SECOND READING SPEECH

Evidence Amendment Bill 2010

Mr Speaker, the purpose of this Bill is to implement national model evidence legislation based on the recommendations arising out of a review of the uniform Evidence Acts by the Australian, Victorian and New South Wales Law Reform Commissions.

Before proceeding to consider the changes made by the Bill I will outline the background to its development in some more detail.

In 1995 the Commonwealth and New South Wales adopted Model uniform evidence legislation. This uniform scheme was subsequently adopted in Tasmania and Norfolk Island.

Around the tenth anniversary of the Commonwealth and New South Wales Acts coming into force, the Australian, New South Wales and Victorian Law Reform Commissions were given a joint reference to review the operation of the uniform evidence Acts.

In the course of their review, the commissions conducted consultations in every State and Territory, and submissions were received from 130 individuals and organisations.

The commissions provided a final Report on Uniform Evidence Law to their respective Attorneys-General in December 2005, advising that the uniform Acts are working well and there are no major structural problems with the Acts or their underlying

policy but recommending a number of changes to clarify and improve the Acts.

Hereinafter for brevity I will refer to this 2005 Report as "the Report".

The Standing Committee of Attorneys General subsequently established an officers' working group to consider the recommendations and, where agreement was reached, to refer the recommendations to the Parliamentary Counsels' Committee for the drafting of model amendments.

An expert reference group, consisting of practitioners, academics and judicial officers and chaired by former New South Wales Supreme Court Justice, the Hon James Wood, then reviewed the draft model amendments.

The Standing Committee of Attorneys General approved the adoption of the amendments (with the exception of the professional confidential relationships privilege) into the model Uniform Evidence Act.

New South Wales and the Commonwealth have already passed legislation based on the draft model bill to amend their existing uniform Evidence Acts.

In addition Victoria has now adopted the national model Uniform Evidence Act and the Northern Territory has signalled its intention to adopt the national model in the future.

The expansion of the uniform evidence scheme will allow for the development of a broad, consistent body of case law on evidentiary matters across the Commonwealth.

Overview

The majority of the amendments in this Bill are for clarification, procedural improvement and to rectify confusing court decisions or uncertainties in the legislation.

The intention of the Bill is to ensure that the rules of evidence continue to be fair, clear, efficient and up-to-date.

I will now deal in some detail with the intent and operation of the key amendments that the Bill proposes.

Availability of witnesses

The Bill replaces subsection 3B (1) of the Act, which sets out the circumstances when a person is taken not to be available to give evidence, with a new subsection.

The main change made by the new subsection is to provide that a person is taken not to be available to give evidence if the person is mentally or physically unable to give the evidence and it is not reasonably practical to overcome the inability.

It is not intended that this amendment should lower the standard of unavailability generally – a person should not be considered unavailable to give evidence simply because the person produces a medical certificate.

A real mental or physical inability to testify must be shown – for example a person who is unable to hear or speak may be able to give evidence in writing in response to written questions, in which case the inability would be overcome.

Competence of Witnesses

The Bill replaces section 13 of the Act which deals with the competence of a witness to give evidence.

The Report noted that the current section 13, which contains two different tests for giving sworn and unsworn evidence, had been criticised for being too restrictive.

The new section 13 provides that all witnesses must satisfy a test of general competence that 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 revised test is to enhance participation of witnesses and to ensure that relevant information is before the court.

The new section also provides that even if the general test of competence is not satisfied in relation to one fact, the 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 that require inferences to be drawn.

The new section will restate the proposition 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.

However, the section will provide that a person who is not competent to give sworn evidence about a fact may provide unsworn evidence about the fact.

This provision will allow young children and others (for example, adults with an intellectual disability) to give unsworn evidence even though they do not understand or cannot adequately explain concepts such as an 'obligation to tell the truth'.

It will be up to the court to determine the weight to be given to unsworn evidence.

Before a person may give unsworn evidence the person must be competent to give evidence under subsection (1) and the court must inform 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 not feel pressured into agreeing with any statements that are untrue.

Questioning witnesses

The primary way in which witnesses give evidence is by question and answer, but this method may be unsuitable for a number of witnesses, such as children, people with an intellectual disability and others who may not be accustomed to this style of communication.

To give the court flexibility to receive evidence in narrative form without the need for application by the party who called the witness, the Bill amends section 29 of the Act to allow the giving of evidence in narrative form, which means that the witness can give evidence as a continuous story in his or her own words.

Improper Questions

Currently Section 41 of the Act permits the court to disallow improper questions put to a witness in cross-examination. The Report concluded that the use of current section 41 to control improper questions was patchy and inconsistent and that greater protection for vulnerable witnesses was needed.

The Bill replaces the current section with a new section that *requires* the court to disallow improper questions. The new section describes the types of questions that must be disallowed and contains a more extensive list of the factors which may be taken into account in determining whether a question should be disallowed.

New subsection 41(3) clarifies 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 is considered by the witness to be distasteful or private.

Voluminous evidence

Currently, section 50 only allows proof of the contents of voluminous or complex documents by the tender of a summary if an application is made before the commencement of the hearing.

However, in some cases, it may only become apparent once evidence begins to be adduced that a summary would be sufficient, could streamline proceedings and assist the court.

The Bill amends this section to allow applications to rely on summary documents to be made during a hearing.

Hearsay rule

The Bill amends section 59, which deals with the hearsay rule, to confirm and clarify the intended operation of the rule against hearsay.

The rule against hearsay prevents evidence of a previous representation from being admitted for the purpose of proving a fact that the maker intended to assert by the representation.

The main rationale for the rule is to avoid any unfairness that would be caused by the admission of a representation made by a witness whose evidence cannot be cross-examined directly in court.

The amended section will provide expressly 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, having regard to the representation and the circumstances in which it was made.

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.

The amendment is intended to counter the approaches to determining 'intention' explored by the NSW Supreme Court in *R v Hannes* (2000) 158 FLR 359.

The Report stated that the reasoning in that case was problematic and there was a risk that the reasoning of the Court was too broad and could give rise to practical difficulties.

Section 60 is also amended to ensure that the clarification of the meaning of intention applies in the context of section 60 as well as section 59.

In addition a new subsection 60(2) is inserted to counter any confusion arising from reasoning in the High Court case of *Lee v The Queen (1998)195 CLR 594* and to confirm that section 60 permits evidence admitted for a non-hearsay purpose to be used to prove the facts asserted in the representation whether or not the person had first hand knowledge based on something they saw, heard or otherwise perceived.

A new subsection (3) is inserted to ensure that evidence of admissions in criminal proceedings that is not first-hand is excluded from the scope of section 60.

Exceptions to hearsay rule

The Bill amends section 64 of the Act, which provides for an exception to the hearsay rule in civil proceedings when the maker of the statement is available to give evidence, to remove the requirement that the exception only applies if, when the representation was made, the asserted fact was fresh in the memory of the person making the representation.

The Report stated that this was not an important indicator of reliability and that freshness in memory could be taken into account when determining the weight to be given to the representation.

The Bill also amends section 65, an exception to the hearsay rule in criminal proceedings where the maker of a representation is not available to give evidence, so that a representation which is an admission against interest must also

be made in circumstances that make it likely to be reliable before it will be admissible.

Section 66, an exception to the hearsay rule in criminal proceedings when the maker of the statement is available to give evidence, is amended by the Bill to make it clear that freshness of the memory of the maker may be determined by taking into account all relevant matters, not just the temporal relationship between the event and the representation.

The Bill amends sections 71 and 161 so that the sections apply to all forms of electronic communications, not simply "tele-communications" and "telexes" as currently.

The Bill also moves the current section 72, which relates to contemporaneous statements about a person's health etc, to be a new section 66A, to make it clear that the exception only applies to first-hand hearsay.

A new section 72 is inserted by the Bill to provide 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.

The Report stated that the Act should be amended to make the hearsay rule more responsive to Aboriginal and Torres Strait Islander oral tradition and make it easier for the court to hear evidence of traditional laws and customs, where relevant and appropriate.

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 and passed on to later generations under Indigenous traditions.

Exceptions to Opinion Rule

The Bill also inserts a new section 78A which is a new 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.

The Report stated 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.

It is pleasing to note that what was section 79A in the Tasmanian Act and unique to Tasmania has now been adopted in the uniform evidence Act as a new subsection (2) to section 79.

This subsection clarifies the admissibility of expert evidence relating to child behaviour and development, particularly in cases of sexual assault.

