

**EVIDENCE (EVIDENCE ON COMMISSION)  
AMENDMENT ACT 1988 No. 64**

NEW SOUTH WALES



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**EVIDENCE (EVIDENCE ON COMMISSION) AMENDMENT ACT  
1988 No. 64**

NEW SOUTH WALES



**Act No. 64, 1988**

An Act to amend the Evidence Act 1898 in relation to the taking of evidence outside the State for the purposes of proceedings in the State and in relation to the taking of evidence in the State for the purposes of proceedings outside the State; and to amend the Crimes Act 1900 for an associated purpose.  
[Assented to 21 November 1988]

*Evidence (Evidence on Commission) Amendment 1988*

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**The Legislature of New South Wales enacts:**

**Short title**

1. This Act may be cited as the Evidence (Evidence on Commission) Amendment Act 1988.

**Commencement**

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

**Amendment of Evidence Act 1898 No. 11**

3. The Evidence Act 1898 is amended as set out in Schedule 1.

**Amendment of Crimes Act 1900 No. 40**

4. The Crimes Act 1900 is amended as set out in Schedule 2.

**Repeal of certain Imperial Acts**

5. (1) The following Imperial Acts are repealed in so far as they are part of the law of New South Wales:

The Foreign Tribunals Evidence Act 1856.

The Evidence by Commission Act 1859.

The Evidence by Commission Act 1885.

(2) Nothing in this section affects—

- (a) any application to any court or judge which is pending at the commencement of this section; or
- (b) any certificate given for the purposes of such an application; or
- (c) any power to make an order on such an application; or
- (d) the operation or enforcement of any order made on such an application.

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**SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898**

(Sec. 3)

(1) Section 1—

Omit the section, insert instead:

**Short title**

1. This Act may be cited as the Evidence Act 1898.

SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

(2) Parts 7, 8, 9—

Before the First Schedule, insert:

**PART 7—EXAMINATION OF WITNESSES ABROAD****Definitions**

64. In this Part—

“Australia” includes the Territories of the Commonwealth (whether internal or external) for the government of which as a Territory provision is made by any Commonwealth Act;

“examination” includes any proceeding for the taking of evidence of a person conducted by the judicial authorities of a foreign country in relation to a letter of request issued as a result of an order made by a court under this Part;

“inferior court” means a court of the State, except when exercising federal jurisdiction, not being the Supreme Court.

**Proceedings in the Supreme Court**

65. (1) In this section, “Supreme Court” means that Court except when exercising federal jurisdiction.

(2) In any civil or criminal proceeding before the Supreme Court, the Court may, in its discretion and where it appears in the interests of justice to do so, on the application of a party to the proceeding, make, in relation to a person outside Australia, an order—

- (a) for the examination of the person on oath or affirmation at any place outside Australia before a Judge of the Court, an officer of the Court or such other person as the Court may appoint;
- (b) for the issue of a commission for the examination of the person on oath or affirmation at any place outside Australia; or
- (c) for the issue of a letter of request to the judicial authorities of a foreign country to take, or to cause to be taken, the evidence of the person.

(3) In determining whether it is in the interests of justice to make an order under subsection (2) in relation to the taking of evidence of a person, the matters to which the Supreme Court shall have regard include the following:

- (a) whether the person is willing or able to come to the State to give evidence in the proceeding;
- (b) whether the person will be able to give evidence material to any issue to be tried in the proceeding;

SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

- (c) whether, having regard to the interests of the parties to the proceeding, justice will be better served by granting or refusing the order.
- (4) Where the Supreme Court makes an order under subsection (2) of the kind referred to in subsection (2) (a) or (b), the Court may, in its discretion, at the time of the making of the order or at a subsequent time, give such directions as it thinks just relating to the procedure to be followed in and in relation to the examination, including directions as to the time, place and manner of the examination, and to any other matter that the Court thinks relevant.
- (5) Where the Supreme Court makes, in relation to a proceeding, an order under subsection (2) of the kind referred to in subsection (2) (c) in relation to the taking of evidence of a person, the Court may, in its discretion, include in the order a request as to any matter relating to the taking of that evidence, including any of the following matters:
- (a) the examination, cross-examination or re-examination of the person, whether the evidence of the person is given orally, upon affidavit or otherwise;
  - (b) the attendance of the legal representative of each party to the proceeding and the participation of those persons in the examination in appropriate circumstances;
  - (c) any prescribed matter.
- (6) Subject to subsection (7), the Supreme Court may, on such terms, if any, as it thinks fit, permit a party to the proceeding to tender as evidence in the proceeding the evidence of a person taken in an examination held as a result of an order made under subsection (2) or a record of that evidence.
- (7) Evidence of a person so tendered is not admissible if—
- (a) it appears to the satisfaction of the Supreme Court at the hearing of the proceeding that the person is in the State and is able to attend the hearing; or
  - (b) the evidence would not have been admissible had it been given or produced at the hearing of the proceeding.
- (8) Where it is in the interests of justice to do so, the Supreme Court may, in its discretion, exclude from the proceeding evidence taken in an examination held as a result of an order made under subsection (2), notwithstanding that it is otherwise admissible.
- (9) In this section, a reference to evidence taken in an examination includes a reference to—
- (a) a document produced at the examination; and

SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

- (b) answers made, whether in writing, or orally and reduced to writing, to any written interrogatories presented at the examination.

**Proceedings in inferior courts**

66. (1) The Supreme Court may, in its discretion, on the application of a party to a civil or criminal proceeding before an inferior court, exercise the same power to make an order of the kind referred to in section 65 (2) for the purpose of that proceeding as the Supreme Court has under that subsection for the purpose of a proceeding in the Supreme Court.

(2) Subsections (6), (7) and (8) of section 65 apply in relation to evidence taken in an examination held as a result of an order made by the Supreme Court by virtue of this section in relation to an inferior court as if—

- (a) in subsections (6), (7) and (8)—
- (i) a reference to the proceeding were a reference to the proceeding in the inferior court; and
  - (ii) a reference to the Supreme Court were a reference to the inferior court; and
- (b) in subsections (6) and (8), a reference to an order made under subsection (2) were a reference to an order made by the Supreme Court by virtue of this section.

