First print

New South Wales

Evidence Amendment Bill 2007

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.

First print

New South Wales

Evidence Amendment Bill 2007

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New South Wales

Evidence Amendment Bill 2007

No , 2007

A Bill for

An Act to make miscellaneous amendments to the *Evidence Act 1995*; and to make consequential amendments to the *Civil Procedure Act 2005*, the *Criminal Procedure Act 1986* and other Acts.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Evidence Amendment Act 2007*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendments to Evidence Act 1995 No 25

The *Evidence Act 1995* is amended as set out in Schedule 1.

4 Amendment of other Acts

The Acts specified in Schedule 2 are amended as set out in that Schedule.

5 Repeal of Acts

(1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.

(2) The *Evidence (Consequential and Other Provisions) Act 1995* is repealed on that day.

(3) The repeal of those Acts does not, because of the operation of section 30 of the *Interpretation Act 1987*, affect any amendments made by those Acts.

Schedule 1 Amendments to Evidence Act 1995

(Section 3)

[1] Section 4 Courts and proceedings to which Act applies

Omit "in relation" from section 4 (1).

[2] Section 4, notes

Insert after note 3:

4 See section 79 of the *Judiciary Act 1903* of the Commonwealth for the application of this Act to proceedings in a State court exercising federal jurisdiction.

[3] Section 13

Omit the section. Insert instead:

13 Competence: lack of capacity

(1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):

(a) the person does not have the capacity to understand a question about the fact, or

(b) the person does not have the capacity to give an answer that can be understood to a question about the fact,

and that incapacity cannot be overcome.

Note. See sections 30 and 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.

(2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.

(3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.

(4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.

(5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person:

(a) that it is important to tell the truth, and

(b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs, and

(c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

(6) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.

(7) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.

(8) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience.

[4] Section 14 Compellability: reduced capacity

Omit "be capable of hearing or understanding, or of communicating replies to, questions on that matter" from section 14 (a).

Insert instead "have the capacity to understand a question about the matter or to give an answer that can be understood to a question about the matter".

[5] Section 18 Compellability of spouses and others in criminal proceedings generally

Omit "de facto spouse" from section 18 (2).

Insert instead "de facto partner".

[6] Section 20 Comment on failure to give evidence

Omit "de facto spouse" from section 20 (3) (a).

Insert instead "de facto partner".

[7] Section 20 (4) and (5) (b)

Omit "de facto spouse" wherever occurring. Insert instead "de facto partner".

[8] Section 21 Sworn evidence to be on oath or affirmation

Omit "section 13 (2)" from section 21 (2). Insert instead "section 13".

[9] Section 29 Manner and form of questioning witnesses and their responses

Omit section 29 (2). Insert instead:

(2) A court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence wholly or partly in narrative form.

[10] Sections 33 (2) (c) and 190 (2) (a)

Omit "lawyer" wherever occurring.

Insert instead "Australian legal practitioner or legal counsel".

[11] Section 37 Leading questions

Omit "a lawyer" from section 37 (1) (c).

Insert instead "an Australian legal practitioner, legal counsel or prosecutor".

[12] Section 41

Omit the section. Insert instead:

41 Improper questions

(1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a ***disallowable question***):

(a) is misleading or confusing, or

(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or

(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or

(d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

(2) Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:

(a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and

(b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject, and

(c) the context in which the question is put, including:

(i) the nature of the proceeding, and

(ii) in a criminal proceeding—the nature of the offence to which the proceeding relates, and

(iii) the relationship (if any) between the witness and any other party to the proceeding.

(3) A question is not a disallowable question merely because:

(a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness, or

(b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.

(4) A party may object to a question put to a witness on the ground that it is a disallowable question.

(5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.

(6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

Note. A person must not, without the express permission of a court, print or publish any question that the court has disallowed under this section—see section 195.

[13] Section 50 Proof of voluminous or complex documents

Omit section 50 (1). Insert instead:

(1) The court may, on the application of a party, direct that the party may adduce evidence of the contents of 2 or more documents in question in the form of a summary if the court is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question.

[14] Chapter 3, Introductory note

Omit "Part 3.11 gives courts discretions to exclude evidence".

Insert instead "Part 3.11 provides for the discretionary and mandatory exclusion of evidence".

[15] Chapter 3, Introductory note, diagram

Omit "Should a discretion to exclude the evidence be exercised?".

Insert instead "Should a discretion to exclude the evidence be exercised or must it be excluded?".

[16] Section 59 The hearsay rule—exclusion of hearsay evidence

Insert "it can reasonably be supposed that" after "a fact that" in section 59 (1).

