised knowledge based on the person's training, study or experience,

(c) **admissions in criminal proceedings**—to ensure that evidence of such admissions that is not first-hand is excluded from the ambit of section 60 of the Principal Act and that the reliability of an admission made by a defendant is tested where the admission is made to, or in the presence of, an investigating official performing functions in connection with the investigation or as a result of an act of another person capable of influencing the decision whether to prosecute,

(d) **coincidence evidence**—to reduce the threshold for admitting coincidence evidence to require consideration of similarities in events or circumstances, rather than the existing threshold that there are similarities in events and circumstances,

(e) **credibility of witnesses**—to ensure that evidence which is relevant both to credibility and a fact in issue, but that is not admissible for the latter purpose, is subject to the same rules as other credibility evidence and to enable evidence to be adduced with the leave of the court to rebut denials and non-admissions in cross-examination,

(f) **advance rulings on evidentiary issues**—to make it clear that the court has the power to make an advance ruling or make an advance finding in relation to an evidentiary issue,

(g) **warnings and directions to the jury**—to make it clear that a trial judge is not to give a warning about the reliability of the evidence of a child solely on account of the age of the child, and to clarify the scope of information to be given to the jury about the forensic disadvantage a defendant may have suffered because of the consequences of delay, and the circumstances in which such information is to be given,

(h) **manner and form of questioning witnesses**—to enable a court on its own motion to direct that a witness give evidence wholly or partly in narrative form and to make further provision with respect to the improper questioning of witnesses in cross-examination in civil and criminal proceedings.

The Bill also makes miscellaneous amendments for the following purposes:

(a) to clarify the application of the Act,

(b) to introduce a test of general competence to give sworn and unsworn evidence

and restate the tests of competence to give sworn and unsworn evidence,
(c) to replace the definition of “de facto spouse” with a new definition of “de facto partner”,
(d) to make further provision with respect to the proof of voluminous or complex documents,
(e) to facilitate proof of electronic communications,
(f) to provide exceptions to the hearsay rule for evidence relevant to Aboriginal and Torres Strait Islander traditional laws and customs and for an exception to the opinion rule for evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about traditional laws and customs of the group,
(g) to provide for the admission of expert opinion evidence on behaviour and development of children,
(h) to make further provision with respect to evidence of admissions,
(i) to clarify and amplify the meaning of references to “lawyer” in various provisions of the Principal Act,
(j) to provide for loss of client legal privilege where a client or party has acted in a manner inconsistent with the assertion of the privilege,
(k) to make amendments that are consequential on the enactment by the Commonwealth of provisions relating to professional confidential relationship privilege,
(l) to make further provision with respect to the assertion of, and effect of asserting, the privilege against self-incrimination,
(m) to make provision with respect to the ability to assert the privilege against self-incrimination in respect of disclosure of information in connection with search and freezing orders in civil proceedings,
(n) to apply Division 3 of Part 3.10 of the Principal Act (Evidence excluded in the public interest) to preliminary proceedings,
(o) to make various other minor or consequential amendments.
The Bill also transfers certain savings and transitional provisions of the *Evidence (Consequential and Other Provisions) Act 1995* to the Principal Act and repeals that Act as it will then be spent.
Outline of provisions
Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on a day or days to be proclaimed.
Clause 3 is a formal provision that gives effect to the amendments to the *Evidence Act 1995* set out in Schedule 1.
Clause 4 is a formal provision that gives effect to the amendments to the Acts set out in Schedule 2.
Clause 5 provides for the repeal of the proposed Act on the day following the day on which all of the provisions of the Act have commenced. It also repeals the *Evidence (Consequential and Other Provisions) Act 1995*.
Schedule 1 Amendments to Evidence Act 1995
Schedule 1 contains the amendments to the *Evidence Act 1995* described in the Overview.
Courts and proceedings to which Act applies
Schedule 1 [1] omits the words “in relation” from the phrase “in relation to all proceedings” in section 4 (1) of the Principal Act. The words are unnecessary as the evidentiary rules prescribed by the Act only apply in the course of a proceeding in a NSW court (as defined). It implements recommendation 2–4 of the Report.
Schedule 1 [2] and [86] insert a note to section 4 of the Principal Act and amend the definition of ***NSW court*** in the Dictionary to the Act to clarify and explain the application of the rules of evidence set out in the Act to State courts exercising

federal jurisdiction. The amendments arise out of recommendation 2–5 of the Report. Section 79 of the *Judiciary Act 1903* of the Commonwealth provides that the "laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable".