**Exclusion of evidence in criminal proceeding**

67. This Part does not affect the power of a court in a criminal proceeding to exclude evidence that has been obtained illegally or would, if admitted, operate unfairly against the defendant.

**Operation of other laws**

68. This Part is not intended to exclude or limit the operation of any law of the State, or of any rule or regulation made under, or in pursuance of, such a law, that makes provision for the examination of witnesses outside Australia for the purpose of a proceeding in the State.

**Regulations and rules of court**

69. (1) The Governor may make regulations, not inconsistent with this Part, for or with respect to any matter that by this Part is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Part and, in particular, for or with respect to the practice and procedure of the Supreme Court in proceedings for the making of an order under section 65 or 66.

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**SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued***

(2) The power to make rules under the Supreme Court Act 1970 regulating the practice and procedure of the Supreme Court extends, for the purpose of regulating proceedings brought under this Part in or before that Court, to making any rules, not inconsistent with this Part or with any regulations made under this section, prescribing all matters necessary or convenient to be prescribed for carrying out or giving effect to this Part and, in particular, for or with respect to the practice and procedure of the Supreme Court in proceedings for the making of an order under section 65 or 66.

(3) This section does not affect any power to make regulations or rules under any other law.

**PART 8—EXAMINATION OF WITNESSES OUTSIDE THE STATE BUT WITHIN AUSTRALIA**

**Application of this Part**

70. This Part does not apply to an examination outside Australia, and references in this Part to persons, acts, matters or things outside the State shall be read as excluding those outside Australia.

**Definitions**

71. In this Part—

“Australia” includes the Territories of the Commonwealth (whether internal or external) for the government of which as a Territory provision is made by any Commonwealth Act;

“examination” includes any proceeding for the taking of evidence of a person conducted by the judicial authorities of a place outside the State in relation to a letter of request issued as a result of an order made by a court under this Part;

“inferior court” means a court of the State, except when exercising federal jurisdiction, not being the Supreme Court;

“judicial authority”, in relation to a place outside the State, means a court or person prescribed as an appropriate judicial authority for that place.

**Proceedings in the Supreme Court**

72. (1) In this section, “Supreme Court” means that Court except when exercising federal jurisdiction.



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**SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued***

(2) In any civil or criminal proceeding before the Supreme Court, the Court may, in its discretion and where it appears in the interests of justice to do so, make, in relation to a person outside the State, an order—

- (a) for the examination of the person on oath or affirmation at any place outside the State before a Judge of the Court, an officer of the Court or such other person as the Court may appoint;
- (b) for the issue of a commission for the examination of the person on oath or affirmation at any place outside the State; or
- (c) for the issue of a letter of request to the judicial authorities of a place outside the State to take, or to cause to be taken, the evidence of the person.

(3) In determining whether it is in the interests of justice to make an order under subsection (2) in relation to the taking of evidence of a person, the matters to which the Supreme Court shall have regard include the following:

- (a) whether the person is willing or able to come to the State to give evidence in the proceeding;
- (b) whether the person will be able to give evidence material to any issue to be tried in the proceeding;
- (c) whether, having regard to the interests of the parties to the proceeding, justice will be better served by granting or refusing the order.

(4) Where the Supreme Court makes an order under subsection (2) of the kind referred to in subsection (2) (a) or (b), the Court may, in its discretion, at the time of the making of the order or at a subsequent time, give such directions as it thinks just relating to the procedure to be followed in and in relation to the examination, including directions as to the time, place and manner of the examination, and to any other matter that the Court thinks relevant.

(5) Where the Supreme Court makes, in relation to a proceeding, an order under subsection (2) of the kind referred to in subsection (2) (c) in relation to the taking of evidence of a person, the Court may, in its discretion, include in the order a request as to any matter relating to the taking of that evidence, including any of the following matters:

- (a) the examination, cross-examination or re-examination of the person, whether the evidence of the person is given orally, upon affidavit or otherwise;

SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

- (b) the attendance of the legal representative of each party to the proceeding and the participation of those persons in the examination in appropriate circumstances;
  - (c) any prescribed matter.
- (6) Subject to subsection (7), the Supreme Court may, on such terms, if any, as it thinks fit, permit a party to the proceeding to tender as evidence in the proceeding the evidence of a person taken in an examination held as a result of an order made under subsection (2) or a record of that evidence.
- (7) Evidence of a person so tendered is not admissible if—
- (a) it appears to the satisfaction of the Supreme Court at the hearing of the proceeding that the person is in the State and is able to attend the hearing; or
  - (b) the evidence would not have been admissible had it been given or produced at the hearing of the proceeding.
- (8) Where it is in the interests of justice to do so, the Supreme Court may, in its discretion, exclude from the proceeding evidence taken in an examination held as a result of an order made under subsection (2), notwithstanding that it is otherwise admissible.
- (9) In this section, a reference to evidence taken in an examination includes a reference to—
- (a) a document produced at the examination; and
  - (b) answers made, whether in writing, or orally and reduced to writing, to any written interrogatories presented at the examination.

**Proceedings in inferior courts**

73. (1) The Supreme Court may, in its discretion, on the application of a party to a civil or criminal proceeding before an inferior court, exercise the same power to make an order of the kind referred to in section 72 (2) for the purpose of that proceeding as the Supreme Court has under that subsection for the purpose of a proceeding in the Supreme Court.

(2) Subsections (6), (7) and (8) of section 72 apply in relation to evidence taken in an examination held as a result of an order made by the Supreme Court by virtue of this section in relation to an inferior court as if—

- (a) in subsections (6), (7) and (8)—
  - (i) a reference to the proceeding were a reference to the proceeding in the inferior court; and

SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

- (ii) a reference to the Supreme Court were a reference to the inferior court; and
- (b) in subsections (6) and (8), a reference to an order made under subsection (2) were a reference to an order made by the Supreme Court by virtue of this section.

**Exclusion of evidence in criminal proceeding**

74. This Part does not affect the power of a court in a criminal proceeding to exclude evidence that has been obtained illegally or would, if admitted, operate unfairly against the defendant.

**Operation of other laws**

75. This Part is not intended to exclude or limit the operation of any law of the State, or of any rule or regulation made under, or in pursuance of, such a law, that makes provision for the examination of witnesses outside the State for the purpose of a proceeding in the State.

