



**Victorian
Law Reform
Commission**

**Implementing the Uniform Evidence Act
Report**

Victorian Law Reform Commission

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Contents

PREFACE	X
CONTRIBUTORS	XIII
TERMS OF REFERENCE	XIV
ABBREVIATIONS	XVII
RECOMMENDATIONS	XIX
CHAPTER 1: INTRODUCTION	1
Terms of Reference	2
Background	2
Terminology	4
Review of the UEA	4
Implementation of the UEA in Victoria	5
Approach Taken to Reference	5
Tasks Undertaken	6
Future Tasks	6
Scope of this Report	7
CHAPTER 2: DRAFTING A VICTORIAN UEA	9
Uniformity	11
Specific Provisions for the Victorian UEA	11
Commencement—Section 2	12
Definitions—Section 3	12
Application—Section 4	14
Commonwealth Provisions—Sections 5 and 6	18
Act Binds Crown—Section 7	19
Operation of Other Acts—Section 8	19
Application of Common Law and Equity—Section 9	21
Compellability of Spouses and Others in Certain Criminal Proceedings—Section 19	22

Improper Questions—Section 41	26
Further Protections: Cross-examination of the Accused —Section 104	28
Professional Confidential Relationships Privilege—Sections 126A–126F	29
Sexual Assault Communications Privilege—Sections 126G–126N	31
Privilege in Respect of Self-incrimination in Other Proceedings —Section 128	32
Privilege Against Self-Incrimination in Ancillary Proceedings	33
Exclusion of Evidence of Reasons for Judicial Decisions —Section 129	35
Extension of Privilege—Section 131A	37
Matters of Law—Section 143	44
Seals and Signatures—Sections 150 and 151	45
Evidence of Commonwealth Documents—Section 155A	45
Proof of Letters Having been Sent by Commonwealth Agencies—Section 163	46
Warnings—Sections 165–165B	46
Person Who May Give Such Evidence—Section 171	47
Application of Certain Sections in Relation to Commonwealth Records—Section 182	49
Full Faith and Credit to be Given to Documents Properly Authenticated—Section 185	49
Swearing Affidavits—Section 186	50
No Privilege Against Self-incrimination for Bodies Corporate —Section 187	51
Witness Failing to Attend Proceedings—Section 194	52
Prohibited Question Not to be Published—Section 195	56
Proceedings for Offences—Section 196	57
Definitions	57

CHAPTER 3: EVIDENCE ACT 1958 AND CRIMES ACTS	59
Evidence Act 1958	60
Repeal	60
Relocation of Provisions	65
New Acts	66
Staged Process	73
<i>Crimes Act 1958</i> and Related Acts	74
 CHAPTER 4: INTERACTION OF UEA WITH OTHER ACTS	 77
Evidentiary Provisions in Victorian Statutes	80
Construing the UEA and Other Evidentiary Provisions	80
Categories of Provisions	82
Provisions Affecting the Legal and Evidentiary Onus of Proof	82
Onus of Proof Provisions	82
Presumptions and Deeming Provisions	84
Conclusive and Prima Facie Evidence	85
Facts Which Need Not Be Proved by Evidence	87
Averments	89
Prescribed Methods of Proof	90
Certificates	90
Expert Certificates	91
Gazettes	93
Certified Copies	94
Copies of Seized Documents	95
Affidavits and Statutory Declarations	96
Other Prescribed Methods of Proof	98
Admissions	100
Statement by an Officer Admissible Against the Corporation	100
Successor in Law and Subrogation Provisions	101
Other Provisions Regarding Admissions	102
Procedural Provisions	103

General Procedural Provisions	103
Proof of Prior Convictions	104
Standard of Proof Provisions	105
Privileges and Exclusionary Provisions	106
Privilege Against Self-incrimination	106
Legal Professional Privilege/Client Legal Privilege	110
Terrorism (Community Protection) (Amendment) Bill 2005	113
Provisions Relating to Medical Privilege	116
Evidence of Settlement Negotiations	117
Parliamentary Privilege	118
Other Statutory Privileges	119
Adopting the Privileges Available in Court to Non-curial Proceedings	122
Other Exclusionary Rules	123
Limitation on the Admissibility or Use of Evidence	124
Secrecy and Confidentiality Provisions	125
Certain Persons Not Competent or Compellable	126
Specific Evidentiary Regimes	127
Sentencing	127
Crimes Mental Impairment	133
Vehicular Offence Provisions	134
Magistrates' Court Criminal Procedure Provisions	137
Wills and Probate	140
Miscellaneous Provisions	141
Right of Defendant to Have Third Persons Before Court	141
Court Findings and Orders	142
Choice of Law	143
Codes of Practice	144
Stamp Duty	145
Road Management Act 2004	146
Crimes (Controlled) Operations Act 2004	147

Exclusion of Evidentiary Rules	148
Conclusion	149
Consequential Amendments	152
References to Royal Commissions and Boards of Inquiry Provisions	153
References to the Audiovisual Provisions	154
References to the Document Provisions	155
References to Definitions in the <i>Evidence Act 1958</i>	157
References to Affidavit and Statutory Declaration Provisions	160
References to Transcript Provisions	161
Other References to the Evidence Act 1958	161
Section 57(3) <i>Coroners Act 1958</i>	162
CHAPTER 5: PRACTICAL IMPLEMENTATION OF THE UEA	165
Introduction	166
Education	166
Judicial Officers and Legal Profession	166
Other Groups Affected	171
Commencement	172
Lead-in time	172
Transitional Provisions	173
Other Matters to be Addressed Prior to Commencement	178
APPENDIX 1	179
Sexual Assault Communications Privilege	179
APPENDIX 2	188
Draft Provisions in Relation to the Privilege Against Self-incrimination	188
APPENDIX 3	190
<i>Evidence Act 1958</i>	190
APPENDIX 4	213
<i>Crimes Act 1958</i>	213
APPENDIX 5	220
<i>Crimes (Criminal Trials) Act 1999</i>	220

APPENDIX 6	222
<i>Summary Offences Act 1966</i>	222
APPENDIX 7	223
Provisions Which Refer to or Affect Legal Professional Privilege	223
APPENDIX 8	227
Provisions which Affect or Refer to Medical Privilege	227
APPENDIX 9	228
Provisions Concerning Evidence of Settlement Negotiations	228
APPENDIX 10	229
Provisions Adopting Privileges Available in Court Proceedings	229
APPENDIX 11	230
Provisions Whereby Courts Not Bound by the Rules of Evidence to Some Degree	230
APPENDIX 12	233
References to Royal Commission Provisions of the <i>Evidence Act 1958</i>	233
APPENDIX 13	236
References to the Audiovisual Provisions of the <i>Evidence Act 1958</i>	236
APPENDIX 14	237
References to Document Provisions of the <i>Evidence Act 1958</i>	237
APPENDIX 15	239
References to Definitions in the <i>Evidence Act 1958</i>	239
APPENDIX 16	240
References to the Affidavit and Statutory Declaration Provisions of the <i>Evidence Act 1958</i>	240
APPENDIX 17	241
References to the Transcript Provisions of the <i>Evidence Act 1958</i>	241
APPENDIX 18	242
Other References to the <i>Evidence Act 1958</i>	242
APPENDIX 19	245
Submissions	245
Consultations	246

BIBLIOGRAPHY	248
OTHER VLRC PUBLICATIONS	251

Preface

The terms of reference for the review of evidence law have required the commission to undertake two main tasks:

- to engage with the Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC) on a review of the uniform Evidence Act (UEA), presently applying in all federal courts and courts of the ACT, NSW, Tasmania and Norfolk Island; and
- to advise the Attorney-General on the action required to implement the UEA in Victoria.

The terms of reference are directed towards facilitating the introduction of the UEA in Victoria. The Attorney-General's Justice Statement, released in May 2004, also made it clear that the government wishes to implement the UEA. We therefore approached the reference on that basis.

The ALRC and NSWLRC had already commenced their joint review of the UEA and had published an Issues Paper when we received our reference. In February 2005, the commission published an Information Paper which was intended to draw the attention of the Victorian legal community to the Issues Paper, provide information and background about the UEA, and explain how we would conduct our review. It also gave details about the joint review and the deadlines imposed by the Commonwealth and NSW Attorneys-General.

As a result of the joint review, the three commissions produced a Discussion Paper in July 2005. A Final Report was submitted to the respective Attorneys-General on 5 December 2005, as required by the ALRC and NSWLRC terms of reference.

This report fulfils the second task of advising the Attorney-General on the action required to implement the UEA in Victoria. It contains recommendations which set out in detail the amendments which will be necessary to the UEA, and consequential amendments to Victorian legislation, including the repeal or relocation of provisions, when the UEA is introduced.

I wish to thank the Research and Policy Officers who worked on this reference, Samantha Burchell and Claire Downey, for the high quality of their work, their commitment, diligence and remarkable intellectual and physical stamina. They have spent the past 12 months under constant pressure to meet the extremely tight timelines. Both have made significant contributions to each report. My thanks also to Angela Langan, Team Leader for the reference, who provided project and staff management, and valuable comment throughout the reference while discharging her other responsibilities. Angela also had responsibility for coordinating the administrative arrangements and exchange of information between the commission and ALRC and NSWLRC.

In relation to the specific work on this report, it would be remiss of me not to make special mention of the work of Claire Downey. She took primary responsibility for identifying the matters to be addressed, conducting the research and drafting the report. This involved, among other things, going through every current Victorian Act and identifying, categorising, and considering the implications for all legislation in Victoria of enacting the UEA. It was a huge and extremely demanding task involving detailed and painstaking work and Claire was called upon to do most of it.

Mention should also be made of the work done by two interns who worked on this project, Tanaya Roy and Merelle DuVé. Early in the reference, Tanaya gathered and analysed material on the operation of the UEA and section 398A of the *Crimes Act 1958* in relation to propensity evidence. In the final weeks of completion of this report, Merelle assisted on a variety of research tasks.

Thanks also go to the Evidence Division of the commission, the Honourable Justice David Harper, Australian Industrial Relations Commission Vice-President the Honourable Iain Ross, and our Chairperson, Professor Marcia Neave, who all provided their expertise and invaluable time to the shaping of recommendations and consideration of the reports.

Our Operations Manager, Kathy Karlevski, and Librarian, Julie Bransden, assisted throughout this reference. The report was edited by Trish Luker, and proofread by Alison Hetherington. Alison also arranged for the layout, design and printing.

I would also like to thank those who provided information and expertise to the reference, including those who attended the roundtables and who provided submissions; they are listed in the appendices. Particular thanks go to the Office of Chief Parliamentary Counsel. I thank Eamonn Moran for his invaluable advice and assistance on implementation issues and questions of statutory interpretation

and drafting. In addition, the Office conducted initial searches of legislation which assisted our identification of evidentiary provisions.

It has been a privilege to have been involved in this reference and to have the opportunity to try to complete a task begun 25 years ago.

The recommendations in this report are those of the whole commission.

A handwritten signature in black ink, appearing to read 'Tim Smith', with a stylized, cursive script.

The Honourable Justice Tim Smith
Commissioner

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Terms of Reference

1. To review the *Evidence Act 1958* and other laws of evidence which apply in Victoria and to advise the Attorney-General on the action required to facilitate the introduction of the uniform Evidence Act into Victoria, including any necessary modification of the existing provisions of the uniform Evidence Act.
2. To consider whether modifications of the existing provisions of the uniform Evidence Act are required:
 - to take account of case law on the operation of the uniform Evidence Act in jurisdictions where the Act is currently in force;
 - in relation to the following topics which have been identified as areas of particular concern and are currently being considered by the Australian Law Reform Commission and the New South Wales Law Reform Commission:
 - the examination and re-examination of witnesses, before and during proceedings;
 - the hearsay rule and its exceptions;
 - the opinion rule and its exceptions;
 - the coincidence rule;
 - the credibility rule and its exceptions; and
 - privileges, including client legal privilege.
3. In conducting the review the Victorian Law Reform Commission should have regard to:
 - the experience gained in other jurisdictions in which the uniform Evidence Act has been in force for some time;
 - the desirability of promoting harmonisation of the laws of evidence throughout Australia, in particular by consulting with the other members of the uniform Evidence Act scheme;
 - recommendations for changes to the law of evidence which have already been made in the Victorian Law Reform Commission's reports on Sexual Offences and Defences to Homicide;

- the right of defendants in criminal trials to receive a fair trial; and
- arrangements for vulnerable witnesses to provide evidence to promote their access to justice.

