Evidence Bill 2008

Introduction Print

EXPLANATORY MEMORANDUM

General

This Bill is the first of two Bills to introduce model uniform evidence law into Victoria. A further Bill will be introduced at a later date to repeal relevant parts of the **Evidence Act 1958** (Vic) the subject matter of which is addressed in this Bill, and to make other relevant amendments and transitional arrangements across the Victorian statute book.

Model uniform evidence law arose out of a comprehensive review of evidence laws by the Australian Law Reform Commission (ALRC) in the 1980s. The ALRC produced a model Bill (the Model Bill) to provide a modernised, structured and reasoned approach to the laws of evidence. The purpose of the Model Bill was to promote and maintain uniformity and harmonisation of evidence laws across Australian jurisdictions. The Model Bill clarified evidence laws by partially codifying complex common law rules and re-writing statutory rules of evidence in a clear and concise manner.

Acts based on the Model Bill were enacted by the Commonwealth and New South Wales in 1995. The two statutes are largely uniform but do have some differing provisions. Together these Acts are referred to as the Uniform Evidence Acts (the UEAs). Tasmania enacted legislation in 2001, largely mirroring the UEAs, but with some departures.

The operation of the UEAs was reviewed by the ALRC, the New South Wales Law Reform Commission (NSWLRC) and the Victorian Law Reform Commission (VLRC). The final report of the three Law Reform Commissions—*Uniform Evidence Law: Report*—was produced in December 2005 (the 2005 LRCs' Report). It found that the UEAs were generally working well, but required some fine-tuning. As a result, a range of recommendations were contained in the 2005 LRCs' Report and this was tabled in Parliament in February 2006.

The recommendations have been largely implemented by proposed amendments to the UEAs and take the form of an amended model uniform evidence Bill (the Model Uniform Evidence Bill). The Model Uniform Evidence Bill was approved by the Standing Committee of Attorneys General in July 2007.

A separate report by the VLRC—*Implementing the Uniform Evidence Act* (the VLRC Implementation Report)—was tabled on the same day as the 2005 LRCs' Report. The VLRC Implementation Report provides more technical recommendations for implementing the Model Bill in Victoria.

This Bill is based upon the Model Uniform Evidence Bill.

The policy behind this Bill is that all relevant and reliable evidence that is of an appropriate probative value should be admissible unless such evidence would cause unfair prejudice to a party to a court proceeding.

The Bill sets out the rules of evidence that apply to all proceedings in a relevant court with the aim of ensuring a fair hearing for persons appearing before the courts.

This Bill is based upon the proposition that the laws of evidence must serve the trial system and is structured so that the provisions follow the order in which issues ordinarily arise in trials. It seeks to maximise certainty for the parties involved in litigation by providing clear rules to enable preparation for, and conduct of, trials.

This Bill seeks to maximise the ability of parties to produce the most probative evidence available, whilst retaining fairness, particularly for an accused in a criminal trial. For this reason, where appropriate, the Bill differentiates between civil and criminal trials.

Transitional provisions will be contained in a separate Bill.

The Bill is divided into Chapters, Parts and Divisions.

Clause Notes

CHAPTER 1—PRELIMINARY

An introductory note contained in the Bill gives an outline of the Bill. The Bill sets out the rules of evidence. Generally speaking, the Bill applies to proceedings in State courts and before other persons or bodies required to apply the laws of evidence.

Chapter 2 is about how evidence is adduced in proceedings.

Chapter 3 is about admissibility of evidence in proceedings.

Chapter 4 is about proof of matters in proceedings.

Chapter 5 deals with miscellaneous matters.

The Dictionary at the end of the Bill defines terms and expressions used in the Bill.

The introductory note sets out related legislation and makes it clear that the Bill is in most respects uniform with the Evidence Act 1995 of the Commonwealth (the Commonwealth Act) and the Evidence Act 1995 of New South Wales (the New South Wales Act).

The introductory note also explains that the UEAs and this Bill are drafted in identical terms except for minor drafting variations that are required to accord with the drafting style of each jurisdiction. Major differences in content are identified by annotations in the text referencing the UEAs.

If one Act contains a provision that is not included in another Act, there is a gap in the numbering of the other Act in order to maintain consistent numbering of the other provisions.

The introductory note also indicates that the Evidence Act 2001 of Tasmania (the Tasmanian Act) largely mirrors the UEAs and this Bill, but with some departures. For this reason, the differences between this Bill and the Tasmanian Act are not annotated.

PART 1.1—FORMAL MATTERS

Clause 1 sets out the purpose of the Bill which is to make fresh provision for the law of evidence that is uniform with Commonwealth and New South Wales law.

Clause 2 provides for the commencement of the Bill. Clauses 1–3 and the Dictionary are to commence on the day after the day on which this Bill receives the Royal Assent. The other provisions are to commence on a day or days to be proclaimed, or, if not proclaimed, on 1 January 2010.

Clause 3 provides that the expressions used in the Dictionary at the end of the Bill have the meanings given to them in the Dictionary.

Clause 3A provides that the Notes in the Bill do not form part of the Bill.

PART 1.2—APPLICATION OF THIS ACT

Clause 4 provides for the Bill to apply to all proceedings in a Victorian court. These include a proceeding relating to bail, a proceeding heard in chambers and an interlocutory proceeding of a similar kind. Whilst sentencing proceedings are also included, the clause specifies that the Bill applies in such proceedings only if the court directs the law of evidence to apply and then only in accordance with the direction.

There are five Notes to clause 4 and they include the following—

The first Note explains that section 4 of the Commonwealth Act is different, and it applies to federal court or ACT court proceedings.

The second Note explains that ***Victorian court*** is defined in the Dictionary and that the Bill will apply not only to courts of law but also to persons and bodies that, in exercising a function under the law of the State, are required to apply the laws of evidence.

The fourth Note makes it clear that the Bill preserves provisions in other Victorian Acts which relieve a court of the obligation to apply the rules of evidence.

Clauses 5 and 6 contain no substantive provisions. Their inclusion ensures parity in section numbering with the Commonwealth and New South Wales Acts.

Clause 7 provides that the Bill binds the Crown.

Clause 8 makes it clear that the Bill does not affect the operation of provisions of other Acts. The Bill does not override existing evidentiary provisions in other Acts. Matters relating to relevant transitional amendments to other Acts will be contained in a separate Bill.

Clause 9 makes it clear that the Bill will only affect the operation of the principles and rules of common law or equity relating to evidence in proceedings to which the Bill applies to the extent that the Bill expressly provides or by necessary intendment. In particular, the operation of such principles and rules will be preserved to the extent that they are not inconsistent with the Bill.

Clause 10 preserves the operation of laws relating to the privileges of any Australian Parliament.

Clause 11 preserves the general power of courts to control proceedings before them, except so far as the Bill provides otherwise, either expressly or by necessary intendment.

CHAPTER 2—ADDUCING EVIDENCE

A Note explains that the Chapter is about ways in which evidence is adduced.

Part 2.1 is about adducing evidence from witnesses.

Part 2.2 is about adducing documentary evidence.

Part 2.3 is about adducing other forms of evidence.

PART 2.1—WITNESSES

Division 1—Competence and compellability of witnesses

Clause 12 states that, except as provided otherwise by the Bill, everyone is a competent and compellable witness.

Clause 13 sets out the test for determining a witness's competence to give sworn and unsworn evidence. See clause 17 for the separate procedures applying to defendants in criminal proceedings.

The UEAs contain two tests for determining competence, one each in relation to giving sworn and unsworn evidence. Each test requires a demonstration of an understanding of the difference between truth and lies. The 2005 LRCs' Report noted that these tests have been criticised for being too similar and restrictive. The Bill clarifies the distinction between sworn and unsworn evidence and focuses on the ability of the person to act as a witness (pursuant to recommendations 4-1 and 4-2 of the 2005 LRCs' Report).

Subclause (1) of this Bill provides that all witnesses must satisfy the test of general competence in subclause (1).

This general test in clause 13 moves away from the "truth and lies" distinction and focuses instead on the ability of the witness to comprehend and communicate. The purpose of the test of general competence is to ensure it is broad enough to enhance participation of witnesses so that relevant information is put before the court.

The new general test of competence provides that a person is not competent to give evidence (either sworn or unsworn) about a fact if the person lacks the capacity to understand, or to give an answer that can be understood, to a question about *that* fact, and that incapacity cannot be overcome.

A Note to the subclause refers to clause 30 which provides that a witness may give evidence through an interpreter and clause 31 which applies to deaf or mute witnesses.

Subclause (2) provides that even if the general test of competence is not satisfied in relation to one fact, a witness may be competent to give evidence about other facts. For example, a young child may be able to reply to simple factual questions but not to questions which require inferences to be drawn.

When a person is competent to give evidence, the following subclauses set out whether that witness should give sworn or unsworn evidence.

Subclause (3) provides that a person is not competent to give sworn evidence if he or she does not have the capacity to understand that he or she is under an obligation to give truthful evidence.

Subclause (4) provides that, subject to the requirements of subclause (5) being met, a person who is not competent to give sworn evidence about a fact, may be competent to give unsworn evidence about the fact. The provision is intended to allow witnesses such as young children and others (for example, adults with an intellectual disability) to give unsworn evidence even though they do not understand concepts such as "truth".

Subclause (5) provides that if a person is not competent to give sworn evidence because of subclause (3), then the person is competent to give unsworn evidence when certain criteria are met. The court is required to inform the person of the importance of telling the truth, explain how the witness should respond to questions to which the witness does not know or cannot remember the answer, and that the witness should not feel pressured into agreeing with any statements that are untrue.

Subclause (6) provides that a person is presumed to be competent to give evidence, unless it is proven that he or she is incompetent.

Subclause (7) provides that evidence given by a witness is not inadmissible merely because, before the witness finishes giving evidence, that witness dies or is no longer competent to give evidence.

Subclause (8) provides that, when a court is determining if a person is competent to give evidence, whether it is sworn or unsworn, the court may inform itself as it thinks fit, including by reference to the opinion of an expert.

Clause 14 provides that a person is not compellable to give evidence on a particular matter if the court is satisfied that substantial cost or delay would be involved in ensuring that the person would have the capacity to understand a question about the matter or to give an answer to it that could be understood.

Clause 15 provides that the Sovereign and others are not compellable to give evidence. The other persons listed are the Governor-General, the Governor of a State, the Administrator of a Territory, a foreign sovereign and the Head of State of a foreign country. The clause also provides that members of a House of any Australian Parliament are not compellable to give evidence if attending court would interfere with attendance at a sitting of that House, a joint sitting of that Parliament or a meeting of a committee of that House or Parliament.

Clause 16 provides that judges or jurors are not competent to give evidence in the proceeding in which they are acting as judges or jurors. However, a juror in a proceeding is competent to give evidence in the proceeding about matters affecting the conduct of the proceeding. Further, a person who is or was a judge in an Australian or overseas proceeding is not compellable to give evidence about that proceeding unless the court gives leave.

Clause 17 provides for rules of competence and compellability for defendants in criminal proceedings and for any associated defendant(s) (a defined term). A defendant is not competent to give evidence as a witness for the prosecution. An associated defendant is not compellable to give evidence for or against a defendant in a criminal proceeding, unless the associated defendant is being tried separately from the defendant. The court must ensure an associated defendant is aware of this clause if she or he is being jointly tried with the defendant.

Clause 18 provides that in a criminal proceeding generally, a person who is the spouse, de facto partner, parent or child of a defendant may object to being required to give evidence or to give evidence about a particular communication. If it appears to the court that this clause may apply to a person, the court must satisfy itself that the person is aware of the effect of the clause. For an objection to be upheld, two criteria must be met. First, there must be a likelihood that harm would or might be caused to the person or to the relationship between the defendant and the person if the person gives the evidence. Second, if the nature and extent of that harm outweighs the desirability of the evidence being given.

The clause sets out five matters that the court must take into account in determining an objection. They are the nature and gravity of the offence, the substance, importance, and the weight likely to be attached to any evidence that the person might give, whether any other relevant evidence is reasonably available to the prosecutor, the nature of the relationship and whether the evidence was received in confidence from the defendant.

If the court finds that the nature and extent of the harm outweighs the desirability of the witness giving evidence, the witness must not be required to give the particular evidence in question, or to give evidence at all.

The clause prohibits a prosecutor from commenting (for example to a jury) on any objection that is made under this clause, on any decision of the court in relation to the objection or on the failure of the person to give evidence.

Clause 19 contains no substantive provisions. Its inclusion ensures parity in section numbering with the Commonwealth and New South Wales Acts.

Clause 20 applies only to criminal proceedings for indictable offences. It permits certain comment by the judge or any party (other than the prosecutor) on a failure by a defendant, his or her spouse or de facto partner or child, to give evidence.

Any such comment, however, (except when made by a co-defendant) must not suggest that the failure to give evidence was because the defendant was guilty of the offence concerned, or believes himself or herself to be guilty of the offence. If such comment is made by or on behalf of a co-defendant, the judge may comment on both the failure to give evidence and the co-defendant's comment.

Division 2—Oaths and affirmations

Clause 21 requires a person to take an oath or make an affirmation before giving sworn evidence. The requirement does not apply to a person called merely to produce a document or thing to a court or who gives unsworn evidence under clause 13.

Clause 22 requires interpreters either to take an oath or make an affirmation. Oaths or affirmations by interpreters must be made in the forms set out in Schedule 1 to the Bill, or in a similar form. An affirmation has the same effect as an oath.

Clause 23 provides that witnesses and interpreters may choose whether to take an oath or make an affirmation and requires the court to inform these persons of this choice. If a witness refuses to take an oath or make an affirmation, or it is not reasonably practicable for the witness to take the appropriate oath, the court may direct the witness to make an affirmation.

