2011

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

EVIDENCE BILL 2011

EXPLANATORY STATEMENT

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EVIDENCE BILL 2011

Overview of Bill

This Bill is the first of three Bills to reform the law of evidence in the ACT. Further Bills will be introduced at a later date which repeal the *Evidence Act 1971*, transferring provisions which need to be retained into other legislation, and amending the *Evidence (Miscellaneous Provisions) Act 1991* to update and modernise where necessary. The Bills will also update, consolidate, reorganise and discard redundant evidence provisions contained in the rest of the ACT statute book.

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

Legislation based on the Model Bill was enacted by the Commonwealth and New South Wales in 1995. The two statutes are largely uniform but do have some differing provisions. Together these Acts are referred to as the Uniform Evidence Acts (the UEAs). Tasmania enacted legislation in 2001, largely mirroring the UEAs, but with some departures, followed by Norfolk Island legislation commencing in 2004.

In the early days of self-government, the ACT agreed that the Commonwealth would legislate the Territory's evidence law. Accordingly, the provisions of the Commonwealth *Evidence Act 1995* (the Commonwealth Act) directly apply to the ACT, resulting in the Commonwealth, New South Wales, the ACT and Tasmania as the model uniform evidence jurisdictions.

The operation of the UEAs was subject to another inquiry, this time a joint effort of the ALRC, the New South Wales Law Reform Commission (NSWLRC) and the Victorian Law Reform Commission (VLRC) (the Commissions). In the course of the review, the Commissions conducted consultations in every State and Territory, and submissions were received from 130 individuals and organisations.

The Final Report, entitled Uniform Evidence Law: Report, was produced in December 2005 (the 2005 LRCs' Report). It found that the UEAs were generally working well, but required some fine-tuning. As a result, a range of recommendations were contained in the 2005 LRCs' Report which was tabled in Parliament in February 2006.

The recommendations have been largely implemented by proposed amendments to the UEAs and take the form of an amended model uniform

evidence bill (the Model Uniform Evidence Bill) which was endorsed by the Standing Committee of Attorneys-General in July 2007. Before they were endorsed an expert reference group, consisting of practitioners, academics and judicial officers and chaired by former New South Wales Supreme Court Justice, the Honourable James Wood, reviewed the draft model amendments.

New South Wales and Commonwealth legislation to implement the Model Uniform Evidence Bill (the NSW *Evidence Amendment Act 2007* and the Commonwealth *Evidence Amendment Act 2008*) commenced on 1 January 2009. Victoria has now joined the uniform evidence scheme with the *Evidence Act 2008* commencing operation on 1 January 2010. Tasmanian legislation to implement the amendments is currently proceeding through Parliament. The amended Commonwealth Act, incorporating the Model Uniform Evidence Bill, is the existing law in the ACT.

This Bill implements the Model Uniform Evidence Bill in the ACT, ceasing the application of Commonwealth evidence law in the Territory, and as a consequence resulting in the ACT independently joining the uniform evidence scheme.

The Act is in most respects uniform with the Commonwealth *Evidence Act 1995* and the New South Wales *Evidence Act 1995*. The Acts are drafted in identical terms except so far as differences are identified by appropriate annotations to the texts, and except so far as minor drafting variations are required to accord with the drafting style of each jurisdiction.

Where the text of this Bill varies from the Commonwealth and New South Wales Evidence Acts it has only been done to accord with the drafting style of the ACT and is not intended to change the meaning of provisions in the Bill.

Human Rights Implications

The Bill contains a number of provisions which engage rights under the *Human Rights Act 2004*.

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

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

The Bill contains overarching provisions giving broad judicial discretions to exclude evidence or limits its use in certain circumstances.

These judicial discretions operate as safeguards that protect and balance the rights of parties to proceedings (civil and criminal), the rights of witnesses and the importance of the court hearing all relevant, reliable and probative evidence. They are consistent with and give effect to the rights under the

Human Rights Act 2004, particularly the right to a fair hearing under section 21.

The following rights under the *Human Rights Act 2004* are engaged by the Bill and will be dealt with in relation to the particular provisions in the clause notes below:

- ***Right to fair trial***

The right to a fair trial is central to the operation of a democratic society based on the rule of law. It is not simply an individual right but protects the broader public interest in the proper administration of justice. The right fair trial guarantees access to the court and a fair and public hearing. It applies to all stages of proceedings in both civil and criminal trials.

The right is concerned about the quality of the process and imposes certain requirements on the system of justice, as well as guaranteeing a series of individual rights to achieve its purpose.

- ***Rights in criminal proceedings***

The right to a fair trial in criminal proceedings provides for a number of minimum guarantees:

- the right to be presumed innocent until proven otherwise according to law;
- the right to be informed promptly of any criminal charge against him or her in a language that he or she understands;
- the right to adequate time and facilities to prepare a defence, including the right to communication with a legal representative of one's own choosing;
- the right to be tried without unreasonable delay;
- the right to be tried and defend oneself in person or by a legal representative of one's own free choice;
- the right to be told about the right to legal representation of one's own choosing;
- the right to free legal representation if one cannot afford private representation and if in the interest of justice;
- the right to have the free assistance of an interpreter if he or she cannot understand the language of the court, irrespective of his or her financial means;
- the right to silence, that is, the right not to give evidence that is self-incriminating;
- the right for a child to be dealt with in a manner that takes account of his or her age and which promotes his or her rehabilitation; and
- the right to appeal a conviction.

- ***Right to freedom of expression***

Section 16 of the *Human Rights Act 2004* provides that everyone has the right to freedom of expression. The right to freedom of expression also includes

the reciprocal freedom not to express, that is, the right to say nothing or the right not to say certain things. [1]

The right to freedom of expression and information is not an absolute right and it is accepted that the right may be legitimately subject to reasonable restrictions. The legitimate aims which any legal restriction on the exercise of this right must pursue include the rights and reputations of others, national security, public order, public health or public morals. [2]

- ***Right to privacy***

Section 12 of the *Human Rights Act 2004* provides that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. The right to privacy concerns a person's 'private sphere', which should be free from government intervention or excessive unsolicited intervention by other individuals.

An interference with privacy will not limit the right if the interference is neither arbitrary nor unlawful. Arbitrariness will not arise if the restrictions on privacy accord with the objectives of the Human Rights Act and are reasonable given the circumstances. An interference with privacy will not be unlawful if the law, which authorises the interference, is precise and circumscribed and determined on a case-by-case basis.

- ***Right to freedom of movement***

Section 13 of the *Human Rights Act 2004* provides that everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT.

- ***Right to the equal protection of the law without discrimination***

Section 8 of the *Human Rights Act 2004* provides that everyone is equal before the law and is entitled to the equal protection of the law without discrimination.

The term discrimination means any distinction, exclusion, restriction or preference based on any ground, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all people, on an equal footing, of all rights and freedoms. Examples of an impermissible basis for different treatment include, race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.

- ***Right to enjoy culture, practise religion, or use language***

Section 27 of the *Human Rights Act 2004* provides that anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.

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[1] *National Bank of Canada v R.C.U.* (1984 SCC).
[2] Article 19(3) International Covenant on Civil and Political Rights.

Clause Notes

Chapter 1 – Preliminary

Part 1.1 – Formal matters

Clause 1 Name of Act – states the title of the Act as the *Evidence Act 2011.*

Clause 2 Commencement – provides that the Act will commence on the date decided by the Minister and notified on the Legislation Register. If the Minister has not fixed a date within twelve months after the day of notification of the Act, the Act will commence on the first day after this period.

Providing for the Minister to determine commencement allows sufficient flexibility in the timing of the commencement of the Act to ensure a smooth transition from the application of the Commonwealth evidence law in the Territory. Removing the application of section 79 of the *Legislation Act 2001* also ensures that the two Bills which, together with this one, will reform the law of evidence in the ACT can commence on the same date. Twelve months will provide sufficient time for the remaining two bills to complete passage through the Legislative Assembly.

Clause 3 Dictionary – provides that the dictionary at the end of the Act is part of the substantive provisions of the Act.

Clause 3A Numbering – explains that the numbering of provisions in the Act maintains consistency with numbering in the Commonwealth Evidence Act.

Clause 3B Notes – provides that notes included in the Act are explanatory only and do not form part of the substantive provisions of the Act. By contrast, where the Act includes an example, the example is part of the substantive provisions of the Act having regard to section 132 of the *Legislation Act 2001*.

Part 1.2 – Application of this Act

Clause 4 Courts and proceedings to which Act applies – provides that the Act applies to all proceedings in an ACT court. These include proceedings relating to bail, interlocutory proceedings and proceedings heard in chambers. While sentencing proceedings are also included, the clause specifies that the Act applies in such proceedings only if the court directs the law of evidence to apply and then only in accordance with the direction.

Clause 5 Extended application of certain provisions – contains no substantive provision. Its inclusion ensures parity in section numbering with the Commonwealth Evidence Act which contains this provision.

Clause 6 Territories - contains no substantive provision. Its inclusion ensures parity in section numbering with the Commonwealth Evidence Act which contains this provision.

Clause 7 Act binds Crown – contains no substantive provision. Its inclusion ensures parity in section numbering with the Commonwealth and New South Wales Evidence Acts which contain this provision.

Clause 8 Operation of other Acts – provides that the Act does not affect the operation of provisions of other Acts.

Clause 8A Offences against Act – application of Criminal Code etc – provides that other legislation applies in relation to offences against the Act, including the *Criminal Code 2002* and the *Legislation Act 2001*.

Clause 9 Application of common law and equity – provides that the Act will only affect the operation of the principles and rules of common law or equity relating to evidence in proceedings to which the Act applies to the extent provided expressly or by necessary intendment by the Act. Accordingly, the operation of such principles and rules will be preserved to the extent that it is consistent with the Act.

Clause 10 Parliamentary privilege preserved – preserves the operation of laws relating to the privileges of any Australian Parliament.

Human rights implications

The clause engages the right to freedom of expression under section 16 of the *Human Rights Act 2004*. The importance of parliamentary privilege is clearly set out in the Human Rights Handbook for Parliamentarians prepared for the United Nations by Manfred Nowak:

> *'Parliament can fulfil its role only if its members enjoy the freedom of expression necessary in order to be able to speak out on behalf of constituents. Members of parliament must be free to seek, receive and impart information and ideas without fear of reprisal. They are therefore generally granted a special status, intended to provide them with the requisite independence: they enjoy parliamentary privilege or parliamentary immunities.'* [3]

Clause 11 General powers of a court – preserves the general power of courts to control proceedings before them, except so far as the Act provides otherwise, either expressly or by necessary intendment.