[17] Section 59 (2A)

Insert after section 59 (2):

(2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

Note. Subsection (2A) was inserted as a response to the decision of the Supreme Court of NSW in *R v Hannes* (2000) 158 FLR 359.

[18] Section 59 (3), notes

Omit:

- business records (section 69)
- tags and labels (section 70)
- telecommunications (section 71)
- contemporaneous statements about a person's health etc (section 72)

Insert instead:

- contemporaneous statements about a person's health etc (section 66A)
- business records (section 69)
- tags and labels (section 70)
- electronic communications (section 71)
- Aboriginal and Torres Strait Islander traditional laws and customs (section 72)

[19] Section 60 Exception: evidence relevant for a non-hearsay purpose

Omit "the fact intended to be asserted by the representation".

Insert instead "an asserted fact".

[20] Section 60 (2) and (3)

Insert at the end of section 60:

(2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62 (2)).

Note. Subsection (2) was inserted as a response to the decision of the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594.

(3) However, this section does not apply in a criminal proceeding to evidence of an admission.

Note. The admission might still be admissible under section 81 as an exception to the hearsay rule if it is "first-hand" hearsay: see section 82.

[21] Section 61 Exceptions to the hearsay rule dependent on competency

Omit section 61 (1). Insert instead:

(1) This Part does not enable use of a previous representation to prove the existence of an asserted fact if, when the representation was made, the person who made it was not competent to give evidence about the fact because of section 13 (1).

[22] Section 61 (2), note

Omit "section 72". Insert instead "section 66A".

[23] Section 62 Restriction to "first-hand" hearsay

Insert after section 62 (2):

(3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the person's health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made.

[24] Section 64 Exception: civil proceedings if maker available

Omit "if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation." from section 64 (3).

[25] Section 65 Exception: criminal proceedings if maker not available

Omit "if the representation was:" from section 65 (2).

Insert instead "if the representation:".

[26] Section 65 (2) (a), (b) and (c)

Insert "was" before "made" wherever occurring.

[27] Section 65 (2) (d)

Omit the paragraph. Insert instead:

(d) was:

(i) against the interests of the person who made it at the time it was made, and

(ii) made in circumstances that make it likely that the representation is reliable.

[28] Section 66 Exception: criminal proceedings if maker available

Insert after section 66 (2):

(2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:

(a) the nature of the event concerned, and

(b) the age and health of the person, and

(c) the period of time between the occurrence of the asserted fact and the making of the representation.

Note. Subsection (2A) was inserted as a response to the decision of the High Court of Australia in *Graham v The Queen* (1998) 195 CLR 606.

[29] Section 66A

Insert after section 66:

66A Exception: contemporaneous statements about a person's health etc

The hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

[30] Section 71

Omit the section. Insert instead:

71 Exception: electronic communications

The hearsay rule does not apply to a representation contained in a document recording an electronic communication so far as the representation is a representation as to:

(a) the identity of the person from whom or on whose behalf the communication was sent, or

(b) the date on which or the time at which the communication was sent, or

(c) the destination of the communication or the identity of the person to whom the communication was addressed.

Notes.

1 Division 3 of Part 4.3 contains presumptions about electronic communications.

2 Section 182 of the Commonwealth Act gives section 71 of the Commonwealth Act a wider application in relation to Commonwealth records.

3 ***Electronic communication*** is defined in the Dictionary.

[31] Section 72

Omit the section. Insert instead:

72 Exception: Aboriginal and Torres Strait Islander traditional laws and customs

The hearsay rule does not apply to 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.

[32] Section 76 The opinion rule

Insert:

- Aboriginal and Torres Strait Islander traditional laws and customs (section 78A)

after:

- lay opinion (section 78)

[33] Section 78A

Insert after section 78:

78A Exception: Aboriginal and Torres Strait Islander traditional laws and customs

The opinion rule does not apply to 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.

[34] Section 79 Exception: opinions based on specialised knowledge

Insert at the end of the section:

(2) To avoid doubt, and without limiting subsection (1):

(a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse), and

(b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:

(i) the development and behaviour of children generally,

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

[35] Section 82 Exclusion of evidence of admissions that is not first-hand

Insert at the end of the section:

Note. Section 60 does not apply in a criminal proceeding to evidence of an admission.

[36] Section 85 Criminal proceedings: reliability of admissions by defendants

Omit section 85 (1). Insert instead:

(1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:

(a) 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, or

(b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

Note. Subsection (1) was inserted as a response to the decision of the High Court of Australia in *Kelly v The Queen* (2004) 218 CLR 216.

[37] Section 89 Evidence of silence

Omit "in the course of official questioning" from section 89 (1).

Insert instead "by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence".

