

First print



New South Wales

Evidence (Consequential and Other Provisions) Bill 1995

Explanatory note

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

This Bill is cognate with the *Evidence Bill 1995*.

Overview of Bill

The objects of this Bill are:

- (a) to repeal the *Evidence Act 1898* and the *Evidence (Reproductions) Act 1967* as a consequence of the enactment of the proposed *Evidence Act 1995* and the *Evidence on Commission Act 1995* and to make necessary consequential amendments to various Acts, and
 - (b) to amend the *Crimes Act 1900* to set out the criteria to be satisfied in order for admissions by accused persons made in the course of official questioning and made at a time when they were under suspicion of having committed an offence to be admissible as evidence, and
 - (c) to enact consequential savings, transitional and other provisions.
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Outline of provisions

Clauses 1–5 are machinery provisions.

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be proclaimed.

Clause 3 repeals the Acts referred to in paragraph (a) of the Overview of this Bill.

Clauses 4 and 5 are formal provisions giving effect to the amendments set out in Schedule 1 and the savings, transitional and other provisions set out in Schedule 2.

Schedule 1 contains the amendments referred to in paragraphs (a) and (b) of the Overview of this Bill.

The amendments referred to in paragraph (a) of the Overview of this Bill include amendments:

- to repeal provisions of the *Crimes Act 1900* to be superseded by the proposed Acts (for example, section 405C which will be superseded by proposed section 164 (3) of the *Evidence Act 1995* and section 413A which will be superseded by proposed section 104)
- to repeal provisions of the *Oaths Act 1900* to be replaced by the proposed Act (for example, sections 33 and 34 which will be superseded by proposed section 13 of the *Evidence Act 1995*)
- to make it clear that proposed section 127 (Religious confessions) of the *Evidence Act 1995* will apply to hearings or proceedings before certain bodies (for example, the New South Wales Crime Commission) to which other provisions of the proposed Act are not to apply
- to translate references to the *Evidence Act 1898* to corresponding references in the proposed *Evidence Act 1995*.

The amendment referred to in paragraph (b) of the Overview of this Bill is based on 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).

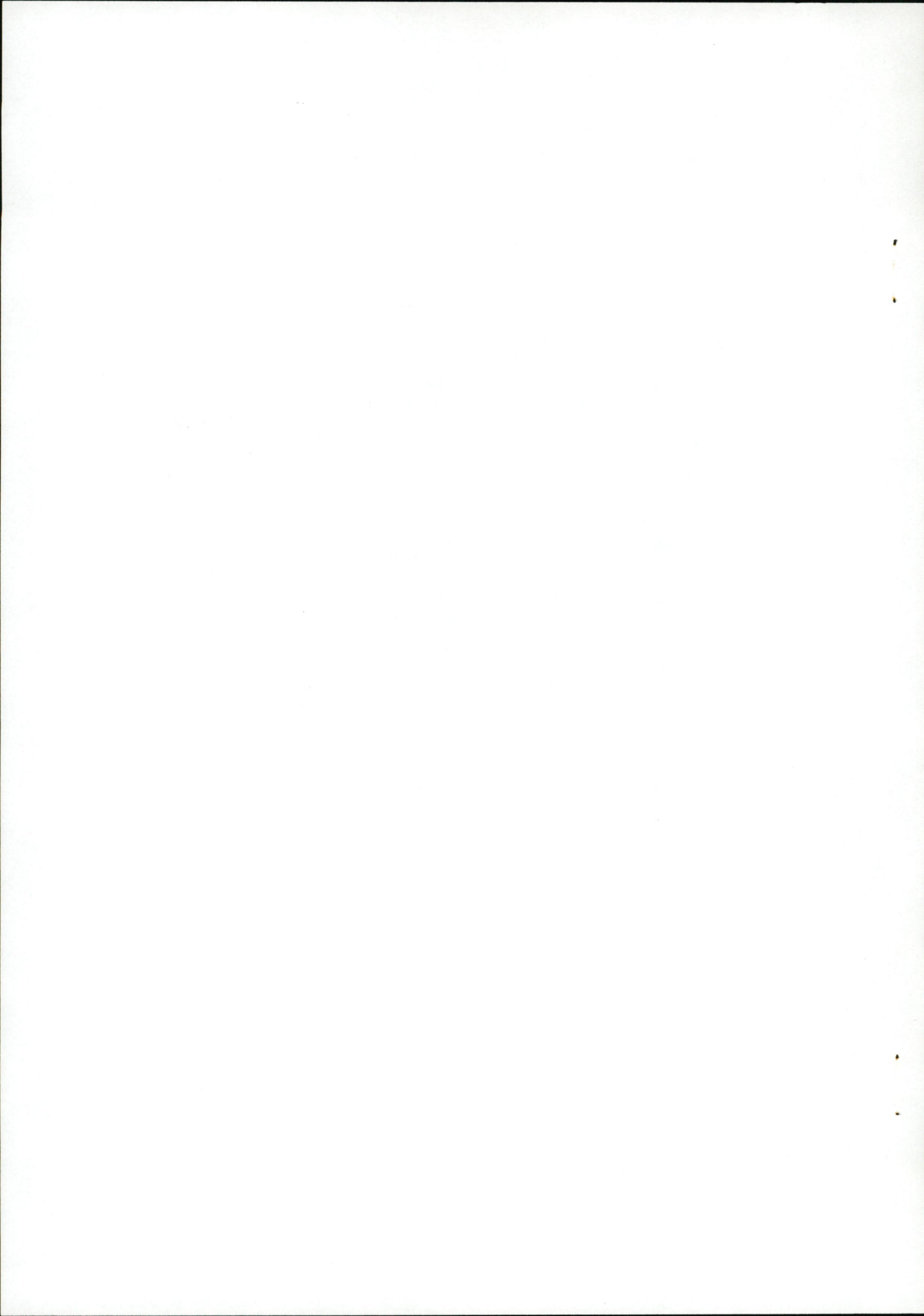
Proposed section 424A of the *Crimes Act 1900* (Schedule 1.5 (3)) provides that evidence of admissions allegedly made to police officers (and other prescribed investigating officials) but not electronically recorded should generally not be admissible. If, however, an investigating official has a reasonable excuse for failing to make such a recording the evidence is admissible but only if the other requirements of the proposed section are met.