Chapter 2 Giving and presenting evidence

This Chapter is about ways in which evidence is given and presented.

Part 2.1 - Witnesses

Part 2.1 is about evidence from witnesses.

[3] M Nowak, Human Rights Handbook for Parliamentarians (2005), 64.

Division 2.1.1 Competence and compellability of witnesses

Clause 12 Competence and compellability – provides that, except as provided otherwise by the Act, everyone is a competent and compellable witness.

Human rights implications

Clause 12 engages rights under sections 12, 13 and 16 of the *Human Rights Act 2004*.

The right to privacy (section 12 Human Rights Act) is engaged by clause 12 because a witness may be required to divulge personal information when giving evidence. However, the limit to the right to privacy is proportionate because the interference is provided for in law and will occur in circumscribed and precise circumstances subject to the court's discretion on a case-by-case basis.

Clause 12 engages and limits the right to freedom of movement (section 13 Human Rights Act) because it provides for a person to be required to come before the court to give evidence. To the extent that a person is required to attend the court under clause 12 the person's freedom of movement is limited.

However, the limitation on the right is clearly reasonable and justifiable in a free and democratic society for the purposes in accordance with section 28 of the *Human Rights Act 2004* having regard to the following factors:

- ***The nature of the right affected;***

The right to move freely within the ACT encompasses a right not to be forced to move to, or from, a particular location and includes freedom from physical barriers and procedural impediments.

- ***The importance of the purpose of the limitation;***

The limitation is important because it enables a court to examine relevant, competent, and compellable witnesses who may hold relevant evidence and or information which may bring to light the truth of disputed facts and evidence. The ability to secure the presence of such witnesses is essential to the effective administration of the justice system and the right to a fair hearing.

- ***The nature and extent of the limitation;***

Clause 12 limits the person's freedom of movement to the extent that a person may be compelled to be physically present at the court or another location for a limited time for the purpose of giving evidence.

- ***The relationship between the limitation and its purpose;***

The limitation on the free movement of a person by requiring the presence of the person at court to give evidence is directly and rationally connected to the purpose of ensuring the effective administration of the justice system and the right to a fair hearing.

- ***Less restrictive means reasonably available of achieving this purpose.***

There are no less restrictive means of achieving this purpose. The justice system would not be able to function if the courts did not have the power to compel people to attend before them and give evidence.

It is also important to note the practice of courts to allow witnesses to leave the court temporarily if their evidence is not required immediately, and to release witnesses once they have given evidence.

The clause engages the right to freedom of expression under section 16 of the *Human Rights Act 2004* because a witness may be compelled to answer certain questions or express certain information to the court. However, clause 12 constitutes a lawful restriction on the right to freedom of expression under section 16 of the *Human Rights Act 2004* as it is essential to ensuring the peaceful and effective functioning of society.

Clause 13 Competence – lack of capacity – sets out the test for determining a witness's competence to give sworn and unsworn evidence. The clause implements recommendations 4-1 and 4-2 of the LRCs' 2005 Report and focuses on the ability of a person to act as a witness.

All witnesses must satisfy the test of general competence in subclause (1). The test provides that a person is not competent to give sworn or unsworn evidence about a fact if the person lacks the capacity to understand, or to give an answer that can be understood to, a question about the fact, and that incapacity cannot be overcome. When considering whether incapacity can be overcome, the court should consider alternative communication methods or support depending on the needs of the individual witness. The note to the provision makes a cross reference to sections 30 and 31 of the Act which provide examples of assistance that may be provided. If, for example, a person has a hearing disability, this incapacity could be overcome by the use of a sign language interpreter, providing a hearing inducting loop, allowing evidence in narrative form or providing captioning.

Subclause (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.

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

Subclause (4) provides that, subject to the requirements of subclause (5) being met, a person who is not competent to give sworn evidence about a fact may 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 'truth'. It is up to the court to determine the weight to be given to unsworn evidence.

Subclause (5) provides that if a person is not competent to give sworn evidence, then he or she may be able to give unsworn evidence. A number of criteria must be met for this to happen. Firstly, the person must be competent

to give evidence under subclause (1). Secondly, the court is required to tell the person that it is important to tell the truth, that he or she should tell the court if asked a question to which he or she does not know, or cannot remember the answer to, and that he or she should not feel pressured into agreeing with any statements that are untrue.

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

Subclause (7) provides that evidence given by a witness is not inadmissible solely on the basis that the witness has died or is no longer competent to give evidence.

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

Human rights implications

Clause 13 engages the right provided in section 8 of the *Human Rights Act 2004* which provides that everyone is equal before the law and is entitled to the equal protection of the law without discrimination.

The test for competence under clause 13 is not based on existence of a disability. Rather, it is focused on the capacity of the individual witness to understand and answer questions put to them. Although the clause includes people who, by reason of a disability, do not have the capacity to understand a question about a fact or give an answer, the clause is not limited to such people. Incapacity can be 'for any reason'. Further, the test is only met where the incapacity cannot be overcome and clause 13(2) ensures that a finding that a person is incapable of understanding and answering questions in relation to one fact does not preclude the person from giving evidence in relation to other facts.

The test for competence under clause 13 is considerably more inclusive than the test which existed prior to changes made following the 2005 LRCs' report. By focusing on the capacity of the individual to understand and answer questions, rather than the existence of a disability, clause 13 gives effect to the rights of people with disabilities to recognition and equality before the law.

Clause 14 Compellability – reduced capacity – provides that a person is not compellable to give evidence on a particular matter if the court is satisfied that substantial cost or delay would be involved in overcoming the person's incapacity to understand a question, or to be understood when answering a question, and adequate evidence on that matter is available from other sources.

Clause 15 Compellability – Sovereign and others – provides that the Sovereign and others are not compellable to give evidence (including members of legislatures if that would prevent members from sitting).

Clause 16 Competence and compellability – judges and jurors – provides that a person who is a judge or juror is not competent to give evidence in the proceeding in which they are acting as judge or juror. However, a juror is competent to give evidence in the proceeding about matters affecting the conduct of the proceeding. The clause also provides that a judge is not compellable to give evidence about a proceeding they have presided over unless the court gives leave.

Human rights implications

The clause engages the right to freedom of expression under section 16 of the *Human Rights Act 2004*. However, clause 16 of the Bill constitutes a lawful restriction on the freedom of expression under section 16 of the *Human Rights Act 2004* as it is essential to ensuring the peaceful and effective functioning of society. The clause is limited in that it only prevents people from giving evidence in a proceeding in which they are acting as judge or juror. Accordingly, the clause acts as a safeguard and promotes the right to a fair trial in section 21 of the *Human Rights Act 2004*.

Clause 17 Competence and compellability – defendants in criminal proceedings – provides for rules of competence and compellability for defendants in criminal proceedings and for any associated defendants.

A defendant is not competent, in a criminal proceeding, to give evidence as a witness for the prosecution.

An associated defendant is not compellable to give evidence for or against a defendant in a criminal proceeding, unless the associated defendant is being tried separately from the defendant. If a witness is an associated defendant who is being tried jointly with the defendant, the court must ensure that the associated defendant is aware of the effect of the above.

Human rights implications

The clause engages the right to freedom of expression under section 16 of the *Human Rights Act 2004*. However, clause 17 of the Bill constitutes a lawful restriction on the freedom of expression under section 16 of the *Human Rights Act 2004* as it acts as an important essential safeguard for the defendant to have a fair trial (section 21 Human Rights Act). The clause also promotes the right in section 22 of the *Human Rights Act 2004* which provides that a defendant is not to be compelled to testify against himself or herself or to confess guilt.

Clause 18 Compellability of domestic partners and others in criminal proceedings generally – provides that a person who is the domestic partner, parent or child of a defendant can object, in a criminal proceeding, to being

required to give evidence, or to give evidence of a communication between the person and the defendant, as a witness for the prosecution.

For an objection to be upheld, two criteria must be met. First, there must be a likelihood that harm would or might be caused to the person or to the relationship between the defendant and the person if the person gives the evidence. Second, the nature and extent of that harm must outweigh the desirability of the evidence being given.

The court must take into account a number of matters in determining an objection, including the nature and gravity of the offence charged, and the substance and importance, and the weight likely to be attached to, any evidence that the person might give.

Human rights implications

Clause 18 engages the rights of minorities in section 27 of the *Human Rights Act 2004.* Kinship ties play an important role in Aboriginal communities. The notion of kinship ties is closely linked to other cultural and religious practices.

Clause 18 only applies to domestic partners, parents and children of the defendant. Accordingly, the judicial discretion to excuse a person from giving evidence does not extend to all people who have a relationship with the defendant, for example, siblings, aunts or uncles.

Where a person has kinship ties with the defendant, other than as a domestic partner, parent or child, they may be compelled to give evidence against the defendant. While this will not necessarily result in a severance of the kinship ties it has the potential to cause harm to the kinship relationship, and the right in section 27 of the Human Rights Act may therefore be limited.

However, to the extent that the right may be limited, it is reasonable and justifiable in a free and democratic society for the purposes in accordance with section 28 of the *Human Rights Act 2004* having regard to the following factors:

- ***The nature of the right affected;***

The right of an individual to maintain their kinship ties is an important Aboriginal cultural right.

- ***The importance of the purpose of the limitation;***

The purpose of the limitation is to ensure that all relevant and reliable evidence that is of an appropriate probative value is admissible.

- ***The nature and extent of the limitation;***

The right to maintain kinship ties is limited only as far as the kinship relationship does not fall within the definition of domestic partner, parent or child. These relationships are defined broadly in the Bill and extend the group of people who may be subject to the judicial discretion under the current law to include people in a domestic partnership, adoptive parents and children, and people with whom a child is living as if the child were a member of the person's family (even where there is no biological relationship). Aboriginal cultural practices whereby a child lives with a person with whom they have kinship ties as if they were a member of the person's family are therefore

accommodated because such people are included in the class of people who may object to giving evidence. The right is limited to the extent that a person shares kinship ties with the defendant but falls outside the class of people covered by clause 18.

- ***The relationship between the limitation and its purpose;***

The extent of the limitation is directly and rationally connected to the desirability of ensuring that all relevant and reliable evidence that is of an appropriate probative value is admissible. It would be undesirable to extend the operation of clause 18 to all people who share kinship ties with a defendant, as this is potentially a very broad class of people and would undermine the ability to ensure that important evidence can be obtained. The definition of domestic partner, parent or child will include a broad class of people who share kinship ties with the defendant, and the provision provides an appropriate balance between the preservation and maintenance of close relationships and the need to maximise the ability to present relevant, probative evidence.