Consistent with the goal of promoting harmonisation of the laws of evidence, the commission should collaborate with the New South Wales Law Reform Commission, and the Australian Law Reform Commission, in their respective reviews of the *Evidence Act 1995* (NSW) and the *Evidence Act 1995* (Cth).

**Attorney-General****10 AUG 2005**

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Dear Professor Neave

REVIEW OF THE UNIFORM EVIDENCE ACTS

Thank you for providing me with the *Review of the Evidence Acts: Discussion Paper* released on 4 July 2005, prepared in collaboration with the Australian Law Reform Commission and the New South Wales Law Reform Commission.

I would like to take this opportunity to congratulate the Victorian Law Reform Commission on the publication of such a comprehensive document that will provide a basis for future consultations.

I would also like to draw the Commission's attention to a recent report entitled *Review of the Victoria Police Witness Protection Program* published by the Office of Police Integrity, which was tabled in Victorian Parliament on Tuesday 19 July 2005.

Amongst other things, the report considers the current provisions in section 55AB of the *Evidence Act* 1958 that apply when a witness has died or is unavailable in certain situations. The report recommends that section 55AB should be amended so as to preserve and admit, with due safeguards, evidence given by people who later died.

In making this recommendation, the report recognises that there are competing demands of fairness for the accused and for the community to see prosecutions of serious crimes proceed. The report also stresses that amendments could reduce the incentive to intimidate or kill witnesses as their evidence would remain.

I ask that the Committee consider this recommendation and the important issues raised as part of its current review.

Yours sincerely

ROB HULLS MP
Attorney-General



Abbreviations

A Crim R	Australian Criminal Reports
ACSR	Australian Corporations and Securities Reports
ACT	Australian Capital Territory
ACTR	Australian Capital Territory Reports
ALD	Administrative Law Decisions
ALJR	Australian Law Journal Reports
ALR	Australian Law Reports
ALRC	Australian Law Reform Commission
CLR	Commonwealth Law Reports
Cth	Commonwealth
ed	edition
(ed/s)	editor/s
FCR	Federal Court Reports
FLR	Federal Law Reports
HL	House of Lords
ibid	in the same place (as the previous footnote)
ie	that is
J	Justice
KB	Law Reports, King's Bench Division
n	footnote
NI	Norfolk Island
No	number
NSW	New South Wales
NSWLR	New South Wales Law Reports
NSWLRC	New South Wales Law Reform Commission
para/s	paragraph/s
pt	part
Qld	Queensland
r	rule (rr plural)
R	The Reports
s	section (ss plural)
SA	South Australia
sch	schedule

UEA	uniform Evidence Act
Tas	Tasmania
v	and (civil) or against (criminal)
Vic	Victoria
VLR	Victorian Law Reports
VLRC	Victorian Law Reform Commission
VR	Victorian Reports
VSC	Supreme Court of Victoria
WA	Western Australia

Recommendations

Chapter 2

1. Except as provided for in the following recommendations, the Victorian UEA should be drafted to mirror the current provisions of the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW), amended in accordance with the recommendations of the joint Final Report.

2. Section 2 of the Victorian UEA should be drafted as follows:

2. Commencement

(1) This part and the Dictionary at the end of this Act commence on the date of assent.

(2) The remaining provisions of this Act commence on a day or days to be appointed by proclamation.

3. Section 3 of the Victorian UEA should be drafted as follows:

3. Definitions

(1) Expressions used in this Act (or in particular provisions of this Act) that are defined in the Dictionary at the end of this Act have the meaning given to them in the Dictionary.

(2) * * * *

(3) * * * *

Note: The Commonwealth and NSW Acts contain additional provisions regarding interpretation which are unnecessary in Victoria due to provisions of the *Interpretation of Legislation Act 1984*.

4. Section 4 of the Victorian UEA should be drafted as follows:

4. Courts and proceedings to which Act applies:

(1) This Act applies in relation to all proceedings in a Victorian court, including proceedings that:

(a) relate to bail; or

(b) are interlocutory proceedings or proceedings of a similar kind; or

- (c) are heard in chambers; or
 - (d) subject to subsection (2), relate to sentencing.
- (2) If such a proceeding relates to sentencing:
- (a) this Act applies only if the court directs that the law of evidence applies in the proceeding; and
 - (b) if the court specifies in the direction that the law of evidence applies only in relation to specified matters—the direction has effect accordingly.
- (3) The court must make a direction if:
- (a) a party to the proceeding applies for such a direction in relation to the proof of a fact; and
 - (b) in the court's opinion, the proceeding involves proof of that fact, and that fact is or will be significant in determining a sentence to be imposed in the proceeding.
- (4) The court must make a direction if the court considers it appropriate to make such a direction in the interests of justice.
- (5) In this section, **proceedings that relate to sentencing** include proceedings for orders under Part 4 of the *Sentencing Act 1991*.

Note 1: Section 4 of the Commonwealth and NSW Acts differ from this section. They apply their Acts to proceedings in federal and Australian Capital Territory and New South Wales courts respectively.

Note 2: **Victorian court** is defined in the Dictionary. The definition includes persons or bodies other than courts required to apply the laws of evidence.

Note 3: Provisions in other Victorian Acts which relieve courts from the obligation to apply the rules of evidence in certain proceedings are preserved by section 8 of this Act. They include:

- section 44 *Accident Compensation Act 1985*;
- section 8 *Bail Act 1977* (which deals with applications for bail);
- section 82 *Children and Young Persons Act 1989*;
- sections 8(6) and 13 *Crimes (Family Violence) Act 1987*;

- sections 11 and 38 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*;
- section 127 *Electoral Act 2002*.

5. Notes should be incorporated into the Victorian UEA as follows:

5. Extended application of certain provisions

Note: The *Evidence Act 1995* (Cth) includes a provision that extends the application of specified provisions of that Act to proceedings in all Australian courts.

6. Territories

Note: The *Evidence Act 1995* (Cth) includes a provision extending that Act to each external territory.

6. Section 7 of the Victorian UEA should be drafted as follows:

7. Act binds Crown

This Act binds the Crown in right of Victoria and also, so far as the legislative power of the Parliament permits, in all its other capacities.

7. Section 8 of the Victorian UEA should be drafted as follows:

8. Operation of other Acts

(1) This Act does not affect the operation of the provisions of any other Act.

Note: The Commonwealth Act includes additional subsections relating to regulations, the operation of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) and certain laws in force in the Australian Capital Territory.

8. Section 9 of the Victorian UEA should be drafted as follows:

9. Effect of Act on other laws

(1) This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.

(2) Without limiting subsection (1), this Act does not affect the operation of such a principle or rule so far as it relates to any of the following:

- (a) admission or use of evidence of reasons for a decision of a member of a jury, or of the deliberations of a member of a jury in relation to such a decision, in a proceeding by way of appeal from a judgment, decree, order or sentence of the relevant court; or
 - (b) the operation of a legal or evidential presumption that is not inconsistent with this Act;
 - (c) the court's power to dispense with the operation of a rule of evidence or procedure in an interlocutory proceeding.
9. No exception should be made to the application of section 18 of the Victorian UEA in criminal proceedings.
10. Section 19 of the Victorian UEA should contain a note referring to the different provision in other UEA jurisdictions.
11. Section 41 of the Victorian UEA should be enacted in the following terms:

41. Improper questions

improper question or questioning means a question or sequence of questions that is unfair to the witness because it is:

- (a) misleading, confusing;
 - (b) unnecessarily repetitive; or
 - (c) annoying, harassing, intimidating, offensive, humiliating or oppressive; or
 - (d) put to the witness in a manner or tone that is inappropriate (including because it is humiliating, belittling or otherwise insulting), or has no basis other than a sexual, racial, cultural or ethnic stereotype.
- (2) The court must disallow an improper question or questioning put to a vulnerable witness in cross-examination, or inform the witness that it need not be answered unless the court is satisfied that it is necessary in the circumstances that the question be put.

vulnerable witness means

- (a) a person under the age of 18; or
- (b) a person with a cognitive impairment or intellectual disability; and includes any other person rendered vulnerable by reason of:
- (c) the age or cultural background of the witness;

- (d) the mental, physical or intellectual capacity of the witness;
 - (e) the relationship between the witness and any party to the proceedings;
or
 - (f) the nature of the offence.
12. Section 104 of the Victorian UEA should be drafted in the same terms as recommended in the joint Final Report.
 13. The Victorian UEA should include a professional confidential relationships privilege in Part 3.10, Division 1A in the form set out in the joint Final Report.
 14. The Victorian UEA should include a sexual assault counselling privilege in Part 3.10, Division 1B, as drafted in accordance with the recommendations of the joint Final Report with the modifications appearing in Appendix 1.
 15. Section 128 of the Victorian UEA should be drafted in accordance with section 128 of the *Evidence Act 1995* (NSW), incorporating the amendments recommended by the joint Final Report with the following differences:
 - ‘Victorian court’ be substituted for ‘NSW court’;
 - ‘Victorian court’ be defined for the purposes of section 128 as ‘a Victorian court, or a person or body authorised by a Victorian law, or by consent of the parties, to hear, receive and examine evidence’.
 16. The Victorian Government request that section 128 of the Victorian UEA be declared by Commonwealth regulation to be a prescribed provision for the purposes of section 128(10) of the *Evidence Act 1995* (Cth), pursuant to section 128(11) of the *Evidence Act 1995* (Cth).
 17. The Victorian UEA should include sections 128A and 128B in the terms set out in Appendix 2.
 18. Section 129(5) of the Victorian UEA should be drafted as follows:
 - (5) This section does not apply in a proceeding that is:
 - (a) a prosecution for one or more of the following offences:
 - (i) attempting to pervert the course of justice;
 - (ii) subornation of perjury;
 - (iii) embracery, bribery of public official, misconduct in public office;

- (iv) section 52A *Summary Offences Act 1966*;
- (v) sections 66 or 78 *Juries Act 2000*;
- (vi) an offence connected with an offence mentioned in subparagraph (i), (ii), (iii), (iv) or (v), including an offence of conspiring to commit such an offence.
- (b) in respect of contempt of court, or
- (c) by way of appeal from, or judicial review of, a judgment, decree, order or sentence of a court, or
- (d) by way of review of an arbitral award, or
- (e) a civil proceeding in respect of an act of a judicial officer or arbitrator that was, and that was known at the time by the judicial officer or arbitrator to be, outside the scope of the matters in relation to which the judicial officer or arbitrator had authority to act.

Note: Subsection (5)(a) differs from section 129(5)(a) of the Commonwealth, NSW and Tasmanian Acts.

