

# CHAPTER 2

## OVERVIEW OF THE BILL

2.1 This chapter sets out the main provisions of the Evidence Bill.

### **Schedule 1 – Uniform evidence amendments**

2.2 Schedule 1 of the Evidence Bill implements the model evidence provisions.

2.3 In summary, the key amendments contained in Schedule 1 relate to:

- competence – introduction of a revised test of general competence to give evidence which moves away from the current 'truth and lies' distinction and focuses instead on the ability of a witness to comprehend and communicate;
- hearsay rule – to provide further guidance on the definition of hearsay evidence; and to clarify the operation of the section 60 exception for evidence relevant for a non-hearsay purpose;
- admissibility of expert evidence – so that expert opinion can be used by a court to inform itself about the competence of a witness and to provide a new exception to the credibility rule where a person has specialised knowledge based on the person's training, study or experience;
- admissions in criminal proceedings – to ensure that evidence of admissions in criminal proceedings that is not first-hand is excluded from the ambit of section 60; and that the reliability of an admission made by a defendant is tested where that admission is made to, or in the presence of, an investigating official performing functions in connection with the investigation, or as a result of an act of another person capable of influencing the decision whether to prosecute;
- coincidence evidence – to reduce the threshold for admitting coincidence evidence to require consideration of similarities in events *or* circumstances, rather than the existing threshold that there be similarities in both the events *and* the circumstances;
- credibility of witnesses – to ensure that evidence which is relevant both to credibility and a fact in issue, but not admissible for the latter purpose, is subject to the same rules as other credibility evidence; and to enable evidence to be adduced with the leave of the court to rebut denials and non-admissions in cross-examination;
- compellability provisions – to ensure same-sex couples are treated in the same manner as de facto spouses (which includes replacing the definition of 'de facto spouse' with the gender neutral phrase 'de facto partner');
- hearsay and opinion rules – to create a new exception for evidence/opinion given 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;

- advance rulings on evidentiary issues – to make it clear that the court has the power to make an advance ruling or make an advance finding in relation to any evidentiary issue;
- warnings and directions to the jury – to make it clear that a trial judge is not to give a warning about the reliability of the evidence of a child solely on account of the age of the child; and to clarify the scope of information to be given to the jury about the forensic disadvantage a defendant may have suffered because of the consequences of delay, and the circumstances in which such information is to be given; and
- manner and form of questioning witnesses – to enable a court, on its own motion, to direct that a witness give evidence wholly or partly in narrative form, and to make further provision with respect to the improper questioning of witnesses in cross-examination in civil and criminal proceedings.

## **Schedule 2 – Other evidence amendments**

2.4 Schedule 2 of the Evidence Bill implements amendments that are specific to the Commonwealth. Many of these amendments are consequential to amendments in Schedule 1 and are necessary to ensure consistency. Schedule 2 also updates cross-references to relevant ACT legislation.

## **Schedule 3 – Printed and electronic publication of Acts**

2.5 Schedule 3 of the Evidence Bill amends the *Amendments Incorporation Act 1905* to establish an authorised database of Commonwealth legislation and to allow courts to rely on the electronic versions of Commonwealth legislation.

2.6 Specifically, Schedule 3 implements amendments to provide for certain printed and electronic versions of Acts (including compilations of Acts) to be taken to be an accurate record of those Acts, unless the contrary is proven. Schedule 3 also provides that printed compilations of Acts include amendments by either Acts or legislative instruments. These amendments will be made to the *Amendments Incorporation Act 1905*, which the Evidence Bill will rename as the *Acts Publication Act 1905*. The amendments will mean that there is one central piece of legislation relating to both the printed and electronic publications of Acts. The EM states that these amendments will improve the accessibility of freely available authoritative information about Australia's laws and will allow courts to rely on electronic versions of Commonwealth Acts.<sup>1</sup>

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1 p. 3.