- ***Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.***

Less restrictive means of achieving this result are not available.

On balance, the limitation in clause 18 is reasonable and appropriate to its objective. The extent of the limitation is proportionate to the desirability of ensuring that all relevant and reliable evidence that is of an appropriate probative value should be admissible.

Clause 19 Compellability of domestic partners and others in certain criminal proceedings – limits the application of clause 18, so that a member of the family of a defendant in criminal proceedings may be compelled by the prosecution to give evidence against the defendant in certain types of proceedings relating to alleged assaults on children and other forms of domestic violence.

Clause 20 Comment on failure to give evidence – permits the judge or any party (other than the prosecutor) to comment on a failure by a defendant, and on a failure of his or her domestic partner, parent or child, to give evidence.

Any such comment, however, (except when made by a co-defendant) must not suggest that the failure to give evidence was because the defendant was guilty of the offence concerned, or the defendant, domestic partner, parent or child believed the defendant was guilty of the offence.

If such comment is made by or on behalf of a co-defendant, the judge may comment on both the failure to give evidence and the co-defendant's comment.

The clause applies only to criminal proceedings for indictable offences.

Division 2.1.2 – Oaths and affirmations

Clause 21 Sworn evidence of witnesses to be on oath or affirmation – provides that a witness must take an oath or make an affirmation before giving evidence. The requirement does not apply to a person giving unsworn evidence under clause 13 or where a person is called only to produce a document or thing to the court.

Clause 22 Interpreters to act on oath or affirmation – provides that a person must take an oath or make an affirmation before acting as an interpreter in a proceeding. The clause also enables an interpreter to take a single oath or make a single affirmation before acting as an interpreter in several proceedings conducted before the same court on the same day.

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

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

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

Clause 25 There is no clause 25. The repeal of section 25 from the uniform evidence law was recommended by the LRCs' in the 2005 Report (recommendation 12-8) because the right of a defendant to make an unsworn statement in a criminal trial no longer exists under Australian law.

Division 2.1.3 – General rules about giving evidence

Clause 26 Court's control over questioning of witnesses – provides that the court can make any order it considers just to control questioning of a witness.

Clause 27 Parties may question witnesses – states the general principle that every party is entitled to question any witness who gives evidence, unless the Act provides otherwise.

Clause 28 Order of examination-in-chief, cross-examination and re-examination – sets out the order in which parties are to question a witness, unless the court directs otherwise.

Clause 29 Manner and form of questioning witnesses and their responses – states the general rule that, subject to the Act and the control of the court, it is up to the parties to determine how to question witnesses.

The primary way in which witnesses are examined is the question and answer format. However, this method of giving evidence may be unsuitable for certain witnesses, including but not limited to children, people with an intellectual disability and people who otherwise may not be accustomed to this style of communication. Accordingly, the Act allows a witness, in certain circumstances, to give evidence completely or partly in narrative form, that is, as a continuous story in his or her own words.

The clause implements recommendation 5-1 of the 2005 LRCs' Report. The Report recommended removal of the requirement for a party to apply for a direction for evidence to be given in narrative form. Under this clause, the court may, on its own motion or on application, direct that the witness give evidence completely or partly in narrative form.

Evidence may also be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid comprehension of other evidence.

Clause 30 Interpreters – provides that witnesses can give evidence through an interpreter unless he or she can speak and understand English sufficiently to understand questions and give adequate replies to them.

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

Clause 32 Attempts to revive memory in court – provides for the use a witness may make of a document to revive memory about a fact or opinion. This may be done only with the leave of the court.

The clause also allows the witness to read aloud from the document with the leave of the court. The court is required to give such directions as it thinks fit to ensure that so much of the document as relates to the proceeding is produced to another party, if that party so requests.

Clause 33 Evidence given by police officers – provides that, in a criminal proceeding, a police officer may give evidence-in-chief for the prosecution by reading or being led through a written statement previously made by them. The evidence may only be given if the statement was made by the police officer at the time of, or soon after, the occurrence of the events to which it refers, the police officer signed the statement when it was made, and a copy of the statement was given to the person charged or his or her legal representative a reasonable time before the prosecution evidence is given.

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

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

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

This clause removes the automatic right of either party to tender a document or require the other party to tender a document. The clause does not, however, preclude the tendering and admission of such a document if it is otherwise relevant and admissible.

Clause 36 Person may be examined without subpoena or other process – enables a court to order a person who is present at proceedings to give evidence or produce documents if the person could be compelled by way of subpoena, or other process to attend for that purpose.

Human rights implications

Clause 36 of the Bill engages and limits the right to freedom of movement (section 13 Human Rights Act) because it provides for a person to be required to come before the court to give evidence. To the extent that a person is required to attend the court under clause 36 the person's freedom of movement is limited.

However, the limit on the right is clearly reasonable and justifiable in a free and democratic society for the purposes in accordance with section 28 of the *Human Rights Act 2004* having regard to the following factors:

- ***The nature of the right affected;***

The right to move freely within the ACT encompasses a right not to be forced to move to, or from, a particular location and includes freedom from physical barriers and procedural impediments.

- ***The importance of the purpose of the limitation;***

The limitation is important because it enables a court to examine relevant, competent, and compellable witnesses who may hold relevant evidence or information which may bring to light the truth of disputed facts and evidence. The ability to secure the presence of such witnesses is essential to the effective administration of the justice system and the right to a fair hearing.

- ***The nature and extent of the limitation;***

Clause 36 limits a person's freedom of movement to the extent that the person cannot leave the court until excused by the court from giving evidence.

- ***The relationship between the limitation and its purpose;***

The limitation on the free movement of a person by requiring the presence of the person at court to give evidence is directly and rationally connected to the purpose of ensuring the effective administration of the justice system and the right to a fair hearing.

- ***Less restrictive means reasonably available of achieving this purpose.***

There are no less restrictive means of achieving this purpose. The justice system would not be able to function if the courts did not have the power to compel people to attend before them and give evidence.

It is also important to note the practice of courts to allow witnesses to leave the court temporarily if their evidence is not required immediately, and to release witnesses once they have given evidence.

Division 2.1.4 – Examination-in-chief and re-examination

Clause 37 Leading questions – provides that a leading question cannot be put to a witness in examination-in-chief or in re-examination except where the court gives leave or one of a number of specified circumstances applies.

The specified circumstances include:

- the question relates to an introductory matter;
- no objection is made to the question and relevant parties are legally represented;
- the question relates to a matter that is not in dispute;
- the question seeks an expert witness's opinion about a hypothetical statement of fact.

Leading question is defined in the Dictionary to mean a question asked of a witness that:

a. directly or indirectly suggests a particular answer to the question; or
b. assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked.

The Australian Law Reform Commission interim report on evidence (ALRC Report 26, para 619) contains the following examples of leading questions:

1. Did you see another coming very fast from the opposite direction?
2. What did you do after Smith hit you? (Put to the plaintiff in an assault action before he has given evidence that he had been hit by Smith)
3. How deep was the canal? (Instead of what was the depth of the canal?)
4. About how fast was the other car going when it smashed into your car? (Instead of what was the speed of the other car at the time of the collision?)

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

The court can also allow a written statement or report to be tendered or treated as evidence-in-chief of its maker, pursuant to rules of court.

Clause 37 reflects what the Australian Law Reform Commission considered in its final Report of the original evidence inquiry (ALRC 38) to be existing practices in relation to leading questions.

Clause 38 Unfavourable witnesses – allows a party, with the leave of the court, to cross-examine its own witness in the following circumstances:

- about evidence the witness has given that is unfavourable to the party;
- about a matter of which the witness may reasonable be supposed to have knowledge and about which he or she is not making a genuine attempt to give evidence; or
- about whether the witness has made a prior inconsistent statement.

The clause specifies the manner in which the questioning of an unfavourable witness is to be conducted and the matters which the court may take into account in granting leave to a party to cross-examine its own witnesses.

Subclause (7) was included in the UEAs to overcome the decision of the High Court in *Vocisano v Vocisano* (1974) 130 CLR 267 by enabling a person conducting a proceeding in the name of a party (for example, an insurer conducting an action in the name of an insured), to cross-examine the party (if the party is called as a witness) in the same circumstances as the person may cross-examine any other witness.

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

Division 2.1.5 – Cross-examination

Clause 40 Witness called in error – prohibits a party from cross-examining a witness called by another party in error and who has not been questioned by that party in the proceedings.

Clause 41 Improper questions – requires the court to disallow improper questions in both civil and criminal proceedings. The clause implements recommendation 5-2 of the LRCs' 2005 Report.

The types of questions that must be disallowed include 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. Questions which have no basis other than a stereotype are also prohibited.

While a party may object to a question on the grounds that it is disallowable, the duty imposed by the clause on the court applies regardless of whether or not an objection is raised to a particular question.

Human rights implications

Clause 41 engages the right to freedom of expression under section 16 of the *Human Rights Act 2004* as it places restrictions on the ability of a party to question a witness. However, clause 41 constitutes a lawful restriction on the right to freedom of expression because it is essential to ensuring the peaceful and effective functioning of society. The provision is designed to prevent cross-examination which is improper and will not unduly hamper the trial techniques of advocates. Clause 41 enables a court to consider the effect of cross-examination and of the trial experience on a witness when deciding whether cross-examination is improper. The clause also allows this interest to be balanced with the public interest in minimising the risk of convicting an innocent person and is therefore consistent with the requirements of a fair trial (section 21 Human Rights Act).

Clause 42 Leading questions – permits a party to put a leading question to a witness in cross-examination, unless the court disallows the question or directs the witness not to answer it. The court must act in this way if satisfied that the facts would be better ascertained if leading questions are not used.

Clause 43 Prior inconsistent statements of witnesses – sets out the manner in which prior inconsistent statements allegedly made by a witness may be put to the witness in cross-examination.

Clause 44 Previous representations of other people – sets out the manner in which a witness may be cross-examined about a previous representation allegedly made by another person.

Clause 45 Production of documents – provides for the production and examination of a document recording a prior inconsistent statement allegedly made by a witness or a previous representation allegedly made by another person that is raised in cross-examination.

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

Human rights implications

Clause 46 of the Bill engages and limits the right to freedom of movement (section 13 Human Rights Act) because it provides for a person to be required to come before the court to give evidence. To the extent that a person is required to attend the court under clause 46 the person's freedom of movement is limited.