**Regulations and rules of court**

76. (1) The Governor may make regulations, not inconsistent with this Part, for or with respect to any matter that by this Part is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Part and, in particular, for or with respect to the practice and procedure of the Supreme Court in proceedings for the making of an order under section 72 or 73.

(2) The power to make rules under the Supreme Court Act 1970 regulating the practice and procedure of the Supreme Court extends, for the purpose of regulating proceedings brought under this Part in or before that Court, to making any rules, not inconsistent with this Part or with any regulations made under this section, prescribing all matters necessary or convenient to be prescribed for carrying out or giving effect to this Part and, in particular, for or with respect to the practice and procedure of the Supreme Court in proceedings for the making of an order under section 72 or 73.

(3) This section does not affect any power to make regulations or rules under any other law.

**PART 9—TAKING OF EVIDENCE FOR FOREIGN AND AUSTRALIAN COURTS****Definitions**

77. In this Part—

SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

“Australia” includes the Territories of the Commonwealth (whether internal or external) for the government of which as a Territory provision is made by any Commonwealth Act;

“proceedings” means—

- (a) proceedings in any civil or commercial matter; or
- (b) proceedings in or before a court in relation to the commission of an offence or an alleged offence;

“property” includes any land, chattel or other corporeal property of any description;

“request” includes any commission, order or other process issued by or on behalf of a requesting court;

“requesting court” means a court or tribunal by or on whose behalf a request is issued, as referred to in section 78.

**Application to the Supreme Court for assistance in obtaining evidence for proceedings in other court**

78. (1) If an application is made to the Supreme Court for an order for evidence to be obtained in the State and the Supreme Court is satisfied—

- (a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal exercising jurisdiction in a place outside the State; and
- (b) that the evidence to which the application relates is to be obtained for the purposes of proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,

the following provisions of this Part apply.

(2) This Part does not apply in respect of proceedings relating to the commission of an offence or an alleged offence unless the requesting court is a court of a place in Australia or of New Zealand.

**Power of the Supreme Court to give effect to application for assistance**

79. (1) The Supreme Court has power, on any such application as is mentioned in section 78, by order to make such provision for obtaining evidence in the State as may appear to the Court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made.

(2) An order under this section may require a specified person to take such steps as the Court may consider appropriate for that purpose.

SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

(3) Without limiting the generality of subsections (1) and (2), an order under this section may, in particular, make provision—

- (a) for the examination of witnesses, either orally or in writing;
- (b) for the production of documents;
- (c) for the inspection, photographing, preservation, custody or detention of any property;
- (d) for the taking of samples of any property and the carrying out of any experiments on or with any property;
- (e) for the medical examination of any person;
- (f) without limiting paragraph (e), for the taking and testing of samples of blood from any person.

(4) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of proceedings in the Supreme Court (whether or not proceedings of the same description as those to which the application for the order relates).

(5) Subsection (4) does not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.

(6) An order under this section shall not require a person—

- (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in the person's possession, custody or power; or
- (b) to produce any documents other than particular documents specified in the order and appearing to the court making the order to be, or to be likely to be, in the person's possession, custody or power.

(7) A person who, by virtue of an order under this section, is required to attend at any place shall be entitled to the like conduct money and payment for expenses and loss of time on attendance as a witness in proceedings before the Supreme Court.

**Privilege of witnesses**

80. (1) A person shall not be compelled by virtue of an order under section 79 to give any evidence which the person could not be compelled to give—

- (a) in similar proceedings in the State; or

*Evidence (Evidence on Commission) Amendment 1988*

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SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

- (b) in similar proceedings in the place in which the requesting court exercises jurisdiction.
- (2) Subsection (1) (b) does not apply unless the claim of the person in question to be exempt from giving evidence is either—
  - (a) supported by a statement contained in the request (whether it is so supported unconditionally or subject to conditions that are fulfilled); or
  - (b) conceded by the applicant for the order.
- (3) Where such a claim by any person is not so supported or conceded, the person may (subject to the other provisions of this section) be required to give the evidence to which the claim relates, but that evidence shall not be transmitted to the requesting court if that court, on the matter being referred to it, upholds the claim.

(4) In this section, references to giving evidence include references to answering any question and to producing any document, and the reference in subsection (3) to the transmission of evidence given by a person shall be construed accordingly.

**Operation of other laws**

81. This Part is not intended to exclude or limit the operation of any law of the State that makes provision for the taking of evidence in the State for the purpose of a proceeding outside the State.

**Rules of court**

82. (1) The power to make rules under the Supreme Court Act 1970 extends to the making of rules for or with respect to—

- (a) the manner in which an application mentioned in section 78 is to be made;
  - (b) the circumstances in which an order can be made under section 79; and
  - (c) the manner in which any reference mentioned in section 80 (3) is to be made.
- (2) Any such rules may include such incidental, supplementary and consequential provisions as are necessary or convenient.
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**SCHEDULE 2—AMENDMENT OF CRIMES ACT 1900**

(Sec. 4)

## (1) Section 338—

After section 337, insert:

**False statements in evidence on commission**

338. If any person, in giving any testimony (either orally or in writing) otherwise than on oath, where required to do so by an order under section 79 of the Evidence Act 1898, makes a statement—

(a) which the person knows to be false in a material particular;  
or

(b) which is false in a material particular and which the person does not believe to be true,

the person is liable to imprisonment for 3 years.

