

**This is the model Evidence Amendment Bill 2007 prepared by the Parliamentary Counsel's Committee and endorsed by the Standing Committee of Attorneys-General on 26 July 2007.**

## **Evidence Amendment Bill 2007**

### **Contents**

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	Page
1 Name of Act	1
2 Commencement	1
3 Amendment of Evidence Act 1995 No 25	1
Schedule 1 Amendments to Evidence Act 1995	2
Schedule 2 Amendment of other Acts	34

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**1 Name of Act**

This Act is the *Evidence Amendment Act 2007*.

**2 Commencement**

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

**3 Amendment of Evidence Act 1995 No 25**

The *Evidence Act 1995* is amended as set out in Schedule 1.

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## Schedule 1 Amendments to Evidence Act 1995

(Section 3)

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**DRAFTING NOTE 3.1** This Schedule contains draft amendments to the NSW Evidence Act 1995 giving effect to instructions on the LRC recommendations in relation to a model State Bill.

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**[1] Section 4 Courts and proceedings to which Act applies** Rec 2-4.

Omit “in relation” from section 4 (1).

**[2] Section 4, notes** Rec 2-5. first set of instructions para 58-60.

Insert after note 3:

<sup>4</sup> See section 79 of the *Judiciary Act 1903* of the Commonwealth for the application of this Act to proceedings in a State court exercising federal jurisdiction.

**[3] Section 13** Rec 4-1, 4-2.

Omit the section. Insert instead:

**13 Competence: lack of capacity**

- (1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):
- (a) the person does not have the capacity to understand a question about the fact, or
  - (b) the person does not have the capacity to give an answer that can be understood to a question about the fact,

and that incapacity cannot be overcome.

**Notes.**

1 See sections 30 and 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.

- (2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.
- (3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.

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- (4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.
  - (5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person:
    - (a) that it is important to tell the truth, and
    - (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs, and
    - (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.
  - (6) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.
  - (7) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.
  - (8) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience.

**[4] Section 14 Compellability: reduced capacity** Rec 4-3.

Omit "be capable of hearing or understanding, or of communicating replies to, questions on that matter" from section 14 (a).

Insert instead "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".

**[5] Section 18 Compellability of spouses and others in criminal proceedings generally** Rec 4-4, 4-5, 4-6.

Omit "de facto spouse" from section 18 (2).

Insert instead "de facto partner".

**[6] Section 20 Comment on failure to give evidence** Rec 4-4,4-5, 4-6.

Omit "de facto spouse" from section 20 (3) (a).

Insert instead "de facto partner".

**[7] Section 20 (4) and (5) (b)**

Omit “de facto spouse” wherever occurring. Insert instead “de facto partner”.

**[8] Section 21 Sworn evidence to be on oath or affirmation** Rec 4-1-4-3

Omit “section 13 (2)” from section 21 (2). Insert instead “section 13”.

**[9] Section 25, note** Rec 12-8.

Omit the note.

**[10] Section 29 Manner and form of questioning witnesses and their responses** Rec 5-1.

Omit section 29 (2). Insert instead:

- (2) A court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence wholly or partly in narrative form.

**[11] Sections 33, 184 and 190** Rec 14-3.

Omit “lawyer” wherever occurring.

Insert instead “Australian legal practitioner or legal counsel”.

**[12] Section 37 Leading questions** Rec 14-3.

Omit “a lawyer” from section 37 (1)(c).

Insert instead “an Australian legal practitioner, legal counsel or prosecutor”.

**[13] Section 41** Rec 5-2.

Omit the section. Insert instead:

**41 Improper questions**

- (1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a *disallowable question*):
  - (a) is misleading or confusing, or
  - (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
  - (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
  - (d) has no basis other than a stereotype (for example, a stereotype based on the witness’s sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

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- (2) Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:
- (a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and
  - (b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject, and
  - (c) the context in which the question is put, including:
    - (i) the nature of the proceeding, and
    - (ii) in a criminal proceeding—the nature of the offence to which the proceeding relates, and
    - (iii) the relationship (if any) between the witness and any other party to the proceeding.
- (3) A question is not a disallowable question merely because:
- (a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness, or
  - (b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.
- (4) A party may object to a question put to a witness on the ground that it is a disallowable question.
- (5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.
- (6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

**Note.** A person must not, without the express permission of a court, print or publish any question that the court has disallowed under this section—see section 195.

**[14] Section 50 Proof of voluminous or complex documents** Rec 6-1.

Omit section 50 (1). Insert instead:

- (1) The court may, on the application of a party, direct that the party may adduce evidence of the contents of 2 or more documents in question in the form of a summary if the court is satisfied that it

would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question.

**[15] Chapter 3, Introductory note**

Omit “Part 3.11 gives courts discretions to exclude evidence”.

Insert instead “Part 3.11 provides for the discretionary and mandatory exclusion of evidence”.

**[16] Chapter 3, Introductory note, diagram**

Omit “Should a discretion to exclude the evidence be exercised?”.