Replacement of phrase "official questioning"

Section 85 currently provides that an admission made by a defendant in a criminal proceeding in the course of "official questioning" or as a result of an act of another person able to influence the prosecution process is inadmissible unless the circumstances in which it was made make it unlikely that the truth of the admission was adversely affected.

The matters the courts take into account in deciding whether the truth was adversely affected include any relevant characteristic of the defendant, the nature of any questioning and the nature of any threat, promise or inducement made.

In *Kelly v The Queen* (2004) 218 CLR 216 the High Court (on appeal from the Tasmanian Court of Criminal Appeal) considered the meaning of "official questioning". The majority of judges considered that the phrase "official questioning"…"marks out a period of time running from when questioning commenced to when it ceased" and that statements made before a nominated time for questioning, within a reasonable time after the conclusion of questioning or "as a result of questioning" are not made "in the course of official questioning". In dissent their honours McHugh and Kirby construed the phrase more broadly.

The proposed amendment to section 85 - to replace the phrase "in the course of official questioning" - broadens the scope of section 85 to cover admissions made "to, or in the presence of, an investigating official who at the time was performing functions in connection with the investigation of the commission, or possible commission, of an offence".

The amendment is consistent with the interpretation by Justice Kirby in *Kelly*.

The Report noted that there was "support both for and against expanding the scope of section 85. Those involved in the investigation or prosecution of criminal offences tend to be against the expansion of the section, while those involved in assisting accused persons tend to favour broadening the scope of s 85."

The Report went on to recommend that section 85 be broadened.

The Law Reform Commissions considered it significant that all the judgements in *Kelly* acknowledged that the reason for section 85 was to overcome the perceived problem of the so-called "police verbal".

The point of divergence between the majority and dissenting judgments was whether the language of the Act supported the purposive interpretation.

The Commissions were "particularly persuaded by the argument that the majority interpretation may allow the police to circumvent section 85 by nominating times for the beginning and end of questioning".

The Report stated that the purpose of section 85 is to ensure the reliability of admissions placed before the court.

If a person makes an admission to a police officer and that admission is at risk of being unreliable due, for example, to a subjective characteristic of the accused, the fact that the police officer did not suspect the person was the perpetrator or the officer was not officially questioning that person at the time of the admission has no bearing on the relative reliability of the statement.

For consistency within the Act this Bill also replaces the phrase "in the course of official questioning" in section 89 (Evidence of silence) and removes the adjective "official" before "questioning" in sections 139 (Cautioning person) and 165 (Unreliable evidence).

It must be noted that the Tasmanian Act currently differs from the uniform Act by the inclusion of section 85A, which sets out the requirements for the admissibility in a proceeding for a serious offence of evidence of an admission made by a defendant during official questioning.

Section 85A was previously section 8(1) of the *Criminal Law (Detention and Interrogation) Act 1995*, the section which was considered in *Kelly*.

This section requires that there be an audio-visual record of the interview during which the admission was made unless the prosecution can show on the balance of probabilities that there is a reasonable explanation why this is not the case (the mandatory taping provisions).

In all other uniform Evidence Act jurisdictions with equivalent mandatory taping provisions the requirements are to be found in legislation other than the Evidence Act.

The Report stated that it was beyond the scope of the reference to consider amending the mandatory taping provisions because the provision is not currently part of the uniform evidence Act regime.

The Report stated the view that "the amendment to section 85 will not affect the operation of the mandatory taping provisions."

This Bill therefore does not amend the phrase "in the course of official questioning" in section 85A because it is important not to expand the requirement for mandatory taping simply because these provisions are contained in the *Evidence Act* in Tasmania.

To amend the mandatory taping provisions would place a considerable practical and administrative burden on police as it would require audio-visual taping whenever the accused is in the presence of an investigating official.

Coincidence Rule

The Bill replaces the current section 98 to reduce the threshold for admitting coincidence evidence from the existing threshold where both the events and the circumstances in which they occurred must be substantially similar, to allow coincidence evidence to be admitted where there are any similarities in the events or the circumstances in which they occurred.

Credibility Rule

The Bill inserts into Part 7 of the Act a new section 101A to define credibility evidence to ensure that Part 7 applies to evidence relevant only to credibility as well as evidence relevant both to credibility and some other purpose but which is not admissible for that other purpose.

The Bill also inserts a new Division 3 into Part 7 to deal specifically with the admissibility of evidence of credibility of a person who has made a previous representation and who will not be called to give evidence.

The new Division also makes provision for the admissibility of credibility evidence about an accused who is not a witness but where a previous representation of the accused has been admitted.

The Bill also inserts a new Division 4 into Part 7 to provide a new exception to the credibility rule for opinion evidence on the credibility of a another witness given by a person who has specialised knowledge based on the person's training, study or experience.

This new Division will make it clear that the exception covers evidence of a person with specialised knowledge of child development and behaviour and includes evidence in relation to the development and behaviour of children generally and the development and behaviour of children who have been victims of sexual offences.

Privileges

The Bill amends section 122 (client legal privilege) to provide for the loss of the privilege where a client or party has acted in a manner inconsistent with the assertion of the privilege.

The Bill inserts a new Division 1A in Part 10 to provide for a Professional Confidential Relationship Privilege.

This new privilege will enable claims, such the claim of an accountant or financial adviser to refuse to answer questions about his or her clients, or the claim of a journalist to refuse to disclose his or her sources, to be tested before the Court.

The new privilege is not absolute but will help reconcile the tension between professional and ethical standards and the legal duty to provide relevant evidence to the Court when requested.

The privilege recognises that there may be a range of competing public interests relevant to determining whether a confidential communication should be disclosed.

The new privilege gives the court the discretion to protect a confidence made to a confidant acting in a professional capacity in circumstances in which the confidant was under an express or implied obligation not to disclose that confidence.

The court must direct that a protected confidence not be adduced if it is satisfied that if the evidence is adduced it is likely that harm would or might be caused (whether directly or indirectly) to the confider, and that the nature and extent of the harm outweighs the desirability of the evidence being given.

Tasmania will retain the absolute privilege in a civil proceeding for a communication to a medical practitioner (section 127A) and the absolute privilege in a criminal proceeding for a communication to a counsellor by the victim of a sexual offence (section 127B) which are Tasmanian provisions not found in the Model Uniform Evidence Act but had been part of Tasmanian law and were included in the Evidence Act (Tas) when it was passed in 2001.

The Bill replaces section 128 (privilege in respect of self-incrimination) to clarify the procedure and to make further provision with respect to the assertion of, and effect of asserting, the privilege against self-incrimination.

The new section will expand the grounds of objection to the giving of evidence to cover not only particular evidence but also evidence on a particular matter.

The new section also simplifies the process for granting a certificate to prevent incriminating evidence given by a witness being used against that person in other proceedings and to clarify the effect of a certificate.

As well as amending section 128 as recommended by the Report, new subsections (8) and (9) have been added to address two issues that arose in *Cornwell v The Queen* [2007] HCA 12 , a case which had not yet been decided by the High Court when the Report was handed down.

In that case the accused was granted a certificate under section 128 in his first trial for evidence given by him that may have incriminated him in relation to other possible charges.

After a hung jury, a retrial commenced for the same offence which resulted in argument over whether the retrial counted as a new proceeding for the purposes of the then section 128 subsection (7) and therefore whether the evidence for which the certificate had been granted could be adduced in the retrial.

There was also argument as to whether the certificate had been validly granted in the first place.

New subsection (8) ensures that a witness can rely on a certificate regardless of any challenge, review, quashing or calling into question on any ground of the decision to give or the validity of the certificate.

This change has been made on the basis that the granting of a certificate under section 128 is not the same as any other evidential ruling and to ensure that the policy behind the section is carried into effect, the witness must be certain of being able to rely on that certificate in future proceedings.

New subsection (9) clarifies that a 'proceeding' under the section does not include a retrial for the same offence, or a trial of the defendant for an offence arising out of the same facts that gave rise to that offence.

In other words, a certificate is not to be used by an accused to prevent the use of his or her evidence in another proceeding for the same offence, or in a proceeding in which he or she is charged with an alternative count, for example, manslaughter, if the first, failed trial in which he or she gave the evidence under certificate was for murder.

The Bill also inserts new subsections (11), (12) and (13) in this section to provide that where a State or Territory court issues a certificate under this section the certificate will be given mutual recognition in other UEA jurisdictions.

The Commonwealth Act already provides for mutual recognition.

The intention of the privilege is to encourage witnesses to testify and potentially provide valuable evidence on the matter at hand without fear of incriminating themselves in another matter and mutual recognition of State and Territory certificates under the UEA reinforces this policy objective.