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## Key provisions in Schedule 1

2.7 Some of the key provisions in Schedule 1 are set out in greater detail below.<sup>2</sup>

### *Amendments to Chapter 2 of the Evidence Act – Adducing evidence*

#### *Competence: lack of capacity to give evidence*

2.8 Item 3 repeals and replaces current section 13 of the Evidence Act to insert a new test for determining a witness's competence to give sworn and unsworn evidence. The Uniform Evidence Law Report noted that current section 13 – which contains two different tests for giving sworn and unsworn evidence, both of which require a witness to demonstrate an understanding of the difference between truth and lies – are too similar and restrictive.<sup>3</sup>

2.9 New section 13 provides that all witnesses must satisfy the test of general competence in subsection 13(1). The revised test provides that a person is *not competent* to give *sworn or unsworn evidence* about a fact if the person lacks the capacity to understand, or to give an answer that can be understood, to a question about the fact, and that incapacity cannot be overcome.

2.10 Proposed subsection 13(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. This restates current subsection 13(1).

2.11 Proposed subsection 13(5) provides that, if a person is not competent to give sworn evidence, he or she may be able to give unsworn evidence, providing the court has told the person:

- that it is important to tell the truth;
- that he or she should inform the court if asked a question to which he or she does not know, or cannot remember, the answer; and
- that he or she should agree to statements believed to be true and should not feel pressured into agreeing with any statements that are believed to be untrue.

2.12 Proposed subsection 13(8) provides that, in informing itself of the competence of a witness, the court may inform itself as it sees fit, including by referring to the opinion of an expert.

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2 Most of the text in Chapter 2 is taken from both the EM to the Evidence Bill and Parliamentary Library, Bills Digest no.140, 2007-08, 'Evidence Amendment Bill 2008'. Chapter 2 will contain only a general overview of the Bill. Further detailed explanation of each of the Evidence Bill's provisions, as well as the Evidence Act as it currently stands, is provided in the EM and the Bills Digest.

3 EM, p. 5.

*Compellability: exceptions for 'de facto partners'*

2.13 Items 5 to 8 change the definition of 'de facto spouse' in two sections of the Evidence Act which:

- provide for certain exemptions to witnesses who could otherwise be compelled to give evidence (section 18); and
- regulate the commentary that can be made on a decision of such witnesses not to give evidence (section 20).

2.14 Currently, a defendant's spouse or de facto spouse, a parent or a child of the defendant are included in the 'protected witness' category.

2.15 The amendments propose that the Evidence Act's current references to a 'de facto spouse' be broadened to refer to a 'de facto partner'. The term 'de facto partner' is defined in the Dictionary as 'a person who is in a de facto relationship' with a relevant person; a de facto relationship exists 'if the two persons have a relationship as a couple and are not legally married'.<sup>4</sup>

2.16 The EM states that the amendments will ensure 'that the terminology relating to de facto relationships is gender neutral and that the section applies to same-sex couples'.<sup>5</sup> The EM also notes that the definition of 'de facto partner' is 'only intended to cover types of relationships where the two persons have a relationship as a couple'.<sup>6</sup> However, the phrase 'relationship as a couple' is not defined or explained further.

2.17 The definition of 'de facto partner' in proposed subclause 11(3) of Part 2 of the Dictionary (Item 94) specifies the criteria that should be used by the court when determining whether someone qualifies as a de facto partner. In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as are relevant in the circumstances of the particular case:

- the duration of the relationship;
- the nature and extent of their common residence;
- the degree of financial dependence or interdependence, and any other arrangements for financial support, between them;
- the ownership, use and acquisition of their property;
- the degree of mutual commitment to a shared life;
- the care and support of children; and
- the reputation and public aspects of the relationship.

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4 See Items 84 and 94 which insert proposed Clause 11 into Part 2 of the Dictionary.

5 p. 6.

6 p. 6.

2.18 The definition also specifies that whether someone is of the same or opposite sex is irrelevant to the conclusion, as is the question of whether either of the persons concerned is legally married to someone else or is in another de facto relationship. The Bills Digest notes that the 'definition is unusual in that there is no reference to exclusivity, usually a factor in establishing a de facto relationship'.<sup>7</sup> There is also no specific reference in the definition to the existence of a sexual relationship (although presumably this is implied in the reference to having 'a relationship as a couple').