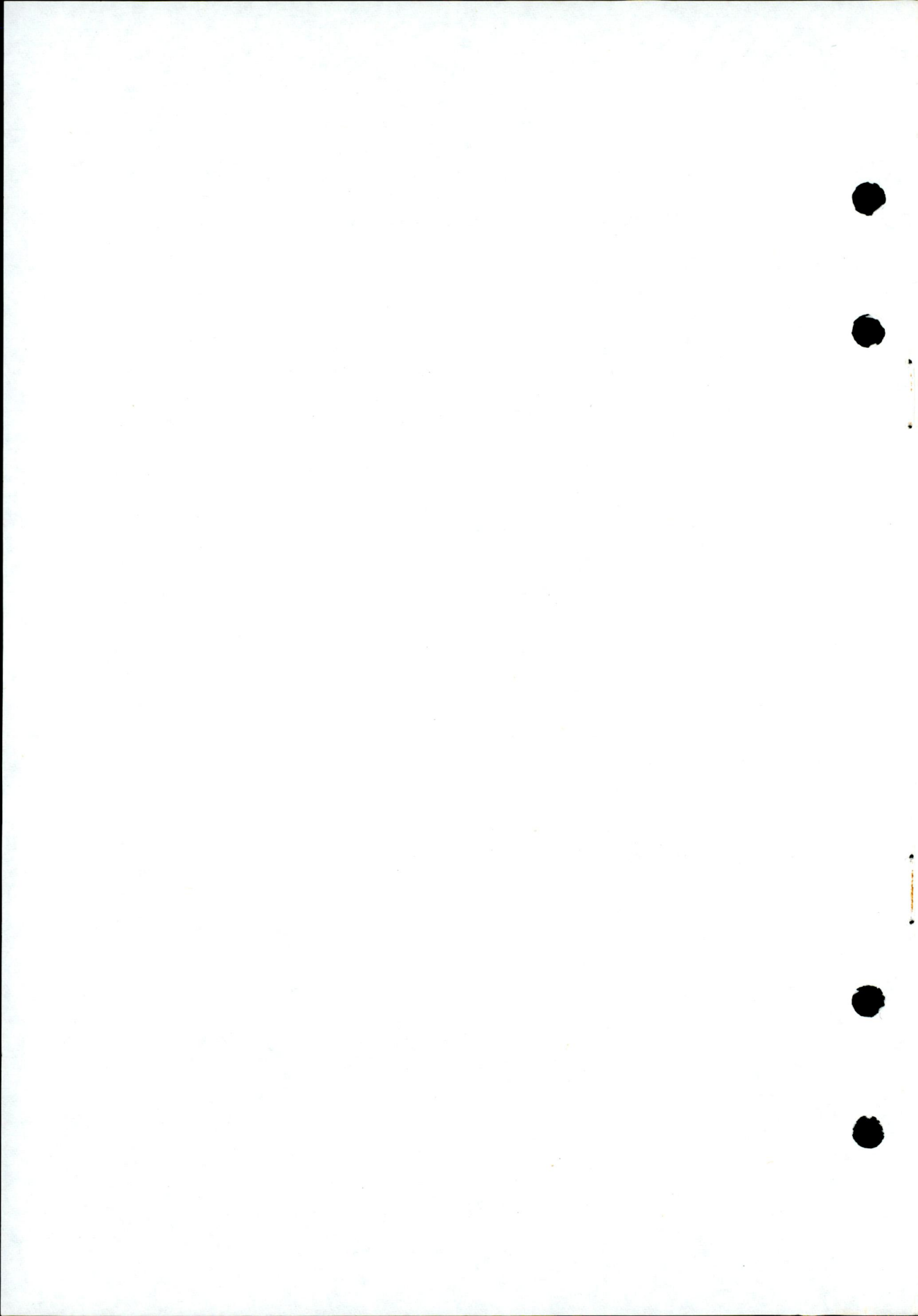
(2) Tenth Schedule (**Offences Punishable by the Supreme Court in its Summary Jurisdiction**)—

Paragraph (f) (i)—

After “330”, insert “, 338”.

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[*Minister's second reading speech made in—  
Legislative Assembly on 30 August 1988  
Legislative Council on 15 November 1988*]





**EVIDENCE (EVIDENCE ON COMMISSION)  
AMENDMENT BILL 1988**

NEW SOUTH WALES



**EXPLANATORY NOTE**

**(This Explanatory Note relates to this Bill as introduced into Parliament)**

The objects of this Bill are—

- (a) to amend the Evidence Act 1898, so as—
- to provide machinery for the examination of witnesses abroad, for the purposes of proceedings in the State; and
  - to provide machinery for the examination of witnesses outside the State but within Australia, for the purposes of proceedings in the State; and
  - to provide machinery for the examination of witnesses in the State, for the purposes of proceedings outside the State; and
- (b) to amend the Crimes Act 1900, to make it an offence for a witness to make a false statement when being examined in the State in accordance with that machinery; and
- (c) to repeal imperial legislation dealing with the taking of evidence for use in proceedings elsewhere.

The Bill is uniform with legislation introduced, or proposed to be introduced, in other States and Territories.

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**Clause 1** specifies the short title of the proposed Act.

**Clause 2** provides that the proposed Act is to commence on a proclaimed day or days.

**Clauses 3 and 4** are formal provisions giving effect to the Schedules of amendments.

**Clause 5** repeals imperial legislation dealing with the taking of evidence for use in proceedings elsewhere.

*Evidence (Evidence on Commission) Amendment 1988*

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**SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898**

Schedule 1 (1) substitutes section 1, for the purpose of removing the material showing how the Act is divided into Parts. Current practice is for details of the arrangement of an Act to be comprehensively set out in the Table of Provisions.

Schedule 1 (2) inserts three new Parts into the Act, as follows:

**Part 7—Examination of Witnesses Abroad**

The provisions of this Part (proposed sections 64–69) provide machinery for the examination of witnesses abroad, for the purposes of non-federal proceedings in the State.

These provisions are modelled on Part III B of the Evidence Act 1905 of the Commonwealth, as inserted by the Evidence Amendment Act 1985 No. 198. Part III B of that Act provides machinery for the examination of witnesses abroad, for the purposes of federal proceedings.

Proposed section 64 contains definitions used in the Part.

Proposed section 65 provides machinery for the Supreme Court to make orders for the examination of witnesses abroad for the purposes of civil or criminal proceedings in the Supreme Court. For this purpose, the Supreme Court is defined as that Court except when exercising federal jurisdiction.

Proposed section 66 provides similar machinery for the Supreme Court to make orders for the examination of witnesses abroad for the purposes of civil or criminal proceedings in other courts of the State (except when exercising federal jurisdiction).

Proposed section 67 states that the Part does not affect the discretion of a court in criminal proceedings to exclude illegally obtained evidence or evidence that would operate unfairly.

Proposed section 68 makes it clear that the provisions of the Part are additional to any other method of examining a witness.