If an investigating official has a reasonable excuse for not recording an admission, evidence of the admission is admissible if investigating officials 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 investigating officials can demonstrate a reasonable excuse for not holding such a recorded interview.

Proposed section 424A will provide additional requirements concerning the admissibility of admissions to which it applies to those contained in Part 3.4 of the proposed *Evidence Act 1995*.

Schedule 2 contains the provisions referred to in paragraph (c) of the Overview of this Bill. It contains a power to make regulations of a savings and transitional nature (clause 1) and makes certain savings relating to the repeal of some of the provisions of the *Evidence Act 1898* and the *Evidence (Reproductions) Act 1967* (clauses 11–15).

The provisions of the *Evidence Act 1995* and *Evidence on Commission Act 1995* will not apply to proceedings the hearings of which began before the commencement of the provisions (clause 2). For example, a provision of the proposed *Evidence Act 1995* that is applicable to criminal proceedings will not apply to proceedings if the arraignment of the accused has occurred before commencement of the provision. However, Schedule 2 enables procedural steps on which the operation of particular provisions depend to be taken before the provision concerned commences (clauses 3 (1) and (2) and 4, 5, 6, 7 and 8).





New South Wales

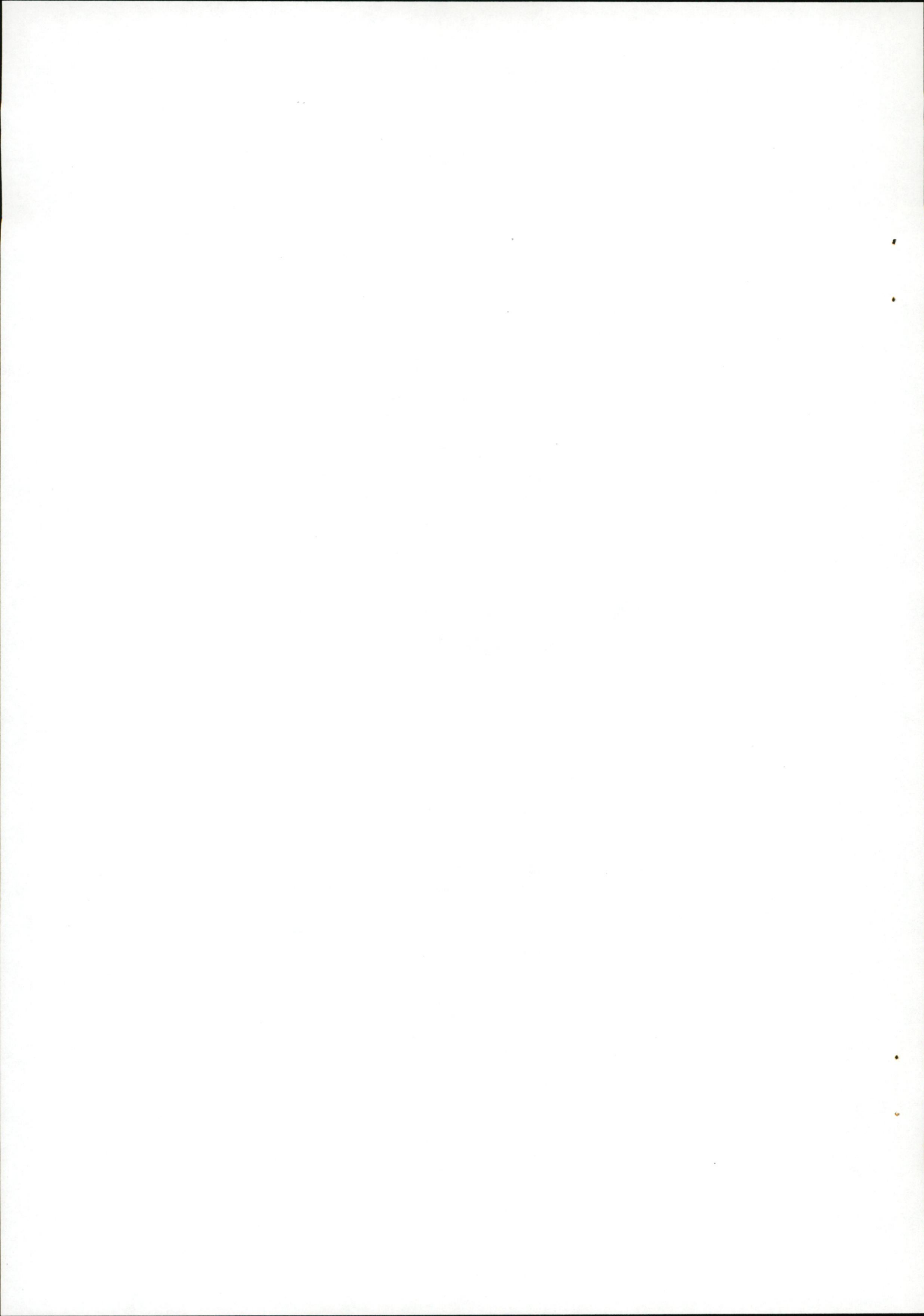
Evidence (Consequential and Other Provisions) Bill 1995

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New South Wales

Evidence (Consequential and Other Provisions) Bill 1995

No. , 1995

A Bill for

An Act to repeal the *Evidence Act 1898* and the *Evidence (Reproductions) Act 1967*, and to amend various other Acts, as a consequence of the enactment of the *Evidence Act 1995* and the *Evidence on Commission Act 1995*; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Evidence (Consequential and Other Provisions) Act 1995*.

2 Commencement

5

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

3 Repeal of Acts

The following Acts are repealed:

Evidence Act 1898

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Evidence (Reproductions) Act 1967

Evidence (Evidence on Commission) Amendment Act 1988.

4 Amendment of Acts

Each Act specified in Schedule 1 is amended as set out in that Schedule.

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5 Savings, transitional and other provisions

Schedule 2 has effect.

Schedule 1 Amendments

(Section 4)

1.1 Associations Incorporation Act 1984 No 143

Section 59 Register

Omit section 59 (5).