Clause 24 provides that it is not necessary to use a religious text to take an oath. An oath is deemed effective whether or not the person who takes it has, in fact, a religious belief or actually understands the nature or consequences of the oath.

Clause 24A provides for an alternate oath to be taken, even if the person's religious or spiritual beliefs do not include a belief in the existence of a god (a reference to which is not necessary when taking an oath).

Clause 25 contains no substantive provisions. Its inclusion ensures parity in section numbering with the Commonwealth and New South Wales Acts.

Division 3—General rules about giving evidence

Clause 26 provides that the court can make any order it considers just to control questioning of a witness, and such orders may include the way in which witnesses are to be questioned, the use of documents and things, the order in which parties may question the witness and the presence and behaviour of any person in connection with the questioning of a witness.

Clause 27 states the general principle that every party is entitled to question any witness who gives evidence, unless the Bill provides otherwise.

Clause 28 sets out the order in which parties are to conduct examination in chief, cross examination and re-examination, unless the court directs otherwise.

Clause 29 states the general rule that, subject to the Bill and the control of the court, it is up to the parties to determine how to question witnesses.

The customary way in which witnesses are examined is that the witness answers questions. However, this method of giving evidence may be unsuitable for certain witnesses, including but not limited to children, people with an intellectual disability and people who otherwise may not be accustomed to this style of communication.

Accordingly, the Bill allows a witness, in certain circumstances, to give evidence wholly or partially in narrative form, that is, as a continuous story in his or her own words. The 2005 LRCs' Report recommended removal of the requirement for a party to apply for a direction for evidence to be given in this narrative form (recommendation 5-1). Under this clause, a party may make an application or the court may make a direction on its own motion.

Evidence may also 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 comprehension of other evidence.

Clause 30 provides that a witness can use an interpreter unless he or she can speak and understand English sufficiently to understand questions and give adequate replies.

Clause 31 provides that witnesses who cannot speak or hear adequately can be questioned, and give evidence, in any appropriate way. The court is able to give directions on the manner in which such witnesses may be questioned and the means by which they may give evidence.

Clause 32 provides for the use a witness may make of a document to revive memory about a fact or opinion. This can be done only with the leave of the court. The section sets out some of the matters the court may take into account in determining whether to give leave (for example, whether the witness will be able to recall the fact or opinion adequately without using the document).

The clause also allows the court to give a witness leave to read aloud from a document. The court will be required to order that the relevant part of the document be produced to a party, if that party requests this.

Clause 33 provides that in a criminal proceeding a police officer may give evidence in chief for the prosecution by reading or being led through a written statement he or she previously made. The written statement must have been made and signed at the time of or soon after the occurrence of the events to which it refers and a copy must be given to the person charged or his or her legal representative a reasonable time before the prosecution evidence is given.

Clause 34 enables a court, at the request of a party, to direct the production of specified documents used by a witness to revive his or her memory out of court. The court may refuse to admit the evidence if the witness does not comply with the directions of the court.

Clause 35 provides that a party who calls for another party's document is not automatically required to tender it. Similarly, the party who produces the document is not automatically entitled to tender it if the calling party does not tender it.

This clause abolishes the rule in *Walker v Walker* (1937) 57 CLR 630. Under that rule, the party called on to produce a document may require the party who called for and inspected the document to then tender the document. This means that a document that may otherwise be inadmissible could be admitted under this rule. This clause removes the automatic right of either party to tender a document or require the other party to tender a document.

The clause does not, however, preclude the tendering and admission of such a document if it is otherwise relevant and admissible.

Clause 36 enables a court to order a person who is present at proceedings to give evidence or produce documents if the person could be compelled by way of subpoena, summons or other order to testify and produce the documents.

Division 4—Examination in chief and re-examination

Clause 37 provides that a ***leading question*** (a defined term) cannot be put to a witness in examination in chief or re-examination unless leave is given or one of the specified circumstances applies.
Such circumstances include where the question relates to a matter introductory to the evidence of the witness or that is not in dispute, or is asked for the purpose of obtaining an expert witness's opinion about a hypothetical statement of facts about which evidence has or is intended to be given.

Leave is also not required where all the parties to the proceeding (other than the party examining the witness) are represented by a lawyer and no objection is made.

Further, unless the court otherwise directs, in civil proceedings, leading questions may be put to a witness relating to an investigation, inspection or report the witness made in the course of carrying out public or official duties.

Subclause (3) enables the court to allow a written statement or report to be tendered or treated as evidence in chief of its maker.

Clause 38 allows a party, with the leave of the court, to cross-examine its own witness about—

- evidence the witness has given that is unfavourable to the party;
- a matter about which the witness may reasonably be supposed to have knowledge but about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or
- whether the witness has made a prior inconsistent statement.

The clause specifies the manner in which the questioning of an unfavourable witness is to be conducted and the matters which the court may take into account in deciding whether or not to grant leave to a party to cross-examine its own witness.

Subclause (7) provides that a party that is also a witness in the proceeding can be cross-examined under this clause, where that proceeding is being conducted in that party's name by an insurer or another person (or on their behalf).

This clause was included in the UEAs to overcome the decision of the High Court of Australia in *Vocisano v Vocisano* (1974) 130 CLR 267.

Clause 39 sets out the law relating to re-examination by limiting the questions that may be put to a witness to questions arising out of evidence given by the witness in cross-examination, unless the court gives leave for other questions to be put.

Division 5—Cross-examination

Clause 40 prohibits a party from cross-examining a witness who another party has called in error unless the witness has given evidence in the proceeding.

Clause 41 enables the court to disallow improper questions put to any witness during cross-examination. The clause imposes an obligation on the court to disallow improper questions being put to a vulnerable witness (or inform the witness it need not be answered). The clause specifies that for the court to deviate from this obligation in relation to a vulnerable witness, it must consider all relevant circumstances of the case and only allow the question if it concludes that it is necessary for the question to be put. The onus is on the party putting the question(s) to demonstrate that the proposed question is necessary.

This clause differs from section 41 of the Model Uniform Evidence Bill which requires the court to prohibit "disallowable" questions from being put to *any* witness.

The adoption, in Victoria, of a two step approach recognises the capacity of the court to control proceedings by enabling regulation of the questioning of all witnesses, without unduly interfering with the trial process. It also acknowledges, however, that special protection is required for vulnerable witnesses and the mandatory obligation to consider all relevant circumstances is designed to facilitate a positive culture of judicial intervention for these witnesses.

The definition of ***improper question or improper questioning*** in this clause is substantially similar to the definition of a ***disallowable question*** in the Model Uniform Evidence Bill.

Subclause (3) defines an improper question or improper questioning in a broad manner, and outlines a non-exhaustive list of the content or style of questions that the court must find to be improper. They include questions that are misleading or confusing, unduly annoying, harassing, intimidating, offensive or repetitive, put in a belittling, insulting or inappropriate manner or if the only basis of the question is a stereotype. As noted above, the court has discretion to disallow these questions in relation to *any* witness, but must disallow them in relation to vulnerable witnesses.

Subclause (4) defines a vulnerable witness. This clause makes it clear that vulnerable witnesses are people under the age of 18 years and people with a cognitive impairment. This is intended to prevent argument about whether or not the obligation under subclause (2) applies to such people. However, the subclause also sets out other conditions or characteristics that may cause people to be categorised as vulnerable. These factors include the—

- age (including, for example, advanced age) and cultural background of the witness;
- mental or physical capacity (for example, where it does not necessarily constitute cognitive impairment) of the witness; and
- context of the case or the context in which the questions are put, including the relationship between the witness and any party to the proceeding.

The subclause is intended to minimise the need for argument about whether a witness is vulnerable. In some cases the vulnerability will be obvious, but in others, it may be the circumstances of the case that cause the witness to be vulnerable.

Subclause (5) provides that a question is not disallowable merely because it challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or the subject of the questions is considered by the witness to be distasteful or private.

Subclause (6) enables a party to object to an improper question put to a witness. However, the absence of such an objection does not remove the court's obligation to monitor questions. Subclause (7) makes it clear that the relevant duties apply whether or not an objection is raised. This subclause is intended to ensure that the court takes an active role in monitoring questions and ensuring the appropriate regulation of questions in cross-examination.

As specified in subclause (8) a failure by the court to disallow a question under clause 41 will not affect the admissibility of the witness's answer. The purpose of this clause is not to diminish the duty on the court to effectively regulate improper questions. Rather, it is designed to ensure that such a failure will not render the evidence elicited inadmissible, and therefore the proceeding subject to appeal.

The first Note to clause 41 is a cross reference to clause 195 which prohibits the publication of disallowed questions unless the express permission of the court has been obtained.

The second Note to clause 41 stipulates (as explained above) that this clause differs from the Model Uniform Evidence Bill.

Clause 42 permits a party to put a ***leading question*** (a defined term) to a witness in cross-examination, unless the court disallows the question or directs the witness not to answer it. In deciding whether to disallow a question or give a direction the court is to take into account, among other things, the witness's age, any mental, intellectual or physical disability that may affect the witness's answer and the extent, if any, to which the witness or the witness' evidence is sympathetic to the cross-examiner.

The clause stipulates, however, that the court must disallow a question or direct the witness not to answer it if the court is satisfied that the facts would be better ascertained if leading questions are not used.

Clause 43 sets out the manner in which prior inconsistent statements of a witness may be put to the witness in cross-examination.

Clause 44 sets out the only manner in which a witness may be cross-examined about a prior statement made by some other person.

Clause 45 provides for the production and examination of a document during cross-examination about an alleged prior inconsistent statement made by a witness or a previous representation made by a person other than a witness.

Clause 46 enables the court to give leave to a party to recall a witness to be questioned about a matter if another party adduces evidence that contradicts or relates to evidence given by the witness, the substance of which was not put to the witness by that other party.

PART 2.2—DOCUMENTS

Clause 47 defines ***document in question*** for the purposes of Part 2.2 of the Bill. It also provides that a document is to be taken to be a copy of a document, even though it is not an exact copy, if it is identical in all relevant respects.

Clause 48 provides that evidence of the contents of a document can be adduced by tendering the document or by any one or more of the following methods—

- adducing evidence of an admission made by another party about its contents;

- tendering a copy of the document produced by a device (for example, a photocopier or a word processor) that reproduces the contents of documents;
- if the content of the document is not in visible form (for example, a tape-recording) or is in a code (for example, shorthand notes), tendering a transcript;
- if the document is an article or thing on or in which information is stored in such a way that it cannot be used unless a device is used to retrieve, produce or collate it, tendering a document produced by the device (for example, computer output or a document produced by an optical laser disk reader);
- tendering a business record that is an extract from, or a summary or copy of, the document;
- if the document is a public document, tendering an official printed copy of the document.

The clause provides that a party to whom a document is not available may lead evidence of the contents of the document by tendering a copy, extract or a summary of the document or adducing evidence of the contents of the document from a witness.

Clause 49 provides for proof of documents in foreign countries.

Clause 50 enables a party to apply to a court for a direction that he or she may adduce evidence of the contents of two or more documents in the form of a summary if it would not otherwise be possible to conveniently examine the evidence because of the volume or complexity of the documents in question.

The court may only make such a direction if the applicant has served on each other party a copy of the summary disclosing the name and address of the person who prepared it, and has given each other party a reasonable opportunity to examine or copy the summarised documents.

Clause 51 abolishes the original document rule which provides that the contents of a document, except in certain limited circumstances, must be proved by production of the original document.

PART 2.3—OTHER EVIDENCE

Clause 52 provides that the Bill (except Part 2.3) will not affect an Australian law or rule of practice so far as it permits evidence to be adduced in a way other than by witnesses giving evidence or documents being tendered in evidence.

Clause 53 enables a judge, on application, to order that a demonstration, experiment or inspection be held. It sets out some of the matters the judge should take into account in deciding whether to make such an order. These include whether the parties will be present and whether a demonstration of an event will properly reproduce the event.

Clause 54 makes it clear that the court (including the jury if there is one) may draw any reasonable inference from what it sees, hears or otherwise notices at a demonstration, experiment or inspection.

CHAPTER 3—ADMISSIBILITY OF EVIDENCE

An introductory note explains that the Chapter is about whether evidence adduced in a proceeding is admissible.

Part 3.1 sets out the general inclusionary rule that relevant evidence is admissible.

Part 3.2 is about the exclusion of hearsay evidence, and exceptions to the hearsay rule.

Part 3.3 is about exclusion of opinion evidence, and exceptions to the opinion rule.

Part 3.4 is about admissions and the extent to which they are admissible as exceptions to the hearsay rule and the opinion rule.

Part 3.5 is about exclusion of certain evidence of judgments and convictions.

Part 3.6 is about exclusion of evidence of tendency or coincidence, and exceptions to the tendency rule and the coincidence rule.

Part 3.7 is about exclusion of evidence relevant only to credibility, and exceptions to the credibility rule.

Part 3.8 is about character evidence and the extent to which it is admissible as an exception to the hearsay rule, the opinion rule, the tendency rule and the credibility rule.

Part 3.9 is about the requirements that must be satisfied before identification evidence is admissible.

Part 3.10 is about the various categories of privilege that may prevent evidence being adduced.

Part 3.11 sets out the discretionary and mandatory exclusions that may apply to evidence even if it would otherwise be admissible.

The diagram contained in the introductory note sets out how Chapter 3 applies to particular evidence. Use of the diagram may assist in applying Chapter 3 in a logical method to determine whether evidence is admissible.

PART 3.1—RELEVANCE

Clause 55 sets out what is relevant evidence. Under the clause, evidence is relevant if it *could* rationally affect (whether directly or indirectly) the assessment of the probability of the existence of a fact in issue.

