FIRST PRINT

EVIDENCE BILL 1991

NEW SOUTH WALES

EXPLANATORY NOTE

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

The objects of this Bill are to reform and provide a comprehensive statement of the law of evidence to be applied in State courts and in certain other legal and administrative proceedings. For those purposes it will replace the Evidence Act 1898 and the Evidence (Reproductions) Act 1967 and exclude the operation of most principles and rules of the common law and equity in relation to the law of evidence.

This Bill includes provisions dealing with:

competency and compellability of witnesses
oaths and affirmations
examination and cross-examination of witnesses
rules governing the admissibility of evidence
standards of proof
judicial notice
proof of documents and other things
safeguards to protect parties
evidence on commission

This Bill implements the majority of the recommendations of the Australian Law Reform Commission (the "ALRC") as summarised in its Report titled "Evidence" on the laws of evidence in Federal and Territory Courts of 1987 (ALRC 38). It is based on the Bill contained in Appendix A to that Report (the "ALRC Bill") and the equivalent clause (if any) of the ALRC Bill to a clause of this Bill is indicated in the heading to the clause of this Bill. Areas where the ALRC recommendations have been significantly modified are described below.

The Bill is divided into Chapters, Parts and Divisions.

CHAPTER 1—PRELIMINARY

Chapter 1 (cll. 1–3) contains provisions relating to the citation and commencement of the proposed Act. Instead of a section containing definitions, a list of defined terms and expressions used in the Act is contained in proposed section 3. The definitions are contained in the Dictionary set out in proposed Schedule 1.

CHAPTER 2—APPLICATION OF ACT

Chapter 2 (cll. 4–9) sets out the circumstances in which the proposed Act will apply.

Clause 4 provides for the proposed Act to apply to proceedings in all courts and tribunals bound by the rules of evidence (including sentencing hearings). "Proceeding" is defined to include a proceeding relating to bail or sentencing, a proceeding heard in chambers and an interlocutory proceeding of a like kind. Transitional provision is made so that the provisions of the proposed Act will not apply to proceedings the hearing of which commenced before the commencement of the provision or to acts done before the commencement in relation to evidence to be received in a proceeding.

The proposed Act will be wider in scope than the Bill proposed by the ALRC which applies to a proceeding in a federal court and in courts of the Territories other than the Northern Territory and which does not apply to sentencing.

Clause 5 provides for the proposed Act to bind the Crown.

Clause 6 ensures that the proposed Act will not affect the operation of other Acts and subordinate instruments making provision in relation to evidentiary matters.

Clause 7 provides that the proposed Act will (with some exceptions) apply to the exclusion of the operation of the principles of the rules of the common law and of equity.

The proposed clause differs from clause 14 of the ALRC Bill in that it omits matter dealing with the application of the Judiciary Act 1903 as this is peculiar to the federal jurisdiction.

Clause 8 provides that the rules for admissibility of evidence set out in the proposed Act are not to affect the law relating to Parliamentary privilege.

Clause 9 preserves, subject to the proposed Act, the general power of courts to control proceedings before them.

Clause 9 (2) is an addition to clause 17 of the ALRC Bill. It expressly preserves the power of courts to use the rules of evidence as a sanction against abuse of process.

In making its recommendations, the ALRC acknowledged the difficulty of drawing a boundary between the rules of evidence and the rules of procedure (Interim Report on Evidence No. 26, vol. 1, para 41). It drew a strict distinction between the rules of evidence and the rules of procedure and accordingly did not cover a number of procedural aspects (for example, ordering witnesses to leave court) which are included in this Bill.

Clause 9 (2) is an adjunct to some of the additional provisions included in this Bill.

CHAPTER 3—WITNESSES

Division 1—Sworn and unsworn evidence

Clause 10 requires witnesses to take an oath or make an affirmation before giving sworn evidence.

Clause 11 requires interpreters to take an oath or make an affirmation.

The forms of oaths and affirmations required are set out in Schedule 2 to the proposed Act.

Clauses 10 and 11 and Schedule 2 expand the forms of oaths and affirmations contained in the ALRC Bill so as to recognise that some religions forbid swearing (while still recognising the concept of making a promise before a deity) and others may have multiple deities.

Clause 10 contains no equivalent to clause 26 (6) of the ALRC Bill. Accordingly, a person who is called merely to produce a document or object to the court will be required in this State to take an oath or make an affirmation.

Clause 12 provides that a religious oath is effective even if the person who takes it does not have a religious belief.

Clauses 13 and 14 describe the limitations on and effect of exercising the right to make a dock statement (under section 405 of the Crimes Act 1900) in criminal proceedings.

The provisions are similar to clauses 27–29 of the ALRC Bill to the extent that they retain the right to make a dock statement and provide rules governing the manner in which it is made. The dock statement is treated as evidence and as such is to be subject to the rules of admissibility, including discretions to exclude evidence (clauses 121–124 of the proposed Act).

The provisions differ from the ALRC provisions in certain ways intended to retain the dock statement as a meaningful testimonial alternative for the defendant:

Leave is not required to testify if a dock statement has already been given (cf. clause 27 (2) of the ALRC Bill).

The ability of any party or witness to comment on or refer to the defendant's choice of action has been removed (cf. clause 28 of the ALRC Bill).

A judge's ability to comment has been limited to those circumstances where the jury requests information or where a party or witness has (contrary to the proposed provisions) adverted to the issue.

A judge must forbid any speculation as to why a defendant has chosen a particular testimonial action.

There is no equivalent of the ALRC provisions requiring a judge to advise a defendant of the choices available in the presence of the jury.

There is no equivalent to clause 29 (3) of the ALRC Bill.

The Bill adopts the recommendation of the New South Wales Law Reform Commission in its Evidence Report of 1988 (LRC 56 Chapter 1, para 2.22–2.23) in not including a provision subjecting unsworn evidence to sanctions for perjury (cf. clause 27 (11) of the ALRC Bill).

Clause 14 also makes provision as to comment on the failure of a defendant to give any evidence.

Division 2—Competence and compellability

Clause 15 states that, in general, everyone is a competent and compellable witness.

Clause 16 sets out the test for determining whether a witness has the capacity to give evidence when the competence of the witness is in doubt (for example, if the witness is a very young child).

Clause 19 of the ALRC Bill requires the witness to have a capacity to understand that, in giving evidence, there is an obligation to give truthful evidence and a capacity to give a rational reply to questions that may be put.

Clause 16 broadens the ALRC provision by enabling a person who fails to satisfy those competency tests to give unsworn evidence if the person understands the difference between the truth and a lie and undertakes to tell the truth.

Clause 16 (3) supersedes clause 35 (deaf and mute witnesses) of the ALRC Bill by providing that a person is not competent to give evidence if the person is incapable of hearing or understanding or communicating a reply to a question and this incapacity cannot be overcome in any appropriate manner.

Clause 17 provides that the Sovereign, the Governor-General, the Governor, the Governor of another State, the Administrator of a Territory, a foreign sovereign and the Head of State of a foreign country are not compellable to give evidence. It also provides that members of Parliament are not compellable if attending court would interfere with attendance at a sitting of Parliament or a meeting of a committee of Parliament.

Clause 18 provides that judges and jurors are not competent to give evidence in the proceeding in which they are acting as judges and jurors. It also provides that a person who is or was a judge in a proceeding is not compellable to give evidence about the proceeding unless the court gives leave.

Clause 19 sets out rules of competence and compellability for the accused in a criminal trial and related offenders (that is, persons being prosecuted for an offence either that arose in relation to the same events as those in relation to which the offence for which the defendant is being prosecuted arose or that relates to or is connected with the offence for which the defendant is being prosecuted). Clause 19 differs from clause 22 of the ALRC Bill in that it does not prevent a related offender from being compelled to give evidence if the related offender is being tried separately from the defendant.

Clause 20 makes it clear that members of families of the accused in a criminal proceeding (that is, spouses, de facto spouses, parents and children) are competent and compellable witnesses. However such persons may object to giving evidence as a witness for the prosecution and, in certain circumstances, will not be required to give evidence.

Clause 20 expands the category of persons covered in clause 24 of the ALRC draft to include children living in the household of a defendant as if they are children of the defendant.

Clause 21 qualifies clause 20 by providing that the persons referred to in clause 20 may be required to give evidence in proceedings for certain offences under the Children (Care and Protection) Act 1987 and the Crimes Act 1900. The provision preserves the current exceptions to the general rule against compelling spouses to give evidence (cf. sections 407 and 407AA of the Crimes Act 1900).

Clause 22 makes provision with respect to the compellability of spouses and de facto spouses to give evidence in civil proceedings. It is broader than clause 25 of the ALRC Bill in that it covers de facto spouses and includes a provision enabling a witness to object to giving evidence similar to the provisions included in clause 20. It also excludes from the operation of the provision any proceeding in which a court must treat a child's interest as paramount.

Clause 23 re-enacts sections 13 and 14 of the Evidence Act 1898. It enables a court to issue a warrant to bring a witness who has failed to attend court without reasonable excuse before the court.

CHAPTER 4—MANNER OF GIVING EVIDENCE

PART 1—GENERAL RULES

Chapter 4 prescribes rules governing the way in which witnesses are questioned and the way in which they may give their evidence.

Clause 24 gives the court a power in general to control the way in which evidence is elicited from witnesses during a trial which is similar to the power contained in clause 30 of the ALRC Bill. However, clause 24 is wider than the ALRC provision as it also states the powers of courts to call and question witnesses and to order witnesses out of court. As noted above (clause 9), these matters were considered by the ALRC to be beyond their terms of reference.

The provisions are based in part on section 101 (Court's power to call witnesses), 107 (exclusion of witness other than a party) and 109 (order not to discuss evidence) of the draft Uniform Evidence Act proposed in the 1982 Canadian Report of the Federal Provincial Task Force on Uniform Rules of Evidence. However, the power to call witnesses as stated is new for civil cases and that for criminal cases has been stated so as to take into account the decision of the High Court in *R* v *Apostilides* (1984) 154 CLR 563.

Clause 25 confirms the general rule that every party is entitled to question any witness who gives evidence.

Clause 26 sets out the order in which witnesses (unless the court otherwise directs) are to be questioned. Usually examination in chief by the party who called the witness is to be followed by cross-examination by other parties and then re-examination by the party who called the witness.

Clause 27 confirms the general rule that a party may determine how to question a witness.

Clause 27 (2) enables the court to encourage the giving of evidence in narrative form. Clause 27 (3) and (4) expands clause 33 of the ALRC Bill to enable evidence to be given in the form of charts, summaries and other explanatory material if this would aid comprehension of other evidence to be given in the proceedings and to enable evidence of speech to be given in indirect form in certain circumstances.

Clause 28 controls the use a witness may make of a document to revive memory about a fact or opinion. This may be done only with the leave of the court. It sets out some of the matters to be taken into account by the court in determining whether to give leave (for example, whether the witness will be able to recall the fact adequately without using the document). The proposed clause also allows the witness to read aloud from the document with the leave of the court.

Clause 29 creates an exception to clause 28 in relation to the use by police officers of documents to revive memory. It enables a police officer, when giving evidence in chief in criminal proceedings, to read or to be led through a written statement made by the police officer at or soon after the occurrence of the events to which it relates. The provision will replace section 418 of the Crimes Act 1900 (as inserted by the Crimes (Police Evidence) Act 1990).

Clause 30 enables a court, at the request of a party, to direct the production of notes used by a witness for another party to revive his or her memory out of court.

Clause 31 ensures that notes used by a witness to revive memory out of court are not directed to be produced if they are protected by the provisions of the proposed Act relating to client legal privilege.

Clause 32 abolishes the rule known as the rule in *Walker* v *Walker* (1937) 57 CLR 630. Under the rule, a document which might otherwise be inadmissible may be admitted in evidence if the party called on to produce it requires the party who called for it and inspected it to tender it.

Under clause 32 admissibility will depend on Chapters 5 and 6 of the proposed Act and it will not become admissible only because of these circumstances.

Clause 33 enables a judge to order a person present at proceedings to produce documents if the person could be compelled by way of subpoena, summons or other order to testify and produce the documents. It will re-enact section 12 of the Evidence Act 1898.

Clause 34 states that a leading question is not to be put to a witness in examination in chief or re-examination unless the question relates to a matter introductory to the evidence of the witness or to a matter that is not in dispute, or the court gives leave.

Clause 34 (2) differs from clause 40 of the ALRC Bill in that it ensures that the practice of allowing a written statement or report to be tendered or treated as evidence in chief of its maker is not affected by the provision (cf. Part 36, Rule 12A, Supreme Court Rules).

Clause 35 allows a party, with the leave of the court, to cross-examine its own witness about evidence that is unfavourable to the party. A party may also cross-examine a witness who appears not to be making a genuine attempt to give evidence about a matter if the witness may reasonably be supposed to know about the matter. The clause is based on clause 41 of the ALRC Bill but includes provision to ensure that the decision of the High Court in *Vocisano* v *Vocisano* (1974) 130 CLR 267 will not prevent a party from cross-examining a witness who is only technically the client of the party. The difficulty arises in third party insurance cases where the party on the record (the person insured) is the witness but the matter in dispute is essentially between the insurer and the other parties to the action.

Clause 36 clarifies the law relating to re-examination by generally limiting the questions that may be put to a witness to questions arising out of or related to evidence given by the witness in cross-examination.

PART 3—CROSS-EXAMINATION

Clause 37 states some of the matters that are to be taken into account in determining whether a question put to a witness should be disallowed or need not be answered because it is misleading or unduly annoying, harassing, intimidatory, offensive or repetitive.

Clause 44 of the ALRC Bill also enables such action to be taken if the question is "oppressive".

Clause 38 states some of the matters that are to be taken into account in determining whether to disallow, or direct a witness not to answer, a leading question put in cross-examination.

The clause modifies clause 45 of the ALRC provision by including within these matters the age of the witness and any mental, intellectual or physical disability to

which the witness is subject. The provision is complementary to the more relaxed provisions relating to competence to give evidence contained in the proposed Act.

Clause 39 regulates the manner in which prior statements of a witness that are inconsistent with the evidence of the witness may be put to the witness in cross-examination and closely follows clause 46 of the ALRC Bill.

Clause 40 regulates the cross-examination of a witness on a prior statement made by some other person (for example, a statement of another witness or a statement made out of court by an employee of the witness). It is closely based on clause 47 of the ALRC Bill but includes some modifications to take account of the possibility that the prior statement may be contained in a sound recording.

Clause 41 provides for the production and examination of documents recording prior inconsistent statements or previous representations which are raised in cross-examination.

Clause 42 provides for the re-call of a witness called by a party if another party adduces evidence that contradicts or relates to evidence given by the witness and the substance of which was not put to the witness. It closely follows clause 48 of the ALRC Bill.

CHAPTER 5—RELEVANCE: THE PRINCIPAL INCLUSIONARY RULE

Clause 43 states the principal rule concerning the admission of evidence, the relevance rule. Evidence is relevant if it will rationally affect (whether directly or indirectly) the assessment of a fact in issue. Evidence is not irrelevant only because, for example, it relates only to credibility.

No minimum or sufficient standard of relevance is required, simply a logical relevance. Evidence which under the test would be admissible although of only marginal relevance may however be excluded under clause 121.

Clause 44 provides that evidence that is not relevant to the issues in a case is not admissible. Evidence that is relevant to the issues in a case is admissible unless excluded by one of the exclusionary rules set out in Chapter 6.

Clause 45 enables a court to admit evidence provisionally even if its relevance is not immediately apparent. Evidence may be admitted if it is reasonably open to make the finding in question or if it would be reasonably open to do so once further evidence is admitted. The ALRC gives as an example the possibility that a knife could be accepted as provisionally relevant subject to proof that it was used in a murder.

Clause 46 allows the court to examine a document or thing for the purpose of determining its relevance and to draw any reasonable inference from it.

CHAPTER 6—ADMISSION AND USE OF EVIDENCE: EXCLUSIONARY RULES

Chapter 6 contains the exclusionary rules under which evidence even though relevant will be inadmissible.

PART 1—HEARSAY EVIDENCE

Division 1—The hearsay rule

Clause 47 defines the hearsay rule. The hearsay rule prevents the admission of evidence of a previous representation to prove the existence of a fact intended by the person to be asserted by the representation (for example, evidence of a statement that "X shot me" to prove that X shot a person). However, clause 47 (3) provides that the hearsay rule will not prevent the use of evidence of a previous representation to prove the existence of such a fact if the evidence of the previous representation is admitted for some other purpose (for example, if in evidence a witness stated that "Y shot me" and evidence of a prior statement that "X shot me" is admitted as a prior inconsistent statement, the earlier statement could also be used to prove that X shot the person). Clause 47 closely follows clause 54 of the ALRC Bill. By restricting the definition of hearsay to intentional assertions (whether by word or conduct) it clarifies the scope of the hearsay rule in regard to non-assertive hearsay.

Clause 48 elaborates the definition of the hearsay rule in clause 54 of the ALRC Bill and has no counterpart in that Bill. The clause is intended to overcome any doubt which may be raised (by cases such as *R* v *Blastland* [1986] AC 41, *Alexander* v *R* (1981) 145 CLR 395, *Walton* v *R* (1989) 166 CLR 283, and *R* v *Benz* (1989) 168 CLR 110)) as to the admissibility of evidence of representations to prove the physical, mental or emotional state of a person or to identify a person, place or thing (by, for example, identifying a person from his or her voice or identifying the relationship of the maker of a representation and another person). The decisions in these cases clearly enable the admission of contemporaneous statements as evidence of state of mind or emotion of the maker but the basis on which the decisions were reached is unclear. The proposed clause will give statutory recognition to the principles concerned and overcome any possible doubt as to the justification for admitting the evidence.

The provision reflects Rule 803 of the United States *Federal Rules of Evidence*.

Clause 49 makes it clear that nothing in the proposed Part enables the use of a previous representation to prove an asserted fact if the representation was made by a person who at the time it was made was not competent to give sworn or unsworn evidence of the fact. The provision has no equivalent in the ALRC Bill.

Division 2—"First-hand" hearsay

Clause 50 defines "first-hand hearsay". First-hand hearsay is direct evidence of a representation made by a person who had personal knowledge of the fact asserted in the representation.

Clause 51 enables oral evidence of a representation made by a person who is not available to give evidence to be given by a person with personal knowledge of the representation as an exception to the hearsay rule. The hearsay rule will also not apply to a document containing such a representation. The clause is wider than clause 56 of the ALRC Bill because in this Bill a person is treated as being unavailable if the person has completely forgotten the fact asserted (cf. Part 2 of the Dictionary).

Clause 52 provides a further exception to the hearsay rule. It enables oral evidence and documentary evidence similar to the type referred to in clause 51 to be brought when the maker of a representation is available to give evidence but it would cause undue expense or undue delay or would not be reasonably practicable to call the person. The clause also enables the maker of a previous representation to give hearsay evidence

(or someone else who saw or heard it being made) but only if when the representation was made it is fresh in the mind of the maker.

Clause 53 sets out the limited circumstances in which first-hand hearsay evidence may be given in criminal proceedings as an exception to the hearsay rule because the maker of a previous representation is not available to give evidence. One example of these is when the representation was against the interests of the person who made it.

Clause 53 is a liberal statement of the common law res gestae rule. It is wider than clause 58 of the ALRC Bill in 3 respects:

It adopts the broader interpretation of when a person is unavailable to give evidence discussed above (clause 51).

It includes within representations that are taken to be against the interests of a person a representation that involves the pecuniary disadvantage to the person (clause 53 (4)).

It requires reasonable contemporaneity with the circumstances in which a fact occurs, not just reasonable contemporaneity of the fact asserted by a representation with the representation.

Clause 54 enables first-hand hearsay evidence to be given in criminal proceedings as an exception to the hearsay rule by the person who made a previous representation or person who had personal knowledge of its making if the maker is called to give evidence and at the time the representation was made the fact asserted was fresh in his or her memory.

Clause 55 requires a party to give notice to each other party of an intention to adduce evidence under certain of the provisions of the proposed Division.

Division 3—Other exceptions to the hearsay rule

Clause 56 creates an exception to the hearsay rule for previous representations in business records. The exception will apply only if the representation was made or recorded in the course of or for the purposes of a business and was made by a person who had personal knowledge of the fact asserted by the representation or was made on the basis of information supplied (directly or indirectly) by a person who might reasonably be supposed to have such knowledge.

Clause 57 creates an exception to the hearsay rule for the contents of tags and labels on documents and objects. It is the same as clause 62 of the ALRC Bill which was intended to enable, for example, the fact that particular goods bear a manufacturer's brand name to be admissible to prove they were manufactured by the manufacturer.

Clause 58 creates an exception to the hearsay rule for the use of telecommunications messages to prove certain matters. An example given by the ALRC is that the contents of an incoming telex might be used to prove the identity of the person from whom it came and where and when it was sent. Clause 58 expands clause 63 of the ALRC Bill to include telephone numbers.

Clause 59 states an exception to the hearsay rule for reputation as to marriage, family history or family relationships, public or general rights. The provision is the same as clause 64 of the ALRC Bill which the ALRC intended to reflect and rationalise existing common law rules in this respect.

Clause 60 abrogates the hearsay rule in interlocutory proceedings.

PART 2—OPINION EVIDENCE

Clause 61 states the exclusionary rule that opinion evidence is not to be admissible to prove a fact asserted by the opinion.

Clause 62 provides an exception to the opinion rule for lay opinions. It enables the admission of an opinion based on what a person saw, heard or otherwise noticed about a matter or event in order to obtain an account of the person's perceptions of the matter or event.

Clause 63 provides an exception to the opinion rule for opinions of persons who have specialised knowledge about a matter based on training, study or experience.

Clause 64 abolishes the ultimate issue rule and common knowledge rule. The ultimate issue rule prevents a witness from expressing an opinion on an issue to be decided by the court. The common knowledge rule prohibits witnesses from giving evidence of opinion about matters of common knowledge.

For the purposes of the clause, it has been assumed that the term "fact in issue" encompasses "ultimate issue".

PART 3—ADMISSIONS

Clause 65 defines "sound recording" for the purposes of the Part to include video recordings with sound attached. Clause 65 expands clause 70 of the ALRC Bill to include video recordings made concurrently with, and accompanying, sound recordings.

Clause 66 restricts the application of the Part to admissions and previous representations made by persons with personal knowledge of the asserted fact concerned. The ALRC Bill does not include a provision of this kind.

Clause 67 provides an exception to the hearsay and opinion rules for admissions and for representations made at or about the time of admissions that are reasonably necessary to understand an admission in question.

Clause 68 is wider than clause 72 of the ALRC Bill in that it not only makes an admission in a civil or criminal proceeding inadmissible unless it is shown that it was not influenced by violent, oppressive, inhuman or degrading conduct of any kind or by a threat of conduct of that kind but also makes it inadmissible if it was influenced by promise of substantial advantage.

Clause 69 provides that a confession by an accused person in a criminal proceeding is only to be admissible if the circumstances in which it was made were such as to make it unlikely that the truth of the admission was adversely affected. The clause sets out the matters the court may take into account (for example, whether, if the admission was made in response to questioning, any threat, promise or representation was made to the person).

Clause 70 sets out the additional criteria to be satisfied for confessions by accused persons made in the course of police interviews and made at a time when they were under suspicion of having committed an offence. It is not based on the ALRC Bill but instead gives effect to the recommendations of the Criminal Law Review Division of the Attorney General's Department in a report titled *A Proposed System of Electronically Recording Police Interviews with Suspected Persons* (1986). The clause provides that evidence of confessions and admissions allegedly made to police officers but not electronically recorded should generally not be admissible. If, however, the police have a reasonable excuse for failing to make such a recording the evidence is admissible but only if the other requirements of the clause are met.

If police have a reasonable excuse for not recording an admission, evidence of the admission is admissible if police subsequently hold a recorded interview and put the earlier admission to the suspect and invite comment. If no later recorded interview is held the evidence is inadmissible unless police can demonstrate a reasonable excuse for not holding such a recorded interview.

If police have a reasonable excuse for not conducting a recorded interview, then evidence of any alleged admission is inadmissible unless the police record their recollection of the substance of the admission on the electronic equipment at the first reasonable opportunity (except where the police have a reasonable excuse for not doing so).

Clause 71 makes a confession inadmissible unless the suspect was, before the confession was made, given the usual caution or the prosecution establishes that there was a reasonable excuse why it was not given.

Clause 72 makes inadmissible any document purporting to be a record of an interview with a person unless the person being interviewed has signed the document.

Clause 73 sets out the circumstances in which admissions made by employees or agents of a party can be treated as having been admissions made by the party. The clause does not determine whether evidence of such an admission is admissible.

Clause 73 is narrower than clause 76 of the ALRC Bill in that, in criminal proceedings, it is limited (in part) to evidence of admissions made by a director, or a person concerned in the management, of a corporation.

Clause 74 clarifies the question of the standard of proof required in deciding whether an admission was made by a particular person.

Clause 75 prevents unfavourable inferences being drawn from evidence of the silence of a person questioned by the police or other officials. The clause is wider than clause 78 of the ALRC Bill. It overcomes the decision in *Woon* v *R* (1964) 109 CLR 529 by providing that no inference of a "consciousness of guilt" may be drawn from a refusal to answer any questions at all or some questions.

Clause 76 provides that if, having regard to the circumstances in which an admission was made, it would be unfair to an accused to use evidence of the admission in the prosecution case, the court may refuse to admit it to prove a particular fact.