Competence: lack of capacity

Section 13 of the Principal Act currently contains two different tests for giving sworn and unsworn evidence, both of which require a witness to demonstrate an understanding of the difference between truth and lies.

Schedule 1 [3] repeals and replaces section 13. It implements recommendations 4–1 and 4–2 of the Report. It sets out a new test for determining a witness's competence to give sworn and unsworn evidence and clarifies the distinction between sworn and unsworn evidence.

New section 13 provides that all witnesses must satisfy the test of general competence in section 13 (1). The general test focuses on the ability of the person to comprehend and communicate. Under this test, a person is not competent to give sworn or unsworn evidence about a fact if the person lacks the capacity to understand a question about the fact, or to give an answer to that question that can be understood, and that incapacity cannot be overcome.

New section 13 (2) makes it clear that, even if the general test of competence is not satisfied in relation to one fact, a person may be competent to give evidence about other facts.

New section 13 (3) provides that a person is not competent to give sworn evidence if he or she does not have the capacity to understand that he or she is under an obligation to give truthful evidence. This restates current section 13 (1).

New section 13 (4) provides that (subject to the requirements of subsection (5) being met), a person who is not competent to give sworn evidence about a fact may give unsworn evidence about the fact. This is intended to allow young children and others (for example, adults with an intellectual disability) to give unsworn evidence even though they do not understand concepts such as "truth". The weight to be given to such evidence will be determined by the court.

New section 13 (5) sets out the requirements that must be met for a person who is not competent to give sworn evidence to be competent to give unsworn evidence.

New section 13 (6) provides that a person is presumed to be competent to give evidence, unless it is proven he or she is incompetent. It restates existing section 13 (5).

New section 13 (7) provides that evidence given by a witness is not inadmissible merely because the witness dies or is no longer competent to give evidence. It restates current section 13 (6).

New section 13 (8) provides that, when a court is determining whether a person is competent to give evidence, the court may inform itself as it thinks fit. It expands current section 13 (7) by specifically referring to the ability of the court to inform itself by obtaining information from experts.

Schedule 1 [4] and [8] make consequential amendments to sections 14 and 21, respectively, of the Principal Act.

Manner and form of questioning witnesses and their responses

Section 29 (2) of the Principal Act currently enables a witness to give evidence wholly or partly in narrative form (instead of in a question and answer format) if the court so directs. At present a direction may be made only on the application of the party that called the witness. **Schedule 1 [9]** implements recommendation 5–1 of the Report. It replaces section 29 (2) to enable a direction to be given by the court on its own motion.

Amendments relating to lawyers and their clients and client legal

privilege

A ***lawyer*** is currently defined in the Dictionary to the Principal Act as a barrister or a solicitor. **Schedule 1 [85]** omits the definition and **Schedule 1 [81]** inserts various definitions of categories of lawyers to implement recommendation 14–3 of the Report. This will ensure that terminology relating to lawyers is consistent with that used in the national uniform legislation on the legal profession and will clarify the meaning and scope of various references to lawyers in the Act.

Schedule 1 [10], [11], [66] and [67] make consequential amendments to sections 33, 37, 148 and 190.

Schedule 1 [53] amends section 114 (5) to ensure that the subsection includes lawyers with a valid practising certificate, as well as relevant statutory officers and government and other lawyers who are otherwise permitted to practise in the jurisdiction.

Schedule 1 [54] amends the definition of ***client*** in section 117 in relation to client legal privilege. It implements recommendation 14–2 of the Report. A client of a lawyer is defined to include a person or body who engages a lawyer to provide legal services or who employs a lawyer.

Schedule 1 [55] replaces the definition of ***lawyer*** in relation to client legal privilege to include Australian lawyers (that is, those who are admitted but do not necessarily have a practising certificate) and employees and agents of lawyers. It will now cover the whole range of lawyers providing legal advice or legal professional services in various jurisdictions and not be limited to those with a practising certificate. It implements recommendation 14–3 of the Report.

Section 118 prevents the admission of certain confidential communications and documents made for the dominant purpose of a lawyer providing legal advice to the client.

Schedule 1 [56] amends section 118 and implements recommendation 14–4 of the Report. It extends the privilege to confidential documents prepared by someone other than the client or lawyer (for example, an accountant or consultant) for the dominant purpose of the lawyer providing legal advice to the client.

Section 191 of the Principal Act deals with agreements by the parties to facts.