The clause makes it clear that evidence is not to be deemed irrelevant (and hence inadmissible under clause 56) because it relates only to the credibility of a witness, the admissibility of other evidence or a failure to adduce evidence.

Clause 56 concerns the admissibility of evidence. Relevant evidence is admissible except as otherwise provided by the Bill. Irrelevant evidence is not admissible.

Clause 57 enables a court to admit evidence provisionally even if its relevance is not immediately apparent. The court may find the evidence is prima facie relevant evidence if it is reasonably open to find the evidence relevant based on the evidence alone or on the basis it *would* be reasonably open to do so once some other further evidence is subsequently admitted. For instance, a knife could be accepted as provisionally relevant, subject to proof that it was used in a murder.

Clause 58 enables a court to examine a document or thing for the purpose of determining its relevance and to draw any reasonable inference from it.

PART 3.2—HEARSAY

Division 1—The hearsay rule

This Part sets out the exclusionary rule for hearsay evidence and exceptions to that rule.

Clause 59 sets out the general exclusionary rule for hearsay evidence ("the hearsay rule"). Under subclause (1), the rule prevents the admission of evidence of a previous representation made by a person to prove the existence of a fact, that the person intended to assert (or it can be reasonably supposed the person intended to

assert), by the representation. Subclause (2) defines this to be an "asserted fact" for the purposes of this Division.

The 2005 LRCs' Report recommended an amendment to section 59 of the UEAs by the insertion of the words "it can reasonably be supposed that" after "a fact that" (recommendation 7-1). This amendment (along with a new subclause (2A)) is intended to provide further guidance on the definition of hearsay evidence under this Division and foreclose the prospect of courts adopting a different approach to determining the meaning of "intention", such as the approaches explored in *R v Hannes* (2000) 158 FLR 359.

Subclause (2A) clarifies what the court should consider in determining the meaning of "intention" (pursuant to recommendation 7-1 of the 2005 LRCs' Report). It provides the test for determining the intention of the maker. Under this subclause, when determining whether a person intended to assert the existence of facts contained in a previous representation, the test to be applied is what a person in the position of maker of the representation can reasonably be supposed to have intended, having regard to the representation and the circumstances in which the representation was made.

The second Note to clause 59 sets out specific exceptions to the hearsay rule. It refers to the sections in the Bill that set out when evidence is admissible (even though it is hearsay evidence).

Examples set out under clause 59 illustrate how the clause is intended to operate.

Clause 60 contains an exception to the hearsay rule where the evidence (which is otherwise hearsay) is relevant for a non-hearsay purpose. Subclause (1) provides that such evidence is not captured by the hearsay rule.

The 2005 LRCs' Report recommended that the reference in section 60 of the UEAs to "the fact intended to be asserted by the representation" be replaced with "an asserted fact" (recommendation 7-2). The words "an asserted fact" are consistent with the term used in clause 59.

The 2005 LRCs' Report also recommended the introduction of subclauses (2) and (3) (recommendations 7-2 and 10-2).

Subclause (2) clarifies that clause 60 operates to permit evidence admitted for a non-hearsay purpose to then be used to prove the facts asserted in the representation, whether or not the evidence is first-hand or more remote hearsay.

The Note to subclause (2) provides that this subclause is a response to the decision of the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594.

Subclause (3) inserts a safeguard, to ensure that evidence of admissions in criminal proceedings that is not first-hand is excluded from the scope of clause 60.

The Note to subclause (3) provides that evidence of an admission might still be admissible under clause 81 of the Bill if it is "first hand" hearsay. The Note makes a cross reference to clause 82 which deals with the exclusion of evidence of admissions that is not first hand.

Clause 61 makes it clear that nothing in Part 3.2 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 evidence of the fact. The clause makes it clear that competence is to be assessed in accordance with the test in clause 13.

Subclause (2) makes it clear that the limitation in clause 61 does not apply to a person's contemporaneous representations about the person's health, feelings, sensations, intentions, knowledge or state of mind.

The Note to subclause (2) refers to clause 66A for further information regarding admissibility of such contemporaneous statements.

Division 2—"First-hand" hearsay

Clause 62 provides that in Division 2, ***previous representation*** (a defined term) refers only to a representation made by a person who had, or might reasonably be supposed to have had, personal knowledge of the fact asserted in the representation, other than from a representation made by some other person about the asserted fact. Such a representation is referred to as "first-hand" hearsay.

Subclause (2) defines personal knowledge as based on something personally seen, heard or otherwise perceived. Subclause (3) refers to clause 66A, which also contains a reference to knowledge and ensures that all previous representations covered by clause 66A are considered "first-hand" hearsay.

Subclauses (2) and (3) reflect recommendation 8-5 of the 2005 LRCs' Report.

Clause 63 provides an exception to the hearsay rule in civil proceedings where the maker of a "first-hand" hearsay representation is not available to give evidence about an asserted fact.

In these circumstances, oral evidence of the representation may be given by a person who witnessed it. Alternatively, a document containing the representation, or another representation reasonably necessary to understand it, may be admitted.

The Notes to clause 63 explain that clause 67 contains notice requirements in relation to this clause, and that clause 4 of Part 2 of the Dictionary is about availability of persons.

Clause 64 provides for two exceptions to the hearsay rule in civil proceedings where the maker of the specified "first-hand" hearsay representation is available to give evidence.
Firstly, where it would cause undue expense or undue delay or it would not be reasonably practicable to call the maker of the representation to give evidence, oral evidence of the representation may be given by a person who witnessed it.
Secondly, a document containing the representation, or any other representation reasonably necessary to understand it, may be admitted.

The clause does not require that the occurrence of the asserted fact be fresh in the memory of the person who made the representation at the time that the representation is made.
The 2005 LRCs' Report found that in practice, the requirement of freshness in memory is not an important indicator of evidentiary reliability (recommendation 8-1).

Clause 65 provides for exceptions to the hearsay rule in criminal proceedings where the maker of the "first-hand" hearsay representation is not available to give evidence.

Subclause (1) provides that the clause applies where a person who made a previous representation is not available to give evidence about an asserted fact. Subclause (2) sets out some specific exceptions to the hearsay rule in such situations.

The specific exceptions under subclause (2) are where the representation was made—

- under a duty to make that representation; or
- when or shortly after the asserted fact occurred *and* in circumstances where it is unlikely that the representation is a fabrication; or

- in circumstances that made it highly probable that the representation was reliable; or
- against the interests of the maker at the time the representation was made *and* it was made in circumstances that make it likely it is reliable.

Subclause (7) provides that a representation is to be taken to be against the maker's interest if it tends to damage the reputation of the maker, incriminate the maker or show that the maker is liable in an action for damages.

The Note to subclause (2) sets out that clause 67 contains notice requirements in relation to this subclause. Under clause 67, such notices are to be given in accordance with any regulations or rules of the court made for the purposes of this clause.

Subclause (2)(d) is in accordance with the 2005 LRCs' Report finding that admissions against interest cannot automatically be assumed to be reliable (recommendation 8-3). For example, where the person who made the statement is an accomplice or co-accused, he or she may be motivated to downplay the extent of his or her involvement in relevant events and to emphasise the culpability of the other. There might be reason to suspect that an accomplice or co-accused would be more inclined to take such a course where, for example, they have immunity from prosecution. Where the accomplice gains immunity from prosecution, the fact that the representation is against self-interest is no longer a reliable safeguard or indicator of reliability.

Accordingly, this subclause contains a requirement that for such admissions to be admitted, they must also be found "to be likely to be reliable". The provision is not restricted to accomplices and co-accused, as statements against interest may arise in other situations.

Subclause (3) contains an exception which enables evidence to be given of a representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding the defendant affected has cross-examined, or had a reasonable opportunity to cross-examine, the person who made the representation.

The Note to subclause (3) sets out that clause 67 contains notice requirements in relation to this subclause.

Subclause (4) sets out that where such evidence (pursuant to subclause (3)) is admitted in a criminal proceeding involving more than one defendant, it cannot be used against a defendant who did not (or did not have reasonable opportunity to) cross-

examine the person about the representation. Reasonable opportunity is defined in subclause (5).

Subclause (6) sets out that evidence of such a representation (pursuant to subclause (3)) may be adduced by producing a transcript or recording that is authenticated in the specified way.

Subclauses (8) and (9) apply to evidence adduced by a defendant.

Subclause (8) provides an exception that enables a defendant to adduce evidence of a representation from a person who witnessed it or to tender a document containing the representation, or another representation reasonably necessary to understand it.

Subclause (9) provides that if evidence of that kind (pursuant to subclause (8)) has been adduced by a defendant about a particular matter, the prosecution or another defendant may adduce evidence of another previous representation about the matter.

The Note to clause 65 explains that clause 4 of Part 2 of the Dictionary is about availability of persons.

Clause 66 provides for exceptions to the hearsay rule in criminal proceedings where the maker of the "first-hand" hearsay representation is available to give evidence.

Subclause (1) provides that the clause applies where a person who made a previous representation is available to give evidence about an asserted fact.

Subclause (2) sets out that if the maker has been called or is to be called to give evidence, evidence of the representation may be given by the maker, or by someone else who witnessed the representation, if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the maker.

Subclause (2A) sets out factors the court may take into account in determining the "freshness" of the memory. This may be determined by a wide range of factors in addition to the temporal relationship between the occurrence of the asserted fact and the making of the representation. The nature of the event and the age and health of the person are included as examples of the considerations which may be relevant to an assessment of the "freshness" of the memory. This is in accordance with the 2005 LRCs' Report (recommendation 8-4).

The Note to subclause (2A) sets out that subclause (2A) is a response to *Graham v The Queen* (1998) 195 CLR 606.

Subclause (3) provides that if a representation was made for the purpose of indicating the evidence that the maker would be able to give in a proceeding, the exception to the hearsay rule is not to apply to evidence adduced by the prosecutor unless the representation concerns the identity of a person, place or thing.

Subclause (4) provides that a document containing a representation (pursuant to subclause (2)) must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Clause 66A contains an exception to the hearsay rule for contemporaneous statements about a person's health, feelings, sensations, intention, knowledge or state of mind.

The clause is limited to first-hand hearsay and enables the court to assess the reliability of the person who had personal knowledge of the asserted fact. This is in accordance with the 2005 LRCs' Report finding that this exception is only justified in relation to first-hand hearsay and it should not apply to second-hand and more remote forms of hearsay (recommendation 8-5).

Clause 67 sets out the notice requirements for a party seeking to adduce hearsay evidence in accordance with Part 3.2.

Clause 68 enables a party in civil proceedings to object to the tender of hearsay evidence where the maker of the representation is available, but has not been called to give evidence. Objections must be made in accordance with the stipulated notice and other requirements. If the objection is unreasonable the court may order that the party pay the costs incurred in relation to the objection and in calling the maker to give evidence.

The Note to clause 68 sets out a difference between this Bill and the Commonwealth Act due to the different way Victorian courts ascertain costs.

Division 3—Other exceptions to the hearsay rule

Clause 69 provides an exception to the hearsay rule for certain 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 or might reasonably be supposed to have 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 or have had such knowledge.

A further exception is provided for evidence that tends to prove that there is no record in a business record keeping system of the happening of an event normally recorded in the system.

The Notes to clause 69 set out other relevant sections about business records.

Clause 70 provides that in certain circumstances, the hearsay rule does not apply to tags or labels attached to objects or documents.

The Note to clause 70 sets out that the Commonwealth Act has an additional subsection relating to customs and excise prosecutions.

Clause 71 provides an exception to the hearsay rule for the use of representations as to the identity of the sender, date and time of sending and destination of the recipient in documents recording an electronic communication. This clause provides a broad and flexible definition of the technologies which fall within the exception to the hearsay rule for telecommunications. This definition is not device-specific or method-specific and embraces all modern electronic technologies. It is also intended to be sufficiently broad to capture future technologies.

The Notes refer to Division 3 of Part 4.3 which contains presumptions about electronic communications, the Commonwealth Act which has a wider application in relation to Commonwealth records and that ***electronic communication*** is a defined term.

This clause accords with the 2005 LRCs' Report (recommendation 6-2).

Clause 72 provides an exception to the hearsay rule for evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

This exception is in accordance with the 2005 LRCs' Report (recommendation 19-1). It found that the UEAs should be amended to make the hearsay rule more responsive to Aboriginal and Torres Strait Islander oral tradition. The laws of evidence have treated information passed on orally as a second class form of knowledge. In Australian Indigenous societies, the value given to information about traditional law and custom passed on via oral tradition is determined by considering factors such as the actual transmission, the source of the information, and the person to whom it has been passed. This clause does not treat orally transmitted evidence of traditional law and custom as prima facie

inadmissible, as this is the form by which law and custom are maintained under Indigenous traditions.

The intention of this clause is to make it easier for evidence of traditional law and customs to be adduced where relevant and appropriate. The exception shifts the focus away from whether there is a technical breach of the hearsay rule, to whether the particular evidence is reliable. Factors relevant to reliability or weight will include the source of the representation, the persons to whom it has been transmitted, and the circumstances in which it was transmitted.

The requirements of relevance in clauses 55 and 56 may operate to exclude representations which do not have sufficient indications of reliability. Reliability can be enhanced through use of judicial powers to control proceedings, to create a culturally appropriate context for the giving of evidence regarding the existence or content of particular traditional laws and customs.

The Note to clause 72 refers to the exception for contemporaneous statements about a person's health in clause 66A.

Clause 73 provides an exception to the hearsay rule for reputation in relation to evidence about marriage, cohabitation, age, family history and family relationship. The provision is intended to reflect and rationalise existing common law rules in this respect. The clause provides that this exception does not apply to evidence adduced in a criminal proceeding unless it tends to contradict such evidence that has been admitted and, in the case of the defendant, reasonable notice has been given by the defendant.