Proposed section 69 authorises the making of regulations and rules of court for the purposes of the Part.

**Part 8—Examination of Witnesses outside the State but within Australia**

The provisions of this Part (proposed sections 70–76) provide machinery for the examination of witnesses outside the State but within Australia, for the purposes of non-federal proceedings in the State.

These provisions are modelled on those contained in the proposed Part 7, with suitable modifications.

Proposed section 70 provides that the Part does not apply to examinations outside Australia (proposed Part 7 provides for such examinations).

Proposed sections 71–76 correspond to proposed sections 64–69.

**Part 9—Taking of Evidence for Foreign and Australian Courts**

The provisions of this Part (proposed sections 77–82) provide machinery for the examination of witnesses in the State, for the purposes of proceedings outside the State.

The Part is modelled on model provisions proposed by the Commonwealth Secretariat (in the United Kingdom) for adoption in Commonwealth jurisdictions, in connection with the Hague Convention on the Taking of Evidence Abroad.

*Evidence (Evidence on Commission) Amendment 1988*

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Proposed section 77 contains definitions used in the Part.

Proposed section 78 provides for the making of an application by a court or tribunal (a "requesting court") outside the State for an order of the Supreme Court for the taking of evidence for use in proceedings before the requesting court. Section 78 (2) provides that evidence may not be taken for use in criminal proceedings outside Australia and New Zealand.

Proposed section 79 empowers the Supreme Court to make orders pursuant to such an application made by a requesting court. An order may provide for the examination of witnesses, the production of documents, the inspection etc. of property, the taking of samples, medical examinations, blood testing etc. However, proposed section 79 (4) stipulates that an order may not provide for anything to be done that could not be done by way of taking evidence for proceedings in the Supreme Court. Proposed section 79 (5) contemplates that evidence may be given otherwise than on oath, if the requesting court asks for this.

Proposed section 80 preserves privileges that a witness has in relation to the giving of evidence, whether the privilege is one arising in similar proceedings in the State or in the place where the requesting court exercises jurisdiction.

Proposed section 81 makes it clear that the provisions of the Part are additional to any other method of taking evidence in the State for external proceedings.

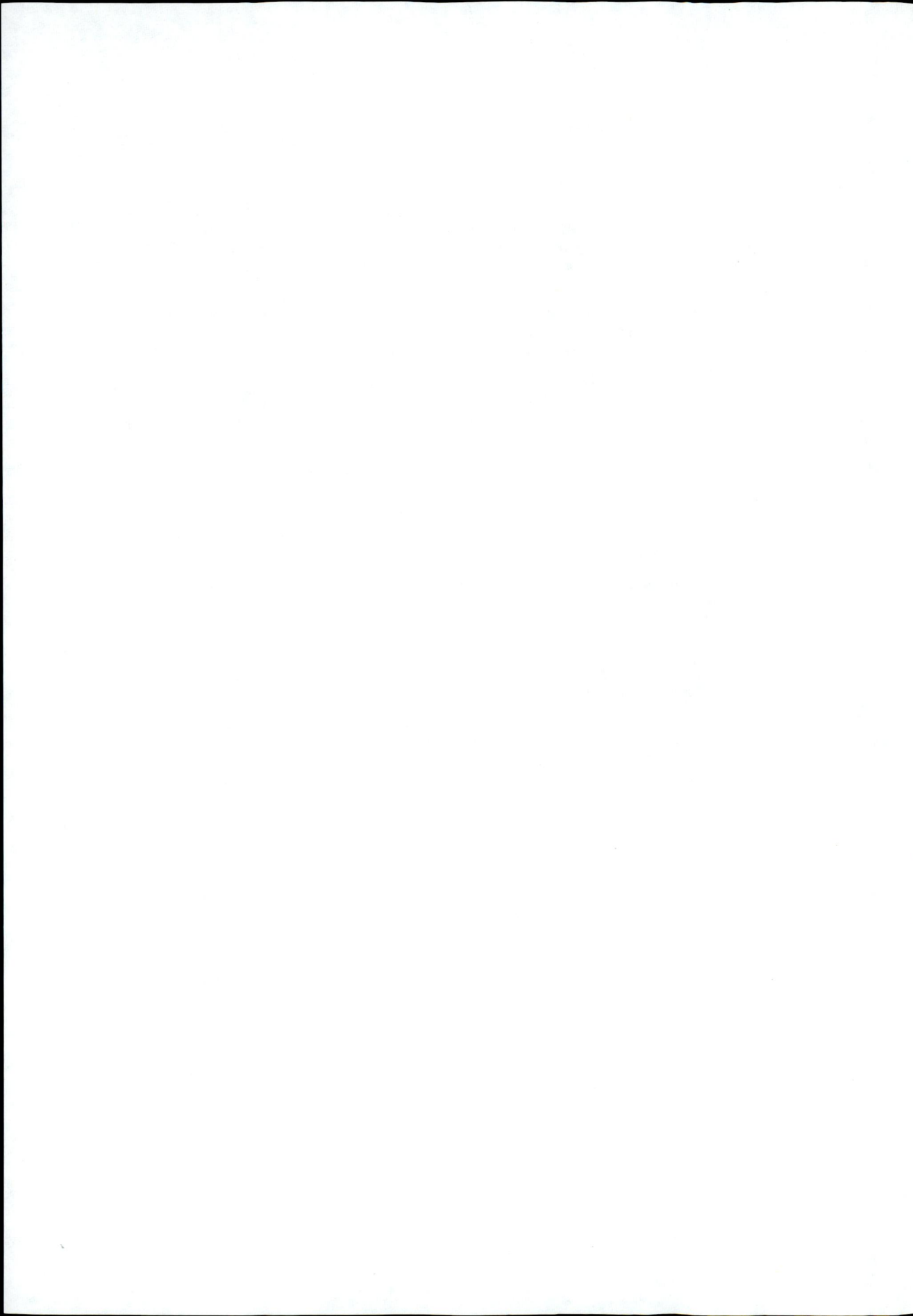
Proposed section 82 authorises the making of rules of court for the purposes of the proposed Part.

**SCHEDULE 2—AMENDMENT OF CRIMES ACT 1900**

Schedule 2 (1) inserts a new section 338, making it an offence to make a false statement when giving evidence (otherwise than on oath) under the proposed Part 9 of the Evidence Act 1898.