Schedule 1 [76] amends section 191 to ensure that representatives of parties who can agree to facts include lawyers who are admitted, those who are otherwise permitted to practise and prosecutors (as to be defined in an amendment made by **Schedule 1 [88]**).

Loss of client legal privilege

Section 122 of the Principal Act currently provides that client legal privilege is lost by consent or if a client or party knowingly and voluntarily discloses the substance of the evidence.

Schedule 1 [57] replaces section 122 with a new section that is aligned more closely with the common law test for loss of privilege set out in *Mann v Carnell* (1999) 201 CLR 1. It implements recommendation 14–5 of the Report.

New section 122 provides that evidence may be adduced if the client or party concerned has acted in a way that is inconsistent with the maintenance of the privilege.

Leading questions

Section 37 permits leading questions to be put to a witness in examination in chief if no objection is taken and each party is represented by a lawyer. **Schedule 1 [11]** amends section 37 to (among other things) provide that leading questions may be put if a party is represented by a prosecutor.

Schedule 1 [88] inserts a definition of ***prosecutor*** into the Principal Act. It covers police prosecutors and other public officers who may be authorised to conduct prosecutions and represent the Crown or police informants, although not admitted legal practitioners.

Improper questions

Section 41 of the Principal Act currently permits the court to disallow questions that are misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. **Schedule 1 [12]** replaces section 41 with a new section that requires the court to disallow such improper questions and that essentially replicates section 275A of the *Criminal Procedure Act 1986*. It gives effect (with minor departures) to recommendation 5–2 of the Report.

Proof of voluminous or complex documents

Section 50 of the Principal Act currently enables a court to direct that evidence be adduced in the form of a summary if application is made to it by a party before the hearing concerned. **Schedule 1 [13]** amends section 50 to omit this restriction and allow an application to be made at any time in proceedings. It implements recommendation 6–1 of the Report.

Exclusion of evidence

Part 3.11 of the Act is currently headed "Discretions to exclude evidence". However the Part includes section 137 which contains a mandatory requirement to exclude prejudicial evidence in criminal proceedings. **Schedule 1 [64]** replaces the heading to the Part so as to refer to the mandatory requirement and to implement recommendation 16–1 of the Report. **Schedule 1 [14] and [15]** make consequential amendments to the introductory note to Chapter 3.

The hearsay rule–exclusion of hearsay evidence

Section 59 of the Principal Act excludes evidence of a previous representation for the purpose of proving a fact which the maker intended to assert by the representation. The meaning of "intended" was explored by the New South Wales Supreme Court in *R v Hannes* (2000) 158 FLR 359. In paragraph 7.34–7.62 of the Report the Commissions emphasised the need to provide guidance on the definition of hearsay and the difficulties that might arise if the approach taken by the Court in that case was pursued. **Schedule 1 [16] and [17]** accordingly amend section 59 to further define hearsay evidence and to clarify what a court should consider in determining the meaning of intention.

Schedule 1 [16] amends section 59 (1) to implement recommendation 7–1 of the Report. It expressly provides that, in determining whether a person intended to assert the existence of facts contained in a previous representation, the test to be applied should be based on what a person in the position of the maker of the representation can reasonably be supposed to have intended.

Schedule 1 [17] inserts section 59 (2A) to provide that, in determining whether a person intended to assert the existence of facts contained in a previous representation, the test to be applied is what a person in the position of the maker of the representation can reasonably be supposed to have intended, having regard to the circumstances in which the representation was made.

Schedule 1 [18] amends the note to section 59 to update cross references to specific exceptions to the hearsay rule as a consequence of the amendments made to insert section 66A (**Schedule 1 [29]**) and to amend section 71 (**Schedule 1 [30]**) that are described below.

Section 60 of the Principal Act contains an exception to the hearsay rule when evidence is relevant for a non-hearsay purpose.

Schedule 1 [19] amends section 60 of the Principal Act to ensure that the amendments to section 59 that clarify the meaning of intention also apply in the context of section 60.

Schedule 1 [20] inserts new section 60 (2) and (3). It implements recommendation 7–2 and implements in substance recommendation 10–2 of the Report.

New section 60 (2) is a response to the decision of the High Court in *Lee v The Queen* (1998) 195 CLR 594. The Court held that section 60 does not convert evidence of what was said, out of court, into evidence of some fact that the person speaking out

of court did not intend to assert. The Report considered that this approach may be regarded as inconsistent with the intention or scheme of the Principal Act (para 7.104).