However, the limit upon the right is clearly reasonable and justifiable in a free and democratic society for the purposes in accordance with section 28 of the *Human Rights Act 2004* having regard to the following factors:

- ***The nature of the right affected;***

The right to move freely within the ACT encompasses a right not to be forced to move to, or from, a particular location and includes freedom from physical barriers and procedural impediments.

- ***The importance of the purpose of the limitation;***

The limitation is important because it enables a court to examine relevant, competent, and compellable witnesses who may hold relevant evidence and or information which may bring to light the truth of disputed facts and evidence. The ability to secure the presence of such witnesses is essential to the effective administration of the justice system and the right to a fair hearing (section 12 of the Human Rights Act).

- ***The nature and extent of the limitation;***

Clause 46 limits the person's freedom of movement to the extent that a person may be compelled to be physically present at the court or another location for a limited time for the purpose of giving evidence.

- ***The relationship between the limitation and its purpose;***

The limitation on the free movement of a person by requiring the presence of the person at court to give evidence is directly and rationally connected to the purpose of ensuring the effective administration of the justice system and the right to a fair hearing.

- ***Less restrictive means reasonably available of achieving this purpose.***

There are no less restrictive means of achieving this purpose. The justice system would not be able to function if the courts did not have the power to compel people to attend before them and give evidence.

It is also important to note the practice of courts to allow witnesses to leave the court temporarily if their evidence is not required immediately, and to release witnesses once they have given evidence.

Part 2.2 – Documents

Part 2.2 is about documentary evidence.

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

Clause 48 Proof of contents of documents – sets out the ways in which a party can present evidence of the contents of a document.

Clause 49 Documents in foreign countries – provides for proof of documents in foreign countries.

Clause 50 Proof of voluminous or complex documents – enables a party to apply to a court for a direction that he or she may present evidence of

the contents of two or more documents in the form of a summary if it would not otherwise be possible to conveniently examine the evidence because of the volume or complexity of the documents in question.

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

The clause implements recommendation 6-1 of the 2005 LRCs' Report by allowing an application to rely on a summary of documents to be made at any time in proceedings.

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

Part 2.3 – Other evidence

Part 2.3 is about other forms of evidence.

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

Part 2.3 is the only part of the Act that changes the methods of adducing 'real evidence', that is, evidence that comes to court other than by witnesses testifying and documents being tendered. Examples include physical objects admitted as exhibits and the physical characteristics and demeanour of witnesses and other people in court. Clause 52 otherwise preserves practices and laws in so far as they permit real evidence to be adduced. The clause does not deal with the admissibility of evidence, just the methodology by which it is adduced.

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

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

Chapter 3 – Admissibility of evidence

This Chapter is about whether evidence presented in a proceeding is admissible. A diagram is included at the start of the chapter which is designed to aid users in determining whether evidence is admissible or is not admissible.

Part 3.1 – Relevance

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

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

Evidence is not to be deemed irrelevant because it relates only to the credibility of a witness, the admissibility of other evidence, or a failure to present evidence.

Clause 56 Relevant evidence to be admissible – states the rule of admissibility of evidence. Evidence that is relevant is admissible unless excluded by one of the rules set out in the Act. Evidence that is not relevant is not admissible. This restates primary rules of evidence at common law. The test of relevance in clause 55 is crucial to determining the admissibility of evidence.

Clause 57 Provisional relevance – enables a court to admit evidence provisionally even if its relevance is not immediately apparent. The court may find the evidence is relevant if it is reasonably open to make the finding in question or if it would be reasonably open to do so once some other further evidence is admitted. For instance, a knife could be accepted as provisionally relevant, subject to proof that it was used in a murder.

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

Part 3.2 – Hearsay

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

Division 3.2.1 – The hearsay rule

Clause 59 The hearsay rule – exclusion of hearsay evidence – sets out the general exclusionary rules for hearsay evidence (“the hearsay rule”). The hearsay rule excludes evidence of a ‘previous representation’ in certain circumstances.

An example of hearsay evidence would be a witness telling the Court what his friend told him about what she saw the accused do. The witness did not see

the accused do anything. It was his friend who saw it, and who should give evidence.

The hearsay rule applies to evidence of representations made out of court – whether oral, written, or in the form of conduct – that are led as evidence of the truth of the fact the maker of the representation intended to assert by the representation. It makes no difference whether the witness testifies to a previous representation made by some other person or to the witness's own previous representation.

The 2005 LRCs' Report recommended an amendment to section 59 of the UEAs by the insertion of the words "it can reasonably be supposed that" after "a fact that" (recommendation 7-1). This amendment (along with a new subclause (3)) is intended to provide further guidance on the definition of hearsay evidence under this Division and prevent courts adopting differing approaches to determining the meaning of "intention", such as the approaches explored in *R v Hannes* (2000) 158 FLR 359.

Subclause (3) clarifies what the court may consider in determining the meaning of "intention" (pursuant to recommendation 7-1 of the 2005 LRCs' Report). When determining whether a person intended to assert the existence of facts contained in a previous representation, the test to be applied is what a person in the position of maker of the representation can reasonably be supposed to have intended, having regard to the representation and the circumstances in which the representation was made.

The note to clause 59 contains cross references to specific exceptions to the hearsay rule. It refers to the sections in the Act that set out when evidence is admissible (even though it is hearsay evidence).

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

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

Subclauses (2) and (3) implement recommendations 7-2 and 10-2 of the 2005 LRCs' Report.

Subclause (2) is a response to the decision of the High Court in *Lee v The Queen* (1998) 195 CLR 594 and clarifies that clause 60 operates to permit evidence admitted for a non-hearsay purpose to be used to prove the facts asserted in the representation, whether the evidence is first-hand or more remote hearsay. That is, whether or not the person had first-hand knowledge based on something they saw, heard or otherwise perceived.

To give one example, the 2005 LRCs' Report states (para 7.99) that this provision will render the hearsay rule inapplicable to the following evidence

admitted as forming party of the basis of an expert opinion, notwithstanding that it involves second hand or more remote hearsay:

- knowledge acquired by experts from reading the work of other experts and from discussion with them;
- the reported data of fellow experts relied on by such people as scientists and technical experts in giving expert opinion evidence;
- factual material commonly relied on in a particular industry or trade or calling.

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

Clause 61 Exceptions to the hearsay rule dependent on competency – makes it clear that nothing in Part 3.2 enables the use of a previous representation to prove an asserted fact if the representation was made by a person who at the time it was made was not competent to give evidence of the fact. The clause makes it clear that competence is to be assessed in accordance with the test in clause 13.

However, the limitation in this clause does not apply to a person's contemporaneous representations about the person's health, feelings, sensations, intentions, knowledge or state of mind (see clause 66A for further information regarding admissibility of such contemporaneous statements).

Division 3.2.2 – First-hand hearsay

Clause 62 Restriction to first-hand hearsay – provides that in Division 2, a reference to a previous representation is a reference to a representation made by a person who had, or might reasonably be supposed to have had, personal knowledge of the fact asserted in the representation, other than from a representation made by someone else about the asserted fact. Such a representation is referred to as "first-hand" hearsay.

Personal knowledge is defined as knowledge based on something personally seen, heard or otherwise perceived. Clause 66A contains a reference to knowledge and ensures that all previous representations covered by clause 66A are considered first-hand hearsay.

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

Clause 63 Exception – civil proceedings if maker not available – provides an exception to the hearsay rule in civil proceedings where the maker of a "first-hand" hearsay representation is not available to give evidence about an asserted fact. In these circumstances, oral evidence of the representation may be given by a person who witnessed it. Alternatively, a document containing the representation, or another representation reasonably necessary to understand it, may be admitted.

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

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

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

Specifically, the hearsay rule does not apply to oral evidence of the representation given by a person who witnessed it, if the representation was made:

(a) under a duty to make that representation; or
(b) when or shortly after the asserted fact occurred and in circumstances where it is unlikely that the representation is a fabrication; or
(c) in circumstances that made it highly probably that the representation was reliable; or
(d) against the interests of the maker at the time the representation was made and it was made in circumstances that make it likely it is reliable.

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

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

Accordingly, this subclause contains a requirement that for such admissions to be admitted, they must also be found 'to be likely to be reliable'. The

provision is not restricted to accomplices and co-accused, as statements against interest may arise in other situations.

The hearsay rule does not apply to evidence of a representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding the defendant affected has cross-examined, or had a reasonable opportunity to cross-examine, the person who made the representation.

The hearsay rule also does not apply to evidence of a representation presented by a defendant if given by a person who witnessed it, or to a document containing the representation, or another representation reasonably necessary to understand it.

If evidence of this kind has been presented by a defendant about a particular matter, the prosecution or another defendant may present evidence of another previous representation about the matter.

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

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

Subclause (3) sets out factors the court may take into account in determining the "freshness" of the memory. This may be determined by a wide range of factors in addition to the temporal relationship between the occurrence of the asserted fact and the making of the representation. The nature of the event and the age and health of the person are included as examples of the considerations which may be relevant to an assessment of the "freshness" of the memory. This subclause was inserted in accordance with the 2005 LRCs' Report (recommendation 8-4).

Subclause (3) is a response to *Graham v The Queen* (1998) 195 CLR 606.

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

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

The clause is limited to first-hand hearsay and enables the court to assess the reliability of the person who had personal knowledge of the asserted fact. This is in accordance with the 2005 LRCs' Report finding that this exception is

only justified in relation to first-hand hearsay and it should not apply to second-hand and more remote forms of hearsay (recommendation 8-5).

Clause 67 Notice to be given – sets out the notice requirements for a party seeking to present hearsay evidence in accordance with Part 3.2.

Clause 68 Objections to tender of hearsay evidence in civil proceedings if maker available – enables a party in civil proceedings to object to the tender of hearsay evidence where the maker of the representation is available, but has not been called to give evidence because it would cause undue expense or undue delay or would not be reasonably practicable (under clause 64). Objections must be made in accordance with the stipulated notice and other requirements. If the objection is unreasonable the court may order that the party pay the costs incurred in relation to the objection and in calling the maker to give evidence.

Division 3.2.3 – Other exceptions to the hearsay rule

Clause 69 Exception – business records – provides an exception to the hearsay rule for certain previous representations in business records. The exception will apply only if the representation was made or recorded in the course of, or for the purposes of, a business and was made by a person who had, or might reasonably be supposed to have had, personal knowledge of the fact asserted by the representation or was made on the basis of information supplied (directly or indirectly) by a person who might reasonably be supposed to have or have had such knowledge.