[38] Section 97 The tendency rule

Omit section 97 (1). Insert instead:

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

[39] Section 98

Omit the section. Insert instead:

98 The coincidence rule

(1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

Note. One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

(2) Subsection (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note. Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

[40] Section 102

Omit the section. Insert instead:

Division 1 Credibility evidence

101A Credibility evidence

Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that:

(a) is relevant only because it affects the assessment of the credibility of the witness or person, or

(b) is relevant:

(i) because it affects the assessment of the credibility of the witness or person, and

(ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.

Notes.

1 Sections 60 and 77 will not affect the application of paragraph (b), because they cannot apply to evidence that is yet to be admitted.

2 Section 101A was inserted as a response to the decision of the High Court of Australia in *Adam v The Queen* (2001) 207 CLR 96.

Division 2 Credibility of witnesses

102 The credibility rule

Credibility evidence about a witness is not admissible.

Notes.

1 Specific exceptions to the credibility rule are as follows:

- evidence adduced in cross-examination (sections 103 and 104)
- evidence in rebuttal of denials (section 106)
- evidence to re-establish credibility (section 108)
- evidence of persons with specialised knowledge (section 108C)
- character of accused persons (section 110)

Other provisions of this Act, or of other laws, may operate as further exceptions.

2 Sections 108A and 108B deal with the admission of credibility evidence about a person who has made a previous representation but is not a witness.

[41] Section 103 Exception: cross-examination as to credibility

Omit "has substantial probative value" from section 103 (1).

Insert instead "could substantially affect the assessment of the credibility of the witness".

[42] Section 103 (2)

Omit "in deciding whether the evidence has substantial probative value".

Insert instead "for the purposes of subsection (1)".

[43] Section 104 Further protections: cross-examination as to credibility

Insert "to credibility evidence" after "applies only" in section 104 (1).

[44] Section 104 (2)

Omit "only because it is relevant to". Insert instead "to the assessment of".

[45] Section 104 (4)

Omit the subsection. Insert instead:

(4) Leave must not be given for cross-examination by the prosecutor under subsection (2) unless evidence adduced by the defendant has been admitted that:

(a) tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and

(b) is relevant solely or mainly to the witness's credibility.

[46] Section 104 (5)

Omit "subsection (4) (b)". Insert instead "subsection (4)".

[47] Section 106

Omit the section. Insert instead:

106 Exception: rebutting denials by other evidence

(1) The credibility rule does not apply to evidence that is relevant to a witness's credibility and that is adduced otherwise than from the witness if:

(a) in cross-examination of the witness:

(i) the substance of the evidence was put to the witness, and

(ii) the witness denied, or did not admit or agree to, the substance of the evidence, and

(b) the court gives leave to adduce the evidence.

(2) Leave under subsection (1) (b) is not required if the evidence tends to prove that the witness:

(a) is biased or has a motive for being untruthful, or

(b) has been convicted of an offence, including an offence against the law of a foreign country, or

(c) has made a prior inconsistent statement, or

(d) is, or was, unable to be aware of matters to which his or her evidence relates, or

(e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth.

[48] Part 3.7, Division 3, heading

Insert after section 108:

Division 3 Credibility of persons who are not witnesses

[49] Section 108A Admissibility of evidence of credibility of person who has made a previous representation

Omit section 108A (1). Insert instead:

(1) If:

(a) evidence of a previous representation has been admitted in a proceeding, and

(b) the person who made the representation has not been called, and will not be called, to give evidence in the proceeding,

credibility evidence about the person who made the representation is not admissible unless the evidence could substantially affect the assessment of the person's credibility.

[50] Section 108A (2)

Omit "in deciding whether the evidence has substantial probative value".

Insert instead "for the purposes of subsection (1)".

[51] Section 108B and Part 3.7, Division 4

Insert after section 108A:

108B Further protections: previous representations of an accused who is not a witness

(1) This section applies only in a criminal proceeding and so applies in addition to section 108A.

(2) If the person referred to in that section is a defendant, the credibility evidence is not admissible unless the court gives leave.

(3) Despite subsection (2), leave is not required if the evidence is about whether the defendant:

(a) is biased or has a motive to be untruthful, or

(b) is, or was, unable to be aware of or recall matters to which his or her previous representation relates, or

(c) has made a prior inconsistent statement.

(4) The prosecution must not be given leave under subsection (2) unless evidence adduced by the defendant has been admitted that:

(a) tends to prove that a witness called by the prosecution has a tendency to be untruthful, and

(b) is relevant solely or mainly to the witness's credibility.

(5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to:

(a) the events in relation to which the defendant is being prosecuted, or

(b) the investigation of the offence for which the defendant is being prosecuted.

(6) Another defendant must not be given leave under subsection (2) unless the previous representation of the defendant that has been admitted includes evidence adverse to the defendant seeking leave.