Insert instead “Should a discretion to exclude the evidence be exercised or must it be excluded?”.

**[17] Section 59 The hearsay rule—exclusion of hearsay evidence** Rec 7-1.

Insert “it can reasonably be supposed that” after “a fact that” in section 59 (1).

**[18] Section 59 (2A)** Rec 7-1.

Insert after section 59 (2):

- (2A) For the purposes of determining under subsection (1) whether it can reasonably be supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

**Note.** Subsection (2A) was inserted as a response to the decision of the Supreme Court of NSW in *R v Hannes* (2000) 158 FLR 359.

**[19] Section 59 (3), notes** Recs 8-5 and 10-2.

Omit:

- business records (section 69)
- tags and labels (section 70)
- telecommunications (section 71)
- contemporaneous statements about a person’s health etc (section 72)

Insert instead:

- contemporaneous statements about a person’s health etc (section 66A)
- business records (section 69)
- tags and labels (section 70)
- electronic communications (section 71)

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- Aboriginal and Torres Strait Islander traditional laws and customs (section 72)

**[20] Section 60 Exception: evidence relevant for a non-hearsay purpose** Rec 7-2.

Omit “the fact intended to be asserted by the representation”.

Insert instead “an asserted fact”.

**[21] Section 60 (2) and (3)** Recs 7-2 and 10-2.

Insert at the end of section 60:

- (2) This section applies whether or not the person who made the representation had personal knowledge of the asserted fact (within the meaning of section 62 (2)).

**Note.** Subsection (2) was inserted as a response to the decision of the High Court of Australia in *Lee v The Queen* (1998) 195 CLR 594.

- (3) However, this section does not apply in a criminal proceeding to evidence of an admission.

**Note.** The admission might still be admissible under section 81 as an exception to the hearsay rule if it is “first-hand” hearsay: see section 82.

**[22] Section 61 Exceptions to the hearsay rule dependent on competency** Rec 8-5.

Omit section 61 (1). Insert instead:

- (1) This Part does not enable use of a previous representation to prove the existence of an asserted fact if, when the representation was made, the person who made it was not competent to give evidence about the fact because of section 13 (1).

**[23] Section 61** Rec 8-5.

Omit “section 72” from the note to section 61 (2).

Insert instead “section 66A”.

**[24] Section 62 Restriction to “first- hand” hearsay** Rec 8-5

Insert after section 62 (2):

- (3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the person’s health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made.

- [25] **Section 64 Exception: civil proceedings if maker available** Rec 8-1. 2007  
Omit “if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.” from section 64 (3).
- [26] **Section 65 Exception: criminal proceedings if maker not available** Rec 8-3.  
Omit “if the representation was:” from section 65 (2). Insert instead “if the representation:”.
- [27] **Section 65 (2) (a), (b) and (c)** Rec 8-3.  
Insert “was” before “made” wherever occurring.
- [28] **Section 65 (2) (d)** Rec 8-3.  
Omit the paragraph. Insert instead:  
(d) was:  
(i) against the interests of the person who made it at the time it was made, and  
(ii) made in circumstances that make it likely that the representation is reliable.
- [29] **Section 66 Exception: criminal proceedings if maker available** Rec 8-4.  
Insert after section 66 (2):  
(2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:  
(a) the nature of the event concerned, and  
(b) the age and health of the person, and  
(c) the period of time between the occurrence of the asserted fact and the making of the representation.  
**Note.** Subsection (2A) was inserted as a response to the decision of the High Court of Australia in *Graham v The Queen* (1998) 195 CLR 606.
- [30] **Section 66A** Rec 8-5.  
Insert after section 66:  
**66A Exception: contemporaneous statements about a person’s health etc**  
The hearsay rule does not apply to evidence of a previous representation made by a person if the representation was a

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contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

**[31] Section 71** Rec 6-2.

Omit the section. Insert instead:

**71 Exception: electronic communications**

The hearsay rule does not apply to a representation contained in a document recording an electronic communication so far as the representation is a representation as to:

- (a) the identity of the person from whom or on whose behalf the communication was sent, or
- (b) the date on which or the time at which the communication was sent, or
- (c) the destination of the communication or the identity of the person to whom the communication was addressed.

**Notes.**

1 Division 3 of Part 4.3 contains presumptions about electronic communications.

2 Section 182 of the Commonwealth Act gives section 71 of the Commonwealth Act a wider application in relation to Commonwealth records.

3 **Electronic communication** is defined in the Dictionary.

**[32] Section 72**

Omit the section. Insert instead:

**72 Exception: Aboriginal and Torres Strait Islander traditional laws and customs** Recs 8-5 and 19-1.

The hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

**[33] Section 76 The opinion rule** Rec 19-2.

Insert:

- Aboriginal and Torres Strait Islander traditional laws and customs (section 78A)

After:

- lay opinion (section 78)

**[34] Section 78A** Rec 19-2.

Insert after section 78:

**78A Exception: Aboriginal and Torres Strait Islander traditional laws and customs**

The opinion rule does not apply to 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.