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1.2 Australia and New Zealand Banking Group Limited (NMRB) Act 1991 No 35

Section 10 Evidence

Omit section 10 (2) and (3).

1.3 Business Names Act 1962 No 11

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Section 4 Interpretation

Omit the definitions of *Machine copy*, *Reproduction* and *Transparency* from section 4 (1).

Insert instead the following definitions:

Machine-copy of a document means a copy of the document made by a machine performing a process: 15

- (a) that involves the production of a latent image of the document (not being a latent image on photo-sensitive material on a transparent base) and the development of that image by chemical means or otherwise, or 20

- (b) that, without the use of photo-sensitive material, produces a copy of the document simultaneously with the making of the document.

Reproduction of a document means a machine-copy of the document or a print made from a transparency of the document. 25

Transparency of a document means the following:

- (a) a developed negative or positive photograph of that document (in this definition referred to as an **original photograph**) made, on a transparent base, by means of light reflected from, or transmitted through, the document, 5
- (b) a copy of an original photograph made by the use of photo-sensitive material (being photo-sensitive material on a transparent base) placed in surface contact with the original photograph, 10
- (c) any one of a series of copies of an original photograph, the first of the series being made by the use of photo-sensitive material (being photo-sensitive material on a transparent base) placed in surface contact with a copy referred to in paragraph (b), and each succeeding copy in the series being made, in the same way, from any preceding copy in the series. 15

1.4 Canberra Advance Bank Limited (Merger) Act 1992 No 17 20

Section 18 Evidence

Omit section 18 (2) and (3).

1.5 Crimes Act 1900 No 40

[1] Omit the following sections:

- 404 (Admission by accused before or at trial) 25
- 405C (Judge not required to warn jury against convicting person of certain sexual offences)
- 407 (Competency of parties and accused persons and their husbands and wives to give evidence)
- 408 (Declaration by person since deceased) 30
- 410 (Confessions etc, when inadmissible)

412	(Evidence to character of accused)	
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)	5
413C	(Documentary evidence of previous convictions)	
415	(Proof of banking transactions)	
416	(Proof of by-laws etc)	
418	(Evidence by police officers)	
420	(Receivers—evidence of guilty knowledge)	10
[2]	Section 335 False statements in evidence on commission	
	Omit "section 79 of the <i>Evidence Act 1898</i> ".	
	Insert instead "section 33 (Power of the Supreme Court to give effect to application for assistance) of the <i>Evidence on Commission Act 1995</i> ".	15
[3]	Section 424A	
	Insert after section 424:	
	424A Admission by suspects	
(1)	This section applies in relation to evidence of an admission within the meaning of this section.	20
(2)	Evidence of an admission is not admissible unless:	
(a)	there is available to the court a tape recording made by an investigating official 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 tape recording referred to in paragraph (a) could not be made, there is available to the court a tape 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	25 30

- (c) the prosecution establishes that there was a reasonable excuse as to why the tape recordings referred to in paragraphs (a) and (b) could not be made.
- (3) The hearsay rule and the opinion rule (within the meaning of the *Evidence Act 1995*) do not prevent the admission or use of a tape recording as mentioned in subsection (2). 5
- (4) In this section:
- admission** means an admission: 10
- (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 15
- (b) that was made in the course of official questioning, and
- (c) that relates to an indictable offence other than an indictable offence that may be dealt with summarily without the consent of the accused. 20
- investigating official** means:
- (a) a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior), or
- (b) a person appointed by or under an Act (other than a person who is engaged in covert investigations under the orders of a superior) and whose functions include functions in respect of the prevention or investigation of offences, prescribed by the regulations for the purposes of this definition. 25 30
- official questioning** means questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence.
- reasonable excuse** includes: 35
- (a) a mechanical failure, or

	(b) the refusal of a person being questioned to have the questioning electronically recorded, or	
	(c) the lack of availability of recording equipment within a period in which it would be reasonable to detain the person being questioned.	5
	<i>tape recording</i> includes:	
	(a) audio recording, or	
	(b) video recording, or	
	(c) a video recording accompanied by a separately but contemporaneously recorded audio recording.	10
(5)	This section does not apply to an admission made before the commencement of this section.	
[4]	Section 445 Proof of previous conviction	
	Omit "the <i>Evidence Act 1898</i> ".	
	Insert instead "section 178 (Convictions, acquittals and other judicial proceedings) of the <i>Evidence Act 1995</i> ".	15
[5]	Section 579 Evidence of proceedings dealt with by way of recognizance after 15 years	
	Omit "section 23 of the <i>Evidence Act 1898</i> " from section 579 (4).	
	Insert instead "section 178 (Convictions, acquittals and other judicial proceedings) of the <i>Evidence Act 1995</i> ".	20
1.6	Criminal Records Act 1991 No 8	
	Section 16 Proceedings before courts	
	Omit section 16 (3). Insert instead:	
(3)	This Act does not affect any of the following provisions:	25
	• section 15 of the <i>Children (Criminal Proceedings) Act 1987</i>	
	• section 414 of the <i>Crimes Act 1900</i>	

- Part 3.8 (Character) of Chapter 3 and section 178 (Convictions, acquittals and other judicial proceedings) of the *Evidence Act 1995*.

1.7 Crown Lands Act 1989 No 6

Section 181 Notices 5

Omit section 181 (2). Insert instead:

- (2) A notice, order or other document sent by post in accordance with subsection (1) is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been given or served on the fourth working day after it was sent. 10

1.8 District Court Act 1973 No 9

Section 65 Attendance

Omit "sections 13 and 14 of the *Evidence Act 1898*" from section 65 (9). 15

Insert instead "section 194 (Witnesses failing to attend proceedings) of the *Evidence Act 1995*".

1.9 Drug Trafficking (Civil Proceedings) Act 1990 No 23

Section 54 Proof of certain matters

Omit "section 23 of the *Evidence Act 1898*" from section 54 (2). 20
Insert instead "section 178 (Convictions, acquittals and other judicial proceedings) of the *Evidence Act 1995*".

1.10 Family Provision Act 1982 No 160

[1] Section 32 Evidence

Section 32 (12) (a)

Omit "and".

[2] Section 32 (12) (b)

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Omit section 32 (12) (b).

[3] Section 32 (13)

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 1995*.