Division 4 Persons with specialised knowledge

108C Exception: evidence of persons with specialised knowledge

(1) The credibility rule does not apply to evidence given by a person concerning the credibility of another witness if:

(a) the person has specialised knowledge based on the person's training, study or experience, and

(b) the evidence is evidence of an opinion of the person that:

(i) is wholly or substantially based on that knowledge, and

(ii) could substantially affect the assessment of the credibility of the witness, and

(c) the court gives leave to adduce the evidence.

(2) To avoid doubt, and without limiting subsection (1):

(a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse), and

(b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of that kind, a reference to an opinion relating to either or both of the following:

(i) the development and behaviour of children generally,

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

[52] Section 112 Leave required to cross-examine about character of accused or co-accused

Omit "is not to be". Insert instead "must not be".

[53] Section 114 Exclusion of visual identification evidence

Omit "a lawyer" from section 114 (5) wherever occurring.

Insert instead "an Australian legal practitioner or legal counsel".

[54] Section 117 Definitions

Omit paragraph (a) from the definition of ***client*** in section 117 (1).

Insert instead:

(a) a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service),

[55] Section 117 (1), definition of "lawyer"

Omit the definition. Insert instead:

lawyer means:

(a) an Australian lawyer, and

(b) an Australian-registered foreign lawyer, and

(c) an overseas-registered foreign lawyer or a natural person who, under the law of a foreign country, is permitted to engage in legal practice in that country, and

(d) an employee or agent of a lawyer referred to in paragraph (a), (b) or (c).

[56] Section 118 Legal advice

Omit "client or a lawyer" from section 118 (c).

Insert instead "client, lawyer or another person".

[57] Section 122

Omit the section. Insert instead:

122 Loss of client legal privilege: consent and related matters

(1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.

(2) Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the

adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.

(3) Without limiting subsection (2), a client or party is taken to have so acted if:

(a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person, or

(b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.

(4) The reference in subsection (3) (a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time of the disclosure, an employee or agent of the client or party, or of a lawyer of the client or party, unless the employee or agent was authorised by the client, party or lawyer to make the disclosure.

(5) A client or party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence merely because:

(a) the substance of the evidence has been disclosed:

(i) in the course of making a confidential communication or preparing a confidential document, or

(ii) as a result of duress or deception, or

(iii) under compulsion of law, or

(iv) if the client or party is a body established by, or a person holding an office under, an Australian law—to the Minister, or the Minister of the Commonwealth, the State or Territory, administering the law, or part of the law, under which the body is established or the office is held, or

(b) of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person, or

(c) of a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.

(6) This Division does not prevent the adducing of evidence of a document that a witness has used to try to revive the witness's memory about a fact or opinion or has used as mentioned in

section 32 (Attempts to revive memory in court) or 33 (Evidence given by police officers).

[58] Part 3.10, Division 1A

Omit the note under the heading to the Division.

[59] Section 126A Definitions

Insert after the definition of ***protected confidence*** in section 126A (1):

Note. This definition differs from the corresponding definition in section 126A (1) of the Commonwealth Act, which is limited to communications to journalists.

[60] Section 126F Application of Division

Insert after section 126F (3):

Note. The Commonwealth Act does not include this subsection.

[61] Section 128

Omit the section. Insert instead:

128 Privilege in respect of self-incrimination in other proceedings

(1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness:

(a) has committed an offence against or arising under an Australian law or a law of a foreign country, or

(b) is liable to a civil penalty.

(2) The court must determine whether or not there are reasonable grounds for the objection.

(3) If the court determines that there are reasonable grounds for the objection, the court is to inform the witness:

(a) that the witness need not give the evidence unless required by the court to do so under subsection (4), and

(b) that the court will give a certificate under this section if:

(i) the witness willingly gives the evidence without being required to do so under subsection (4), or

(ii) the witness gives the evidence after being required to do so under subsection (4), and

(c) of the effect of such a certificate.

(4) The court may require the witness to give the evidence if the court is satisfied that:

(a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, and

(b) the interests of justice require that the witness give the evidence.

(5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the court must cause the witness to be given a certificate under this section in respect of the evidence.

(6) The court is also to cause a witness to be given a certificate under this section if:

(a) the objection has been overruled, and

(b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.

(7) In any proceeding in a NSW court or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence:

(a) evidence given by a person in respect of which a certificate under this section has been given, and

(b) any information, document or thing obtained as a direct or indirect consequence of the person having given evidence,

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

Note. This subsection differs from section 128 (7) of the Commonwealth Act. The Commonwealth provision refers to an "Australian Court" instead of a "NSW court".

(8) Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

(9) If a defendant in a criminal proceeding for an offence is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the defendant for the same offence or a trial of the defendant for an offence arising out of the same facts that gave rise to that offence.