19. The Victorian UEA should be drafted to include the following provisions:

Division 3A—Extension of Privilege

131A. Extension of privilege provisions

If:

- (a) a person is required by a disclosure requirement to give information or produce a document which would result in the disclosure of a communication, document or information of a kind referred to in Divisions 1, 1A or 3 of Part 3.10, and
- (b) that person objects to giving that information or providing that document,

the objection shall be considered and determined by the relevant court by the application of the provisions of Part 3.10, excluding section 123, with any necessary modifications.

disclosure requirement means any court process or order requiring the disclosure of information and includes:

- (a) a subpoena to produce documents;
- (b) pre-trial discovery;

- (c) non-party discovery;
 - (d) interrogatories;
 - (e) notices to produce;
 - (f) search warrants;
 - (g) requests to produce documents under Division 1 of Part 4.6.
20. Provisions be inserted in Part 4, Division 3, sub-division 5 of the *Magistrates' Court Act 1989* reflecting the established protocols and practices relating to claims for privilege in relation to search warrants including:
- a form of warrant which advises of the right to claim privilege and how to do so;
 - the option of informal preliminary determination of privilege claims by an independent arbitrator;
 - the return of documents over which there is a disputed privilege claim in a sealed envelope or box to the relevant court for determination; and
 - time limits for application to be made to the court for determination of the privilege claim.
21. Consideration should be given to the adoption of appropriate UEA privilege provisions in Acts investing bodies or persons with compulsory disclosure powers.
22. Section 143 of the Victorian UEA should be in the same form as section 143 of the *Evidence Act 1995* (NSW).
23. Section 150 of the Victorian UEA should be in the same form as section 150 of the *Evidence Act 1995* (NSW) and include a note under section 151 as appears in that Act.
24. The Victorian UEA, under the heading '155A Evidence of Commonwealth documents', should contain a note to the effect that the Commonwealth Act includes a provision relating to evidence of Commonwealth documents and that section 5 of the *Evidence Act 1995* (Cth) extends the operation of section 155A to all Australian courts.
25. The Victorian UEA, under the heading '163 Proof of letters having been sent by Commonwealth agencies', should contain a note to the effect that

the Commonwealth Act includes a provision relating to proof of letters having been sent by Commonwealth agencies and that section 5 of the *Evidence Act 1995* (Cth) extends the operation of section 163 of that Act to all Australian courts.

26. Sections 165, 165A and 165B of the Victorian UEA should be in the form recommended in the joint Final Report.
27. Section 171 of the Victorian UEA should contain the following definition of ‘authorised person’ in subsection 3:

(3) In this section:

authorised person means:

- (a) a person before whom an affidavit may be taken or made in a country or place outside the state under section 124 of the *Evidence Act 1958*, or
 - (b) a member of the police force above the rank of sergeant, or
 - (c) a person authorised by the Attorney-General for the purposes of this section.
28. The Victorian UEA, under the heading ‘182 Application of certain sections in relation to Commonwealth records’ should contain a note to the effect that the *Evidence Act 1995* (Cth) includes a provision that extends the operation of certain provisions of the Commonwealth Act to all Australian courts in relation to Commonwealth records.
 29. The Victorian UEA, under the heading ‘185 Faith and credit to be given to documents properly authenticated’ should include a note to the effect that the *Evidence Act 1995* (Cth) includes a provision requiring full faith and credit to be given to the public acts, records and judicial proceedings of a state or territory by every court.
 30. Section 186 of the Victorian UEA should be drafted as follows:

186. Swearing of affidavits for use in Victorian courts

Affidavits for use in a Victorian court may be sworn and taken before any person, and in the manner authorised by the *Evidence Act 1958* for that purpose.

Note 1: Sections 112, 123C, 124, 125, 126, 126A of the *Evidence Act 1958* relate to swearing affidavits.

Note 2: The Commonwealth Act includes a provision about swearing affidavits before justices of the peace, notaries public and lawyers for use in court proceedings involving the exercise of federal jurisdiction and in courts of a territory.

31. Section 187 of the Victorian UEA should be enacted in the same form as section 187 of the *Evidence Act 1995* (NSW).

32. Section 194 of the Victorian UEA should be drafted as follows:

194. Witness failing to attend proceedings

(1) If a witness fails to appear when called in any civil or criminal proceedings and it is proved that he or she had been:

(a) bound over to appear; or

(b) duly bound by recognisance or undertaking to appear;

(c) served with a summons or subpoena to attend and a reasonable sum of money has been provided to the witness for the costs and expense in that behalf,

the court may:

(d) issue a warrant to apprehend the witness and bring him or her before the court;

(e) order the witness to pay a fine of not more than 5 penalty units, but no such fine shall exempt such person from any other proceedings for disobeying such subpoena or summons;

(f) take such other action against the witness as is permitted by law.

(2) Where a subpoena or summons has been issued for the attendance of a witness on the hearing of a civil or criminal proceeding and it is proved, on application by the party seeking to compel his or her attendance, that the witness:

(a) is avoiding service thereof; or

(b) has been duly served, but is unlikely to comply with such subpoena or summons;

the court may issue a warrant to apprehend the witness and bring him or her before the court.

(3) The court issuing a warrant under this section may endorse the warrant with a direction that the person must, on arrest, be released on bail as specified in the endorsement.

(4) An endorsement under subsection (4) must fix the amounts in which the principal and the sureties, if any, are bound and the amount of any money or the value of any security to be deposited.

(5) The person to whom a warrant to arrest is directed must cause the person named or described in the warrant when arrested

(a) to be released on bail in accordance with any endorsement on the warrant; or

(b) if there is no endorsement on the warrant, to be brought before the court which issued the warrant; or

(c) discharge a person from custody on bail under section 10 of the *Bail Act 1977*;

(6) Matters may be proved under this section orally or by affidavit.

Note: This section differs from the NSW Act and Tasmanian Act. The Commonwealth Act does not include an equivalent provision.

33. Section 195 of the Victorian UEA should be drafted in terms similar to section 195 of the *Evidence Act 1995* (NSW).
34. The Victorian UEA should not contain an equivalent to section 196 of the *Evidence Act 1995* (NSW).
35. The following definitions should be included in the Dictionary of the Victorian UEA:

Victorian court means:

(a) the Supreme Court, or

(b) any other court created by parliament,

and includes any person or body (other than a court) that, in exercising a function under the law of the state, is required to apply the laws of evidence.

Governor of a State includes any person for the time being administering the government of a state.

Governor-General means Governor-General of the Commonwealth and includes any person for the time being administering the government of the Commonwealth.

36. The following definitions from other uniform Evidence Acts be excluded from the Victorian Act with referencing notes:

ACT court, federal court, NSW court, Tasmanian court

Chapter 3

37. Upon the enactment of Victorian UEA, the following provisions of the *Evidence Act 1958* be repealed:

Sections 5, 10, 11, 13, 22, 23, 23A, 24, 25, 26, 27, 28, 29, 31, 32, 32A, 32B, 32C, 32D, 32E, 32F, 32G, 33, 34, 35, 36, 37, 38, 39, 40, 41, 41B*, 41C*, 41F*, 42A, 42B, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 53A, 53B, 53C, 53D, 53E, 53F, 53G, 53H, 53J, 53K, 53L, 53M, 53N, 53P, 53R, 53S, 53T, 54, 55, 55A, 55AB, 55AC, 55B, 55C, 55D, 56, 57, 58, 58A, 58B, 58C, 58D, 58E, 58F, 58G, 58H, 58I, 58J, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 73, 74, 75, 75A, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 99, 101, 102, 103, 104, 145, 146, 147, 148, 149, 149A, 149AB, 149B, 149C, 150, Schedule 3.

38. Upon the enactment of a Victorian UEA the following provisions of the *Evidence Act 1958* be repealed and re-enacted as indicated:

- section 12 (gaol orders) and Schedule 2 (form of order) to the *Corrections Act 1986*;
- sections 21D–21H to the *Legal Aid Act 1978*;
- sections 37A–37E, 41A*, 41D*, 41E*, 41G*, 41H*, 42, 142–143; 152(1); 152(2)(aa) to the *Crimes Act 1958*, or one of the new Crimes Acts;
- section 53Q (records may be preserved on microfilm) to the *Electronic Transactions (Victoria) Act 2001*;
- section 72 (certified copies of maps) to the *Survey Co-ordination Act 1958*.

39. The Department of Justice should consider a review of all sections in Victorian Acts which provide that evidence of things said at, or documents

prepared in connection with, mediation or other alternative dispute resolution mechanisms are not admissible in legal proceedings.

40. The definition of family mediator in section 21I of the *Evidence Act 1958* (or any equivalent re-enacted section) be amended to refer to the persons listed in section 19N(1) of the *Family Law Act 1975* (Cth).
41. Section 21J of the *Evidence Act 1958* (or any equivalent re-enacted section) be amended to provide that the section does not apply to:
 - an admission by an adult that indicates that a child has been abused or is at risk of abuse; or
 - a disclosure by a child that indicates that the child has been abused or is at risk of abuse

unless, in the opinion of the court there is sufficient evidence of the admission or disclosure available to the court from other sources.

42. Upon enactment of a Victorian UEA and the repeal of the sections referred to in recommendation 37 and the relocation of the provisions in recommendation 38 the remaining provisions of the *Evidence Act 1958* be retained in that Act or a Evidence (Miscellaneous Provisions) Act, pending relocation to the Acts listed in recommendation 43.
43. Consideration should be given to the drafting and enactment of the following Acts:
 - Evidence on Commission Act;
 - Royal Commissions Act;
 - Mediation Act;
 - Evidence (Transmission and Recording) Act;
 - Oaths Act.
44. Upon the enactment of the Victorian UEA, the following provisions of the *Crimes Act 1958* be repealed:
 - sections 95(2), 395(7), 398A, 399, 400, 401, 411, 413, 415, 419.
45. Upon the enactment of the Victorian UEA, section 464J of the *Crimes Act 1958* be amended to include a subsection (ba) in terms similar to section 23S(ba) of the *Crimes Act 1914* (Cth).

46. Upon the enactment of the Victorian UEA, section 18 of the *Crimes (Criminal Trials) Act 1999* be repealed.
47. Upon the enactment of the Victorian UEA, section 20 of the *Crimes (Criminal Trials) Act 1993* be amended to provide that: ‘Nothing in this section affects the operation of sections 29 and 50 of the [Victorian UEA] or Part 2A of the *Evidence Act 1958*.

Chapter 4

48. The following provisions be amended as specified in Appendix 7 on the introduction of the Victorian UEA:
 - *Dangerous Goods Act 1985* ss 13C (Note 2) and 19G;
 - *Equipment (Public Safety) Act 1994* ss 14B (Note 2) and 23A;
 - *Health Records Act 2001* s 96;
 - *Health Services (Conciliation and Review) Act 1987* s 27(10)(a);
 - *Occupational Health and Safety Act 2004* ss 100, 155;
 - *Terrorism (Community Protection) Act 2003* s 13ZU
 - *Transport Accident Act 1986* s 126A;
 - *Whistleblowers Protection Act 2001* s 10;
49. The following provisions be amended, as specified in Appendix 8 on the introduction of the Victorian UEA:
 - *Alcoholics and Drug Dependant Persons Act 1968* s 16(5);
 - *Children, Youth and Families Act 2005* s 200;
 - *Emergency Services Superannuation Act 1986* s 29(5);
 - *State Superannuation Act 1988* s 86(3);
 - *Transport Superannuation Act 1988* s 38(3).
50. The provisions in Appendix 9 should be considered as part of a broader review of mediation provisions in Victorian legislation recommended in recommendation 39.

51. The provisions in Appendix 10 should be considered as part of the review in Recommendation 21.
52. The following provisions should be amended as specified in Appendix 11 on the introduction of a Victorian UEA:
 - *Accident Compensation Act 1985* s 44;
 - *Bail Act 1977* s 8;
 - *Children and Young Persons Act 1989* s 82;
 - *Children Youth and Families Act 2005* s 215;
 - *Confiscation Act 1997* ss 33, 59, 64;
 - *Crimes (Family Violence) Act 1987* s 13A;
 - *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* ss 11, 38;
 - *Electoral Act 2002* s 127;
 - *Food Act 1984* ss 19, 19B, 42;
 - *Magistrates' Court Act 1989* ss 4G, 103(2);
 - *Marine Act 1988* s 125;
 - *Prostitution Control Act 1994* s 80(3A);
 - *Road Safety Act 1986* ss 12(2)(b), 15A(8)(b), 16E(3)(b), 26(2)(b), 26A(2)(b), 33(15)(b), 50(5)(a), 50AAB(6)(a), 51(10B);
 - *Sentencing Act 1991* ss 89(3E)(a), 89B(5)(a);
 - *Wills Act 1997* ss 22, 27.
53. The provisions in Appendix 12 should be amended as a consequence of the amendment or re-enactment of the royal commissions and boards of inquiry provisions of the *Evidence Act 1958*.
54. The provisions in Appendix 13 should be amended as a consequence of the amendment or re-enactment of the audiovisual provisions of the *Evidence Act 1958*.
55. Section 301(6) of the *Water Act 1989* should be amended as specified in Appendix 14 on the introduction of a Victorian UEA.