**[35] Section 79 Exception: opinions based on specialised knowledge** Rec 9-1.

Insert at the end of the section:

- (2) To avoid doubt, and without limiting subsection (1):
  - (a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse), and
  - (b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:
    - (i) the development and behaviour of children generally,
    - (ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

**[36] Section 82 Exclusion of evidence of admissions that is not first-hand** Rec 9-1.

Insert at the end of the section:

**Note.** Section 60 does not apply in a criminal proceeding to evidence of an admission.

**[37] Section 85 Criminal proceedings: reliability of admissions by defendants** Rec 10-1.

Omit section 85 (1). Insert instead:

- (1) This section applies only in a criminal proceeding and only to evidence of an admission made by a defendant:
  - (a) 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, or

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

**Note.** Subsection (1) was inserted as a response to the decision of the High Court of Australia in *Kelly v The Queen* (2004) 218 CLR 216.

**[38] Section 89 Evidence of silence** Rec 10-1.

Omit “in the course of official questioning” from section 89 (1).

Insert instead “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”.

**[39] Section 97 The tendency rule** Rec 11-3.

Omit section 97 (1). Insert instead:

- (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person’s character or otherwise) to act in a particular way, or to have a particular state of mind unless:
- (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party’s intention to adduce the evidence, and
- (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

**[40] Section 98** Rec 11-1, 11-2.

Omit the section. Insert instead:

**98 The coincidence rule**

- (1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:
- (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party’s intention to adduce the evidence, and

- (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

**Note.** One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

- (2) Subsection (1) (a) does not apply if:
- (a) the evidence is adduced in accordance with any directions made by the court under section 100, or
- (b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

**Note.** Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

**[41] Section 102** Rec 12-1.

Omit the section. Insert instead:

**Division 1 Credibility evidence**

**101A Credibility evidence**

Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that:

- (a) is relevant only because it affects the assessment of the credibility of the witness or person, or
- (b) is relevant:
- (i) because it affects the assessment of the credibility of the witness or person, and
- (ii) for some other purpose for which it is not admissible, or cannot be used, because of a provision of Parts 3.2 to 3.6.

**Notes**

1 Sections 60 and 77 will not affect the application of paragraph (b), because they cannot apply to evidence that is yet to be admitted.

2 Section 101A was inserted as a response to the decision of the High Court of Australia in *Adam v The Queen* (2001) 207 CLR 96.

**Division 2 Credibility of witnesses**

**102 The credibility rule**

Credibility evidence about a witness is not admissible.

**Note 1.** Specific exceptions to the credibility rule are as follows:

- evidence adduced in cross-examination (sections 103 and 104)

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- evidence in rebuttal of denials (section 106)
  - evidence to re-establish credibility (section 108)
  - evidence of persons with specialised knowledge (section 108C)
  - character of accused persons (section 110)

Other provisions of this Act, or of other laws, may operate as further exceptions.

**Note 2.** Sections 108A and 108B deal with the admission of credibility evidence about a person who has made a previous representation but is not a witness.

- [42] **Section 103 Exception: cross-examination as to credibility** Rec 12-2.  
Omit “has substantial probative value” from section 103 (1).  
Insert instead “could substantially affect the assessment of the credibility of the witness”.
- [43] **Section 103 (2)** Rec 12-2.  
Omit “in deciding whether the evidence has substantial probative value”.  
Insert instead “for the purposes of subsection (1)”.
- [44] **Section 104 Further protections: cross-examination as to credibility**  
Rec 12-1.  
Insert “to credibility evidence” after “applies only” in section 104 (1).
- [45] **Section 104 (2)** Rec 12-1.  
Omit “only because it is relevant to”. Insert instead “to the assessment of”.
- [46] **Section 104 (4)** Recs 12-1 and 12-3.  
Omit the subsection. Insert instead:  
(4) Leave must not be given for cross-examination by the prosecutor under subsection (2) unless evidence adduced by the defendant has been admitted that:  
(a) tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and  
(b) is relevant solely or mainly to the witness’s credibility.
- [47] **Section 104 (5)**  
Omit “subsection (4) (b)”. Insert instead “subsection (4)”.
- [48] **Section 105, note** Rec 12-8.  
Omit the note.

**[49] Section 106** Recs 12-5 and 12-7.

Omit the section. Insert instead:

**106 Exception: rebutting denials by other evidence**

- (1) The credibility rule does not apply to evidence that is relevant to a witness's credibility and that is adduced otherwise than from the witness if:
  - (a) in cross-examination of the witness:
    - (i) the substance of the evidence was put to the witness, and
    - (ii) the witness denied, or did not admit or agree to, the substance of the evidence, and
  - (b) the court gives leave to adduce the evidence.
- (2) Leave under subsection (1) (b) is not required if the evidence tends to prove that the witness:
  - (a) is biased or has a motive for being untruthful, or
  - (b) has been convicted of an offence, including an offence against the law of a foreign country, or
  - (c) has made a prior inconsistent statement, or
  - (d) is, or was, unable to be aware of matters to which his or her evidence relates, or
  - (e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth.