(10) In a criminal proceeding, this section does not apply in relation to the giving of evidence by a defendant, being evidence that the defendant:

(a) did an act the doing of which is a fact in issue, or

(b) had a state of mind the existence of which is a fact in issue.

(11) A reference in this section to doing an act includes a reference to failing to act.

Notes.

1 Bodies corporate cannot claim this privilege. See section 187.

2 Clause 3 of Part 2 of the Dictionary sets out what is a civil penalty.

3 The Commonwealth Act includes subsections to give effect to certificates in relation to self-incriminating evidence under the NSW Act in proceedings in federal and ACT courts and in prosecutions for Commonwealth and ACT offences.

4 Subsections (8) and (9) were inserted as a response to the decision of the High Court of Australia in *Cornwell v The Queen* [2007] HCA 12 (22 March 2007).

[62] Section 128A

Insert after section 128:

128A Privilege in respect of self-incrimination—exception for certain orders etc

(1) In this section:

disclosure order means an order made by a NSW court in a civil proceeding requiring a person to disclose information as part of, or in connection with, a freezing, search or other order under Part 25 of the *Uniform Civil Procedure Rules 2005* but does not include an order made by a court under the *Proceeds of Crime Act 2002* of the Commonwealth or the *Confiscation of Proceeds of Crime Act 1989* or *Criminal Assets Recovery Act 1990* of New South Wales.

relevant person means a person to whom a disclosure order is directed.

(2) If a relevant person objects to complying with a disclosure order on the grounds that some or all of the information required to be disclosed may tend to prove that the person:

(a) has committed an offence against or arising under an Australian law or a law of a foreign country, or

(b) is liable to a civil penalty,

the person must:

(c) disclose so much of the information required to be disclosed to which no objection is taken, and

(d) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken (the ***privilege affidavit***) and deliver it to the court in a sealed envelope, and

(e) file and serve on each other party a separate affidavit setting out the basis of the objection.

(3) The sealed envelope containing the privilege affidavit must not be opened except as directed by the court.

(4) The court must determine whether or not there are reasonable grounds for the objection.

(5) Subject to subsection (6), if the court finds that there are reasonable grounds for the objection, the court must not require the information contained in the privilege affidavit to be disclosed and must return it to the relevant person.

(6) If the court is satisfied that:

(a) any information disclosed in the privilege affidavit may tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law, and

(b) the information does not tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, and

(c) the interests of justice require the information to be disclosed,

the court may make an order requiring the whole or any part of the privilege affidavit containing information of the kind referred to in paragraph (a) to be filed and served on the parties.

(7) If the whole or any part of the privilege affidavit is disclosed (including by order under subsection (6)), the court must cause the relevant person to be given a certificate in respect of the information referred to in subsection (6) (a).

(8) In any proceeding in a NSW court:

(a) evidence of information disclosed by a relevant person in respect of which a certificate has been given under this section, and

(b) evidence of any information, document or thing obtained as a direct result or indirect consequence of the relevant person having disclosed that information,

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence concerned.

(9) Subsection (8) does not prevent the use against the relevant person of any information disclosed by a document:

(a) that is an annexure or exhibit to a privilege affidavit prepared by the person in response to a disclosure order, and

(b) that was in existence before the order was made.

(10) Subsection (8) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

Note. Section 87 of the *Civil Procedure Act 2005* makes provision with respect to protection against self-incrimination in relation to certain matters to which this section does not apply.

[63] Section 131A

Insert before section 132:

131A Application of Division to preliminary proceedings of courts

(1) If:

(a) a person is required by a disclosure requirement to give information, or to produce a document, which would result in the disclosure of a communication, a document or its contents or other information of a kind referred to in Division 1, 1A or 3, and

(b) the person objects to giving that information or providing that document,

the court must determine the objection by applying the provisions of this Part (other than sections 123 and 128) with any necessary modifications as if the objection to giving information or producing the document were an objection to the giving or adducing of evidence.

(2) In this section, ***disclosure requirement*** means a process or order of a court that requires the disclosure of information or a document and includes the following:

(a) a summons or subpoena to produce documents or give evidence,

(b) pre-trial discovery,

(c) non-party discovery,

(d) interrogatories,

(e) a notice to produce,

(f) a request to produce a document under Division 1 of Part 4.6.

[64] Part 3.11, heading

Omit the heading. Insert instead:

Part 3.11 Discretionary and mandatory exclusions

[65] Section 139 Cautioning of persons

Omit "official questioning" from section 139 (2). Insert instead "questioning".

[66] Section 148 Evidence of certain acts of justices, Australian lawyers and notaries public

Omit "lawyer" where firstly occurring. Insert instead "Australian lawyer".