56. The following provisions should be repealed, as specified in Appendix 14, on the introduction of a Victorian UEA:

- *Australian and New Zealand Banking Group Act 1970* ss 8(1)–(2), 20(1)–(2);
- *Australian and New Zealand Banking Group (NMRB) Act 1991* ss 10(2)–(3), 18(2)–(3), 19(2)–(3);
- *Bank Integration Act 1992* s 20;
- *Children, Youth and Families Act 2005* s 532(14)(a);
- *Commonwealth Games Arrangements Act 2001* s 4ZE(2);
- *Companies (Application of Laws) Act 1981* sch 1, cl 41;
- *Construction Industry Long Service Leave Act 1997* ss 38(2)–(3);
- *Electricity Industry (Residual Provisions) Act 1993* ss 75(2)–(3), 110(2)–(3), 128(2)–(3), 147(2)–(3), 153N(2)–(3), 153TK(2)–(3), 153TZB(2)–(3);
- *Film Act 2001* ss 53(2)–(3);
- *Gas Industry (Residual Provisions) Act 1994* ss 81(2)–(3), 126(2)–(3);
- *Health Services Act 1988* ss 65K(2)–(3), 203(2)–(3), 218(2)–(3), 260(3)–(4);
- *House Contracts Guarantee Act 1987* s 63(2);
- *Magistrates' Court Act 1989* s 43(9)(a);
- *National Australia Bank and Bank of New Zealand Act 1997* ss 11(2)–(3);
- *National Mutual Royal Savings Bank Limited (Merger) Act 1987* ss 8(2)–(3);
- *Port Services Act 1995* ss 113(2)–(3), 161(2)–(3);
- *Project Development and Construction Management Act 1994* ss 58(2)–(3), 74(2)–(3);
- *Rail Corporations Act 1996* s 54(2);

- *State Bank (Succession of Commonwealth Bank) Act 1990* ss 16(2)–(3);
 - *The Commercial Bank of Australia Limited (Merger) Act 1982* ss 10(2)–(3);
 - *The Commercial Banking Company of Sydney Limited (Merger) Act 1982* ss 10(2)–(3);
 - *Transfer of Land Act 1958* s 4, definition of reproduction;
 - *Transfer of Land Act 1958* s 27D(7)(a);
 - *Victorian Plantations Corporation Act 1993* ss 47(2)–(3);
 - *Water Industry Act 1994* ss 166(2)–(3);
 - *Water (Resource Management) Act 2005* s 115Q(2);
 - *Westpac and Bank of Melbourne (Challenge Bank) Act 1996* ss 11(2)–(3), 22(2)–(3).
57. The following provisions should be amended to refer to the definition of document in the Victorian UEA:
- *Australian and New Zealand Banking Group Act 1970* ss 7(2), 19(2);
 - *Charities Act 1978* s 8;
 - *Public Records Act 1973* s 2.
58. The definition of ‘legal proceedings’ should be inserted in the *Interpretation of Legislation Act 1984* and the following provisions amended to refer to it:
- *Children and Young Persons Act 1989* ss 273(1), 274(1);
 - *Children, Youth and Families Act 2005* ss 583(1), 584(1)(b);
 - *Corrections Act 1986* s 57A(1)(b);
 - *Terrorism (Community Protection Act) 2003* s 23(1);
 - *Victims of Crime Assistance Act 1996* s 65(1).
59. The definition of ‘persons acting judicially’ should be inserted in the *Interpretation of Legislation Act 1984* and the following provisions amended to refer to it:
- *Education Act 1958* s 14B;

- *Infertility Treatment Act 1995* s 150;
 - *Retail Leases Act 2003* s 89(4);
 - *Victims of Crime Assistance Act 1996* s 65(2).
60. Definitions of ‘Act’, ‘Australasian State’ and ‘government printer’ should be inserted in the *Interpretation of Legislation Act 1984*.
61. The provisions in Appendix 16 should be amended as a consequence of the amendment or re-enactment of the oaths provisions of the *Evidence Act 1958*.
62. The provisions in Appendix 17 should be amended as a consequence of the amendment or re-enactment of the transcript provisions of the *Evidence Act 1958*.
63. The following provisions should be amended as specified in Appendix 18 on the introduction of the Victorian UEA:
- *Coroners Act 1985* s 57(3);
 - *Companies (Application of Laws) Act 1981* sch 1, cl 48;
 - *Emerald Tourist Railways Act 1977* s 38(9);
 - *Futures Industry (Application of Laws) Act 1986* sch 1, cl 13;
 - *Juries Act 2000* s 62;
 - *Magistrates’ Court Act 1989* ss 129(1)–(2);
 - *Magistrates’ Court Act 1989* sch 5 (various clauses);
 - *Magistrates’ Court Act 1989* sch 8, cl 19;
 - *Police Regulation Act 1958* s 86KC;
 - *Securities Industry Act 1975* s 21(9);
 - *Securities Industry (Application of Laws) Act 1981* sch 1, cl 12;
 - *Sentencing Act 1991* ss 6F(2), 6J(2);
 - *Transfer of Land Act 1958* s 114(4);
 - *Victims of Crime Assistant Act 1996* s 63(3);

- *Whistleblowers Protection Act 2001* s 61I;
- *Working with Children Act 2005* s 47(3).

Chapter 5

64. The development of education programs about the UEA in Victoria should address, in particular:
 - the policy underlying the UEA;
 - the structure of the UEA and the rules of admissibility;
 - the areas of significant change for Victoria;
 - the interaction between the UEA and other evidentiary provisions.
65. Material on the UEA should be incorporated in professional admission, professional development or continuing legal education programs across the state in a variety of different modes or formats and be tailored to the specific needs of different sectors of the legal profession. In particular, the commission recommends that teaching about the UEA be delivered by:
 - the Judicial College of Victoria;
 - the providers of professional admission, continuing professional development or continuing legal education programs for barristers and solicitors;
 - the specialist sections and associations of the Law Institute of Victoria and the Victorian Bar;
 - the Victorian Bar Readers' course;
 - the Office of Public Prosecutions, Victoria Legal Aid and Victoria Police.
66. The Department of Justice and/or the providers of judicial education and continuing professional development should produce an interactive, problem-solving electronic resource for application of the UEA to be made available to and adapted to the particular needs of judicial officers and members of the legal profession.

67. A period of approximately 12 months should be allowed between the enactment of the Victorian UEA and commencement of the operation of its provisions.
68. The transitional provisions on the introduction of the UEA should provide:
 - that the UEA does not apply to a hearing in a proceeding that is part heard at the time of commencement, but otherwise applies to all hearings beginning on or after the commencement date whether or not an earlier hearing in a matter was conducted prior to the commencement of the UEA;
 - that provisions of the *Evidence Act 1958* and other provisions repealed at the time of the commencement of the UEA continue to apply to a hearing in a proceeding which began before their repeal;
 - a definition of when various hearings such as committals and trials of criminal proceedings are taken to have commenced;
 - that where there is an order for a new trial on appeal, and the hearing of that new trial commences after the commencement of the Act, that the Act applies to that hearing.
69. A transitional provision be drafted to apply section 131A to:
 - subpoenas to produce documents returnable after the commencement of the Act;
 - discovery ordered or required after the commencement of the Act;
 - interrogatories served after the commencement of the Act;
 - notices to produce served after the commencement of the Act;
 - warrants issued after the commencement of the Act.
70. Following the enactment of a Victorian UEA, the Supreme, County and Magistrates' Courts should review their respective court rules and make such amendments to those rules as are necessary to facilitate the operation of the new Act.
71. Following the enactment of a Victorian UEA, regulations should be drafted for Victoria based on the Evidence Regulation 1995 (Cth) and Evidence Regulation 2005 (NSW) with any necessary modifications.

Chapter 1

Introduction

Terms of Reference	2
Background	2
Terminology	4
Review of the UEA	4
Implementation of the UEA in Victoria	5
Approach Taken to Reference	5
Tasks Undertaken	6
Future Tasks	6
Scope of this Report	7

TERMS OF REFERENCE

1.1 In November 2004, the Victorian Law Reform Commission was asked to review the *Evidence Act 1958* and other laws of evidence and to advise the Attorney-General on the action required to facilitate the introduction of the uniform Evidence Act (UEA) in Victoria. The commission was also asked to consider any necessary modification of the existing provisions of the UEA. In conducting the review, the commission was to have regard to experience gained in other jurisdictions and the desirability of promoting harmonisation of the laws of evidence throughout Australia.

1.2 The Attorney-General's Justice Statement, released in May 2004, made it clear that the Victorian Government wishes to implement the UEA.¹ The statement announced that 'the Government is proposing to implement legislation consistent with the model Evidence Acts passed by the Commonwealth and New South Wales parliaments and adapted to the needs of the Victorian courts'.²

1.3 In addressing the terms of reference, the commission has taken a twofold approach. The first part of the review has focused on modifications and improvements which should be made to the UEA. The second part of the review has considered implementation, in particular, the drafting of a Victorian uniform Evidence Act (the Victorian UEA) and any consequential repeal or amendment of existing Victorian legislation. We have also addressed the preparation and education required to facilitate the transition to the Victorian UEA.

BACKGROUND

1.4 The uniform Evidence Acts have their origins in an inquiry by the Australian Law Reform Commission (ALRC) into the laws of evidence. The terms of reference of that inquiry directed the ALRC to:

review the laws of evidence applicable in proceedings in federal courts and the courts of the territories with a view to producing a wholly comprehensive law of evidence based on concepts appropriate to current conditions and anticipated requirements...³

1 Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004) 7, 24, 26.

2 Ibid 26.

3 The terms of reference are reproduced in Australian Law Reform Commission, *Evidence*, Report No 38 (1987). The commissioner in charge of the Victorian reference, Justice Tim Smith, was also the commissioner in charge of the original ALRC reference.

1.5 The inquiry commenced in 1979 and produced a number of research reports and discussion papers on aspects of evidence law. In 1985 the ALRC published an Interim Report in two volumes, the second containing draft legislation.⁴ In 1987 the ALRC published its Final Report, with further refined draft legislation.⁵

1.6 Following the release of the ALRC reports, in 1988 the New South Wales Law Reform Commission (NSWLRC) recommended, for the most part, that the ALRC model be introduced in NSW.⁶ In 1993, the Commonwealth and NSW enacted substantially similar legislation to commence on 1 January 1995.⁷

1.7 More recently, similar legislation has been enacted in Tasmania⁸ and Norfolk Island.⁹ The Commonwealth and NSW Acts, together with the Tasmanian and Norfolk Island Acts, have become known as the uniform Evidence Acts.

1.8 Introduction of the UEA in Victoria has been previously considered by the Victorian Parliament Scrutiny of Acts and Regulations Committee, which recommended its adoption.¹⁰ More recently, in November 2003, the Victorian Bar Council and the Law Institute of Victoria jointly recommended its introduction.¹¹

1.9 In the commission's reports *Defences to Homicide* and *Sexual Offences: Law and Procedure*, we identified deficiencies in the laws of evidence in Victoria that adversely affect the trial of such cases and recommended adoption of some UEA provisions to address the deficiencies.¹²

4 Australian Law Reform Commission, *Evidence, Volume 1*, Interim Report 26 (1985); Australian Law Reform Commission, *Evidence, Volume 2*, Interim Report No 26 (1985).

5 Australian Law Reform Commission (1987) above n 3.

6 New South Wales Law Reform Commission, *Evidence*, Report 56 (1988).

7 *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW).

8 *Evidence Act 2001* (Tas).

9 *Evidence Act 2004* (NI).

10 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Evidence Act 1958 (Vic) and Review of the Role and Appointment of Public Notaries*, No 12 (1996).

11 Joint letter from the Victorian Bar and the Law Institute of Victoria to the Supreme Court Litigation Committee, 19 November 2003.

12 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004); Victorian Law Reform Commission, *Sexual Offences: Law and Procedure: Final Report* (2004).

TERMINOLOGY

1.10 In this report, a reference to the ‘uniform Evidence Act’ or the ‘UEA’ is a reference to the generic model of the UEA.