Schedule 2 (2) inserts a reference to the new section 338 into the Tenth Schedule. The result will be that proceedings for an offence against the section may be dealt with by the Supreme Court in its summary jurisdiction.

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# EVIDENCE (EVIDENCE ON COMMISSION) AMENDMENT BILL 1988

NEW SOUTH WALES



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**EVIDENCE (EVIDENCE ON COMMISSION)  
AMENDMENT BILL 1988**

NEW SOUTH WALES



No. , 1988

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**A BILL FOR**

An Act to amend the Evidence Act 1898 in relation to the taking of evidence outside the State for the purposes of proceedings in the State and in relation to the taking of evidence in the State for the purposes of proceedings outside the State; and to amend the Crimes Act 1900 for an associated purpose.

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*Evidence (Evidence on Commission) Amendment 1988*

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**The Legislature of New South Wales enacts:**

**Short title**

1. This Act may be cited as the Evidence (Evidence on Commission) Amendment Act 1988.

**5 Commencement**

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

**Amendment of Evidence Act 1898 No. 11**

3. The Evidence Act 1898 is amended as set out in Schedule 1.

**10 Amendment of Crimes Act 1900 No. 40**

4. The Crimes Act 1900 is amended as set out in Schedule 2.

**Repeal of certain Imperial Acts**

5. (1) The following Imperial Acts are repealed in so far as they are part of the law of New South Wales:

- 15     The Foreign Tribunals Evidence Act 1856.  
        The Evidence by Commission Act 1859.  
        The Evidence by Commission Act 1885.

(2) Nothing in this section affects—

- 20     (a) any application to any court or judge which is pending at the commencement of this section; or  
        (b) any certificate given for the purposes of such an application; or  
        (c) any power to make an order on such an application; or  
        (d) the operation or enforcement of any order made on such an application.

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**25           SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898**

(Sec. 3)

(1) Section 1—

Omit the section, insert instead:

**Short title**

- 30           1. This Act may be cited as the Evidence Act 1898.



SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

(2) Parts 7, 8, 9—

Before the First Schedule, insert:

**PART 7—EXAMINATION OF WITNESSES ABROAD**

**Definitions**

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64. In this Part—

“Australia” includes the Territories of the Commonwealth (whether internal or external) for the government of which as a Territory provision is made by any Commonwealth Act;

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“examination” includes any proceeding for the taking of evidence of a person conducted by the judicial authorities of a foreign country in relation to a letter of request issued as a result of an order made by a court under this Part;

“inferior court” means a court of the State, except when exercising federal jurisdiction, not being the Supreme Court.

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**Proceedings in the Supreme Court**

65. (1) In this section, “Supreme Court” means that Court except when exercising federal jurisdiction.

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(2) In any civil or criminal proceeding before the Supreme Court, the Court may, in its discretion and where it appears in the interests of justice to do so, on the application of a party to the proceeding, make, in relation to a person outside Australia, an order—

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(a) for the examination of the person on oath or affirmation at any place outside Australia before a Judge of the Court, an officer of the Court or such other person as the Court may appoint;

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(b) for the issue of a commission for the examination of the person on oath or affirmation at any place outside Australia; or

(c) for the issue of a letter of request to the judicial authorities of a foreign country to take, or to cause to be taken, the evidence of the person.

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(3) In determining whether it is in the interests of justice to make an order under subsection (2) in relation to the taking of evidence of a person, the matters to which the Supreme Court shall have regard include the following:

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(a) whether the person is willing or able to come to the State to give evidence in the proceeding;

(b) whether the person will be able to give evidence material to any issue to be tried in the proceeding;

SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

(c) whether, having regard to the interests of the parties to the proceeding, justice will be better served by granting or refusing the order.

5 (4) Where the Supreme Court makes an order under subsection (2) of the kind referred to in subsection (2) (a) or (b), the Court may, in its discretion, at the time of the making of the order or at a subsequent time, give such directions as it thinks just relating to the procedure to be followed in and in relation to the examination, including directions as to the time, place and manner of the examination, and to any other matter that the Court thinks relevant.

10 (5) Where the Supreme Court makes, in relation to a proceeding, an order under subsection (2) of the kind referred to in subsection (2) (c) in relation to the taking of evidence of a person, the Court may, in its discretion, include in the order a request as to any matter relating to the taking of that evidence, including any of the following matters:

- 15 (a) the examination, cross-examination or re-examination of the person, whether the evidence of the person is given orally, upon affidavit or otherwise;
- 20 (b) the attendance of the legal representative of each party to the proceeding and the participation of those persons in the examination in appropriate circumstances;
- 25 (c) any prescribed matter.

(6) Subject to subsection (7), the Supreme Court may, on such terms, if any, as it thinks fit, permit a party to the proceeding to tender as evidence in the proceeding the evidence of a person taken in an examination held as a result of an order made under subsection (2) or a record of that evidence.

30 (7) Evidence of a person so tendered is not admissible if—

- (a) it appears to the satisfaction of the Supreme Court at the hearing of the proceeding that the person is in the State and is able to attend the hearing; or
- 35 (b) the evidence would not have been admissible had it been given or produced at the hearing of the proceeding.

(8) Where it is in the interests of justice to do so, the Supreme Court may, in its discretion, exclude from the proceeding evidence taken in an examination held as a result of an order made under subsection (2), notwithstanding that it is otherwise admissible.

40 (9) In this section, a reference to evidence taken in an examination includes a reference to—

- (a) a document produced at the examination; and

SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

- (b) answers made, whether in writing, or orally and reduced to writing, to any written interrogatories presented at the examination.

**Proceedings in inferior courts**

5           66. (1) The Supreme Court may, in its discretion, on the application of a party to a civil or criminal proceeding before an inferior court, exercise the same power to make an order of the kind referred to in section 65 (2) for the purpose of that proceeding as the Supreme Court has under that subsection for  
10           the purpose of a proceeding in the Supreme Court.