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1.11 Food Act 1989 No 231

Section 68 Authenticity of notices etc of the Director-General

Omit "*Evidence Act 1898*" from section 68 (2).
Insert instead "*Evidence Act 1995*".

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1.12 Funeral Funds Act 1979 No 106

Section 89 Evidence

Omit the section.

**1.13 Independent Commission Against Corruption Act 1988
No 35**

Section 17 Evidence and procedure

Insert at the end of the section:

- (3) Despite subsection (1), section 127 (Religious confessions) of the *Evidence Act 1995* applies to any hearing before the Commission. 5

1.14 Interpretation Act 1987 No 15

[1] Section 21 Meaning of commonly used words and expressions

Omit the definition of *document* from section 21 (1). 10

Insert instead:

document means any record of information, and includes:

- (a) anything on which there is writing, or
(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or 15
(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or 20
(d) a map, plan, drawing or photograph.

[2] Section 44 Judicial notice of statutory rules

Omit the section.

[3] Section 51 Judicial notice of seals

Omit the section. 25

[4] Section 76 Service by post

Omit section 76 (b). Insert instead:

- (b) in Australia or in an external Territory—is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been effected on the fourth working day after the letter was posted, and 5
- (c) in another place—is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been effected at the time when the letter would have been delivered in the ordinary course of post. 10

[5] Section 76 (2)

Insert at the end of section 76:

- (2) In this section:
 - working day* means a day that is not: 15
 - (a) a Saturday or Sunday, or
 - (b) a public holiday or a bank holiday in the place to which the letter was addressed.

1.15 Justices Act 1902 No 27

Section 89G Enforcement of amounts payable to private payees 20

Omit “section 23 of the *Evidence Act 1898*” from section 89G (4). Insert instead “section 178 (Convictions, acquittals and other judicial proceedings) of the *Evidence Act 1995*”.

1.16 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 2.2 (Documents) of the *Evidence Act 1995*, taken to be a proceeding to which that Act applies. 5

1.17 Local Government Act 1993 No 30

Section 704 Delineation of local government boundaries by reference to maps

Omit "sections 15 and 16 of the *Evidence Act 1898*" from section 704 (4). 10

Insert instead "sections 152 (Documents produced from proper custody) and 156 (Public documents) of the *Evidence Act 1995*".

1.18 Motor Accidents Act 1988 No 102

Part 5 Claims and court proceedings to enforce claims, Division 5 Hearsay evidence in court proceedings 15

Omit the Division.

1.19 New South Wales Crime Commission Act 1985 No 117

[1] Section 18 Failure of witnesses to attend and answer questions etc 20

Insert "or except as provided by section 18A" after "excuse" in section 18 (2).

[2] Section 18A

Insert after section 18:

18A Religious confessions

- (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. 5
- (2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose. 10
- (3) 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. 15

1.20 Oaths Act 1900 No 20

[1] Section 13 Declaration or affirmation instead of oath

Omit "Whenever" from section 13 (1).
Insert instead "Subject to the *Evidence Act 1995*, whenever". 20

[2] Section 26A Judicial notice to be taken of certain seals and signatures

Omit the section.

[3] Section 29 Penalty for swearing falsely in affidavits

Omit "Every".
Insert instead "Except as provided by section 33, every". 25

[4] Part 6 Declarations by children

Omit Part 6. Insert instead:

32 Person may make declaration instead of oath

- (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 or other person 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. 5
- (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. 15
- (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 20
 - (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. 25
- (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. 30

33 False statements

- (1) Any person who, having made an affidavit under section 32, wilfully makes a false statement in the affidavit, knowing the statement to be false, is taken to be guilty of perjury if the making of the statement, had it been on oath, would by law have been perjury. 35

- (2) No prosecution for an offence referred to in subsection (1) is to be commenced without the sanction of the Attorney General.

[5] Tenth Schedule Declaration

Omit the Schedule.

5

1.21 Parliamentary Evidence Act 1901 No 43

Section 11 Penalty for refusal to answer

Omit "If" from section 11 (1).

Insert instead "Except as provided by section 127 (Religious confessions) of the *Evidence Act 1995*, if".

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1.22 Police Service Act 1990 No 47

Section 194 Attendance

Omit "sections 13 and 14 of the *Evidence Act 1898*" from section 194 (5).

Insert instead "section 194 (Witnesses failing to attend proceedings) of the *Evidence Act 1995*".

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1.23 Real Property Act 1900 No 25

[1] Section 38 Recording dealings on certificates of title etc

Omit "transparency" wherever occurring from section 38 (7)–(9).
Insert instead "reproducible copy".

20

[2] Section 38

Omit section 38 (10). Insert instead:

(10) In this section:

reproducible copy means a copy of a document that is captured and retained in a manner that enables the document to be reproduced. 5

1.24 Roads Act 1993 No 33

Section 250

Omit the section. Insert instead:

250 Presumption of validity of orders and notices 10

Section 45 of the *Interpretation Act 1987* applies to any order or notice published in the Gazette in accordance with this Act in the same way as it applies to instruments made by the Governor.

1.25 Royal Commission (Police Service) Act 1994 No 60 15

Section 37

Omit the section (including the note). Insert instead:

37 Religious confessions

Section 127 (Religious confessions) of the *Evidence Act 1995* applies to any hearing or proceeding to which this Act applies. 20

Note. Section 127 of the *Evidence Act 1995* protects religious confessions from disclosure in proceedings. Section 37 makes it clear that the protection extends to a hearing or proceeding under this Act. 25

1.26 Royal Commissions Act 1923 No 29

Section 11 Answers and documents

Insert “and section 127 (Religious confessions) of the *Evidence Act 1995*” after “this section” in section 11 (1).

1.27 Special Commissions of Inquiry Act 1983 No 90

5

Section 17 Answers and documents

Insert “and section 127 (Religious confessions) of the *Evidence Act 1995*” after “this section” in section 17 (1).

1.28 Strata Titles Act 1973 No 68

Section 42 Provisions applying to strata plans etc

10

Omit “and shall be deemed to be an original document within the meaning of the *Evidence (Reproductions) Act 1967*” from section 42 (3).