PART 4—EVIDENCE OF JUDGMENTS AND CONVICTIONS

This Part changes the rule known as the rule in *Hollington* v *Hewthorn* [1943] KB 587.

Clause 77 provides that evidence of a finding of fact or of a decision in a proceeding is not admissible to prove a fact in issue in the proceeding. It is wider than clause 80 of the ALRC Bill which relates only to evidence of a decision.

Clause 78 provides 2 exceptions to the rule set out in clause 77. The first relates to evidence of a grant of probate or letters of administration to prove death, date of death or the due execution of a will. The second relates to evidence in civil proceedings of convictions of a party or a person through or under whom a party claims (not being convictions under review or that have been quashed or set aside or in respect of which a pardon has been given).

Clause 79 preserves existing law that enables evidence of convictions to be admitted in defamation proceedings and the rules relating to judgments in rem, res judicata and issue estoppel.

PART 5—EVIDENCE OF CONDUCT AND CHARACTER RELEVANT TO ISSUES

Division 1—Preliminary

Clause 80 provides that a reference in the proposed Part to the doing of an act includes a reference to the failure to do the act.

Clause 81 provides that the proposed Part is not to apply to evidence that relates only to the credibility of a witness, a proceeding that relates to bail or sentencing or to evidence of character, conduct and tendencies where character, conduct and tendencies are facts in issue in the proceeding.

Clause 82 provides that evidence which but for the proposed Part would be admissible may not be used to prove prior conduct or character or tendencies.

Division 2—Tendency and misconduct evidence

Clause 83 states the tendency rule. Under this exclusionary rule, evidence of the character, reputation or conduct of a party, or evidence of the tendencies of a party, is not admissible to prove the tendencies of the person. The ALRC give the example of the exclusion of evidence of a person's prior convictions for assault to prove that the person has a tendency to assault or otherwise break the law.

Clause 83 is wider than clause 86 of the ALRC Bill because it includes within the exclusionary rule not only evidence of similar misconduct but also evidence of misconduct for which the person has not been charged. (On this, see *Hoch* v *R* (1988) 165 CLR 292; *Harriman* v *R* (1989) 167 CLR 590). Clause 84 is also widened in this way.

Division 3—Conduct evidence

Clause 84 provides an exception to the tendency rule for evidence of prior conduct, including evidence that a person had a particular state of mind. The exception arises where such evidence is adduced to prove that the person involved had some other state of mind or did some other act that was substantially and relevantly similar.

Clause 85 complements clause 84 by providing for the situation where evidence of prior conduct is said to be relevant not because the acts or states of mind are substantially and relevantly similar, but because it is improbable that a particular series of events occurred co-incidentally. The evidence is excluded unless the court determines that it is reasonably open to find that the events occurred and the person concerned could have been responsible for them.

Clause 86 relates to conduct evidence adduced in a criminal proceeding and provides a further exclusionary rule for such evidence to the tendency rule and that set out in clause 85. In such a proceeding evidence is not admissible unless the existence of the fact in issue to which the evidence is led is substantially in dispute and the evidence adduced has substantial probative value. The matters the court is to take into account in determining whether evidence has substantial probative value include, for example, the

extent to which the act is unusual. The provision is based on clause 89 of the ALRC Bill which rationalises existing law.

Clause 87 requires parties to give notice of their intention to rely on clause 85 or 86.

Division 4—Character evidence

Clause 88 provides that a witness who is examined as to the character of a person may give evidence of the general repute of the person and of his or her own knowledge of the habits, disposition and conduct of the person. It re-enacts section 413 of the Crimes Act 1900 but unlike that section applies to both civil and criminal proceedings.

Clause 89 provides an exception to the hearsay rule, the opinion rule and the tendency rule for evidence adduced by a defendant about his or her own good character. It is based on clause 91 of the ALRC Bill which is intended to rationalise the existing law.

Clause 90 provides an exception to the hearsay rule and the tendency rule for expert opinion evidence about a defendant in criminal proceedings adduced by co-accused.

Clause 91 provides that cross-examination of an accused person on matters arising out of evidence to which clauses 89 and 90 apply may only be by leave of the court.

Clause 91 expands clause 93 of the ALRC Bill by providing that a prosecutor may not adduce evidence in chief to disprove the character evidence adduced by a defendant unless the court gives leave.

PART 6—CREDIBILITY

Clause 92 states the general rule that evidence that relates only to the credibility of a witness is not admissible to prove that the evidence of a witness should or should not be accepted (the credibility rule).

Clause 93 provides an exception to the hearsay rule, the opinion rule and the credibility rule for evidence led by the accused in criminal proceedings of his or her good character. The provision is based on clause 95 of the ALRC Bill and rationalises existing law.

Clause 94 provides an exception to the credibility rule to permit (as is presently the case) attacks on credit during cross-examination of witnesses and parties. However such evidence is not admissible if it does not have substantial probative value as to the credibility of the witness. Matters that may be taken into account include whether the evidence shows that the witness lied while under an obligation to tell the truth.

Clause 95 protects the accused who gives sworn evidence in criminal proceedings by, for example, requiring that the leave of the court must be obtained for cross-examination of the accused on matters relevant only to the accused's credibility (unless the cross-examination relates to whether the defendant was biased or had a motive to be untruthful, to his or her recollections or if the defendant has made a prior inconsistent statement). The proposed clause will enable more control to be exercised over unwarranted attacks on the credibility of a prosecution witness. It is based on section 413A of the Crimes Act 1900 which is to be repealed (Schedule 4).

Clause 96 applies the rules set out in clauses 94 and 95 to the case where the accused gave only unsworn evidence and cannot be cross-examined. They are intended to apply as if the accused had given sworn evidence.

Clause 97 provides two further exceptions to the credibility rule.

The first exception covers evidence adduced from a witness that another witness is biased or has a motive to be untruthful, has a prior conviction, has made a prior inconsistent statement or has been pronounced, declared or otherwise found to be an habitual criminal. It closely follows clause 99 (1) of the ALRC Bill except in relation to the element concerning habitual criminals. The witness whose credibility is attacked must have denied the substance of the evidence when the witness was cross-examined.

The second exception covers evidence adduced from a witness that another witness is not, or was not, able to be aware of the matters to which his or her evidence relates or knowingly or recklessly made a false representation while under an obligation to tell the truth.

Clause 98 enables evidence relating to the credibility of a maker of a hearsay statement to be admitted even though the maker of the statement has not given evidence or been cross-examined if the statement has been admitted under an exception to the hearsay rule.

Clause 99 provides exceptions to the credibility rule for evidence adduced in re-examination of a witness or to explain or contradict evidence adduced under clauses 96 or 98.

PART 7—IDENTIFICATION EVIDENCE

Clause 100 defines "identification evidence" for the purposes of the proposed Part. The definition is narrower than the definition contained in clause 3 of the ALRC Bill as it is confined to visual identification.

Clause 101 restricts the application of the proposed Part to criminal proceedings.

Clause 102 sets out the basic rule for the admission of identification evidence. It requires that, unless it would not be reasonable to do so, an identification parade be held and an identification be made without the person who made it being intentionally influenced.

The provision sets out some of the matters that may be taken into account in determining whether it was reasonable to have held an identification parade, for example, the practicality of holding such a parade (including, if the defendant refused to co-operate, the manner and reason for the refusal).

Clause 103 sets out the tests for admission of identification evidence where identification was made after examining photographs or "Identikit pictures" or similar things. It provides, for example, that photographs of the accused must have been taken after the accused was taken into custody and must be examined with those of a number of persons who were not in custody so that no inference will be drawn that because a person was identified from police photographs he or she has a criminal record.

Clause 104 requires the judge, if requested by the defendant, to inform the jury of the special need for caution before accepting identification evidence admitted in the proceedings.

The provision differs from clause 105 of the ALRC Bill in omitting the requirement that the judge instruct the jury that it is not to find the accused guilty where there is no alternative evidence of guilt or special circumstances support the identification evidence. It also omits the requirement for a directed verdict where a finding of guilt can be made

only if eye-witness identification evidence is accepted and there are no such special circumstances or corroborative evidence.

PART 8—PRIVILEGES

Division 1—Client legal privilege

Clause 105 defines terms for the purposes of the proposed Division. It includes a definition of "client" based on that included in clause 108 of the ALRC Bill but expanded to ensure that the provisions will cover government employees.

Clause 106 is based on the provisions of the ALRC Bill relating to client legal privilege with some significant modifications.

Clause 106 of the ALRC Bill protects from disclosure in court evidence of communications passing between clients and their legal practitioners, and documents and communications made by or passing between legal practitioners, if the communications have been made for the dominant purpose of providing legal advice to the client. This Bill adopts the narrower sole purpose test (see *Grant* v *Downs* (1976) 135 CLR 674). The sole purpose test is augmented by providing that summaries or copies of privileged communications, made for record keeping purposes or for the information of management, will be privileged (clause 106 (1) (g)). Communications between the lawyer or client and a third party are protected only if for litigation (clause 106 (1) (d) and (e)). Drafts or other notes made by a third person which are not communications within the meaning of the Division are not included.

The clause also makes it clear that privilege is not available with respect to mere copies of unprivileged material made by a lawyer.

The provision does not affect the principle enunciated by the High Court in *Baker* v *Campbell* (1983) 153 CLR 52 (and confirmed in the *Federal Commissioner of Taxation and Others* v *Citibank Ltd* (1989) 85 ALR 588) that documents held by a lawyer to which professional privilege attaches could not properly be made the subject of a search warrant).

Clauses 107–111 are based on clause 107 of the ALRC Bill and deal with the circumstances in which client legal privilege may cease to apply. These include, for example, that the client has consented for it not to apply and that it would prevent a court enforcing an order of the court. Clause 107 (12) of the ALRC Bill which provides that the privilege is lost for communications and documents made in furtherance of a fraud, an offence, an act that renders a person liable to a civil penalty or a deliberate abuse of statutory power has been modified in this Bill (clause 111) so as to pay regard only to the purposes of the client or lawyer. This overcomes the decision in *R* v *Central Criminal Court, Ex parte Francis & Francis* [1989] AC 346. Clause 107 (12) of the ALRC Bill has also been narrowed (in so far as it relates to abuse of power) to apply only where the case concerns a challenge to the validity of that exercise brought in a court with a power to determine validity.

Clause 112 provides that if client legal privilege in relation to evidence is lost, it is also lost in relation to evidence of other communications necessary to understand the lost evidence.

Division 2—Other privileges

This Bill does not include a provision similar to clause 109 of the ALRC Bill which would give a court a discretionary power to accord privilege to confidential communications and records generally.

Clause 113 entitles members of the clergy to refuse to divulge the contents of religious confessions made to them in their professional capacity and the fact that they have been made. It re-enacts section 10 of the Evidence Act 1898 as inserted by the Evidence (Religious Confessions) Amendment Act 1989.

Clause 114 provides for a privilege against self-incrimination. It differs from clause 110 of the ALRC Bill in that it provides for the discretionary exclusion of evidence discovered in consequence of the answers of a witness compelled to testify on the basis that privilege was not available if it is later discovered that privilege was indeed available (clause 114 (6)).

The provision does not affect the principle that the privilege against self-incrimination applies to non-testimonial as well as to testimonial or court room contexts (see the High Court decision in *Sorby* v *Commonwealth* (1983) 152 CLR 281, *Pyneboard Pty Ltd* v *Trade Practices Commission* (1983) 152 CLR 328 and *Police Service Board* v *Morris* (1985) 156 CLR 397).

Division 3—Evidence excluded in the public interest

Clause 115 prevents evidence of reasons for decisions made by judges (who, as defined in the Dictionary, include also Magistrates or other persons before whom proceedings are held) or arbitrators being given in a proceeding to which the proposed Act applies and which is not the proceeding concerned. The provision applies both to the judge or arbitrator concerned and also to persons under his or her control (for example, a judge's associate) and also encompasses deliberations.

Clause 116 requires a court to prevent evidence of matters of state (for example, international relations and law enforcement) being given if the public interest in admitting the evidence is outweighed by the public interest in preserving its secrecy or confidentiality.

The provision is modelled on clause 112 of the ALRC Bill but differs from it in providing that, among the matters that a court may take into account in determining whether evidence should be adduced in a criminal proceeding, is whether the direction is to be made subject to the term that the prosecution be stayed. The provision was suggested by remarks of Murphy J in *Alister* v *R* (1984) 154 CLR 404, 431.

Clause 117 states a rule that evidence is not to be adduced of communications made between, or documents prepared by, parties in dispute in connection with and during attempts to settle the dispute. "Dispute" is more narrowly defined than in clause 113 of the ALRC Bill so that it will be clearly limited to a dispute in a proceeding or pending or reasonably apprehended proceeding. The rule is not to apply in certain circumstances set out in the proposed clause (for example, if the parties consent or if the communication affects the rights of a person).

Division 4—General

Clause 118 provides that a court must satisfy itself that a witness or party is aware of its rights under the proposed Part if it appears that the witness or party may have a ground for making an application or objection under it.

Clause 119 makes it clear that a court can call for and examine any document in respect of which a claim for privilege under the proposed Part is made so that it may determine the claim.

Clause 120 provides that if under the proposed Part evidence may not be adduced or given in a proceeding, it is not admissible in the proceeding.

Division 5—Discretions to exclude evidence

Clause 121 provides a general discretion to exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice or confusion or the danger of misleading the court or wasting its time.

Clause 122 enables the court to limit the use to which evidence may be put.

The proposed Act will generally allow evidence to be used to support any rational inference once the evidence is admitted for any reason. Clause 122 will give the court a discretion to admit evidence and limit its use instead of leaving it with a power only to either admit or to exclude. There is no equivalent provision in the ALRC Bill.

Clause 123 enables the court to exclude prosecution evidence in criminal proceedings if its probative value is outweighed by the danger of unfair prejudice to the accused.

Clause 124 enables the court to exclude evidence obtained improperly, unlawfully or in consequence of an impropriety or a contravention of the law. The clause is modelled on clause 119 of the ALRC Bill which the ALRC intended to reflect, with some modifications, the exclusionary discretion known as the rule in *Bunning* v *Cross* (1978) 141 CLR 54.

CHAPTER 7—OTHER ASPECTS OF PROOF

PART 1—JUDICIAL NOTICE

Clause 125 makes it unnecessary to lead evidence about matters of law, including the provisions and coming into operation of Acts and statutory rules. It will supersede section 44 of the Interpretation Act 1987. It differs from clause 120 of the ALRC Bill in that in so far as proof of Imperial Acts is concerned it applies only in respect of Imperial Acts applying in Australia and it specifically applies to rules of court published or notified in the Gazette.

Clause 126 makes it unnecessary to tender evidence about knowledge that is not reasonably open to question and which is common knowledge in the locality where the proceedings are being heard or can be verified by consulting authoritative sources.

An example given by the ALRC is that it would not be necessary to lead formal evidence in a trial in a court in Sydney about the location of the Opera House.

Clause 127 preserves the practice by which certificates relating to certain matters of international affairs are treated as being conclusive.

Clause 128 re-enacts section 24A (a) of the Evidence Act 1898. It provides that it is unnecessary to lead evidence of the fact that a person holds (or held) one of the offices specified in the clause (for example, as a Minister of the Crown).

PART 2—DOCUMENTS

The proposed Part is intended to codify the way in which the contents of documents can be proved.

Clause 129 defines "document in question" for the purposes of the proposed Part. A document is to be taken to be a copy of a document for the purposes of the Part even if it is not an exact copy if it is identical in all relevant aspects.

Clause 130 abolishes the common law rule ("the best evidence rule") which restricts to limited circumstances the tender of copies of documents if the original document is available.

Clause 131 sets out the ways in which the contents of documents can be proved. The original itself can be tendered or an alternative. For example, the provision enables the proof of documents by way of photocopies, transcripts of tape recordings and computer print outs. Provision is made for the tender of copies, extracts or summaries from business records and official printings of public documents. Clause 131 is based on clause 125 of the ALRC Bill but departs from it in enabling copies of documents to be tendered or oral evidence given not only if the original document is unavailable but also if it would be unduly inconvenient to obtain it or if its contents are not in issue (cl. 131 (3) (d) and (e)).

Clause 132 provides for proof of documents in foreign countries.

PART 3—FACILITATION OF PROOF

Clause 133 makes provision in relation to evidence produced wholly or partly by machines. In general it may be presumed that a machine was working properly on the day in question. The ALRC gives the example that it will not be necessary to call an expert to prove that the photocopier that produced a photocopy normally completely copies documents and to give detailed evidence that it was working properly when a photocopy was produced. The provision differs from clause 127 of the ALRC Bill in that the ALRC provision creates a rebuttable presumption placing the legal burden of disproof on the party disputing the presumed fact.

The clause will provide a prima facie presumption which disappears once doubt is raised. A similar change is made in clauses 142 and 143.

Clause 134 dispenses with the need to call a witness who attested to the execution of a document (other than a will) to give evidence about the execution of the document. However, it will still be necessary to prove the signature of the maker of the document concerned.

Clause 135 re-enacts part of section 52A of the Evidence Act 1898. It provides that it is not necessary to adduce evidence of the attestation, verification, signing or acknowledgment of a document by a justice of the peace.

Clause 136 presumes (unless the contrary is proved) that documents such as the Gazette and documents printed with the authority of the government are what they purport to be and have been published on the day on which they purport to have been published. The clause also provides that if such a document contains or notifies the doing of an official act it will be presumed that the act was validly done and, if the date on which it was done is indicated in the document, on that date.

Clause 137 presumes (unless the contrary is proved) that seals (including Royal seals, government seals, seals of bodies corporate and seals of persons acting in an official capacity) are authentic and valid. A similar presumption is made with respect to the signature of persons acting in an official capacity.

Clause 138 re-enacts section 25 and part of section 52A of the Evidence Act 1898 and relates to proof of signatures of justices of the peace.

Clause 139 re-enacts section 36 of the Evidence Act 1898 and provides a mechanism for proof of the authorship of writing or a signature that is in dispute.

Clause 140 presumes (unless the contrary is proved) that a copy of, or an extract from or summary of, a public document purporting to be sealed or certified as such by a person who might reasonably be supposed to have custody of the document is a copy or extract or summary of the public document.

Clause 141 presumes (unless the contrary is proved) that a document that is more than 20 years old produced from proper custody is what it purports to be and to have been duly executed or attested.

Clause 142 presumes the accuracy (unless evidence sufficient to raise real doubt is adduced to the contrary) of a statement in a tag or label as to the ownership or origin of the object or document to which it is attached or on which it is placed.

Clause 143 establishes various presumptions in connection with postal and telecommunications services. These include the presumption that a letter posted by pre-paid post was received 4 working days after it was posted and that documents produced from telex and similar machines correctly show the message transmitted.

Clause 144 presumes (unless the contrary is proved) that statistics purporting to be produced by the Australian Bureau of Statistics or the Australian Statistician are authentic.

Clause 145 re-enacts section 23 of the Evidence Act 1898 which provides for proof of convictions, acquittals and other judicial proceedings by a certificate given by certain prescribed persons.

Clause 146 re-enacts section 23A of the Evidence Act 1898 which provides for the proof of the identity of persons from finger-prints taken in another State or a Territory.

Clause 147 re-enacts section 15A of the Evidence Act 1898 and provides for proof of service of notifications, notices, orders and directions required to be sent by an Act or statutory rule.

Clause 148 re-enacts section 19 of the Evidence Act 1898 and provides for the proof of the statutory and case law of foreign countries.

Clause 149 re-enacts section 19A of the Evidence Act 1898 and provides for the proof of the law of foreign countries to be decided by the judge.

Clause 150 re-enacts section 29 of the Evidence Act 1898 and describes the evidentiary effect of a grant of probate of a will and of letters of administration.

Clause 151 re-enacts section 30 of the Evidence Act 1898 and makes specific provision concerning the evidentiary effect of certain documents furnished under the Registration of Births, Deaths and Marriages Act 1973.

Clause 152 re-enacts section 32 of the Evidence Act 1898 and provides for proof of the incorporation or registration of trading societies or companies.

PART 4—STANDARD OF PROOF

Clause 153 provides that the standard of proof in civil proceedings is proof on the balance of probabilities and lists some of the matters a court may take into account in determining whether a case is proved.

Clause 154 provides that the standard of proof in criminal proceedings is, in the case of the prosecution, proof beyond reasonable doubt and, in the case of the defendant, proof on the balance of probabilities.

Clause 155 provides that the standard of proof relating to the admissibility of evidence is proof on the balance of probabilities. Unlike clause 138 of the ALRC Bill the clause does not provide for the court to take into account the importance of the evidence in determining whether the standard has been reached.

PART 5—CORROBORATION

Clause 156 abolishes the existing rules of law requiring some classes of evidence to be corroborated and the associated requirements as to the warnings to be given to juries in the absence of corroboration. The provision does not apply to a rule of law requiring corroboration with respect to perjury or a like offence.

PART 6—WARNINGS

Clause 157 allows any party in a jury trial to ask the judge to give a warning to the jury about the unreliability of evidence to which the clause applies and the need for care in determining the weight to attach to the evidence. The kinds of evidence to which the clause applies include hearsay evidence, evidence of admissions and evidence affected by the age or ill-health of the witness. The clause differs from clause 140 of the ALRC Bill in that it is not to apply to evidence of the victims of sexual offences.

CHAPTER 9—EVIDENCE ON COMMISSION

This Chapter re-enacts Parts 7–9 of the Evidence Act 1898. The Parts were inserted by the Evidence (Evidence on Commission) Amendment Act 1988 and are uniform with legislation in other States and Territories. The provisions provide machinery for:

(a) the examination of witnesses abroad, for the purposes of proceedings in the State (clauses 158–163); and

(b) the examination of witnesses outside the State but within Australia, for the purposes of proceedings in the State (clauses 164–170); and

(c) the examination of witnesses in the State, for proceedings outside the State (clauses 171–176).

CHAPTER 10—MISCELLANEOUS

Clause 177 allows a court to examine a document or thing in respect of which a question has arisen in relation to the application of the proposed Act and to draw reasonable inferences from the document or thing.

Clause 178 makes provision for evidence to be given (including evidence by affidavit or certificate in writing if it relates to a public document) by persons who are responsible for the making or keeping of certain documents and things in order to admit the documents or things as evidence. It applies to evidence of a fact which under certain provisions of the proposed Act relating to exceptions to the hearsay rule for first hand hearsay, business records, tags and labels and telecommunications is to be proved in relation to a document or thing.

Clause 179 allows a party against whom evidence is led or is to be led to make certain requests (for example, production, examination, testing and copying of documents) to safeguard the party against unfair prejudice.

Clause 180 allows the judge, on application, to order that a demonstration, experiment or inspection be held and sets out some of the matters the judge should take into account. These include whether the parties will be present and whether a demonstration of an event will properly reproduce the event.

Clause 181 makes it clear that a demonstration, experiment or inspection ("a view") referred to in clause 180 is to be treated as evidence and that the court may draw any reasonable inference from what it sees, hears or otherwise notices.

Clause 182 sets out the circumstances in which a voir dire is to be held. These include not only determination of the admission of evidence but also whether a witness is competent or compellable. The provision is based on clause 146 of the ALRC Bill but takes into account the Privy Council decision in *Wong Kam-ming* v *R* [1980] AC 247. In that case it was held that the prosecution may not question the accused on a voir dire as to the truth of a confession made by the accused. Proposed clause 182 (3) is intended to reinforce that decision and overcome the qualifications suggested in *Frijaf* v *R* [1982] WAR 128.

Clause 183 allows the court, with the consent of the parties, to waive the rules relating to the manner of giving evidence, the exclusionary rules and the rules relating to the method of proof of documents. The clause is more limited than clause 147 (3) of the ALRC Bill which enables orders to be made in relation to evidence if the matter to which it relates is not genuinely in dispute. Under clause 183 the court may make orders to do so if there is no reasonable doubt as to the fact or opinion to which the evidence relates. Provision is also made to enable a court to act on its own motion if all parties are legally represented and none objects.

Clause 184 enables the parties to agree that a fact is not to be disputed in the proceeding and for such fact to be accepted in the proceeding without proof. There is no equivalent in the ALRC Bill.

Clause 185 complements provisions of the proposed Act enabling a court to give any leave, permission or direction. It enables the court to do so on such terms as it thinks fit and sets out some of the matters it may take into account (for example, the extent to which to do so would unduly lengthen the hearing).

Clause 186 is based on clause 149 of the ALRC Bill which extends the powers of courts in relation to discovery and inspection of documents and things to cover documents such as computer disks and allows testing and inspection of such documents and things. The clause differs from its ALRC model in providing that the proposed section also applies to orders for the disclosure and exchange of evidence, intended evidence, documents and reports. It also provides that it does not authorise the making of orders, rules of court or regulations compelling a defendant in a criminal proceeding to disclose material.

Clause 187 re-enacts section 43 of the Evidence Act 1898 which empowers a court to impound documents.

Clause 188 re-enacts section 59 of the Evidence Act 1898 which prohibits publication of questions forbidden or disallowed by a court without the express permission of the court.

Clauses 189–191 re-enact sections 49–51 of the Evidence Act 1898 which set out the circumstances in which a banker may be compelled to produce bankers' books or appear as a witness and provide for the inspection of bankers' books.

Clause 192 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 193 repeals the Evidence Act 1898 and the Evidence (Reproductions) Act 1967.

Clause 194 is a formal provision which gives effect to the Schedule of amendments to other Acts.