The Bill also inserts a new section 128A to make provision for an assertion of the privilege against self-incrimination in respect of disclosure of information in connection with search orders (such as Anton Pillar orders) and freezing orders (such as Mareva injunctions) in civil proceedings.

This provision is based on a further consideration of the issue by the Victorian Law Commission in 2006 and not the Report.

The new section provides a means for evidence to be secured and provided to the court in a sealed envelope.

The court is then empowered to require disclosure of that evidence to the party seeking it where, upon consideration, the court determines that the interests of justice require it and a certificate providing use and derivative use immunity is given to the disclosing party.

The protection conferred by new section 128A does not apply to documents that were in existence before a search or freezing order was made and any pre-existing documents annexed or exhibited to the privilege affidavit are also not covered by the protection conferred by section 128A.

As with section 128, section 128A contains mutual recognition provisions.

The Bill also inserts a new section 131A to extend certain specified privilege provisions to compulsory processes for disclosure such as discovery.

Warnings

The Bill inserts a new section 165A into the Act to clarify that child witnesses are not to be considered inherently less reliable than adult witnesses.

Juries often underestimate the credibility of child witnesses under the misconception that the evidence of children is inherently less reliable than that of adults and this misconception is reinforced when judges give general warnings about the unreliability of child witnesses.

Research conducted in recent years demonstrates that a child's cognitive and recall skills are not inherently less reliable than those of an adult.

This amendment addresses the popular misconceptions and reinforces the policy underpinning section 165 that warnings should only be given where the circumstances of the case indicate they are warranted.

New section 165A (1) provides that in any proceeding in which evidence is given by a child before a jury, the judge is prohibited from warning or suggesting to the jury, firstly, that children as a class are unreliable witnesses; secondly, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny than the evidence of adults; thirdly, that a particular child's evidence is unreliable solely on account of the age of the child; and, fourthly, in criminal proceedings, that it is dangerous to convict on the uncorroborated evidence of a witness who is a child.

However, new subsection 165A (2) permits the judge to either 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.

The expression in that subsection – "circumstances (other than solely the age of the child)" – encompasses such things as characteristics of individuals of the witness's age (for example suggestibility), characteristics unique to that child (for example intellectual disability), and circumstances unique to that child (for example the manner in which the investigation was conducted

conducted or the manner in which the child was questioned).

The Bill also inserts a new section 165B to replace the existing common law on *Longman* warnings so as to limit the circumstances in which they need to be given and to clarify their operation.

In *Longman v The Queen* (1989) 168 CLR 79, the majority of the High Court held that the jury in a sexual assault case should have been warned that, as the evidence of the complainant could not be tested adequately after the passage of time, it would be dangerous to convict on that evidence alone unless the jury, scrutinising the evidence with great care, was satisfied of its truth and accuracy.

In addition to the warning about delay, the Court also found that the jury should have been warned about the risk of fantasy and the potential for delay, emotion, prejudice or suggestion to distort recollection.

There is considerable evidence that *Longman* warnings on the effects of delay are given almost routinely and in circumstances where the delay is of relatively short duration.

This proposed amendment clarifies that there is no irrebuttable presumption of forensic disadvantage arising from delay and that information provided to the jury in relation to forensic disadvantage arising from delay should only be given where there is an identifiable risk of prejudice to the accused.

The mere passage of time is not to be regarded as a significant forensic disadvantage.

Moreover, the information provided to the jury should not be couched in language like ‘dangerous or unsafe to convict’ as

these words are considered an encroachment on the fact-finding task of the jury and open to the risk of being interpreted as a direction to acquit.

Accordingly, the new section refers not to "warnings", but rather to the court informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account.

Miscellaneous Provisions

The Bill inserts a new section 192A to provide 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.

The power to give advance rulings carries significant benefits in promoting the efficiency of trials by allowing counsel to select witnesses and prepare for trial with greater certainty.

This proposed amendment addresses the finding of the High Court in *TKWJ v The Queen* (2002) 212 CLR 124 that the uniform Evidence Acts only permit advance rulings to be made in cases where leave, permission or direction is sought under the Act

The Bill also amends references to "lawyer" throughout the Act in a way that is consistent with the Legal Profession Act 2007.

National model amendments not included in the Bill

There are only two amendments to the national model that are not included in this Bill.

The first is the replacement of the definition of "de facto spouse" with a new definition of "de facto partner" to widen the definition and make it gender neutral. In the Tasmanian Act there is no current definition of "de facto spouse" as "spouse" is now defined to include a person in a significant relationship within the meaning of the *Relationships Act 2003*. This definition is wider than the proposed new definition of "de facto partner" and is gender neutral and therefore no change is required.

The second is an amendment to section 104(4) (b) and (c) where the Tasmanian Act currently differs from the Uniform Evidence Act as the result of a deliberate policy decision to retain the provisions as they were in the *Evidence Act 1910*.

Like this speech, the clause notes provided with this Bill are detailed as the Standing Committee of Attorneys General officers' working group agreed that, in the interests of maintaining uniformity, there should be uniform clause notes (called an explanatory memorandum in other jurisdictions) to accompany the Bill.

I commend the Bill to the House.

CLAUSE NOTES

Evidence Bill 2008

Note: A reference in these Clause notes to "the Report" is a reference to the Uniform Evidence Law Report jointly released by the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission in December 2005.

Clause 1: Short Title

Clause 2: Commencement

Clause 3: Principal Act

Clause 4: Amends section 3 – Interpretation to:

- Insert definitions of the terms 'Australian lawyer', 'Australian legal practitioner', 'Australian practising certificate', 'Australian registered foreign lawyer', 'legal counsel' and 'overseas-registered foreign lawyer' for the purposes of the Act. The terminology and definitions are consistent with the model National Legal Profession laws.
- Inserts a definition of 'legal counsel' to cover Australian lawyers who do not require a current Australian practising certificate to practise law. Examples of

legal counsel include in-house counsel and government lawyers.

- inserts a cross-reference to the definition of credibility evidence in section 101A
- inserts a definition of 'electronic communication' by reference to the *Electronic Transactions Act 2000*...
- inserts a definition of 'prosecutor'
- inserts a definition of traditional laws and customs. The definition is intended to be broader than the High Court interpretation of 'traditional laws and customs' as referring to laws and customs which originate in the normative system of Aboriginal and Torres Strait Islander societies prior to the assertion of sovereignty by the British Crown. The definition contains a non-exhaustive list of matters that fall within the definition, such as the customary laws, traditions, customs, observances, practices, knowledge and beliefs of a group (including a kinship group) of Aboriginal or Torres Strait Islander people.

Clause 5: Repeals and replaces subsection 3B(1) of the Principal Act to include as a new ground of unavailability the situation where a person is mentally and physically unable to give the evidence and it is not

and it is not reasonably practical to overcome that difficulty. This amendment implements Recommendation 8-2 of the Report.

It is not intended that this amendment should lower the standard of unavailability generally. A person should not be considered unavailable to give evidence simply because the person produces a medical certificate. A real mental or physical inability to testify must be shown.

The qualification that the 'inability' of the witness 'cannot reasonably be overcome' is designed to exclude the possibility that, for example, a person unable to speak or hear but who can communicate in writing may be considered 'physically unable' to testify: there will generally be reasonable measures for overcoming such difficulties.

Clause 6: Repeals and replaces current section 13 and sets out a new test for determining a witness's competence to give sworn and unsworn evidence. This implements recommendations 4-1 and 4-2 of the Report and focuses on the ability of a person to act as a witness.

Current section 13 contains two different tests for giving sworn and unsworn evidence, which both require a witness to demonstrate an understanding of the difference between truth and lies. The Report noted that these tests have been criticised for being

for being too similar and restrictive. The approach adopted clarifies the distinction between sworn and unsworn evidence.

New section 13 provides that all witnesses must satisfy the test of general competence in subsection 13(1). This test of general competence 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 revised test of general competence is to enhance participation of witnesses and to ensure that relevant information is before the court.

The revised test of general competence 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. When considering whether incapacity can be overcome, the court should consider alternative communication methods or support depending on the needs of the individual witness.

New subsection 13(2) provides that even if the general test of competence is not satisfied in relation to one fact, the 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.

New 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).

New subsection 13(4) provides that, subject to the requirements of subsection 13(5) being met, a person who is not competent to give sworn evidence about a fact may provide unsworn evidence about the fact. The provision will allow young children and others (for example, adults with an intellectual disability) to give unsworn evidence even though they do not understand or cannot adequately explain concepts such as an 'obligation to tell the truth'. It is up to the court to determine the weight to be given to unsworn evidence.