1.11 A reference to the collective ‘uniform Evidence Acts’ means the *Evidence Act 1995* (Cth), the *Evidence Act 1995* (NSW), the *Evidence Act 2001* (Tas) and the *Evidence Act 2004* (NI). Where it is necessary in the context of a discussion to differentiate between the statutes, this will be done expressly.

1.12 A reference to the ‘Victorian UEA’ is to the recommended version of the Victorian UEA.

REVIEW OF THE UEA

1.13 In July 2004 the ALRC and the NSWLRC each received references to review the operation of the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) respectively, after approximately 10 years operation. The terms of reference (which are almost identical) asked each commission to work in association with the other with a view to producing agreed recommendations.¹³ In December 2004, the ALRC released an Issues Paper in consultation with the NSWLRC.¹⁴

1.14 In the same month, we received terms of reference which proposed collaboration with the ALRC and the NSWLRC in their respective reviews. The effect was to create a joint review by the three commissions. This is the first time we have collaborated on a reference with law reform bodies from other jurisdictions.

1.15 In July 2005 the three commissions produced a joint Discussion Paper, which included a set of agreed proposals and questions and invited submissions and comment from the public.¹⁵

1.16 Meanwhile, Queensland, Western Australia and the Northern Territory have all commenced consideration of adopting the UEA. The Queensland Law Reform Commission, the Law Reform Commission of Western Australia, the Northern

13 The terms of reference are reproduced in Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law: Report*, ALRC Report 102, NSWLRC Report 112 and VLRC Final Report (2005).

14 Australian Law Reform Commission, *Review of the Evidence Act 1995*, Issues Paper 28 (2004).

15 Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC Discussion Paper 69, NSWLRC Discussion Paper 47 and VLRC Discussion Paper (2005).

Territory Law Reform Committee, together with the Tasmanian Law Reform Institute, all contributed on a consultative basis to the joint review.

1.17 A joint Final Report by the three commissions, which focuses on any problems with the uniform Evidence Acts and recommends changes to those Acts which are considered necessary or desirable, is published contemporaneously with this report.¹⁶

1.18 This trend to uniformity is understandable in view of the complexities, uncertainties and inconsistencies in the common law on the one hand, and the benefits of the UEA on the other, including:

- the simplicity of a self-contained Act largely codifying the laws of evidence;
- a structured approach to the rules of evidence guided by an underlying policy framework;
- the application of the same laws of evidence across state and federal courts, and between state courts.

IMPLEMENTATION OF THE UEA IN VICTORIA

APPROACH TAKEN TO REFERENCE

1.19 The second part of the review has explored the issue of implementing the UEA in Victoria, in particular legislative drafting and amendment and practical implementation, including education and training. The second part of the review is covered by this report.¹⁷

1.20 For this aspect of the review, we have departed from our usual practice of publishing a consultation paper where we invite submissions on identified issues prior to the publication of a final report. This is because much of the consideration required was of a technical nature, and did not involve significant matters of policy or general public interest. The consultative process adopted by the commission for this reference has been to seek the views of interested parties on particular issues through a series of roundtable discussions, meetings with individuals and correspondence with professional bodies.

16 ALRC, NSWLRC, VLRC (2005) above n 13.

17 A similar report was published in Tasmania prior to the introduction of the *Evidence Act 1996* (Tas). See Law Reform Commissioner of Tasmania, *Report on the Uniform Evidence Act and its Introduction to Tasmania*, Report No 74 (1996).

TASKS UNDERTAKEN

1.21 To date, the commission has undertaken a number of tasks in considering the implementation of the UEA in Victoria.

INFORMATION PAPER

1.22 The commission produced an Information Paper in February 2005. The paper provided information about the background, policy framework and structure of the UEA. It also explained how we intended to approach and conduct the review.

MODIFICATION OF UEA PROVISIONS FOR VICTORIA

1.23 The commission has identified and considered those provisions of the UEA which need to be tailored for Victoria. This has been assisted by the experience of other states and informed by the commission's collaboration in the preparation of the joint Discussion Paper and the joint Final Report.

REVIEW OF EVIDENCE ACT 1958 AND CRIMES ACT 1958

1.24 The terms of reference have required the commission to review the provisions of the current *Evidence Act 1958* to determine whether, upon the introduction of a UEA in Victoria, the provisions should be repealed, amended or located elsewhere.

1.25 The evidentiary provisions of the *Crimes Act 1958* and related Acts have also been the subject of specific consideration. The Department of Justice is conducting a review of these Acts. In light of this, the commission has confined its recommendations to consideration of inconsistencies with the UEA. Any other issues would be outside our terms of reference.

REVIEW OF VICTORIAN LEGISLATION

1.26 The commission has also sought to locate evidentiary provisions in all current Victorian statutes and review these provisions to identify any necessary amendments when the UEA is introduced in Victoria.

FUTURE TASKS

1.27 In accordance with its educational functions¹⁸ and as a continuation of the second part of the review, the commission intends to prepare a publication which will

18 Victorian Law Reform Commission Act 2000 s 5.

provide a guide to using the the Victorian UEA and will address significant areas of change for Victoria, for publication prior to the Victorian UEA coming into force.

SCOPE OF THIS REPORT

1.28 This report serves a number of purposes. It is designed to:

- make recommendations about the drafting of a Victorian UEA, with particular regard to the non-uniform provisions (Chapter 2);
- consider how the Victorian UEA will operate with other Victorian legislation and make recommendations as to the repeal or amendment of existing provisions (Chapters 3 and 4);
- make recommendations about practical issues of implementation, in particular, education of the judiciary, legal profession and others, and the arrangements for enactment and commencement of the legislation (Chapter 5).

1.29 This report is intended to provide government with considered and comprehensive recommendations for implementation, and to serve as a resource for practitioners and others to assist in the process of transition in the event that the recommendations are adopted. It is hoped that this report, taken together with the recommendations of the joint Final Report, provides a sound basis for the introduction of the UEA in Victoria.

Chapter 2

Drafting a Victorian UEA

Uniformity	11
Specific Provisions for the Victorian UEA	11
Commencement—Section 2	12
Definitions—Section 3	12
Application—Section 4	14
Commonwealth Provisions—Sections 5 and 6	18
Act Binds the Crown—Section 7	19
Operation of Other Acts—Section 8	19
Application of Common Law and Equity—Section 9	21
Compellability of Spouses and Others in Certain Criminal Proceedings—Section 19	22
Improper Questions—Section 41	26
Further Protections: Cross-examination of the Accused—Section 104	28
Professional Confidential Relationships Privilege—Sections 126A–126F	29
Sexual Assault Communications Privilege—Sections 126G–126N	31
Privilege in Respect of Self-incrimination in Other Proceedings—Section 128	32
The Privilege Against Self-Incrimination in Ancillary Proceedings	33
Exclusion of Evidence of Reasons for Judicial Decisions—Section 129	35
Extension of Privilege—Section 131A	37
Matters of Law—Section 143	44
Seals and Signatures—Sections 150 and 151	45

Evidence of Commonwealth Documents—Section 155A	45
Proof of Letters Having been Sent by Commonwealth Agencies—Section 163	46
Warnings—Sections 165–165B	46
Person Who May Give Such Evidence—Section 171	47
Application of Certain Sections in Relation to Commonwealth Records— Section 182	49
Full Faith and Credit to be Given to Documents Properly Authenticated— Section 185	49
Swearing Affidavits—Section 186	50
No Privilege Against Self-incrimination for Bodies Corporate—Section 187	51
Witness Failing to Attend Proceedings—Section 194	52
Prohibited Question Not to be Published— Section 195	56
Proceedings for Offences— Section 196	57
Definitions	57

UNIFORMITY

2.1 Apart from addressing a variety of problems in the present law of evidence, a major benefit of the introduction of the UEA in Victoria would be greater uniformity of evidence law in all courts, state and federal. It would allow practitioners to utilise a single evidentiary regime, whether a case is brought in a federal court or one of the state courts. Uniformity of evidence law would also contribute to narrowing the potential for different outcomes between similar cases in different jurisdictions.

2.2 The benefits of introducing the UEA in Victoria would be substantially diminished if the provisions of the Victorian Act were to differ from the substantive provisions in other UEA jurisdictions. Therefore, the commission believes that compelling reasons are required to recommend departure from the uniform model in the Victorian UEA. In this chapter, we discuss areas where departure is considered necessary. However, in general terms, the commission is satisfied that the current provisions of the Commonwealth and NSW Acts, amended in accordance with the recommendations of the joint Final Report, comprise an appropriate form for adoption in Victoria.¹⁹



RECOMMENDATION

1. Except as provided for in the following recommendations, the Victorian UEA should be drafted to mirror the current provisions of the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW), amended in accordance with the recommendations of the joint Final Report.

SPECIFIC PROVISIONS FOR THE VICTORIAN UEA

2.3 The remainder of this chapter is concerned with drafting provisions of the Victorian UEA where:

- the provision needs to be drafted specifically for the jurisdiction;
- there are substantive differences between sections in different UEA jurisdictions;

19 Most of the amendments recommended by the joint review appear in Appendix 1 of the joint Final Report. Some amendments in the recommendations do not appear in the Appendix; some necessary consequential amendments also do not appear. In the area of privilege, some of the significant recommendations for amendment do not formulate the amendment required to achieve the proposed outcome. The commission makes recommendations in this report as to how those recommendations might be implemented.

- an amendment is recommended by the joint Final Report for which no draft has been put forward.²⁰

These provisions are identified and discussed below in the order they appear in the UEA.

COMMENCEMENT—SECTION 2

2.4 The detailed issues of commencement are dealt with in Chapter 5, where we discuss the importance of providing appropriate lead time for the commencement of the Act. The commission does not consider that section 2 needs to specify a commencement date. It can be drafted, as the NSW section was, to allow the majority of the provisions to commence on a day to be proclaimed. This is common practice in most Victorian legislation. It provides a degree of flexibility to account for practical issues which may arise. Such flexibility might be necessary in this instance, particularly given the added complications of attempting to maintain a level of uniformity across jurisdictions.

! RECOMMENDATION

2. Section 2 of the Victorian UEA should be drafted as follows:

2. Commencement

(1) This part and the Dictionary at the end of this Act commence on the date of assent.

(2) The remaining provisions of this Act commence on a day or days to be appointed by proclamation.

DEFINITIONS—SECTION 3

2.5 The definition section of the Commonwealth and NSW Acts refers to a dictionary appearing at the end of the Acts. This dictionary approach is common in more recent Commonwealth legislation. In adopting the UEA, Tasmania opted to have the definitions appear in section 3 consistent with their own drafting style.

²⁰ Specifically, the recommendations in relation to extending privilege (Recommendations 14–1, 15–3, 15–6, 15–11) and the privilege against self-incrimination in ancillary proceedings (Recommendation 15–10).

2.6 Victorian legislation usually contains a definition section at the beginning of an Act. However, the commission believes that it is preferable to adopt the form of the Commonwealth and NSW Acts with a dictionary at the end. While this may be counterintuitive for many practitioners, it will assist in the use of the UEA across jurisdictions. It will also allow for easier use of texts and loose-leaf services from other jurisdictions which follow the order of the Commonwealth and NSW Acts.²¹

2.7 Each of the current uniform Evidence Acts contains a number of notes which either provide explanatory material in relation to a section or point to differences between the Acts. The Victorian UEA will also contain notes. Section 3(2) of the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) provide that the notes included in those Acts do not form part of the Acts.²² In Victoria, diagrams and notes in new legislation now form part of an Act.²³ While there is the theoretical potential for the construction of the Acts to be affected by this difference, the commission believes that there is no reason to depart from the established position in Victoria. The notes assist an understanding of the UEA and provide helpful cross-references to other sections and Acts. Therefore the commission does not recommend that an equivalent section 3(2) be enacted in the Victorian UEA.

2.8 Section 3(3) of the *Evidence Act 1995* (NSW) allows for the original ALRC reports to be used as aids to interpretation. This section is required because section 34 of the *Interpretation Act 1987* (NSW) refers only to law reform commission reports tabled before the NSW Parliament as extrinsic material to be used in construing NSW Acts.²⁴ The equivalent provision in the Victorian *Interpretation of Legislation Act 1984* is not so confined.²⁵ Therefore, there is no need to enact a provision similar to section 3(3) of the NSW Act in the Victorian UEA.