Clause 74 provides a similar exception (to clause 73) to the hearsay rule for reputation as to public or general rights. In a criminal proceeding, the exception does not apply to evidence adduced by a prosecutor unless it tends to contradict such evidence that has been admitted.

Clause 75 provides an exception to the hearsay rule for evidence adduced in interlocutory proceedings if the party who adduces it also adduces evidence of its source.

PART 3.3—OPINION

Clause 76 states the general exclusionary rule that opinion evidence is not admissible to prove a fact asserted by the opinion ("the opinion rule").

The Second Note to clause 76 sets out a list of the specific exceptions to the opinion rule as contained in other sections of the Bill.

Examples set out under clause 76 illustrate how the clause is intended to operate.

Clause 77 provides that the opinion rule does not apply to evidence that is admitted because it is relevant on some basis other than proof of the fact asserted by the opinion.

Clause 78 provides an exception to the opinion rule for lay opinions. It permits opinion evidence if it is based on the person's own perception of an event and evidence of the opinion is necessary to obtain an adequate understanding of the person's perception of the event.

Clause 78A provides an exception to the opinion rule for evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group.

This clause is in accordance with the 2005 LRCs' Report (recommendation 19-2). The 2005 LRCs' Report recommended that a member of an Aboriginal or Torres Strait Islander group (the group) should not have to prove that he or she has specialised knowledge based on training, study or experience before being able to give opinion evidence about the traditional law and custom of his or her own group.

People who are not members of the group will have their competence to give such evidence determined under clause 79, based on their specialised knowledge based on training, study or experience.

The requirement of relevance in clauses 55 and 56 may operate to exclude opinions which do not have sufficient indications of reliability, for example where the person is a member of the group but has had little or no contact with that group. Reliability can be enhanced through use of judicial powers to control proceedings, to create a culturally appropriate context for the giving of evidence regarding the existence or content of particular traditional laws and customs.

Clause 79 provides exceptions to the opinion rule for evidence that is wholly or substantially based on specialised knowledge.

Subclause (1) sets out an exception allowing a person with specialised knowledge based on training, study or experience to give an opinion that is wholly or substantially based on that knowledge. It is not necessary for the person to be formally qualified. Relevant experience will suffice.

Subclause (2) sets out specific considerations in relation to specialised knowledge relating to child behaviour and development, particularly in cases of sexual assault.

This is in accordance with the 2005 LRCs' Report (recommendation 9-1). The 2005 LRCs' Report found that specialist knowledge on the development and behaviour of children can be relevant to a range of matters in legal proceedings, including testimonial capacity, the credibility of a child witness, the beliefs and perceptions held by a child, and the reasonableness of those beliefs and perceptions. Such evidence can, in certain cases such as child sexual assault matters, be important in assisting the court to assess other evidence or to address misconceived notions about children and their behaviour. However, the Report found that courts show a continuing reluctance in many cases to admit this type of evidence. The inclusion of subclause (2) makes it clear that this particular type of specialised knowledge is admissible.

Clause 80 abolishes the common law rules known as the "ultimate issue rule" and the "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" excludes expert opinion evidence on matters of common knowledge.

PART 3.4—ADMISSIONS

This Part sets out exceptions to the hearsay and opinion rules relating to admissions. An ***admission*** (a defined term) is not rendered inadmissible by the hearsay or opinion rules.

Clause 81 provides an exception to the hearsay and opinion rules for evidence of an admission. A similar exception is provided for evidence of a representation made at or about the time of the admission that is reasonably necessary to understand the admission.

The Note to clause 81 sets out the specific exclusionary rules relating to admissions that are contained in other clauses in the Bill.

An example set out under clause 81 illustrates how the clause is intended to operate.

Clause 82 qualifies the exception created by clause 81. The hearsay rule will apply to evidence of an admission unless the evidence is given orally by a person who witnessed the admission or the evidence is a document in which the admission is made.

The Note to clause 82 provides for exclusion of evidence of admissions that is not first-hand.

The Note clarifies that clause 60, which contains an exception to the hearsay rule for evidence that is admitted for a non-hearsay purpose, does not apply to evidence of an admission in a criminal proceeding.

Clause 83 restricts the use that can be made of admissions as against third parties. Under this clause, the hearsay rule and the opinion rule apply so that evidence of an admission cannot be used in relation to the case of a third party unless that third party consents to the entire evidence being used. Consent cannot be given in respect of part only of the evidence. A third party is a party to a proceeding who did not make the admission or adduce the evidence.

Clause 84 provides that if the party against whom evidence of an admission is being led raises an issue in the proceeding about whether the admission was influenced by violent, oppressive, inhuman or degrading conduct, or by a threat of such conduct, evidence of the admission is not admissible unless the court is satisfied that the admission was not influenced by that conduct or by a threat of that conduct.

Clause 85 relates to admissions by defendants in a criminal proceeding.

Subclause (1) sets out that the relevant admissions under the clause are either—

- an admission made to or in the presence of an ***investigating official*** (a defined term), who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence; or

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

In comparison, section 85 of the UEAs is limited to an admission made "in the course of questioning".

The Note to subclause (1) makes it clear that this clause addresses the interpretation of the term "in the course of official questioning" expressed by the majority in the decision of the High Court of Australia in *Kelly v The Queen* (2004) 218 CLR 216. The majority held that the phrase "in the course of official questioning" in a particular Act "marks out a period of time running from when questioning commenced to when it ceased". This is a narrow interpretation.

The requirements in clause 85 are designed to place minimal administrative or resource demands on the police (for instance there is no general duty to ensure that admissions are made in circumstances that are unlikely to adversely affect the truth of the admission). However, it is simultaneously intended to ensure that the prosecution can demonstrate reliability in cases where the truth of an admission may be in doubt due to the circumstances in which it was made.

Clause 85 is designed to be broad enough to cover the period where the investigating official is performing functions in connection with the investigation of the commission, or possible commission, of an offence. Accordingly, any admissions made to police during this time will fall within the scope of clause 85. The breadth of this provision is consistent with the traditional caution with which the law treats admissions made to police officers and to other persons in authority.

It should be noted that this clause departs from the 2005 LRCs' Report (recommendation 10-1). The clause goes further than the recommendation in two respects.

First, subclause (1)(b) is intended to make it clear that covert operatives are not within the ambit of the provision.

The possibility that covert operatives could be covered by the clause was considered by Callaway JA in the Victorian Court of Appeal unreported decision *R v Tofilau* [2006] VSCA 40.

Second, the term "official questioning" has been removed from other parts of the Bill so as to avoid any uncertainty. This has occurred in clauses 89, 139, 165 and the Dictionary.

Clause 86 makes inadmissible in a criminal proceeding any document (other than a sound or video recording, or transcript of such a recording) purporting to be a record of interview by an investigating official with a defendant unless the defendant acknowledged the document as a true record by signing or otherwise marking it.

The purpose of this clause is to limit the circumstances in which documentary evidence, such as a statement of evidence containing an admission, is used to prove the contents of the statement.

However, it does not in any way limit the admissibility of oral evidence regarding any such admission, where this evidence comes within an exception to the hearsay rule. Nor does it affect current requirements in relation to the taping, for example, of "records of interview". Furthermore, where such documentary evidence is admissible pursuant to other Acts, this clause will not apply. For example, in relation to summary offences, documentary evidence containing admissions, without a defendant's acknowledgement, may form part of the brief of evidence against a defendant. Clause 5 of Schedule 2 of the **Magistrates' Court Act 1989** provides that in certain circumstances such evidence is to be treated as if its contents are a record of evidence given orally. This clause is not intended to affect the operation of that provision.

Clause 87 sets out the circumstances in which a representation made by another person is treated as being an admission made by a party. A representation made by another person is taken also to have been made by a party if—

- the person had authority to make statements on behalf of the party;
- it was made by an employee or agent about a matter within the scope of the person's employment or authority;
- it was made in furtherance of a common purpose with the party.

For the purposes of the clause, an exception to the hearsay rule is provided for evidence of a previous representation made by a person about his or her employment or authority to make statements or act on behalf of a party.

Clause 88 provides that to determine whether evidence of an admission is admissible, a person will be deemed to have made an admission if it is reasonably open to find that she or he so made the admission.

Clause 89 prohibits unfavourable inferences (including an inference of consciousness of guilt or an inference relevant to a party's credibility) being drawn in a criminal proceeding from a failure by a person to answer a question, or respond to a representation, from an investigating official performing functions in connection with the investigation of the commission, or possible commission, of an offence.

If the only use that can be made of the evidence of the silence would be to draw such an unfavourable inference, the evidence of the silence itself is inadmissible for that purpose. The application of this clause is limited to the evidence of the silence. A recent Victorian decision regarding the prohibition on the admissibility of silence in the course of selective answering is the unreported Victorian Court of Appeal decision *R v Barrett* [2007] VSCA 95 (17 May 2007).

Further, the clause is not intended to prevent the drawing of adverse inferences from the giving of inconsistent accounts.

The clause does not prevent use of the evidence to prove that the party or other person refused to answer the question or respond to the representation if the refusal is a fact in issue in the proceedings.

Clause 90 provides that, if in a criminal proceeding, 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 the admission at all, or admit the admission, but limit its use.

The Note to clause 90 makes it clear that the admission may nevertheless be excluded under other relevant discretions (contained in Part 3.11).

PART 3.5—EVIDENCE OF JUDGMENTS AND CONVICTIONS

This Part abolishes the rule known as the rule in *Hollington v Hewthorn* [1943] KB 587. In that case, evidence of a conviction was held to be inadmissible in civil proceedings to prove the facts on which it was based.

Clause 91 provides that evidence of a decision or a finding of fact in a proceeding is not admissible to prove a fact in issue in the proceeding. The clause makes it clear that once such evidence is prohibited (under this Part) from proving a fact in issue, even if it is admitted for some other relevant purpose, it cannot then be used in contravention of this clause.

The note to clause 91 refers to clause 178 that provides for certificate evidence of decisions.

Clause 92 provides two exceptions to the basic rule set out in clause 91.

The first exception provides that evidence of a grant of probate or letters of administration to prove death, date of death or the due execution of a will is admissible.

The second exception provides for the admissibility of 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 93 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 3.6—TENDENCY AND COINCIDENCE

This Part provides for the admissibility of evidence relating to conduct, reputation, character and tendency of parties and witnesses, that is relevant to a fact in issue in the proceedings. Clause 97 sets out the "tendency rule" and clause 98 sets out the "coincidence rule".

The Part does not apply if a matter is a fact in issue or relates only to the credibility of witnesses. Credibility evidence is dealt with in Part 3.7. Part 3.8 sets out rules relating to evidence of the character of a defendant in a criminal proceeding.

Clause 94 provides that Part 3.6 does not apply to evidence that relates only to the credibility of a witness, evidence in a proceeding so far as it relates to bail or sentencing or to evidence of character, reputation, conduct or tendency of a person that is a fact in issue in the proceeding.

Clause 95 provides that if evidence is deemed inadmissible for a prohibited purpose (as "tendency" or "coincidence"), even if it is relevant for another purpose (and so may be admissible) it must not be used for a prohibited purpose.

For example, evidence that may not be subject to the tendency rule includes evidence that may be relevant to a fact in issue, where the relevance is not dependent on the drawing of an inference of tendency from the evidence. For example, evidence of prior conduct revealing a motive for the crime charged or evidence relevant to a person's state of mind. If such evidence is admitted, it cannot then be used for a tendency purpose.

Clause 96 provides that a reference in Part 3.6 to the doing of an act includes a reference to a failure to do the act.

Clause 97 sets out the exclusionary rule for tendency evidence.

The rule ("the tendency rule") deals with the admission of evidence of a person's character, reputation, conduct or tendency where the evidence is being admitted to prove that the person has or had a tendency to act in a particular way or to have a particular state of mind.

There is an exception to the tendency rule. Tendency evidence can be admitted under this clause if appropriate notice is given (or the court dispenses with the notice requirement under clause 100) and the court finds that the evidence has significant probative value.

Under clause 97, the court is to admit the evidence if it has significant probative value. ***Probative value*** is a defined term. The probative value of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

Once the evidence is found to have probative value, the exception applies where the court thinks the probative value is significant. Although the term "significant" is not defined, it is not intended to mean "substantial". The 2005 LRCs' Report concluded that the term is well defined in common law, and means something more than mere relevance, but less than a substantial degree of relevance. Whether the probative value of the evidence is significant or not will depend on the circumstances of the case and the fact(s) in issue. The court can consider the evidence alone, or in relation to other evidence.

See clause 101 below for an additional consideration regarding admissibility of tendency evidence in relation to criminal proceedings.

The exclusionary tendency rule does not apply to tendency evidence adduced to explain or contradict tendency evidence adduced by another party. Such evidence is not excluded under this clause.

The Note to clause 97 sets out that other specific exceptions to the tendency rule are contained in clauses 110 and 111 of the Bill. These specific exceptions relate to character evidence of an accused, and permit the admission of evidence, in some circumstances, that would otherwise be inadmissible due to the tendency rule.

Clause 98 sets out the exclusionary rule for coincidence evidence.

The rule ("the coincidence rule") prevents the admission of evidence of the occurrence of two or more events that is being tendered to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind.

The clause applies where the party adducing the evidence of the two or more events relies on any similarities in the events *or* any similarities in the circumstances in which the events occurred. The clause also applies where the evidence of the two or more events relies on any similarities in both the events *and* circumstances in which the events occurred.

There is an exception to the coincidence rule. Coincidence evidence can be admitted under this clause if appropriate notice is given and the court finds that the evidence of the two or more events has significant probative value. The assessment of probative value can take into account other evidence, not just the coincidence evidence alone.