*Manner and form of questioning witnesses*

2.19 Item 10 repeals and replaces current subsection 29(2). New subsection 29(2) allows the court, on its own motion or on application, to direct that a witness give evidence wholly or partly in narrative form, rather than in question and answer format. The EM states that this will give the court more flexibility to receive the best possible evidence without the need for application by a party, which is presently the case. Witnesses such as children and people with an intellectual disability are likely to be assisted by this increased flexibility.<sup>8</sup>

2.20 Item 13 repeals and replaces current section 41 which permits the court to disallow improper questions put to a witness in cross-examination. New section 41 requires the court to disallow improper questions to seek to give greater protection to vulnerable witnesses. Proposed subsection 41(1) describes the types of questions which must be disallowed. These include questions that are misleading or confusing, unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or put to a witness in a manner or tone that is belittling, insulting or otherwise inappropriate. Proposed subsection 41(1) also expands the type of prohibited questions to those which have no basis other than a stereotype, including stereotypes based on age and mental, intellectual or physical disability.

2.21 Proposed subsection 41(2) lists the factors which may be taken into account in determining whether a question should be disallowed. Factors include the witness's age, education, ethnic and cultural background, gender, language background and skills, level of maturity, and understanding and personality.

2.22 Proposed subsection 41(3) provides that a question is not disallowable merely because it challenges the truthfulness of the witness, or the consistency or accuracy of any statement made by the witness; or the question requires the witness to discuss a subject that could be considered by the witness to be distasteful or private.

2.23 Proposed subsection 41(4) provides that a party may object to a question put to a witness on the ground that it is a disallowable question.

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7 p. 11.

8 p. 7.

2.24 Proposed subsection 41(5) provides that the duty imposed by section 41 on the court applies regardless of whether or not an objection is raised to a particular question.

2.25 Proposed section 41 applies to both civil and criminal proceedings. Proposed subsection 41(6) provides that a failure by the court to disallow a question under section 41 will not affect the admissibility of the witness's answer.

### *Documents*

2.26 Item 14 repeals and replaces existing subsection 50(1) to allow an application to adduce evidence of the contents of two or more documents in question (where the contents are voluminous or complex) to be able to rely on a summary of documents to be made at any time in proceedings: its effect is that applications to rely on summary documents could be made *during* a hearing, rather than *before* a hearing commences (which is currently the case).

### *Amendments to Chapter 3 of the Evidence Act – Admissibility of evidence*

#### *Exclusion of hearsay: section 59*

2.27 Section 59 of the Evidence Act provides the general exclusionary hearsay rule:

Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.

2.28 In the Uniform Evidence Law Report, the Commissions considered the distinction between intended and unintended assertions, and noted the difficulties introduced by the courts in interpreting section 59.

2.29 Items 17 and 18 propose amendments to section 59 so as to clarify the meaning of 'intention' in section 59.

2.30 New subsection 59(1) provides that, in determining whether a person intended to assert the existence of facts contained in a previous representation, the test to be applied should be based on what a person in the position of the maker of the representation can *reasonably be supposed to have intended*. The test proceeds on the basis that intention may be properly inferred from the external and objective manifestations normally taken to signify intention. Although direct evidence of subjective intention can be considered, investigation or proof of the subjective mindset of the person who made the representation is not required.

#### *Exception to the hearsay rule: evidence relevant for a non-hearsay purpose*

2.31 Section 60 of the Evidence Act provides that:

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The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

2.32 Item 22 inserts new subsections 60(2) and (3). Proposed subsection 60(2) clarifies that section 60 operates to permit evidence admitted for a non-hearsay purpose to be used to prove the facts asserted in the representation, whether the evidence is first-hand or more remote hearsay (that is, whether or not the person had first-hand knowledge based on something seen, heard or otherwise perceived). Proposed subsection 60(3) inserts a safeguard to ensure that evidence of admissions in criminal proceedings that is not first-hand is excluded from the scope of section 60.

*Exception to the hearsay rule: in criminal proceedings if the maker is not available*

2.33 Items 28-30 amend section 65. Current section 65 provides an exception to the hearsay rule in certain circumstances when a person is not available to give evidence.