!**RECOMMENDATION**

3. Section 3 of the Victorian UEA should be drafted as follows:

21 See, eg, Stephen Odgers, *Uniform Evidence Law* (6th ed, 2004).

22 *Evidence Act 1995* (Cth) s 3(2); *Evidence Act 1995* (NSW) s 3(2).

23 Since 2001, under *Interpretation of Legislation Act 1984* s 36(3A).

24 *Interpretation Act 1987* (NSW) s 34(2)(b).

25 *Interpretation of Legislation Act 1984* s 35(b)(iv).

! RECOMMENDATION

3. Definitions

(1) Expressions used in this Act (or in particular provisions of this Act) that are defined in the Dictionary at the end of this Act have the meaning given to them in the Dictionary.

(2) * * * *

(3) * * * *

Note: The Commonwealth and NSW Acts contain additional provisions regarding interpretation which are unnecessary in Victoria due to provisions of the *Interpretation of Legislation Act 1984*.

APPLICATION—SECTION 4

VICTORIAN COURTS

2.9 Section 4 is pivotal in defining the bounds of the operation of the UEA. While this section shares common elements across jurisdictions, it must be drafted individually for each. The draft proposed by the commission is based on the NSW and Tasmanian sections. The section applies the Act to all proceedings in Victorian courts. ‘Victorian court’ is then defined to mean the Supreme Court or any other court created by parliament and to include any person or body (other than a court) that, in exercising a function under the law of the state, is required to apply the laws of evidence. The Act does not extend to bodies such as the Victorian Civil and Administrative Tribunal²⁶ or the State Coroner.²⁷ To avoid any doubt, the section goes on to specify that it applies to proceedings that relate to bail, interlocutory proceedings and matters heard in chambers.

2.10 Victorian courts are currently bound to apply the rules of evidence; however, there are significant statutory exceptions. They include applications for bail,²⁸ some

26 Although, the *Victorian Civil and Administrative Tribunal Act 1998* will cover some of the privilege provisions of the UEA. See paras 4.154–4.158.

27 While commonly referred to as the Coroner’s Court and constituted largely by magistrates, the *Coroner’s Act 1985* does not establish a court.

28 *Bail Act 1977* s 8.

proceedings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1996*²⁹ and the *Confiscation Act 1997*,³⁰ proceedings before the County Court under the *Accident Compensation Act 1985*,³¹ and proceedings before the Family Division of the Children's Court.³²

2.11 There is therefore an inconsistency between section 4 of the UEA and the sections in the above Acts which relieve courts from the obligation to apply the laws of evidence. This inconsistency is resolved by section 8 of the UEA, which allows sections of other Acts to override the UEA. While no legal problem arises, the commission is concerned that the wording of section 4 may confuse. For example, on the face of section 4, the UEA applies to bail proceedings. However, in most bail proceedings—that is, applications for bail—the Act will not apply.³³

2.12 One option to alert readers to this aspect of its operation would be to include the expression 'unless otherwise provided' at the beginning of section 4 to point to the existence of other provisions. However, the commission thinks this would be overly cumbersome.

2.13 The commission believes that a note should be included at the end of section 4 pointing to provisions in other Acts which relieve Victorian courts from the obligation to apply the laws of evidence, and that those provisions are preserved by section 8. This is consistent with the practice of using notes in the UEA to draw attention to other sections of the Act which impact on certain provisions.

SENTENCING

2.14 Section 4 also makes special provision for sentencing proceedings. Section 4 provides that the UEA does not apply to sentencing proceedings unless the court directs that the laws of evidence apply. The court is required to direct that the laws of evidence apply, on application by a party, where a fact will be significant in

29 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1996* ss 11, 45.

30 *Confiscation Act 1997* ss 33, 59, 64.

31 *Accident Compensation Act 1985* s 44.

32 *Children and Young Persons Act 1989* s 82 (to be replaced by s 215 of the *Children, Youth and Families Act 2005*).

33 Although the UEA will apply in other proceedings under the *Bail Act 1977*, such as proceedings for offences against the Act.

determining the sentence. This largely reflects the current practice in Victoria, if not the strict legal position.³⁴

2.15 The phrase ‘proceedings that relate to sentencing’ in section 4 is not defined in the UEA. In considering the interaction of the UEA with other Victorian legislation, we considered whether certain types of proceeding do relate to sentencing. In particular, whether applications for orders in addition to sentence under Part 4 of the *Sentencing Act 1991* are proceedings relating to sentencing. Applications for orders under this part are often made at the same time as the main sentencing proceedings. Where they are contested, they are listed before the sentencing judge.³⁵ In the commission’s consultations, the Director of Public Prosecutions pointed out that orders made under Part 4 are sentences for the purposes of the appeal provisions of the *Crimes Act 1958*³⁶ and that it would therefore be logical that they be treated as proceedings relating to sentencing.³⁷

2.16 In the commission’s view, while the phrase ‘proceedings that ... relate to sentencing’ appears broad enough to encompass applications for orders in addition to sentence, the matter should still be clarified. Whether a proceeding is one that relates to sentencing determines whether the UEA applies without a specific direction or whether application is necessary for it to apply. It should be clear to courts and practitioners what the situation is without the need for argument. Therefore the commission proposes that an additional subsection be included in section 4 clarifying that a proceeding relating to sentencing includes applications under Part 4 of the *Sentencing Act 1991*.³⁸



RECOMMENDATION

4. Section 4 of the Victorian UEA should be drafted as follows:

4. Courts and proceedings to which Act applies:

(1) This Act applies in relation to all proceedings in a Victorian court, including proceedings that:

34 See paras 4.154–4.158.

35 Consultation with the Director of Public Prosecutions, 9 December 2005.

36 *Crimes Act 1958* s 566.

37 Consultation with the Director of Public Prosecutions, 9 December 2005.

38 The interaction of section 4 with other sentencing provisions is discussed further in Chapter 4.

**RECOMMENDATION**

- (a) relate to bail; or
- (b) are interlocutory proceedings or proceedings of a similar kind; or
- (c) are heard in chambers; or
- (d) subject to subsection (2), relate to sentencing.

(2) If such a proceeding relates to sentencing:

- (a) this Act applies only if the court directs that the law of evidence applies in the proceeding; and
- (b) if the court specifies in the direction that the law of evidence applies only in relation to specified matters—the direction has effect accordingly.

(3) The court must make a direction if:

- (a) a party to the proceeding applies for such a direction in relation to the proof of a fact; and
- (b) in the court's opinion, the proceeding involves proof of that fact, and that fact is or will be significant in determining a sentence to be imposed in the proceeding.

(4) The court must make a direction if the court considers it appropriate to make such a direction in the interests of justice.

(5) In this section, **proceedings that relate to sentencing** include proceedings for orders under Part 4 of the *Sentencing Act 1991*.

Note 1: Section 4 of the Commonwealth and NSW Acts differ from this section. They apply their Acts to proceedings in federal and Australian Capital Territory and New South Wales courts respectively.

Note 2: **Victorian court** is defined in the Dictionary. The definition includes persons or bodies other than courts required to apply the laws of evidence.

! RECOMMENDATION

Note 3: Provisions in other Victorian Acts which relieve courts from the obligation to apply the rules of evidence in certain proceedings are preserved by section 8 of this Act. They include:

- section 44 *Accident Compensation Act 1985*;
- section 8 *Bail Act 1977* (which deals with applications for bail);
- section 82 *Children and Young Persons Act 1989*;³⁹
- sections 8(6) and 13 *Crimes (Family Violence) Act 1987*;
- sections 11 and 38 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*;
- section 127 *Electoral Act 2002*.

COMMONWEALTH PROVISIONS—SECTIONS 5 AND 6

2.17 Sections 5 and 6 of the *Evidence Act 1995* (Cth) are specific to the federal legislative role and are not replicated in the state Acts. They extend the operation of certain sections of the Commonwealth Act to all Australian courts, including state courts exercising non-federal jurisdiction, and to the external territories. NSW and Tasmania have incorporated notes into their uniform Evidence Acts referring to the Commonwealth provisions to assist practitioners. It is recommended the Victorian UEA do the same.

! RECOMMENDATION

5. Notes should be incorporated into the Victorian UEA as follows:

5. Extended application of certain provisions

Note: The *Evidence Act 1995* (Cth) includes a provision that extends the application of specified provisions of that Act to proceedings in all Australian courts.

39 Or section 215 of the *Children, Youth and Families Act 2005*, whichever is appropriate at the time of enactment.

**RECOMMENDATION****6. Territories**

Note: The *Evidence Act 1995* (Cth) includes a provision extending that Act to each external territory.

ACT BINDS CROWN—SECTION 7

2.18 Section 7 of the *Evidence Act 1995* (Cth) reads simply ‘This Act binds the Crown in all its capacities’. Section 7 of the *Evidence Act 1995* (NSW) reads:

This Act binds the Crown in right of NSW and also, so far as the legislative power of the Parliament permits, in all its other capacities.

Section 7 of the *Evidence Act 2001* (Tas) replicates the NSW provision.

2.19 Victorian legislation commonly uses the same formulation and so should the Victorian UEA.⁴⁰

**RECOMMENDATION**

6. Section 7 of the Victorian UEA should be drafted as follows:

7. Act binds Crown

This Act binds the Crown in right of Victoria and also, so far as the legislative power of the Parliament permits, in all its other capacities.

OPERATION OF OTHER ACTS—SECTION 8

2.20 Section 8 is crucial to the interaction of the UEA and evidentiary provisions contained in other legislation.⁴¹ Its main function is to preserve evidentiary provisions in other Acts from being impliedly repealed. Section 8 of the Commonwealth Act includes specific subsections relating to pieces of Commonwealth legislation which are not relevant for the purpose of drafting the Victorian UEA.

40 See, eg, *Taxation Administration Act 1997* s 6.

41 See paras 4.5–4.9.

2.21 Section 8 of the Commonwealth Act also preserves the operation of regulations in force on the commencement of the section.⁴² It goes on to provide that the section ceases to apply to a regulation once it is amended. The NSW and Tasmanian Acts do not contain this provision.

2.22 The purpose of the Commonwealth provision was presumably to allow evidentiary provisions in regulations to continue to operate until such time as the regulation was amended, at which point the regulation could be made consistent with the Act, repealed or re-enacted in the authorising Act.

2.23 With a longer period between enactment and commencement of the Victorian UEA,⁴³ there should be time to review the evidentiary provisions in regulations as well as court rules and make such changes as are necessary before commencement. In the commission's view it is preferable to allow the ordinary rules of precedence to apply to resolve any inconsistency between statutory rules and the Act.⁴⁴ Regulations should not override the operation of the Act. Where there is to be departure from the UEA it should be contained in an Act, not subordinate legislation.



RECOMMENDATION

7. Section 8 of the Victorian UEA should be drafted as follows:

8. Operation of other Acts

(1) This Act does not affect the operation of the provisions of any other Act.

Note: The Commonwealth Act includes additional subsections relating to regulations, the operation of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) and certain laws in force in the Australian Capital Territory.

42 The section does not apply to other statutory rules such as rules of court. See Geoff Bellamy and Peter Meibusch, *Commonwealth Evidence Law* (1995) [8.12].

43 See Recommendation 67.

44 The result being that any statutory rule made before the commencement of the Act which is inconsistent with the Act will be rendered invalid and any future statutory rule which is inconsistent with the Act will be taken not to operate unless it is expressly authorised to do so. See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (3rd ed, 2005) [19.19]–[19.21].

APPLICATION OF COMMON LAW AND EQUITY—SECTION 9

2.24 Section 9 preserves evidentiary principles and rules of common law and equity. The preservation is limited to where the Act does not specify otherwise. The intent of Chapter 3 is to replace the common law rules of admissibility. Part 2.1, Division 1 of the UEA is also designed to replace common law and statutory provisions regarding the competence and compellability of witnesses. Where the UEA is inconsistent with the common law, it will prevail as a result of section 9. But the UEA does not deal with areas of the law sometimes treated as part of the law of evidence, such as presumptions and inferences to be drawn from the conduct of a party's case,⁴⁵ the doctrine of *res judicata*, *issue estoppel* and pleas in bar. These aspects of common law are generally unaffected by the Act and preserved by section 9.