This clause incorporates recommendation 11-1 of the 2005 LRCs' Report and omits the requirement (contained in section 98 of the UEAs) that the events be substantially similar with the surrounding circumstances.

See clause 97 above for a discussion of significant probative value.

See clause 101 below for an additional consideration regarding admissibility of coincidence evidence in relation to criminal proceedings.

The Note to subclause (1) clarifies the intention and effect of the provision by stating that the two or more related events, which constitute the coincidence evidence, may include an event which is a fact in issue in the proceeding. This note implements recommendation 11-2 of the 2005 LRCs' Report.

The exclusionary coincidence rule does not apply to coincidence evidence adduced to explain or contradict coincidence evidence adduced by another party. Such evidence is not excluded under this clause.

Clause 99 requires any notice to be given in accordance with the regulations or rules of court.

Clause 100 sets out the circumstances in which the court may dispense with notice requirements. It enables the court, on the application of a party, to direct that the tendency rule or coincidence rule is not to apply to particular evidence despite the party's failure to give notice under clauses 97 or 98.

Clause 101 provides a further consideration in relation to the admissibility of both tendency and coincidence evidence adduced in a criminal proceeding. In such a proceeding, where tendency or coincidence evidence is not ruled out by clauses 97 or 98, the court must then consider whether the probative value of such evidence substantially outweighs any prejudicial effect that it may have on the defendant.

See clause 97 above for an explanation of the defined term ***probative value***. Whilst the term "substantially" is not defined, the 2005 LRCs' Report makes it clear that the clause is not intended to be read narrowly and the court should engage in an act of balancing the probative value of the evidence with the prejudicial effect it may have on the defendant. In carrying out this test, the court is not to rule out evidence merely because it finds there is a "reasonable view" of the evidence that is consistent with innocence.

The 2005 LRCs' Report also supported the application of the test outlined by Spigelman CJ in the decision of *R v Ellis* (2003) 58 NSWLR.

This clause does not prevent the prosecution from adducing tendency or coincidence evidence to explain or contradict tendency or coincidence evidence adduced by the defendant.

PART 3.7—CREDIBILITY

Division 1—Credibility evidence

Clause 101A inserts a definition of the evidence to which the "credibility rule" in clause 102 applies. "Credibility" evidence is either evidence that is (a) relevant only because it affects the assessment of the credibility of the witness or person, or (b) relevant because it affects the assessment of credibility and is

relevant, but not admissible, or cannot be used, for some other purpose under Parts 3.2 to 3.6 of the Bill.

Paragraph (b) has been inserted to address the decision of the High Court of Australia in *Adam v The Queen* (2001) 207 CLR 96 (*Adam*). Prior to *Adam*, the provisions in Part 3.7 controlled the admissibility of evidence so that the credibility rule applied if evidence was relevant both to credibility and a fact in issue, even where the evidence was admissible for the purpose of proving a fact in issue.

Adam considered section 102 of the UEAs, which is in effect, the same as clause 101A(a) of this Bill. The result of that decision is that control of evidence for more than one purpose, including credibility, depends entirely upon the exercise of the discretions and exclusionary rules contained in clauses 135 to 137. This has the potential to lead to greater uncertainty, inconsistent outcomes and increased appeals.

The introduction of the elements in clause 101A(b) make evidence relevant to both credibility and a fact in issue, but not admissible for the latter purpose, subject to the same rules as other credibility provisions.

Clauses 101A and 102 are in accordance with the 2005 LRCs' Report (recommendation 12-1).

The Note to clause 101A clarifies that clauses 60 (exception to the hearsay rule) and 77 (exception to the opinion rule) are not relevant in the determination of admissibility for another purpose under clause 101A because they cannot apply to evidence which has not yet been admitted. The inclusion of this note is in response to the decision in *Adam*.

Division 2—Credibility of witnesses

This Division deals with the "credibility rule" and additional protections and exceptions to that rule.

Clause 102 states the credibility rule itself—credibility evidence about a witness is not admissible. Accordingly, evidence that comes within the definition of credibility evidence in clause 101A is not admissible. The existence of clause 101A is not intended to change the law in this regard.

The Note to clause 102, however, sets out exceptions to the rule, and lists the clauses in the Bill that permit the admission of credibility evidence in some circumstances.

Clauses 101A and 102 are in accordance with the 2005 LRCs' Report (recommendation 12-1).

Clause 103 provides an exception to the credibility rule. The rule does not apply to evidence to be adduced in cross-examination if the evidence could substantially affect the assessment of the credibility of the witness.

Under this clause, the test is not whether the evidence has substantial probative value. Under section 103 of the UEAs the test was whether the evidence has substantial probative value and common law interpretation of this section considered the co-existing definition of ***probative value*** in the Dictionary in the Bill. The two provisions combined had the unintended effect of shifting the focus from issues of credibility (see R v RPS unreported, NSW Court of Criminal Appeal, Gleeson CJ, Hunt J at CL and Hidden J, 13 August 1997).

This clause implements recommendation 12-2 of the 2005 LRCs' Report and makes it clear that the evidence relevant to credibility must be substantial in order to be admitted.

Clause 104 provides an additional safeguard in relation to credibility evidence adduced in criminal proceedings. It protects a defendant who gives evidence in criminal proceedings by requiring the leave of the court for the cross-examination of the defendant on matters relevant to the assessment of the defendant's credibility.

Subclause (3) provides that leave is not required where cross-examination by the prosecutor relates to whether the defendant was biased or had a motive to be untruthful, whether the defendant is or was unable to be aware of or to recall matters to which his or her previous representation relates or whether the defendant has made a previous inconsistent statement.

Under subclause (4), where leave is required, it must not be given to the prosecution unless the defendant has adduced evidence that tends to prove that a prosecution witness has a tendency to be untruthful and the evidence is relevant solely or mainly to the witness's credibility. Subclause (5) makes it clear that subclause (4) does not include a reference to evidence of conduct in relation to the proceedings.

Under subclause (6) a second (or other) defendant cannot be given leave for cross-examination unless the evidence of the first defendant is adverse to the second (or other) defendant and that evidence has been admitted.

The clause is intended to enable the court to exercise control over unwarranted attacks on the credibility of a prosecution witness.

Clause 105 contains no substantive provisions. Its inclusion ensures parity in section numbering with the Commonwealth and New South Wales Acts.

Clause 106 provides that in specific circumstances the credibility rule does not apply to rebutting a witness's denials by other evidence.

Subclause (1)(a) sets out the specific circumstances—when in cross-examination of the witness, the substance of the evidence is put to the witness and it is denied, or the witness did not admit or agree to it. If the court then gives leave, credibility evidence can be adduced.

The inclusion of the circumstance "the witness . . . did not agree to it" is in response to the 2005 LRCs' Report (recommendation 12-5). It found that a sole requirement that the substance of the evidence be denied and that the evidence be relevant to a defined category may prevent the admission of important evidence for reasons of efficiency rather than fairness. Clause 106 creates a broader basis on which to admit evidence.

Subclause (2) provides that leave is not required where the evidence falls within paragraphs (a) to (e). These circumstances include where the witness is biased, has made a prior inconsistent statement or where the witness is, or was, unable to be aware of matters to which their evidence relates.

Clause 107 contains no substantive provisions. Its inclusion ensures parity in section numbering with the Commonwealth and New South Wales Acts.

Clause 108 provides exceptions to the credibility rule. First, for evidence adduced in re-examination of a witness. Second, if the court gives leave, the credibility rule does not apply to evidence of a prior consistent statement of a witness if—

- evidence of a prior inconsistent statement of the witness has been admitted; or
- 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.

Division 3—Credibility of persons who are not witnesses

This Division implements recommendations 12-1 and 12-6 of the 2005 LRCs' Report.

Clause 108A deals with the admissibility of credibility evidence of a person who has made a previous representation. ***Previous representation*** is a defined term.

Subclause (1) applies to all situations in which evidence of a previous representation has been admitted and where the maker of the representation is not called to give evidence.

In accordance with recommendations 12-1 and 12-6 of the 2005 LRCs' Report, this clause reflects the new definition of ***credibility evidence*** (see clauses 102 and 103(2)) so that credibility evidence about the person will not be admissible unless it could substantially affect the person's credibility. It ensures that subclause (1) applies to evidence relevant to credibility.

Clause 108A only applies where the person who made the representation will not be called to give evidence in the proceeding. Where that person is the defendant or a witness for the defence, it will be up to the defence whether or not to call that person to give evidence. However, this may not be decided (or disclosed) prior to the close of the Crown case, potentially leading to uncertainty as to whether the relevant person who made the representation will be called. Without this information, the prosecution cannot rely on the provisions of clause 108A to admit credibility evidence.

However, clause 46 of the Bill provides that the court may give leave to a party to recall a witness if another party raised a matter on which the relevant witness was not cross-examined. Further, this problem can be overcome by the prosecution later being able to reopen its case, or being allowed to call a case in reply: see *R v Siulai* [2004] NSWCCA 152. See clause 108B below for an additional consideration regarding defendants.

Clause 108B provides further protections in relation to previous representations of an accused who is not a witness.

Clause 108B provides that if evidence of a prior representation made by the defendant in a criminal trial has been admitted, and the defendant has not or will not be called to give evidence, the same restrictions on adducing evidence relevant to the credibility of the defendant should apply as under clause 104. This is to overcome the position in relation to section 108A of the UEAs, which could permit a situation where the prosecution could

tender a prior representation of the defendant and then lead credibility evidence against the defendant.

Subclause (2) provides that the prosecution must ordinarily seek the court's leave where it wishes to tender evidence relevant only to a defendant's credibility. When deciding whether to grant leave, the court is to take into account matters in subclause (4).

Subclause (3) provides that leave is not required, however, where cross-examination by the prosecutor relates to whether the defendant was biased or had a motive to be untruthful, whether the defendant is or was unable to be aware of or to recall matters to which his or her previous representation relates or whether the defendant has made a previous inconsistent statement.

Under subclause (4), where leave is required, it must not be given to the prosecution unless the defendant has adduced evidence that tends to prove that a prosecution witness has a tendency to be untruthful and the evidence is relevant solely or mainly to the witness's credibility. Subclause (5) makes it clear that subclause (4) does not include a reference to evidence of conduct in relation to the proceedings.

Under subclause (4) there may be a situation where the defence adduces this evidence after the Crown has closed its case. The issues that arise in this situation are discussed under clause 108A.

Under subclause (6) a second (or other) defendant cannot be given leave for cross-examination unless the evidence of the first defendant is adverse to the second (or other) defendant and that evidence has been admitted.

This clause is in accordance with the 2005 LRCs' Report (recommendation 12-6).

Division 4—Persons with specialised knowledge

Clause 108C creates a new exception to the credibility rule. This exception applies to expert opinion evidence that could substantially affect the assessment of the credibility of a witness. This evidence can only be adduced with leave of the court. The purpose of the clause is to permit expert opinion evidence in situations where it would be relevant to the fact-finding process (for example, to prevent misinterpretation of witness behaviour or inappropriate inferences being drawn from that behaviour).

Subclause (2) clarifies that specialist knowledge includes specialised knowledge of child development and behaviour. This clause complements clause 79.

This clause is in accordance with the 2005 LRCs' Report (recommendation 12-7).

PART 3.8—CHARACTER

This Part sets out rules relating to evidence of the character of a defendant in a criminal proceeding.

Clause 109 restricts the application of Part 3.8 to criminal proceedings.

Clause 110 provides exceptions to the hearsay rule, the opinion rule, the tendency rule and the credibility rule for evidence adduced by a defendant about his or her own good character and evidence adduced to rebut such evidence.

Clause 111 provides an exception to the hearsay rule and tendency rule for expert opinion evidence about a defendant's character adduced by a co-accused.

Clause 112 requires leave to be obtained to cross-examine a defendant about matters set out in Part 3.8.

This clause amends section 112 of the UEAs to correct a minor drafting inconsistency between subsection 104(2) and section 112. The words in section 112 "is not to be" are replaced with "must not be". This implements recommendation 12-4 of the 2005 LRCs' Report, but does not make any substantive change to the law.

PART 3.9—IDENTIFICATION EVIDENCE

This Part sets out exclusionary rules for visual identification evidence in a criminal proceeding and provides for the giving of warnings to juries about identification evidence. ***Identification evidence*** is a defined term.

Clause 113 restricts the application of Part 3.9 to criminal proceedings.

Clause 114 provides a general exclusionary rule for visual identification evidence. Visual identification evidence adduced by the prosecution is not admissible unless—

- an identification parade that included the defendant was held before the identification was made; or
- it was not reasonable to hold such a parade; or

- the defendant refused to take part in such a parade—

and the identification was made without the person who made it having been intentionally influenced to identify the defendant.

Subclause (3) sets out some of the matters that a court may take into account in determining whether it was reasonable to have held an identification parade. These include the kind and gravity of the offence, the importance of the evidence and the practicality of holding such a parade (including, if the defendant failed to cooperate, the manner and reason for the failure).

Under subclauses (4) and (5), it is to be presumed that it would not have been reasonable to hold an identification parade if it would have been unfair to the defendant to hold the parade or the defendant refused to take part in the parade unless an ***Australian legal practitioner*** (a defined term) or other party was present and there were reasonable grounds to believe this was not reasonably practicable.

Subclause (6) stipulates that in determining whether it was reasonable to hold a parade, the court is not to take into account availability of pictures or photographs that could be used in making identifications.

Clause 115 sets out the rules governing the admissibility of visual identification evidence where the identification was made wholly or partly after examining pictures (defined to include photographs) kept for use by police officers.