[67] Section 148 (a)

Omit "a lawyer". Insert instead "an Australian lawyer".

[68] Section 161

Omit the section. Insert instead:

161 Electronic communications

(1) If a document purports to contain a record of an electronic communication other than one referred to in section 162, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the communication:

(a) was sent or made in the form of electronic communication that appears from the document to have been the form by which it was sent or made, and

(b) was sent or made by or on behalf of the person by or on whose behalf it appears from the document to have been sent or made, and

(c) was sent or made on the day on which, at the time at which and from the place from which it appears from the document to have been sent or made, and

(d) was received at the destination to which it appears from the document to have been sent, and

(e) if it appears from the document that the sending of the communication concluded at a particular time—was received at that destination at that time.

(2) A provision of subsection (1) does not apply if:

(a) the proceeding relates to a contract, and

(b) all the parties to the proceeding are parties to the contract, and

(c) the provision is inconsistent with a term of the contract.

Note. Section 182 of the Commonwealth Act gives section 161 of the Commonwealth Act a wider application in relation to Commonwealth records.

[69] Part 4.5, heading

Insert "**and information**" after "**Warnings**".

[70] Section 165 Unreliable evidence

Omit "official questioning" from section 165 (1) (f).

Insert instead "questioning by an investigating official".

[71] Section 165 (6)

Omit the subsection. Insert instead:

(6) Subsection (2) does not permit a judge to warn or inform a jury in proceedings before it in which a child gives evidence that the reliability of the child's evidence may be affected by the age of the child. Any such warning or information may be given only in accordance with section 165A (2) and (3).

[72] Sections 165A and 165B

Omit the sections. Insert instead:

165A Warnings in relation to children's evidence

(1) A judge in any proceeding in which evidence is given by a child before a jury must not do any of the following:

(a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses,

(b) warn the jury, or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults,

(c) give a warning, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the age of the child,

(d) in the case of a criminal proceeding—give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a witness who is a child.

(2) Subsection (1) does not prevent the judge, at the request of a party, from:

(a) informing the jury that the evidence of the particular child may be unreliable and the reasons why it may be unreliable, and

(b) warning or informing the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it,

if the party has satisfied the court that there are circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence and that warrant the giving of a warning or the information.

(3) This section does not affect any other power of a judge to give a warning to, or to inform, the jury.

165B Delay in prosecution

(1) This section applies in a criminal proceeding in which there is a jury.

(2) 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.

(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.

(4) It is not necessary that a particular form of words be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, but the judge must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay.

(5) The judge must not warn or inform the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with this section, but this section does not affect any other power of the judge to give any warning to, or to inform, the jury.

(6) For the purposes of this section:

(a) delay includes delay between the alleged offence and its being reported, and

(b) significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay.

(7) For the purposes of this section, the factors that may be regarded as establishing a ***significant forensic disadvantage*** include, but are not limited to, the following:

(a) the fact that any potential witnesses have died or are not able to be located,

(b) the fact that any potential evidence has been lost or is otherwise unavailable.

[73] Section 184 Accused may admit matters and give consents

Omit ", if advised to do so by his or her lawyer".

[74] Section 184 (2)

Insert at the end of section 184:

(2) A defendant's admission or consent is not effective for the purposes of subsection (1) unless:

(a) the defendant has been advised to do so by his or her Australian legal practitioner or legal counsel, or

(b) the court is satisfied that the defendant understands the consequences of making the admission or giving the consent.

[75] Section 189 The voir dire

Omit "Section 128 (8)" from section 189 (6).

Insert instead "Section 128 (10)".

[76] Section 191 Agreements as to facts

Omit "lawyers" from section 191 (3) (a).

Insert instead "Australian legal practitioners, legal counsel or prosecutors".

[77] Section 192A

Insert after section 192:

192A Advance rulings and findings

Where a question arises in any proceedings, being a question about:

(a) the admissibility or use of evidence proposed to be adduced, or

(b) the operation of a provision of this Act or another law in relation to evidence proposed to be adduced, or

(c) the giving of leave, permission or direction under section 192,

the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings.

[78] Section 198

Insert after section 197:

198 Savings, transitional and other provisions

Schedule 2 has effect.

[79] Schedule 2

Insert after Schedule 1:

Schedule 2 Savings, transitional and other provisions

(Section 198)

Part 1 Preliminary

Note. The Commonwealth Act does not include an equivalent provision to Schedule 2. There are provisions to the same effect as Part 2 of Schedule 2 in the *Evidence (Transitional Provisions and Consequential Amendments) Act 1995* of the Commonwealth.

1 Regulations

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

this Act

Evidence on Commission Act 1995

Evidence Amendment Act 2007

(2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.