**[50] Section 108 Exception: re-establishing credibility** Rec 12-8.

Omit the note to section 108 (2).

**[51] Part 3.7, Division 3, heading**

Insert after section 108:

**Division 3 Credibility of persons who are not witnesses**

**[52] Section 108A Admissibility of evidence of credibility of person who has made a previous representation** Recs 12-1 and 12-6.

Omit section 108A (1). Insert instead:

- (1) If:

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- (a) evidence of a previous representation has been admitted in a proceeding, and
  - (b) the person who made the representation has not been called, and will not be called, to give evidence in the proceeding,
- credibility evidence about the person who made the representation is not admissible unless the evidence could substantially affect the assessment of the person's credibility.

**[53] Section 108A (2)** Rec 12-6.

Omit "in deciding whether the evidence has substantial probative value".

Insert instead "for the purposes of subsection (1)".

**[54] Section 108B and Part 3.7, Division 4** Rec 12-6.

Insert after section 108A:

**108B Further protections: previous representations of an accused who is not a witness**

- (1) This section applies only in a criminal proceeding and so applies in addition to section 108A.
- (2) If the person referred to in that section is a defendant, the credibility evidence is not admissible unless the court gives leave.
- (3) Despite subsection (2), leave is not required if the evidence is about whether the defendant:
  - (a) is biased or has a motive to be untruthful, or
  - (b) is, or was, unable to be aware of or recall matters to which his or her previous representation relates, or
  - (c) has made a prior inconsistent statement.
- (4) The prosecution must not be given leave under subsection (2) unless evidence adduced by the defendant has been admitted that:
  - (a) tends to prove that a witness called by the prosecution has a tendency to be untruthful, and
  - (b) is relevant solely or mainly to the witness's credibility.
- (5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to:
  - (a) the events in relation to which the defendant is being prosecuted, or

- (b) the investigation of the offence for which the defendant is being prosecuted.
- (6) Another defendant must not be given leave under subsection (2) unless the previous representation of the defendant that has been admitted includes evidence adverse to the defendant seeking leave.

#### **Division 4 Persons with specialised knowledge**

##### **108C Exception: evidence of persons with specialised knowledge**

- (1) The credibility rule does not apply to evidence given by a person concerning the credibility of another witness if:
  - (a) the person has specialised knowledge based on the person's training, study or experience, and
  - (b) the evidence is evidence of an opinion of the person that:
    - (i) is wholly or substantially based on that knowledge, and
    - (ii) could substantially affect the assessment of the credibility of the witness, and
  - (c) the court gives leave to adduce the evidence.
- (2) To avoid doubt, and without limiting subsection (1):
  - (a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse), and
  - (b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of that kind, a reference to an opinion relating to either or both of the following:
    - (i) the development and behaviour of children generally,
    - (ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.

##### **[55] Section 110 Evidence about character of accused persons** Rec 12-8.

Omit the note to the section.

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- [56] **Section 112 Leave required to cross-examine about character of accused or co-accused** Rec 12-4.  
Omit “is not to be”. Insert instead “must not be”.
- [57] **Section 114 Exclusion of visual identification evidence** Rec 14-3.  
Omit “a lawyer” wherever occurring in section 114 (5).  
Insert instead “an Australian legal practitioner or legal counsel”.
- [58] **Section 117 Definitions** Rec 14-2.  
Omit paragraph (a) from the definition of *client* in section 117 (1).  
Insert instead:  
(a) a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service),
- [59] **Section 117 (1), definition of “lawyer”**  
Omit the definition. Insert instead:  
*lawyer* means:  
(a) an Australian lawyer, and  
(b) an Australian-registered foreign lawyer, and  
(c) an overseas-registered foreign lawyer or a natural person who, under the law of a foreign country, is permitted to engage in legal practice in that country, and  
(d) an employee or agent of a lawyer referred to in paragraph (a), (b) or (c).
- [60] **Section 118 Legal advice** Rec 14-4.  
Omit “client or a lawyer” from section 118 (c). Insert instead “client, lawyer or another person”.
- [61] **Section 122** Rec 14-5.  
Omit the section. Insert instead:  
**122 Loss of client legal privilege: consent and related matters**  
(1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.  
(2) Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the

adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.

- (3) Without limiting subsection (2), a client or party is taken to have so acted if:
  - (a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person, or
  - (b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.
- (4) The reference in subsection (3) (a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time of the disclosure, an employee or agent of the client or party or of a lawyer of the client or party unless the employee or agent was authorised by the client, party or lawyer to make the disclosure.
- (5) A client or party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence merely because:
  - (a) the substance of the evidence has been disclosed:
    - (i) in the course of making a confidential communication or preparing a confidential document, or
    - (ii) as a result of duress or deception, or
    - (iii) under compulsion of law, or
    - (iv) if the client or party is a body established by, or a person holding an office under, an Australian law—to the Minister, or the Minister of the Commonwealth, the State or Territory, administering the law, or part of the law, under which the body is established or the office is held, or
  - (b) of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person, or
  - (c) of a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.
- (6) This Division does not prevent the adducing of evidence of a document that a witness has used to try to revive the witness's memory about a fact or opinion or has used as mentioned in

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section 32 (Attempts to revive memory in court) or 33 (Evidence given by police officers).