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

Clause 70 Exception – contents of tags, labels and writing – provides an exception to the hearsay rule for the tags and labels attached to or writing placed on objects (including documents).

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

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

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

the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

This exception is in accordance with the 2005 LRCs' Report (recommendation 19-1). It found that the UEAs should be amended to make the hearsay rule more responsive to Aboriginal and Torres Strait Islander oral tradition. In Australian Indigenous societies, the value given to information about traditional law and custom passed on via oral tradition is determined by considering factors such as the actual transmission, the source of the information, and the person to whom it has been passed. This clause does not treat orally transmitted evidence of traditional law and custom as prima facie inadmissible, as this is the form by which law and custom are maintained under Indigenous traditions. Accordingly, the clause acts as a safeguard and promotes a number of human rights under the *Human Rights Act 2004*, including sections 14 and 27.

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

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

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

Clause 74 Exception – reputation of public or general rights - provides an exception to the hearsay rule for reputation as to public or general rights. Odgers[4] notes that under the common law, the term 'public right' is one affecting the community in general[5] and a 'general right' is one affecting a particular class, such as the rights of a group of Aboriginals in respect of a particular piece of land. [6]

[4] S Odgers, *Uniform Evidence Law*, 2010, p 75.
[5] *Brett v Beales* (1830) 10 B&C 508; 109 ER 539.
[6] *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; *Mabo v Queensland* [1992] 1 Qd R 78; *Gumana v Northern Territory* [2005] FCA 50.

In a criminal proceeding, the exception does not apply to evidence presented by a prosecutor unless it tends to contradict such evidence that has been admitted.

Clause 75 Exception – interlocutory proceedings – provides an exception to the hearsay rule for evidence presented in interlocutory proceedings if the party who presents it also presents evidence of its source.

Part 3.3 - Opinion

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

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

The note to clause 76 sets out specific exceptions to the opinion rule as contained in other sections of the Act.

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

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

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

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

The clause implements recommendation 19-2 of the 2005 LRCs' Report.

The Report recommended that a member of an Aboriginal or Torres Strait Islander group (the group) should not have to prove that he or she has specialised knowledge based on training, study or experience before being able to give opinion evidence about the traditional law and custom of his or her own group.

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

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

Clause 79 Exception – opinions based on specialised knowledge – provides an exception to the opinion rule allowing a person with specialised knowledge based on training, study or experience to give an opinion that is completely or substantially based on that knowledge. It is not necessary for the person to be formally qualified, relevant experience will suffice.

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

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

Human rights implications

The clause acts as a safeguard and promotes the right under section 11 of the *Human Rights Act 2004* for every child to have the protection needed because of being a child, without distinction or discrimination of any kind.

Clause 80 Ultimate issue and common knowledge rules abolished - abolishes the common law rules known as the 'ultimate issue rule' and the 'common knowledge rule'.

The 'ultimate issue rule' prevents a witness from expressing an opinion on an issue to be decided by the court. The old common law rule is subject to much criticism – uncertainty as to its present formulation, the arbitrariness of its implementation, and its conceptual nonsensicality. The popular justification for the rule, that it prevented the expert or lay witness from usurping the function of the jury, is misconceived. There is no usurpation. The jury, in any event will be told that they must assess the evidence, lay and expert. It is one

the most important issues that expert assistance can be crucial and the courts need to be able to receive it. The change should not significantly increase the volume of testimony received by the courts because it has become a common practice de facto to allow evidence to be given upon ultimate issues. It will, however, serve to make the law more coherent and to remove a rule which has the potential to, and now and again does, cause unnecessary confusion and hardship. [7]

The 'common knowledge rule' excludes expert opinion evidence on matters of common knowledge. This old common law rule has led to difficulties in defining the boundaries of the concept. While abolishing the rule will render admissible some additional evidence, the number of experts appearing before the courts and the testimony they give will not produce serious time or cost problems. An expert may still be of assistance to the court even in an area about which most people know something. Additionally, a relevance discretion is quite capable of excluding such material. The change will give parties the opportunity to present relevant evidence to the courts. It will enable the accused to defend their case using all relevant material, and accordingly will enhance the appearance of doing justice and the credibility of the trial system. [8]

Part 3.4 - Admissions

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

Clause 81 Hearsay and opinion rules – exception for admissions and related representations – provides an exception to the hearsay and opinion rules for evidence of an admission and evidence of a representation made at or about the time of the admission that is reasonably necessary to understand the admission.

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

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

Clause 82 Exclusion of evidence of admissions that is not first-hand – qualifies the exception created by clause 81. The hearsay rule will apply to evidence of an admission unless the evidence is given orally by a person who witnessed the admission or the evidence is a document in which the admission is made.

The note to clause 82 states that clause 60, which contains an exception to the hearsay rule for evidence that is admitted for a non-hearsay purpose, does not apply to evidence of an admission in a criminal proceeding. The

[7] ALRC 26, vol 1, para 743.
[8] ALRC 26, vol 1, para 743.

note was included in response to recommendation 10-2 of the 2005 LRCs' Report.

Clause 83 Exclusion of evidence of admissions as against third parties – provides that the hearsay rule and the opinion rule apply so that evidence of an admission cannot be used in relation to the case of a third party unless that third party consents. Consent cannot be given in respect of part only of the evidence. A third party is a party to a proceeding who did not make the admission or present the evidence.

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

Clause 85 Criminal proceedings – reliability of admissions by defendants – relates to admissions by defendants in a criminal proceeding.

The clause only applies to:

- an admission made to or in the presence of an investigating official, who at that time was exercising functions in connection with the investigation of the commission, or possible commission, of an offence; or
- an admission made as a result of an act of someone else who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution should be brought or continued.

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

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

Clause 85(3) provides a number of matters that the court may take into account, including:

- any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental,

intellectual or physical disability to which the person is or appears to be subject; and

- if the admission was made in response to questioning – the nature of the questions and the way in which they were put and the nature of any threat, promise or other inducement made to the person questioned.

These matters act as a safeguard and promote the right to fair trial under section 21 of the *Human Rights Act 2004*.

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

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

First, subclause (1)(b) is intended to make it clear that covert operatives are not within the ambit of the provision. The possibility that covert operatives could be covered by the clause was considered by Callaway JA in the Victorian Court of Appeal unreported decision *R v Tofilau* [2006] VSCA 40.

Second, the term ‘official questioning’ has been removed from other parts of the Bill so as to avoid any uncertainty. The term has been removed from clauses 89, 139, 165 and the Dictionary.

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

Clause 87 Admissions made with authority – sets out the circumstances in which a representation made by another person is treated as being an admission made by a party.

A representation made by another person is taken to have been made by a party if it is reasonably open to find that when it was made:

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

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

Clause 88 Proof of admissions – provides that to determine whether evidence of an admission is admissible the court is to find that a person made an admission if it is reasonably open so to find.

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

If the only use that can be made of the evidence of the silence would be to draw such an unfavourable inference, the evidence of the silence itself is inadmissible for that purpose.

The application of this clause is limited to the evidence of the silence. A recent Victorian decision regarding the prohibition on the admissibility of silence in the course of selective answering is the unreported Victorian Court of Appeal decision *R v Barrett* [2007] VSCA 95 (17 May 2007).

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

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

Clause 90 Discretion to exclude admissions – provides that, if in a criminal proceeding, having regard to the circumstances in which an admission was made, it would be unfair to an accused to use evidence of the admission in the prosecution case, the court may refuse to admit the admission at all, or admit the admission, but limit its use.

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

Part 3.5 – Evidence of judgments and convictions

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

Clause 91 Exclusion of evidence of judgments and convictions – provides that evidence of a decision or judgment, or a finding of fact, in a proceeding is not admissible to prove some fact that was in issue in those proceeding. For example, a decision includes an acquittal and under this rule, an acquittal would not be admissible for the purpose of showing that the person charged was innocent. An acquittal establishes no more than that the

Crown failed to prove the accused person's guilt beyond reasonable doubt. It is of such minimal probative value that there is very little to be gained by admitting evidence of it and the disadvantages flowing from its admission would be considerable.

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

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

The second exception provides that, in civil proceedings, evidence that a party or a person through or under whom a party claims has been convicted of an offence is admissible (not being convictions under review or that have been quashed or set aside or in respect of which a pardon has been given).

Clause 93 Savings – preserves existing law that enables evidence of convictions to be admitted in defamation proceedings and the rules relating to judgments *in rem, res judicata* and issue estoppel.

Part 3.6 – Tendency and coincidence

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

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

Clause 95 Use of evidence for other purposes – provides that if evidence is deemed inadmissible for a prohibited purpose under Part 3.6 (for example, because it is 'tendency' or 'coincidence' evidence), it cannot be used for the prohibited purpose even if it is relevant, and accordingly admissible, for another purpose.

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

Clause 97 The tendency rule – sets out the exclusionary rule for tendency evidence.

The rule ('the tendency rule') prevents evidence of a person's character, reputation, conduct or tendency being admitted to prove that the person has or had a tendency to act in a particular way or to have a particular state of mind unless two requirements have been satisfied.

These are, firstly, that notice has been given or dispensed with and, secondly, if the court considers that the evidence would, either by itself or having regard to other evidence presented or to be presented by the party seeking to present the tendency evidence, have significant probative value.

Notice is not required to be given if the court dispenses with notice requirements under clause 100 or the evidence is adduced to explain or contradict tendency evidence presented by another party. The human rights implications arising from a court dispensing with notice requirements is dealt with under the explanation of clause 100 below.

Clause 98 The coincidence rule – sets out the exclusionary rule for coincidence evidence.

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

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

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

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

Notice is not required to be given if the court dispense with notice requirements under clause 100 or the evidence is adduced to explain or contradict tendency evidence presented by another party. The human rights implications arising from a court dispensing with notice requirements is dealt with under the explanation of clause 100 below.

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

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

An example where it may be appropriate to prospectively waive the notice requirement where there is reason to believe that evidence would be fabricated of notice were given.

Human Rights implications

Clause 100 engages the right to a fair trial in section 21 of the *Human Rights Act 2004* because it requires a balancing of probative value of the evidence with the prejudice that may be caused to a party by the failure to give reasonable notice. However, in deciding whether to make a direction a court must take into account the factors listed in clause 192(2). These matters include the following:

- the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing;
- the extent to which to do so would be unfair to a party or to a witness;
- the importance of the evidence in relation to which the leave, permission or direction is sought;
- the nature of the proceeding;
- the power, if any, of the court to adjourn the hearing or to make another order to give a direction in relation to the evidence.