New subsection 13(5) provides that if a person is not competent to give sworn evidence, then he or she may be able to give unsworn evidence. The court is required to inform 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 not feel pressured into agreeing with any statements that are untrue.

New subsection 13(6) provides that a person is presumed to be competent to give evidence, unless it is proven that he or she is incompetent. This provision restates current subsection 13(5).

New subsection 13(7) provides that evidence given by a witness is not inadmissible solely on the basis that the witness dies or is no longer competent to give evidence. This provision restates current subsection 13(6).

New subsection 13(8) provides that, when a court is determining if a person is competent to give evidence, the court may inform itself as it thinks fit, including by referring to the opinion of an expert. This expands on current subsection 13(7) by specifically referring to information from experts. This provision is not intended to allow an expert to supplant the court's role in determining a witness's competence. Rather it is intended to emphasise that the court may have recourse to expert assistance (for example, to identify any alternative communication methods or support needs which could facilitate the giving of evidence by a person with a disability).

Under this new general test of competence, rulings as to competence may be made not only before the witness commences to give evidence but as that witness's evidence proceeds.

Clause 7: Amends current subsection 14(a) by replacing the words 'be capable of hearing or understanding, or of communicating replies to, questions on that matter', with 'have the capacity to understand a question about the matter or to give an answer that can be understood to a question about the matter'. This clause implements recommendation 4-3 of the Report.

This is a consequential amendment arising out of clause 6 which introduces a general test of competence into section 13.

Clause 8: Amends current section 21 by removing the reference to subsection 13(2) and replacing it with a reference to section 13. This is a consequential amendment arising from clause 6 which introduces a general test of competence into section 13

Clause 9: This clause implements recommendation 5-1 of the Report. The amendment gives the court flexibility to receive the best possible evidence without the need for application by a party by modifying the existing requirement that a party must apply to the court for a direction that the witness may give evidence in narrative form. New subsection 29(2) provides that a court may, on its own motion or on application, direct that the witness give evidence wholly or partly in narrative form.

Should the process result in undue delay or inadmissible evidence being given, the court has

general powers to control proceedings, and specific powers under sections 135, 136 and 137 to exclude or limit the use of evidence.

Clause 10: Amends section 33(2)(c) to ensure that it applies 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. The terms 'Australian legal practitioner' and 'legal counsel' are defined by the amendments to section 3.

Clause 11: Amends section 37, which deals with leading questions in examination and cross-examination of witnesses, to ensure that it covers lawyers with a valid practising certificate, lawyers who are otherwise permitted to practise in that jurisdiction, and non-lawyers responsible for conducting prosecutions (such as police prosecutors). A new definition of 'prosecutor' is included in section 3

Clause 12: Repeals and replaces current section 41 which permits the court to disallow improper questions put to a witness in cross-examination. This clause implements recommendation 5-2 of the Report. The Report concluded that the use of current section 41 to control improper questions was patchy and inconsistent and that more protection for vulnerable witnesses was needed.

New section 41 requires the court to disallow improper questions.

New subsection 41(1) describes the types of questions that must be disallowed. This includes questions that are misleading or confusing, unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate and questions which have no basis other than a stereotype, including stereotypes based on age and mental, intellectual or physical disability.

New subsection 41(2) lists the factors which may be taken into account in determining whether a question should be disallowed. Factors include (but are not limited to) the witness's age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality. This list of factors in new subsection 41(2) is more extensive than the list in current subsection 41(2).

The amendments to current paragraphs 41(2)(a) and 41(2)(b) clarify that the court can both observe the relevant characteristics of the witness or be advised of them by counsel when determining whether a question should be disallowed.

The new 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 statements made by the witness, or is

is considered by the witness to be distasteful or private.

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

Clause 13: **R**epeals and replaces current subsection 50(1) to allow an application to rely on a summary of documents to be made at any time in proceedings. This clause implements recommendation 6-1 of the Report

Current paragraph 50(1)(a) only allows proof of contents of voluminous or complex documents by the tender of a summary where an application is made before the commencement of the hearing. Preparation of a summary may be overlooked before a hearing commences, or not be completed in time. In some cases, it may only become apparent once evidence begins to be adduced that a summary could streamline proceedings and assist the court. New subsection 50(1) allows applications to rely on summary documents to be made during a hearing. An application may still be rejected if it is opposed and evidence of prejudice or disadvantage is demonstrated by the opposing party.

Clause 14: This clause implements Recommendation 7-1 of the Report.

The clause:

- amends current subsection 59(1) by inserting the words 'it can reasonably be supposed that' after 'a fact that'.

- inserts a new subsection 59(2A) to clarify what the court should consider in determining the meaning of 'intention'.

New section 59 provides expressly 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.

These amendments are intended to counter the approaches to determining 'intention' explored by the NSW Supreme Court in *R v Hannes* (2000) 158 FLR 359. According to Spigelman CJ's reasoning in that case an 'intended' fact could include (1) facts specifically and consciously adverted to by the maker, as well as (2) any fact which is a necessary assumption underlying the fact subjectively adverted to. This reasoning is problematic because proof of a

subjective state of mind is very difficult to ascertain, and particularly so if a party must argue that the representation was *not* intended to assert the existence of a particular fact. Secondly, the policy of the Act is to exclude unintended assertions from the rule against hearsay. There is a risk that the reasoning in relation to necessary assumptions is too broad and could therefore give rise to practical difficulties. There is also a risk that it would result in the exclusion of relevant evidence of implied assertions assumed by a fact adverted to, even though the implied assertion, when considered independently of the adverted fact it supports, could not reasonably be supposed to have been intended.

Clause 15: Repeals and replaces section 60 to insert new subsections 60(2) and (3). This clause implements recommendations 7-2 and 10-2 of the Report. Section 60 contains an exception to the hearsay rule for evidence that is admitted for a non-hearsay purpose.

New subsection 60(2) is a response to the decision of *Lee v the Queen* (1998) 195 CLR 594, in which the High Court held that section 60 does not make admissible evidence of a representation the truth of which the witness did not intend to assert . *Lee* has been interpreted to mean that second-hand and more remote hearsay does not fall within section 60. As a consequence, evidence of unintended implied assertions or second-hand hearsay may now be treated as subject to the hearsay rule. However,

section 60 was not intended to be limited to first-hand hearsay, either in relation to prior statements or in relation to the factual basis of expert evidence.

New 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. This amendment is intended to overrule the reasoning in the case of *Lee v The Queen(1998) 195 CLR 594* to the extent that it is inconsistent with the principal that section 60 applies to relevant first-hand and more remote hearsay, subject only to the mandatory and discretionary exclusions in Chapter 3, Part 11.

New 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. This amendment implements recommendation 10-2 of the Report, but it does so by amendment to section 60 rather than by amendment to section 82.

Clause 16: Repeals and replaces current subsection 61(1) to align the exception to the hearsay rule dependent on competency with new section 13. This clause implements recommendation 4-3 of the Report.

This is a consequential amendment arising out of clause 6 which amends section 13 and sets out a new test for determining a witness's competence to give sworn and unsworn evidence. This clause ensures

ensures that the terminology used in subsection 61(1) is consistent with the new test expressed in section 13.

Clause 17: Inserts a new subsection 62(3) to align section 62 with new section 66A. This clause relates to recommendation 8-5 of the Report.

Subsection 62(2) defines 'previous representation' in terms which are not wide enough to cover all the matters referred to in the new section 66A, such as intention or knowledge. New subsection 62(3) ensures all previous representations under section 66A are considered first-hand hearsay. This is a consequential amendment arising out of clause 22 (contemporaneous statements about a person's health).

Clause 18: Amends current subsection 64(3) which provides an exception to the hearsay rule in civil proceedings when the maker of the representation is available. This clause implements recommendation 8-1 of the Report.

The effect of this clause is to remove the requirement that, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation. The Report found that in practice, the requirement of freshness in memory is not considered an important indicator of evidentiary reliability. However, the court may still take this factor into account in determining the weight to be

given to the evidence, and whether to exclude or limit the use of the evidence under sections 135 through 137.

Clause 19: Amends subsection 65(2) by deleting the word 'was' from the phrase 'if the representation was' and then re-inserts the word was at the beginning of paragraphs (a), (b) and (c) to improve the clarity of these provisions.

The clause also 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 is not available. This item implements recommendation 8-3 of the Report.