[62] **Part 3.10, Division 1A** Rec 15-1.

Insert after Division 1:

**Division 1A Professional confidential relationship privilege**

**126A Definitions**

(1) In this Division:

*harm* includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).

*protected confidence* means a communication made by a person in confidence to another person (in this Division called the *confidant*):

- (a) in the course of a relationship in which the confidant was acting in a professional capacity, and
- (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

*protected confider* means a person who made a protected confidence.

*protected identity information* means information about, or enabling a person to ascertain, the identity of the person who made a protected confidence.

(2) For the purposes of this Division, a communication may be made in confidence even if it is made in the presence of a third party if the third party's presence is necessary to facilitate communication.

**126B Exclusion of evidence of protected confidences**

- (1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:
  - (a) a protected confidence, or
  - (b) the contents of a document recording a protected confidence, or
  - (c) protected identity information.

- (2) The court may give such a direction:
  - (a) on its own initiative, or
  - (b) on the application of the protected confider or confidant concerned (whether or not either is a party).
- (3) The court must give such a direction if it is satisfied that:
  - (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced, and
  - (b) the nature and extent of the harm outweighs the desirability of the evidence being given.
- (4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:
  - (a) the probative value of the evidence in the proceeding,
  - (b) the importance of the evidence in the proceeding,
  - (c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding,
  - (d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates,
  - (e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider,
  - (f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed,
  - (g) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor,
  - (h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.
- (5) The court must state its reasons for giving or refusing to give a direction under this section.

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**126C Loss of professional confidential relationship privilege: consent**

This Division does not prevent the adducing of evidence given with the consent of the protected confider concerned.

**126D Loss of professional confidential relationship privilege: misconduct**

- (1) This Division does not prevent the adducing of evidence of a communication made or the contents of a document prepared in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.
- (2) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:
  - (a) the fraud, offence or act was committed, and
  - (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,the court may find that the communication was so made or document so prepared.

**126E Ancillary orders**

Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence or protected identity information, the court may:

- (a) order that all or part of the evidence be heard in camera, and
- (b) make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of the protected confider.

**126F Application of Division**

- (1) This Division does not apply in relation to a proceeding the hearing of which began before the commencement of this Division.
- (2) This Division applies in relation to a protected confidence within the meaning of this Division whether made before or after the commencement of this Division.

- (3) This Division does not apply [*each jurisdiction to insert reference to laws (if any) of that jurisdiction relating to sexual assault communications privilege*].
  - (4) The court may give a direction under this Division in respect of a protected confidence or protected identity information whether or not the protected confidence or protected identity information is privileged under another section of this Part or would be so privileged except for a limitation or restriction imposed by that section.
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**DRAFTING NOTE 3.2** The above Division is to be inserted in the Commonwealth Act and is included in the incorporated State model Bill. The NSW Evidence Act 1995 should be amended as indicated in the following item.

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**[63] Part 3.10, Division 1A** Rec 15-1.

Omit the note under the heading to the Division.

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**DRAFTING NOTE 3.3** The appropriate note will need to be inserted here depending on jurisdictional adoption of Division 1A.

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**[64] Section 126F Application of Division** Rec 15-1.

Insert after section 126F (3):

**Note.** The Commonwealth Act, X State Act does not include this subsection.

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**DRAFTING NOTE 3.4** The appropriate note will need to be inserted here depending on jurisdictional adoption of Division 1A.

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**[65] Section 128** Recs 15-7, 15-8, 15-9

Omit the section. Insert instead:

**128 Privilege in respect of self-incrimination in other proceedings**

- (1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness:
    - (a) has committed an offence against or arising under an Australian law or a law of a foreign country, or
    - (b) is liable to a civil penalty.
-

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- (2) The court must determine whether or not there are reasonable grounds for the objection.
  - (3) If the court determines that there are reasonable grounds for the objection, the court is to inform the witness:
    - (a) that the witness need not give the evidence unless required by the court to do so under subsection (4), and
    - (b) that the court will give a certificate under this section if:
      - (i) the witness willingly gives the evidence without being required to do so under subsection (4), or
      - (ii) the witness gives the evidence after being required to do so under subsection (4), and
    - (c) of the effect of such a certificate.
  - (4) The court may require the witness to give the evidence if the court is satisfied that:
    - (a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, and
    - (b) the interests of justice require that the witness give the evidence.
  - (5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the court must cause the witness to be given a certificate under this section in respect of the evidence.
  - (6) The court is also to cause a witness to be given a certificate under this section if:
    - (a) the objection has been overruled, and
    - (b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.
  - (7) In any proceeding in a [*insert [name of jurisdiction] court*] or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence:
    - (a) evidence given by a person in respect of which a certificate under this section has been given, and
    - (b) any information, document or thing obtained as a direct or indirect consequence of the person having given evidence, cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.
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**Note.** This subsection differs from section 128 (7) of the Commonwealth Act. The Commonwealth provision refers to an “Australian Court” instead of a “[name of jurisdiction] court”.