New section 60 (2) confirms that section 60 permits evidence admitted for a non-hearsay purpose to be used to prove the facts asserted in the representation, whether or not the person had first-hand knowledge based on something they saw, heard or otherwise perceived.

New section 60 (3) ensures that evidence of admissions in criminal proceedings that is not first-hand is excluded from the scope of section 60. It gives effect to the substantive part of recommendation 10–2 of the Report.

Schedule 1 [21] implements recommendation 4–3 of the Report. It is a consequential amendment to replace section 61 (1) to bring the subsection into line with the proposed amendments to section 13 described above relating to tests for determining the competency of witnesses to give sworn and unsworn evidence.

Exception: contemporaneous statements about a person's health etc—restriction to first-hand hearsay

Section 72 of the Principal Act contains an exception to the hearsay rule for contemporaneous statements about a person's health, feelings, sensations, intention, knowledge or state of mind. **Schedule 1 [29]** re-enacts section 72 (which is currently in Division 3 of Part 3.2) as a new section 66A (which is in Division 2 of Part 3.2). It implements recommendation 8–5 of the Report. The section has been moved to Division 2 to make it clear that the exception applies only to first-hand hearsay—it applies to representations made by a person who has personal knowledge of an asserted fact and not second-hand and more remote forms of hearsay.

Schedule 1 [22] and [23] make consequential amendments to sections 61 and 62, respectively. Section 62 (2) defines what is meant by personal knowledge of an asserted fact in terms that are not wide enough to cover all the matters referred to in new section 66A. New section 62 (3) ensures that all representations referred to in section 66A are considered first-hand hearsay.

Exception: civil proceedings if maker available

Section 64 of the Principal Act provides an exception to the hearsay rule in civil proceedings when the maker of the representation is available. **Schedule 1 [24]** implements recommendation 8–1 of the Report. It amends section 64 (3) to remove the requirement in that subsection that the exception only apply if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation. The Commissions considered that the requirement was not an important indicator of evidentiary reliability and that freshness in memory could be taken into account in determining the weight to be given to the evidence and whether to exercise the general discretions under sections 135–137 of the Principal Act to exclude it (paragraph 8.15 of the Report).

Exception: criminal proceedings if maker not available

Section 65 of the Principal Act provides an exception to the hearsay rule in criminal proceedings where a person who made a previous representation is not available to give evidence about an asserted fact. Currently section 65 (2) (d) provides that the hearsay rule does not apply to a previous representation if the representation was made against the interests of the person who made it at the time it was made.

Schedule 1 [27] implements recommendation 8–3 of the Report so that such a representation must also be made in circumstances that make it likely that the representation is reliable. **Schedule 1 [25] and [26]** make consequential amendments to section 65.

Exception: criminal proceedings if maker available

Section 66 of the Principal Act provides an exception to the hearsay rule in criminal proceedings where the maker of the representation is available to give evidence about the asserted fact. The hearsay rule does not apply if, when the representation was

made, the occurrence of the asserted fact was fresh in the memory of the maker.
Schedule 1 [28] implements recommendation 8–4 of the Report and is a response to the decision of the High Court in *Graham v The Queen* (1998) 195 CLR 606. New section 66 (2A) makes it clear that freshness of the memory of the maker may be determined by taking into account all matters it considers relevant, not just the temporal relationship between the occurrence of the asserted fact and the making of the representation.

Electronic communications

Section 71 of the Principal Act provides an exception to the hearsay rule for certain representations contained in documents transmitted by electronic mail or by a fax, telegram, lettergram or telex. **Schedule 1 [30]** replaces section 71 with a new section and **Schedule 1 [84]** inserts a definition of ***electronic communication*** into the Dictionary to implement recommendation 6–2 of the Report. The new definition of ***electronic communication*** gives the term the same meaning as it has in the *Electronic Transactions Act 2000* and embraces all modern electronic technologies, including telecommunications, as well as the more outmoded methods of communication like telex.

New section 71 allows for a broader and more flexible definition of the technologies which fall within the exception.

Section 161 of the Principal Act currently facilitates proof of messages transmitted by telex. **Schedule 1 [68]** replaces existing section 161 with a new section 161 to facilitate proof of messages transmitted by electronic communications as to be defined. It implements recommendation 6–3 of the Report and will provide new presumptions relating to the sending and receipt as well as the source and destination of electronic communications.