(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

(4) Regulations made as referred to in subclause (1) may have effect despite the terms of any savings or transitional provision contained in this Schedule, if the regulations so provide.

[80] Schedule 2

Insert after Part 2 (as to be inserted by Schedule 2.4):

Part 3 Provisions consequent on the enactment of the Evidence Amendment Act 2007

16 Definition

In this Part:

the amending Act means the *Evidence Amendment Act 2007*.

17 Proceedings already begun

(1) Subject to this Part, an amendment made to this Act by the amending Act does not apply in relation to proceedings the hearing of which began before the commencement of the amendment.

(2) This Act, as in force immediately before the commencement of the amendment, continues to apply in relation to proceedings the hearing of which began before that commencement.

18 Admissions

(1) The amendment made by the amending Act to section 85 does not apply in relation to admissions made before the commencement of the amendment.

(2) That section, as in force immediately before the commencement of the amendment, continues to apply in relation to admissions made before that commencement.

19 Failure or refusal to answer questions etc

(1) The amendment made by the amending Act to section 89 does not apply in relation to any failure or refusal, before the commencement of the amendment:

(a) to answer one or more questions, or

(b) to respond to a representation.

(2) That section, as in force immediately before the commencement of the amendment, continues to apply in relation to any such refusal or failure before that commencement.

20 Prior operation of notice provisions

If, before the commencement of an amendment made to section 97 or 98 by the amending Act, a notice of the kind referred to in section 97 or 98 is given:

(a) in the circumstances provided for in the section concerned, and

(b) in accordance with such requirements (if any) as would apply to the giving of the notice under that section after that commencement,

the notice is taken to have been given under that section as in force after that commencement.

21 Disclosure orders

Section 128A, as inserted by the amending Act, does not apply in relation to any order made before the commencement of that section.

22 Disclosure requirements

Section 131A, as inserted by the amending Act, does not apply in relation to any disclosure requirement made before the commencement of that section.

[81] Dictionary

Insert in alphabetical order in Part 1:

Australian lawyer has the meaning it has in the *Legal Profession Act 2004*.

Australian legal practitioner has the meaning it has in the *Legal Profession Act 2004*.

Australian practising certificate has the meaning it has in the *Legal Profession Act 2004*.

Australian-registered foreign lawyer has the meaning it has in the *Legal Profession Act 2004*.

legal counsel means an Australian lawyer employed in or by a government agency or other body who by law is exempted from holding an Australian practising certificate, or who does not require an Australian practising certificate, to engage in legal practice in the course of that employment.

Note. Examples of legal counsel are in-house counsel and government solicitors.

overseas-registered foreign lawyer has the meaning it has in Part 2.7 of the *Legal Profession Act 2004*.

[82] Dictionary, Part 1

Insert in alphabetical order:

credibility evidence is defined in section 101A.

[83] Dictionary, Part 1, definition of "de facto spouse"

Omit the definition. Insert instead:

de facto partner is defined in clause 11 of Part 2 of this Dictionary.

[84] Dictionary, Part 1

Insert in alphabetical order:

electronic communication has the same meaning as it has in the *Electronic Transactions Act 2000*.

[85] Dictionary, Part 1

Omit the definition of ***lawyer***.

[86] Dictionary, Part 1

Omit "(including such a court exercising federal jurisdiction)" from the definition of ***NSW court***.

[87] Dictionary, Part 1, definition of "official questioning"

Omit the definition.

[88] Dictionary, Part 1

Insert in alphabetical order:

prosecutor means a person who institutes or is responsible for the conduct of a prosecution.

[89] Dictionary, Part 1

Insert in alphabetical order:

traditional laws and customs of an Aboriginal or Torres Strait Islander group (including a kinship group) includes any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group.

[90] Dictionary, Part 2

Insert at the end of the Part:

11 References to de facto partners

(1) A reference in this Act to a de facto partner of a person is a reference to a person who is in a de facto relationship with the person.

(2) A person is in a de facto relationship with another person if the two persons have a relationship as a couple and are not legally married.

(3) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as are relevant in the circumstances of the particular case:

(a) the duration of the relationship,

(b) the nature and extent of their common residence,

(c) the degree of financial dependence or interdependence, and any arrangements for financial support, between them,

(d) the ownership, use and acquisition of their property,

(e) the degree of mutual commitment to a shared life,

(f) the care and support of children,

(g) the reputation and public aspects of the relationship.

(4) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether two persons have a relationship as a couple.

(5) For the purposes of subclause (3), the following matters are irrelevant:

(a) whether the persons are different sexes or the same sex,

(b) whether either of the persons is legally married to someone else or in another de facto relationship.