The current paragraph 65(2)(d) only contains one limb and provides that the hearsay rule would not apply to a previous representation made against the interests of the maker at the time it was made. 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. An accomplice or co-accused may be motivated to downplay the extent of his or her involvement in relevant events and to emphasise the culpability of the other. An accomplice or co-accused may be more inclined to take such a course where, for example, they have immunity from prosecution. Then, the fact that the representation is against self-

is against self-interest is no longer a reliable safeguard or indicator of reliability.

This item adds 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 arise in other situations.

Clause 20: Inserts a new subsection 66(2A). This clause implements recommendation 8-4 of the Report and is a response to *Graham v The Queen* (1998) 195 CLR 606.

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. For example, the Report referred to psychological research showing that the nature of an event should be considered in determining 'freshness' of memory. 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 'freshness'

Clause 21: Re-enacts current section 72 as new section 66A. This clause implements recommendation 8-5 of the Report.

New section 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 section was previously located in Division 3 of Part 2 of Chapter 3, which is titled 'Other exceptions to the hearsay rule'. This section has been moved to Division 2 to clarify that the provision is limited to first-hand hearsay. Similarly, the reference to a 'representation' has been replaced with a reference to a 'previous representation', in order to be consistent with Division 2 and to limit the section to first-hand hearsay.

The exception should not apply to second-hand and more remote forms of hearsay. The Report found that that the exception is only justifiable if there is reason to think that the evidence is reliable. Cross-examination of the person who had personal knowledge of the fact asserted in the representation would allow the court to assess that reliability.

Clause 22: Repeals and replaces current sections 71 and 72.

The amendment to section 71 replaces the words 'a document recording a message that has been transmitted by electronic mail or by a fax, telegram, lettergram or telex' with 'a document recording an

electronic communication'. This clause implements recommendation 6-2 of the Report.

New section 71 allows for a broader and more 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 sufficiently broad to capture future technologies.

A definition of electronic communication has been inserted in section 3.

This clause also 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. The amendment implements recommendation 19-1 of the Report.

The Report found that the Act should be amended to make the hearsay rule more responsive to Aboriginal and Torres Strait Islander oral tradition. 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.

The intention is to make it easier for the court to hear evidence of traditional laws and customs, where relevant and appropriate. The exception inserted by

inserted by this clause 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 sections 55 and 56 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 appropriate context for the giving of evidence regarding the existence or content of particular traditional laws and customs. Further safeguards are provided by the court's powers under sections 135, 136 and 137 to exclude or limit the use of evidence.

Clause 23: Inserts a new 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 amendment implements recommendation 19-2 of the Report.

The 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

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 current section 79, on the basis of their specialised knowledge based on training, study or experience.

The requirement of relevance in sections 55 and 56 may operate to exclude opinions which do not have sufficient indications of reliability, eg where the person is a member of the group but has had little or no contact with that group. Reliability will also be ensured if courts continue to use their 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. Further safeguards are provided by the court's powers, under sections 135, 136 and 137, to exclude or limit the use of evidence.

Clause 24: Substantially re-enacts current section 79A as a new subsection 79(2). The subsection clarifies the admissibility of expert evidence relating to child behaviour and development, particularly in cases of sexual assault. The subsection has become part of the model Uniform Evidence Act following recommendation 9-1 of the Report.

Clause 25: Repeals section 79A, which clause 25 substantially re-enacts as subsection 79(2).

Clause 26: Repeals and replaces the current subsection 85(1) on admissions by a defendant in criminal proceedings. The words 'in the course of official questioning' in paragraph 85(1)(a) are 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 amendment enhances the reliability of evidence in criminal trials and implements recommendation 10-1 of the Report.

This amendment addresses the reasons of the majority of the High Court in *Kelly v The Queen* (2004) 218 CLR 216. The majority held (at [52]) that the phrase 'in the course of official questioning' in the Tasmanian *Criminal Law (Detention and Interrogation) Act 1995* (now repealed) 'marks out a period of time running from when questioning commenced to when it ceased'. McHugh J, in dissent, expressed the concern that such an interpretation would 'make the section's operation hostage to the oral evidence of the police officers as to when the questioning commenced and ended'.

The purpose of section 85 is to ensure that only reliable evidence is placed before the court. The requirements in section 85 place few administrative or resource demands on the police. Rather, it places an onus on the prosecution to show reliability in cases where the truth of an admission may be in doubt due to the circumstances in which it was

made. Limiting, as *Kelly* does, the period of 'official questioning' to one determined by investigating officials is unsatisfactory. This amendment broadens section 85 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. Any admissions made to police during this time will fall within the scope of section 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.

This amendment goes further than recommendation 10-1 of the Report in two respects.

Firstly, in addition to inserting new subsection 85(1), item 37 also amends paragraph 85(1)(b) to add the words 'and who the defendant knew or reasonably believed to be" (capable of influencing the decision to bring or continue a prosecution of the defendant). This is to remove covert operatives from the ambit of the provision, following Callaway JA's suggestion in *R v Tofilau* [2006] VSCA 40 that covert operatives may be included in the scope of section 85.

Secondly, the term 'official questioning' has been removed from sections 89, 139 and 165 of the Act for the sake of consistency (see clauses 27, 40 and 45).

It should be noted that the phrase "official questioning" has been preserved in section 85A of the Tasmanian Act (the mandatory taping provision).

Section 85A was previously section 8(1) of the *Criminal Law (Detention and Interrogation) Act 1995*, the section which was considered in *Kelly* (above). The Report stated that it was beyond the scope of the Commissions' reference to consider amending the mandatory taping provisions because the provision is not currently part of the UEA. (In all other UEA States with equivalent mandatory taping provisions the requirements are to be found in legislation other than the Evidence Act.)

The Report stated the view of the ALRC that "the amendment to section 85 will not affect the operation of the mandatory taping provisions." Because there was no intention that the recommended amendment to section 85 to effect the mandatory taping provisions, and because any change to this provision would place administrative and resource demands on police, section 85A has not been amended.

Clause 27: Amends current subsection 89(1) by replacing the words 'in the course of official questioning' with 'by 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 item implements recommendation 10-1 of the Report.

Subsection 89(1) prevents unfavourable inferences being drawn from a person's silence when questioned. This amendment is inserted for the same reasons as the amendment to paragraph 85(1)(a) at clause 26.

Clause 28: Repeals and replaces current subsection 97(1). The amendment replaces the words 'if' with 'unless' in subsection (1), and 'or' with 'and' in paragraph (a), thereby removing the current double negatives. This item implements recommendation 11-3 of the Report.

Current subsection 97(1) states the tendency rule. The amendment does not change the substantive law, but makes the provision easier to understand.

Clause 29: Repeals and replaces current section 98 with a new section 98 which introduces a general test for the coincidence rule. This amendment implements recommendations 11-1 and 11-2 of the Report.

The coincidence rule applies to evidence sought to be admitted that two or more related events occurred, 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. Current section 98 provides that evidence may not be admitted for coincidence purposes unless it has

'significant probative value'. Therefore, the person adducing the evidence must satisfy the requirement that the probative value of the coincidence evidence substantially outweighs any prejudicial effect it may have on the other party. Reasonable notice of intention to adduce such evidence must also be given to each other party to the proceeding.

Under current section 98 evidence of events which do not satisfy the definition of being substantially or relevantly similar, or which did not occur in substantially similar circumstances, may be adduced to prove that a person did something or had a particular state of mind. Therefore, the control that current section 98 is supposed to exercise over the admissibility of coincidence evidence does not work if the events do not satisfy the definition of related events (ie substantial and relevantly similar, and occurring in circumstances which are substantially similar). Meanwhile, highly probative evidence of unusually similar acts occurring in different circumstances would be excluded under current section 98. Because the coincidence rule is intended to operate as a preliminary screening provision in both civil and criminal proceedings, the threshold should not be set so high.

New section 98 applies where the party adducing the evidence relies on any similarities in the events or the circumstances in which they occurred, or any

similarities in both the events and circumstances in which they occurred.

A number of existing requirements are retained. The current requirement for the party to give reasonable notice in writing to other parties of their intention to adduce the evidence is restated in paragraph 98(1)(a). The current requirement for the court to be satisfied that the evidence will have significant probative value, either by itself or with other evidence, is restated in paragraph 98(1)(b). New subsection 98(2) restates existing exceptions under current subsection 98(3).

Clause 30: Repeals and replaces Part 7 – CREDIBILITY. The main changes to the part are as follows:

Current section 102 is repealed and new sections 101A and 102 are inserted which set out the credibility rule. This amendment implements recommendation 12-1 of the Report.