- (8) Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

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**DRAFTING NOTE 3.5** Subsection (8) has been amended for consistency with proposed section 128A (8).

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- (9) If a defendant in a criminal proceeding for an offence is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the defendant 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.
- (10) In a criminal proceeding, this section does not apply in relation to the giving of evidence by a defendant, being evidence that the defendant:
- (a) did an act the doing of which is a fact in issue, or
  - (b) had a state of mind the existence of which is a fact in issue.
- (11) A reference in this section to doing an act includes a reference to failing to act.

**Notes.**

- <sup>1</sup> Bodies corporate cannot claim this privilege. See section 187.
- <sup>2</sup> Clause 3 of Part 2 of the Dictionary sets out what is a civil penalty.
- <sup>3</sup> The Commonwealth Act includes subsections (\*)–(\*). The subsections give effect to certificates in relation to self-incriminating evidence under the NSW Act in proceedings in federal and ACT courts and in prosecutions for Commonwealth and ACT offences.
- <sup>4</sup> Subsections (8) and (9) were inserted as a response to the decision of the High Court of Australia in *Cornwell v. The Queen* [2007] HCA 12 (22 March 2007).

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**DRAFTING NOTE 3.6** The Cth section could also be substituted in full and renumbered.

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[66] **Section 128A** Rec 15-10.

Insert after section 128:

**128A Privilege in respect of self-incrimination—exception for certain orders etc**

- (1) In this section:

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**disclosure order** means an order made by a [[*insert name of jurisdiction*] court] in a civil proceeding requiring a person to disclose information, as part of, or in connection with a freezing or search order under the [*insert reference to appropriate legislation of relevant jurisdiction*] but does not include an order made by a court under the *Proceeds of Crime Act 2002* of the Commonwealth or *insert reference to complementary legislation of the relevant jurisdiction*). [

**relevant person** means a person to whom a disclosure order is directed.

- (2) If a relevant person objects to complying with a disclosure order on the grounds that some or all of the information required to be disclosed may tend to prove that the person:
- (a) has committed an offence against or arising under an Australian law or a law of a foreign country, or
  - (b) is liable to a civil penalty,
- the person must:
- (c) disclose so much of the information required to be disclosed to which no objection is taken, and
  - (d) prepare an affidavit containing so much of the information required to be disclosed to which objection is taken (the **privilege affidavit**) and deliver it to the court in a sealed envelope, and
  - (e) file and serve on each other party a separate affidavit setting out the basis of the objection.
- (3) The sealed envelope containing the privilege affidavit must not be opened except as directed by the court.
- (4) The court must determine whether or not there are reasonable grounds for the objection.
- (5) Subject to subsection (6), if the court finds that there are reasonable grounds for the objection, the court must not require the information contained in the privilege affidavit to be disclosed and must return it to the relevant person.
- (6) If the court is satisfied that:
- (a) any information disclosed in the privilege affidavit may tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law, and

- (b) the information does not tend to prove that the relevant person has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, and
- (c) the interests of justice require the information to be disclosed,

the court may make an order requiring the whole or any part of the privilege affidavit containing information of the kind referred to in paragraph (a) to be filed and served on the parties.

- (7) If the whole or any part of the privilege affidavit is disclosed (including by order under subsection (6)), the court must cause the relevant person to be given a certificate in respect of the information referred to in subsection (6) (a).
- (8) In any proceeding in a *[[insert name of jurisdiction]* court]:
  - (a) evidence of information disclosed by a relevant person in respect of which a certificate has been given under this section, and
  - (b) evidence of any information, document or thing obtained as a direct result or indirect consequence of the relevant person having disclosed that information,

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence concerned.

- (9) Subsection (8) does not prevent the use against the relevant person of any information disclosed by a document:
  - (a) that is an annexure or exhibit to a privilege affidavit prepared by the person in response to a disclosure order, and
  - (b) that was in existence before the order was made.
- (10) Subsection (8) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.

**[67] Section 131A** Rec 14-1, 14-6, 15-3, 15-11.

Insert before section 132:

**131A Application of Division to preliminary proceedings of courts**

- (1) If:
  - (a) a person is required by a disclosure requirement to give information, or to produce a document, which would result

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in the disclosure of a communication, a document or its contents or other information of a kind referred to in Division 1, 1A or 3, and

- (b) the person objects to giving that information or providing that document,

the court must determine the objection by applying the provisions of this Part (other than sections 123 and 128) with any necessary modifications as if the objection to giving information or producing the document were an objection to the giving or adducing of evidence.