The Full Court of the Federal Court has pointed out:

> *[T]he function of the discretion vested in the judge in a criminal trial is to endure fairness in the trial process having regard, on the one hand to the need to protect the accused against undue prejudice and, on the other hand, to the probative significance of the evidence to be sought to be led by the Crown*. [9]

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

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

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

The clause does not prevent the prosecution from presenting tendency or coincidence evidence to explain or contradict tendency or coincidence evidence presented by the defendant.

[9] *Eastman v The Queen* (1997) 76 FCR 9; 158 ALR 107 at 55 (FCR).

Part 3.7 - Credibility

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

Division 3.7.1 – Credibility evidence

Clause 101A Credibility evidence – defines 'credibility evidence'. Evidence that is 'credibility evidence' is either (a) relevant only because it affects the assessment of the credibility of the witness or person, or (b) relevant because it affects the assessment of credibility and is relevant, but not admissible, or cannot be used, for some other purpose under Parts 3.2 to 3.6 of the Bill.

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

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

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

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

The note to clause 101A clarifies that clauses 60 (exception to the hearsay rule) and 77 (exception to the opinion rule) will not affect the operation of paragraph (b) because they cannot apply to evidence that is yet to be admitted. The inclusion of this note is in response to the decision in *Adam*.

Division 3.7.2 – Credibility of witnesses

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

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

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

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

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

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

Clause 104 Further protections – cross-examination as to credibility – provides an additional safeguard in relation to credibility evidence given in criminal proceedings. It protects a defendant who gives evidence in criminal proceedings, requiring that the leave of the court must be obtained for cross-examination of the defendant on matters relevant only to the defendant's credibility, unless the cross-examination relates to whether the defendant was biased or had a motive to be untruthful, to his or her recollections or if the defendant has made a prior inconsistent statement.

Clause 105 There is no clause 105. The repeal of section 105 from the UEAs was recommended in the 2005 LRCs' Report (recommendation 12-8) because the right of a defendant to make an unsworn statement in a criminal trial no longer exists under Australian law.

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

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

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

Prior to the amendments made to this provision in response to the 2005 LRCs' Report (recommendation 12-5), the provision provided for a fixed list of situations (now listed in subclause (2) as circumstances where leave is not required) in which credibility evidence might be admitted to rebut a denial by a witness. In the Report it was concluded that a more flexible approach should be adopted.

Evidence that did not fall within the previous 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 that ensuring the efficiency of trials.

Clause 107 There is no clause 107. The section has been repealed from the Commonwealth and New South Wales Evidence Acts.

Clause 108 Exception – re-establishing credibility – provides exceptions to the credibility rule for evidence given in re-examination of a witness, or (if the court gives leave) to evidence of a prior inconsistent statement of a witness in two circumstances. Firstly, where evidence of a prior inconsistent statement of the witness has been admitted, and secondly, where it is or will be suggested that evidence given by the witness has been fabricated or re-constructed or is the result of a suggestion.

Division 3.7.3 – Credibility of people who are not witnesses

Clause 108A Admissibility of evidence of credibility of person who has made a previous representation - deals with the admissibility of credibility evidence of a person who has made a previous representation.

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

In accordance with recommendations 12-1 and 12-6 of the 2005 LRCs' Report, this clause reflects the new definition of 'credibility evidence' (see clause 101A) so that credibility evidence about the person will not be admissible unless it could substantially affect the person's credibility. It ensures that subclause (1) applies to evidence relevant to credibility.

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

However, clause 46 of the Bill provides that the court may give leave to a party to recall a witness if another party raised a matter on which the relevant

witness was not cross-examined. Further, this problem can be overcome by the prosecution later being able to reopen its case, or being allowed to call a case in reply: see *R v Siulai* [2004] NSWCCA 152. See clause 108B below for an additional consideration regarding defendants.

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

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

Subclause (2) provides that the prosecution must ordinarily seek the court's leave where it wishes to tender evidence relevant only to a defendant's credibility. When deciding whether to grant leave, the court is to take into account matters in subclause (4). Leave is not required where the evidence falls within an exception under subclause (3).

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

Division 3.7.4 – People with specialised knowledge

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

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

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

Part 3.8 – Character

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

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

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

Human rights implications

Clause 110 acts as a safeguard and promotes the right to a fair trial in section 21 of the *Human Rights Act 2004*. The ALRC explained the rationale on which this provision is based:

> *A fundamental principle of our accusatorial criminal trial system has been encapsulated in the maxim: 'Better that ten guilty men go free than one innocent man be wrongly convicted". If the legal system is to minimise the risk of wrongful conviction, it may be necessary to give the accused an absolute right to introduce evidence of his good character, subject to the relevance discretion.* [10]

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

Clause 112 Leave required to cross-examine about character of accused or co-accused – requires leave to be obtained to cross-examine a defendant about matters set out in Part 3.8.

Part 3.9 – Identification evidence

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

Human Rights implications

The right to privacy (section 12 Human Rights Act) is engaged by Part 3.9 of the Bill because a witness may be required to divulge personal information including visual identification evidence. However, the limitation on the right is a proportionate response and the least restrictive available as the limitation will occur in circumscribed and precise circumstances provided for in law subject to the court's discretion on a case-by-case basis.

The judicial discretion operates as a safeguard that protects and balances the rights of parties to proceedings (civil and criminal), the rights of witnesses and the importance of the court hearing all relevant, reliable and probative

[10] ALRC 26, vol 1, para 802.

evidence. It is consistent with and gives effect to rights under the *Human Rights Act 2004*, particularly the right to a fair hearing under section 21.

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

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

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

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

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

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

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

Clause 115 Exclusion of evidence of identification by pictures – provides an exclusionary rule for visual identification evidence where the identification was made completely or partly after examining pictures (defined to include photographs) kept for use by police officers. Picture identification evidence presented by the prosecution is not admissible unless the pictures examined did not suggest that they were pictures of a person in police custody. Picture identification evidence based on pictures taken before a defendant was taken into custody will only be admissible in the following limited circumstances:

- the defendant's appearance has changed significantly from when the offence was committed;
- it was not reasonably practicable to make a picture of the defendant after he or she was taken into custody;
- the evidence contradicts or qualifies picture identification;
- evidence adduced by the defence.

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

Part 3.10 – Privileges

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

Division 3.10.1 – Client legal privilege

Clause 117 Definitions – defines the terms ***client***, ***confidential communication***, ***confidential document***, ***lawyer*** and ***party***, for the purposes of the Division.

The definition of ***client*** has a wide meaning, including, for example, government employees. It also includes an entity who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service). Under this definition there is no distinction between government and private lawyers—a client is allowed to be an employer of the lawyer.

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

It is intended that the definition of ***lawyer*** for the client legal privilege provisions reflect the breadth of the concept in the case law. There is no justification for limiting client legal privilege to only those with a practising certificate, particularly since a range of lawyers may provide legal advice or professional legal services in various jurisdictions without hold such a certificate. It is the substance of the relationship that is important, rather than a strict requirement that the lawyer hold a practising certificate. Employees and agents of lawyers are also included.

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

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

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

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

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

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

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

Clause 118(c) extends the privilege to confidential documents prepared by someone other than the client or lawyer (such as an accountant or consultant) for the dominant purpose of the lawyer providing legal advice to the client (implementing recommendation 14-4 of the 2005 LRCs' Report). This reflects developments in the common law consideration of legal advice privilege as discussed by the Full Federal Court in *Pratt Holdings v Commissioner of Taxation* (2004) 207 ALR 217.

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

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

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

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

Clause 122 Loss of client legal privilege – consent and related matters – enables evidence that would otherwise be subject to client legal privilege to

be presented with the consent of the client or party concerned, or where the client or party has acted in a way inconsistent with the maintenance of the privilege, that is, inconsistency between some prior conduct of the client or party and the conduct of the client or party in objecting to disclosure of material prima facie protected by client legal privilege.

While the provision does not expressly refer to 'fairness' the common law approach is that it is necessary to inform the assessment of consistency or inconsistency by taking into account the consideration of fairness. [11]

Additionally, subclause 122(5) provides a number of circumstances where a client or party will not be taken to have acted in a way inconsistent, including as a result of duress or deception or under compulsion of law.

The clause was amended following the 2005 LRCs' Report to more closely align it with the common law test for loss of privilege as set out in *Mann v Carnell* (1999) 201 CLR 1 (implementing recommendation 14-5 of the Report). Prior to amendments following on from the Report, the focus of the provision was on the intention of the holder of the privilege and waiver consequent on disclosure of privileged material. The clause is now concerned with the behaviour of the holder of the privilege.

The intention of the clause is that the privilege should not extend beyond what is necessary, and that voluntary publication by the client should bring the privilege to an end. The addition of the inconsistency criterion for waiver also gives the court greater flexibility to consider all the circumstances of the case.

Clause 123 Loss of client legal privilege – defendants - ensures that a defendant in a criminal proceeding can present evidence of confidential communications and documents except such communications between, or documents prepared by, an associated defendant or his or her lawyer.

Clause 124 Loss of client legal privilege – joint clients - provides that in a civil proceeding involving joint clients of a lawyer, one of the joint clients can present evidence concerning the confidential communications and documents made by any of the joint clients.

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

Clause 126 Loss of client legal privilege – related communications and documents – ensures that client legal privilege does not attach to communications or documents that relate to communications or documents that are not protected under the Division if the related communications or

[11] S Odgers, *Uniform Evidence Law*, 2010, p 617.

documents are unreasonably necessary for an understanding of the unprotected communications or documents.

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

Division 3.10.2 – Other privileges

Clause 127 Religious confessions – entitles members of the clergy to refuse to divulge both the contents of religious confessions made to them in their professional capacity and the fact that they have been made. However, this privilege does not apply if the communication involved in the religious confession was made for a criminal purpose.

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

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

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

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

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

Subclause (9) provides that the operation of the certificate does not apply to a proceeding which is a retrial for the same offence or a trial for an offence

arising out of the same facts that gave rise to the original criminal proceeding in which the certificate was issued.

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

Clause 128A Privilege in relation to selfincrimination – exception for certain orders etc - provides a process to deal with objections on the grounds of selfincrimination when complying with a search order (Anton Piller) or a freezing order (Mareva) in civil proceedings other than under the proceeds of crime legislation.