1.29 Strata Titles (Leasehold) Act 1986 No 219

Section 71 Provisions applying to strata plans etc

15

Omit “and shall be deemed to be an original document within the meaning of the *Evidence (Reproductions) Act 1967*” from section 71 (2).

1.30 Water Board (Corporatisation) Act 1994 No 88

Schedule 9 Savings, transitional and other provisions

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Omit clause 16.

Schedule 2 Savings, transitional and other provisions

(Section 5)

1 Savings and transitional regulations

- (1) The Governor may make regulations that contain provisions of a savings or transitional nature consequent on the enactment of the following Acts: 5
- this Act
- Evidence Act 1995
- Evidence on Commission Act 1995. 10
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as: 15
- (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. 20

2 Proceedings

- (1) A provision of the *Evidence Act 1995* or *Evidence on Commission Act 1995* does not apply in relation to a proceeding the hearing of which began before the commencement of the provision, except as provided by this Schedule. 25
- (2) A provision of the *Evidence Act 1898* or the *Evidence (Reproductions) Act 1967* that is repealed by this Act continues to apply in relation to proceedings the hearing of which began before the repeal. 30

3 Prior operation of notification provisions

- (1) If, before the commencement of a notification provision, a document of a kind referred to in that provision is given or served:
- (a) in the circumstances provided for in that provision, and 5
 - (b) in accordance with such requirements (if any) as would apply to the giving or serving of the document under that provision after its commencement,
- the document is taken to have been given or served under that provision. 10
- (2) The following provisions of the *Evidence Act 1995* are notification provisions for the purposes of subclause (1):
- (a) section 33 (2) (c),
 - (b) section 49 (a),
 - (c) section 50 (2) (a), 15
 - (d) section 67 (1),
 - (e) section 68 (2),
 - (f) section 73 (2) (b),
 - (g) section 168 (1),
 - (h) section 168 (3), 20
 - (i) section 168 (5),
 - (j) section 168 (6),
 - (k) section 173 (1),
 - (l) section 177 (2),
 - (m) section 177 (5). 25
- (3) If a notice given before the commencement of section 67 (1) of the *Evidence Act 1995* is taken because of this clause to have been given under that subsection, the period for an objection to be made under section 68 of that Act to the tender of evidence to which the notice relates is the period ending: 30
- (a) 7 days after the commencement of section 68 of that Act, or
 - (b) 21 days after the notice was given to the party concerned, whichever is the later.

- (4) If a notice given before the commencement of section 168 (1) or (3) of the *Evidence Act 1995* is taken because of this clause to have been given under one of those subsections, the period for a request to be made under that subsection in connection with the notice is the period ending: 5
- (a) 7 days after the commencement of section 168 of that Act, or
- (b) 21 days after the notice was given to the party concerned, whichever is the later.
- (5) If a copy of a document served before the commencement of section 168 (5) or (6) of the *Evidence Act 1995* is taken because of this clause to have been served under one of those subsections, the period for a request to be made under that subsection in connection with the document is the period ending: 10
- (a) 7 days after the commencement of section 168 of that Act, or 15
- (b) 21 days after the document was served on the party concerned, whichever is the later.
- 4 Proof of voluminous or complex documents** 20
- A person is taken, for the purposes of section 50 (2) (b) of the *Evidence Act 1995*, to have been given a reasonable opportunity to examine or copy documents if such an opportunity was given to the person before the commencement of section 50 of that Act. 25
- 5 Notices for the purposes of sections 97 and 98 of the Evidence Act 1995**
- References in sections 97 (1) (a) and 98 (1) (a) of the *Evidence Act 1995* to giving notice are taken to include references to giving notice of the kind referred to in those paragraphs before the commencement of section 97 and section 98 of that Act, respectively. 30

6 Requests under section 167 of the Evidence Act 1995

The reference in section 167 of the *Evidence Act 1995* to making a request is taken to include a reference to making a request of the kind referred to in that section before the commencement of that section.

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7 Requests under section 173 of the Evidence Act 1995

The reference in section 173 (2) of the *Evidence Act 1995* to a request is taken to include a reference to a request of the kind referred to in that subsection made before the commencement of section 173 of that Act.

10

8 Agreements under section 191 of the Evidence Act 1995

The reference in section 191 (3) (a) of the *Evidence Act 1995* to an agreement is taken to include a reference to an agreement of the kind referred to in that paragraph entered into before the commencement of section 191 of that Act.

15

9 Identifications already carried out

- (1) Section 114 of the *Evidence Act 1995* does not apply in relation to an identification made before the commencement of that section.
- (2) Section 115 of the *Evidence Act 1995* does not apply in relation to an identification made before the commencement of that section.

20

10 Cautioning of persons

Section 139 of the *Evidence Act 1995* does not apply in relation to a statement made or an act done before the commencement of that section.

25

11 Amendments made by this Act

- (1) An amended provision does not apply in relation to proceedings the hearing of which began before the commencement of the amendment.
- (2) An amended provision continues to apply in relation to proceedings the hearing of which began before that commencement as if the amendment had not been made.

30

(3) In this section:

amended provision means a provision of another Act that is amended by Schedule 1 to this Act, and is taken to include a provision of another Act that is repealed or omitted by that Schedule. 5

amendment of provision, includes repeal or omission of the provision.

12 Admissibility of evidence or statements as to access by husband or wife

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 by this Act. 10

13 Imperial Acts

An Imperial Act or a provision of such an Act that was repealed by the *Evidence Act 1898* is not revived merely because the *Evidence Act 1898* is repealed by this Act. 15

14 Construction of references to old Acts

(1) In this clause:

old Act means: 20

- (a) the *Evidence Act 1898*, or
- (b) the *Evidence (Reproductions) Act 1967*.

(2) A reference in any Act or instrument to an old Act (or a provision of an old Act) is to be read as a reference to the *Evidence Act 1995* or the *Evidence on Commission Act 1995* (or the provision of those Acts) that, having regard to the reference and the context in which the reference occurs, most nearly corresponds to the old Act (or the provision of the old Act). 25

15 Saving of rules

Any rules made under Part 7 or 8 of the *Evidence Act 1898* and in force immediately before the repeal of that Act by this Act are taken to be rules made under the *Evidence on Commission Act 1995* and may be amended and repealed accordingly.