Clause 195 is a formal provision which gives effect to Schedule 5.

SCHEDULE 1—DICTIONARY OF TERMS USED IN THE ACT

Schedule 1 contains a dictionary of terms used in the Act which is based on clauses 3–10 of the ALRC Bill. Modifications are made to a number of these provisions.

In particular, in relation to Part 1 of the Dictionary:

(a) "admission" is defined more expansively to include not only representations adverse to a party's interest but representations made for tactical reasons, whether or not they are adverse to the party making them; and

(b) a definition of "adverse representation" is included to define more comprehensively the types of representations that amount to admissions; and

(c) a definition of "court" is included to cover the wider range of bodies and persons affected by the proposed Act; and

(d) a definition of "credibility" is included; and

(e) the definition of "document" is expanded to include certain marks, symbols and perforations having a meaning for persons qualified to interpret them; and

(f) paragraph (b) of the definition of "leading question" is replaced with a definition based on that contained in Tapper (ed), *Cross on Evidence* (7th ed) at page 269; and

(g) a reference to the definition of "proceeding" in clause 4 of the Bill is included; and

(h) a definition of "related offender" replaces the definition of "person who is being prosecuted for a related offence"; and

(i) the definition of "representation" (which is pivotal to the operation of provisions dealing with refreshing memory and the hearsay rule) is expanded to include such matter as aides memoire with the intention of maximising the scope of those provisions.

In relation to Part 2 of the Dictionary, the following modifications are made:

(a) a reference to a business in the proposed Act is to have a wider meaning than that given by clause 4 of the ALRC Bill as it is to include a business engaged in or carried on by an incorporated or unincorporated association or partnership (see *Trade Practices Commission* v *TNT Management Pty Ltd (Rulings)* (1984) 56 ALR 647; and

(b) the term "unavailability of persons" is modified as explained above.

SCHEDULE 2—OATHS AND AFFIRMATIONS

Schedule 2 sets out the forms of oaths and affirmations that may be taken or made by witnesses and interpreters.

SCHEDULE 3—AFFIDAVIT BY POLICE FINGER-PRINT EXPERT

Schedule 3 sets out the form of affidavit to be given by a finger-print expert from another State or a Territory in identifying a person.

SCHEDULE 4—AMENDMENTS TO OTHER ACTS

Schedule 4 contains necessary consequential changes to various Acts flowing from the repeal of the Evidence Act 1898 and the Evidence (Reproductions) Act 1967 and the enactment of the proposed Act. They include, for example, the repeal of provisions of the Crimes Act 1900 to be superseded by the proposed Act and translation of references to the Evidence Act 1898 to corresponding references in the proposed Act.

SCHEDULE 5—SAVINGS, TRANSITIONAL AND OTHER PROVISIONS

Schedule 5 contains a power to make regulations of a savings or transitional nature and makes certain savings related to the repeal of some provisions of the Evidence Act 1898.

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EVIDENCE BILL 1991

NEW SOUTH WALES

TABLE OF PROVISIONS

CHAPTER 1—PRELIMINARY

1. Short title
2. Commencement
3. Definitions (ALRC 3, Evidence Act 1898, s. 3)

CHAPTER 2—APPLICATION OF ACT

4. Proceedings to which Act applies (ALRC 3, 11)
5. Act binds Crown (ALRC 13)
6. Operation of other Acts (ALRC 14)
7. Application of common law and equity (ALRC 15)
8. Parliamentary privilege preserved (ALRC 16)
9. General powers of court (ALRC 17)

CHAPTER 3—WITNESSES

Division 1—Sworn and unsworn evidence

10. Sworn evidence of witnesses to be on oath or affirmation (ALRC 26, 29 (1))
11. Interpreters to act on oath or affirmation (ALRC 26 (1))
12. Requirements for oaths (ALRC 26 (3) and (5))
13. Unsworn evidence in criminal proceedings (ALRC 27)
14. Comment on failure to give evidence or sworn evidence (ALRC 23, 28)

Division 2—Competence and compellability

15. Competence and compellability (ALRC 18)
16. Competence: lack of capacity (ALRC 19, Oaths Act 1900, s. 33)
17. Compellability: Sovereign etc. (ALRC 20)
18. Competence and compellability: Judges and jurors (ALRC 21)

19. Competence and compellability: defendant etc. in criminal proceedings (ALRC 3 (definition of "person who is being prosecuted for a related offence") and 22)
20. Compellability of spouses etc. in criminal proceedings (ALRC 24)
21. Compellability of spouses etc. in certain proceedings
22. Compellability of spouses in civil proceedings (ALRC 25)
23. Witnesses failing to attend proceedings (Evidence Act 1898, ss. 13, 14)

CHAPTER 4—MANNER OF GIVING EVIDENCE

PART 1—GENERAL RULES

24. Court's power to call and question witnesses etc. (ALRC 30)
25. Parties may question witnesses (ALRC 31)
26. Examination in chief to be completed before other questioning (ALRC 32)
27. Manner and form of questioning witnesses and their responses (ALRC 33)
28. Attempts to revive memory in court (ALRC 36)
29. Evidence by police officers (Crimes Act 1900, s. 418)
30. Attempts to revive memory out of court (ALRC 37)
31. Direction not to extend to certain documents (ALRC 38)
32. Effect of calling for production of documents (ALRC 39)
33. Persons may be examined without subpoena (Evidence Act 1898, s. 12)

PART 2—EXAMINATION IN CHIEF AND RE-EXAMINATION

34. Leading questions (ALRC 40)
35. Unfavourable evidence (ALRC 41)
36. Limits on re-examination (ALRC 42)

PART 3—CROSS-EXAMINATION

37. Improper questions (ALRC 44)
38. Leading questions (ALRC 45)
39. Prior inconsistent statements of witness (ALRC 46)
40. Previous representations of other persons (ALRC 47)
41. Production of documents (ALRC 48)
42. Certain matters to be put to witness (ALRC 49)

CHAPTER 5—RELEVANCE: THE PRINCIPAL INCLUSIONARY RULE

43. Relevant evidence (ALRC 50)
44. Relevant evidence to be admissible (ALRC 51)
45. Provisional relevance (ALRC 52)
46. Inferences as to relevance (ALRC 53)

CHAPTER 6—ADMISSION AND USE OF EVIDENCE: EXCLUSIONARY RULES

PART 1—HEARSAY EVIDENCE

Division 1—The hearsay rule

47. The hearsay rule—exclusion of hearsay evidence (ALRC 54)

48. Exceptions to the definition of hearsay evidence
49. Exceptions to the hearsay rule dependent on competency

Division 2—"First-hand" hearsay

50. Restriction to "first-hand" hearsay (ALRC 55)
51. Exception: civil proceedings if maker not available (ALRC 56)
52. Exception: civil proceedings if maker available (ALRC 57)
53. Exception: criminal proceedings if maker not available (ALRC 58)
54. Exception: criminal proceedings if maker available (ALRC 59)
55. Notice to be given (ALRC 60)

Division 3—Other exceptions to the hearsay rule

56. Exception: business records (ALRC 61)
57. Exception: contents of tags, labels etc. (ALRC 62)
58. Exception: telecommunications (ALRC 63)
59. Exception: reputation as to certain matters (ALRC 64)
60. Exception: interlocutory proceedings (ALRC 65)

PART 2—OPINION EVIDENCE

61. The opinion rule—exclusion of opinion evidence (ALRC 66)
62. Exception: lay opinions (ALRC 67)
63. Exception: opinions based on specialised knowledge (ALRC 68)
64. Ultimate issue and common knowledge rules abolished (ALRC 69)

PART 3—ADMISSIONS

65. Definition: sound recording (ALRC 70)
66. Restriction to personal admissions and representations
67. Hearsay and opinion rules: exception for admissions (ALRC 71)
68. Exclusion of admissions influenced by violence etc. (ALRC 72)
69. Criminal proceedings: reliability of admissions by defendants (ALRC 73)
70. Criminal proceedings: admissions by suspects (ALRC 74 (1)–(3))
71. Criminal proceedings: cautioning of suspects (ALRC 74 (4))
72. Exclusion of records of oral questioning (ALRC 75)
73. Admissions made with authority (ALRC 76)
74. Proof of making of admission (ALRC 77)
75. Evidence of silence (ALRC 78)
76. Discretion to exclude admissions (ALRC 79)

PART 4—EVIDENCE OF JUDGMENTS AND CONVICTIONS

77. Exclusion of evidence of judgments and convictions (ALRC 80)
78. Exceptions (ALRC 81)
79. Savings (ALRC 82)

PART 5—EVIDENCE OF CONDUCT AND CHARACTER RELEVANT TO ISSUES

Division 1—Preliminary

80. Definition (ALRC 83)

81. Application (ALRC 84)
82. Use of evidence for other purposes (ALRC 85)

Division 2—Tendency and misconduct evidence

83. Exclusion of tendency and misconduct evidence (ALRC 86)

Division 3—Conduct evidence

84. Exception: conduct (including of accused) to prove tendency (ALRC 87)
85. Exclusion of evidence of conduct (including of accused) to prove improbability of co-incidence (ALRC 88)
86. Further protections: prosecution evidence of conduct of accused (ALRC 89)
87. Notice to be given (ALRC 90)

Division 4—Character evidence

88. Evidence of character (Crimes Act 1900, s. 413)
89. Exception: character of accused (ALRC 91)
90. Exception: character of co-accused (ALRC 92)
91. Cross-examination of accused by leave only (ALRC 93)

PART 6—CREDIBILITY

92. The credibility rule—exclusion of evidence relevant only to credibility (ALRC 94)
93. Exception: character of accused (ALRC 95)
94. Exception: cross-examination as to credibility (ALRC 96)
95. Further protections: cross-examination of accused (ALRC 97)
96. If unsworn evidence given (ALRC 98)
97. Exception: rebutting denials by other evidence (ALRC 99)
98. Exception: application of certain provisions to maker of representations (ALRC 100)
99. Exception: re-establishing credibility (ALRC 101)

PART 7—IDENTIFICATION EVIDENCE

100. Definition (ALRC 3)
101. Application of Part (ALRC 102)
102. Exclusion of identification evidence (ALRC 103)
103. Exclusion of evidence of identification by pictures (ALRC 104)
104. Directions to jury (ALRC 105)

PART 8—PRIVILEGES

Division 1—Client legal privilege

105. Definitions (ALRC 3, 108)
106. Privilege in respect of legal advice and litigation etc. (ALRC 106)
107. Loss of client legal privilege: generally (ALRC 107 (2), (3) and (5))
108. Loss of client legal privilege: consent etc. (ALRC 107 (1), (6)–(10))
109. Loss of client legal privilege: related offenders (ALRC 107 (4))
110. Loss of client legal privilege: joint clients (ALRC 107 (11))
111. Loss of client legal privilege: fraud etc. or abuse of power (ALRC 107 (12), (13))

112. Effect of sections 107–111 (ALRC 107 (14))

Division 2—Other privileges

113. Religious confessions (Evidence Act 1898, s. 10)
114. Privilege in respect of self-incrimination in other proceedings (ALRC 110)

Division 3—Evidence excluded in the public interest

115. Exclusion of evidence of reasons for judicial etc. decisions (ALRC 111)
116. Exclusion of evidence of matters of state (ALRC 112)
117. Exclusion of evidence of settlement negotiations (ALRC 113)

Division 4—General

118. Court to inform of rights etc. (ALRC 114)
119. Court may inspect etc. documents (ALRC 115)
120. Certain evidence inadmissible (ALRC 116)

Division 5—Discretions to exclude evidence

121. General discretion to exclude (ALRC 117)
122. General discretion to limit use of evidence
123. Criminal proceedings: discretion to exclude prejudicial evidence (ALRC 118)
124. Discretion to exclude improperly obtained evidence (ALRC 119)

CHAPTER 7—OTHER ASPECTS OF PROOF

PART 1—JUDICIAL NOTICE

125. Matters of law (ALRC 120, Evidence Act 1898, s. 18)
126. Matters of common knowledge etc. (ALRC 121)
127. Certain Crown certificates (ALRC 122)
128. Judicial notice of holders of certain offices (Evidence Act 1898, s. 24A)

PART 2—DOCUMENTS

129. Definitions (ALRC 123)
130. "Best evidence" rule abolished (ALRC 124)
131. Proof of contents of documents (ALRC 125)
132. Documents in foreign countries (ALRC 126)

PART 3—FACILITATION OF PROOF

133. Evidence produced by machines, processes etc. (ALRC 127)
134. Attestation of documents (ALRC 128)
135. Attestation before a justice (Evidence Act 1898, s. 52A)
136. Gazettes etc. (ALRC 129)
137. Seals and signatures (ALRC 130, Evidence Act 1898, s. 15)
138. Signatures of justices of the peace (Evidence Act 1898, ss. 25, 52A)
139. Comparison of disputed writing (Evidence Act 1898, s. 36)
140. Public documents (ALRC 131)
141. Documents produced from proper custody (ALRC 132)
142. Labels etc. (ALRC 133)
143. Posts and telecommunications (ALRC 134)
144. Official statistics (ALRC 135)

145. Convictions, acquittals and other judicial proceedings (Evidence Act 1898, s. 23)
146. Proof of identity of person convicted in another State and of convictions (Evidence Act 1898, s. 23A)
147. Proof of service of statutory notice etc. (Evidence Act 1898, s. 15A)
148. Foreign law (Evidence Act 1898, s. 19)
149. Questions of foreign law to be decided by Judge (Evidence Act 1898, s. 19A)
150. Probate and letters of administration (Evidence Act 1898, s. 29)
151. Births, deaths, marriages and parentage information (Evidence Act 1898, s. 30)
152. Companies, incorporation, registration etc. (Evidence Act 1898, s. 32)

PART 4—STANDARD OF PROOF

153. Civil proceedings: standard of proof (ALRC 136)
154. Criminal proceedings: standards of proof (ALRC 137)
155. Admissibility of evidence: standard of proof (ALRC 138)

PART 5—CORROBORATION

156. Corroboration requirements abolished (ALRC 139)

PART 6—WARNINGS

157. Unreliable evidence (ALRC 140)

CHAPTER 9—EVIDENCE ON COMMISSION

PART 1—EXAMINATION OF WITNESSES ABROAD

158. Definitions (Evidence Act 1898, s. 64)
159. Proceedings in the Supreme Court (Evidence Act 1898, s. 65)
160. Proceedings in inferior courts (Evidence Act 1898, s. 66)
161. Exclusion of evidence in criminal proceeding (Evidence Act 1898, s. 67)
162. Operation of other laws (Evidence Act 1898, s. 68)
163. Regulations and rules of court (Evidence Act 1898, s. 69)

PART 2—EXAMINATION OF WITNESSES OUTSIDE THE STATE BUT WITHIN AUSTRALIA

164. Application of this Part (Evidence Act 1898, s. 70)
165. Definitions (Evidence Act 1898, s. 71)
166. Proceedings in the Supreme Court (Evidence Act 1898, s. 72)
167. Proceedings in inferior courts (Evidence Act 1898, s. 73)
168. Exclusion of evidence in criminal proceeding (Evidence Act 1898, s. 74)
169. Operation of other laws (Evidence Act 1898, s. 75)
170. Regulations and rules of court (Evidence Act 1898, s. 76)

PART 3—TAKING OF EVIDENCE FOR FOREIGN AND AUSTRALIAN COURTS

171. Definitions (Evidence Act 1898, s. 77)

172. Application to the Supreme Court for assistance in obtaining evidence for proceedings in other court (Evidence Act 1898, s. 78)
173. Power of the Supreme Court to give effect to application for assistance (Evidence Act 1898, s. 79)
174. Privilege of witnesses (Evidence Act 1898, s. 80)
175. Operation of other laws (Evidence Act 1898, s. 81)
176. Rules of court (Evidence Act 1898, s. 82)

CHAPTER 10—MISCELLANEOUS

177. Inferences (ALRC 141)
178. Proof of certain matters by affidavit etc. (ALRC 142)
179. Request to produce documents or call witnesses (ALRC 143)
180. Views etc. (ALRC 144)
181. Views etc. to be evidence (ALRC 145)
182. The voir dire (ALRC 146)
183. Waiver of rules of evidence (ALRC 147)
184. Agreements as to facts
185. Leave etc. may be given on terms (ALRC 148)
186. Additional powers (ALRC 149)
187. Impounding documents (Evidence Act 1898, s. 43)
188. Prohibited question not to be published (Evidence Act 1898, s. 59)
189. Order to produce book or to appear (Evidence Act 1898, s. 49)
190. Inspection of bankers' books (Evidence Act 1898, s. 50)
191. Costs (Evidence Act 1898, s. 51)
192. Regulations (ALRC 151)
193. Repeal of Evidence Act 1898 etc.
194. Consequential amendments
195. Savings, transitional and other provisions

SCHEDULE 1—DICTIONARY OF TERMS USED IN THE ACT
Part 1—Definitions
Part 2—Expressions and matters
SCHEDULE 2—OATHS AND AFFIRMATIONS
SCHEDULE 3—AFFIDAVIT BY POLICE FINGER-PRINT EXPERT
SCHEDULE 4—AMENDMENTS TO OTHER ACTS
SCHEDULE 5—SAVINGS, TRANSITIONAL AND OTHER PROVISIONS

EVIDENCE BILL 1991

NEW SOUTH WALES

No. , 1991

A BILL FOR

An Act relating to evidence in proceedings in State courts and in certain other legal and administrative proceedings; to repeal the Evidence Act 1898 and the Evidence (Reproductions) Act 1967; and to amend certain other Acts.

The Legislature of New South Wales enacts:

CHAPTER 1—PRELIMINARY

Short title

1. This Act may be cited as the Evidence Act 1991.

Commencement

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

Definitions (ALRC 3, Evidence Act 1898 s. 3)

3. (1) In this Act, or in a particular provision of this Act, the following expressions have the meanings set out in Part 1 of the dictionary in Schedule 1:

admission
adverse representation
banker
banker's books
case
civil proceeding
confidential communication
confidential document
confidential record
court
credibility
credibility rule
criminal proceeding
cross-examiner
de facto spouse
document
enactment
evidence
exercise of a function
federal court
function
hearsay rule
investigating official
Judge

lawyer
leading question
offence
official questioning
opinion rule
police officer
previous representation
prior consistent statement
prior inconsistent statement
probative value
proceeding
public document
related offender
representation
sworn evidence
telecommunications installation
telecommunications service
tendency rule
unsworn evidence.

(2) In this Act, or in a particular provision of this Act, the following expressions and matters have the meaning, or are to be interpreted in the manner, set out in Part 2 of the dictionary in Schedule 1:

references to businesses
references to examination in chief, cross-examination, re-examination etc.
references to civil penalties
unavailability of persons
unavailability of documents
representations in documents
witnesses.

CHAPTER 2—APPLICATION OF ACT

Proceedings to which Act applies (ALRC 3, 11)

4. (1) This Act applies to and in relation to all proceedings within the meaning of this Act.

(2) In this Act, **"proceeding"** means a proceeding (however described):

(a) in a court; or

(b) before a person or body (other than a court) authorised by law, or by consent of parties, to hear and receive evidence.

(3) **"Proceeding"** also includes:

(a) a proceeding relating to bail; and

(b) an interlocutory proceeding or a proceeding of a like kind; and

(c) a proceeding that is heard in chambers; and

(d) a proceeding relating to sentencing.

(4) If a provision of this Act so provides, **"proceeding"** includes a proceeding:

(a) in a federal court or a court of another State or a Territory or of a foreign country; and

(b) before a person or body (other than a court) authorised by a Commonwealth law or a law of another State or of a foreign country to hear and receive evidence; and

(c) in a coroner's inquest or inquiry; and

(d) in a court-martial.

(5) A provision of this Act does not apply to or in relation to:

(a) a proceeding the hearing of which commenced before the commencement of the provision; or

(b) any act done before the commencement of the provision in relation to evidence to be received in a proceeding.

(6) The rules of evidence that would have been applicable to a proceeding or act referred to in subsection (5) before the commencement of the relevant provision are to apply as if the provision had not commenced.

Act binds Crown (ALRC 13)

5. This Act binds the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, in all its other capacities.

Operation of other Acts (ALRC 14)

6. The provisions of an enactment other than this Act have effect despite this Act.

Application of common law and equity (ALRC 15)

7. (1) In proceedings to which this Act applies, the provisions of this Act (other than Part 3 (Facilitation of proof) of Chapter 7) apply to the exclusion of the operation of the principles and rules of the common law and of equity.

(2) Subsection (1) does not apply to exclude the operation of the principles and rules of the common law and of equity in relation to:

(a) the operation of the following provisions:
section 8 (Parliamentary privilege preserved)
section 9 (General powers of court)
section 46 (2) (which relates to inferences as to relevance)
section 79 (Savings)
section 156 (2) (which relates to abolition of corroboration requirements)
section 157 (4) (which relates to unreliable evidence); or

(b) the admission or use of evidence in a proceeding in respect of a contempt of court; or

(c) the admission or use of evidence in a proceeding by way of appeal from a judgment, decree, order or sentence of a court; or

(d) the operation of legal and evidential presumptions at common law.

Parliamentary privilege preserved (ALRC 16)

8. Chapters 5 and 6 do not affect the law relating to the privileges of Parliament or a House of Parliament.

General powers of court (ALRC 17)

9. (1) It is the intention of Parliament that the power of a court to control the conduct of a proceeding not be affected by this Act, except in so far as the contrary intention appears in this Act.

(2) In particular, the powers of a court respecting abuse of process in a proceeding are not affected.

CHAPTER 3—WITNESSES

Division 1—Sworn and unsworn evidence

Sworn evidence of witnesses to be on oath or affirmation (ALRC 26, 29 (1))

10. (1) A person may not give sworn evidence in a proceeding unless the person:

(a) has taken an oath in the form set out in Part 1 of Schedule 2 or in a similar form; or

(b) has made an affirmation in the form set out in Part 3 of Schedule 2 or in a similar form.

(2) The person who is to give sworn evidence is to choose whether to take an oath or make an affirmation.

(3) Before a witness gives sworn evidence, the court is to inform the witness that witnesses have the choice of taking an oath or making an affirmation.

(4) The court may direct a person who is to give sworn evidence to make an affirmation if:

(a) the person refuses to choose whether to take an oath or make an affirmation; or

(b) it is not reasonably practicable for the person to take an appropriate oath.

Interpreters to act on oath or affirmation (ALRC 26 (1))

11. A person may not act as an interpreter in a proceeding unless the person:

(a) has taken an oath in the form set out in Part 2 of Schedule 2 or in a similar form; or

(b) has made an affirmation in the form set out in Part 4 of Schedule 2 or in a similar form,

except as provided otherwise by this Division.

Requirements for oaths (ALRC 26 (3) and (5))

12. (1) It is not necessary that a religious text be used in taking an oath.

(2) An oath is effective for the purposes of this Division even if the person who took it:

(a) did not have a religious belief or did not have a religious belief of a particular kind; or

(b) did not understand the nature and consequences of the oath.

Unsworn evidence in criminal proceedings (ALRC 27)

13. (1) In a criminal proceeding, a defendant may give unsworn evidence.

(2) A defendant who gives unsworn evidence may also give sworn evidence.

(3) In giving unsworn evidence, the defendant, with the leave of the court:

(a) may read from a statement in writing; and

(b) may use notes.

(4) A lawyer may assist the defendant to prepare the statement or notes.

(5) The court may direct that any statement in writing or notes that the defendant proposes to use be produced to the court or to some other party before the defendant gives the evidence.

(6) If the defendant is unable to read from a statement in writing, the defendant's lawyer may, with the leave of the court, read the statement to the court.

(7) After unsworn evidence has been given, the defendant's lawyer may, with the leave of the court, direct the defendant's attention to matters as to which the defendant:

(a) has not given unsworn evidence; or

(b) might wish to give further unsworn evidence.

(8) A defendant who has given unsworn evidence must not be cross-examined.

(9) Unsworn evidence given by a defendant may not be used for or against any other defendant.

(10) Subsections (8) and (9) do not apply if the defendant gives both sworn and unsworn evidence.

(11) In this section:

"unsworn evidence" means an unsworn statement made by a defendant under section 405 of the Crimes Act 1900.

Comment on failure to give evidence or sworn evidence (ALRC 23, 28)

14. (1) In a criminal proceeding:

(a) there is to be no comment (except as provided by this section) by any person on the failure of the defendant to give any evidence or to give sworn evidence; and

(b) the defendant is to make no statement as to the reasons why the defendant did not give evidence or sworn evidence.

(2) If the issue of why the defendant did not give evidence or sworn evidence is raised before or by the jury, the Judge may:

(a) state that the defendant had the choice of giving no evidence or of giving either sworn or unsworn evidence (but must not comment on the consequences attached to those choices); and

(b) warn the jury that it must not speculate as to the reasons the defendant chose not to give evidence or gave unsworn evidence.

Division 2—Competence and compellability

Competence and compellability (ALRC 18)

15. Except as otherwise provided by this Act:

(a) every person is competent to give sworn evidence; and

(b) a person who is competent to give sworn evidence about a fact is compellable to give that sworn evidence.

Competence: lack of capacity (ALRC 19, Oaths Act 1900, s. 33)

16. (1) A person who is incapable of understanding that, in giving evidence in a proceeding, he or she is under an obligation to give truthful evidence is not competent to give sworn evidence.