The clause addresses, but does not implement, recommendation 15-10 of the 2005 LRCs' Report. The clause is based upon the Victorian Law Reform Commission Implementation Report. It provides that the privilege against selfincrimination under the Bill applies to disclosure orders. The principal provisions are outlined below.

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

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

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

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

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

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

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

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

Division 3.10.3 — Evidence excluded in the public interest

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

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

Subclause (5) provides that the prohibitions in this clause do not apply in various types of proceedings, for example, a prosecution for offences of attempting to pervert the course of justice or perverting the course of justice. Exceptions are made for these offences as they are concerned with conduct adversely affecting the trial system. In addition, a number of the offences may take place in the jury room and prosecution of them might require evidence to be given by jurors.

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

The clause provides some guidance on the nature of evidence which relates to matters of state and lists some matters to be taken into account by the court when determining whether to exclude evidence of matters of state (for example, the importance of the information or document in the proceeding and the means available to limits its publication).

Clause 131 Exclusion of evidence of settlement negotiations – provides that evidence must not be presented of communications made between, or documents prepared by, parties in dispute in connection with and during attempts to settle the dispute (this does not include attempts to settle criminal proceedings).

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

Division 3.10.4 - General

Clause 131A Application of div 3.10.4 to preliminary proceedings of courts – 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 implements recommendation 14-6 in full and recommendations 14-1, 15-3, 15-6 and 15-11 in part of the 2005 LRCs' Report.

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

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

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

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

The privileges are not extended to non-curial contexts.

Clause 132 Court to inform of rights to make applications and objections – provides that a court must satisfy itself that a witness or party is aware of his or her rights to claim a privilege under this Part if it appears that the witness or party may have a ground for making an application or objection under it. This provision operates to ensure fairness to the witness or party who has a basis for making an objection. If there is a jury, this is to be done in the absence of the jury.

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

Clause 134 Inadmissibility of evidence that must not be presented or given – provides that if, because of this Part, evidence must not be presented or given in a proceeding, the evidence is not admissible in the proceeding.

Part 3.11 – Discretionary and mandatory exclusions

Part 3.11 provides for the discretionary and mandatory exclusion of evidence even if it would otherwise be admissible.

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

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

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

Clause 137 Exclusion of prejudicial evidence in criminal proceedings – requires the court to exclude prosecution evidence in criminal proceedings if its probative value is outweighed by the danger of unfair prejudice to the accused.

The 2005 LRCs' Report refers to common law authority that evidence is not unfairly prejudicial to a defendant merely because it damages the defence case.

The clause requires the court to systematically assess the probative value of the evidence against the real risk that the tribunal of fact will misuse the evidence in some unfair way.

Clause 138 Exclusion of improperly or illegally obtained evidence – enables the court to exclude evidence obtained improperly, unlawfully or in consequence of an impropriety or a contravention of the law. Such evidence is excluded unless the desirability of admitting it outweighs the undesirability of admitting evidence obtained in the particular way it was obtained.

<u>Human rights implications</u>
The clause is an important safeguard for the right to a fair trial provided in section 21 of the *Human Rights Act 2004*. The clause sets out a range of factors the court must consider when determining whether to exclude evidence under this clause, including whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights. Other factors include:

- the probative value of the evidence;
- the importance of the evidence in the proceeding;
- the nature of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding;
- the gravity of the impropriety or contravention;

- whether the impropriety or contravention was deliberate or reckless;
- whether any other proceeding has been or is likely to be taken in relation to the impropriety or contravention;
- the difficulty of obtaining the evidence without the impropriety or contravention.

The clause is intended to reflect, with some modifications, the exclusionary discretion at common law that is known as the rule in *Bunning v Cross* (1978) 141 CLR 54.

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

Evidence of the statement made or act done is taken to have been improperly obtained if:

- the questioning was conducted by an investigating official who did not have the power to arrest the person;
- the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence;
- the investigating official did not caution the person before starting to question the person.

The caution must be to the effect that the person need not say or do anything but that anything the person does say or do may be used in evidence. The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency but need not be in writing unless the person is unable to hear adequately, and accordingly promotes the right to recognition and quality before the law under section 8 of the *Human Rights Act 2004*.

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

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

Chapter 4 - Proof

This Chapter is about the proof of matters in a proceeding.

Part 4.1 – Standard of proof

Part 4.1 is about the standard of proof in civil proceedings and criminal proceedings.

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

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

Clause 142 Admissibility of evidence – standard of proof – provides that the standard of proof for a finding of fact necessary for deciding a question whether evidence should or should not be admitted in a proceeding, or any other question arising under the Act (if the Act does not otherwise provide) is proof on the balance of probabilities. The clause lists some of the matters a court may take into account in determining whether the standard has been reached. The court may take additional matters into account.

Part 4.2 Judicial notice

Part 4.2 is about matters that do not require proof in a proceeding.

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

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

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

Part 4.3 – Facilitation of proof

Part 4.3 makes easier the proof of the matters dealt with in the part.

Division 4.3.1 - General

Clause 146 Evidence produced by processes, machines and other devices – makes provision in relation to evidence produced completely or partly by machines. It may be presumed that a machine was working properly

on the day in question. The provision creates a rebuttable presumption placing the legal burden of disproof on the party disputing the presumed fact, but provides that the prima facie presumption disappears once a real doubt is raised.

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

Clause 148 Evidence of certain acts of justices, Australian lawyers and notaries public – provides that it is presumed (unless the contrary is proved) that documents are attested, verified, signed or acknowledged by a justice of the peace, an Australian lawyer or a notary public if they purport to be so attested, verified, signed or acknowledged.

Clause 149 Attestation of documents – dispenses with the need to call a witness who attested to the execution of a document (other than a will or other testamentary document) to give evidence about the execution of the document. However, it will still be necessary to prove the signature of the maker of the document concerned.

Clause 150 Seals and signatures – presumes (unless the contrary is proved) that seals (including Royal seals, government seals, seals of bodies corporate and seals of people acting in an official capacity) are authentic and valid. A similar presumption is made with respect to the signature of people acting in an official capacity.

Clause 151 Seals of bodies established under State law – contains no substantive provision. Its inclusion ensures parity in section numbering with the Commonwealth Evidence Act which contains this provision.

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

Division 4.3.2 – Matters of official record

Clause 153 Gazettes and other official documents – presumes (unless the contrary is proved) that documents, such as the Government Gazette and other documents printed with the authority of the government, are what they purport to be and were published on the day on which they purport to have been published. The clause also provides that if such a document contains or notifies the doing of an official act, it will be presumed that the act was validly done and, if the date on which it was done is indicated in the document, the act was done on that date.

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

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

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

Clause 155A Evidence of Commonwealth documents – contains no substantive provision. Its inclusion ensures parity in section numbering with the Commonwealth Evidence Act which contains this provision.

Clause 156 Public documents – presumes (unless the contrary is proved) that a copy of, or an extract from or summary of, a public document purporting to be sealed or certified as such by a person who might reasonably be supposed to have custody of the document is a copy, extract or summary of the document.

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

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

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

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

Division 4.3.3—Matters relating to post and communications

Clause 160 Postal articles – provides that, unless evidence sufficient to raise doubt is presented, a postal article sent by pre-paid post addressed to a

person at a specified address was received at that address on the fourth working day (as defined) after posting.

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

Clause 161 Electronic communications – provides that, unless evidence sufficient to raise a doubt is presented, a range of presumptions apply to records of electronic communications. The presumptions relate to the mode of communication, the sender, the time and place of sending and receipt.

Electronic communication is defined and embraces all modern electronic technologies, including telecommunications, as well as the facsimile and telex methods of communication.

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

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

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

Clause 163 Proof of letters having been sent by Commonwealth agencies – contains no substantive provision. Its inclusion ensures parity in section numbering with the Commonwealth Evidence Act which contains this provision.

Part 4.4 – Corroboration

Part 4.4 is about requirements that evidence be corroborated.

Clause 164 Corroboration requirements abolished – provides that evidence need not be corroborated. It also abolishes, subject to the other provisions of the Act, the existing rules of law or practice that require warnings or directions to be given to a jury in the absence of corroboration. The provision does not apply to a rule of law requiring corroboration with respect to perjury or a like offence.

Part 4.5 – Warnings and information

Part 4.5 requires judges to warn juries about the potential unreliability of certain kinds of evidence.

Clause 165 Unreliable evidence – allows any party in a jury trial to ask the judge to give a warning to the jury about the unreliability of evidence to which the clause applies and the need for care in determining the weight to attach to the evidence. The clause sets out the types of evidence that may be unreliable and includes hearsay evidence, evidence of admissions and evidence affected by the age or ill-health of the witness.

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

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

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

Human rights implications

Clause 165 engages the right under section 8 of the *Human Rights Act 2004* which provides that everyone is equal before the law and is entitled to the equal protection of the law without discrimination. The clause requires a warning to be given to a jury, if a party so requests, regarding the unreliability of certain kinds of evidence, including for reasons of age, ill health, injury or the like. This limits the right of people with disabilities or of advanced age to be equal before the law.

However, the limit upon the right is reasonable and justifiable in a free and democratic society for the purposes in accordance with section 28 of the *Human Rights Act 2004* having regard to the following factors:

- ***the nature of the right affected***

Freedom from discrimination and the right of all people to be treated equally by the law regardless of any disability or impairment.

- ***the importance of the purpose of the limitation***

The purpose of this limitation is to give effect to an accused person's right to a fair trial by ensuring that warnings can be given to a jury regarding unreliable evidence.

- ***the nature and extent of the limitation***

The court has a discretion to give a warning to the jury regarding evidence, the reliability of which may be affected by age or disability. It is only where reliability of evidence is affected that the warning can be given. There is no automatic assumption that people of advancing age or with disabilities will give unreliable evidence. A judge will need to be satisfied that the evidence may be unreliable in the individual circumstances of each case.

- ***the relationship between the limitation and its purpose***

The ability to give a warning is directly and rationally connected with the purpose of ensuring a fair trial as it is limited to circumstances in which the reliability of the evidence may be affected by age or disability.

- ***less restrictive means reasonably available to achieve its purpose***

There are no less restrictive means of achieving this purpose.

It is also important to note the safeguard in clause 165(3) that enables the judge to refuse to give a warning if there are good reasons for not doing so.

This is a reasonable limitation of the right to recognition and equality before the law because the primary aim of ensuring that an accused person has a fair trial is further by the capacity to warn a jury that evidence may be unreliable because of factors affecting a witness.