Subclause (2) makes it clear that if the pictures looked at by a witness suggest that the person is in police custody (for example, the picture displays a prisoner identification number), then the evidence will be inadmissible. This clause is based on the prejudice that could flow if a person appears to be in police custody in the picture and this influences selection of that picture by the witness.

Subclause (3) sets out another limited exclusion. Under this subclause, the prosecution cannot adduce evidence where the visual identification occurs at a time when the defendant is in custody and the visual identification is of a photo taken at a time prior to the defendant being taken into custody. If there is a lapse in time between the photograph (for example) being taken of the defendant and the photograph being shown to a witness, that evidence will prima facie be inadmissible. This clause is designed to encourage police officers to provide current photographs for the purpose of identification. However, there are exceptions to this exclusion. These are set out in the next subclause.

Subclause (4) provides that even if there has been a lapse of time between the taking of the photograph and the photograph being shown to a witness, identification evidence is admissible under this clause if either of the following two circumstances apply—

- the appearance of the defendant has changed significantly during the lapsed period; or
- it was not reasonably practicable to take a (second) picture after the defendant was taken into custody.

A qualification in relation to subclause (4) is contained in subclause (5). For the evidence to remain admissible, one of the following circumstances must exist—

- the defendant refused to take part in an identification parade;
- the appearance of the defendant has changed significantly during the lapsed period (accordingly, an identification parade would have been of little utility); or
- it would not have been reasonable to have held an identification parade that included the defendant (for example, because there were insufficient appropriate people to include in the parade).

Subclause (7) sets out information and a warning that a judge must give in relation to identification evidence, if requested to do so by the defendant.

Clause 116 requires the judge to inform the jury of the special need for caution before accepting identification evidence admitted in the proceedings. No particular form of words is required.

PART 3.10—PRIVILEGES

Division 1—Client Legal Privilege

This Part sets out evidence that is protected from disclosure on grounds of privilege or for public policy considerations.

Clause 117 defines, for the purposes of the Division, the terms ***client***, ***confidential communication***, ***confidential document***, ***lawyer*** and ***party***. The definition of ***client*** has a wide meaning, including, for example, government employees. The definition of ***client*** includes a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of

service). Under this definition there is no distinction between government and private lawyers—a client is allowed to be an employer of the lawyer.

This clause contains the definition of ***client*** relevant to client legal privilege, in accordance with recommendation 14-2 of the 2005 LRCs' Report. The recommendation changes the definition of ***client*** (in section 117 of the UEAs) from "an employer (not a lawyer) of a lawyer" to "a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service)". The purpose of the amendment is to remove the distinction between government and private lawyers—a client is allowed to be an employer of the lawyer.

Accordingly, subclause (1) defines lawyer for the purposes of client legal privilege to include "Australian lawyers", that is, those who are admitted to practice but do not necessarily have a current practising certificate.

It is intended that the definition of lawyer for the client legal privilege provisions reflect the breadth of the concept in the case law. The policy of the privilege does not justify its restriction to those with a practising certificate, particularly since a range of lawyers may provide legal advice or professional legal services in various jurisdictions. It is the substance of the relationship that is important, rather than a strict requirement that the lawyer hold a practising certificate. Employees and agents of lawyers are also included.

This clause is not intended to affect the common law concept of independent legal advice.

This clause adopts the ACT Court of Appeal decision in *Commonwealth v Vance* [2005] ACTCA 35. In considering the definition of ***lawyer*** under section 117 of the UEAs, the ACT Court of Appeal found that a practising certificate was an important indicator, but not conclusive on the issue of whether the legal advice was sufficiently independent to constitute legal advice under the requirements of the UEAs.

The broader definition in this clause includes a person who is admitted in a foreign jurisdiction. The rationale of client legal privilege is to serve the public interest in the administration of justice and its status as a substantive right means it should not be limited to advice obtained only from Australian lawyers. This position reflects the reasoning of the Full Federal Court in *Kennedy v Wallace* (2004) 142 FCR 185.

Clauses 118–120 clarify the circumstances under which "client legal privilege" can arise.

Clause 118 is concerned with client legal privilege arising out of the provision of legal advice. It provides protection from disclosure in court for—

- confidential communications passing between the client and his or her lawyers;
- the client's lawyers; or
- the contents of a confidential document prepared by the client, lawyer or another person—

made for the dominant purpose of the lawyer (or lawyers) providing legal advice to the client.

The Model Uniform Evidence Bill amends section 118(c) of the UEAs by replacing the words "client or a lawyer" with "client, lawyer or another person". This implements recommendation 14-4 of the 2005 LRCs' Report.

Clause 118(c) extends the privilege to confidential documents prepared by someone other than the client or lawyer (such as an accountant or consultant) for the dominant purpose of the lawyer providing legal advice to the client. This reflects developments in the common law consideration of legal advice privilege as discussed by the Full Federal Court in *Pratt Holdings v Commissioner of Taxation* (2004) 207 ALR 217.

Clause 119 is concerned with client legal privilege arising out of the provision of professional legal services relating to litigation. It provides protection from disclosure in court for confidential communications and documents made for the dominant purpose of the client being provided with professional legal services relating to a proceeding or an anticipated or pending proceeding to which the client is or may be a party.

Clause 120 is concerned with client legal privilege of unrepresented parties. It provides protection from disclosure in a court proceeding for confidential communications between a party who is not represented by a lawyer and other persons and for documents prepared by, or at the request of the party, for the dominant purpose of preparing for or conducting the proceeding.

The "dominant purpose" test adopted in the above provisions is more liberal than the "sole purpose" test adopted in the decision of the High Court of Australia in *Grant v Downs* (1976) 135 CLR 674.

Clause 121 makes provision for the loss of client legal privilege generally. The privilege will be lost when the client or party has died and the evidence is relevant to the question of the client's or party's intentions or competence in law. It will also be lost if the result of not admitting the evidence would be that the court would be prevented from enforcing an order of an Australian court. The clause does not prevent the adducing of evidence of a communication or document that affects a right of a person.

Clause 122 deals with the loss of client legal privilege: consent and related matters.

Clause 122 is designed to align the Bill more closely with the common law test for loss of privilege as set out in *Mann v Carnell* (1999) 201 CLR 1. This implements recommendation 14-5 of the 2005 LRCs' Report.

Section 122 of the UEAs provides that client legal privilege is lost by consent or by knowing and voluntary disclosure of the substance of the evidence. However, this clause provides that evidence may be adduced where a client or party has acted in a manner inconsistent with the maintenance of the privilege.

Clause 122 is concerned with the behaviour of the holder of the privilege, as opposed to the intention of the holder of the privilege, as has been the case under section 122 of the UEAs. The intention of this clause is that the privilege should not extend beyond what is necessary, and that voluntary publication by the client should bring the privilege to an end. The addition of the inconsistency criterion for waiver also gives the court greater flexibility to consider all the circumstances of the case.

Clause 123 ensures that a defendant in a criminal proceeding can adduce evidence of confidential communications and documents except such communications between, or documents prepared by, an ***associated defendant*** (a defined term) or his or her lawyer.

Clause 124 provides that in a civil proceeding involving joint clients of a lawyer, one of the joint clients can adduce evidence concerning the confidential communications and documents made by any of the joint clients.

Clause 125 provides that client legal privilege is lost for confidential communications made and documents prepared in furtherance of a fraud, an offence, or an act that renders a person liable to a civil penalty or a deliberate abuse of statutory power.

Subclause (2) provides that if the commission of a fraud, offence or act referred to in subclause (1) is a fact in issue in the proceeding and there are reasonable grounds for finding that it

was committed and for finding that the communication or document was made or prepared in the 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 as the case may require.

Clause 126 provides that where client legal privilege does not prevent evidence being adduced of a communication or a document, it also does not prevent evidence being adduced of another communication or document reasonably necessary to enable a proper understanding of the first communication or document.

An example is included in the Bill to illustrate the intention of this clause.

Division 2—Other privileges

Clause 127 entitles members of the clergy to refuse to divulge both the contents of religious confessions made to them in their professional capacity and the fact that they have been made. The entitlement applies even if an Act provides that the rules of evidence do not apply, that a person or body is not bound by the rules of evidence or that a person is not excused from answering a question or producing any document or thing because of privilege or otherwise.

Subclause (2) provides that the privilege does not apply if the communication involved was made for a criminal purpose.

This privilege is based on an acknowledgment that some religions have a ritual of confessing one's sins to a member of the clergy as God's human intermediary, in circumstances where the member of the clergy is bound to keep the contents of the confession confidential. The privilege acknowledges that members of clergy, whose faith requires absolute confidentiality of a confession, would be placed in an intolerable situation if required to choose between compliance with a strict provision of their faith and an order of a court. Consequently, this privilege promotes the right to freedom of religion for the clergy of religious denominations which include the ritual of confession.

Clause 128 sets out the process which the court is to undertake when a witness objects to giving particular evidence, or evidence on a particular matter, on the grounds that the evidence may tend to prove he or she has committed an offence or is liable to a civil penalty.

The court must determine whether there are reasonable grounds for the objection and if it finds that there are, the court is to advise the witness that they do not need to give the evidence unless required to do so by the court. In such circumstances, where the witness gives the evidence, whether required to by the court or otherwise, the court is to give the witness a certificate.

The court can only require the witness to give the evidence if the evidence does not tend to prove the witness has committed an offence or may be liable to a civil penalty under the law of a foreign country and the interests of justice require that the witness give the evidence. A certificate makes the evidence (and evidence obtained as a consequence of its being given) inadmissible in any Australian proceeding, except a criminal proceeding in respect of the falsity of the evidence.

Subclauses (8) and (9) respond to two issues considered in the decision of the High Court of Australia in *Cornwell v The Queen* [2007] HCA 12 (*Cornwell*). The issues concerned the applicability of the certificate to a retrial and the operation of a certificate in circumstances where the validity of the certificate has been called into question.

Subclause (8) provides that a certificate has effect regardless of the outcome of any challenge to its validity. This clause is included on the basis that the granting of a certificate under clause 128 is not the same as any other evidential ruling. To ensure that the policy of clause 128 is effective, the witness must be certain of being able to rely on that certificate in future proceedings.

Subclause (9) provides that the operation of the certificate does not apply to a proceeding which is a retrial for the same offence or a trial for an offence arising out of the same facts that gave rise to the original criminal proceeding in which the certificate was issued.

The Notes to the clause, amongst other matters, make it clear that the privilege does not apply to bodies corporate.

Clause 128A provides a process to deal with objections on the grounds of self-incrimination when complying with a search order (Anton Piller) or a freezing order (Mareva) in civil proceedings other than under the proceeds of crime legislation. Examples of search orders and freezing orders can be found in Orders 37A and 37B of the Supreme Court (General Civil Procedure) Rules 2005.

This clause addresses, but does not implement, recommendation 15-10 of the 2005 LRCs' Report. The clause is based upon the VLRC Implementation Report. It provides that the privilege

against self-incrimination under the Bill applies to disclosure orders. The principal provisions are outlined below.

Subclause (2) provides that where objection is taken to the provision of information required under a disclosure order, the person who is subject to the order must prepare an affidavit containing the required information to which objection is taken (called a privilege affidavit), deliver it to the court in a sealed envelope, and file and serve on each other party a separate affidavit setting out the basis of the objection.

Subclause (5) provides that if the court finds there are reasonable grounds for the objection, unless the court requires the information to be provided pursuant to subclause (6), the court must not require the disclosure of the information and must return it to the person.

Subclause (6) provides that if the court is satisfied that the information may tend to prove that the person has committed an offence or is liable to a civil penalty under Australian law, but not under the law of a foreign country, and the interests of justice require the information to be disclosed, the court may require the whole or any part of the privilege affidavit to be filed and served on the parties.

Subclause (7) provides that the court must give the person a certificate in respect of the information that is disclosed pursuant to subclause (6).

Subclause (8) provides that evidence of that information and evidence of any information, document or thing obtained as a direct result or indirect consequence of the disclosure cannot be used against the person in any proceeding, other than a criminal proceeding in relation to the falsity of the evidence concerned.

Subclause (9) clarifies that the protection conferred by clause 128A does not apply to information contained in documents annexed to a privilege affidavit that were in existence before a search or freezing order was made.

Subclause (10) provides that a certificate has effect regardless of the outcome of any challenge to its validity. As discussed in relation to clause 128(8) above, this clause is in response to the *Cornwell* decision, and serves the same function.

Clause 187 sets out the circumstances in which bodies corporate cannot claim this privilege.

Division 3—Evidence excluded in the public interest

Clause 129 prohibits (subject to some exceptions) evidence of the reasons for a decision, or of the deliberations of a judge or an arbitrator being given by the judge or arbitrator, or by a person under his or her direction or control, or by tendering a document prepared by any of these persons. The clause does not apply to published reasons for decisions.

The clause also prohibits evidence of the reasons for a decision or the deliberations of a member of a jury in a proceeding being adduced by any jury member in another proceeding.

Subclause (5) provides that the prohibitions in this clause do not apply in various types of proceedings. For example, a prosecution for offences of attempting to pervert the course of justice or perverting the course of justice.

Clause 130 requires a court to prevent evidence of matters of state (for example, matters affecting international relations or law enforcement) being adduced if the public interest in admitting the evidence is outweighed by the public interest in preserving its secrecy or confidentiality.

The clause provides some guidance on the nature of evidence which relates to matters of state and lists some matters to be taken into account by the court when determining whether to direct that information or a document not be adduced as evidence.

Subclause (5) sets out matters the court is to take into account when determining whether to exclude evidence of matters of state. Such matters include—

- the importance of the information or document in the proceeding;
- the likely effect of adducing evidence of the information or document and the means available to limit its publication;
- in a criminal proceeding, whether the party seeking to adduce evidence is a defendant or a prosecutor. Further, if a defendant is seeking to adduce the evidence, whether the direction is to be made subject to a condition that the prosecution be stayed.