(2) A person who is incapable of giving a rational reply to a question about a fact is not competent to give sworn or unsworn evidence about the fact, but may be competent to give sworn or unsworn evidence about other facts.

(3) A person is not competent to give sworn or unsworn evidence about a fact if:

(a) the person is incapable of hearing or understanding, or of communicating a reply to, a question about the fact; and

(b) that incapacity cannot be overcome by an appropriate manner of questioning or means of giving evidence, or cannot be overcome without undue cost or undue delay.

(4) A person who because of subsection (1) is not competent to give sworn evidence is competent to give unsworn evidence if:

(a) the court is satisfied that the person understands the difference between the truth and a lie; and

(b) the court tells the person that it is important to tell the truth; and

(c) the person indicates, by responding appropriately when asked, that he or she will not tell lies in the proceeding.

(5) The unsworn evidence of a person referred to in subsection (4) is to be treated as if it were sworn evidence.

(6) It is to be presumed, unless the contrary is established to the satisfaction of the court, that a person is not incompetent by reason of this section.

(7) Evidence that has been given by a witness becomes inadmissible if, before the witness finishes giving evidence:

(a) the witness dies or ceases to be competent to give evidence; and

(b) the court decides that it would be unfair to admit the evidence.

(8) For the purpose of determining a question arising under this section, the court may inform itself as the court thinks fit.

Compellability: Sovereign etc. (ALRC 20)

17. (1) None of the following is compellable to give evidence:

The Sovereign
The Governor-General
The Governor
The Governor of another State
The Administrator of a Territory
A foreign sovereign or the Head of State of a foreign country.

(2) A member of a House of Parliament or a member of the legislature of the Commonwealth, another State or a Territory is not compellable to give evidence if the member would, if compelled to give evidence, be prevented from attending:

(a) a sitting of the House or the legislature, or a joint sitting of Parliament or the legislature, of which he or she is a member; or

(b) a meeting of a committee of that House or legislature.

Competence and compellability: Judges and jurors (ALRC 21)

18. (1) A person who is a Judge or juror in a proceeding is not competent to give evidence in the proceeding.

(2) A person who is or was a Judge in a proceeding (including a proceeding referred to in section 4 (4)) is not compellable to give evidence about the proceeding unless the court gives leave.

Competence and compellability: defendant etc. in criminal proceedings (ALRC 3 (definition of "person who is being prosecuted for a related offence") and 22)

19. (1) This section applies only in a criminal proceeding.

(2) A defendant is not competent to give evidence as a witness for the prosecution.

(3) A related offender is not compellable to give evidence for or against a defendant in a criminal proceeding, unless the related offender is being tried separately from the defendant.

(4) A related offender may not give evidence as a witness for the prosecution, except with the leave of the court.

(5) Without limiting the matters that may be taken into account by the court, in determining whether to give leave it is to take into account:

(a) whether the person has or appears to have a motive to misrepresent a matter as to which the person is to give evidence; and

(b) whether the completion or termination of the prosecution of the person before the person gives evidence is reasonably practicable.

(6) If it appears to the court that a witness called by the prosecutor may be a related offender, the court is to satisfy itself (if there is a jury, in the absence of the jury) that the witness is aware of the effect of subsection (3).

(7) In this section:

"related offender", in relation to a defendant in a criminal proceeding, means a person against whom a prosecution has been instituted (being a prosecution that has not been completed or terminated) for:

(a) an offence that arose in relation to the same events as those in relation to which the offence for which the defendant is being prosecuted arose; or

(b) an offence that relates to or is connected with the offence for which the defendant is being prosecuted.

Compellability of spouses etc. in criminal proceedings (ALRC 24)

20. (1) This section applies only in a criminal proceeding.

(2) A person who is the spouse, the de facto spouse, a parent or a child of a defendant may object to being required to give evidence or to give evidence of a communication between the person and the defendant as a witness for the prosecution. The person may not so object if the person is, in relation to the defendant, a related offender.

(3) The objection is to be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right so to object, whichever is the later.

(4) If it appears to the court that a person may have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person.

(5) If there is a jury, the court is to hear and determine any objection under this section in the absence of the jury.

(6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:

(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant concerned, if the person gives the evidence; and

(b) the nature and extent of that harm outweighs the desirability of having the evidence given.

(7) Without limiting the matters that may be taken into account by the court, for the purposes of subsection (6) it must take into account:

(a) the nature and gravity of the offence for which the defendant is being prosecuted; and

(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it; and

(c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor; and

(d) the nature of the relationship between the defendant and the person; and

(e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.

(8) If an objection under this section has been determined, the prosecutor may not comment on:

(a) the objection; or

(b) the decision of the court in relation to the objection; or

(c) the failure of the person to give evidence.

(9) In this section:

(a) a reference to a parent, in relation to a person, includes a reference to an adoptive parent of that person and, in relation to a person who is an ex-nuptial child, also includes a reference to the natural father of that person; and

(b) a reference to a child is a reference to a child of any age and includes a reference to an adopted child and an ex-nuptial child; and

(c) a reference to a child of a defendant includes a reference to a child living with the defendant as if the child were a member of the defendant's family.

Compellability of spouses etc. in certain proceedings

21. Despite section 20, a person who is the spouse or de facto spouse or parent or child of a defendant may be required to give evidence as a witness in proceedings for an offence against or referred to in the following provisions:

section 25 (Child abuse), 26 (Neglect of children), 50 (Children not to be employed in certain cases unless licensed) or 52 (Entertainment and performances by children) of the Children (Care and Protection) Act 1987

section 407AA (Compellability of spouses to give evidence in certain proceedings) of the Crimes Act 1900.

Compellability of spouses in civil proceedings (ALRC 25)

22. (1) This section applies in a civil proceeding (not being a proceeding concerning the custody, guardianship or wardship of a child, a proceeding for access to a child or for child support or maintenance or any proceeding in which the court must treat a child's interests as paramount).

(2) A witness who is the spouse or de facto spouse of a party in a civil proceeding may object to giving evidence of a communication between the person and his or her spouse during the marriage or de facto relationship.

(3) The objection may be made before the witness gives the evidence or as soon as practicable after the witness becomes aware of the right to so object, whichever is the later.

(4) If it appears to the court that a witness may have a right to make such an objection, the court is to satisfy itself that the witness is aware that he or she may object to giving the evidence.

(5) If there is a jury, the court is to hear and determine the objection in the absence of the jury.

(6) The witness must not be required to give the evidence if, on an objection, the court finds that:

(a) the likelihood of the harm that would or might be caused, whether directly or indirectly, by the witness giving evidence of the communication to:

(i) the person who made the objection; or

(ii) the relationship between that person and the defendant concerned; and

(b) the nature and extent of any such harm,

outweigh the desirability of having the evidence given.

(7) Without limiting the matters that may be taken into account by the court, for the purposes of subsection (6) it must take into account:

(a) the nature of the cause of action; and

(b) the substance and importance of any evidence that the witness might give and the weight that is likely to be attached to it; and

(c) whether any other evidence concerning the matters to which the evidence of the witness would relate is reasonably available to the court; and

(d) the nature of the relationship between the defendant and the witness; and

(e) whether, in giving the evidence, the witness would have to disclose matter that was received by the witness in confidence from the defendant.

(8) If an objection under this section has been determined, no party may comment on the objection, on the decision of the court in relation to the objection or on the failure of the witness to give the evidence.

Witnesses failing to attend proceedings (Evidence Act 1898, ss. 13, 14)

23. (1) If a witness fails to appear when called in any civil or criminal proceedings and it is proved that he or she has been duly bound by recognisance or served with a summons or subpoena, the court may:

(a) order the person to show cause at those or later proceedings why execution of the recognisance or an attachment for disobedience to the summons or subpoena should not be issued against the person; or

(b) if it is proved that the non-appearance is without just cause or reasonable excuse and that the person will probably be able to give relevant sworn evidence in the proceeding, issue a warrant to bring the person before the court to give the evidence.

(2) Proof under this section may be oral before the court or by affidavit.

(3) On return of an order to show cause under this section the court may deal with the case in the same way as the Supreme Court would deal with an order to the like effect made by that Court.

CHAPTER 4—MANNER OF GIVING EVIDENCE

PART 1—GENERAL RULES

Court's power to call and question witnesses etc. (ALRC 30)

24. (1) The court may, in exceptional circumstances, call a witness.

(2) The court may question any witness.

(3) The court on its own motion may, or at the request of a party, must, by order exclude from the court any witness (not being a party to the proceeding) who has not yet testified, in order to prevent the witness hearing the evidence of other witnesses.

(4) If the court is satisfied that the presence of a witness would materially assist in the presentation of the evidence, it may, despite subsection (3), permit the witness to remain in the court, subject to any conditions it considers appropriate.

(5) If there is a jury, the court may comment as to the weight to be given to the testimony of any witness who:

(a) remained in court contrary to an order under subsection (3); or

(b) was permitted to remain in the court under subsection (4).

(6) The court may order any person not to discuss evidence given in the proceeding with any witness who is to testify in the proceeding.

(7) The court may make such orders as it considers just in relation to:

(a) the manner in which witnesses are to be questioned; and

(b) the production and use of documents and things in connection with the questioning of witnesses; and

(c) the order in which the parties may question a witness; and

(d) the presence and behaviour of any person in connection with the questioning of witnesses.

Parties may question witnesses (ALRC 31)

25. A party may question any witness, except as provided by this Act.

Examination in chief to be completed before other questioning (ALRC 32)

26. Unless the court otherwise directs:

(a) cross-examination of a witness is not to take place before the examination in chief of the witness; and

(b) re-examination of a witness is not to take place before all other parties who wish to do so have cross-examined the witness.

Manner and form of questioning witnesses and their responses (ALRC 33)

27. (1) A party may question a witness in any way the party thinks fit, except as provided by this Chapter or as directed by the court.

(2) Evidence may be given in whole or in part orally or in written narrative form and the court may direct that it be so given.

(3) Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence given or to be given.

(4) Evidence of speech may be given in an indirect form if:

(a) the direct form is also given; or

(b) it appears to the court that the indirect form is necessary to give an adequate account of a speech.

Attempts to revive memory in court (ALRC 36)

28. (1) A witness may not, in the course of giving evidence, use a document to try to revive his or her memory about a fact or opinion without the leave of the court, except as provided by section 29.

(2) Without limiting the matters that may be taken into account by the court, in determining whether to give leave it is to take into account:

(a) whether the witness will be able to recall the fact adequately without using the document; and

(b) whether so much of the document as the witness proposes to use is, or is a copy of, a document that was made by the witness at the time of, or soon after, the occurrence of the fact or formation of the opinion to which it refers.

(3) If a witness has, while giving evidence, used a document to try to revive his or her memory about a fact or opinion, the witness may, with the leave of the court, read aloud, as part of his or her evidence, so much of the document as relates to that fact or opinion.

(4) The hearsay rule does not prevent the admission or use of evidence that a witness has read aloud from a document only because doing so has failed to revive his or her memory.

(5) If leave has been given as mentioned in this section, the court is, on the request of a party, to give such directions as the court thinks fit to ensure that so much of the document as relates to the proceeding is produced to that party.

Evidence by police officers (Crimes Act 1900, s. 418)

29. **(1)** In any criminal proceeding, a police officer may give evidence in chief for the prosecution by reading or being lead through a written statement previously made by the police officer.

(2) Evidence may not be so given unless:

(a) the statement was made by the police officer at the time of or soon after the occurrence of the events to which it refers; and

(b) the police officer signed the statement when it was made; and

(c) a copy of the statement has been given to the person charged or to his or her lawyer a reasonable time before the hearing of the evidence for the prosecution.

(3) The hearsay rule does not prevent the admission or use of evidence that a police officer has read aloud from a written statement only because doing so has failed to revive his or her memory.

Attempts to revive memory out of court (ALRC 37)

30. **(1)** The court may, on the request of a party, give such directions as are appropriate to ensure that specified documents and things used by a witness otherwise than while giving evidence to try to revive his or her memory are produced to the party for the purposes of the proceeding.

(2) The court may refuse to admit the evidence given by the witness so far as it concerns a fact as to which the witness so revived his or her memory if, without reasonable excuse, the directions have not been complied with.

Direction not to extend to certain documents (ALRC 38)

31. (1) A direction under section 30 is not to be made so as to require the production of a document if evidence of the contents of the document may not be adduced by virtue of section 106 (Privilege in respect of legal advice and litigation etc.).

(2) The objection required under section 106 is also required in connection with the operation of subsection (1).

Effect of calling for production of documents (ALRC 39)

32. (1) A party is not to be required to tender a document only because the party, whether under this Act or otherwise, called for the document to be produced to the party or inspected it when it was so produced.

(2) If a document so called for has been produced or inspected and the party to whom it was produced or who inspected it has failed to tender it, the party who produced it is not for that reason entitled to tender it.

Persons may be examined without subpoena (Evidence Act 1898, s. 12)

33. (1) In any proceeding, a court may, on its own motion or on the application of a party, order that a person who:

(a) is present; and

(b) might have been compellable to give evidence or produce documents or things under a subpoena or other summons or order duly issued and served for that purpose,

is compellable to give evidence and produce documents or things to the court then in the person's possession or under the person's control in the same manner as the person would have been under the subpoena or other summons or order.

(2) The court may also order that if the person refuses to give the evidence or produce the documents or things to the court the person is to be subject to the same penalties and liabilities as if the person had been duly subpoenaed or summoned for that purpose.

(3) A party who inspects a document or thing produced to the court because of an order under subsection (1) need not use the document in evidence.

PART 2—EXAMINATION IN CHIEF AND RE-EXAMINATION

Leading questions (ALRC 40)

34. (1) A leading question is not to be put to a witness in examination in chief or in re-examination unless:

(a) the question relates to a matter introductory to the evidence of the witness or to a matter that is not in dispute; or

(b) the court gives leave.

(2) Subsection (1) does not prevent a court from exercising power under rules of court to allow a written statement or report to be tendered or treated as evidence in chief of its maker.

Unfavourable evidence (ALRC 41)

35. (1) A party may, with the leave of the court, question a witness called by the party about evidence given by the witness that is unfavourable to the party.

(2) The party may question the witness as though the party were cross-examining the witness.

(3) The party so questioning a witness may also, with the leave of the court, question the witness about matters relevant only to the credibility of the witness, and such questioning is to be taken to be cross-examination for the purposes of this Act.

(4) If, in examination in chief, a witness appears to the court not to be making a genuine attempt to give evidence about a matter of which the witness may reasonably be supposed to have knowledge, the party who called the witness may, with the leave of the court, question the witness about any matter (including a matter relevant only to the credibility of the witness) as though the party were cross-examining the witness.

(5) Questioning as mentioned in this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.

(6) If the court so directs, the order in which the parties question the witness is to be as the court directs.

(7) Without limiting the matters that may be taken into account by the court, in determining whether to give leave or a direction under this section it is to take into account:

(a) whether the party gave notice at the earliest opportunity of his or her intention to seek leave; and

(b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by some other party.

(8) For the purposes of this section, an insurer or other person with a legal, statutory or equitable right to act in the name of a party and who does so act is taken to be the party and the person in whose name the insurer or other person acts is taken to be a witness only.

Limits on re-examination (ALRC 42)

36. On re-examination, a witness may be questioned as to matters arising out of or related to evidence given by the witness in cross-examination and other questions may not be put to the witness without the leave of the court.

PART 3—CROSS-EXAMINATION

Improper questions (ALRC 44)

37. (1) A court may disallow a question put to a witness in cross-examination or inform the witness that the question need not be answered if the question is misleading or unduly annoying, harassing, intimidating, offensive or repetitive.

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

(a) any relevant condition or characteristic of the witness, including age, personality and education; and

(b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

Leading questions (ALRC 45)

38. (1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.

(2) Without limiting the matters that the court may take into account, in determining whether to disallow the question or give such a direction it is to take into account the extent to which:

(a) evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness; and

(b) the witness has an interest consistent with an interest of the cross-examiner; and

(c) the witness is sympathetic to the party who is cross-examining the witness, either generally or in relation to a particular matter; and

(d) the facts will be better ascertained if leading questions are not used; and

(e) the age of the witness or any mental, intellectual or physical disability to which the witness is subject may affect the answers of the witness.

(3) Subsection (1) does not limit the power of the court to control leading questions.

Prior inconsistent statements of witness (ALRC 46)

39. (1) It is not necessary that complete particulars of a prior inconsistent statement alleged to have been made by a witness be given to the witness, or that a document that contains a record of the statement be shown to the witness, before the witness may be cross-examined about the statement.

(2) If, in cross-examination, a witness does not admit that he or she has made a prior inconsistent statement, the cross-examiner may not adduce evidence of the statement otherwise than from the witness unless, in the cross-examination, the cross-examiner:

(a) gave the witness such particulars of the statement as are reasonably necessary to enable the witness to identify the statement; and

(b) drew the attention of the witness to so much of the statement as is inconsistent with the evidence of the witness.

(3) For the purpose of adducing that evidence, the party may re-open the party's case.

Previous representations of other persons (ALRC 47)

40. (1) A cross-examiner may not, in cross-examination of a witness, use a previous representation alleged to have been made by a person other than the witness, except as provided by this section.

(2) A cross-examiner may question a witness about such a representation and its contents if:

(a) evidence of the representation has been admitted; or

(b) the court is satisfied that it will be admitted.

(3) A document in which such a representation is recorded may be used only as follows if evidence of the representation has not been admitted and the court is not satisfied that (if it were to be adduced) it would be admitted:

(a) the document may be produced (or, in the case of a sound recording, played) to the witness;

(b) the witness may then be asked whether, having examined (or heard) the contents of the document, he or she adheres to the evidence that he or she has given;

(c) neither the cross-examiner nor the witness is to identify the document or disclose its contents..

(4) A document used as mentioned in subsection (3) may be marked for identification.

Production of documents (ALRC 48)

41. (1) If a party:

(a) is cross-examining or has cross-examined a witness about a prior inconsistent statement alleged to have been made by the witness that is recorded in a document; or

(b) in cross-examination of a witness, is using or has used a previous representation alleged to have been made by some other person that is recorded in a document,

the party must, if the court so orders or if some other party so requires, produce the document, or such evidence of the contents of the document as is available to the party, to the court or to that other party.

(2) If a document or evidence has been so produced, the court may:

(a) examine it;

(b) give directions as to its use; and

(c) subject to this Act, admit it even if it has not been tendered by a party.

(3) A party is not, by reason only of having produced a document to a witness who is being cross-examined, to be required to tender the document.

Certain matters to be put to witness (ALRC 49)

42. If a party adduces evidence:

(a) that contradicts evidence already given in examination in chief by a witness called by some other party; or

(b) about a matter as to which a witness who has already been called by some other party was able to give evidence in examination in chief,

and the evidence adduced has been admitted, the court may, if the party who adduced that evidence did not cross-examine the witness about the matter to which the evidence relates, give leave to the party who called the witness to re-call the witness to be questioned about the matter.

CHAPTER 5—RELEVANCE: THE PRINCIPAL INCLUSIONARY RULE

Relevant evidence (ALRC 50)

43. (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (whether directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) In particular, evidence is not to be taken to be irrelevant only because it relates only to:

(a) the credibility of a party or a witness; or

(b) the admissibility of other evidence; or

(c) a failure to adduce evidence.

Relevant evidence to be admissible (ALRC 51)

44. Evidence that is relevant in a proceeding is, except as otherwise provided by this Act, admissible, and is to be admitted, in the proceeding. Evidence that is not relevant in the proceeding is not so admissible.

Provisional relevance (ALRC 52)

45. (1) If the determination of the question whether evidence adduced by a party is relevant depends on the court's making some other finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant:

(a) if it is reasonably open to make that finding; or

(b) subject to the admission of further evidence at some later stage of the proceeding that will make it reasonably open to make that finding.

(2) Without limiting subsection (1), if the relevance of evidence of an act done by a person depends on the court's making a finding that the person and one or more other persons had or were acting in furtherance of a common purpose (whether to effect an unlawful conspiracy or otherwise) the court may use the evidence itself in determining whether the common purpose existed.

Inferences as to relevance (ALRC 53)

46. (1) If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.

(2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

CHAPTER 6—ADMISSION AND USE OF EVIDENCE: EXCLUSIONARY RULES

PART 1—HEARSAY EVIDENCE

Division 1—The hearsay rule

The hearsay rule—exclusion of hearsay evidence (ALRC 54)

47. (1) Evidence of a previous representation (that is, **"hearsay evidence"**) is not admissible to prove the existence of a fact intended by the person who made the representation to be asserted by the representation.

(2) Such a fact is in this Part referred to as an **asserted fact**.

(3) Despite subsection (1), if evidence of a previous representation is admitted because it is relevant for some purpose other than proof of the fact asserted by the representation, the evidence may be used to prove the existence of the asserted fact.

Exceptions to the definition of hearsay evidence

48. (1) Section 47 does not prevent the use of evidence of a previous representation to prove the existence of an asserted fact if:

(a) it is used to prove the existence of an asserted fact, being the physical, mental or emotional state of a person at the time the person made the previous representation; or

(b) it is used to prove the existence of an asserted fact, being the identification (visual or otherwise), at the time the previous representation was made, of a person, place or thing by the person who made the previous representation.

(2) In this section, a reference to the physical, mental or emotional state of a person includes a reference to:

(a) the person's sensations, intentions, plans, motives, designs, mental feelings and bodily health; and

(b) bodily sensations (for example, pain) felt by the person.

Exceptions to the hearsay rule dependent on competency

49. Nothing in this Part enables the use to prove the existence of an asserted fact of a previous representation made by a person who, at the time the representation was made, was not competent to give sworn or unsworn evidence of the fact.

Division 2—"First-hand" hearsay

Restriction to "first-hand" hearsay (ALRC 55)

50. (1) A reference in this Division to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.

(2) A person whose knowledge of an asserted fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (not being knowledge based on a previous representation made by some other person about the asserted fact) has personal knowledge of an asserted fact.

Exception: civil proceedings if maker not available (ALRC 56)

51. In a civil proceeding, if the person who made a previous representation is not available to give evidence about an asserted fact, the hearsay rule does not apply in relation to:

(a) oral evidence of the representation that is given by a person who saw, heard or otherwise perceived the making of the representation; or

(b) a document so far as it contains the representation or some other representation to which it is reasonably necessary to refer to understand the representation.

Exception: civil proceedings if maker available (ALRC 57)

52. (1) This section applies in a civil proceeding where a person who made a previous representation is available to give evidence about an asserted fact.

(2) If it would cause undue expense or undue delay, or would not be reasonably practicable, to call that person to give evidence, the hearsay rule does not apply in relation to:

(a) oral evidence of the representation that is given by a person who saw, heard or otherwise perceived the making of the representation; or

(b) a document so far as it contains the representation or some other representation to which it is reasonably necessary to refer to understand the representation.

(3) If a person who made a previous representation has been or is to be called to give evidence, the hearsay rule does not apply in relation to evidence of the representation that is given by:

(a) that person; or

(b) a person who saw, heard or otherwise perceived the making of the representation,

if, at the time when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(4) If subsection (3) applies in relation to a representation, a document containing the representation is not to be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Exception: criminal proceedings if maker not available (ALRC 58)

53. (1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply in relation to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the making of the representation, being a representation that was:

(a) made under a duty to make that representation or to make representations of that kind; or

(b) made at or shortly after the time when the circumstances in which the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or

(c) made in the course of giving sworn evidence in a proceeding (including a proceeding referred to in section 4 (4)) if the defendant, in that proceeding, cross-examined the person who made the representation, or had a reasonable opportunity to cross-examine that person, about it; or

(d) against the interests of the person who made it at the time when it was made.

(3) For the purposes of subsection (2) (c), a defendant who was not present at a time when the cross-examination of a person might have been

conducted but could reasonably have been present at that time may be taken to have had a reasonable opportunity to cross-examine the person.

(4) A representation is taken to be against the interests of the person who made it for the purposes of subsection (2) (d) if the representation:

(a) tends to damage the reputation of the person who made it; or

(b) tends to show that that person has committed an offence for which the person has not been convicted; or

(c) tends to show that that person is liable in an action for damages; or

(d) is a representation as to a pecuniary disadvantage to the person that tends to show that the person is under an obligation in some other respect.

(5) The hearsay rule does not prevent the admission or use of evidence of a previous representation adduced by a defendant, being evidence that is given by a person who saw, heard or otherwise perceived the making of the representation.

(6) If evidence of a previous representation about a matter has been adduced by a defendant and has been admitted, the hearsay rule does not apply in relation to evidence of a previous representation about the matter adduced by some other party, being evidence that is given by a witness who saw, heard or otherwise perceived the making of the representation adduced by that other party.

Exception: criminal proceedings if maker available (ALRC 59)

54. **(1)** In a criminal proceeding, if the person who made a previous representation is available to give evidence about an asserted fact, the hearsay rule does not apply in relation to evidence of the previous representation that is given by:

(a) that person if, at the time when the representation was made, the occurrence of the asserted fact was fresh in his or her memory; and

(b) a person who saw, heard or otherwise perceived the making of the representation being made, if:

(i) at the time when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation; and

(ii) the person who made it has been or is to be called to give evidence in the proceeding.

(2) Subsection (1) does not apply in relation to evidence adduced by the prosecutor of a representation that was made for the purpose of indicating the evidence that the person who made it would be able to give in a proceeding referred to in section 4 (4).