2.34 Item 30 repeals and replaces current paragraph 65(2)(d) and introduces a second limb to the hearsay rule exception relating to previous representations in criminal proceedings when the maker of the representations is not available. Current paragraph 65(2)(d) only contains one limb and provides that the hearsay rule does not apply to a previous representation made against the interests of the maker at the time it was made.

2.35 The EM states that the assumption behind this provision was that, where a statement is against the interests of the person who made it, this provides an assurance of reliability. However, where the person who made the statement is an accomplice or co-accused, this may not be the case.

2.36 Item 30 inserts the requirement that a representation which is made against the interests of the maker should also be made in circumstances that make it likely that the representation is reliable. The provision is not restricted to accomplices and co-accused, as statements against interest may also arise in other situations.

*Exception to the hearsay rule: in criminal proceedings where the maker is available*

2.37 Current section 66 provides an exception to the hearsay rule where, in a criminal proceeding, a person who made a previous representation is available to give evidence about an asserted fact. Such a person may give evidence where the 'occurrence of the asserted fact was fresh in the memory of the person who made the representation'. The Uniform Evidence Law Report noted that the courts have had difficulty in interpreting the meaning of 'fresh in the memory', as a result of the High Court's decision in *Graham v The Queen*.<sup>9</sup>

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9 (1998) 195 CLR 606.

2.38 New subsection 66(2A) clarifies that the 'freshness' of the memory of a witness in criminal proceedings who has made a previous representation 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 considerations which may be relevant to an assessment of 'freshness'.

*Exception to the hearsay rule: electronic communications*

2.39 Item 33 repeals and replaces current section 71 which provides an exception to the hearsay rule for representations contained in documents recording a message that has been transmitted via telecommunications. New section 71 will allow for a broader and more flexible definition of the technologies which fall within the exception. The definition is not device-specific or method-specific, embraces all modern technologies, and is sufficiently broad to capture future technologies.

*New exception to the hearsay rule: Aboriginal and Torres Strait Islander traditional laws and customs*

2.40 Item 34 repeals and replaces section 72 with a new 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 Australian Aboriginal or Torres Strait Islander group.

2.41 The Uniform Evidence Law Report found that the Evidence Act should be amended to make the hearsay rule more responsive to Aboriginal and Torres Strait Islander oral tradition. In particular, the Commissions considered that it is not appropriate for the legal system to treat orally transmitted evidence of traditional law and custom as prima facie inadmissible, when this is the very form by which law and custom are maintained under Indigenous traditions.<sup>10</sup>

2.42 According to the EM, the intention of this new exception is to make it easier for the court to hear evidence of traditional laws and customs, where relevant and appropriate. The exception moves 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.<sup>11</sup>

2.43 The EM also notes that current requirements of relevance contained in sections 55 and 56 of the Evidence Act may operate to exclude representations which do not have sufficient indications of reliability. Reliability will also be ensured if courts continue to use their powers to control proceedings to create a culturally

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10 p. 16.

11 p. 16.



appropriate context for the giving of evidence regarding the existence or content of particular traditional laws and customs. Further safeguards are also provided by the court's powers under sections 135, 136 and 137 to exclude or limit the use of evidence.<sup>12</sup>

*New exception to the opinion rule: Aboriginal and Torres Strait Islander traditional laws and customs*

2.44 Section 76 of the Evidence Act provides that:

Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

2.45 Items 35 and 36 introduce an exception to the 'opinion rule' which will allow members of an Aboriginal and Torres Strait Islander group to give opinion evidence about the existence or non-existence, or the content, of the traditional laws and customs of the group.

2.46 The Uniform Evidence Law report found that a member of an Aboriginal or Torres Strait Islander 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.

2.47 People who are not members of the group will have their competence to give such evidence determined under current section 79, on the basis of their specialised knowledge gained through training, study or experience.

*Exception to the opinion rule: admissibility of expert evidence*

2.48 Section 79 of the Evidence Act provides an exception to the opinion rule where the opinion is based on specialised knowledge. The EM notes that expert opinion evidence on the development and behaviour of children can be relevant to a range of matters in legal proceedings and can be important in assisting the court to assess other evidence or to address misconceived notions about children and their behaviour.<sup>13</sup> However, the Uniform Evidence Law Report found that courts show a continuing reluctance in many cases to admit this type of evidence.