Aboriginal and Torres Strait Islander traditional laws and customs

Schedule 1 [31] and [33] replace section 72 (which is re-enacted as section 66A by **Schedule 1 [29]**) and insert section 78A, respectively. The proposed sections implement recommendations 19–1 and 19–2 of the Report. They create exceptions to the hearsay rule for evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group and to the opinion rule for evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group. The Commissions intend the proposed amendments to shift the focus from whether there is a technical breach of the hearsay rule to whether the particular evidence is reliable. Evidence given will still be subject to the safeguards of relevance provided by section 55, and the discretionary and mandatory exclusions in sections 135–137, of the Principal Act (paragraphs 19.74 and 19.78 of the Report).
Schedule 1 [89] inserts a definition of ***traditional laws and customs*** of an Aboriginal or Torres Strait Islander group into the Dictionary to the Principal Act. The amendment implements recommendation 19–3 of the Report.
Schedule 1 [32] is a consequential amendment.

Exception: opinions based on specialised knowledge

Section 79 of the Principal Act provides that the opinion rule (under which evidence of an opinion is not admissible to prove the existence of a fact about which the opinion was expressed) does not apply to evidence of an opinion of a person wholly or substantially based on specialised knowledge of a person gained from the person's training, study or experience.
Schedule 1 [34] inserts a new section 79 (2) to implement recommendation 9–1 of the Report. New section 79 (2) makes it clear that the exception covers expert opinion evidence of persons with specialised knowledge of child development and behaviour (including specialised knowledge of the impact of sexual abuse on children and of their behaviour during and following abuse). It includes evidence in relation to the

development and behaviour of children generally and the development and behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.

Exclusion of evidence of admissions that is not first-hand

Schedule 1 [35] inserts a note to section 82. This reflects proposed new section 60 (3) (to be inserted by **Schedule 1 [20]**) which makes it clear that section 60 of the Principal Act, which contains an exception to the hearsay rule for evidence that is admitted for a hearsay purpose, does not apply to evidence of an admission in a criminal proceeding. New section 60 (3) gives effect to the substantive part of recommendation 10–2 of the Report.

De facto partners

Schedule 1 [83] omits the definition of ***de facto spouse*** from the Dictionary to the Principal Act and **Schedule 1 [90]** replaces it with a definition of ***de facto partner***. The proposed definition implements (with modifications) recommendations 4–5 and 4–6 of the Report. **Schedule 1 [5]–[7]** make consequential amendments. The items implement the Commissions' recommendation in 4–4 of the Report that references to de facto relationships should be gender neutral. ***De facto spouse*** is currently defined by reference to de facto relationships within the meaning of the *Property (Relationships) Act 1984*. The new definition of ***de facto partner*** is in similar terms but is not limited to a relationship between two adults and omits specific reference to whether a sexual relationship exists as a particular matter to be taken into account in determining whether a de facto relationship exists.

Criminal proceedings: reliability of admissions by defendants

Section 85 of the Principal Act sets out the matters to be taken into account by a court in determining whether to admit evidence of an admission made by a defendant in the course of official questioning or as a result of an act of another person capable of influencing the decision about the prosecution of the defendant. **Schedule 1 [36]** inserts a new section 85 (1) to implement (with a minor departure) recommendation 10–1 of the Report.

The majority of the High Court in *Kelly v The Queen* (2004) 218 CLR 216 took a narrow view of the term "in the course of official questioning" in existing section 85 (1). It "marks out a period of time running from when questioning commenced to when it ceased" (at [52]). New section 85 (1) (a) broadens the scope of section 85 to cover admissions made "to, or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence".

In addition to the amendment recommended in the Report, section 85 (1) (b) provides that section 85 applies where an admission is made as a result of the act of a person who "the defendant knew or reasonably believed to be" capable of influencing a decision about the prosecution of the defendant. This removes covert operatives from the ambit of the provision.

Schedule 1 [37], [65], [70] and [87] contain consequential amendments to sections 89, 139, 165 and the Dictionary, respectively.

The tendency rule

Schedule 1 [38] replaces section 97 (1) to implement recommendation 11–3 of the Report. The amendment does not change the substantive law. It removes double negatives and makes other changes to make the subsection easier to understand.

The coincidence rule

Schedule 1 [39] replaces section 98 with a new section 98 which introduces a general test for the coincidence rule. It implements recommendations 11–1 and 11–2 of the Report.