(3) If subsection (1) applies in relation to a representation, a document containing the representation is not to be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Notice to be given (ALRC 60)

55. (1) The provisions of sections 51, 52 (2) and 53 (2) and (5) do not apply in relation to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the intention to adduce the evidence, except as provided by this section.

(2) If notice has not been given, the court may, on the application of a party and subject to such conditions (if any) as the court thinks fit to impose, direct that one or more of the provisions referred to in subsection (1) is to apply:

(a) despite the failure of the party to give the notice; or

(b) in relation to specified evidence with such modifications as the court specifies.

(3) In a civil proceeding, if the writing by which notice is given discloses that it is not intended to call the person who made the previous representation concerned on a ground referred to in section 52 (2), a party may, not later than 7 days after notice has been given, by notice in writing given to each other party, object to the tender of the evidence, or of a specified part of the evidence.

(4) The notice is to set out the grounds on which the objection is based.

(5) The court may determine the objection on the application of a party made at or before the hearing.

(6) If the objection is unreasonable, the court may order that the party objecting is, in any event, to bear the costs (ascertained on a solicitor and client basis) incurred by another party:

(a) in relation to the objection; and

(b) in calling the person who made the representation to give evidence.

(7) Notice is to be given in accordance with rules of court or regulations (if any) made for the purposes of this section.

Division 3—Other exceptions to the hearsay rule

Exception: business records (ALRC 61)

56. (1) This section applies to a document that:

(a) forms part of the records belonging to or kept by a business or that at any time was or formed part of such a record; and

(b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, a business.

(2) The hearsay rule does not prevent the admission or use of the document (so far as it contains the representation) if the representation was made:

(a) by a person whose knowledge of the asserted fact might reasonably be supposed to be based on what the person saw, heard or otherwise perceived; or

(b) on the basis of information directly or indirectly supplied by a person whose knowledge of the asserted fact might reasonably be supposed to be based on what the person saw, heard or otherwise perceived.

(3) Subsection (2) does not apply if the representation was prepared or obtained for the purpose of conducting, or in contemplation of or in connection with, a proceeding (including a proceeding referred to in section 4 (4)).

(4) If:

(a) the happening of an event of a particular kind is in question; and

(b) in the course of a business, a system has been followed of making and keeping a record of the happening of all events of that kind,

the hearsay rule does not prevent the admission or use of evidence that tends to prove that there is no record kept in accordance with that system of the happening of the event.

Exception: contents of tags, labels etc. (ALRC 62)

57. If:

(a) a document has been attached to an object; or

(b) writing has been placed on a document or object,

being a document or writing that may reasonably be supposed to have been so attached or placed in the course of a business, the hearsay rule does not prevent the admission or use of the document or writing.

Exception: telecommunications (ALRC 63)

58. If a document that records a message that has been transmitted by means of a telecommunications service has been produced by a telecommunications installation or received from the Australian Telecommunications Corporation, the hearsay rule does not prevent the admission or use of a representation in the document as to:

(a) the identity of the person from whom or on whose behalf the message was sent; or

(b) the date on which, the time at which or the place from which the message was sent; or

(c) the identity of the person to whom the message was addressed; or

(d) the telephone number of the place from, or to, which the message was sent.

Exception: reputation as to certain matters (ALRC 64)

59. (1) The hearsay rule does not prevent the admission or use of evidence of:

(a) reputation that a man and a woman cohabiting at a particular time were married to each other at that time; or

(b) reputation as to family history or a family relationship; or

(c) reputation as to the existence, nature or extent of a public or general right.

(2) In a criminal proceeding, subsection (1) does not apply in relation to evidence adduced by the prosecutor but, if evidence as mentioned in subsection (1) has been admitted, this subsection does not prevent the admission or use of evidence that tends to contradict it.

Exception: interlocutory proceedings (ALRC 65)

60. The hearsay rule does not prevent the admission or use of evidence adduced in an interlocutory proceeding if the party who adduces it also adduces evidence of its source.

PART 2—OPINION EVIDENCE

The opinion rule—exclusion of opinion evidence (ALRC 66)

61. (1) Evidence of an opinion is not admissible to prove the existence of a fact as to the existence of which the opinion was expressed.

(2) Despite subsection (1), if evidence of an opinion is admitted because it is relevant for some purpose other than proof of the existence

of a fact as to the existence of which the opinion was expressed, the evidence may be used to prove the existence of the fact.

Exception: lay opinions (ALRC 67)

62. If:

(a) an opinion expressed by a person is based on what the person saw, heard or otherwise noticed about a matter or event; and

(b) evidence of the opinion is reasonably necessary to obtain an adequate account of the person's perception of the matter or event,

the opinion rule does not prevent the admission or use of the evidence.

Exception: opinions based on specialised knowledge (ALRC 68)

63. If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not prevent the admission or use of evidence of an opinion of that person that is wholly or substantially based on that knowledge.

Ultimate issue and common knowledge rules abolished (ALRC 69)

64. Evidence of an opinion is not inadmissible only because it is about:

(a) a fact in issue; or

(b) a matter of common knowledge.

PART 3—ADMISSIONS

Definition: sound recording (ALRC 70)

65. In this Part, a reference to a sound recording includes:

(a) a reference to a recording of visual images and sounds; and

(b) a reference to a recording of visual images together with a contemporaneous recording of sounds.

Restriction to personal admissions and representations

66. In this Part, a reference to an admission or a previous representation made in relation to an admission is a reference to an admission or previous representation that was made by a person whose knowledge of an asserted fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived, other than a previous representation made by some other person about the asserted fact.

Hearsay and opinion rules: exception for admissions (ALRC 71)

67. (1) The hearsay rule and the opinion rule do not prevent the admission or use of:

(a) evidence of an admission; or

(b) evidence of a previous representation made in relation to an admission at the time when the admission was made or shortly before or shortly after that time, being a representation to which it is reasonably necessary to refer to understand the admission.

(2) If, by reason only of the operation of subsection (1), the hearsay rule and the opinion rule do not prevent the admission or use of:

(a) evidence of an admission; or

(b) evidence of a previous representation as mentioned in subsection (1) (b),

the evidence may, if admitted, be used only in relation to the case of the party who made the admission concerned and the case of the party who adduced the evidence.

(3) The evidence may be used in relation to the case of some other party if that other party consents but consent may not be given in respect of part only of the evidence.

Exclusion of admissions influenced by violence etc. (ALRC 72)

68. Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced:

(a) by violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards some other person, or by a threat of conduct of that kind; or

(b) by the promise of substantial advantage made to the person who made the admission or to another person, whether for the benefit of the person to whom the promise is made or for the benefit of some other person.

Criminal proceedings: reliability of admissions by defendants (ALRC 73)

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

(2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

(3) Without limiting the matters that may be taken into account by the court, for the purposes of subsection (2) it is to take into account:

(a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and

(b) if the admission was made in response to questioning:

(i) the nature of the questions and the manner in which they were put; and

(ii) the nature of any threat, promise or representation made to the person questioned.

Criminal proceedings: admissions by suspects (ALRC 74 (1)–(3))

70. (1) This section applies only:

(a) in a criminal proceeding; and

(b) in relation to evidence of an admission within the meaning of this section.

(2) Evidence of an admission is not admissible unless:

(a) there is available to the court a sound recording made by a police officer at a police station of the interview in the course of which the admission was made; or

(b) if the prosecution establishes that there was a reasonable excuse as to why a sound recording referred to in paragraph (a) could not be made, there is available to the court a sound recording of an interview with the person who made the admission about the making and terms of the admission in the course of which the person states that he or she made an admission in those terms; or

(c) if the prosecution establishes that there was a reasonable excuse as to why the sound recordings referred to in paragraphs (a) and (b) could not be made, there is available to the court a sound recording made as soon as practicable after the interview in the course of which the admission was made in which a police officer (who was present at the interview) states that the admission was made and describes the terms of the admission; or

(d) the prosecution establishes that there was a reasonable excuse as to why the sound recordings referred to in paragraphs (a), (b) and (c) could not be made.

(3) The hearsay rule and the opinion rule do not prevent the admission or use of a sound recording as mentioned in subsection (2).

(4) In this section:

"admission" means an admission:

(a) that was made by a defendant who, at the time when the admission was made, was or ought reasonably to have been suspected by an investigating official of having committed an offence; and

(b) that was made in the course of official questioning; and

(c) that relates to an indictable offence which cannot be dealt with summarily without the consent of the accused;

"reasonable excuse" includes:

(a) a mechanical failure; and

(b) the refusal of a person being questioned to have the questioning electronically recorded; and

(c) the lack of availability of recording equipment within a period in which it would be reasonable to detain the person being questioned.

Criminal proceedings: cautioning of suspects (ALRC 74 (4))

71. (1) Evidence of an admission made in response to a question put by an investigating official in the course of official questioning of a suspect is not admissible unless:

(a) before the admission was made, the suspect was informed by an investigating official that the suspect need not say or do anything, or answer any questions, in connection with the investigation but that anything that he or she said or did might be given in evidence; or

(b) the prosecution establishes that the investigating official had a reasonable excuse for failing to so inform the suspect.

(2) The suspect must also be informed that he or she may, however, be required by law to furnish specified information to the investigating official.

(3) In this section, **"suspect"** means a person who, at the time a question was put by an investigating official was, or ought reasonably to have been, suspected by the investigating official of having committed an offence.

Exclusion of records of oral questioning (ALRC 75)

72. (1) If an oral admission was made by a defendant to an investigating official in response to a question put or a representation made by the official, a document prepared by or on behalf of the official

is not admissible in a criminal proceeding to prove the contents of the question, representation or response unless the defendant has acknowledged that the document is a true record of the question, representation or response.

(2) The defendant may acknowledge that a document is a true record by signing, initialling or otherwise marking the document.

(3) In subsection (1), **"document"** does not include a sound recording or a transcript of a sound recording.

Admissions made with authority (ALRC 76)

73. **(1)** If it is reasonably open to find that:

(a) at the time when a previous representation was made, the person who made it had authority to make statements on behalf of a party in relation to the matter with respect to which the representation was made; or

(b) at the time when a previous representation was made, the person who made it was an employee of a party or had authority otherwise to act for a party and the representation related to a matter within the scope of the person's employment or authority; or

(c) a previous representation was made by a person in furtherance of a common purpose (whether lawful or not) that the person had with a party or with a party and one or more other persons,

the representation is, for the purpose only of determining whether it is to be taken to be an admission, taken to have been made by the party.

(2) For the purposes of subsection (1), the hearsay rule does not prevent the admission or use of a previous representation made by a person that tends to prove:

(a) that the person had authority to make statements on behalf of a party in relation to a matter; or

(b) that the person was an employee of a party or had authority otherwise to act for a party; or

(c) the scope of the person's employment or authority; or

(d) the existence at any time of a common purpose.

(3) In a criminal proceeding, subsection (1) (a) and (b) applies against a defendant only in relation to evidence of an admission made by a director, or a person concerned in the management, of a corporation that is prosecuted for an offence.

Proof of making of admission (ALRC 77)

74. If it is reasonably open to find that a particular person made an admission, the court is, for the purpose of determining whether evidence of the admission is admissible, to find that the person made the admission.

Evidence of silence (ALRC 78)

75. (1) In a criminal proceeding, an inference unfavourable to a person may not be drawn from evidence that the person or some other person failed or refused:

(a) to answer a question or some or any questions; or

(b) to respond to a representation put or made to the person in the course of official questioning.

(2) If evidence of that kind may only be used to draw such an inference, it is not admissible.

(3) Subsection (1) does not prevent the use of the evidence to prove that the person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.

(4) In this section, **"inference"** includes an inference of consciousness of guilt.

Discretion to exclude admissions (ALRC 79)

76. In a criminal proceeding, if evidence of an admission is adduced by the prosecution and, having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence, the court may:

(a) refuse to admit the evidence; or

(b) refuse to admit the evidence to prove a particular fact.

PART 4—EVIDENCE OF JUDGMENTS AND CONVICTIONS

Exclusion of evidence of judgments and convictions (ALRC 80)

77. (1) Evidence of a finding of fact or of the decision in a proceeding (including a proceeding referred to in section 4 (4)) is not admissible to prove the existence of a fact that was in issue in the proceeding.

(2) Evidence that under this Part is not admissible to prove the existence of a fact may not be used to prove that fact even if it is relevant for some other purpose.

Exceptions (ALRC 81)

78. (1) Section 77 (1) does not prevent the admission or use of evidence of a grant of probate, letters of administration or like order of a court to prove:

(a) the death or date of death of the person concerned; or

(b) the due execution of the testamentary document concerned.

(2) In a civil proceeding, section 77 (1) does not prevent the admission or use of evidence that a party, or a person through or under whom a party claims, has been convicted of an offence, not being a conviction:

(a) in respect of which a review or appeal (however described) has been instituted but not finally determined; or

(b) that has been quashed or set aside; or

(c) in respect of which a pardon has been given.

(3) If, by virtue of this section, section 77 (1) does not prevent the admission or use of evidence, the hearsay rule and the opinion rule do not prevent the admission or use of that evidence.

Savings (ALRC 82)

79. This Part does not affect the operation of:

(a) section 55 of the Defamation Act 1974 or any other law which relates to the admissibility or effect of evidence of a conviction tendered in a proceeding (including a criminal proceeding) for defamation; or

(b) a judgment in rem; or

(c) the law relating to res judicata or issue estoppel.

PART 5—EVIDENCE OF CONDUCT AND CHARACTER RELEVANT TO ISSUES

Division 1—Preliminary

Definition (ALRC 83)

80. A reference in this Part to the doing of an act includes a reference to a failure to act.

Application (ALRC 84)

81. (1) This Part does not apply in relation to evidence that relates only to the credibility of a witness.

(2) This Part does not apply so far as a proceeding relates to bail or sentencing.

(3) This Part does not apply in relation to evidence of the character, reputation or conduct of a person, or in relation to evidence of a tendency that a person has or had, if that character, reputation, conduct or tendency is a fact in issue.

Use of evidence for other purposes (ALRC 85)

82. Evidence that under this Part is not admissible to prove a particular matter may not be used to prove that matter even if it is relevant for some other purpose.

Division 2—Tendency and misconduct evidence

Exclusion of tendency and misconduct evidence (ALRC 86)

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

(2) Evidence of a party's misconduct is not admissible against that party to prove that the party acted in a particular way or had a particular state of mind.

(3) This section does not prevent the admission or use of evidence by a party that explains or contradicts evidence, of the kind mentioned in that subsection, adduced by another party.

(4) For the purposes of this section, knowledge of a fact or circumstance is not to be taken to be a state of mind.

Division 3—Conduct evidence

Exception: conduct (including of accused) to prove tendency (ALRC 87)

84. (1) If there is a question whether a party did a particular act and it is reasonably open to find that:

(a) the party did some other act; and

(b) both acts, and the circumstances in which they were done, are substantially and relevantly similar,

the tendency rule does not prevent the admission or use of evidence that the party did the other act.

(2) If there is a question whether a party had a particular state of mind and it is reasonably open to find that:

(a) the party had some other state of mind; and

(b) both the states of mind, and the circumstances in which they existed, are substantially and relevantly similar,

the tendency rule does not prevent the admission or use of evidence that the party had the other state of mind.

(3) If there is a question whether a party did a particular act or had a particular state of mind and it is reasonably open to find that:

(a) the party did some other act that amounted to misconduct; and

(b) evidence of the misconduct is of substantial probative value,

the tendency rule does not prevent the admission or use of evidence of the misconduct.

Exclusion of evidence of conduct (including of accused) to prove improbability of co-incidence (ALRC 88)

85. (1) Evidence that 2 or more events occurred is not admissible against a party to prove that, because of the improbability of the events occurring co-incidentally, the party did a particular act or had a particular state of mind unless it is reasonably open to find that:

(a) the events occurred and the party could have been responsible for them; and

(b) all the events, and the circumstances in which they occurred, are substantially and relevantly similar or the inference that all the events and the circumstances in which they occurred are connected has substantial probative value.

(2) Subsection (1) does not prevent the admission or use of evidence by a party that explains or contradicts evidence of the kind mentioned in that subsection.

Further protections: prosecution evidence of conduct of accused (ALRC 89)

86. (1) This section applies in relation to evidence in a criminal proceeding adduced by the prosecutor and so applies in addition to sections 84 and 85.

(2) Evidence that the defendant did or could have done a particular act or had or could have had a particular state of mind, being an act or state of mind that is similar to an act or state of mind the doing or existence of which is a fact in issue, is not admissible unless:

(a) the existence of that fact in issue is substantially in dispute in the proceeding; and

(b) the evidence has substantial probative value.

(3) Evidence that the defendant did some act that amounted to misconduct, not being an act the doing of which is a fact in issue, is not admissible as tending to prove the fact in issue unless the existence of that fact in issue is substantially in dispute in the proceeding.

(4) Without limiting the matters that the court may have regard to, in determining whether the evidence has substantial probative value it is to have regard to:

(a) the nature and extent of the similarity; and

(b) in the case of evidence of a state of mind—the extent to which the state of mind is unusual or the frequency with which it occurs; and

(c) in the case of evidence of an act:

(i) the extent to which the act is unusual; and

(ii) the likelihood that the defendant would have repeated the act; and

(iii) the number of occasions on which similar acts have been done; and

(iv) the period that has elapsed between the time when the act was done and the time when the defendant is alleged to have done the act that the evidence is adduced to prove.

(5) Subsection (1) does not prevent the admission or use of evidence by a party that explains or contradicts evidence, of the kind mentioned in that subsection, adduced by another party.

Notice to be given (ALRC 90)

87. (1) Subject to subsection (2):

(a) section 84 does not apply in relation to evidence adduced by a party; and

(b) evidence adduced by a party to which section 85 applies is not admissible,

unless the party has given reasonable notice in writing to each other party of the intention to adduce the evidence.

(2) The court may, on the application of a party and subject to such

conditions (if any) as the court thinks fit to impose, direct that section 84 or 85, or both, is or are to apply:

(a) despite the failure of the party to give such notice; or

(b) in relation to specified evidence—with such modifications as the court specifies.

(3) Notice is to be given in accordance with rules of court or regulations (if any) made for the purposes of this section.

Division 4—Character evidence

Evidence of character (Crimes Act 1900, s. 413)

88. (1) A witness who is examined as to the character of a person may give evidence of the general repute of the person and of his or her own knowledge of the habits, disposition and conduct of the person.

(2) Despite subsection (1), a witness must not state that he or she would not believe another person on his or her oath or affirmation.

Exception: character of accused (ALRC 91)

89. (1) This section applies only in a criminal proceeding.

(2) The hearsay rule, the opinion rule and the tendency rule do not prevent the admission or use of evidence adduced by a defendant that tends to prove that the defendant is, either generally or in a particular respect, a person of good character.

(3) If evidence that tends to prove that the defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule and the tendency rule do not prevent the admission or use of evidence that tends to prove that the defendant is not generally a person of good character.

(4) If evidence that tends to prove that the defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule and the tendency rule do not prevent the admission or use of evidence that tends to prove that the defendant is not a person of good character in that respect.

Exception: character of co-accused (ALRC 92)

90. (1) In a criminal proceeding, the hearsay rule and the tendency rule do not prevent the admission or use of evidence of an opinion about a defendant adduced by some other defendant if:

(a) the person whose opinion it is has specialised knowledge based on the person's training, study or experience; and

(b) the opinion is wholly or substantially based on that knowledge.

(2) If evidence of an opinion as mentioned in subsection (1) has been admitted, the hearsay rule, the opinion rule and the tendency rule do not prevent the admission or use of evidence to prove that that evidence should not be accepted.

Cross-examination of accused by leave only (ALRC 93)

91. (1) A defendant in a criminal proceeding may not be cross-examined by the prosecutor as to matters arising out of evidence to which section 89 or 90 applies unless the court gives leave.

(2) The prosecutor in a criminal proceeding may not adduce evidence in chief to disprove the character evidence adduced by a defendant unless the court gives leave.

PART 6—CREDIBILITY

The credibility rule—exclusion of evidence relevant only to credibility (ALRC 94)

92. Evidence that relates only to the credibility of a witness is not admissible to prove that the evidence of the witness should or should not be accepted.

Exception: character of accused (ALRC 95)

93. (1) This section applies only in a criminal proceeding.

(2) The hearsay rule, the opinion rule and the credibility rule do not prevent the admission or use of evidence adduced by a defendant that tends to prove that the defendant is, either generally or in a particular respect, a person of good character.

(3) If evidence that tends to prove that the defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule and the credibility rule do not prevent the admission or use of evidence that tends to prove that the defendant is not generally a person of good character.

(4) If evidence that tends to prove that the defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule and the credibility rule do not prevent the admission or use of evidence that tends to prove that the defendant is not a person of good character in that respect.

Exception: cross-examination as to credibility (ALRC 96)

94. (1) The credibility rule does not prevent the admission or use of evidence that relates to the credibility of a witness and has been adduced in cross-examination of the witness.

(2) Such evidence is not admissible if it:

(a) is relevant only because it is relevant to the credibility of the witness; and

(b) does not have substantial probative value as to the credibility of the witness.

(3) Without limiting the matters that the court may have regard to, in determining whether the evidence has substantial probative value it is to have regard to:

(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation at a time when the witness was under an obligation to tell the truth; and

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

Further protections: cross-examination of accused (ALRC 97)

95. (1) This section applies only in a criminal proceeding and so applies in addition to section 94.

(2) A defendant may not be cross-examined as to a matter that is relevant only because it is relevant to the credibility of the defendant, except with the leave of the court.

(3) Leave is not required for cross-examination by the prosecutor as to whether the defendant:

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

(b) was or is unable to be aware of or recall matters to which his or her evidence relates; or

(c) has made a prior inconsistent statement.

(4) Leave must not be given for cross-examination by the prosecutor as to any other matter that is relevant only because it is relevant to the credibility of the defendant unless:

(a) evidence has been adduced by the defendant that tends to prove that the defendant is, either generally or in a particular respect, a person of good character; or

(b) evidence has been admitted that was adduced by the defendant that tends to prove that a witness called by the prosecutor has a tendency to be untruthful and that is relevant solely or mainly to impugn the credibility of that witness.

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

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

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

(6) Leave is not to be given for cross-examination by some other defendant unless the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine and that evidence has been admitted.

If unsworn evidence given (ALRC 98)

96. In a criminal proceeding, if a defendant has given unsworn evidence only, sections 94 and 95 apply in relation to evidence that is relevant only because it is relevant to the credibility of the defendant as if the defendant had given sworn evidence and the evidence concerned had been adduced in cross-examination of the defendant.

Exception: rebutting denials by other evidence (ALRC 99)

97. (1) The credibility rule does not prevent the admission or use of the following evidence, if it is adduced otherwise than from the witness and the witness has denied the substance of the evidence:

(a) evidence that the witness is biased or has a motive for being untruthful;

(b) evidence that the witness has been convicted of an offence, including an offence against the law of a foreign country;

(c) evidence that the witness has made a prior inconsistent statement;

(d) evidence that the witness has been pronounced, declared or otherwise found to be an habitual criminal.

(2) The credibility rule does not prevent the admission or use of the following evidence, if it is adduced (with the leave of the court) otherwise than from the witness and the witness has denied the substance of the evidence:

(a) evidence that the witness was or is unable to be aware of matters to which his or her evidence relates;

(b) evidence that the witness knowingly or recklessly made a false representation while under an obligation to tell the truth imposed by or under a law, including a law of the Commonwealth, another State or a Territory or of a foreign country.

Exception: application of certain provisions to maker of representations (ALRC 100)

98. If:

(a) by virtue of a provision of Part 1, the hearsay rule does not prevent the admission of evidence of a previous representation; and

(b) evidence of the representation has been admitted; and

(c) the person who made the representation has not been called to give evidence,

the credibility rule does not prevent the admission or use of evidence about matters as to which the person could have been cross-examined if he or she had given evidence.

Exception: re-establishing credibility (ALRC 101)

99. (1) The credibility rule does not prevent the admission or use of evidence adduced in re-examination of a witness.

(2) The credibility rule does not prevent the admission or use of evidence that explains or contradicts evidence adduced as mentioned in section 96 or 98, if the court gives leave to adduce that evidence.

(3) If:

(a) evidence of a prior inconsistent statement of a witness has been admitted; or

(b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion,

the credibility rule does not prevent the admission or use of evidence of a prior consistent statement of the witness if the court gives leave to adduce the evidence.

PART 7—IDENTIFICATION EVIDENCE

Definition (ALRC 3)

100. In this Part, **"identification evidence"**, in relation to a criminal proceeding, means evidence that is:

(a) an assertion by a person to the effect that a defendant was, or resembles a person who was, present at or near a place where:

(i) the offence for which the defendant is being prosecuted was committed; or

(ii) an act that is connected with that offence was done,

at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw at that place and time; or

(b) a report (whether oral or in writing) of an assertion as mentioned in paragraph (a).

Application of Part (ALRC 102)

101. This Part applies only in a criminal proceeding.

Exclusion of identification evidence (ALRC 103)

102. **(1)** Identification evidence adduced by the prosecutor is not admissible unless:

(a) either:

(i) an identification parade that included the defendant was held before the identification was made; or

(ii) it would not have been reasonable to have held such a parade; and

(b) the identification was made without the person who made it having been intentionally influenced to make it.