Part 7 is divided into four Divisions:- 'Division 1 – Credibility evidence'; 'Division 2 – Credibility of witnesses'; Division 3 – Credibility of persons and Division 4- Persons with specialised knowledge. Division 1 contains section 101A, Division 2 contains new section 102 and current sections 103 to 108, Division 3 contains new sections 108A and 108B and Division 4 contains new section 108C.

New section 101A inserts a definition of the evidence to which the credibility rule applies. The section 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 Act. The current section 102 states that evidence that is relevant only to a witness's credibility is not admissible. This amendment addresses the literal interpretation of current section 102 adopted by the High Court in *Adam v The Queen* (2001) 207 CLR 96. The consequence of the 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. Prior to the decision in *Adam*, the provisions in Part 7 (Credibility) had been used to control the admissibility of such evidence. As a result of the decision in *Adam*, that control no longer exists.

The decision in *Adam* has created the unsatisfactory 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 to 137. 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. This amendment enables the section to operate as it was originally intended.

New section 102 restates the credibility rule in simpler terms and is not intended to change the law. It states that credibility evidence about a witness is not admissible.

Current subsection 103(1) is amended by replacing the words 'has substantial probative value' with 'could substantially affect the assessment of the credibility of the witness'. This amendment implements recommendation 12-2 of the Report.

Current subsection 103(1) states 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 in section 3 of the Act but it has been argued that this definition cannot apply to section 103 because the definition refers to the relationship between evidence and a fact in issue, rather than to issues of credibility. In *R v RPS* (unreported, NSW Court of Criminal Appeal, Gleeson CJ, Hunt J at CL and Hidden J, 13 August 1997) Hunt J held that section 103 should be read as meaning that 'evidence adduced in cross-examination must therefore have substantial probative value in the sense

substantial probative value in the sense that it could rationally affect the assessment of the credit of the witness'.

The amendment expressly incorporates this construction of section 103 and maintains the requirement that the evidence relevant to credibility be substantial in order to be admitted.

A consequential amendment is made to subsection 103(2) by deleting the words 'in deciding whether the evidence has substantial probative value' and replacing them with 'for the purposes of subsection (1)'.

Subsection 104(1) is amended to make it clear that section 104 applies only 'to credibility evidence' in a criminal proceeding. Subsection 104(2) is amended by replacing the words 'only because it is relevant to' with 'to the assessment of'. Subsection 104(4) is amended by replacing the words "about any matter that is relevant only because it is relevant to the defendant's credibility" with "under subsection 2". These amendments are consequential to the amendment which inserts a new section 101A.

Subsection 104(4) is further amended by the deletion of current paragraph (a) thereby removing the overlap between paragraph 104(4)(a) and Part 8 (evidence about character). A further consequential amendment has been made to subsection 104(5) by replacing a reference to paragraph 104(4)(b) with a reference to

reference to subsection 104(4).

The note in section 105 is deleted as there is no longer provision under Australian law for unsworn statements to be made by a defendant in a criminal trial.

Current section 106, which provides that the credibility rule does not apply to rebutting a witness's denials by other evidence in specific circumstances, is replaced. This amendment implements recommendation 12-5 of the Report.

There are two key changes to the existing provision. 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.

While new paragraph 106(1)(b) requires that the court give leave to adduce evidence relevant to credibility, new subsection 106(2) provides that leave is not required where the evidence falls within paragraphs 106(2)(a) to (e). Paragraphs (a) to (e) set out the same exceptions as contained in current section 106.

Under the current section 106, the requirement that the substance of the evidence be denied and that the

evidence must be relevant to a defined category may prevent the admission of important evidence for reasons of efficiency rather than fairness. This amendment overcomes this issue by creating a broader basis on which to admit evidence. Evidence not falling within the current exceptions may now be adduced with the court's leave. While this has the potential to lengthen some trials, it is considered that increased flexibility is needed to avoid a miscarriage of justice which is more important then ensuring the efficiency of trials.

Current section 107 has now been amended and removed to become section 108A in Division 3 to clarify that this section applies to all situations in which evidence of a previous representation has been admitted where the maker of the representation is not called to give evidence. This change implements recommendation 12-1 of the Report.

The amendment updates subsection 108A(1) to reflect the new definition of credibility evidence so that credibility evidence about the person will not be admissible unless it could substantially affect an assessment of the person's credibility. This amendment is consistent with the amendment to section 102 and subsection 103(2), and ensures that subsection 108A(1) applies to evidence relevant to credibility.

Section 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. There is generally no obligation on the defence to disclose this information to the prosecution or the court. This may lead to uncertainty for the prosecution before the close of its case where it is not aware whether the relevant person who made the representation will be called. Without this information, the prosecution cannot rely on the provisions of section 108A to admit credibility evidence. However, this problem can be overcome by the prosecution later being able to reopen its case, or being allowed to call a case in reply.

Subsection 108A(2) is amended by deleting the words 'in deciding whether the evidence has substantial probative value' and replacing them with 'for the purposes of subsection (1)'. This amendment improves the clarity of the subsection and is consistent with the amendment to subsection 108A(1).

New sections 108B and 108C are inserted into the Act.

New section 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 section 104. This is to overcome the current position in section 108A where the prosecution can tender a prior representation of the defendant and then lead credibility evidence against the defendant.

New subsection 108B(2) provides that the prosecution must seek the court's leave where they wish 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 subsection 108B(4). Leave is not required where the evidence falls within an exception under subsection 108B(3).

New section 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. 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 witness behaviour or inappropriate inferences from that behaviour).

New subsection 108C(2) clarifies that specialist knowledge includes specialised knowledge of child development and behaviour.

Clause 31: Amends section 112 by correcting 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 change implements recommendation 12-4 of the Report.

This amendment does not make any substantive change to the law.

Clause 32: Amends section 117 which contains the definition of 'client' relevant to client legal privilege. This amendment implements recommendation 14-2 of the Report.

The amendment changes the definition of 'client' in paragraph 117(1)(a) 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 in allowing a client to be an employer of the lawyer

The amendment also clarifies that the definition of 'lawyer' in relation to client legal privilege includes 'Australian lawyers', that is, those who are admitted but do not necessarily have a current practising certificate, as well as foreign lawyers.

This amendment adopts the ACT Court of Appeal decision in *Commonwealth v Vance* [2005] ACTCA 35. In considering the definition of 'lawyer' under section 117, 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 for the purposes of claiming privilege under the Act.

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. The amendment is directed to clarifying that client legal privilege may pertain to lawyers and their employees and agents. However, the amendment is not intended to affect the common law concept of independent legal advice.

This item also extends the definition of 'lawyer' so that it includes a person who is admitted in a foreign jurisdiction. The rationale of client legal privilege 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.

Clause 33: Amends subsection 118(c) by replacing the words 'client or a lawyer' with 'client, lawyer or another person'. This amendment implements recommendation 14-4 of the Report.

Section 118 prevents the admission of evidence of certain confidential communications and documents made for the dominant purpose of a lawyer providing legal advice to the client. Subsection 118(c) has been amended to extend the privilege to confidential documents which may have been 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 34: Repeals and replaces section 122 to align the provision more closely with the common law test for loss of privilege as set out in *Mann v Carnell* (1999) 201 CLR 1. This amendment implements recommendation 14-5 of the Report.

Current section 122 provides that client legal privilege is lost by consent or by knowing and voluntary disclosure of the substance of the evidence. This clause 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. This amendment ensures that new section 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 current section 122. The test of inconsistency

section 122. The test of inconsistency adopted by this amendment 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. The addition of the inconsistency criterion for waiver also gives the court greater flexibility to consider all the circumstances of the case.

Clause 35: Inserts a Professional Confidential Relationship Privilege into the Evidence Act. This amendment implements recommendation 15-1 of the Report.

The new provisions will enable claims such as the claim of an accountant or financial adviser to refuse to answer questions about his or her clients, or the claim of a journalist to refuse to disclose his or her sources, to be tested. The privilege will help reconcile the tension between professional and ethical standards and the legal duty to provide relevant evidence to the courts when requested. The privilege recognises that there may be a range of competing public interests relevant to determining whether a confidential communication should be disclosed.

The new privilege gives the court the discretion to protect a confidence made to a confidant acting in a professional capacity in circumstances in which the confidant was under an express or implied obligation

not to disclose its contents. The privilege is not absolute.

The court must direct that a protected confidence not be adduced if it is satisfied that if the evidence is adduced it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider, and that the nature and extent of the harm outweighs the desirability of the evidence being given.

A court will be able to ensure that any part of a communication or document that should not be disclosed is not adduced.

The court may give such a direction on its own initiative or on the application of the protected confider or confidant concerned (whether or not either is a party).