Currently section 98 provides that similar fact evidence is not admissible to prove that a person did a particular act or had a particular state of mind by reason of the improbability of the related events occurring coincidentally unless certain conditions

are satisfied. Events are related events only if they are substantially and relevantly similar and the circumstances in which they occurred are substantially similar. The Commissions considered that this test raised the threshold too high and could exclude highly probative evidence from the ambit of the provision.

New section 98 applies where there are any similarities in the events or the circumstances in which they occurred, or similarities in both the events and the circumstances in which they occurred.

Credibility evidence

Schedule 1 [40] inserts new sections 101A and 102 which set out the credibility rule. It implements recommendation 12–1 of the Report.

Currently section 102 states that evidence that is relevant only to a witness's credibility is not admissible. In *Adam v The Queen* (2001) 207 CLR 96 the High Court interpreted the provision in a way that has meant that the credibility rule will not apply if evidence is relevant both to credibility and a fact in issue, even where the evidence is not admissible for the purpose of proving a fact in issue.

New section 101A defines credibility evidence to ensure that Part 3.7 will apply not only to evidence relevant only to credibility but also to evidence relevant for some other purpose for which it is not admissible or cannot be used because of a provision of Parts 3.2–3.6 of the Principal Act.

New section 102 restates the credibility rule in simpler terms.

Schedule 1 [44], [50] and [82] make consequential amendments to sections 104 (2), 108A and the Dictionary, respectively.

Exception: cross-examination as to credibility

Section 103 of the Principal Act provides that the credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value. **Schedule 1 [41]** amends the section to provide instead that the rule does not apply if such evidence "could substantially affect the assessment of the credibility of the witness". It implements recommendation 12–2 of the Report.

Schedule 1 [42] and [43] make consequential amendments to sections 103 (2) and 104 (1), respectively.

Schedule 1 [45] replaces section 104 (4) with a new subsection as a consequence of the amendment made by **Schedule 1 [41]**. It implements recommendation 12–1 (in part), and 12–3, of the Report. The amendment also restates section 104 (4) (a) and (b) and removes the overlap between section 104 (4) (a) and Part 3.8.

Schedule 1 [46] makes a consequential amendment to section 104 (5).

Exception: rebutting denials by other evidence

Section 106 of the Principal Act currently provides that the credibility rule does not apply to a rebuttal of a witness's denials by other evidence in specified circumstances. **Schedule 1 [47]** replaces section 106 with a new section enabling the admission of evidence on a broader basis. It implements recommendation 12–5 of the Report.

New section 106 (1) enables the court to grant leave to adduce evidence relevant to credibility in circumstances other than those currently specified. It also provides that evidence relevant to credibility may be led not only where the witness has denied the substance of the evidence in cross-examination but also where he or she did not admit or agree to it.

Under new section 106 (2), leave is not required to adduce evidence of the kind currently described in section 106.

Credibility of persons who are not witnesses

Schedule 1 [48] inserts a new Division heading as a consequence of amendments arising out of recommendations 12–1 and 12–3 of the Report.

Admissibility of evidence of credibility of person who has made a previous representation

Schedule 1 [49] replaces section 108A (1) with a new subsection which makes it

clear that the subsection applies to all situations in which evidence of a previous representation has been admitted where the maker has not been called and will not be called to give evidence. It implements recommendations 12–1 (in part), and 12–6, of the Report. The amendment updates section 108A (1) to reflect the new definition of ***credibility evidence*** inserted by **Schedule 1 [40]**.

Schedule 1 [50] amends section 108A (2) to implement recommendation 12–6 of the Report.

Further protections: previous representations of an accused who is not a witness

Schedule 1 [51] inserts new sections 108B and 108C and a Division heading into the Principal Act. It implements in substance recommendations 12–6 and 12–7 of the Report.

Section 108A of the Principal Act applies where hearsay evidence has been admitted and the defendant who made the previous representation has not been or will not be called to give evidence. It permits admission of evidence relevant only to credibility about matters on which the defendant could have been cross-examined if he or she had given evidence.

New section 108B provides for the same restrictions on adducing the evidence relevant to the defendant's credibility as apply under section 104 of the Principal Act (as proposed to be amended elsewhere in Schedule 1). Under new section 108B (2), the prosecution must seek the court's leave to tender evidence relevant only to the defendant's credibility. When deciding whether to grant leave the court is required to take into account specified matters. Leave is not required if the evidence falls within specified exceptions.