- (2) In this section, *disclosure requirement* means a process or order of a court that requires the disclosure of information or a document and includes the following:
- (a) a summons or subpoena to produce documents or give evidence,
  - (b) pre-trial discovery,
  - (c) non-party discovery,
  - (d) interrogatories,
  - (e) a notice to produce,
  - (f) a request to produce a document under Division 1 of Part 4.6.

**Note.** The Victorian section includes a reference to search warrants.

- [68] **Part 3.11, heading** Rec 16-1.

Omit the heading. Insert instead:

### **Part 3.11 Discretionary and mandatory exclusions**

- [69] **Section 139 Cautioning of persons** Rec 10-1

Omit “official questioning” from section 139 (2). Insert instead “questioning”.

- [70] **Section 148 Evidence of certain acts of justices, Australian lawyers and notaries public** Rec 14-3.

Omit “lawyer” where firstly occurring. Insert instead “Australian lawyer”.

- [71] **Section 148 (a)**

Omit “a lawyer”. Insert instead “an Australian lawyer”.

- [72] **Section 161** Rec 6-3.

Omit the section. Insert instead:

**161 Electronic communications**

- (1) If a document purports to contain a record of an electronic communication other than one referred to in section 162, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the communication:
  - (a) was sent or made in the form of electronic communication that appears from the document to have been the form by which it was sent or made, and
  - (b) was sent or made by or on behalf of the person by or on whose behalf it appears from the document to have been sent or made, and
  - (c) was sent or made on the day on which, at the time at which and from the place from which it appears from the document to have been sent or made, and
  - (d) was received at the destination to which it appears from the document to have been sent, and
  - (e) if it appears from the document that the sending of the communication concluded at a particular time—was received at that destination at that time.
- (2) A provision of subsection (1) does not apply if:
  - (a) the proceeding relates to a contract, and
  - (b) all the parties to the proceeding are parties to the contract, and
  - (c) the provision is inconsistent with a term of the contract.

**Note.** Section 182 of the Commonwealth Act gives section 161 of the Commonwealth Act a wider application in relation to Commonwealth records.

**[73] Part 4.5, heading**

Insert “**and information**” after “**Warnings**”.

**[74] Section 165 Unreliable evidence** Recs 10-1, 18-2.

Omit “official questioning” from section 165 (1) (f).

Insert instead “questioning by an investigating official”.

**[75] Section 165 (6)**

Insert after section 165 (5):

- (6) Subsection (2) does not permit a judge to warn or inform a jury in proceedings before it in which a child gives evidence that the reliability of the child’s evidence may be affected by the age of

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the child. Any such warning or information may be given only in accordance with section 165A (2) and (3).

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**DRAFTING NOTE 3.7** Section 165 (6) above is to be included in the Commonwealth Evidence Act and the incorporated State model Bill. Section 165 (6) of the NSW Evidence Act will need to be omitted and replaced with the new subsection. NSW should also omit the note to the section as in the following item

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**[76] Section 165 (6), note**

Omit the note.

**[77] Sections 165A and 165B** Rec 18-2 and 18.3.

Omit the sections. Insert instead:

**165A Warnings in relation to children's evidence**

- (1) A judge in any proceeding in which evidence is given by a child before a jury must not do any of the following:
  - (a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses,
  - (b) warn the jury, or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults,
  - (c) give a warning, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the age of the child,
  - (d) in the case of a criminal proceeding—give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a witness who is a child.
- (2) Subsection (1) does not prevent the judge, at the request of a party, from:
  - (a) informing the jury that the evidence of the particular child may be unreliable and the reasons why it may be unreliable, and
  - (b) warning or informing 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,

if the party has satisfied the court that there are circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence and that warrant the giving of a warning or the information.

- (3) This section does not affect any other power of a judge to give a warning to, or to inform, the jury.

**165B Delay in prosecution**

- (1) This section applies in a criminal proceeding in which there is a jury.
- (2) If the court, on application by the defendant, is satisfied 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 that disadvantage and the need to take that disadvantage into account when considering the evidence.
- (3) The judge need not comply with subsection (2) if there are good reasons for not doing so.
- (4) It is not necessary that a particular form of words be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, but the judge must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay.
- (5) The judge must not warn or inform the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with this section, but this section does not affect any other power of the judge to give any warning to, or to inform, the jury.
- (6) For the purposes of this section:
- (a) delay includes delay between the alleged offence and its being reported, and
  - (b) significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay.

**[78] Section 184 Accused may admit matters and give consents**

Omit “, if advised to do so by his or her lawyer”.

**[79] Section 184 (2)**

Insert at the end of section 184:

- (2) A defendant’s admission or consent is not effective for the purposes of subsection (1) unless:
- (a) the defendant has been advised to do so by his or her Australian legal practitioner or legal counsel, or

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- (b) the court is satisfied that the defendant understands the consequences of making the admission or giving the consent.

**[80] Section 191 Agreements as to facts** Rec 14-3

Omit “lawyers” from section 191 (3) (a).

