

Passed by both Houses



New South Wales

Evidence Amendment Bill 2007

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2007*



New South Wales

Evidence Amendment Bill 2007

Act No , 2007

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.

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

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- (1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.
- (2) The *Evidence (Consequential and Other Provisions) Act 1995* is repealed on that day.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:

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- (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.

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- (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:

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- (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.
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- (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:

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- (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:

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- (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).

Evidence Amendment Bill 2007

Schedule 2 Amendment of other Acts

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