New section 108C implements recommendation 12–7 of the Report and recommendation 57 of the Criminal Justice Sexual Offences Taskforce Report entitled "Responding to sexual assault: the way forward" (2005). It provides a new exception to the credibility rule for opinion evidence given by a person who has specialised knowledge based on the person's training, study or experience that is wholly or substantially based on that knowledge and that could substantially affect the assessment of the credibility of the witness. The new section is intended to enable the admission of expert opinion evidence that is relevant to the fact-finding process (for example, to prevent misinterpretation of the behaviour of a witness with an intellectual disability or cognitive impairment, or inappropriate inferences from such behaviour). Section 108C (2) makes it clear that the exception covers evidence of persons with specialised knowledge of child development and behaviour (including specialised knowledge of the impact of sexual abuse on children and of their behaviour during and following abuse). It includes evidence in relation to the development and behaviour of children generally and the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

Privilege in respect of self-incrimination in other proceedings

Section 128 of the Principal Act provides a procedure for giving a witness who objects to giving particular evidence a certificate which grants that person use and derivative use immunity for the evidence if the person can claim the privilege against self-incrimination.

Schedule 1 [61] replaces section 128. It addresses recommendations 15–7 and 15–8 of the Report.

New section 128 (1) expands the grounds of objection to the giving of evidence to cover not only particular evidence but also evidence on a particular matter. The section is also restructured to simplify the process for certification (section 128 (2)–(6)). New section 128 (7) describes the effect of a certificate and replicates existing section 128 (7). New section 128 (8) and (9) address two issues that arose in *Cornwell v The Queen* [2007] HCA 12. Section 128 (8) ensures that the witness can

rely on a certificate and that section 128 (7) will have effect in relation to a certificate despite any challenge, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate. However, new section 128 (9) makes it clear that a certificate under the section in relation to a proceeding does not apply to a retrial for the same offence or an offence arising out of the same facts. New section 128 (10) and (11) replicate existing section 128 (8) and (9).

Schedule 1 [75] makes a consequential amendment to section 189.

Privilege in respect of self-incrimination—exception for certain disclosure orders

Schedule 1 [62] inserts a new section 128A into the Principal Act. It provides a process for dealing with objections on the grounds of self-incrimination to complying with a search order (Anton Pillar), freezing order (Mareva) or other order under Part 25 of the *Uniform Civil Procedure Rules 2005* in civil proceedings. The amendment addresses issues raised by recommendation 15–10 of the Report.

New section 128A provides that a privilege against self-incrimination applies to these orders (section 128A (8)). A person the subject of an order may prepare an affidavit containing the required information to which objection is taken (called a privilege affidavit) and deliver it to the court in a sealed envelope. A separate affidavit setting out the basis of the objection is to be filed and served on each other party (section 128A (2)). If the court finds there are reasonable grounds for the objection, the court must not require the disclosure of information (section 128A (5)). If the court is satisfied the information may incriminate the person but that the interests of justice require disclosure it may give the person a certificate in respect of the information disclosed (section 128A (7)). The certificate confers use and derivative use immunity (section 128A (8)).

Section 128A (9) makes it clear that the protection conferred does not apply to documents that were in existence before a search or freezing order was made or pre-existing annexures or exhibits to the privilege affidavit.

Section 128A (10) is similar in terms to proposed new section 128 (8) described above.

Extension of privilege provisions to pre-trial disclosure procedures and proceedings outside court

Schedule 1 [63] inserts new section 131A to extend certain specified privilege provisions in Part 3.10 of the Principal Act to compulsory processes for disclosure, such as discovery and subpoenas. Issues relating to this extension were discussed in relation to recommendations 14–1, 14–6, 15–3, 15–6 and 15–11 of the Report and a draft provision was included in the Victorian Law Reform Commission's report titled "Implementing the Uniform Evidence Act".

Warnings in relation to children's evidence and delay in prosecution

Schedule 1 [72] inserts new sections 165A and 165B which deal with warnings in relation to children's evidence and delays in prosecution. It implements recommendations 18–2 and 18–3 of the Report.

Schedule 1 [69] makes a consequential amendment to the heading to Part 4.5.

New section 165A is intended to displace certain common law practices relating to warnings and to ensure that the courts treat child witnesses the same as adult witnesses when determining whether a warning is appropriate.