The new subsection 126B (4) sets out a non-exhaustive list of the matters the court is to take into account in determining whether to exclude evidence. These include the probative value of the evidence in the proceeding, the nature of the subject matter of the proceeding and the importance of the evidence.

New sections 126C and 126D set out some circumstances when the proposed Division will not prevent the adducing of evidence. Evidence will be

able to be adduced with the consent of the protected confider concerned. The professional confidential relationship privilege will be lost for communications made and documents prepared in the furtherance of a fraud, an offence or an act that renders a person liable to a civil penalty.

New section 126E gives some examples of ancillary orders that a court may make to limit the harm, or extent of the harm, that may be caused if evidence of a protected confidence or protected identity information is disclosed.

New section 126F provides for the application of the Division. It makes it clear that the Division does not apply in relation to a proceeding the hearing of which began before the commencement of the Division but applies to protected confidences made whether before or after the commencement. The court will be able to give a direction under the Division in respect of a protected confidence or protected identity information whether or not the confidence or information is privileged under another section of Part 10 or would be so privileged except for a limitation or restriction imposed by that section. For example, current section 127 entitles members of the clergy to refuse to divulge the contents of communications made to them in their professional capacity but is limited to communications made as religious confessions. The proposed Division will enable clergy to object to disclosure of confidences

disclosure of confidences made to them other than confessions.

Clause 36: Replaces the current procedure under section 128 where a witness claims the privilege against self-incrimination. This amendment addresses recommendations 15-7 and 15-8 of the Report.

This change has arisen from concerns noted in the 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.

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

In addition, section 128 has been restructured to simplify the order in which the process of certification is outlined in the section. Rather than including the requirement for the court to inform the witness of his or her rights and the effect of the section, the new section provides:

- that the witness may object to giving the evidence on the grounds that it may incriminate him or her (or make him or her liable to a civil penalty) (subsection 128(1))

- that the court shall determine whether or not that claim is based on reasonable grounds (subsection 128(2))

- if the claim is reasonable, that the court can then tell the witness that he or she may choose to give the evidence or the court will consider whether the interests of justice require that the evidence be given, (subsections 128(3) and (4)) and

- if the evidence is given, either voluntarily or under compulsion, that a certificate shall be granted preventing the use of that evidence against the person in another proceeding (subsection 128(5)).

New subsections 128(8) and 128(9) address two issues that arose in *Cornwell v The Queen* [2007] HCA 12 where the accused was granted a certificate under section 128 in his first trial for evidence given by him that may have incriminated him in relation to other possible charges. After a hung jury, a retrial commenced for the same offence. There was argument over whether the retrial counted as a new proceeding for the purposes of the then subsection 127(7) and therefore whether the evidence for which the certificate had been granted could be adduced in the retrial. There was also argument as to whether the certificate had been validly granted in the first place.

At the time the Report was published, the High Court had not delivered judgment in the *Cornwell* proceeding. In response to the High Court's decision in *Cornwell*, new subsections 128(8) and 128(9) have been included in addition to the amendments made in response to recommendation 15-7 of the Report.

New subsection 128(8) provides that subsection 128(7) applies regardless of any challenge, review, quashing or calling into question on any ground of the decision to give or the validity of the certificate concerned. This amendment has been made on the basis that the granting of a certificate under section 128 is not the same as any other evidential ruling. To ensure that the policy of section 128 is carried into effect, the witness must be certain of being able to rely on that certificate in future proceedings.

The new subsection 128(9) makes clear that a 'proceeding' under the section does not include a retrial for the same offence, or a trial of the defendant for an offence arising out of the same facts that gave rise to that offence. That is, the new subsection 128(9) seeks to make clear that a certificate is not to be used by an accused to prevent the use of his or her evidence in another proceeding for the same offence, or in a proceeding in which he or she is charged with an alternative count (eg manslaughter, if the first, failed trial in which he or she gave the evidence under certificate was for murder).

New subsections 128(12), 128(13) and 128(14) provide that where a State or Territory court issues a certificate under this section the certificate will be given mutual recognition in other UEA jurisdictions.

The intention of the privilege is to encourage witnesses to testify and potentially provide valuable evidence on the matter at hand without fear of incriminating themselves in another matter. Mutual recognition of State and Territory certificates under the UEA reinforces this policy objective.

Clause 37: Inserts 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.

This amendment addresses, but does not implement, recommendation 15-10 of the Report. Recommendation 15-10 was that self-incrimination privilege be abrogated in relation to search and freezing orders. The Victorian Law Reform Commission (VLRC) revisited this issue in its 2006 Report 'Implementing the Uniform Evidence Act'. The VLRC developed draft provisions which, rather than preventing claims for privilege being made entirely, provide a means for evidence to be secured and provided to the court in a sealed envelope. Under these draft VLRC provisions the court is then empowered to require disclosure of that evidence to the party seeking it where, upon consideration, the

the court determines that the interests of justice require it and a certificate providing use and derivative use immunity is given to the disclosing party. The new section 128A is based on the work of the VLRC.

The new section clarifies that the privilege against self-incrimination under the Act applies to disclosure orders. 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 (subsection 128A(2)). If the court finds there are reasonable grounds for the objection, the court must not require the disclosure of the information and must return it to the person (subsection 128A (5)).

If the court is satisfied 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 (subsection 128A (6)). The court must give the person a certificate in respect of the information that is disclosed (subsection 128A (7)). Evidence of that information and evidence of any information, document or thing obtained as a direct result or

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 (subsection 128A(8)).

Subsection 128A (9) clarifies that the protection conferred by section 128A does not apply to documents that were in existence before a search or freezing order was made. Any pre-existing documents annexed or exhibited to the privilege affidavit are also not covered by the protection conferred by section 128A.

New subsection 128A (10) departs from recommendation 15-10, in similar terms to the departure at subsection 128(8). In response to the High Court's decision in *Cornwell*, new subsection 128A(10) provides that section 128A(8) applies regardless of any challenge, review, quashing or calling into question on any ground of the decision to give or the validity of the certificate concerned. This amendment has been made on the basis that the granting of a certificate under section 128A is not the same as any other evidential ruling. To ensure that the policy of section 128A is carried into effect, the witness must be certain of being able to rely on that certificate in future proceedings.

New subsections 128A(11), 128A(12) and 128A(13) provide that where a State or Territory court issues

a certificate under this section, the certificate will be given mutual recognition in other UEA jurisdictions.

Clause 38: Inserts a new section 131A, which expands the scope of privileges in the Act so that they apply to any process or order of a court which requires disclosure as part of preliminary proceedings. This amendment implements recommendation 14-6 and recommendations 14-1, 15-3 and 15-11 in part.

The Report noted that the introduction of the Evidence Acts has resulted in two sets of laws operating in the area of privilege. Where the Evidence Acts govern the admissibility of evidence of privileged communications and information, the common law does not apply. In all other situations, the common law rules persist unless a statute expressly abrogates the privilege. This means that within a single proceeding, different laws apply at the pre-trial and trial stages. Individuals' ability to resist or obtain disclosure of the same information may vary depending on the stage of the proceedings in which it is sought.

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

This provision implements these recommendations in

in part, by extending the operation of the privileges to pre-trial court proceedings. The provision does not extend the privileges to non-curial contexts.

The provision implements recommendation 14-6 by ensuring that section 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.

Clause 39: Removes the heading to Part 11 of Chapter 3 'Discretions to exclude evidence' and replaces it with 'Discretionary and mandatory exclusions'. This amendment implements recommendation 16-1 of the Report.

This is a technical amendment which reflects that Part 11 contains both discretionary and mandatory exclusions.

Clause 40: Amends section 139(2) by omitting "official questioning" and substituting "questioning". This item relates to recommendation 10-1 of the Report.

Current section 139 deems a statement made or acts done by a person during questioning by an investigating official to have been obtained improperly if the person is not properly cautioned prior to the questioning. This amendment is to address the reasons of the majority of the High Court in *Kelly v The Queen* (2004) 218 CLR 216 and is consequential to the amendment of section 85 (clause 26)

Clause 41: Amends section 148 by replacing the word 'lawyer' with 'Australian lawyer' in the heading and where first occurring.

Section 148 is designed to facilitate proof of a range of legal documents and should not be constrained by a narrow definition of 'lawyer'.

Clause 42: Repeals and replaces section 161 to facilitate proof of electronic communications. This amendment implements recommendation 6-3 of the Report.

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 addresses this issue by providing presumptions relating to the sending and receipt as well as the source and destination of the electronic communication.