(2) Without limiting the matters that may be taken into account by the court, in determining whether it was reasonable to hold an identification parade it is to take into account:

(a) the kind of offence, and the gravity of the offence, concerned; and

(b) the importance of the evidence; and

(c) the practicality of holding such a parade having regard, among other things:

(i) if the defendant refused to co-operate in the conduct of the parade—to the manner and extent of, and the reason (if any) for, the refusal; and

(ii) in any case—to whether the identification was made at or about the time of the commission of the relevant offence; and

(d) the appropriateness of holding such a parade having regard, among other things, to the relationship (if any) between the defendant and the person who made the identification.

(3) If:

(a) the defendant refused to co-operate in the conduct of an identification parade unless a lawyer acting for him or her was present while it was being held; and

(b) there were, at the time when the parade was to have been conducted, reasonable grounds to believe that it was not reasonably practicable for such a lawyer so to be present,

it is to be presumed that it would not have been reasonable to have held an identification parade at that time.

(4) In determining whether it was reasonable to have held an identification parade, the court is not to take into account the availability of pictures that could be used in making identifications.

Exclusion of evidence of identification by pictures (ALRC 104)

103. (1) This section:

(a) applies in relation to identification evidence adduced by the prosecutor if the identification was made wholly or partly as a result of the person who made the identification examining pictures kept for the use of police officers; and

(b) applies in addition to section 102.

(2) Identification evidence to which this section applies is not admissible if a defendant was in the custody of a police officer in connection with the investigation of an offence at the time when the pictures were examined unless:

(a) the picture of the defendant that was examined was made after the defendant had been taken into that custody; or

(b) the pictures examined included a reasonable number of pictures of persons who were not, at the time when the pictures of those persons were made, in the custody of a police officer in connection with the investigation of an offence,

and the identification was made without the person who made it having been intentionally influenced to make it.

(3) In any other case to which this section applies, the identification evidence is not admissible unless the pictures examined included a reasonable number of pictures of persons who were not, at the time when the pictures of those persons were made, in the custody of a police officer in connection with the investigation of an offence.

(4) If evidence concerning an identification of a defendant that was made after examining a picture has been adduced by that defendant, this

section does not render inadmissible evidence adduced by the prosecutor, being evidence that contradicts or qualifies that evidence.

(5) In this section:

(a) a reference to a **"picture"** includes a reference to a photograph; and

(b) a reference to the making of a picture includes a reference to the taking of a photograph.

Directions to jury (ALRC 105)

104. (1) If identification evidence has been admitted, the Judge is, if the defendant so requests, to inform the jury that there is a special need for caution before accepting identification evidence and of the reasons for that need for caution, both generally and in the circumstances of the case.

(2) If identification evidence has been admitted, the Judge is, if the defendant is not represented in the proceeding by a lawyer, to inform the defendant that he or she may make a request under subsection (1).

PART 8—PRIVILEGES

Division 1—Client legal privilege

Definitions (ALRC 3, 108)

105. (1) In this Division:

"client" includes the following:

(a) an employer (not being a lawyer) of a lawyer;

(b) an employee or agent of a client;

(c) an employer of a lawyer, being:

(i) the Public Service or any other service of the State; or

(ii) a body established by an Act or other law of the State; or

(d) if the client is a person in respect of whose person, estate or property a manager or committee or other person (however described) is for the time being acting under a law, including a law of another State or a Territory, that relates to persons of unsound mind—a person so acting; and

(e) if the client has died—a personal representative of the client,

and also includes a successor to the rights and obligations of the client in respect of which a confidential communication was made;

"confidential communication", "confidential document" or **"confidential record"** means a communication made or a document or record prepared in such circumstances that, at the time when it was made or prepared:

(a) the person who made or prepared it; or

(b) the person to whom it was made or for whom it was prepared,

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law;

"lawyer" includes an employee or agent of a lawyer;

"party" includes the following:

(a) an employee or agent of a party;

(b) if the party is a person in respect of whose person, estate or property a manager or committee or other person (however described) is for the time being acting under a law, including a law of another State or a Territory, that relates to persons of unsound mind—a person so acting;

(c) if the party has died—a personal representative of the party,

and also includes a successor to the rights and obligations of the client and in respect of which a confidential communication was made.

(2) In this Division a reference to the commission of an act includes a reference to a failure to act.

Privilege in respect of legal advice and litigation etc. (ALRC 106)

106. (1) In a proceeding, a Judge is to direct that evidence is not to be adduced if, on objection by a person (in this Division called **"the client"**), the Judge finds that adducing the evidence would result in the disclosure of:

(a) a confidential communication made between the client and a lawyer for the sole purpose of the lawyer providing professional legal advice or assistance to the client; or

(b) a confidential communication made between 2 or more lawyers acting for the client for the sole purpose of one or more of the lawyers providing professional legal advice or assistance to the client; or

(c) a confidential communication made between the employees or agents of a lawyer for the sole purpose of the lawyer providing professional legal advice or assistance to the client; or

(d) a confidential communication made between the client, a lawyer or an employee or agent of a lawyer and some other person for the sole purpose of facilitating the provision or receipt of professional legal advice or assistance in relation to a proceeding (including a proceeding referred to in section 4 (4)), or an anticipated or pending proceeding, in which the client is or may be a party; or

(e) a confidential communication made between the employees or agents of the client for the sole purpose of facilitating the provision or receipt of professional legal advice or assistance as referred to in paragraph (d); or

(f) the contents of a draft, memorandum, note or other document prepared by the client or a lawyer for the sole purpose of facilitating the provision or receipt of a confidential comunication or confidential document referred to in paragraphs (a)–(e); or

(g) the contents of a summary or copy of a communication or document referred to in this section made solely for the purpose of:

(i) keeping a confidential record of the matters to which it relates; and

(ii) if made for a company, association or partnership or its employee or agent, informing a director or person having the management of the company, association or partnership of the matters to which it relates.

(2) If, on objection by a party who is not represented in the proceeding by a lawyer, the court finds that the adducing of evidence will result in the disclosure of the contents of a confidential document that has been prepared by or at the direction or request of the party for the sole purpose of preparing for or conducting the proceeding, the court is to direct that the evidence not be adduced.

Loss of client legal privilege: generally (ALRC 107 (2), (3) and (5))

107. (1) Section 106 does not prevent the adducing of evidence relevant to a question concerning the intentions or competence in law of a client or party who has died.

(2) Section 106 does not prevent the adducing of evidence if, were the evidence not adduced, the court would be prevented, or it could reasonably be expected that the court would be prevented, from enforcing an order of a court (including a federal court or a court of another State or a Territory).

(3) Section 106 does not prevent the adducing of evidence of the making of a communication, or document, that affects a right of a person if the proceeding concerns or involves that right.

Loss of client legal privilege: consent etc. (ALRC 107 (1), (6)–(10))

108. (1) Section 106 does not prevent the adducing of evidence given with the consent of the client or party concerned.

(2) If a client or party has voluntarily disclosed the substance of evidence, not being a disclosure made:

(a) in the course of the making of the confidential communication or the preparation of the confidential document; or

(b) as a result of duress or deception; or

(c) under compulsion of law,

section 106 does not prevent the adducing of the evidence.

(3) If the communication or document was disclosed by a person who was, at the time, an employee or agent of a client or a lawyer, subsection (3) does not apply unless the employee or agent was authorised to make the disclosure.

(4) If a confidential communication is contained in a document and a witness has used the document as mentioned in section 28 or 29, section 106 does not prevent the adducing of evidence of the document.

(5) If the substance of evidence has been disclosed with the express or implied consent of the client or party, section 106 does not prevent the adducing of the evidence.

(6) A disclosure by a client of a lawyer to a person who is a client of the same lawyer is not to be taken to be a disclosure for the purposes of subsection (5) if the disclosure concerns a matter in relation to which the lawyer is providing or is to provide professional legal advice or assistance to both of them.

Loss of client legal privilege: related offenders (ALRC 107 (4))

109. In a criminal proceeding, section 106 does not prevent a defendant from adducing evidence other than evidence of:

(a) a confidential communication made between a related offender and a lawyer acting for that person in connection with the offence for which the related offender is being prosecuted; or

(b) the contents of a confidential communication or confidential document that was made or prepared by or at the direction or request of a related offender or by a lawyer acting for that person in connection with the offence for which the related offender is being prosecuted; or

(c) the contents of a summary or copy of a communication or document in connection with the prosecution of that offence referred to in section 106 (1) (g).

Loss of client legal privilege: joint clients (ALRC 107 (11))

110. If, in relation to a proceeding in connection with a matter, 2 or more of the parties have, before the commencement of the proceeding, jointly retained a lawyer in relation to the matter, section 106 does not prevent one of those parties who retained the lawyer adducing evidence of:

(a) a communication made by any one of them to the lawyer; or

(b) a document prepared by or at the direction or request of any one of them,

in connection with that matter.

Loss of client legal privilege: fraud etc. or abuse of power (ALRC 107 (12), (13))

111. **(1)** Section 106 does not prevent the adducing of evidence of:

(a) a communication made or a document prepared in furtherance by a client or lawyer (or both) of the commission of a fraud, an offence or an act that renders a person liable to a civil penalty; or

(b) a communication or a document that the client knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse (whether by action or inaction) of a power in relation to a proceeding challenging the validity of the exercise, or the failure to exercise, the power brought before a court of superior jurisdiction with administrative law powers of judicial review.

(2) For the purposes of this section, if the commission of the fraud, offence or the act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that:

(a) the fraud, offence or act, or the abuse of power, was committed; and

(b) the communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power,

the court may find that the communication was so made or the document so prepared.

(3) In this section, **"power"** means:

(a) a power (including a prerogative power) conferred by or under the common law; or

(b) a power conferred by or under an enactment, a Commonwealth Act, an Act of another State or an Imperial Act applying as part of the law of another State.

Effect of sections 107–111 (ALRC 107 (14))

112. If, by virtue of a provision of this Division, section 106 does not prevent the adducing of evidence of a communication or document, that section does not prevent the adducing of evidence of another communication or document that is reasonably necessary to enable a proper understanding of the communication or document.

Division 2—Other privileges

Religious confessions (Evidence Act 1898, s. 10)

113. (1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.

(2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose.

(3) This section applies even in circumstances where an Act provides:

(a) that the rules of evidence do not apply or that a person or body is not bound by the rules of evidence; or

(b) that a person is not excused from answering any question or producing any document or other thing on the ground of privilege or any other ground.

(4) Without limiting the generality of subsection (3), this section applies:

(a) to any hearing or proceeding to which the Royal Commissions Act 1923, the Special Commissions of Inquiry Act 1983 or the Independent Commission Against Corruption Act 1988 applies; or

(b) in relation to a witness summoned to attend and give evidence before either House of Parliament (or a Parliamentary Committee) as referred to in the Parliamentary Evidence Act 1901.

(5) In this section, **"religious confession"** means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination concerned.

Privilege in respect of self-incrimination in other proceedings (ALRC 110)

114. (1) If a witness objects to giving evidence on the ground that the evidence may tend to prove that the witness:

(a) has committed an offence against or arising under a law of or in force in this State, the Commonwealth, another State or a Territory or the law of a foreign country; or

(b) is liable to a civil penalty,

the court is, if there are reasonable grounds for the objection, to inform the witness:

(c) that he or she need not give the evidence but that, if he or she gives the evidence, the court will give a certificate under this section; and

(d) of the effect of the certificate.

(2) If the witness declines to give the evidence, the court is not to require the witness to give it but, if the witness gives the evidence, the court is to cause the witness to be given a certificate under this section in respect of the evidence.

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

(a) the witness's objection to giving evidence has been overruled; and

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

(4) Evidence in respect of which a certificate under this section has been given is not admissible against the person to whom the certificate was given in any proceeding (including a proceeding referred to in section 4 (4)). However, this does not apply if the proceeding is a criminal proceeding in respect of the falsity of the evidence.

(5) In a criminal proceeding, this section does not apply in relation to evidence that a defendant:

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

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

(6) If information disclosed by evidence in respect of which a certificate under subsection (3) was given is sought to be adduced or given as evidence in a proceeding, the court may refuse to admit the evidence.

(7) In this section, a reference to the doing of an act includes a reference to a failure to act.

Division 3—Evidence excluded in the public interest

Exclusion of evidence of reasons for judicial etc. decisions (ALRC 111)

115. (1) Evidence of the reasons for a decision made by a person:

(a) acting as a Judge in a proceeding (including a proceeding referred to in section 4 (4)); or

(b) acting as an arbitrator in respect of a dispute that has been submitted to the person, or to the person and one or more other persons, for arbitration,

or the deliberations of a person so acting in relation to such a decision, may not be given by that person, or by a person who was under the direction or control of that person, in a proceeding to which this Act applies that is not the proceeding concerned.

(2) Subsection (1) does not prevent the admission or use, in a proceeding, of published reasons for a decision.

(3) Evidence of the reasons for a decision made by a member of a jury in a proceeding (including a proceeding referred to in section 4 (4)), or of the deliberations of a member of a jury in relation to such a decision, may not be given by any of the members of that jury in a proceeding to which this Act applies that is not the proceeding concerned.

(4) This section does not apply in a proceeding that is:

(a) a prosecution for one of more of the following offences:

(i) an offence against or arising under section 319, 321, 322 or 333 of the Crimes Act 1900;

(ii) an offence against or arising under section 67 of the Jury Act 1977;

(iii) an offence connected with an offence mentioned in subparagraph (i) or (ii), including an offence of conspiring to commit such an offence; or

(b) in respect of a contempt of a court; or

(c) by way of appeal from or judicial review of a judgment, decree, order or sentence of a court or tribunal.

Exclusion of evidence of matters of state (ALRC 112)

116. (1) If the public interest in evidence being admitted that relates to matters of state is outweighed by the public interest in secrecy or confidentiality in relation to the evidence being preserved, the court may,

either of its own motion or on the application of any person (whether or not a party), direct that the evidence not be adduced.

(2) For the purposes of subsection (1), evidence that relates to matters of state includes:

(a) evidence that relates to:

(i) the security or defence of Australia; or

(ii) international relations or to relations between the Commonwealth and a State or relations between 2 or more States; or

(iii) the prevention or detection of offences or contraventions of the law; or

(b) evidence which, if adduced:

(i) would disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of a law, including a law of the Commonwealth or a State; or

(ii) would tend to prejudice the proper functioning of government, including the government of the Commonwealth or another State.

(3) Without limiting the matters that may be taken into account by the court, for the purposes of subsection (1) it is to take into account:

(a) the importance of the evidence in the proceeding; and

(b) if the proceeding is a criminal proceeding—whether the evidence is adduced by the defendant or by the prosecutor; and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the likely effect of the evidence being adduced and any means available to limit its publication; and

(e) whether the substance of the evidence has already been published; and

(f) if the proceeding is a criminal proceeding and the evidence is adduced by the defendant—whether or not the direction is to be made subject to the term that the prosecution be stayed.

(4) For the purposes of subsection (1), the court may inform itself in any manner the court thinks fit.

(5) A reference in this section to a State includes a reference to a Territory.

Exclusion of evidence of settlement negotiations (ALRC 113)

117. (1) Evidence may not be adduced of:

(a) a communication made:

(i) between persons in dispute; or

(ii) between one or more persons in dispute and a third party,

being a communication made in connection with an attempt to negotiate a settlement of the dispute; or

(b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

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

(a) the persons in dispute consent to the evidence being adduced or, if one of those persons has tendered the communication or document in evidence in some other proceeding (including a proceeding referred to in section 4 (4)), all the other persons so consent; or

(b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or

(c) the communication or document made in connection with an attempt to settle the dispute included a statement to the effect that it was not to be treated as confidential; or

(d) the communication or document relates to an issue in dispute and the dispute, so far as it relates to that issue, has been settled; or

(e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or

(f) the making of the communication, or the preparation of the document, affects a right of a person and the proceeding concerns or involves that right; or

(g) the communication was made, or the document prepared, in furtherance of the commission of a fraud, an offence or an act that renders a person liable to a civil penalty; or

(h) a party to the dispute knew or ought reasonably to have known that the communication was made, or the document prepared, in furtherance of a deliberate abuse (whether by action or inaction) in relation to a proceeding challenging the validity of the exercise, or the failure to exercise, that power brought before a court of superior jurisdiction with administrative law powers of judicial review.

(3) For the purposes of subsection (2) (g), if the commission of the fraud, the offence or the act is a fact in issue and there are reasonable grounds for finding that:

(a) the fraud, offence or act was committed; and

(b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,

the court may find that the communication was so made or the document so prepared.

(4) For the purposes of subsection (2) (h), if:

(a) the abuse of power is a fact in issue; and

(b) there are reasonable grounds for finding that a communication was made or document prepared in furtherance of the abuse of power,

the court may find that the communication was so made or the document so prepared.

(5) A reference in this section to:

(a) a dispute is a reference to a dispute which is the subject of or related to a proceeding (including a proceeding referred to in section 4 (4)) or a pending or reasonably apprehended proceeding (including a proceeding referred to in section 4 (4)); and

(b) an attempt to negotiate the settlement of a dispute does not include a reference to an attempt to negotiate the settlement of a criminal proceeding or an anticipated criminal proceeding; and

(c) a party to a dispute includes a reference to an employee or agent of such a party; and

(d) the commission of an act includes a reference to a failure to act.

(6) In this section, **"power"** means:

(a) a power (including a prerogative power) conferred by or under the common law; or

(b) a power conferred by or under an enactment, a Commonwealth Act, an Act of another State or an Imperial Act applying as part of the law of another State.

Division 4—General

Court to inform of rights etc. (ALRC 114)

118. If it appears to the court that a witness or a party may have grounds for making an application or objection under a provision of this Part, the court is to satisfy itself (if there is a jury, in the absence of the jury) that the witness or party is aware of the effect of that provision.

Court may inspect etc. documents (ALRC 115)

119. If a question arises under this Part in relation to a document, the court may order that the document be produced to it and may inspect the document for the purpose of determining the question.

Certain evidence inadmissible (ALRC 116)

120. Evidence that, by or under a provision of this Part, may not be adduced or given in a proceeding is not admissible in the proceeding.

Division 5—Discretions to exclude evidence

General discretion to exclude (ALRC 117)

121. If the probative value of evidence is substantially outweighed by the danger of unfair prejudice or confusion or the danger that the evidence might mislead or cause or result in undue waste of time, the court may refuse to admit the evidence.

General discretion to limit use of evidence

122. If there is a danger that evidence may cause or result in unfair prejudice or confusion or may mislead or cause or result in undue waste of time, the court may limit the use to be made of the evidence.

Criminal proceedings: discretion to exclude prejudicial evidence (ALRC 118)

123. In a criminal proceeding, if the probative value of evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the defendant, the court must refuse to admit the evidence.

Discretion to exclude improperly obtained evidence (ALRC 119)

124. (1) Evidence that was obtained:

(a) improperly or in contravention of a law; or

(b) in consequence of an impropriety or of a contravention of a law,

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been improperly obtained if:

(a) the person conducting the questioning (the "questioner") knew or ought reasonably to have known that the doing or omission of an act was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning but even so did or omitted to do the act in the course of the questioning; or

(b) the questioner knew or ought reasonably to have known that the making of a false statement was likely to cause the person who was being questioned to make an admission but even so made the false statement in the course of the questioning.

(3) Without limiting the matters that may be taken into account by the court, for the purposes of subsection (1) it is to take into account:

(a) the probative value of the evidence; and

(b) the importance of the evidence in the proceeding; and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the gravity of the impropriety or contravention; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights*; and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty, if any, of obtaining the evidence without impropriety or contravention of a law.

CHAPTER 7—OTHER ASPECTS OF PROOF

PART 1—JUDICIAL NOTICE

Matters of law (ALRC 120, Evidence Act 1898, s. 18)

125. (1) Proof is not required about matters of law, including the provisions and coming into operation, in whole or in part, of:

(a) an Act, an Imperial Act applying in Australia, a Commonwealth Act, an Act of another State or an Act or Ordinance of a Territory; or

* NOTE: See Schedule 2 of the Human Rights and Equal Opportunity Act 1986 of the Commonwealth.

(b) an instrument of a legislative character (including regulations, statutory rules, rules of court and by-laws) made or issued under or by authority of such an Act or Ordinance, being an instrument:

(i) that is required by or under an enactment to be published in a government or official gazette (by whatever name called); or

(ii) the making or issuing of which is so required to be notified in a government or official gazette (by whatever name called).

(2) The Judge may inform himself or herself about those matters in any manner that the Judge thinks fit.

(3) In this section, **"Act"** includes a private Act.

Matters of common knowledge etc. (ALRC 121)

126. (1) Proof is not required about knowledge that is not reasonably open to question and is:

(a) common knowledge in the locality in which the proceeding is being held or generally; or

(b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.

(2) The Judge may acquire knowledge of that kind in any manner that the Judge thinks fit.

(3) The court (if there is a jury, including the jury) is to take knowledge of that kind into account.

(4) The Judge is to give a party such opportunity to make submissions, and to refer to relevant information, in relation to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

Certain Crown certificates (ALRC 122)

127. This Part does not exclude the application of the principles and rules of the common law and of equity relating to the effect of a certificate given by or on behalf of the Crown with respect to a matter of international affairs.

Judicial notice of holders of certain offices (Evidence Act 1898, s. 24A)

128. (1) Proof is not required of the fact that a person holds, or at any time held, the office of Minister of the Crown, Solicitor-General, Director of Public Prosecutions or any other office declared by the Governor by

order published in the Gazette to be an office to which this section applies.

(2) The Judge may inform himself or herself about those offices in any manner that the Judge thinks fit.

PART 2—DOCUMENTS

Definitions (ALRC 123)

129. (1) A reference in this Part to a **document in question** is a reference to a document as to the contents of which it is sought to adduce evidence.

(2) For the purposes of this Part, if a document is not an exact copy of a document in question but is identical to the document in question in all relevant respects, it may be taken to be a copy of the document in question.

"Best evidence" rule abolished (ALRC 124)

130. The principles and rules of the common law that relate to the mode of proof of the contents of documents are abolished.

Proof of contents of documents (ALRC 125)

131. (1) A party may adduce evidence of the contents of a document in question by tendering the document in question or:

(a) by adducing evidence of an admission made by some other party to the proceeding as to the contents of the document in question; or

(b) by tendering a document that:

(i) is or purports to be a copy of the document in question; and

(ii) has been produced, or purports to have been produced, by a device that reproduces the contents of documents; or

(c) if the document in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing)—by tendering a document that is or purports to be a transcript of the words; or

(d) if the document in question is an article or thing on or in which information is stored in such a manner that it cannot be used by the court unless a device is used to retrieve, produce or collate it—by tendering a document that was or purports to have been produced by use of the device; or

(e) by tendering a document that:

(i) forms part of the records of or kept by a business (whether or not the business is still in existence); and

(ii) purports to be a copy of, or an extract from or a summary of, the document in question, or is or purports to be a copy of such a document; or

(f) if the document in question is a public document—by tendering a document that was or purports to have been printed:

(i) by a person authorised by or on behalf of the Government to print the document or by the government or official printer of the Commonwealth, another State or a Territory; or

(ii) by the authority of the government or administration of this State, the Commonwealth, another State, a Territory or a foreign country,

and is or purports to be a copy of the document in question.

(2) Subsection (1) applies in relation to a document in question, whether the document in question is available to the party or not.

(3) If:

(a) a document in question is unavailable to a party; or

(b) it would be unduly inconvenient for a party to obtain a document in question because it is not in the possession or under the control of the party and it is in the possession or under the control of some other party who knows or might reasonably be supposed to know that evidence of the contents of the document is likely to be relevant; or

(c) it would be unduly inconvenient for a party to obtain a document in question because it is not in the possession or under the control of the party and, at the time when it was in the possession or under the control of some other party, that other party knew or might reasonably be supposed to have known that evidence of the contents of the document was likely to be relevant; or

(d) the document in question or its contents are not in issue,

evidence of the document may be adduced in accordance with subsection (4).

(4) A party may adduce evidence of the contents of a document in question referred to in subsection (3):

(a) by tendering a document that is a copy of, or an extract from or a summary of, the document in question; or

(b) by adducing oral evidence of the contents of the document in question.

Documents in foreign countries (ALRC 126)

132. If a document in question is in a foreign country, section 131 (1) (b), (c), (d), (e) or (f) does not apply unless:

(a) the party who adduces evidence of the contents of the document in question has, not less than 28 days (or such other period as may be prescribed by the regulations or as may be required by rules of court) before the day on which the evidence is adduced, served on each other party a copy of the document proposed to be tendered; or

(b) the court directs that it is to apply.

PART 3—FACILITATION OF PROOF

Evidence produced by machines, processes etc. (ALRC 127)

133. (1) This section applies in relation to a document or thing produced wholly or partly by a device or process.

(2) If it is reasonably open to find that the device or process is one that, or is of a kind that, if properly used, ordinarily does what the party tendering the document or thing asserts it to have done, it is to be presumed (unless evidence sufficient to raise real doubt is adduced to the contrary) that, in producing the document or thing on the occasion in question, the device or process did what that party asserts it to have done.

(3) In the case of a document that is, or was at the time it was produced, part of the records of, or kept for the purposes of, a business (whether or not the business is still in existence), then, where the device or process is or was at that time used for the purposes of the business, it is to be presumed (unless evidence sufficient to raise real doubt is adduced to the contrary) that on the occasion in question the device or process did what the party adducing the evidence asserts it to have done.

(4) Subsection (3) does not apply in relation to the contents of a document that was produced for the purposes of, or for purposes that included the purposes of, a proceeding referred to in section 4 (4).