2.49 Item 38 inserts new subsection 79(2) to clarify that the exception covers expert evidence about child development and behaviour, particularly in cases of sexual assault. The changes will allow expert opinion to be used by a court to inform itself about the competence of a witness.

2.50 This amendment will also have an impact on the use of the credibility rule. New section 108C provides a new exception to the credibility rule where a person has

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12 p. 16.

13 p. 17.

specialised knowledge based on the person's training, study or experience, mirroring the amendment of proposed section 79(2) relating to the opinion rule.<sup>14</sup>

### *Admissions in criminal proceedings*

2.51 The purpose of current section 85 is to ensure that only reliable evidence is placed before the court, by requiring the prosecution to demonstrate that the particular admission was made in circumstances which make it unlikely that its truth was adversely affected.

2.52 Item 40 amends subsection 85(1) to ensure that evidence of admissions in criminal proceedings that is not first-hand is excluded from the ambit of section 60 (exception to the hearsay rule) by repealing and replacing existing subsection 85(1). The words 'in the course of official questioning' in paragraph 85(1)(a) will be replaced with 'to or in the presence of, an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence'. This clarification aims to enhance the reliability of evidence by broadening the period where the questioning might take place. Apart from implementing a recommendation made by the Commissions in the Uniform Evidence Law Report, this proposed amendment would also implement developments in case law.<sup>15</sup>

2.53 The amendment will also require that the reliability of an admission made by a defendant is tested where that admission is made to, or in the presence of, an investigating official performing functions in connection with the investigation, or as a result of an act of another person capable of influencing the decision whether to prosecute.

2.54 The EM states that the amendment goes further than the recommendation made by the Commissions in two respects because of recommendations by the SCAG working group, which were also approved by the SCAG expert reference group, and form part of the model evidence provisions.<sup>16</sup> Following a decision in the Victorian Supreme Court in 2006 that suggested covert operatives may be included in the scope of section 85, the words '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 to prosecute' have been added to paragraph 85(1)(b). Further, to avoid doubt, the term 'official questioning' has been removed from other parts of the Evidence Act (this has occurred via Items 41, 65, 70 and 89).

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14 New section 108C is explained in further detail below.

15 The amendment addresses the reasons of the majority of the High Court in *Kelly v The Queen* (2004) 218 CLR 216.

16 p. 19.

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*Coincidence evidence*

2.55 Item 43 repeals and replaces current section 98 with a new section 98 which introduces a general test for the coincidence rule. Item 43 will reduce the threshold for admitting coincidence evidence to require *consideration* of similarities in events or circumstances, rather than the existing threshold that there *are* similarities in events or circumstances.

2.56 The Commissions considered that the existing test raises a high threshold and could exclude highly probative evidence from the ambit of the provision. New section 98 will apply where the party adducing the evidence relies on any similarities in the event *or* the circumstances in which they occurred, *or* any similarities in both the events and circumstances in which they occurred.

2.57 The requirement to give reasonable notice in writing to other parties is retained, as is the requirement for the court to be satisfied that the evidence will have significant probative value.

*Credibility of witnesses*

2.58 Item 45 inserts new Divisions 1 and 2 into the Evidence Act and proposes to amend the credibility rule in order to clarify its interpretation. New subsection 101A will provide a definition of credibility evidence and new section 102 will restate the credibility rule.

2.59 Proposed section 101A defines credibility evidence as evidence that:

- (a) is relevant only because it affects the assessment of the credibility of the witness or person; or
- (b) is relevant because it affects the assessment of credibility of the witness or person and is relevant, but not admissible, or cannot be used, for some other purpose under Parts 3.2 to 3.6 of the Evidence Act.