Clause 131 provides that evidence is not to be adduced of communications made between, or documents prepared by, parties in dispute in connection with attempts to settle the dispute (this does not include attempts to settle criminal proceedings).

The circumstances in which this privilege does not apply are set out in the clause (for example, if the parties consent or if the communication affects the rights of a person).

Division 4—General

Clause 131A expands the scope of privileges in the Bill so that they apply to any process or order of a court which requires disclosure as part of preliminary proceedings. This implements recommendation 14-6 in full and recommendations 14-1, 15-3, 15-6 and 15-11 in part of the 2005 LRCs' Report.

The 2005 LRCs' Report noted that the introduction of the UEAs meant that two sets of laws operated in the area of privilege. The UEAs govern the admissibility of evidence of privileged communications and information. Otherwise the common law rules apply unless the privilege is expressly abrogated by statute. Within a single proceeding, different laws applied at the pre-trial and trial stages. The ability to resist or obtain disclosure of the same information varied.

The 2005 LRCs' Report recommended that the operation of client legal privilege, professional confidential relationship privilege, sexual assault communications privilege and matters of state privilege should be extended to apply to any compulsory pre-trial process for disclosure (recommendations 14-1, 15-3, 15-6 and 15-11 respectively).

This provision partly implements those recommendations, by extending the operation of the privileges to pre-trial court proceedings.

The clause, implementing recommendation 14-6, ensures that clause 123 remains applicable only to the adducing of evidence at trial by an accused in a criminal proceeding, despite the extension of client legal privilege to pre-trial court proceedings.

The privileges are not extended to non-curial contexts.

Clause 132 provides that a court must satisfy itself that a witness or party is aware of his or her rights to claim a privilege under this Part if it appears that the witness or party may have a ground for making an application or objection under it. If there is a jury, this is to be done in the absence of the jury.

Clause 133 makes it clear that a court can call for and examine any document in respect of which a claim for privilege under this Part is made so that it may determine the claim.

Clause 134 provides that if, under this Part, evidence must not be adduced or given in a proceeding, the evidence is not admissible in the proceeding.

PART 3.11—DISCRETIONARY AND MANDATORY EXCLUSIONS

Clause 135 provides a general discretion to exclude evidence if its probative value is substantially outweighed by the danger of it being unfairly prejudicial to a party, misleading or confusing or possibly causing or resulting in undue waste of time.

Clause 136 enables the court to limit the use to be made of evidence where there is a danger that a particular use might be unfairly prejudicial or misleading or confusing.

Under the Bill, evidence can be used to support any rational inference once the evidence is admitted for any reason. This clause gives the court discretion to admit evidence and limit its use instead of leaving it with a power only to admit or to exclude.

Clause 137 provides that the court must exclude prosecution evidence in criminal proceedings if its probative value is outweighed by the danger of unfair prejudice to the accused. The 2005 LRCs' Report refers to common law authority that evidence is not unfairly prejudicial to a defendant merely because it damages the defence case.

Probative value is a defined term. This clause requires the court to systematically assess the probative value of the evidence against the real risk that the tribunal of fact will misuse the evidence in some unfair way.

Clause 138 enables the court to exclude evidence obtained improperly, unlawfully or in consequence of an impropriety or a contravention of the law. Such evidence is excluded unless the desirability of admitting it outweighs the undesirability of admitting evidence obtained in the particular way it was obtained. The clause is intended to reflect, with some modifications, the exclusionary discretion at common law that is known as the rule in *Bunning v Cross* (1978) 141 CLR 54.

The clause sets out a range of factors the court can consider when determining whether to exclude evidence under this clause.

Clause 139 sets out the circumstances in which evidence of a statement made or act done by a person during questioning by investigating officials is to be taken to have been improperly obtained for the purpose of clause 138. It applies both to officials who have the power to arrest and to those with no such power. The definition of investigating officials excludes covert operatives acting under the orders of a superior.

Evidence of the statement made or act done is taken to have been improperly obtained if the investigating official did not caution the person before starting to question the person in the circumstances set out in the clause. Those circumstances differ depending on whether the official had the power to arrest. The caution must be to the effect that the person need not say or do anything but that anything the person does say or do may be used in evidence. The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency but need not be in writing unless the person is unable to hear adequately.

The requirement for a caution does not apply in so far as any Australian law requires the person being questioned to answer questions put by or do things required by an investigating official.

The provision is consistent with the 2005 LRCs' Report recommendation 10-1 and addresses the decision of the majority of the High Court in *Kelly v The Queen* (2004) 218 CLR 216 regarding the meaning of "official questioning". See clause 85 above for reference to this case.

CHAPTER 4—PROOF

PART 4.1—STANDARD OF PROOF

Clause 140 provides that the standard of proof in civil proceedings is proof on the balance of probabilities and lists some of the matters a court must take into account in determining whether a case is proved. The court may take additional matters into account.

Clause 141 provides that the standard of proof in criminal proceedings, in the case of the prosecution, is proof beyond reasonable doubt and, in the case of the defendant, proof on the balance of probabilities.

Clause 142 provides that the standard of proof for a finding of fact necessary for deciding a question whether evidence should or should not be admitted in a proceeding, or any other question arising under the Bill (if the Bill does not otherwise provide) is proof on the

balance of probabilities. The clause lists some of the matters a court must take into account in determining whether the standard has been reached. The court may take additional matters into account.

PART 4.2—JUDICIAL NOTICE

Clause 143 makes it unnecessary to adduce evidence about matters of law, including the provisions and coming into operation of Acts and statutory rules.

Clause 144 makes it unnecessary to adduce evidence about knowledge that is not reasonably open to question and that is either common knowledge in the locality where the proceeding is being heard or can be verified by consulting authoritative sources.

Clause 145 preserves the rules of the common law and equity relating to the effect of a conclusive certificate relating to a matter of international affairs.

PART 4.3—FACILITATION OF PROOF

Division 1—General

Clause 146 makes provision in relation to evidence produced wholly or partly by machines. It may be presumed that a machine was working properly on the day in question. The provision creates a rebuttable presumption placing the legal burden of disproof on the party disputing the presumed fact, but provides that the prima facie presumption disappears once a real doubt is raised.

Clause 147 creates a similar presumption (to clause 146) for documents produced by machines in the course of business.
The presumption does not apply to documents that were prepared in connection with a possible proceeding or made in connection with a criminal investigation.

Clause 148 provides that it is presumed (unless the contrary is proved) that documents were attested, verified, signed or acknowledged by a justice of the peace, an ***Australian lawyer*** (a defined term) or a notary public if they purport to be so attested, verified, signed or acknowledged.

Clause 149 dispenses with the need to call a witness who attested to the execution of a document (other than a will or other testamentary document) 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 150 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 151 contains no substantive provision. Its inclusion ensures parity in section numbering with the Commonwealth Act.

Clause 152 presumes (unless the contrary is proved) that a document that is more than 20 years old which is produced from proper custody is what it purports to be and was duly executed or attested.

Division 2—Matters of official record

Clause 153 presumes (unless the contrary is proved) that documents, such as the Government Gazette and other documents printed with the authority of the government, are what they purport to be and were 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, the act was done on that date.

Clause 154 presumes (unless the contrary is proved) that documents purporting to have been printed by authority of an Australian Parliament, or a House or Committee of such a Parliament is what it purports to be was published on the day it purports to have been published.

Clause 155 provides for evidence of a document that is a Commonwealth record or a State or Territory public document to be given by production of a document that purports to be such a record or document or that purports to be a copy of or extract from that record that is certified by a Minister.

Evidence will also be able to be given if such a record or document is signed or sealed or certified to be a copy or extract by a person who might reasonably be supposed to have custody of it.

Clause 155A contains no substantive provision. Its inclusion ensures parity in section numbering with the Commonwealth and New South Wales Acts.

Clause 156 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, extract or summary of the document.

The clause also lists the circumstances in which an order from a court to produce a public document will be taken to have been complied with by an officer entrusted with the custody of a public document.

Clause 157 makes a similar presumption in relation to evidence of public documents relating to court processes that are examined copies and have been sealed by a court or signed by a judge, magistrate, registrar or other proper officer.

Clause 158 provides for the admission in Victorian courts of a public document that is a public record of another State or Territory to the same extent and for the same purpose for which it is admissible under a law of that State or Territory.

Clause 159 provides that a document containing statistics purporting to be produced by the Australian Statistician is evidence that those statistics are authentic.

Division 3—Matters relating to post and communications

Clause 160 provides that, unless evidence sufficient to raise doubt is adduced, a postal article sent by pre-paid post addressed to a person at a specified address was received at that address on the fourth working day (as defined) after posting.

This presumption does not apply in a proceeding between all parties to a contract in relation to the contract if the presumption is inconsistent with a term of that contract.

Clause 161 provides that, unless evidence sufficient to raise a doubt is adduced, a range of presumptions apply to records of electronic communications. The presumptions relate to the mode of communication, the sender, the time and place of sending and receipt. ***Electronic communication*** is a defined term and embraces all modern electronic technologies, including telecommunications, as well as the facsimile and telex methods of communication.

The presumptions do not apply in a proceeding between all parties to a contract in relation to the contract if the presumption is inconsistent with a term of that contract.

Clause 162 provides that, unless evidence sufficient to raise doubt is adduced, it is presumed that a document purporting to contain a record of a message transmitted by lettergram or telegram was received by the person to whom it was addressed 24 hours after the message was delivered to a post office for transmission.

This presumption does not apply in a proceeding between all parties to a contract in relation to the contract if the presumption is inconsistent with a term of that contract.

Clause 163 contains no substantive provision. Its inclusion ensures parity in section numbering with the Commonwealth and New South Wales Acts.

PART 4.4—CORROBORATION

Clause 164 provides that evidence need not be corroborated. It also abolishes, subject to the other provisions of the Bill, the existing rules of law or practice that require warnings or directions to be given to a jury 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 4.5—WARNINGS AND INFORMATION

Clause 165 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 clause sets out the types of evidence that may be unreliable and includes hearsay evidence, evidence of admissions and evidence affected by the age or ill-health of the witness.

Subclause (3) provides that a judge need not comply with a party's request if there are good reasons for not doing so. If a warning is given, no particular form of words need be used in giving the warning or information.

The clause is not intended to affect any other power of the judge to give a warning to, or inform, the jury.

The clause prohibits a judge from warning or informing the jury about the reliability of a child's evidence. It stipulates that any warning about a child's evidence must be given in accordance with clause 165A.

Clause 165A deals with warnings in relation to children's evidence.

The clause is based on the 2005 LRCs' Report (recommendation 18-2) which refers to research that demonstrates that children's cognitive and recall skills are not inherently less reliable than adults. However, the credibility of children's evidence may be underestimated by juries. This perception of unreliability is enhanced if a judge gives a general warning about the unreliability of child witnesses. This clause addresses these misconceptions and reinforces the policy underpinning clause 165 that warnings should only be given where the circumstances of the case indicate they are warranted.

Subclause (1) provides that in any proceeding in which evidence is given by a child before a jury, a judge is prohibited from warning or suggesting to the jury—

- that children as a class are unreliable witnesses;
- that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults;
- that a particular child's evidence is unreliable solely on account of the age of the child;
- in criminal proceedings, that it is dangerous to convict on the uncorroborated evidence of a witness who is a child.

Under subclause (2) a party can request a warning (or information) to be made in relation to a particular child. If such a request is made, the court must be satisfied that there are circumstances particular to that child (other than age) that affect the reliability of the child's evidence and warrant the giving of a warning or information to the jury. If the court so finds, it can—

- inform the jury that the evidence of a particular child may be unreliable and the reasons for which it may be unreliable; or
- warn or inform the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it.

Subclause (3) provides that this clause does not affect any other power of a judge to give a warning to, or inform, the jury.

Clause 165B regulates warnings to juries in criminal proceedings where a delay as been found by the court to have resulted in a significant forensic disadvantage to the defendant.

Under subclause (2), the defendant must apply to the judge for a warning to be given. The court can only give a warning if satisfied that the defendant has in fact suffered a significant forensic disadvantage and that this is a result of delay. When giving such a warning, the court must tell the jury about the nature of the disadvantage and the need to take this into account when considering the evidence. Whilst no specific words are required to be used in the warning, subclause (4) makes it clear that the judge is prohibited from suggesting in any way that it would be dangerous or unsafe to convict the defendant solely because of the delay or significant forensic disadvantage.

A relevant delay for the purposes of this section is a lapse in time between the alleged offence and its being reported. Subclause (5) makes it clear that delay alone will not be sufficient to constitute significant forensic disadvantage.

Subclause (3) provides that the judge need not comply with subclause (2) if there are good reasons for not doing so.

Clause 165B is intended to replace the common law position on such warnings enunciated in *Longman v The Queen* (1989) 168 CLR 79. Warnings on delay can only be given in accordance with this clause. This clause responds to recommendation 18-2 of the 2005 LRCs Report.

PART 4.6—ANCILLARY PROVISIONS

Division 1—Requests to produce documents or call witnesses

Division 1 provides for a party to make certain requests to another party for the purpose of determining a question that relates to a previous representation, evidence of a conviction or the authenticity, identity or admissibility of a document or thing and the party may make such requests only within the specified time limits (unless the court gives leave to make them outside those limits).

Clause 166 defines ***request*** and includes a request made by a party to another party for the production, examination, testing, copying of documents or things; the calling of witnesses, including a witness who made a previous representation.