2.25 Section 9 of the Commonwealth Act includes provisions to preserve the operation of certain state laws which might otherwise be rendered invalid as inconsistent with the Commonwealth Act, by section 109 of the Commonwealth Constitution. The state laws which are preserved include those which require the appropriate stamp duty to be paid on certain contractual documents before they are admissible and provisions relating to certificate evidence and proof of title to property.

2.26 The NSW and Tasmanian Acts serve as a more appropriate model for Victoria in drafting section 9.



RECOMMENDATION

8. Section 9 of the Victorian UEA should be drafted as follows:

9. Effect of Act on other laws

(1) This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.

45 *Jones v Dunkel* (1959) 101 CLR 298 (inferences that may be drawn from a party's failure to lead evidence in civil proceedings); *Weissensteiner v The Queen* (1993) 178 CLR 217 (the use that can be made of an accused's failure to give evidence); *Browne v Dunn* (1893) 6 R 67 (HL) (consequences of a failure to put relevant matters to a witness in cross-examination).



RECOMMENDATION

(2) Without limiting subsection (1), this Act does not affect the operation of such a principle or rule so far as it relates to any of the following:

- (a) admission or use of evidence of reasons for a decision of a member of a jury, or of the deliberations of a member of a jury in relation to such a decision, in a proceeding by way of appeal from a judgment, decree, order or sentence of the relevant court; or
- (b) the operation of a legal or evidential presumption that is not inconsistent with this Act;
- (c) the court's power to dispense with the operation of a rule of evidence or procedure in an interlocutory proceeding.

COMPELLABILITY OF SPOUSES AND OTHERS IN CERTAIN CRIMINAL PROCEEDINGS—SECTION 19

2.27 Section 12 of the UEA provides that a person who is competent to give evidence may be compelled to give evidence. In criminal proceedings this is subject to section 18, which provides that the spouse, de facto spouse,⁴⁶ parent or child of a defendant may object to being required to give evidence as a witness for the prosecution. If such an objection is made, the court must decide whether the nature and extent of the harm which is likely to be caused (to the witness or his or her relationship with the defendant) if the witness is required to give evidence is outweighed by the desirability of the evidence being given. Section 18 lists a number of considerations to be taken into account by the court in this balancing exercise. They include:

- the nature and gravity of the offence;
- the substance and importance of the evidence;
- whether the evidence may be tendered through other means;
- the nature of the relationship between the defendant and the witness;

46 ALRC, NSWLRC, VLRC (2005) above n 13, Recommendation 4–4 recommends that this term be replaced by 'de facto partner' and that this term be defined in broad and gender neutral terms.

- whether in giving evidence the witness would have to disclose information that was received in confidence from the defendant.

2.28 If the desirability of having the evidence given outweighs the likely harm which would be caused, the witness may be compelled to give evidence; if it does not, the witness will be excused.

2.29 Section 19 of the UEA provides that section 18 does not apply in proceedings for certain offences. In those proceedings all witnesses are compellable. Family members are not able to object to giving evidence and courts have no power to excuse them.

2.30 Section 19 differs between jurisdictions because it lists specific offences from state and territory law.⁴⁷ The offences listed are generally against children, although in some instances they include sexual and family violence offences. Section 19 replaced similar provisions which existed in NSW, Tasmania and the ACT before the enactment of the UEA.⁴⁸ The exception is based on a policy that the offences specified are of such a nature that there should be no opportunity for spouses and other family members to object to giving evidence.

The rationale is clearly that, in the case of domestic violence offences, there is a significant risk that the victim will be unduly influenced by the offender to withhold testimony necessary for conviction even though that is not the victim's true wish. Further, to remove the discretion from the spouse ... also removes a possible area of contention between spouses. If the alleged victim has no privilege to assert, the alleged offender cannot blame the victim for submitting to the giving of evidence when validly summoned to do so.⁴⁹

2.31 Section 18 of the UEA was modelled on section 400 of the *Crimes Act 1958*. There is currently no equivalent to section 19 under Victorian law. That is, there is no exception to the right of family members to make an application to be excused from giving evidence in criminal proceedings.

2.32 The operation of a provision allowing witnesses to apply to be exempted from giving evidence against a family member in all criminal proceedings was supported by

47 The offences in section 19 of the *Evidence Act 1995* (Cth) are all offences under ACT law.

48 Odgers (2004) above n 21, [1.2.780]. The provisions listed in s 19 of the NSW Act re-enact s 407(3)(b) and s 407AA of the *Crimes Act 1900* (NSW). Section 19 of the Tasmanian Act reflects the offences in ss 85(7) and 85A of the *Evidence Act 1910* (Tas). The offences listed in s 19 of the Commonwealth Act are the same offences for which a spouse was a compellable witness under s 66(3) of the *Evidence Act 1971* (ACT).

49 *R v Wright* (2004) 155 ACTR 50, 53; 149 A Crim R 298, 301.

Victoria Legal Aid. It submitted that in its experience the court's discretion in these matters was appropriately exercised and that even when a witness is not ultimately exempted from giving evidence, the process of applying for exemption had significant benefits:

The witness has an opportunity to explain the nature and importance of their relationship to the defendant and the judicial officer has an opportunity to explain the policy reasons compelling the witness to give evidence. This dialogue often reduces the stress for the witness and minimises damage to the relationship between the witness and defendant (a victim, in relevant cases). This beneficial process would not occur if s.400 applications were prohibited for particular offences.

2.33 In some UEA jurisdictions, family violence is one of the areas in which compellability has been a particular issue. The difficulties of prosecuting family violence offences are well known in all jurisdictions. Uncertainty about whether victims of family violence will give evidence at trial may be a factor influencing the decision to prosecute. Issues around a victim's willingness to take legal action and giving evidence have been raised by the commission in our family violence reference.⁵⁰ Victoria Police raised the issue of the operation of section 400 of the Crimes Act in that context. It expressed concern that any exclusion of the operation of section 400, resulting in children being automatically compelled to give evidence, may endanger both the child and the family unit. However, it suggested that the presence of family violence might be included as a factor weighing heavily in the interests of the community in obtaining the evidence.⁵¹ In its submission to the evidence inquiry, Victoria Police did not advocate for any exception to the general application of section 18 in criminal proceedings.⁵²

2.34 The commission's forthcoming final report on the Review of Family Violence Laws will consider the broader issues surrounding of the unwillingness of some victims of family violence to give evidence against a family member in both criminal and civil intervention order proceedings. However, the commission does not make specific recommendations about compellability in the area of family violence.

2.35 The commission believes that legal certainty of the compellability of a witness will not resolve the difficulties faced by prosecutors with unwilling witnesses. Prosecutors will always face the possibility of witnesses being unwilling to confirm

50 Victorian Law Reform Commission, *Review of Family Violence Laws: Consultation Paper* (2004) [9.31].

51 Family Violence Submission 72.

52 Submission 25.

their statement even when the witness is compelled to give evidence. Further, for any type of offence there will be situations in which it will be more appropriate to excuse a witnesses from giving evidence than forcing them to do so, even if the nature of the offence weighs against excusing them.

2.36 Section 19 of the uniform Evidence Acts is not the subject of many reported cases. However, one example from the ACT illustrates the difficulties of removing the availability of the discretion. In *R v YL*⁵³ the ACT Supreme Court encountered a situation in which the Crown sought to compel a 7-year-old child to give evidence against his stepmother on a charge that she assaulted him. This offence fell within section 19 of the *Evidence Act 1995* (Cth). Evidence was presented to the court that there was a risk of significant harm to the child if he was forced to give evidence. Justice Crispin held that if section 18 were available in the circumstances there were strong grounds for an objection. As section 19 precluded the objection he was unable to uphold it, however, he held that the court retained the discretion not to exercise any coercive measures to compel the witness. In his judgment he remarked of section 19:

This provision, no doubt, reflected a well-founded concern that victims of domestic violence and other members of their families might object to giving evidence against the perpetrators due to fear of reprisals or family loyalty. I accept that there is a compelling need to protect people from domestic violence by the due prosecution of offenders and to prevent offenders escaping prosecution by intimidation or persuasion. A person who has violently assaulted his or her children should not escape prosecution and remain free to further mistreat them merely because the other parent is reluctant to give evidence. The legislative policy of denying any right of objection under section 18 to potential witnesses in domestic violence offences of the kind specified is, no doubt, attributable to considerations of this kind.

However, due recognition of the importance of these considerations need not be accompanied by a complete disregard for the risk that curial processes intended to protect spouses and children may themselves inflict further perhaps quite unwarranted harm. If section 19 still applies to such offences as the Crown maintained, the Court would have no power to uphold an objection by an emotionally vulnerable child even if supported by convincing evidence that to force him or her into the witness box would bring him or her to the brink of suicide.⁵⁴

53 (2004) 187 FLR 84.

54 Ibid [20]–[21].

2.37 The commission believes that there should not be any circumstances in which objection cannot be taken by a family member to giving evidence in criminal proceedings and the exercise of the power to excuse a witness determined in accordance with section 18. Sensibly applied, section 18 provides an adequate means for ensuring that witnesses are required to give evidence in appropriate circumstances and excused where there are greater overriding concerns.

!

RECOMMENDATIONS

9. No exception should be made to the application of section 18 of the Victorian UEA in criminal proceedings.
10. Section 19 of the Victorian UEA should contain a note referring to the different provision in other UEA jurisdictions.

IMPROPER QUESTIONS—SECTION 41

2.38 Section 41 of the UEA deals with the court's power to disallow improper questions put to witnesses in cross-examination. The joint review considered whether this section should be amended to make specific provision for the protection of vulnerable witnesses and whether the section should impose a duty on the court to prevent improper questioning. The ALRC and NSWLRC joined in a recommendation that section 41 be amended to adopt the terms of section 275A of the *Criminal Procedure Act 1986* (NSW).⁵⁵ This provision was introduced in NSW in 2005 and provides that the court must disallow all 'disallowable questions', a term defined to include the current categories of improper questions under section 41 and some further categories.

2.39 The commission dissented from the majority view on this point.⁵⁶ For the reasons expressed in the joint report, we believe that a model which maintains the court's discretion to disallow improper questions or questioning, but imposes a duty on the court to prohibit improper questioning of vulnerable witnesses is to be preferred. We recommend that Victoria should adopt the alternative model put forward by the commission and review the operation of the different provisions after a few years to determine which is most effective.

55 ALRC, NSWLRC, VLRC (2005) above n 13, Recommendation 5–2.

56 Ibid [5.119]–[5.128].

**RECOMMENDATION**

11. Section 41 of the Victorian UEA should be enacted in the following terms:

41. Improper questions

(1) The court may disallow an improper question or questioning put to a witness in cross-examination, or inform the witness that it need not be answered.

improper question or questioning means a question or sequence of questions that is unfair to the witness because it is:

- (a) misleading, confusing;
- (b) unnecessarily repetitive; or
- (c) annoying, harassing, intimidating, offensive, humiliating or oppressive; or
- (d) put to the witness in a manner or tone that is inappropriate (including because it is humiliating, belittling or otherwise insulting), or has no basis other than a sexual, racial, cultural or ethnic stereotype.

(2) The court must disallow an improper question or questioning put to a vulnerable witness in cross-examination, or inform the witness that it need not be answered unless the court is satisfied that it is necessary in the circumstances that the question be put.

vulnerable witness means

- (a) a person under the age of 18; or
- (b) a person with a cognitive impairment or intellectual disability; and

includes any other person rendered vulnerable by reason of:

- (c) the age or cultural background of the witness;
- (d) the mental, physical or intellectual capacity of the witness;
- (e) the relationship between the witness and any party to the proceedings; or



RECOMMENDATION

(f) the nature of the offence.