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New South Wales

Evidence (Consequential and Other Provisions) Act 1995 No 27

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New South Wales

Evidence (Consequential and Other Provisions) Act 1995 No 27

Act No 27, 1995

An Act to repeal the *Evidence Act 1898* and the *Evidence (Reproductions) Act 1967*, and to amend various other Acts, as a consequence of the enactment of the *Evidence Act 1995* and the *Evidence on Commission Act 1995*; and for other purposes. [Assented to 19 June 1995]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Evidence (Consequential and Other Provisions) Act 1995*.

2 Commencement

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

3 Repeal of Acts

The following Acts are repealed:

Evidence Act 1898

Evidence (Reproductions) Act 1967

Evidence (Evidence on Commission) Amendment Act 1988.

4 Amendment of Acts

Each Act specified in Schedule 1 is amended as set out in that Schedule.

5 Savings, transitional and other provisions

Schedule 2 has effect.

Schedule 1 Amendments

(Section 4)

1.1 Associations Incorporation Act 1984 No 143

Section 59 Register

Omit section 59 (5).

1.2 Australia and New Zealand Banking Group Limited (NMRB) Act 1991 No 35

Section 10 Evidence

Omit section 10 (2) and (3).

1.3 Business Names Act 1962 No 11

Section 4 Interpretation

Omit the definitions of *Machine copy*, *Reproduction* and *Transparency* from section 4 (1).

Insert instead the following definitions:

Machine-copy of a document means a copy of the document made by a machine performing a process:

- (a) that involves the production of a latent image of the document (not being a latent image on photo-sensitive material on a transparent base) and the development of that image by chemical means or otherwise, or
- (b) that, without the use of photo-sensitive material, produces a copy of the document simultaneously with the making of the document.

Reproduction of a document means a machine-copy of the document or a print made from a transparency of the document.

Transparency of a document means the following:

- (a) a developed negative or positive photograph of that document (in this definition referred to as an **original photograph**) made, on a transparent base, by means of light reflected from, or transmitted through, the document,
- (b) a copy of an original photograph made by the use of photo-sensitive material (being photo-sensitive material on a transparent base) placed in surface contact with the original photograph,
- (c) any one of a series of copies of an original photograph, the first of the series being made by the use of photo-sensitive material (being photo-sensitive material on a transparent base) placed in surface contact with a copy referred to in paragraph (b), and each succeeding copy in the series being made, in the same way, from any preceding copy in the series.

**1.4 Canberra Advance Bank Limited (Merger) Act 1992
No 17**

Section 18 Evidence

Omit section 18 (2) and (3).

1.5 Crimes Act 1900 No 40

[1] Omit the following sections:

- 404 (Admission by accused before or at trial)
- 405C (Judge not required to warn jury against convicting person of certain sexual offences)
- 407 (Competency of parties and accused persons and their husbands and wives to give evidence)
- 408 (Declaration by person since deceased)
- 410 (Confessions etc, when inadmissible)

- 412 (Evidence to character of accused)
- 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)
- 413C (Documentary evidence of previous convictions)
- 415 (Proof of banking transactions)
- 416 (Proof of by-laws etc)
- 418 (Evidence by police officers)
- 420 (Receivers—evidence of guilty knowledge)

[2] Section 335 False statements in evidence on commission

Omit “section 79 of the *Evidence Act 1898*”.

Insert instead “section 33 (Power of the Supreme Court to give effect to application for assistance) of the *Evidence on Commission Act 1995*”.

[3] Section 424A

Insert after section 424:

424A Admission by suspects

- (1) This section applies 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 tape recording made by an investigating official 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 tape recording referred to in paragraph (a) could not be made, there is available to the court a tape 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) the prosecution establishes that there was a reasonable excuse as to why the tape recordings referred to in paragraphs (a) and (b) could not be made.
- (3) The hearsay rule and the opinion rule (within the meaning of the *Evidence Act 1995*) do not prevent the admission or use of a tape 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 other than an indictable offence that may be dealt with summarily without the consent of the accused.

investigating official means:

- (a) a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior), or
- (b) a person appointed by or under an Act (other than a person who is engaged in covert investigations under the orders of a superior) and whose functions include functions in respect of the prevention or investigation of offences, prescribed by the regulations for the purposes of this definition.

official questioning means questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence.

reasonable excuse includes:

- (a) a mechanical failure, or

- (b) the refusal of a person being questioned to have the questioning electronically recorded, or
- (c) the lack of availability of recording equipment within a period in which it would be reasonable to detain the person being questioned.

tape recording includes:

- (a) audio recording, or
 - (b) video recording, or
 - (c) a video recording accompanied by a separately but contemporaneously recorded audio recording.
- (5) This section does not apply to an admission made before the commencement of this section.

[4] Section 445 Proof of previous conviction

Omit “the *Evidence Act 1898*”.

Insert instead “section 178 (Convictions, acquittals and other judicial proceedings) of the *Evidence Act 1995*”.

[5] Section 579 Evidence of proceedings dealt with by way of recognizance after 15 years

Omit “section 23 of the *Evidence Act 1898*” from section 579 (4).

Insert instead “section 178 (Convictions, acquittals and other judicial proceedings) of the *Evidence Act 1995*”.

1.6 Criminal Records Act 1991 No 8

Section 16 Proceedings before courts

Omit section 16 (3). Insert instead:

- (3) This Act does not affect any of the following provisions:
 - section 15 of the *Children (Criminal Proceedings) Act 1987*
 - section 414 of the *Crimes Act 1900*

- Part 3.8 (Character) of Chapter 3 and section 178 (Convictions, acquittals and other judicial proceedings) of the *Evidence Act 1995*.

1.7 Crown Lands Act 1989 No 6

Section 181 Notices

Omit section 181 (2). Insert instead:

- (2) A notice, order or other document sent by post in accordance with subsection (1) is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been given or served on the fourth working day after it was sent.

1.8 District Court Act 1973 No 9

Section 65 Attendance

Omit "sections 13 and 14 of the *Evidence Act 1898*" from section 65 (9).

Insert instead "section 194 (Witnesses failing to attend proceedings) of the *Evidence Act 1995*".