Insert instead “Australian legal practitioners, legal counsel or prosecutors”.

**[81] Section 192A** Rec 16-2. first set of instructions paras 54-57

Insert after section 192:

**192A Advance rulings and findings**

Where a question arises in any proceedings, being a question about:

- (a) the admissibility or use of evidence proposed to be adduced, or
- (b) the operation of a provision of this Act or another law in relation to evidence proposed to be adduced, or
- (c) the giving of leave, permission or direction under section 192,

the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings.

**[82] Dictionary** Rec 14-3.

Insert in alphabetical order in Part 1:

*Australian lawyer* has the meaning it has in the *Legal Profession Act 2004*.

*Australian legal practitioner* has the meaning it has in the *Legal Profession Act 2004*.

*Australian practising certificate* has the meaning it has in the *Legal Profession Act 2004*.

*Australian-registered foreign lawyer* has the meaning it has in the *Legal Profession Act 2004*.

*legal counsel* means an Australian lawyer employed in or by a government agency or other body who by law is exempted from holding an Australian practising certificate, or who does not require an Australian practising certificate, to engage in legal practice in the course of that employment.

**Note.** Examples of legal counsel are in-house counsel and government solicitors.

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*overseas-registered lawyer* has the meaning it has in Part 2.7 of the *Legal Profession Act 2004*.

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**DRAFTING NOTE 3.8** Each State/Territory to insert name of appropriate Act in the above definitions.

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**[83] Dictionary, Part 1** Rec 12-1.

Insert in alphabetical order:

*credibility evidence* is defined in section 101A.

**[84] Dictionary, Part 1, definition of "de facto spouse"** Rec 4-4, 4-5, 4-6

Omit the definition. Insert instead:

*de facto partner* is defined in clause 12 of Part 2 of this Dictionary.

**[85] Dictionary, Part 1** Rec 6-2, 6-3.

Insert in alphabetical order:

*electronic communication* has the same meaning as it has in the *Electronic Transactions Act 2000*.

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**DRAFTING NOTE 3.9** Each jurisdiction to insert name of appropriate Act.

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**[86] Dictionary, Part 1**

Omit the definition of *lawyer*.

**[87] Dictionary, Part 1** Rec 16-2

Omit "(including such a court exercising federal jurisdiction)" from the definition of *NSW court*.

**[88] Dictionary, Part 1 definition of "official questioning"** Rec 10-1.

Omit the definition.

**[89] Dictionary, Part 1** Rec 14-3. Third set of instructions paras 19-21.

Insert in alphabetical order:

*prosecutor* means a person who institutes or is responsible for the conduct of a prosecution.

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**[90] Dictionary, Part 1** Rec 19-3

Insert in alphabetical order:

*traditional laws and customs* of an Aboriginal or Torres Strait Islander group (including a kinship group) includes any of the traditions, customary laws, customs, observances, practices, knowledge and beliefs of the group.

**[91] Dictionary, Part 2** Rec 4-4, 4-5, 4-6.

Insert at the end of the Part:

**11 References to de facto partners**

- (1) A reference in this Act to a de facto partner of a person is a reference to a person who is in a de facto relationship with the person.
- (2) A person is in a de facto relationship with another person if the two persons have a relationship as a couple and are not legally married.
- (3) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as are relevant in the circumstances of the particular case:
  - (a) the duration of the relationship,
  - (b) the nature and extent of their common residence,
  - (c) the degree of financial dependence or interdependence, and any arrangements for financial support, between them,
  - (d) the ownership, use and acquisition of their property,
  - (e) the degree of mutual commitment to a shared life,
  - (f) the care and support of children,
  - (g) the reputation and public aspects of the relationship.
- (4) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether two persons have a relationship as a couple.
- (5) For the purposes of subclause (3), the following matters are irrelevant:
  - (a) whether the persons are different sexes or the same sex,
  - (b) whether either of the persons is legally married to someone else or in another de facto relationship.

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## Schedule 2 Amendment of other Acts

(Section \*)

### 2.1 Civil Procedure Act 2005 No 28

- [1] **Section 87 Protection against self-incrimination in relation to interlocutory matters**

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Section 87 will require amendment if proposed section 128A of the Evidence Act is enacted. Jurisdictions other than NSW may need to amend equivalent or similar provisions.

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### 2.2 Criminal Procedure Act 1986 No 209

- [1] **Section 275A Improper questions**

Omit the section.

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**DRAFTING NOTE 3.10** Awaiting advice on whether section 275A should be omitted or amended to mirror proposed section 41 to be inserted in the Evidence Act. Section 294 (Warning to be given by Judge in relation to lack of complaint in certain sexual offence proceedings) and section 294A (Warnings to be given by Judge in relation to complainants evidence) of the Criminal Procedure Act will also need amendment as a consequence if proposed sections 165B and 165A, respectively, are inserted in the Evidence Act. Jurisdictions other than NSW may need to amend equivalent or similar provisions.

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