2.60 New section 101A addresses the literal interpretation of existing section 102 adopted by the High Court in *Adam v The Queen*.<sup>17</sup> Section 102 currently states that evidence that is relevant only to a witness's credibility is not admissible. Prior to the decision in this case, the provisions in Part 3.7 (Credibility) had been used to control the admissibility of evidence relevant both to credibility and a fact in issue. The consequence of this decision is that the credibility rule will not apply if evidence is relevant both to credibility and a fact in issue, even where the evidence is not admissible for the purpose of proving a fact in issue.

2.61 The decision in the case of *Adam* has led to the situation in which control of evidence relevant for more than one purpose, including credibility, depends entirely upon the exercise of the discretions and exclusionary rules contained in sections 135

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17 (2001) 207 CLR 96.

to 137 of the Evidence Act. According to the EM, this has the potential to lead to greater uncertainty, inconsistent outcomes and increased appeals. Evidence relevant to both credibility and a fact in issue, but not admissible for the latter purpose, should be subject to the same rules as other credibility provisions.<sup>18</sup>

2.62 Item 45 also adds a note to section 101A to clarify that section 60 (exception to the hearsay rule) and section 77 (exception to the opinion rule) are not relevant in the determination of admissibility for another purpose under section 101A because they cannot apply to evidence which has not yet been admitted.

2.63 New section 102 is not intended to change the law on credibility evidence, instead restating the credibility rule in simpler terms. It states that credibility evidence about a witness is not admissible.

2.64 Items 48-51 are consequential amendments arising out of the amendments in Item 45.

*Exception to the credibility rule: cross examination as to credibility*

2.65 Current subsection 103(1) provides that the credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value. Probative value is defined to mean:

The extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

2.66 Item 46 amends subsection 103(1) by replacing the words 'has substantial probative value' with 'could substantially affect the assessment of the credibility of the witness'. The rationale for the change is that the proposed wording is more accurate and draws on the construction adopted by the Court of Criminal Appeal in *R v RPS*<sup>19</sup> which has allowed the courts to give meaning to the section.

2.67 Current section 106 provides that the credibility rule does not apply to rebutting a witness's denials by other evidence in specific circumstances (for example, where evidence tends to prove the witness's bias or motive to be untruthful). The Uniform Evidence Law Report noted that these specific circumstances or exceptions may be too limiting and may prevent the admission of important evidence.

2.68 Item 52 implements two key changes by repealing and replacing section 106. First, the court may grant leave to adduce evidence relevant to credibility outside the current categories. Second, evidence relevant to credibility may be led not only where the witness has denied the substance of the evidence in cross-examination, but also where he or she did not admit or agree to it.

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18 p. 21.

19 Unreported, NSW Court of Criminal Appeal, 13 August 1997.

2.69 Items 53-56 make amendments restructuring the provisions in a new Division 3 that relates to credibility of persons who are not witnesses. In particular, Item 54 repeals and replaces subsection 108A(1) to reflect the new definition of credibility and the changes to section 102 in Item 45.

*New exception to the credibility rule: admissibility of expert evidence*

2.70 Item 56 inserts new section 108C into the Evidence Act. Proposed section 108C creates a new exception to the credibility rule and applies to expert opinion evidence that could substantially affect the assessment of the credibility of a witness. The court must give leave for this evidence to be adduced. The purpose of the amendment is to permit expert opinion evidence in situations where it would be relevant to the fact-finding process (for example, to prevent misinterpretation of behaviour of a witness with an intellectual disability or cognitive impairment or inappropriate inferences from that behaviour). The EM states that this proposed amendment complements the amendments to section 79 contained in Item 38.<sup>20</sup>

*Privilege: client legal privilege*

2.71 The 'client legal privilege' allows a lawyer's client to refuse giving evidence on the grounds that it is information falling within that client/lawyer relationship.

2.72 Current section 122 provides that client legal privilege is lost by consent, or by knowing and voluntary disclosure of the substance of the evidence. Item 62 amends section 122 to provide that evidence may be adduced where a client or party has acted in a manner inconsistent with the maintenance of the privilege; that is, the operation of the client legal privilege will be restricted where the privilege has already been expressly or impliedly waived. The EM states that this test of inconsistency 'sits well with the underlying rationale of section 122, namely, that the privilege should not extend beyond what is necessary, and that voluntary publication by the client should bring the privilege to an end'.<sup>21</sup>

*Privilege: privilege against self-incrimination*

2.73 Item 63 replaces the current procedure under section 128 where a witness claims the privilege against self-incrimination.