1.9 Drug Trafficking (Civil Proceedings) Act 1990 No 23

Section 54 Proof of certain matters

Omit "section 23 of the *Evidence Act 1898*" from section 54 (2).
Insert instead "section 178 (Convictions, acquittals and other judicial proceedings) of the *Evidence Act 1995*".

1.10 Family Provision Act 1982 No 160

[1] Section 32 Evidence

Section 32 (12) (a)

Omit "and".

[2] Section 32 (12) (b)

Omit section 32 (12) (b).

[3] Section 32 (13)

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 1995*.

1.11 Food Act 1989 No 231

Section 68 Authenticity of notices etc of the Director-General

Omit "*Evidence Act 1898*" from section 68 (2).

Insert instead "*Evidence Act 1995*".

1.12 Funeral Funds Act 1979 No 106

Section 89 Evidence

Omit the section.

**1.13 Independent Commission Against Corruption Act 1988
No 35**

Section 17 Evidence and procedure

Insert at the end of the section:

- (3) Despite subsection (1), section 127 (Religious confessions) of the *Evidence Act 1995* applies to any hearing before the Commission.

1.14 Interpretation Act 1987 No 15

[1] Section 21 Meaning of commonly used words and expressions

Omit the definition of *document* from section 21 (1).

Insert instead:

document means any record of information, and includes:

- (a) anything on which there is writing, or
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or
- (d) a map, plan, drawing or photograph.

[2] Section 44 Judicial notice of statutory rules

Omit the section.

[3] Section 51 Judicial notice of seals

Omit the section.

[4] Section 76 Service by post

Omit section 76 (b). Insert instead:

- (b) in Australia or in an external Territory—is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been effected on the fourth working day after the letter was posted, and
- (c) in another place—is, unless evidence sufficient to raise doubt is adduced to the contrary, taken to have been effected at the time when the letter would have been delivered in the ordinary course of post.

[5] Section 76 (2)

Insert at the end of section 76:

(2) In this section:

working day means a day that is not:

- (a) a Saturday or Sunday, or
- (b) a public holiday or a bank holiday in the place to which the letter was addressed.

1.15 Justices Act 1902 No 27

Section 89G Enforcement of amounts payable to private payees

Omit “section 23 of the *Evidence Act 1898*” from section 89G (4). Insert instead “section 178 (Convictions, acquittals and other judicial proceedings) of the *Evidence Act 1995*”.

1.16 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 2.2 (Documents) of the *Evidence Act 1995*, taken to be a proceeding to which that Act applies.

1.17 Local Government Act 1993 No 30

Section 704 Delineation of local government boundaries by reference to maps

Omit "sections 15 and 16 of the *Evidence Act 1898*" from section 704 (4).

Insert instead "sections 152 (Documents produced from proper custody) and 156 (Public documents) of the *Evidence Act 1995*".

1.18 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.

1.19 New South Wales Crime Commission Act 1985 No 117

[1] Section 18 Failure of witnesses to attend and answer questions etc

Insert "or except as provided by section 18A" after "excuse" in section 18 (2).

[2] Section 18A

Insert after section 18:

18A Religious confessions

- (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) 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.

1.20 Oaths Act 1900 No 20

[1] Section 13 Declaration or affirmation instead of oath

Omit "Whenever" from section 13 (1).

Insert instead "Subject to the *Evidence Act 1995*, whenever".

[2] Section 26A Judicial notice to be taken of certain seals and signatures

Omit the section.

[3] Section 29 Penalty for swearing falsely in affidavits

Omit "Every".

Insert instead "Except as provided by section 33, every".

[4] Part 6 Declarations by children

Omit Part 6. Insert instead:

32 Person may make declaration instead of oath

- (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 or other person 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.

33 False statements

- (1) Any person who, having made an affidavit under section 32, wilfully makes a false statement in the affidavit, knowing the statement to be false, is taken to be guilty of perjury if the making of the statement, had it been on oath, would by law have been perjury.

- (2) No prosecution for an offence referred to in subsection (1) is to be commenced without the sanction of the Attorney General.

[5] Tenth Schedule Declaration

Omit the Schedule.

1.21 Parliamentary Evidence Act 1901 No 43

Section 11 Penalty for refusal to answer

Omit "If" from section 11 (1).

Insert instead "Except as provided by section 127 (Religious confessions) of the *Evidence Act 1995*, if".

1.22 Police Service Act 1990 No 47

Section 194 Attendance

Omit "sections 13 and 14 of the *Evidence Act 1898*" from section 194 (5).

Insert instead "section 194 (Witnesses failing to attend proceedings) of the *Evidence Act 1995*".

1.23 Real Property Act 1900 No 25

[1] Section 38 Recording dealings on certificates of title etc

Omit "transparency" wherever occurring from section 38 (7)–(9).
Insert instead "reproducible copy".

[2] Section 38

Omit section 38 (10). Insert instead:

(10) In this section:

reproducible copy means a copy of a document that is captured and retained in a manner that enables the document to be reproduced.

1.24 Roads Act 1993 No 33

Section 250

Omit the section. Insert instead:

250 Presumption of validity of orders and notices

Section 45 of the *Interpretation Act 1987* applies to any order or notice published in the Gazette in accordance with this Act in the same way as it applies to instruments made by the Governor.

1.25 Royal Commission (Police Service) Act 1994 No 60

Section 37

Omit the section (including the note). Insert instead:

37 Religious confessions

Section 127 (Religious confessions) of the *Evidence Act 1995* applies to any hearing or proceeding to which this Act applies.

Note. Section 127 of the *Evidence Act 1995* protects religious confessions from disclosure in proceedings. Section 37 makes it clear that the protection extends to a hearing or proceeding under this Act.

1.26 Royal Commissions Act 1923 No 29

Section 11 Answers and documents

Insert “and section 127 (Religious confessions) of the *Evidence Act 1995*” after “this section” in section 11 (1).

1.27 Special Commissions of Inquiry Act 1983 No 90

Section 17 Answers and documents

Insert “and section 127 (Religious confessions) of the *Evidence Act 1995*” after “this section” in section 17 (1).

1.28 Strata Titles Act 1973 No 68

Section 42 Provisions applying to strata plans etc

Omit “and shall be deemed to be an original document within the meaning of the *Evidence (Reproductions) Act 1967*” from section 42 (3).