Attestation of documents (ALRC 128)

134. It is not necessary to adduce the evidence of an attesting witness to a document (not being a testamentary document) to prove that the document was signed or attested as it purports to have been signed or attested.

Attestation before a justice (Evidence Act 1898, s. 52A)

135. If any Act or rule, regulation, ordinance or by-law made under an Act requires, authorises or permits a document to be attested or verified by, or signed or acknowledged before, a justice of the peace, it is not necessary to adduce evidence that it was so attested, verified, signed or acknowledged if it purports to have been attested, verified, signed or acknowledged by a justice of the peace.

Gazettes etc. (ALRC 129)

136. (1) It is to be presumed, unless the contrary is proved, that a document purporting:

(a) to be the Gazette; or

(b) to be a government or official gazette (by whatever name called) of the Commonwealth, another State or a Territory; or

(c) to have been printed by authority of the government or administration of this State, the Commonwealth, another State, a Territory or a foreign country,

is what it purports to be and was published on the day on which it purports to have been published.

(2) If there is produced to a court:

(a) a copy of the Gazette; or

(b) a copy of a government or official gazette (by whatever name called) of the Commonwealth, another State or a Territory; or

(c) a document that purports to have been printed by authority of the government or administration of this State, the Commonwealth, another State, a Territory or a foreign country,

being a copy or document in which the doing of an act,

(d) by the Governor, the Governor-General or the Governor of another State or the Administrator of a Territory; or

(e) by a person authorised or empowered by law to do the act,

is notified or published, it is to be presumed, unless the contrary is proved, that the act was duly done and, if the date on which the act was done appears in the copy or document, that it was done on that date.

Seals and signatures (ALRC 130, Evidence Act 1898, s. 15)

137. (1) If the imprint of a seal appears on a document and purports to be the imprint of:

(a) the Public Seal of the State; or

(b) a Royal Great Seal; or

(c) the Great Seal of Australia; or

(d) some other seal of the Commonwealth; or

(e) a seal of another State, a Territory or a foreign country; or

(f) the seal of a body (including a court or a tribunal), or a body corporate established by or under Royal Charter or the law of this State, the Commonwealth, another State, a Territory or a foreign country,

it is to be presumed, unless the contrary is proved, that:

(g) the imprint is the imprint of the seal of which it purports to be the imprint; and

(h) the document was duly sealed as it purports to have been sealed.

(2) If the imprint of a seal appears on a document and purports to be the imprint of the seal of:

(a) the Sovereign, the Governor, the Governor-General or the Governor of another State; or

(b) a person holding office under a law of this State, the Australian Constitution, a law of the Commonwealth, another State, a Territory or a foreign country,

it is to be presumed, unless the contrary is proved, that:

(c) the imprint is the imprint of the seal of which it purports to be the imprint; and

(d) the document was duly sealed by the person purporting to seal it acting in his or her official capacity.

(3) If a document purports to have been signed by a person referred to in subsection (2) (a) or (b), it is to be presumed, unless the contrary is proved, that the document was duly signed by that person acting in his or her official capacity.

(4) This section does not apply to a seal or signature referred to in section 26A of the Oaths Act 1900.

Signatures of justices of the peace (Evidence Act 1898, ss. 25, 52A)

138. **(1)** It is not necessary to adduce evidence that a person whose signature to a magisterial act is followed by the words "justice of the peace" or the letters "J.P." is a justice of the peace.

(2) It is not necessary to adduce evidence of the signature of a justice of the peace if it is attached or appended to a document and the place where it was attached or appended is shown.

Comparison of disputed writing (Evidence Act 1898, s. 36)

139. (1) If the authorship of any writing or signature is in dispute:

(a) evidence of a comparison of the writing or signature in dispute with any other writing or signature proved to the satisfaction of the court to be genuine is admissible as evidence concerning the authorship of the writing or signature in dispute; and

(b) the writing or signature in dispute and the other writing or signature are admissible as such evidence.

(2) Evidence of the comparison may be based on observations of the writing or signature in dispute or of the other writing or signature (or of both) made before or during, or before and during, the proceedings in which the evidence is given.

(3) In this section, a reference to writing or a signature includes a reference to:

(a) a duplicate of the writing or signature; and

(b) a reproduction of the writing or signature made by photographic, photostatic or any other prescribed means,

whether or not the original writing or signature is available.

(4) A duplicate or reproduction of any writing or signature is admissible under this section only if the original writing or signature is not available.

(5) The Governor may make regulations for the purposes of subsection (3) (b).

Public documents (ALRC 131)

140. A document that purports to be a copy of, or an extract from or a summary of, a public document and to have been:

(a) sealed with the seal of a person who, or of a body that might reasonably be supposed to have the custody of the public document; or

(b) certified as such a copy, extract or summary by a person who might reasonably be supposed to have the custody of the public document,

is to be presumed, unless the contrary is proved, to be a copy of the public document, or an extract from or a summary of, the public document.

Documents produced from proper custody (ALRC 132)

141. If a document that is or purports to be more than 20 years old is produced from proper custody, it is to be presumed, unless the contrary is proved, that:

(a) the document is the document that it purports to be; and

(b) if it purports to have been executed or attested by a person, that it was duly executed or attested by that person.

Labels etc. (ALRC 133)

142. If:

(a) a document has been attached to an object or writing has been placed on a document or object; and

(b) the document or writing so attached or placed may reasonably be supposed to have been so attached or placed in the course of a business,

it is to be presumed (unless evidence sufficient to raise real doubt is adduced to the contrary) that the ownership or the origin of the object or document is as stated in the document or writing.

Posts and telecommunications (ALRC 134)

143. (1) It is to be presumed (unless evidence sufficient to raise real doubt is adduced to the contrary) that a postal article sent by prepaid post addressed to a person at a specified address in Australia or in an external Territory was received at that address on the fourth working day after having been posted.

(2) If a message has been:

(a) sent by means of a telecommunications installation; or

(b) delivered to an office of the Australian Telecommunications Corporation for transmission by the Corporation and any fee payable in respect of that transmission has been paid,

it is to be presumed (unless evidence sufficient to raise real doubt is adduced to the contrary) that the message was received by the person to whom it was addressed 24 hours after having been sent or delivered.

(3) If a document that has been:

(a) produced by a telecommunications installation; or

(b) received from the Australian Telecommunications Corporation,

purports to contain a record of a message transmitted by means of a telecommunications service, it is to be presumed (unless evidence sufficient to raise real doubt is adduced to the contrary) that the message:

(c) was so transmitted; and

(d) was sent by the person from whom or on whose behalf it purports to have been sent on the date on which and at the time at which, and from the place from which, it purports to have been sent.

(4) In this section, **"postal article"** has the meaning it has under the Australian Postal Corporation Act 1989 of the Commonwealth.

Official statistics (ALRC 135)

144. It is to be presumed, unless the contrary is proved, that if a document purports to have been published by or on behalf of, or by arrangement with:

(a) the Australian Bureau of Statistics—the statistics contained in it were derived by the Bureau from information obtained by the Bureau; or

(b) the Australian Statistician—the statistics contained in it were derived by the Australian Statistician from information obtained by the Australian Statistician.

Convictions, acquittals and other judicial proceedings (Evidence Act 1898, s. 23)

145. **(1)** This section applies to the following facts:

(a) the conviction or acquittal before or by any court or Judge of a person charged with an offence;

(b) the sentencing of a person to any punishment or pecuniary fine by any court or Judge;

(c) an order by a court or Judge that a person is to pay any sum of money;

(d) the pendency or existence at any time before a court or Judge of a civil or criminal proceeding.

(2) Evidence of a fact to which this section applies may be given by a certificate signed by a prescribed person:

(a) showing the fact, or purporting to contain the substance (omitting the formal parts) of the record, indictment, conviction, acquittal, sentence or order, or of the proceeding in question; and

(b) stating the time and place of the conviction, acquittal, sentence or order, or of the proceeding; and

(c) stating the title of the court or the name of the Judge concerned.

(3) A certificate given under this section, stating that the person signing the certificate ordinarily has the custody of the records, documents, proceedings or minutes referred to in the certificate, is evidence of that fact.

(4) A certificate given under this section showing a conviction, acquittal, sentence or order is also evidence of the particular offence or matter in respect of which the conviction, acquittal, sentence or order was had, or passed, or made, if stated in the certificate.

(5) A certificate given under this section showing the pendency or existence of a proceeding is also evidence of the particular nature and occasion or ground and cause of the proceeding, if stated in the certificate.

(6) A certificate given under this section purporting to contain the substance (omitting the formal parts) of a record, indictment, conviction, acquittal, sentence or order, or of a proceeding, is also evidence of the matters stated in the certificate.

(7) Every summary conviction is presumed not to have been appealed from until the contrary is shown.

(8) In this section, **"prescribed person"**, in relation to evidence of a fact to which this section applies, means:

(a) the Judge concerned; or

(b) the clerk of the court concerned; or

(c) the officer ordinarily having the custody of the records, or documents, proceedings or minutes, of the court or Judge concerned; or

(d) the officer ordinarily having the custody of the records of the District Court, in the case of any conviction which has been transmitted to that Court; or

(e) the deputy of such clerk or officer.

Proof of identity of person convicted in another State and of convictions (Evidence Act 1898, s. 23A)

146. (1) An affidavit purporting to be made by a finger-print expert who is a police officer of any other State or Territory that is in the form set out in Schedule 3 is admissible in evidence for the purpose of proving the identity of any person alleged to have been convicted in that other State or Territory of any offence.

(2) An affidavit referred to in this section is evidence that the person, a copy of whose finger-prints is exhibited to the affidavit:

(a) is the person who, in any document exhibited to the affidavit and purporting to be a certificate of conviction or certified copy of a conviction, is referred to as having been convicted; and

(b) has been convicted of the offences mentioned in the affidavit.

Proof of service of statutory notice etc. (Evidence Act 1898, s. 15A)

147. (1) The service, giving or sending, pursuant to an Act, regulation, rule, ordinance or by-law, of a written notification, notice, order or direction may, in any proceeding (including a proceeding referred to in section 4 (4) (c)), be proved by the oath of the person who served, gave or sent it, or by affidavit.

(2) A person who, for the purposes of a civil or criminal proceeding, makes an affidavit referred to in this section is not, because of making the affidavit, exonerated from attending for cross-examination if required to do so by a party to the proceeding.

Foreign law (Evidence Act 1898, s. 19)

148. (1) Evidence of any Act, code or other written law of any foreign country may be given by the production of a printed copy in a volume of the Act, code or law:

(a) purporting to be published by the authority of the government or administration of the foreign country; or

(b) proved to the satisfaction of the court to be commonly admitted as evidence in the courts and judicial tribunals of that country.

(2) Evidence of the unwritten or common law of any foreign country may be given by the production of a book of reports of cases adjudicated in the courts of the country, proved to the satisfaction of the court to be authorised reports.

Questions of foreign law to be decided by Judge (Evidence Act 1898, s. 19A)

149. If, for the purpose of disposing of any civil or criminal proceeding being tried by a Judge with a jury in any court, it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law is, instead of being submitted to the jury, to be decided by the Judge alone.

Probate and letters of administration (Evidence Act 1898, s. 29)

150. (1) The probate of any will or letters of administration with the will annexed is evidence of the due execution of the will on all questions concerning real estate (within the meaning of the Wills, Probate and Administration Act 1898) in the same manner and to the same extent as it was evidence before the commencement of section 29 of the Evidence Act 1898 concerning personal estate (within the meaning of that Act).

(2) The copy attached or annexed to probate of the will or letters of administration, purporting to be a copy of the will, is evidence of the contents of the will.

(3) The probate of any will or letters of administration is evidence of the death and the date of the death of the testator or intestate.

(4) In this section, **"probate of any will or letters of administration"** includes:

(a) an exemplification of probate or of letters of administration; and

(b) any document accepted as sufficient instead of an exemplification by the Supreme Court in the Probate Division under any law for the time being.

Births, deaths, marriages and parentage information (Evidence Act 1898, s. 30)

151. (1) A certified copy of, or a certified extract from, a recording relating to any birth, death or marriage furnished under the Registration of Births, Deaths and Marriages Act 1973 is evidence:

(a) of the fact of that birth, death or marriage; and

(b) of the particulars contained in that copy or extract with respect to that birth, death or marriage; and

(c) in the case of the birth of a child, of the fact that a person named in the copy or extract as being the father or mother of that child is the father or the mother of that child; and

(d) in the case of a marriage, of the fact that the marriage has been duly celebrated.

(2) If in a certified copy of, or a certified extract from, a recording in the register of parentage information furnished under the Registration of Births, Deaths and Marriages Act 1973 a person is named as being the father or mother of a child named in that copy or extract, that copy or extract is evidence of the fact that that person is the father or the mother of that child.

(3) A certificate furnished under section 48A (Certificate with respect to children of certain deceased persons) of the Registration of Births, Deaths and Marriages Act 1973 is evidence of the matters certified in the certificate.

(4) If a copy of, or an extract from, a recording relating to any birth, death or marriage made in a register kept under the law of:

(a) another State or a Territory; or

(b) any country forming part of the British Commonwealth of Nations; or

(c) any dependent territory of the United Kingdom; or

(d) any other country or territory, being a country or territory for the time being proclaimed under subsection (8),

is certified by an officer authorised by or under that law for the purpose, that copy or extract is evidence:

(e) of the fact of that birth, death or marriage; and

(f) of the particulars contained in the copy or extract with respect to that birth, death or marriage; and

(g) in the case of the birth of a child, of the fact that a person named in the copy or extract as being the father or mother of that child is the father or the mother of that child; and

(h) in the case of a marriage, of the fact that the marriage has been duly celebrated.

(5) If an officer authorised by or under any law referred to in subsection (4) issues a certificate in which the officer certifies:

(a) any matter relating to a birth, death or marriage recorded in a register kept under that law; or

(b) that any person is recorded in any register so kept as being the father or mother of a child or children named in the certificate,

that certificate is evidence of that matter or of the fact that that person is the father or mother of that child or those children.

(6) If, in a copy of, or an extract from, a recording made in a register kept under any law referred to in subsection (4), (being a register corresponding to the register of parentage information kept under the Registration of Births, Deaths and Marriages Act 1973), a person is named as being the father or mother of any child named in the copy or extract, that copy or extract is, if certified by an officer authorised by or under that law for the purpose to be a true copy of, or extract from, that recording, evidence of the fact that that person is the father or mother of that child.

(7) A certificate signed by the Principal Registrar of Births, Deaths and Marriages that any original general register, or any original local register, kept under the Registration of Births, Deaths and Marriages Act 1973 is lost or destroyed is conclusive evidence of that fact.

(8) The Governor may, by order published in the Gazette, proclaim any country or territory to be a country or territory for the purposes of subsection (4) (d).

Companies, incorporation, registration etc. (Evidence Act 1898, s. 32)

152. Evidence of the incorporation or registration of any trading society or company, whether foreign or otherwise, may be given by proof that the society or company carried on business within New South Wales (or elsewhere) under a certain name or style.

PART 4—STANDARD OF PROOF

Civil proceedings: standard of proof (ALRC 136)

153. (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account, in determining whether it is satisfied as mentioned in subsection (1) it is to take into account the nature of the cause of action or defence, the nature of the subject-matter of the proceeding and the gravity of the matters alleged.

Criminal proceedings: standards of proof (ALRC 137)

154. (1) In a criminal proceeding, a court is to not find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.

(2) In a criminal proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.

Admissibility of evidence: standard of proof (ALRC 138)

155. Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for determining:

(a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or

(b) any other question arising under this Act,

have been proved if it is satisfied that they have been proved on the balance of probabilities.

PART 5—CORROBORATION

Corroboration requirements abolished (ALRC 139)

156. (1) It is not necessary that evidence on which a party relies be corroborated.

(2) Subsection (1) does not affect the operation of a rule of law that requires corroboration with respect to the offence of perjury or a like or related offence.

(3) Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the Judge:

(a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or like effect; or

(b) give a direction relating to the absence of corroboration.

PART 6—WARNINGS

Unreliable evidence (ALRC 140)

157. (1) This section applies in relation to the following kinds of evidence:

(a) evidence in relation to which Part 1 (Hearsay Evidence) or 3 (Admissions) of Chapter 6 applies;

(b) identification evidence;

(c) evidence the reliability of which may be affected by age, ill-health (whether physical or mental), injury or the like;

(d) in the case of a criminal proceeding—evidence given by a witness called by the prosecutor, being a person who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding;

(e) in the case of oral evidence of official questioning of a defendant—if the questioning is recorded in writing that has not been signed or otherwise acknowledged in writing by the defendant;

(f) in the case of a proceeding against the estate of a deceased person—evidence adduced by or on behalf of a person seeking relief in the proceeding, being evidence about a matter about which the deceased person could, if he or she were alive, have given evidence.

(2) If there is a jury and a party so requests, the Judge unless there are good reasons for not doing so is:

(a) to warn the jury that the evidence may be unreliable; and

(b) to inform the jury of matters that may cause the evidence to be unreliable; and

(c) to warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(3) It is not necessary that a particular form of words be used in giving the warning or information.

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

CHAPTER 9—EVIDENCE ON COMMISSION

PART 1—EXAMINATION OF WITNESSES ABROAD

Definitions (Evidence Act 1898, s. 64)

158. 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 (Evidence Act 1898, s. 65)

159. (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; or

(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 is to 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) If 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) If 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, on 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) If 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), even though 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 (Evidence Act 1898, s. 66)

160. (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 159 (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 159 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 (Evidence Act 1898, s. 67)

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

Operation of other laws (Evidence Act 1898, s. 68)

162. 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 (Evidence Act 1898, s. 69)

163. (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 159 or 160.

(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 159 or 160.

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

PART 2—EXAMINATION OF WITNESSES OUTSIDE THE STATE BUT WITHIN AUSTRALIA

Application of this Part (Evidence Act 1898, s. 70)

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

Definitions (Evidence Act 1898, s. 71)

165. 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 (Evidence Act 1898, s. 72)

166. (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 if 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; or

(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 is to 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) If 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) If 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, on affidavit or otherwise;

(b) the attendance of the lawyer representing 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) If 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), even though 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 (Evidence Act 1898, s. 73)

167. (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 166 (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 166 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 (Evidence Act 1898, s. 74)

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

Operation of other laws (Evidence Act 1898, s. 75)

169. 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 (Evidence Act 1898, s. 76)

170. (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 166 or 167.

(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 166 or 167.

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

PART 3—TAKING OF EVIDENCE FOR FOREIGN AND AUSTRALIAN COURTS

Definitions (Evidence Act 1898, s. 77)

171. 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;

"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 172.

Application to the Supreme Court for assistance in obtaining evidence for proceedings in other court (Evidence Act 1898, s. 78)

172. (1) If an application is made to the Supreme Court for an order for evidence to be obtained in the State and the 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 (Evidence Act 1898, s. 79)

173. (1) The Supreme Court has power, on any such application as is mentioned in section 172, 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.

(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; and

(b) for the production of documents; and

(c) for the inspection, photographing, preservation, custody or detention of any property; and

(d) for the taking of samples of any property and the carrying out of any experiments on or with any property; and

(e) for the medical examination of any person; and

(f) without limiting paragraph (e), for the taking and testing of samples of blood from any person.

(4) An order under this section is not to 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 if this is asked for by the requesting court.

(6) An order under this section must 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 is 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 (Evidence Act 1898, s. 80)

174. (1) A person must not be compelled by virtue of an order under section 173 to give any evidence which the person could not be compelled to give:

(a) in similar proceedings in the State; or

(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) If 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 is not to 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 is to be construed accordingly.

Operation of other laws (Evidence Act 1898, s. 81)

175. 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 (Evidence Act 1898, s. 82)

176. (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 172 is to be made; and

(b) the circumstances in which an order can be made under section 173; and

(c) the manner in which any reference mentioned in section 174 (3) is to be made.

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

CHAPTER 10—MISCELLANEOUS

Inferences (ALRC 141)

177. If a question arises as to the application of a provision of this Act in relation to a document or thing, the court may:

(a) examine the document or thing; and

(b) draw any reasonable inference from it as well as from other matters from which inferences may properly be drawn.

Proof of certain matters by affidavit etc. (ALRC 142)

178. (1) Evidence of a fact that, by virtue of section 51, 52, 53, 56, 57 or 58 or a provision of Part 2 or 3 of Chapter 7, is to be proved in relation to a document or thing may be given by a person who, at the relevant time or at some later time, had a position of responsibility in relation to the making or keeping of the document or thing.

(2) Despite Chapter 6, the evidence may include evidence based on the knowledge and belief of the person who gives it or on information that that person has.

(3) The evidence may be given by affidavit or, in the case of evidence that relates to a public document, by a statement in writing.

(4) An affidavit or statement that includes evidence based on knowledge, information or belief is to set out the source of the knowledge or information or the basis of the belief.

(5) A copy of the affidavit or statement is to be served on each party a reasonable time before the hearing of the proceeding.

(6) The party who tenders the affidavit or statement is, if some other party so requests, to call the deponent or person who made the statement to give evidence but need not otherwise do so.

Request to produce documents or call witnesses (ALRC 143)

179. (1) In this section, **"request"** means a request given by a party (**"the requesting party"**) to some other party to do one or more of the following:

(a) to produce to the requesting party or to permit that party, adequately and in an appropriate manner, to examine, test or copy the whole or a part of a specified document or thing;

(b) to call as a witness a specified person believed to be concerned in the production or maintenance of a specified document or thing or a specified person in whose possession a document or thing is believed to be or to have been at any time;

(c) in relation to a document of the kind referred to in paragraph (c) or (d) of the definition of "document" referred to in section 3—to permit the requesting party, adequately and in an appropriate manner, to examine and test the document and the way in which it was produced and has been kept;

(d) in relation to evidence of a previous representation—to call as a witness the person who made the previous representation;

(e) in relation to evidence that a person has been convicted of an offence, being evidence to which section 78 (2) applies—to call as a witness a person who gave evidence in the proceeding in which the person was so convicted.

(2) If, for the purpose of determining a question that relates to:

(a) a previous representation; or

(b) evidence of a conviction of a person for an offence; or

(c) the authenticity, identity or admissibility of a document or thing,

a party has given a reasonable request to some other party and that other party has, without reasonable cause, failed or refused to comply with the request, the court may make one or more of the following orders:

(d) an order directing the other party to comply with the request;

(e) an order that the other party produce a specified document or thing, or call as a witness a specified person, as mentioned in subsection (1);

(f) such order with respect to adjournments or costs as is just,

or may refuse to admit the evidence in relation to which the request was made.

(3) If the party who has failed to comply with a request proves that the document or thing to be produced or the person to be called is unavailable, it is reasonable cause to fail to comply with the request.

(4) Without limiting the matters that the court may take into account, in relation to the exercise of a function under subsection (2) it is to take into account:

(a) the importance in the proceeding of the evidence in relation to which the request was made; and

(b) whether the outcome of the dispute in relation to the matter to which the evidence relates is likely to be affected by the evidence; and

(c) whether there is a reasonable doubt as to the authenticity or accuracy of the evidence or of the document the contents of which are sought to be proved; and

(d) whether there is a reasonable doubt as to the authenticity of the document or thing that is sought to be tendered; and

(e) in the case of a request in relation to evidence of a previous representation—whether there is a reasonable doubt as to the accuracy of the representation or of the information on which it was based; and

(f) in the case of a request as mentioned in subsection (1) (e)—whether some other person is available to give evidence about the conviction or the facts that were in issue in the proceeding in which the conviction was obtained; and

(g) whether compliance with the request would involve undue expense or delay or would not be reasonably practicable; and

(h) the nature of the proceeding.

Views etc. (ALRC 144)

180. (1) A Judge may, on application, order that a demonstration, experiment or inspection be held.

(2) A Judge is not to make an order under subsection (1) unless satisfied that:

(a) the parties will be given a reasonable opportunity to be present; and

(b) the Judge and, if there is a jury, the jury, will be present.

(3) Without limiting the matters that the Judge may take into account, in determining whether to make an order under subsection (1) the Judge is to take into account:

(a) whether the parties will be present; and

(b) whether the usefulness of the holding of the demonstration, experiment or inspection is outweighed by the danger of unfair prejudice or the danger that it might mislead or cause or result in undue waste of time; and

(c) in the case of a demonstration—the extent to which the demonstration will properly reproduce the conduct or event to be demonstrated; and

(d) in the case of an inspection—the extent to which the place or thing to be inspected has materially altered.

(4) The court (including, if there is a jury, the jury) may not itself conduct an experiment in the course of its deliberations.

(5) This section does not apply in relation to the inspection of an exhibit by the court or by the jury.

Views etc. to be evidence (ALRC 145)

181. Subject to this Act, the court (including, if there is a jury, the jury) may draw any reasonable inference from what it sees, hears or otherwise notices during a demonstration, experiment or inspection.

The voir dire (ALRC 146)

182. (1) If the determination of a question whether:

(a) evidence should be admitted (whether in the exercise of a discretion or not); or

(b) a witness is competent or compellable,

depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.

(2) If there is a jury, a preliminary question whether evidence of an admission, or evidence to which section 124 (Discretion to exclude improperly obtained evidence) applies, should be admitted is to be heard and determined in the absence of the jury.

(3) In the hearing of a preliminary question as to whether a defendant's admission should be allowed into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the defendant.

(4) If there is a jury, the jury is not to be present at a hearing to determine any other preliminary question unless the court so orders.