2.74 The privilege against self-incrimination allows a witness to object to giving evidence if it would go to establishing that they have committed an offence or are liable to a civil penalty. The court must decide whether there are reasonable grounds for the objection and, if so, must tell the witness that they can refrain from giving evidence.

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20 p. 25. New section 79 is discussed in more detail above.

21 p. 26.

2.75 However, the court is able to insist that the witness give the evidence if the 'interests of justice' require it (although only if the evidence does not go to show guilt of an offence or liability for a civil penalty in a foreign country). The court can also offer the witness a choice about whether to give the evidence, and can explain that it can provide a certificate regarding that evidence which would ensure that in further proceedings the certified evidence cannot be used against the witness.

2.76 The proposed changes to the privilege against self-incrimination are largely technical. The changes arise from concerns noted in the Uniform Evidence Law Report that the current certification process is cumbersome and hard to explain to witnesses; comments were also made about the necessity to invoke the process in relation to each question. A preferable approach was that the broader 'subject matter' of the evidence, rather than the 'particular evidence' be protected.<sup>22</sup>

2.77 To address these concerns, new section 128 has been expanded to cover not only 'particular evidence' but also 'evidence on a particular matter' (proposed subsection 128(1)).

2.78 In addition, section 128 has been restructured to simplify the order in which the process of certification is outlined in the section.

2.79 Item 63 also introduces a new section 128A which provides a process to deal with objections on the grounds of self-incrimination made by a person who is subject to a search order (Anton Pillar) or a freezing order (Mareva) in civil proceedings other than under proceeds of crime legislation.

#### *Presumptions relating to electronic communications*

2.80 Item 68 repeals and replaces section 161 to facilitate proof of electronic communications.

2.81 Currently, there is no provision in the uniform Evidence Acts that applies presumptions relating to the sending and receiving of electronic communications generally. New section 161 will address this issue by providing presumptions relating to the sending and receipt, as well as the source and destination, of the electronic communication. The term 'electronic communication' is defined in the Dictionary at Item 86 and includes all modern technologies, including telecommunications.

#### *Advance rulings on evidentiary issues*

2.82 Item 78 inserts a new section 192A to provide that the court may, if it considers appropriate, give an advance ruling or make an advance finding in relation to the admissibility of evidence and other evidentiary questions, and in relation to the giving of leave, permission or directions under section 192.

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22 EM, p. 27.

2.83 The EM states that this proposed amendment addresses the finding of the High Court in *TKWJ v The Queen*<sup>23</sup> that the uniform Evidence Acts only permit advance rulings to be made in cases where leave, permission or direction is sought under the legislation. The power to give advance rulings carries significant benefits in promoting the efficiency of trials and allows counsel to select witnesses and prepare for trial with greater certainty.

*Miscellaneous amendments: the term 'lawyer'*

2.84 Items 11, 12, 58, 66, 67, 76 and 77 contain amendments to replace the term 'lawyer' with 'Australian legal practitioner or legal counsel' in various sections of the Evidence Act. 'Lawyer' is defined in the Dictionary as a barrister or solicitor. Items 80 and 88 insert definitions of the terms 'Australian legal practitioner' and 'legal counsel' into the Dictionary. The EM states that it has been unclear whether the term 'lawyer' requires a person to hold a current practising certificate or whether it is sufficient that the person be admitted on the roll of the relevant court.<sup>24</sup> The effect of the proposed amendments is to ensure that the sections will apply to lawyers with a valid practising certificate, as well as 'legal counsel', that is, lawyers who do not have a current practising certificate but are otherwise permitted to practise in that jurisdiction.

2.85 Items 12 and 77 are similar amendments. They replace the term 'lawyer' with 'Australian legal practitioner or legal counsel or prosecutor'. Item 91 incorporates a new definition of 'prosecutor' into the Dictionary.

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23 (2002) 212 CLR 124.

24 p. 8.