'Electronic communication' is defined in the Dictionary at item 85 and embraces all modern electronic technologies, including telecommunications, as well as the more outmoded facsimile and telex methods of communication.

Clause 43: Amends section 164 by omitting subsection (4) as the content of this subsection is now included in new section 165A (1) (d) – see clause 44.

Clause 44: **A**mends the heading to Part 4.5 by inserting the words 'and information' after the word 'Warnings'. This relates to recommendation 18-2 of the Report.

This is a consequential amendment arising out of clause 42 which amends provisions relating to warnings about children's evidence and delay in prosecution.

Clause 45: (a) Removes the words 'official questioning' from paragraph 165(1) (f) and replaces them with 'questioning by an investigating official'. This relates to recommendation 10-1 of the Report. This amendment is for the same reasons as the amendment to section 85 (see clause 26).

(b) Inserts a new subsection into section 165 which deals with warnings for categories of unreliable evidence. New subsection 165(6) provides that a judge must not warn or inform a jury that the reliability of a child's evidence may be affected by the age of the child except as provided in new section 165A. This amendment relates to recommendation 18-2 of the Report.

Clause 46: Inserts new sections 165A and 165B which deal with warnings in relation to children's evidence and delay in prosecution. This implements recommendations 18-2 and 18-3 of the Report.

Section 165A

New section 165A is intended to displace the common law practices of giving warnings.

Juries often underestimate the credibility of child witnesses under the misconception that the evidence of children is inherently less reliable than that of adults. This misconception is reinforced when judges give general warnings about the unreliability of child witnesses.

Research conducted in recent years demonstrates that children's cognitive and recall skills are not inherently less reliable than those of adults. This is discussed in Chapter 18 of the Report. This amendment addresses these misconceptions and reinforces the policy underpinning section 165 that warnings should only be given where the circumstances of the case indicate they are warranted.

New subsection 165A (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, and

- in criminal proceedings, that it is dangerous to convict on the uncorroborated evidence of a witness who is a child.

However, subsection 165A (2) permits the judge to either:

- 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.

The judge may give a warning or inform the jury if a party has requested the warning or information and the court is satisfied that there are circumstances particular to that child (other than their age) that affect the reliability of the child's evidence and warrant the giving of the warning or information.

The expression 'circumstances (other than solely the age of the child)' encompasses all of the following:

- characteristics of individuals of the witness's age (eg suggestibility)
- characteristics unique to that child (eg disability), and
- historical or current circumstances unique to that child (eg the manner in which the investigation was conducted, the manner in which the child was questioned).

Section 165B

New section 165B regulates information which may be given to juries in criminal proceedings on the subject of delay resulting in forensic disadvantage to the accused.

The purpose of new section 165B is to replace the existing common law on *Longman* warnings so as to limit the circumstances in which they are given and clarify their operation. In *Longman v The Queen* (1989) 168 CLR 79, the majority of the High Court held that the jury in a sexual assault case should have been warned that, as the evidence of the complainant could not be tested adequately after the passage of time, it would be dangerous to convict on that evidence alone unless the jury, scrutinising the evidence with great care, was satisfied of its truth and accuracy. In addition to the warning about delay, the Court also found that the jury should have been warned about the risk of fantasy and the potential for delay, emotion, prejudice or suggestion to distort recollection.

There is considerable evidence that *Longman* warnings on the effects of delay are given almost routinely and in circumstances where the delay is of relatively short duration. This amendment clarifies that there is no irrebuttable presumption of forensic disadvantage arising from delay and that information provided to the jury in relation to forensic disadvantage arising from delay should only be given where there is an identifiable risk of prejudice to the

accused. Such prejudice should not be assumed to exist merely because of the passage of time.

Moreover, the information provided to the jury should not be couched in language like 'dangerous or unsafe to convict' as these words are considered an encroachment on the fact-finding task of the jury and open to the risk of being interpreted as a direction to acquit. Accordingly, section 165B has been drafted to refer not to warnings to the jury, but rather to the court informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account.

Subsection 165B(2) provides that if the court is satisfied, on application by the defendant, that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence.

The section contains two safeguards. First, the mere passage of time is not to be regarded as a significant forensic disadvantage (subsection 165B (4)). Significant forensic disadvantage arises not because of delay itself, but because of the consequences of delay – such as the fact that any potential witnesses have died or are not able to be located, or the fact that potential evidence has been lost or is otherwise unavailable.

The second safeguard is that the court need not take this action if there are good reasons for not doing so (subsection 165B (3)).

Subsection 165B(5) provides that no particular form of words need to be used in giving the information, but that the judge must not suggest that it would be dangerous or unsafe to convict the defendant because of the delay.

The court remains bound by the overriding obligation to prevent any miscarriage of justice. As a result, if the judge considered that the requirements of section 165B could be made out and counsel had failed to apply for the warning, the judge would be bound to ask counsel (in the absence of the jury) whether such a warning was requested.

The information regarding forensic disadvantage and delay which may be given under section 165B is distinct from jury directions relating to credibility and delay in complaint.

Clause 47: Amends section 184 which relates to consent or admissions made by an accused by inserting a new subsection 184(2).

In the interests of greater uniformity, section 184 is amended to follow the procedure in subsection 190(2) more closely. The new subsection 184(2) reflects the test in subsection 190(2) so that a defendant may give the relevant consent or make the relevant admission if:

- advised to do so by his or her Australian legal practitioner or legal counsel, or
- the court is satisfied that the defendant understands the consequences of doing so.

The section will now be uniform throughout UEA jurisdictions, so the note to the section has been omitted.

Clause 48: Amends section 189(6) to replace the reference to Section 128(8) with a reference to Section 128(10). This change is consequential on the amendments to section 128 made in clause 35.

Clause 49: Omits the word lawyer from paragraph 190(2)(a) and replaces it with "Australian legal practitioner or legal counsel".

Section 190 deals with consent to the waiver of rules of evidence. This amendment ensures that the defendant can be advised in relation to the waiver by a lawyer who has a current practising certificate and those who are otherwise permitted to practice in that jurisdiction.

Clause 50: Omits the word 'lawyers' from paragraph 191(3)(a) and replaces it with 'Australian legal practitioners, legal counsel or prosecutors'.

Section 191 deals with agreements by the parties as to facts. This amendment ensures that representatives of the parties who can agree to the facts in a statement in writing include lawyers who

have a current practising certificate, those who are otherwise permitted to practise in that jurisdiction and prosecutors.

Clause 51: Inserts a new section 192A to implement recommendation 16-2 of the Report. Section 192A 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.

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

This amendment addresses the finding of the High Court in
TKWJ v The Queen (2002) 212 CLR 124 that the uniform Evidence Acts only permit advance rulings to be made in cases where leave, permission or direction is sought under the Act. The power to give advance rulings carries significant benefits in promoting the efficiency of trials. It allows counsel to select witnesses and prepare for trial with greater certainty. Without such a power, tactical decisions, particularly in relation to character evidence, are based on speculation.

Clause 52: Amends section 197 to omit subsections (3) and (4). Savings and transitional matters will now be dealt with in Schedule 2 as provided by new section 200 inserted by Clause 51.

Clause 53: Inserts a new section 200 which provides that Schedule 2 has effect with respect to savings and transitional matters.

Clause 54: Inserts Schedule 2 – Savings, Transitional and other Provisions

FACT SHEET

Evidence Amendment Bill 2008

This Bill amends the *Evidence Act 2001* (the Act) to implement most of the recommendations made by the Australian Law Reform Commission, New South Wales Law Reform Commission and the Victorian Law Reform Commission in their inquiry into the operation of the uniform Evidence Acts. The inquiry was conducted over an 18 month period with consultations in every State and Territory. A total of 130 written submissions were received from a wide range of individuals and organisations.

The Commissions reported that the uniform evidence Acts are working well but they made a range of recommendations to 'fine tune' the law and promote harmonisation between Australian jurisdictions.

The amendments in this Bill are largely technical and will have most impact on the courts and legal practitioners. They promote uniform evidence laws in order to increase efficiencies for the courts, legal practitioners and business.

However the Bill contains a number of important reforms including amendments to make it easier for children and people with a cognitive impairment to give evidence, to promote the use of narrative evidence and to control cross-examination of vulnerable witnesses.

Key changes relate to:

- the hearsay rule; to provide further guidance on the definition of hearsay evidence
- admissions in criminal proceedings;
- coincidence evidence; to lower the threshold for admitting coincidence evidence;
- credibility of witnesses;
- advance rulings on evidentiary issues; to make it clear that the court has the power to make an advance ruling or finding in relation to any evidentiary issue, and
- warnings and directions to juries.