(5) Without limiting the matters that the court may take into account, in determining whether to make an order as mentioned in subsection (4) it is to take into account:

(a) whether the evidence concerned will be adduced in the course of the hearing to determine the preliminary question; and

(b) whether the evidence to be adduced in the course of that hearing would be admitted if adduced at some other stage of the hearing of the proceeding (other than in some other hearing to determine a preliminary question or, in a criminal proceeding, in relation to sentencing).

(6) Section 114 (5) does not apply to a hearing to determine a question referred to in subsection (2) or a preliminary question.

(7) In the application of Chapters 5 and 6 to a hearing to determine a question referred to in subsection (2) or a preliminary question, the facts in issue are taken to include the fact to which the hearing relates.

(8) If a jury in a proceeding was not present at a hearing to determine a preliminary question, evidence is not to be adduced of evidence given by a witness at the hearing unless it is inconsistent with other evidence given by the witness in the proceeding.

Waiver of rules of evidence (ALRC 147)

183. (1) The court may, on its own motion if all parties are legally represented and no objection is made by any party or, in any other case, if the parties consent, by order dispense with the application of any one or more of the provisions of:

(a) Chapter 4; or

(b) Parts 1–6 (inclusive) of Chapter 6; or

(c) Part 2 of Chapter 7,

in relation to particular evidence or generally.

(2) In a criminal proceeding, the consent of a defendant is not effective for the purposes of subsection (1) unless the court is satisfied that the defendant understands the consequences of giving the consent.

(3) In a civil proceeding, the court may order that any one or more of the provisions mentioned in subsection (1) do not apply in relation to evidence if:

(a) there is no reasonable doubt as to the fact or opinion to which the evidence relates; or

(b) the application of those provisions would cause or involve unnecessary expense or delay.

(4) Without limiting the matters that the court may take into account, in determining whether to exercise the power conferred by subsection (3) it is to take into account:

(a) the importance of the evidence in the proceeding; and

(b) the nature of the cause of action or defence and the nature of the subject-matter of the proceeding; and

(c) the probative value of the evidence; and

(d) the powers of the court (if any) to adjourn the hearing, to make some other order or to give a direction in relation to the evidence.

Agreements as to facts

184. (1) In this section, **"agreed fact"** means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.

(2) In a proceeding:

(a) evidence is not required to prove the existence of an agreed fact; and

(b) evidence may not be adduced to contradict or qualify an agreed fact,

unless the court gives leave.

(3) Subsection (2) does not apply unless the agreed fact:

(a) is stated in an agreement in writing signed by the parties or by lawyers representing the parties and adduced in evidence in the proceeding; or

(b) with the leave of the court, is stated by a party before the court with the agreement of all other parties.

Leave etc. may be given on terms (ALRC 148)

185. (1) If, by virtue of a provision of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account, in determining whether to give the leave, permission or direction it is to take into account:

(a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and

(b) the extent to which to do so would be unfair to a party or to a witness; and

(c) the importance of the evidence in relation to which the leave or permission is sought; and

(d) the nature of the proceeding; and

(e) the powers, if any, of the court to adjourn the hearing or to make some other order or to give a direction in relation to the evidence.

Additional powers (ALRC 149)

186. (1) The powers of a court in relation to:

(a) the discovery or inspection of documents; and

(b) ordering disclosure and exchange of evidence, intended evidence, documents and reports,

extend to enabling the court to make such orders as the court thinks fit (including orders as to methods of inspection, adjournments and costs) to ensure that the parties to a proceeding can adequately, and in an appropriate manner, inspect documents of the kind referred to in paragraph (c) or (d) of the definition of "document" referred to in section 3.

(2) The power of a person or body to make rules of court or regulations in relation to any court extends to making rules or regulations for or with respect to the discovery, exchange, inspection or disclosure of intended evidence, documents and reports of persons intended to be called by a party to give evidence in a proceeding to which this Act applies.

(3) Without limiting subsection (2), rules or regulations made under that subsection may provide for the exclusion of evidence if the rules are not complied with, or for its admission on specified terms.

(4) This section does not authorise the making of orders, rules of court or regulations compelling a defendant in a criminal proceeding to disclose material.

Impounding documents (Evidence Act 1898, s. 43)

187. If a document adduced in evidence by a party is admitted in evidence by a court by virtue of this Act, the court may, at the request of any other party, direct that the document be impounded and be kept in the custody of some officer of the court or other proper person for such period and subject to such conditions as the court thinks fit.

Prohibited question not to be published (Evidence Act 1898, s. 59)

188. A person must not, without the express permission of a court, print or publish any question or inquiry which has been forbidden or disallowed by the court, on any of the grounds mentioned in sections 37 (Improper questions) and 92 (The credibility rule—exclusion of evidence relevant only to credibility).

Order to produce book or to appear (Evidence Act 1898, s. 49)

189. (1) A banker, or officer of a bank, is not, in any civil or criminal proceeding to which the bank is not a party, compellable:

(a) to produce any banker's book, the contents of which can be proved under this Act; or

(b) to appear as a witness to prove the matters, transactions and accounts recorded in the banker's book,

unless by order made for special cause.

(2) An order under subsection (1) may be made only:

(a) by the Supreme Court in respect of any proceeding in a court; and

(b) by a Judge of the District Court in respect of any proceeding in the District Court.

Inspection of bankers' books (Evidence Act 1898, s. 50)

190. (1) On the application of any party to a civil or criminal proceeding before a court, the court or the Supreme Court may order that the party be at liberty to inspect and take copies of any entries in a banker's book relating to the matters in question in the proceeding.

(2) An order under this section may be made either with or without summoning the bank or any other party, and is to be served on the bank 2 clear days before it is to be obeyed, unless the court or Supreme Court otherwise directs.

Costs (Evidence Act 1898, s. 51)

191. (1) A court or Judge may order that the costs or any part of the costs of:

(a) any application to the court or Judge under or for the purposes of section 189 or 190; or

(b) anything done or to be done under an order of the court or Judge made under or for the purposes of those sections,

be paid to any party by the bank if the costs result from any default or delay on the part of the bank.

(2) Any order against a bank under this section may be enforced as if the bank were a party to the proceeding.

Regulations (ALRC 151)

192. The Governor may make regulations, not inconsistent with this Act, prescribing matters for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed, for carrying out or giving effect to this Act.

Repeal of Evidence Act 1898 etc.

193. The following Acts are repealed:

Evidence Act 1898

Evidence (Reproductions) Act 1967.

Consequential amendments

194. Each Act specified in Schedule 4 is amended as set out in that Schedule.

Savings, transitional and other provisions

195. Schedule 5 has effect.

SCHEDULE 1—DICTIONARY OF TERMS USED IN THE ACT

(Sec. 3)

PART 1—DEFINITIONS

admission means a previous representation made by a person who is or becomes a party to a proceeding, being:

(a) an adverse representation; or

(b) a representation about a fact or opinion that would or could make it unnecessary for the other party to the proceeding to adduce evidence of the fact or opinion;

adverse representation means a representation that is adverse to the interest of a person who is or becomes a party to a proceeding in the outcome of the proceeding and includes:

(a) a representation that tends to damage the reputation of the person; and

(b) a representation that tends to show that a person has committed an offence for which the person has not been convicted; and

(c) a representation that tends to show that the person is liable in an action for damages; and

(d) a representation as to a pecuniary disadvantage to the person that tends to show that the person is under an obligation in some other respect;

banker means:

(a) any person, partnership, or company engaged in New South Wales or elsewhere in the ordinary business of banking by receiving deposits and issuing bills or notes payable to the bearer at sight or on demand; and

(b) any Government or Post Office Savings Bank, established under any law in force for the time being;

bankers' books includes ledgers, day-books, cash-books, account books and other accounting records used in the ordinary business of the bank;

case, in relation to a party, means the facts in issue in respect of which the party bears the legal burden of proof;

civil proceeding means a proceeding in a court, other than a criminal proceeding;

confidential communication is defined in section 105;

SCHEDULE 1—DICTIONARY OF TERMS USED IN THE ACT—*continued*

confidential document is defined in section 105;

confidential record is defined in section 105;

court, in relation to a person or body (other than a court) authorised by law, or by consent of parties, to hear and receive evidence includes the person or body;

credibility, in relation to evidence of a defendant or other party or a witness, means the believability of any part or all of the evidence of the defendant, party or witness;

credibility rule means section 92;

criminal proceeding means a prosecution in a court for an offence and includes a proceeding for the commitment of a person for trial for an offence;

cross-examiner means a party who is cross-examining a witness;

de facto spouse means:

(a) in relation to a man, a woman who is living or has lived with the man as his wife on a genuine domestic basis although not married to him; and

(b) in relation to a woman, a man who is living or has lived with the woman as her husband on a genuine domestic basis although not married to her;

document includes:

(a) any thing on which there is writing; and

(b) a map, plan, drawing or photograph; and

(c) a thing from which sounds or visual images (including writing) are capable, with or without the aid of a device, of being reproduced;

(d) any thing on which there are marks, symbols or perforations having a meaning for persons qualified to interpret them,

and also includes a part of a document (as so defined) and a copy, reproduction or duplicate of a document or of a part of a document;

enactment means an Act, an Imperial Act applying as part of the law of the State or a regulation, rule, by-law or ordinance made under such an Act;

evidence includes unsworn evidence;

exercise of a function includes, where the function is a duty, a reference to the performance of the duty;

SCHEDULE 1—DICTIONARY OF TERMS USED IN THE ACT—*continued*

federal court means the High Court or any court created by the Parliament of the Commonwealth;

function includes a power, authority and duty;

hearsay rule means section 47 (1);

investigating official means a police officer or a person whose functions include functions in respect of the prevention or investigation of offences;

Judge, in relation to a proceeding, means the Judge, Magistrate or other person before whom the proceeding is being held;

lawyer means a barrister or a solicitor;

leading question means a question asked of a witness that:

(a) directly or indirectly suggests a particular answer to the question; or

(b) assumes the existence of a fact as to which the witness is to testify or is capable of testifying;

offence includes an offence against or arising under a law of or in force in another State or Territory or under a law of the Commonwealth;

official questioning means questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence;

opinion rule means section 61 (1);

police officer means:

(a) a member of the Police Service of New South Wales; or

(b) a member of the Australian Federal Police; or

(c) a member of the police force of another State or Territory;

previous representation means a representation made otherwise than in the course of the giving of evidence in the proceeding in which evidence of the representation is sought to be adduced;

prior consistent statement, in relation to a witness, means a previous representation that is consistent with evidence given by the witness;

prior inconsistent statement, in relation to a witness, means a previous representation that is inconsistent with evidence given by the witness;

SCHEDULE 1—DICTIONARY OF TERMS USED IN THE ACT—*continued*

probative value, in relation to evidence, means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue;

proceeding is defined in section 4;

public document means a document that:

(a) forms part of the records of the Crown in any of its capacities; or

(b) forms part of the records of the government of a foreign country; or

(c) forms part of the records of a person or body holding office or exercising a function under or by virtue of an Act or law, whether of the State, the Commonwealth, another State or a Territory or of a foreign country; or

(d) is being kept by or on behalf of the Crown, such a government or such a person or body,

and includes the records of the proceedings of a House of Parliament, a House of the Parliament of the Commonwealth or another State, a Legislative Assembly of a Territory or the legislature of a foreign country;

related offender is defined in section 19;

representation includes:

(a) an express or implied representation (whether oral or in writing); and

(b) a representation to be inferred from conduct; and

(c) a representation not intended by its maker to be communicated to or seen by another person; and

(d) a representation which for any reason is not communicated;

sworn evidence means evidence given by a person who, before he or she gave it, had taken an oath or made an affirmation in accordance with this Act;

telecommunications installation and **telecommunications service** have the meanings that they respectively have under the Telecommunications Act 1989 of the Commonwealth;

tendency rule means section 83;

unsworn evidence means evidence that is not sworn evidence.

SCHEDULE 1—DICTIONARY OF TERMS USED IN THE ACT—*continued*

PART 2—EXPRESSIONS AND MATTERS

References to businesses (ALRC 4)

1. (1) A reference in this Act to a business includes a reference to:

(a) a profession, calling, occupation, trade or undertaking; and

(b) an activity engaged in or carried on by the Crown in any of its capacities; and

(c) an activity engaged in or carried on by the government of a foreign country; and

(d) an activity engaged in or carried on by a person or body holding office or exercising power under or by virtue of the Australian Constitution or of a law, whether of the State, the Commonwealth, another State or a Territory or a foreign country, being an activity engaged in or carried on in the performance of the functions of the office or in the exercise of the power; and

(e) the proceedings of a House of Parliament, a House of the Parliament of the Commonwealth or another State, a Legislative Assembly of a Territory or the legislature of a foreign country.

(2) A reference in this Act to a business also includes a reference to:

(a) a business that is not engaged in or carried on for profit; and

(b) a business engaged in or carried on outside Australia; and

(c) a business engaged in or carried on by an incorporated or unincorporated association or a partnership.

References to examination in chief etc. (ALRC 5)

2. (1) A reference in this Act to:

(a) **examination in chief** of a witness is a reference to the questioning of a witness by the party who called the witness to give evidence, not being questioning that is re-examination; and

(b) **cross-examination** of a witness is a reference to the questioning of a witness by a party other than the party who called the witness to give evidence; and

(c) **re-examination** of a witness is a reference to the questioning of a witness by the party who called the witness to give evidence, being questioning (other than further examination in chief with the leave of the court) conducted after the cross-examination of the witness by some other party,

SCHEDULE 1—DICTIONARY OF TERMS USED IN THE ACT—*continued*

and examine in chief, cross-examine and re-examine have corresponding meanings.

(2) If a party has recalled a witness who has already given evidence, a reference in this Act to re-examination of a witness does not include a reference to questioning of the witness by that party before the witness is questioned by some other party.

References to civil penalties (ALRC 6)

3. For the purposes of this Act, a person is taken to be liable to a civil penalty if, in a proceeding (including a proceeding referred to in section 4 (4) but not including a criminal proceeding), the person would be liable to a penalty arising under a law of or in force in the State, the Commonwealth, another State, a Territory or a foreign country.

Unavailability of persons (ALRC 7)

4. (1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if:

(a) the person is dead; or

(b) the person is not competent to give evidence about the fact; or

(c) it would not be lawful for the person to give evidence about the fact; or

(d) the evidence, under a provision of this Act, may not be given; or

(e) all reasonable steps have been taken by the party proving the person is not available to find the person or to secure his or her attendance, but without success; or

(f) all reasonable steps have been taken by the party proving the person is not available to compel the person to give the evidence, but without success.

(2) A person is also taken not to be available to give evidence about a fact if the person is unable to recall the fact and his or her memory cannot be revived.

(3) In all other cases the person is taken to be available to give evidence about the fact.

Unavailability of documents (ALRC 8)

5. (1) For the purposes of this Act:

SCHEDULE 1—DICTIONARY OF TERMS USED IN THE ACT—*continued*

(a) a document that cannot be found by a party after reasonable enquiry and search is taken not to be available to the party; and

(b) a document that has been destroyed is taken not to be available to a party if it was destroyed by the party, or by a person on behalf of the party, otherwise than in bad faith or was destroyed by some other person.

(2) A document other than a document referred to in subsection (1) is taken not to be available to a party if it cannot be obtained by the party by any judicial procedure of the court.

(3) In all other cases the document is taken to be available to the party.

Representations in documents (ALRC 9)

6. For the purposes of this Act, where a representation is contained in a document that:

(a) was written, made, recorded or otherwise produced by a person; or

(b) was recognised by a person as his or her representation by signing, initialling or otherwise marking the document,

the representation is taken to have been made by the person.

Witnesses (ALRC 10)

7. A reference in this Act:

(a) to a witness includes a reference to a party giving evidence; and

(b) to a witness who has been called by a party to give evidence includes a reference to the party giving evidence.

SCHEDULE 2—OATHS AND AFFIRMATIONS

(Secs. 10, 11)

PART 1

Oaths by witnesses

I swear (or the person taking the oath may promise) by Almighty God (or the person may name a god or gods recognised by his or her religion) that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

SCHEDULE 2—OATHS AND AFFIRMATIONS—*continued*

PART 2

Oaths by interpreters

I swear (or the person taking the oath may promise) by Almighty God (or the person may name a god or gods recognised by his or her religion) that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

PART 3

Affirmations by witnesses

I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

PART 4

Affirmations by interpreters

I solemnly and sincerely declare and affirm that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

SCHEDULE 3—AFFIDAVIT BY POLICE FINGER-PRINT EXPERT

(Sec. 146)

New South Wales

In the ..... (*insert name of court*)

Regina v. .....

[*or Between* ..... Informant and

..... Defendant, *or, as the case may be.*]

I ..... of .....

in the (*State or Territory*) make oath and say as follows:

SCHEDULE 3—AFFIDAVIT BY POLICE FINGER-PRINT EXPERT—*continued*

1. I am a finger-print expert and a police officer of the above State or Territory.
2. I have examined the finger-print card now produced and shown to me marked "A".
3. The finger-prints on the card are identical with those appearing on a finger-print card in the records of the Police Service, being finger-prints of ..... (*name of person and alias, if any*)
4. According to those records, which I believe to be accurate, ... was convicted in the above State or Territory of the following offences:

   [*Set out description of offences, dates of conviction, and courts in which the person was convicted.*]
5. From an examination of those records I believe the person referred to in the document(s) annexed now shown to me and marked "B" [*"C", "D" etc. respectively*] as having been convicted of the offence(s) stated in the documents is identical with the person whose finger-prints are shown on the card marked "A".

SWORN at .....

this ..... day of .....

199.....

Before me

.....

A person authorised to take affidavits in the State [*or Territory*] of

.....

SCHEDULE 4—AMENDMENTS TO OTHER ACTS

(Sec. 194)

Companies (New South Wales) Code

(1) Section 289 (**Interpretation and application**):

Omit section 289 (7), insert instead:

SCHEDULE 4—AMENDMENTS TO OTHER ACTS—*continued*

(7) An investigation under this Part shall, for the purposes of Part 2 (Documents) of Chapter 7 (Other Aspects of Proof) of the Evidence Act 1991, be deemed to be a proceeding within the meaning of that Act.

(2) Section 306 (**Provisions relating to reports**):

From section 306 (14), omit "*Evidence Act 1898*", insert instead "*Evidence Act 1991*".

Crimes Act 1900 No. 40

(1) Omit the following sections:

404 (Admission by accused before or at trial)
407 (Competency of parties and accused persons and their husbands and wives to give evidence)
408 (Declaration by person since deceased)
410 (Confession etc. when inadmissible)
413 (Witnesses to character—what evidence admissible)
413A (Restriction on cross-examination of accused)
413B (Admissibility of evidence and questions about accused's disposition or reputation)
415 (Proof of banking transactions)
416 (Proof of by-laws etc.)
418 (Evidence of police officers)
420 (Receivers—evidence of guilty knowledge)

(2) Section 405C (Judge not required to warn jury against convicting person of certain sexual offences):

(a) From section 405C (2), omit "prescribed" wherever occurring.

(b) From section 405C (3) and (4), omit ", being a sexual offence other than a prescribed sexual offence," wherever occurring.

(3) Section 445 (**Proof of previous conviction**):

Omit "the Evidence Act 1898", insert instead "section 145 (Convictions, acquittals and other judicial proceedings) of the Evidence Act 1991".

SCHEDULE 4—AMENDMENTS TO OTHER ACTS—*continued*

(4) Section 579 (**Evidence of proceedings dealt with by way of recognizance after 15 years**):

From section 579 (4), omit "section 23 of the Evidence Act 1898", insert instead "section 145 (Convictions, acquittals and other judicial proceedings) of the Evidence Act 1991".

District Court Act 1973 No. 9

Section 65 (**Attendance**):

From section 65 (9), omit "sections 13 and 14 of the Evidence Act 1898", insert instead "section 23 of the Evidence Act 1991".

Family Provision Act 1982 No. 160

Section 32 (**Evidence**):

(a) Omit section 32 (12) (b).

(b) Omit section 32 (13), insert instead:

(13) The exceptions to the rules against hearsay set out in this section are in addition to the exceptions to the hearsay rule set out in the Evidence Act 1991.

Food Act 1989 No. 231

Section 68 (**Authenticity of notices etc. of the Director-General**):

From section 68 (2), omit "Evidence Act 1898", insert instead "Evidence Act 1991".

Interpretation Act 1987 No. 15

(1) Section 22 (**References to enactment etc. of Acts**):

Omit section 22 (2).

(2) Section 44 (**Judicial notice of statutory rules**):

Omit the section.

(3) Section 51 (**Judicial notice of seals**):

Omit the section.

SCHEDULE 4—AMENDMENTS TO OTHER ACTS—*continued*

(4) Section 76 (**Service by post**):

Omit section 76 (b), insert instead:

(b) is, unless evidence sufficient to raise real doubt is adduced to the contrary, taken to have been effected on the fourth working day after the letter was posted.

Loan Fund Companies Act 1976 No. 94

Section 51 (**Procedure with respect to holding of inquiry**):

Omit section 51 (10), insert instead:

(10) An inquiry under this Division is, for the purposes of Part 2 (Documents) of Chapter 7 (Other aspects of proof) of the Evidence Act 1991, taken to be a proceeding within the meaning of that Act.

Local Government Act 1919 No. 41

Section 625B (**Delineation of local government boundaries by reference to maps**):

From section 625B (3), omit "shall be public documents to which the provisions of sections 15 and 16 of the Evidence Act, 1898, as amended by subsequent Acts, shall apply", insert instead "are public documents to which sections 140 (Public documents) and 141 (Documents produced from proper custody) of the Evidence Act 1991 apply".

Motor Accidents Act 1988 No. 102

Part 5 (**Claims and court proceedings to enforce claims**), Division 5 (**Hearsay evidence in court proceedings**):

Omit the Division.

National Companies and Securities Commission (State Provisions) Act 1981 No. 60

Section 8 (**Power to summon witnesses and take evidence**):

From section 8 (4), omit "Evidence Act 1898", insert instead "Evidence Act 1991".

SCHEDULE 4—AMENDMENTS TO OTHER ACTS—*continued*

Oaths Act 1900 No. 20

(1) After section 31, insert:

Person may make declaration instead of oath

31A. (1) This section applies to the making of an affidavit by a person before a justice or other person authorised to take an affidavit when the justice is satisfied, having regard to any matter thought relevant (including age and capacity to hear, understand or communicate) that the person is not competent to take an oath.

(2) The affidavit by the person is to be allowed, as if it were taken on oath, so long as:

(a) the justice or other person tells the person that it is important to tell the truth; and

(b) the person makes a declaration, by responding appropriately when asked, that he or she will not tell lies in the affidavit.

(3) However, the affidavit is not to be allowed if the justice or other person is satisfied that:

(a) the person does not understand the difference between the truth and a lie; or

(b) the person is not able to respond rationally to questions.

(4) It is to be presumed, unless the contrary is established to the satisfaction of the justice or other person, that the person understands the difference between the truth and a lie and is able to respond rationally to questions.

(5) This section does not make evidence admissible if it would otherwise be inadmissible.

(6) In this section, **"affidavit"** includes a deposition and a statement made in an information or complaint.

(2) Omit sections 33 (**Children may make declaration instead of oath**) and 34 (**Manner of making declaration**).

(3) Section 35 (**False statements**)

From section 35 (1), omit "section 33", insert instead "section 31A".

SCHEDULE 4—AMENDMENTS TO OTHER ACTS—*continued*

(4) Tenth Schedule (**Declaration**):

Omit the Schedule.

Securities Industry (Application of Laws) Act 1981 No. 61

Schedule 1:

(a) Omit item 10, insert instead:

10. For section 20 of the Commonwealth Act there were substituted the following section:

20. An investigation under this Division shall, for the purposes of Part 2 (Documents) of Chapter 7 (Other Aspects of Proof) of the *Evidence Act 1991*, be deemed to be a proceeding within the meaning of that Act.

(b) From item 12, omit "Evidence Act 1898", insert instead "Evidence Act 1991".

Securities Industry (New South Wales) Code

(1) Section 20:

Omit the section, insert instead:

Investigation deemed to be a proceeding

20. An investigation under this Division shall, for the purposes of Part 2 (Documents) of Chapter 7 (Other Aspects of Proof) of the *Evidence Act 1991*, be deemed to be a proceeding within the meaning of that Act.

(2) Section 30 (**Report of inspector**):

From section 30 (10), omit "*Evidence Act 1898*", insert instead "*Evidence Act 1991*".

SCHEDULE 5—SAVINGS, TRANSITIONAL AND OTHER PROVISIONS

(Sec. 195)

Savings and transitional regulations

1. (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act.

SCHEDULE 5—SAVINGS, TRANSITIONAL AND OTHER PROVISIONS—*continued*

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

(3) To the extent to which such a 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 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 publication.

Holders of certain offices

2. An order made under section 24A of the Evidence Act 1898 and in force on the day on which section 128 of this Act commences is taken to have been made under section 128.

Births, deaths, marriages and parentage information

3. An order made under section 30 (8) of the Evidence Act 1898 and in force on the day on which section 151 of this Act commences is taken to have been made under section 151 (8).

Admissibility of evidence or statements as to access by husband or wife

4. To remove doubt, it is declared that the common law rule relating to evidence by spouses as to access and marital intercourse abolished by section 14D of the Evidence Act 1898 is not revived by the repeal of that section.