New section 165A (1) prohibits a judge from warning or suggesting that children as a class are unreliable witnesses, that the evidence of children as a class is inherently less credible or reliable than the evidence of adults, that a particular child's evidence is unreliable solely on account of the age of the child or that it is dangerous to convict on the uncorroborated evidence of a child. However, section 165A (2) provides that the judge may in certain circumstances inform the jury that the evidence of a particular child may be unreliable and the reasons why it may be unreliable or warn or inform the jury of the need for caution in determining whether to accept the

evidence of a particular child and the weight to be given to it.
Section 165 deals with warnings about unreliable evidence.
Schedule 1 [71] makes an amendment to replace section 165 (6) that is related to new section 165A. New section 165 (6) provides that a judge must not warn or inform a jury that the reliability of a child's evidence may be affected by the age of the child except as provided by new section 165A.
New section 165B regulates warnings that are given to juries in criminal proceedings concerning delay and forensic disadvantage to the accused.
Section 165B (2) provides that, if the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence. The mere passage of time is not to be regarded as a significant forensic disadvantage (section 165B (6)) and the judge need not take this action if there are good reasons for not doing so (section 165B (3)).
The section is intended to make it clear that (contrary to the tendency at common law following *Longman v The Queen* (1989) 168 CLR 79 for judges to routinely give warnings in relation to forensic disadvantage arising from delay) information about forensic disadvantage need only be given if a party applies for it, and should only be given where there is an identifiable risk of prejudice to the accused. Such prejudice should not be assumed to exist merely because of the passage of time.
Accused may admit matters and give consents
Section 184 provides for a defendant in or before a criminal proceeding to admit any matters of fact and give any consent that a party to a civil proceeding may make or give if the defendant is advised to do so by his or her lawyer.
Schedule 1 [74] inserts section 184 (2) so that an admission or consent can also be effective if the court is satisfied that the defendant understands the consequences of making the admission or giving the consent. New section 184 (2) makes section 184 consistent with existing section 190 (2) of the Principal Act and enables a defendant who is unrepresented by a lawyer to make such admissions and give such consents.
Schedule 1 [73] makes a consequential amendment.
Schedule 1 [77] inserts new section 192A. It implements recommendation 16–2 of the Report. New section 192A enables a court, if it considers it to be appropriate, to give an advance ruling or make an advance finding in relation to the admissibility of evidence and other evidentiary matters.
The amendment also emphasises that an advance ruling or finding may be made with respect to the giving of leave, permission or a direction under section 192 of the Principal Act.
Minor corrections
Schedule 1 [52] corrects a minor drafting inconsistency in section 112. It implements recommendation 12–4 of the Report.
Savings, transitional and other provisions
Schedule 1 [79] inserts a new Schedule 2 containing savings and transitional provisions and enabling the making of savings and transitional regulations.
Schedule 1 [78] inserts a machinery provision giving effect to that Schedule.
Schedule 1 [80] inserts in the Schedule savings and transitional provisions that are consequent on the proposed Act.
Amendment consequent on legislation of other jurisdictions
Schedule 1 [58] omits a note as a consequence of the insertion of Division 1A (Professional confidential relationship privilege) of Part 3.10 into the *Evidence Act 1995* of the Commonwealth.
Schedule 1 [59] and [60] insert notes as a consequence of the insertion of Division 1A (Professional confidential relationship privilege) of Part 3.10 into the *Evidence Act 1995* of the Commonwealth.

Schedule 2 Amendment of other Acts

Schedule 2 amends the Acts specified in the Schedule.

Schedule 2.1 amends section 87 of the *Civil Procedure Act 2005* to explain its relationship to proposed section 128A of the Principal Act (as inserted by **Schedule 1 [62]**).

Schedule 2.2 amends the *Coroners Act 1980* to ensure that sections 33 and 33AA of that Act are consistent with proposed section 128 of the Principal Act (as inserted by **Schedule 1 [61]**) and to insert related definitions in section 4 of the Act.

Schedule 2.3 [1] repeals section 275A (Improper questions) of the *Criminal Procedure Act 1986*. The section will be replaced by proposed section 41 of the Principal Act (as inserted by **Schedule 1 [12]**).

Schedule 2.3 [2] repeals section 294 (3)–(5) of the *Criminal Procedure Act 1986*. The provisions relate to warnings to be given where forensic disadvantage has been caused by delay in prosecution and will be replaced by proposed section 165B of the Principal Act (as inserted by **Schedule 1 [72]**).

Schedule 2.4 omits Schedule 2 to the *Evidence (Consequential and Other Provisions) Act 1995* and transfers its contents (without substantive change) to proposed new Schedule 2 to the Principal Act (to be inserted by **Schedule 1 [79]**). The provisions are transferred provisions to which section 30A of the *Interpretation Act 1987* applies.