Schedule 2 Amendment of other Acts

(Section 4)

2.1 Civil Procedure Act 2005 No 28

Section 87 Protection against self-incrimination in relation to interlocutory matters

Insert after section 87 (2):

(2A) This section does not apply in circumstances in which section 128A of the *Evidence Act 1995* applies.

2.2 Coroners Act 1980 No 27

[1] Section 4 Definitions

Insert in alphabetical order in section 4 (1):

Australian law has the same meaning as it has in the *Evidence Act 1995*.

civil penalty has the same meaning as it has in the *Evidence Act 1995*.

[2] Section 33 Rules of procedure and evidence

Insert "against or arising under an Australian law or a law of a foreign country or which renders or tends to render the witness liable to a civil penalty" after "offence".

[3] Section 33AA

Omit the section. Insert instead:

33AA Privilege in respect of self-incrimination

(1) This section applies if a witness at an inquest or inquiry held by a coroner who is a Magistrate objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness:

(a) has committed an offence against or arising under an Australian law or a law of a foreign country, or

(b) is liable to a civil penalty.

(2) The coroner must determine whether or not there are reasonable grounds for the objection.

(3) If the coroner determines that there are reasonable grounds for the objection, the coroner is to inform the witness:

(a) that the witness need not give the evidence unless required by the coroner to do so under subsection (4), and

(b) that the coroner will give a certificate under this section if:

(i) the witness willingly gives the evidence without being required to do so under subsection (4), or

(ii) the witness gives the evidence after being required to do so under subsection (4), and

(c) of the effect of such a certificate.

(4) The coroner may require the witness to give the evidence if the coroner is satisfied that:

(a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, and

(b) the interests of justice require that the witness give the evidence.

(5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the coroner must cause the witness to be given a certificate under this section in respect of the evidence.

(6) The coroner is also to cause a witness to be given a certificate under this section if:

(a) the objection has been overruled, and

(b) after the evidence has been given, the coroner finds that there were reasonable grounds for the objection.

(7) In any proceeding in a NSW court within the meaning of the *Evidence Act 1995* or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence:

(a) evidence given by a person in respect of which a certificate under this section has been given, and

(b) any information, document or thing obtained as a direct or indirect consequence of the person having given evidence,

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

(8) Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

(9) A reference in this section to doing an act includes a reference to failing to act.

(10) A certificate under this section can only be given in respect of evidence that is required to be given by a natural person.

[4] Schedule 3 Savings and transitional provisions

Insert at the end of clause 1A (1):

Evidence Amendment Act 2007, but only to the extent that it amends this Act

[5] Schedule 3

Insert after clause 14:

15 Inquests and inquiries commenced before Evidence Amendment Act 2007

(1) In this clause:

amending Act means the *Evidence Amendment Act 2007*.

(2) Section 33, as amended by the amending Act, does not apply in respect of an inquest or inquiry commenced to be held before the amendment of that section by that Act.

(3) That section, as in force immediately before it was amended, continues to apply in respect of such an inquest or inquiry.

(4) Section 33AA, as substituted by the amending Act, does not apply in respect of an inquest or inquiry commenced to be held before the substitution of that section by that Act.

(5) Section 33AA, as in force immediately before that substitution, continues to apply in respect of such an inquest or inquiry.

2.3 Criminal Procedure Act 1986 No 209

[1] Section 275A Improper questions

Omit the section.

[2] Section 294 Warning to be given by Judge in relation to lack of complaint in certain sexual offence proceedings

Omit section 294 (3)–(5).

[3] Schedule 2 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Evidence Amendment Act 2007, to the extent that it amends this Act

[4] Schedule 2

Insert at the end of the Schedule (with appropriate Part and clause numbers):

Part Provisions consequent on enactment of Evidence Amendment Act 2007

Improper questions and certain warnings

(1) An amendment made to section 275A or 294 by the *Evidence Amendment Act 2007* does not apply in relation to any proceeding the hearing of which began before the commencement of the amendment.

(2) Sections 275A and 294, as in force immediately before the commencement of the amendment, continue to apply to proceedings the hearing of which began before that amendment.

2.4 Evidence (Consequential and Other Provisions) Act 1995 No 27

Schedule 2 Savings, transitional and other provisions

Omit the Schedule.

Transfer clauses 2–15 of the Schedule to the *Evidence Act 1995* as clauses 2–15 of Part 2 of Schedule 2 to that Act (as inserted by this Act) after the following heading and clause:

Part 2 Provisions consequent on the enactment of this Act

1A Transferred provisions

(1) This clause is taken to have commenced on 1 September 1995 (the date of commencement of this Act other than Part 1.1 and the Dictionary).

(2) This Part is a transferred provision to which section 30A of the *Interpretation Act 1987* applies.