(2) Subsections (6), (7) and (8) of section 65 apply in relation to evidence taken in an examination held as a result of an order made by the Supreme Court by virtue of this section in relation to an inferior court as if—

- 15           (a) in subsections (6), (7) and (8)—
- (i) a reference to the proceeding were a reference to the proceeding in the inferior court; and
- (ii) a reference to the Supreme Court were a reference to the inferior court; and
- 20           (b) in subsections (6) and (8), a reference to an order made under subsection (2) were a reference to an order made by the Supreme Court by virtue of this section.

**Exclusion of evidence in criminal proceeding**

25           67. This Part does not affect the power of a court in a criminal proceeding to exclude evidence that has been obtained illegally or would, if admitted, operate unfairly against the defendant.

**Operation of other laws**

30           68. This Part is not intended to exclude or limit the operation of any law of the State, or of any rule or regulation made under, or in pursuance of, such a law, that makes provision for the examination of witnesses outside Australia for the purpose of a proceeding in the State.

**Regulations and rules of court**

35           69. (1) The Governor may make regulations, not inconsistent with this Part, for or with respect to any matter that by this Part is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Part and, in particular, for or with respect to the practice and procedure of the Supreme Court in proceedings for the making of  
40           an order under section 65 or 66.

SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

(2) The power to make rules under the Supreme Court Act 1970 regulating the practice and procedure of the Supreme Court extends, for the purpose of regulating proceedings brought under this Part in or before that Court, to making any rules, not inconsistent with this Part or with any regulations made under this section, prescribing all matters necessary or convenient to be prescribed for carrying out or giving effect to this Part and, in particular, for or with respect to the practice and procedure of the Supreme Court in proceedings for the making of an order under section 65 or 66.

(3) This section does not affect any power to make regulations or rules under any other law.

**PART 8—EXAMINATION OF WITNESSES OUTSIDE THE STATE BUT WITHIN AUSTRALIA**

**Application of this Part**

70. This Part does not apply to an examination outside Australia, and references in this Part to persons, acts, matters or things outside the State shall be read as excluding those outside Australia.

**Definitions**

71. In this Part—

“Australia” includes the Territories of the Commonwealth (whether internal or external) for the government of which as a Territory provision is made by any Commonwealth Act;

“examination” includes any proceeding for the taking of evidence of a person conducted by the judicial authorities of a place outside the State in relation to a letter of request issued as a result of an order made by a court under this Part;

“inferior court” means a court of the State, except when exercising federal jurisdiction, not being the Supreme Court;

“judicial authority”, in relation to a place outside the State, means a court or person prescribed as an appropriate judicial authority for that place.

**Proceedings in the Supreme Court**

72. (1) In this section, “Supreme Court” means that Court except when exercising federal jurisdiction.

SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

(2) In any civil or criminal proceeding before the Supreme Court, the Court may, in its discretion and where it appears in the interests of justice to do so, make, in relation to a person outside the State, an order—

- 5           (a) for the examination of the person on oath or affirmation at any place outside the State before a Judge of the Court, an officer of the Court or such other person as the Court may appoint;
- 10          (b) for the issue of a commission for the examination of the person on oath or affirmation at any place outside the State; or
- (c) for the issue of a letter of request to the judicial authorities of a place outside the State to take, or to cause to be taken, the evidence of the person.

15          (3) In determining whether it is in the interests of justice to make an order under subsection (2) in relation to the taking of evidence of a person, the matters to which the Supreme Court shall have regard include the following:

- 20           (a) whether the person is willing or able to come to the State to give evidence in the proceeding;
- (b) whether the person will be able to give evidence material to any issue to be tried in the proceeding;
- 25           (c) whether, having regard to the interests of the parties to the proceeding, justice will be better served by granting or refusing the order.

            (4) Where the Supreme Court makes an order under subsection (2) of the kind referred to in subsection (2) (a) or (b), the Court may, in its discretion, at the time of the making of the order or at a subsequent time, give such directions as it thinks just relating to the procedure to be followed in and in relation to the examination, including directions as to the time, place and manner of the examination, and to any other matter that the Court thinks relevant.

30           (5) Where the Supreme Court makes, in relation to a proceeding, an order under subsection (2) of the kind referred to in subsection (2) (c) in relation to the taking of evidence of a person, the Court may, in its discretion, include in the order a request as to any matter relating to the taking of that evidence, including any of the following matters:

- 35           (a) the examination, cross-examination or re-examination of the person, whether the evidence of the person is given orally, upon affidavit or otherwise;
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SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

(b) the attendance of the legal representative of each party to the proceeding and the participation of those persons in the examination in appropriate circumstances;

(c) any prescribed matter.

5 (6) Subject to subsection (7), the Supreme Court may, on such terms, if any, as it thinks fit, permit a party to the proceeding to tender as evidence in the proceeding the evidence of a person taken in an examination held as a result of an order made under subsection (2) or a record of that evidence.

10 (7) Evidence of a person so tendered is not admissible if—

(a) it appears to the satisfaction of the Supreme Court at the hearing of the proceeding that the person is in the State and is able to attend the hearing; or

15 (b) the evidence would not have been admissible had it been given or produced at the hearing of the proceeding.

(8) Where it is in the interests of justice to do so, the Supreme Court may, in its discretion, exclude from the proceeding evidence taken in an examination held as a result of an order made under subsection (2), notwithstanding that it is otherwise admissible.

20 (9) In this section, a reference to evidence taken in an examination includes a reference to—

(a) a document produced at the examination; and

25 (b) answers made, whether in writing, or orally and reduced to writing, to any written interrogatories presented at the examination.

**Proceedings in inferior courts**

30 73. (1) The Supreme Court may, in its discretion, on the application of a party to a civil or criminal proceeding before an inferior court, exercise the same power to make an order of the kind referred to in section 72 (2) for the purpose of that proceeding as the Supreme Court has under that subsection for the purpose of a proceeding in the Supreme Court.

35 (2) Subsections (6), (7) and (8) of section 72 apply in relation to evidence taken in an examination held as a result of an order made by the Supreme Court by virtue of this section in relation to an inferior court as if—

(a) in subsections (6), (7) and (8)—

(i) a reference to the proceeding were a reference to the proceeding in the inferior court; and

SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

(ii) a reference to the Supreme Court were a reference to the inferior court; and

(b) in subsections (6) and (8), a reference to an order made under subsection (2) were a reference to an order made by the Supreme Court by virtue of this section.