1.29 Strata Titles (Leasehold) Act 1986 No 219

Section 71 Provisions applying to strata plans etc

Omit “and shall be deemed to be an original document within the meaning of the *Evidence (Reproductions) Act 1967*” from section 71 (2).

1.30 Water Board (Corporatisation) Act 1994 No 88

Schedule 9 Savings, transitional and other provisions

Omit clause 16.

Schedule 2 Savings, transitional and other provisions

(Section 5)

1 Savings and transitional regulations

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

this Act

Evidence Act 1995

Evidence on Commission Act 1995.

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of 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.

2 Proceedings

- (1) A provision of the *Evidence Act 1995* or *Evidence on Commission Act 1995* does not apply in relation to a proceeding the hearing of which began before the commencement of the provision, except as provided by this Schedule.
- (2) A provision of the *Evidence Act 1898* or the *Evidence (Reproductions) Act 1967* that is repealed by this Act continues to apply in relation to proceedings the hearing of which began before the repeal.

3 Prior operation of notification provisions

- (1) If, before the commencement of a notification provision, a document of a kind referred to in that provision is given or served:
 - (a) in the circumstances provided for in that provision, and
 - (b) in accordance with such requirements (if any) as would apply to the giving or serving of the document under that provision after its commencement,the document is taken to have been given or served under that provision.
- (2) The following provisions of the *Evidence Act 1995* are notification provisions for the purposes of subclause (1):
 - (a) section 33 (2) (c),
 - (b) section 49 (a),
 - (c) section 50 (2) (a),
 - (d) section 67 (1),
 - (e) section 68 (2),
 - (f) section 73 (2) (b),
 - (g) section 168 (1),
 - (h) section 168 (3),
 - (i) section 168 (5),
 - (j) section 168 (6),
 - (k) section 173 (1),
 - (l) section 177 (2),
 - (m) section 177 (5).
- (3) If a notice given before the commencement of section 67 (1) of the *Evidence Act 1995* is taken because of this clause to have been given under that subsection, the period for an objection to be made under section 68 of that Act to the tender of evidence to which the notice relates is the period ending:
 - (a) 7 days after the commencement of section 68 of that Act, or
 - (b) 21 days after the notice was given to the party concerned,whichever is the later.

Schedule 2 Savings, transitional and other provisions

- (4) If a notice given before the commencement of section 168 (1) or (3) of the *Evidence Act 1995* is taken because of this clause to have been given under one of those subsections, the period for a request to be made under that subsection in connection with the notice is the period ending:
- (a) 7 days after the commencement of section 168 of that Act, or
 - (b) 21 days after the notice was given to the party concerned, whichever is the later.
- (5) If a copy of a document served before the commencement of section 168 (5) or (6) of the *Evidence Act 1995* is taken because of this clause to have been served under one of those subsections, the period for a request to be made under that subsection in connection with the document is the period ending:
- (a) 7 days after the commencement of section 168 of that Act, or
 - (b) 21 days after the document was served on the party concerned, whichever is the later.

4 Proof of voluminous or complex documents

A person is taken, for the purposes of section 50 (2) (b) of the *Evidence Act 1995*, to have been given a reasonable opportunity to examine or copy documents if such an opportunity was given to the person before the commencement of section 50 of that Act.

5 Notices for the purposes of sections 97 and 98 of the Evidence Act 1995

References in sections 97 (1) (a) and 98 (1) (a) of the *Evidence Act 1995* to giving notice are taken to include references to giving notice of the kind referred to in those paragraphs before the commencement of section 97 and section 98 of that Act, respectively.

6 Requests under section 167 of the Evidence Act 1995

The reference in section 167 of the *Evidence Act 1995* to making a request is taken to include a reference to making a request of the kind referred to in that section before the commencement of that section.

7 Requests under section 173 of the Evidence Act 1995

The reference in section 173 (2) of the *Evidence Act 1995* to a request is taken to include a reference to a request of the kind referred to in that subsection made before the commencement of section 173 of that Act.

8 Agreements under section 191 of the Evidence Act 1995

The reference in section 191 (3) (a) of the *Evidence Act 1995* to an agreement is taken to include a reference to an agreement of the kind referred to in that paragraph entered into before the commencement of section 191 of that Act.

9 Identifications already carried out

- (1) Section 114 of the *Evidence Act 1995* does not apply in relation to an identification made before the commencement of that section.
- (2) Section 115 of the *Evidence Act 1995* does not apply in relation to an identification made before the commencement of that section.

10 Cautioning of persons

Section 139 of the *Evidence Act 1995* does not apply in relation to a statement made or an act done before the commencement of that section.

11 Amendments made by this Act

- (1) An amended provision does not apply in relation to proceedings the hearing of which began before the commencement of the amendment.
- (2) An amended provision continues to apply in relation to proceedings the hearing of which began before that commencement as if the amendment had not been made.

- (3) In this section:

amended provision means a provision of another Act that is amended by Schedule 1 to this Act, and is taken to include a provision of another Act that is repealed or omitted by that Schedule.

amendment of provision, includes repeal or omission of the provision.

12 Admissibility of evidence or statements as to access by husband or wife

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 by this Act.

13 Imperial Acts

An Imperial Act or a provision of such an Act that was repealed by the *Evidence Act 1898* is not revived merely because the *Evidence Act 1898* is repealed by this Act.

14 Construction of references to old Acts

- (1) In this clause:

old Act means:

- (a) the *Evidence Act 1898*, or
- (b) the *Evidence (Reproductions) Act 1967*.

- (2) A reference in any Act or instrument to an old Act (or a provision of an old Act) is to be read as a reference to the *Evidence Act 1995* or the *Evidence on Commission Act 1995* (or the provision of those Acts) that, having regard to the reference and the context in which the reference occurs, most nearly corresponds to the old Act (or the provision of the old Act).

15 Saving of rules

Any rules made under Part 7 or 8 of the *Evidence Act 1898* and in force immediately before the repeal of that Act by this Act are taken to be rules made under the *Evidence on Commission Act 1995* and may be amended and repealed accordingly.

[Minister's second reading speech made in—
Legislative Council on 24 May 1995
Legislative Assembly on 31 May 1995]