Clause 167 provides that a party may make a reasonable request to another party for the purpose of determining a question that relates to a previous representation, evidence of a conviction or the authenticity, identity or admissibility of a document or thing.

Clause 168 provides that a party has 21 days to make a request, after receiving notice of another party's intention to adduce evidence of a previous representation, or of a conviction in order to prove a fact in issue, or tender a document in evidence or to prove the contents of another document. The court may give leave to make such a request after 21 days if there is good reason to do so.

Clause 169 provides that if a party, without reasonable cause, fails or refuses to comply with a request, the court may order that the party comply with the request, produce a specified document or thing, or call a specified witness, or that the evidence in relation to which the request was made not be admitted in evidence.

If a party fails to comply with such an order to produce a specified document or thing or to call a witness, the court may direct that evidence in relation to which the request was made is not to be admitted into evidence. The court may also make orders as to adjournments or costs.

The clause provides examples of circumstances which constitute reasonable cause for a party to fail to comply with a request and an inclusive list of matters that the court must take into account in exercising its power to make orders under the section. The court may take additional matters into account.

The Note to the clause refers to clauses 4 and 5 of Part 2 of the Dictionary which provides definitions about the availability of persons, documents and things.

Division 2—Proof of certain matters by affidavits or written statements

Clause 170 permits evidence relevant to the admissibility of evidence to which specified provisions of the Bill apply (for example, Part 4.3 relating to facilitation of proof) to be given by affidavit or, if it relates to a public document, by a written statement.

Clause 171 provides for such evidence (as specified in clause 170) to be given by a person with responsibility for making or keeping the relevant document or thing. It may be given by an authorised person (for example, a person before whom an oath can be taken outside the State) if it would not be reasonably practicable or would cause undue expense for the responsible person to give the evidence.

Clause 172 enables evidence of a fact in relation to a document or thing to be given based on information or on knowledge or belief. An affidavit or statement containing evidence based on knowledge, information or belief must set out the source of the knowledge or information or the basis of the belief.

Clause 173 provides that a copy of any affidavit or statement must be served on each other party a reasonable time before the hearing. The deponent of the affidavit or maker of the statement must be called to give evidence if another party so requests.

Division 3—Foreign law

Clause 174 provides for the proof of the statutory law, treaties or acts of state of foreign countries.

Clause 175 provides for the proof of the case law of foreign countries.

Clause 176 provides for questions as to the effect of foreign law to be decided by the judge.

Division 4—Procedures for proving other matters

Clause 177 provides for evidence of an expert's opinion to be given by certificate. The party tendering an expert certificate must serve notice of it, and a copy of the certificate, on each other party, 21 days before the hearing, or such other period determined by the court on application by a party. A party so served can require the expert to be called as a witness.

Clause 178 provides for evidence of a conviction, acquittal, sentencing or other order by, or other judicial proceeding before, an Australian or foreign court to be given by a certificate signed by a judge, magistrate, registrar or other proper officer of the court concerned.

Clause 179 provides for proof of the identity of a person alleged to have been convicted of an offence to be adduced by an affidavit of a fingerprint expert of the police force of the relevant State or Territory.

Clause 180 provides for proof of the identity of a person alleged to have been convicted of an offence against a law of the Commonwealth to be adduced by an affidavit of a fingerprint expert of the Australian Federal Police.

Clause 181 provides that proof of the service, giving or sending under an Australian law, of written notification, notices, orders and direction may be proved by affidavit of the person who served, gave or sent it.

CHAPTER 5—MISCELLANEOUS

Clause 182 contains no substantive provision. Its inclusion ensures parity in section numbering with the Commonwealth Act.

Clause 183 allows a court to examine a document or thing in respect of which a question has arisen in relation to the application of the Bill and to draw reasonable inferences from the document or thing.

Clause 184 enables a defendant in or before a criminal proceeding, to make any admissions and give any consent that a party to a civil proceeding can make. A defendant's consent will not be effective in criminal proceedings unless he or she has been advised to consent by his or her lawyer, or if the court is satisfied that the defendant appreciates the consequences of doing so.

Clause 185 contains no substantive provision. Its inclusion ensures parity in section numbering with the Commonwealth Act.

Clause 186 contains no substantive provision, however a Note to the clause refers to provisions in the **Evidence Act 1958** which relate to swearing affidavits. The inclusion of this clause number ensures parity in section numbering with the Commonwealth Act.

Clause 187 provides that, for the purposes of a law of the State, a body corporate does not have a privilege against self-incrimination.

Clause 188 empowers a court to impound documents tendered or produced before the court.

Clause 189 sets out the circumstances in which a voir dire (the determination of a preliminary question in the absence of a jury) is to be held. These include questions as to whether evidence should be admitted or can be used against a person and as to whether a witness is competent or compellable.

Clause 190 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.

A defendant's consent will not be effective in a criminal proceeding unless he or she has been advised to consent by his or her lawyer, or the court is satisfied that the defendant understands the consequences of the consent. The clause also enables a court to make such orders in civil proceedings without the consent of the parties if the matter to which the evidence relates is not genuinely in dispute, or if the application of those rules would cause unnecessary expense or delay.

Clause 191 applies where the parties to a proceeding have agreed that, for the purposes of the proceeding, a fact is not to be disputed in the proceeding. If the agreement is in writing, signed by or for all the parties or, by leave of the court, stated before the court with the agreement of all parties, evidence may not be adduced to prove, rebut or qualify an agreed fact, unless the court gives leave.

Subclause (3)(a) refers to ***Australian lawyers***, ***legal counsel*** or ***prosecutors*** (defined terms).

Clause 192 complements clauses of the Bill enabling a court to give any leave, permission or direction on such terms as it thinks. The clause sets out some of the matters the court must take into account (for example, the extent to which to do so would unduly lengthen the hearing). The court may take additional matters into account.

Clause 192A deals with advance rulings and findings and implements recommendation 16-2 of the 2005 LRCs' Report. It provides that the court may, if it considers it appropriate, give an advance ruling or make an advance finding in relation to the admissibility of evidence and other evidentiary questions.

Paragraph (c) makes clear that the court may also make an advance ruling or finding in relation to the giving of leave, permission or directions under clause 192.

This clause addresses the finding of the High Court in *TKWJ v The Queen* (2002) 212 CLR 124 that the UEAs only permit an advance ruling to be made in cases where the UEAs requires leave, permission or direction to be sought, but not to be made in relation to the exercise of "discretions". The 2005 LRCs' Report concluded that a broader power to make advance warnings was important as it carries significant benefits in promoting the efficiency of trials. This clause gives a broader power.

Clause 193 provides that a court may make orders to ensure that a party can adequately inspect documents that require interpretation by a qualified person or from which sounds, images or writing can be reproduced. The clause also extends the power of a person or body to make rules of court in relation to the discovery, exchange, inspection or disclosure of intended evidence, documents and reports of persons intended to be called to give evidence.

Clause 194 substantially replaces section 150 of the **Evidence Act 1958**, section 415 of the **Crimes Act 1958**, and section 61 of the **Magistrates' Court Act 1989**. The clause provides powers for the court to issue a warrant to bring a witness before the court who has failed to attend court, including circumstances where the court is satisfied that the witness is avoiding service or is unlikely to attend.

A Note to the clause provides that this section differs from the New South Wales Act and that the Commonwealth Act does not include such a provision.

Clause 195 makes it an offence to print or publish (without express court permission) an improper question (see clause 41), or any question disallowed by the court because the answer would contravene the credibility rule (Part 3.7) or any question in respect of which leave has been refused under Part 3.7. The maximum penalty for the offence is a fine of 60 penalty units.

Clause 196 contains no substantive provision. Its inclusion ensures parity in section numbering with the provisions in New South Wales which include this provision.

Clause 197 enables the Governor in Council to make regulations for the purposes of the Bill.

SCHEDULE 1

Oaths and Affirmations

Schedule 1 sets out the forms of oaths and affirmations that may be taken or made by witnesses and interpreters.

DICTIONARY

The dictionary defines various words and expressions used in the Bill. The 2005 LRCs' Report recommended changes which required amendment to some definitions in the UEA. These are explained below. Otherwise, the terms are not explained below.

PART 1—DEFINITIONS

ACT Court

admission

asserted fact

associated defendant

Australia

Australian court

Australian law

Australian lawyer—

The definition is consistent with the National Legal Profession legislation, which in Victoria is contained in the **Legal Profession Act 2004**.

This definition (together with the definition of ***Australian legal practioner***) replaces the definition of ***lawyer*** contained in the Dictionary of the UEAs. This is consistent with recommendation 14-3 of the 2005 LRCs' Report.

The term ***lawyer*** is defined in and only used for the purposes of Part 3.10 on Privileges.

Australian legal practioner—

The definition is consistent with the National Legal Profession legislation, which in Victoria is contained in the **Legal Profession Act 2004**.

Australian or overseas proceeding

Australian Parliament

Australian practising certificate—

The definition is consistent with the National Legal Profession legislation, which in Victoria is contained in the **Legal Profession Act 2004**.

Australian-registered foreign lawyer—

The definition is consistent with the National Legal Profession legislation, which in Victoria is contained in the **Legal Profession Act 2004**.

Australian Statistician

business

case

child

civil penalty

civil proceeding

client

coincidence evidence

coincidence rule

Commonwealth owned body corporate

Commonwealth record

confidential communication

confidential document

court

credibility of a person

credibility of a witness

credibility evidence—

The definition cross-references the definition of credibility evidence in clause 101A.

credibility rule—

The definition cross-references the meaning of credibility rule in clause 102.

criminal proceeding

cross-examination

cross-examiner

de facto partner—

The definition cross-references the definition of de facto partner in Part 2 of the Dictionary.

document

electronic communication—

Electronic communication is defined by reference to the **Electronic Transactions (Victoria) Act 2000**. This is in accordance with recommendations 6-2 and 6-3 of the 2005 LRCs' Report.

examination in chief

exercise

fax

federal court

foreign court

function

government or official gazette

Governor of a State

Governor-General

hearsay rule

identification evidence

investigating official

joint sitting

judge

law

leading question

legal counsel

Legislative Assembly

Member (of the Australian Federal Police)

NSW court

offence

opinion rule

overseas-registered foreign lawyer

parent

picture identification evidence

police officer

postal article

previous representation

prior consistent statement

prior inconsistent statement

probative value

prosecutor—

A definition of ***prosecutor*** is included in the Dictionary due to the omission of a definition of ***lawyer*** from the Dictionary (consistent with recommendation 14-3 of the 2005 LRCs' Report).

public document

re-examination

representation

seal

tendency evidence

tendency rule

traditional laws and customs—

The inclusion of this definition implements recommendation 19-3 of the 2005 LRCs' Report.

The 2005 LRCs' Report concluded that "traditional laws and customs" is the most appropriate term to be used and a "broad definition of traditional laws and customs" was desirable.

The everyday meaning of a ***traditional law*** or ***traditional custom*** is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. However, in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, the High Court of the Australia held that for the purpose of the Native Title Act, ***traditional laws and customs*** refers specifically to traditional laws and customs whose content originates in the normative system of Aboriginal and Torres Strait Islander societies prior to assertion of sovereignty by the British Crown.

The 2005 LRCs' Report considered that for the purposes of the UEAs, ***traditional laws and customs*** should not be limited to that interpretation.

In accordance with the 2005 LRCs' Report, to ensure that the Bill covers the full range of matters within the scope of ***traditional laws and customs***, a broad definition of ***traditional laws and customs*** has been used. The definition contains a non-exhaustive list of matters that includes customary laws, traditions, customs, observances, practices, knowledge and beliefs of a group (including a kinship group) of Aboriginal or Torres Strait Islander people. This broader definition is intended to enable the court to receive more diverse evidence, which can be used to

prove the existence and content of particular traditional laws or customs.

Further, the definition refers to "*any* of the traditions, customary laws, customs" etc. of the group. This is intended to make it clear that the exceptions to the hearsay and opinion rules apply to traditions and customs generally, and not only to those whose content has been shown to originate in traditional laws and customs in force prior to the assertion of sovereignty by the British Crown. It is impractical and inappropriate to require courts to inquire whether the content of any given traditional laws or custom has its origins before sovereignty, in order to decide whether the exceptions may apply. Requiring such an inquiry would be contrary to the purpose of the new exceptions, which is to shift the focus away from technical obstacles to admissibility, to whether the particular evidence is reliable, and what weight it should be accorded.

Victorian court

visual identification evidence

witness

PART 2—OTHER EXPRESSIONS

1 References to businesses

Business is defined broadly and extends to statutory authorities.

2 References to examination in chief, cross-examination and re-examination

3 References to civil penalties

4 Unavailability of persons

5 Unavailability of documents and things

6 Representations in documents

7 Witnesses

8 References to documents

8A References to offices etc.

9 References to laws

10 References to children and parents

11 References to de facto partners

The definition of ***de facto partners*** implements recommendation 4-6 of the 2005 LRCs' Report in part. Clause 18 of the Bill, which applies only in criminal proceedings, allows certain categories of witness to object to giving evidence against the accused. Witnesses who are entitled to raise the objection include the accused's de facto partner.

The 2005 LRCs' Report recommended the introduction of the term ***de facto partner*** as a gender neutral term and a definition that covers same-sex couples, with no requirements for cohabitation or adulthood.

This definition is intended to be a non-exhaustive list of factors the court can refer to in determining whether a couple is in a de facto relationship. It includes the factors or indicia recommended by the 2005 LRCs' Report as well as additional factors that are common to existing state and territory definitions of ***de facto***.

The definition of ***de facto partners*** in this Bill differs from the Commonwealth and New South Wales Acts in that it provides that a person is in a de facto relationship with another person if those persons are in a registered relationship within the meaning of the **Relationships Act 2008**.