Clause 165A Warnings in relation to children's evidence - makes it clear that judges must not give a warning or inform a jury that the evidence of a child may be unreliable or that there is a need for caution in determining whether to accept the evidence of a child unless the court is satisfied that there are circumstances particular to that child that affect the reliability of the evidence.

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

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

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

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

This clause does not affect any other power of a judge to give a warning to, or inform, the jury.

Clause 165B Delay in prosecution - regulates information which may be given to juries in criminal proceedings on the subject of delay and forensic disadvantage to the accused.

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

Subclause (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 tell the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence.

The clause contains two safeguards. First the mere passage of time is not to be regarded as a significant forensic disadvantage (subclause (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 (subclause (3)).

Subclause (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. 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 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. Use of the phrase 'delay in complaint' in the new section has also been deliberately avoided because of its association with discredited assumptions about the reliability of sexual assault complainants, particularly children.

<u>Human rights implications</u>
The ALRC and VLRC accepted that, where there is forensic disadvantage arising from lengthy delay, a warning may be necessary in the circumstances of a particular case in order to ensure that an accused person receives a fair trial (section 21 *Human Rights Act 2004*). However, the ALRC and VLRC considered that there was a need for legislative amendment to limit the circumstances in which the warning is given and to clarify its operation. [12] 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

[12] ALRC 102, para 18.117.

judge would be bound to ask counsel (in the absence of the jury) whether such a warning was requested.

Part 4.6 – Ancillary provisions

Part 4.6 sets out procedures for proving certain other matters.

Division 4.6.1 – Requests to produce documents or call witnesses

Clause 166 Meaning of *request* – div 4.6.1 – defines ***request*** for the purposes of Division 4.6.1.

Clause 167 Requests may be made about certain matters – provides that a party may make a reasonable request to another party for the purpose of deciding a question that relates to a previous representation, evidence of a conviction or the authenticity, identity or admissibility of a document or thing.

Clause 168 Time limits for making certain requests – sets out the time limits that apply in relation to the making of requests under the Division.

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

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

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

Human rights implications

Clause 169 of the Bill engages and limits the right to freedom of movement (section 13 Human Rights Act) because it provides for a person to be required to come before the court to give evidence. To the extent that a person is required to attend the court under clause 169 the person's freedom of movement is limited.

However, the limit upon the right is clearly reasonable and justifiable in a free and democratic society for the purposes in accordance with section 28 of the *Human Rights Act 2004* having regard to the following factors:

- ***The nature of the right affected;***

The right to move freely within the ACT encompasses a right not to be forced to move to, or from, a particular location and includes freedom from physical barriers and procedural impediments.

- ***The importance of the purpose of the limitation;***

The limitation is important because it enables a court to examine relevant, competent, and compellable witnesses who may hold relevant evidence and or information which may bring to light the truth of disputed facts and evidence. The ability to secure the presence of such witnesses is essential to the effective administration of the justice system and promotes the right to a fair trial under section 21 of the *Human Rights Act 2004*.

- ***The nature and extent of the limitation;***

Clause 169 limits the person's freedom of movement to the extent that a person may be compelled to be physically present at the court or another location for a limited time for the purpose of giving evidence.

- ***The relationship between the limitation and its purpose;***

The limitation on the free movement of a person by requiring the presence of the person at court to give evidence is directly and rationally connected to the purpose of ensuring the effective administration of the justice system and the right to a fair hearing.

- ***Less restrictive means reasonably available of achieving this purpose.***

There are no less restrictive means of achieving this purpose. The justice system would not be able to function if the courts did not have the power to compel people to attend before them and give evidence.

It is also important to note the practice of courts to allow witnesses to leave the court temporarily if their evidence is not required immediately, and to release witnesses once they have given evidence.

Division 4.6.2 – Proof of certain matters by affidavits or written statements

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

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

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

Clause 173 Notification of other parties – provides that a copy of any affidavit or statement must be served on each other party a reasonable time

before the hearing. The deponent of the affidavit or maker of the statement must be called to give evidence if another party so requests.

Division 4.6.3 – Foreign law

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

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

Clause 176 Questions of foreign law to be decided by judge – provides for the proof of the law of foreign countries to be decided by the judge.

Division 4.6.4 – Procedures for proving other matters

Clause 177 Certificates of expert evidence – provides for evidence of an expert's opinion to be given by certificate. The party tendering an expert certificate must serve notice, and a copy, of the certificate on each other party before the hearing. A party so served can require the expert to be called as a witness.

Clause 178 Convictions, acquittals and other judicial proceedings – provides for proof of convictions, acquittals and other judicial proceedings by a certificate given by specific people.

Clause 179 Proof of identity of convicted people – affidavits by members of State or Territory police forces – provides for proof of the identity of a person alleged to have been convicted of an offence by an affidavit of a fingerprint expert of the police force of the relevant State or Territory.

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

Human rights implications

The right to privacy (section 12 Human Rights Act) is engaged by clauses 179 and 180 of the Bill because a witness may be required to divulge personal information including identification evidence. However, the limitation on the right is a proportionate response and the least restrictive available as the limitation will occur in circumscribed and precise circumstances provided for in law subject to the court's discretion on a case-by-case basis.

Clause 181 Proof of service of statutory notifications, notices, orders and directions – provides for poof of service of written notifications, notices, orders and directions required to be sent under an Australian law.

Chapter 5 - Miscellaneous

Clause 182 Application of certain sections in relation to Commonwealth records – contains no substantive provision. Its inclusion ensures parity in section numbering with the Commonwealth Evidence Act which includes this provision.

Clause 183 Inferences – allows a court to examine a document or thing in respect of which a question has arisen in relation to the application of the Act and to draw reasonable inferences from the document or thing. The Full Federal Court has held that this provision does not dispense with proof of matters that need to be provided before opinion evidence contained in a documentary report becomes admissible.

Clause 184 Accused may admit matters and give consents – enables a defendant in or before a criminal proceeding, to make any admissions and give any consent that a party to a civil proceeding may make. A defendant's consent will not be effective in criminal proceedings unless he or she has been advised to consent by his or her legal practitioner or legal counsel, or if the court is satisfied that the defendant understands the consequences of doing so.

Clause 185 Faith and credit to be given to documents properly authenticated – contains no substantive provision. Its inclusion ensures parity in section numbering with the Commonwealth Evidence Act which includes this provision.

Clause 186 Swearing of affidavits before justices of the peace, notaries public and lawyers – contains no substantive provision. Its inclusion ensures parity in section numbering with the Commonwealth Evidence Act which includes this provision.

Clause 187 Abolition of the privilege against selfincrimination for bodies corporate – provides that, for the purposes of a law of the Territory, a body corporate does not have a privilege against self-incrimination.

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

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

Clause 190 Waiver of rules of evidence – allows the court, with the consent of the parties, to waive the rules relating to the manner of giving evidence, the exclusionary rules and the rules relating to the method of proof of documents.

A defendant's consent will not be effective in a criminal proceeding unless he or she has been advised to consent by his or her legal practitioner or legal counsel, or the court is satisfied that the defendant understands the consequences of the consent.

The clause also enables a court to make such orders in civil proceedings without the consent of the parties if the matter to which the evidence relates is not genuinely in dispute, or if the application of those rules would cause unnecessary expense or delay.

Clause 191 Agreements as to facts – enables the parties to agree that a fact is not to be disputed in the proceeding. Evidence may not be presented to prove, contradict or qualify an agreed fact, unless the court gives leave.

Clause 192 Leave, permission or direction may be given on conditions – complements provisions of the Act enabling a court to give any leave, permission or direction on the conditions that it thinks fit. The clause sets out some of the matters the court must take into account (for example, the extent to which to do so would unduly lengthen the hearing). The court may also take additional matters into account.

Clause 192A Advance rulings and findings - provides that a court may, if it considers it appropriate, give an advance ruling or make an advance finding in relation to the admissibility of evidence and other evidentiary questions.

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

The clause implements recommendation 16-2 of the 2005 LRCs' Report. In the Report, it was stated at para 16.98:

> *'The uniform Evidence Acts are silent on the issue of advance rulings. After their enactment, authorities in New South Wales proceeded on the assumption that the Acts allowed for advance rulings in relation to the admissibility of evidence. However, these authorities were recently overruled by the High Court in TKWJ v The Queen [(2002) 212 CLR 124] where it held that the uniform Evidence Acts only permit advance rulings to be made in some cases where leave, permission or direction is sought.'*

The 2005 LRCs' Report concluded that a broader power to make advance warnings was important as it carries significant benefits in promoting the efficiency of trials. This clause gives a broader power which 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 193 Additional powers – provides that a court may make orders to ensure that a party can adequately inspect documents that require

interpretation by a qualified person or from which sounds, images or writing can be reproduced.

The clause also extends the power of an entity to make rules of court in relation to the discovery, exchange, inspection or disclosure of intended evidence, documents and reports of people intended to be called to give evidence.

Clause 194 Witnesses failing to attend proceedings – contains no substantive provision. Its inclusion ensures parity in section numbering with the New South Wales Evidence Act which includes this provision. There are provisions to the same effect in ACT legislation applying to ACT courts.

Clause 195 Prohibited question not to be published – makes it an offence for a person to print or publish (without express court permission) an improper question (see clause 41), or a question where the answer likely to be given would contravene the credibility rule (Part 3.7) or a question in respect of which leave has been refused under Part 3.7 (which deals with evidence relevant to a witness's credibility). The maximum penalty for the offence is a fine of 60 penalty units.

Human rights implications

Clause 195 engages a number of rights under the *Human Rights Act 2004*, including the right to freedom of expression (section 16) and the right to a fair trial (section 21). The offence engages the right to freedom of expression because it prevents the publication of certain material, however, the right is not absolute and it is accepted that it can be legitimately subject to reasonable restrictions. The offence is designed to promote the public interest in the administration of justice and also promotes an accused person's right to a fair trial through preventing the publication of prejudicial material. Accordingly, clause 195 of the Bill constitutes a lawful restriction on the right to freedom of expression under section 16 of the *Human Rights Act 2004*.

Clause 196 Proceedings for offences – contains no substantive provision. Its inclusion ensures parity in section numbering with the New South Wales Evidence Act which includes this provision.

Clause 197 Regulation-making power – permits the Executive to make regulations for the Act. Regulations made under this clause must be notified, on the Legislation Register (http://www.legislation.act.gov.au), and presented to the Legislative Assembly.

Schedule 1 – Oaths and affirmations

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

Dictionary

The dictionary defines various words and expressions used in the Act.