**Exclusion of evidence in criminal proceeding**

74. This Part does not affect the power of a court in a criminal proceeding to exclude evidence that has been obtained illegally or would, if admitted, operate unfairly against the defendant.

**Operation of other laws**

75. This Part is not intended to exclude or limit the operation of any law of the State, or of any rule or regulation made under, or in pursuance of, such a law, that makes provision for the examination of witnesses outside the State for the purpose of a proceeding in the State.

**Regulations and rules of court**

76. (1) The Governor may make regulations, not inconsistent with this Part, for or with respect to any matter that by this Part is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Part and, in particular, for or with respect to the practice and procedure of the Supreme Court in proceedings for the making of an order under section 72 or 73.

(2) The power to make rules under the Supreme Court Act 1970 regulating the practice and procedure of the Supreme Court extends, for the purpose of regulating proceedings brought under this Part in or before that Court, to making any rules, not inconsistent with this Part or with any regulations made under this section, prescribing all matters necessary or convenient to be prescribed for carrying out or giving effect to this Part and, in particular, for or with respect to the practice and procedure of the Supreme Court in proceedings for the making of an order under section 72 or 73.

(3) This section does not affect any power to make regulations or rules under any other law.

**PART 9—TAKING OF EVIDENCE FOR FOREIGN AND AUSTRALIAN COURTS****Definitions**

77. In this Part—

SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

“Australia” includes the Territories of the Commonwealth (whether internal or external) for the government of which as a Territory provision is made by any Commonwealth Act;

“proceedings” means—

- 5 (a) proceedings in any civil or commercial matter; or  
 (b) proceedings in or before a court in relation to the commission of an offence or an alleged offence;

“property” includes any land, chattel or other corporeal property of any description;

10 “request” includes any commission, order or other process issued by or on behalf of a requesting court;

“requesting court” means a court or tribunal by or on whose behalf a request is issued, as referred to in section 78.

15 **Application to the Supreme Court for assistance in obtaining evidence for proceedings in other court**

78. (1) If an application is made to the Supreme Court for an order for evidence to be obtained in the State and the Supreme Court is satisfied—

- 20 (a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal exercising jurisdiction in a place outside the State; and  
 (b) that the evidence to which the application relates is to be obtained for the purposes of proceedings which either have been instituted before the requesting court or whose  
 25 institution before that court is contemplated,

the following provisions of this Part apply.

(2) This Part does not apply in respect of proceedings relating to the commission of an offence or an alleged offence unless the requesting court is a court of a place in Australia or of New Zealand.

30 **Power of the Supreme Court to give effect to application for assistance**

79. (1) The Supreme Court has power, on any such application as is mentioned in section 78, by order to make such provision for obtaining evidence in the State as may appear to the Court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made.

(2) An order under this section may require a specified person to take such steps as the Court may consider appropriate for that purpose.



SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

(3) Without limiting the generality of subsections (1) and (2), an order under this section may, in particular, make provision—

- (a) for the examination of witnesses, either orally or in writing;
- 5 (b) for the production of documents;
- (c) for the inspection, photographing, preservation, custody or detention of any property;
- (d) for the taking of samples of any property and the carrying out of any experiments on or with any property;
- 10 (e) for the medical examination of any person;
- (f) without limiting paragraph (e), for the taking and testing of samples of blood from any person.

(4) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of proceedings in the Supreme Court (whether or not proceedings of the same description as those to which the application for the order relates).

(5) Subsection (4) does not preclude the making of an order requiring a person to give testimony (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.

- (6) An order under this section shall not require a person—
- 25 (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in the person's possession, custody or power; or
- (b) to produce any documents other than particular documents specified in the order and appearing to the court making the order to be, or to be likely to be, in the person's
- 30 possession, custody or power.

(7) A person who, by virtue of an order under this section, is required to attend at any place shall be entitled to the like conduct money and payment for expenses and loss of time on attendance as a witness in proceedings before the Supreme Court.

35 **Privilege of witnesses**

80. (1) A person shall not be compelled by virtue of an order under section 79 to give any evidence which the person could not be compelled to give—

- (a) in similar proceedings in the State; or

SCHEDULE 1—AMENDMENT OF EVIDENCE ACT 1898—*continued*

(b) in similar proceedings in the place in which the requesting court exercises jurisdiction.

(2) Subsection (1) (b) does not apply unless the claim of the person in question to be exempt from giving evidence is either—

(a) supported by a statement contained in the request (whether it is so supported unconditionally or subject to conditions that are fulfilled); or

(b) conceded by the applicant for the order.

(3) Where such a claim by any person is not so supported or conceded, the person may (subject to the other provisions of this section) be required to give the evidence to which the claim relates, but that evidence shall not be transmitted to the requesting court if that court, on the matter being referred to it, upholds the claim.

(4) In this section, references to giving evidence include references to answering any question and to producing any document, and the reference in subsection (3) to the transmission of evidence given by a person shall be construed accordingly.

**Operation of other laws**

81. This Part is not intended to exclude or limit the operation of any law of the State that makes provision for the taking of evidence in the State for the purpose of a proceeding outside the State.

**Rules of court**

82. (1) The power to make rules under the Supreme Court Act 1970 extends to the making of rules for or with respect to—

(a) the manner in which an application mentioned in section 78 is to be made;

(b) the circumstances in which an order can be made under section 79; and

(c) the manner in which any reference mentioned in section 80 (3) is to be made.

(2) Any such rules may include such incidental, supplementary and consequential provisions as are necessary or convenient.

**SCHEDULE 2—AMENDMENT OF CRIMES ACT 1900**

(Sec. 4)

## (1) Section 338—

After section 337, insert:

5 **False statements in evidence on commission**

338. If any person, in giving any testimony (either orally or in writing) otherwise than on oath, where required to do so by an order under section 79 of the Evidence Act 1898, makes a statement—

10 (a) which the person knows to be false in a material particular;  
or

(b) which is false in a material particular and which the person does not believe to be true,

the person is liable to imprisonment for 3 years.

15 (2) Tenth Schedule (**Offences Punishable by the Supreme Court in its Summary Jurisdiction**)—

Paragraph (f) (i)—

After “330”, insert “, 338”.