FURTHER PROTECTIONS: CROSS-EXAMINATION OF THE ACCUSED—SECTION 104

2.40 Section 104 of the UEA regulates the cross-examination of a defendant in a criminal proceeding as to issues of credit. The common law equivalent is often referred to as providing a shield for the defendant which is only lost in certain circumstances. It is one of the few sections in Chapter 3 of the UEA where jurisdictions differ. Tasmania has adopted a different approach to the Commonwealth and NSW. The fundamental differences between the two sections are:

- whether the shield is lost through the conduct of the defence or only in the more narrow circumstance of the admission of evidence; and
- whether the section explicitly protects the accused from the loss of the shield where imputations form a necessary part of a proper defence—such as where there is alleged police corruption—or whether that is left to the discretion of the court.

2.41 While one submission expressed a preference for the Tasmanian approach,⁵⁷ consultation in Victoria generally supported a provision similar to the Commonwealth and NSW Acts.⁵⁸ The issue is considered in the joint Final Report and the commission joins with the ALRC and NSWLRC in preferring section 104 of the Commonwealth and NSW Acts.⁵⁹

2.42 Some amendments to section 104 are recommended in the joint Final Report in order to overcome the effect of the High Court's decision in *Adam v The Queen*.⁶⁰ The commission's recommendation is therefore for the adoption of the draft of section 104 as it appears in the joint Final Report.⁶¹

⁵⁷ Submission 25.

⁵⁸ Roundtable consultation with members of the legal community, 30 August 2005.

⁵⁹ ALRC, NSWLRC, VLRC (2005) above n 13, [12.61].

⁶⁰ (2001) 207 CLR 96.

⁶¹ ALRC, NSWLRC, VLRC (2005) above n 13, Appendix 1.



RECOMMENDATION

12. Section 104 of the Victorian UEA should be drafted in the same terms as recommended in the joint Final Report.

PROFESSIONAL CONFIDENTIAL RELATIONSHIPS PRIVILEGE—SECTIONS 126A–126F

2.43 The original ALRC inquiry recommended that the UEA include a discretionary professional relationships privilege on the basis that a public interest existed in maintaining confidentiality in the context of a number of professional relationships.⁶² The provision was to be discretionary so that:

The public interest in the efficient and informed disposal of litigation in each case will be balanced against the public interest in the retention of confidentiality within the relationship and the needs of particular and similar relationships.⁶³

2.44 This recommendation was adopted in NSW resulting in Division 1A of Part 3.10 of the *Evidence Act 1995* (NSW). The recommendation was not adopted by the Commonwealth. Tasmania retains a medical communications privilege but does not replicate the provisions of the NSW Act.⁶⁴

2.45 The joint Final Report recommends the adoption of the professional confidential communications privilege in the Commonwealth Act.⁶⁵

2.46 A number of professional bodies responded to requests to address the question of whether the professional confidential relationships privilege should be adopted in the Victorian UEA. Professional bodies were generally supportive of the privilege being adopted and pointed both to their professional obligations of confidentiality and the importance of trust and confidence in their relationships with patients and clients.

2.47 The Australian Nursing Federation submitted that:

It is imperative that patients believe they can trust their health professionals as this trust can also have an enormous effect on their health and their ability to sustain their optimal health levels.

62 Australian Law Reform Commission (1987) above n 3, Recommendation 54.

63 Australian Law Reform Commission (1985) above n 4, [955].

64 *Evidence Act 2001 (Tas)* s 127A.

65 ALRC, NSWLRC, VLRC (2005) above n 13, Recommendation 15–1

2.48 The Australian Dental Association (Victoria) submitted that the justifications for the medical privilege—protecting privacy, encouraging people to seek treatment and the public interest in patients receiving treatment—applies equally to dentists and their patients.

2.49 The Pharmaceutical Society of Australia (Victorian Branch) pointed out that confidential information is routinely disclosed to pharmacists in their dealings with clients, and that pharmacists are often the first port of call for clients seeking further medical assistance.

2.50 The Australian Naturopathic Practitioners Association pointed to its code of ethics which requires practitioners to maintain confidences except where disclosure is required by law.

2.51 The Australian Medical Association (Victorian Branch) expressed concern that the UEA privilege involves a discretionary test with unpredictable outcomes and therefore may not adequately protect doctor–patient confidentiality. The association submitted that the doctor–patient relationship required distinct treatment and suggested that a specific provision be included in the UEA for the doctor–patient communications to adequately protect confidentiality.

2.52 Concerns were expressed by members of the Victorian legal community that the NSW provisions were too wide and uncertain.⁶⁶ There was a reluctance to accept even a limited protection of confidential communications beyond the established categories.

2.53 The commission joined with the ALRC and the NSWLRC in recommending the adoption of the professional confidential relationships privilege in other UEA jurisdictions in the joint Final Report.⁶⁷ The commission recommends that it be included in the Victorian UEA. These provisions both recognise the broader range of relationships of trust and confidence and allow the court to balance this against the importance of receiving the evidence in the context of each case. The commission is reassured in its view by the operation of the NSW provision over a number of years which has resulted in neither undue restriction of the evidence available at trial nor the loss of confidence in the medical profession.

66 Roundtable consultation with members of the Victorian legal community, 23 August 2005; consultation with the Supreme Court Litigation Committee, 29 September 2005.

67 ALRC, NSWLRC, VLRC (2005) above n 13, Recommendation 15–1.



RECOMMENDATION

13. The Victorian UEA should include a professional confidential relationships privilege in Part 3.10, Division 1A in the form set out in the joint Final Report.

SEXUAL ASSAULT COMMUNICATIONS PRIVILEGE—SECTIONS 126G–126N

2.54 Provisions dealing with sexual assault communications currently exist only in the NSW and Tasmanian uniform Evidence Acts,⁶⁸ although, the main NSW provisions are in fact found in the *Criminal Procedure Act 1986* (NSW).⁶⁹ The joint Final Report recommends that provisions similar to those currently operating in NSW be included in both the NSW and Commonwealth uniform Evidence Acts to apply in both civil and criminal proceedings.⁷⁰ The NSW provisions were preferred to the absolute privilege in criminal proceedings contained in the Tasmanian Act.⁷¹

2.55 The commission has previously considered the various models of sexual assault counselling privileges in the course of research for the sexual offences inquiry. We recommended that the NSW model be adopted in preference to the Tasmanian model.⁷² In the report, the commission also recommended that certain matters be included as factors to be considered in the public interest test.⁷³ The commission maintains that these factors should be included in the public interest test provisions of the Victorian UEA.

2.56 The joint Final Report included draft provisions for inclusion in the *Evidence Act 1995* (Cth). The Victorian UEA would require some modification of these provisions, such as the definition of ‘sexual assault offence’ and ‘informant’, to reflect Victorian legislation. A draft of Part 3.10, Division 1B for the Victorian UEA is included as Appendix 1, with the relevant modifications underlined.

68 *Evidence Act 1995* (NSW) ss 126G–126I which apply only in civil proceedings; *Evidence Act 2001* (Tas) s 126B.

69 *Criminal Procedure Act 1986* (NSW) ss 295–306.

70 ALRC, NSWLRC, VLRC (2005) above n 13, Recommendation 15–4.

71 *Evidence Act 2001* (Tas) s 126B.

72 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure: Final Report* (2004), [4.71]–[4.98].

73 *Ibid* Recommendation 83.

! RECOMMENDATION

14. The Victorian UEA should include a sexual assault counselling privilege in Part 3.10, Division 1B, as drafted in accordance with the recommendations of the joint Final Report with the modifications appearing in Appendix 1.

PRIVILEGE IN RESPECT OF SELF-INCRIMINATION IN OTHER PROCEEDINGS— SECTION 128

2.57 Section 128 of the UEA differs from the common law, which grants an absolute right to claim the privilege against self-incrimination. Under the UEA, witnesses may give, or be compelled to give, self-incriminating evidence in certain circumstances, but the court will grant a certificate excluding the admission of that evidence against the witness in any other legal proceeding. The joint Final Report recommends that section 128 be redrafted to clarify its operation without substantially altering its effect.⁷⁴

2.58 Provisions of the state and Commonwealth Acts give the certificates operation. Certificates granted under the *Evidence Act 1995* (Cth) operate to prevent the admission of the evidence in all Australian courts.⁷⁵ Section 128(7) of the *Evidence Act 1995* (NSW) provides that the evidence covered by the certificate granted under that Act cannot be used against the witness in proceedings in a NSW court. As part of the joint review, it was recommended that for the purposes of section 128 of the *Evidence Act 1995* (NSW), ‘NSW court’ be defined more broadly than the general definition in the UEA in order to give the certificates greater operation.⁷⁶ Similarly, the definition of ‘Victorian court’ should be extended for the purpose of section 128 of the Victorian UEA.

2.59 The protection of a certificate granted under the *Evidence Act 1995* (NSW) is extended by subsections 128(10)–(12) of the *Evidence Act 1995* (Cth) which provide that certificates granted under prescribed state Acts have the same effect as those under the Commonwealth Act in proceedings before the Federal Court and in prosecutions for Commonwealth offences.

74 ALRC, NSWLRC, VLRC (2005) above n 13, Recommendation 15–7.

75 *Evidence Act 1995* (Cth) s 128(7). ‘Australian court’ is defined broadly and includes a person or body authorised by an Australian law, or by consent of the parties, to hear, receive and examine evidence.

76 ALRC, NSWLRC, VLRC (2005) above n 13, Recommendation 15–9.

2.60 Section 128 of the Victorian UEA should be drafted in terms similar to the NSW provision with the amendments suggested by the joint review to make the section easier to understand and apply.⁷⁷ For certificates granted in Victoria to have extended operation under the Commonwealth Act, Victoria would need to request that the Commonwealth declare section 128 of the Victorian UEA to be a prescribed provision for the purposes of section 128(10) of the *Evidence Act 1995* (Cth). Without such extended operation, the value of a Victorian certificate in mitigating the effect of compelling self-incriminatory testimony would be reduced.



RECOMMENDATION

15. Section 128 of the Victorian UEA should be drafted in accordance with section 128 of the *Evidence Act 1995* (NSW), incorporating the amendments recommended by the joint Final Report with the following differences:
 - ‘Victorian court’ be substituted for ‘NSW court’;
 - ‘Victorian court’ be defined for the purposes of section 128 as ‘a Victorian court, or a person or body authorised by a Victorian law, or by consent of the parties, to hear, receive and examine evidence’.
16. The Victorian Government request that section 128 of the Victorian UEA be declared by Commonwealth regulation to be a prescribed provision for the purposes of section 128(10) of the *Evidence Act 1995* (Cth), pursuant to section 128(11) of the *Evidence Act 1995* (Cth).

PRIVILEGE AGAINST SELF-INCRIMINATION IN ANCILLARY PROCEEDINGS

2.61 An issue was raised in the joint review as to the application of the privilege against self-incrimination in the context of orders for disclosure made in connection with Anton Piller (search) and Mareva (freezing) orders. Such orders are usually made *ex parte* and can require the preparation of disclosure affidavits by persons on whom the orders are served. The issue which has arisen in NSW is whether, in those circumstances, the common law privilege against self-incrimination or the provisions of the UEA applies and, further, if section 128 applies, how objection is to be made and determined.

77 See *ibid*, Appendix 1, for draft provisions in relation to the privilege against self-incrimination.

2.62 A practice developed in NSW of requiring disclosure to be made in an affidavit, which was not to be served until the court had determined the claim for privilege and, if necessary, granted a certificate in relation to the information disclosed. The most recent NSW authority held that the practice which was previously employed was invalid and disclosure could not be required until the claim for privilege had been determined.⁷⁸ Given the urgency of the relief sought in these cases, and the likelihood of privilege claims, concerns were expressed that this rendered this form of relief largely ineffective. The joint Final Report discusses provisions in other jurisdictions which have abrogated the privilege against self-incrimination in these circumstances to overcome this difficulty.⁷⁹

2.63 In the joint Final Report, the commissions recommend that the UEA be amended to abrogate the privilege in these circumstances while providing protection against the use of any self-incriminatory evidence in criminal proceedings.⁸⁰ The joint Final Report also recommends that the protection against subsequent use of the evidence not apply to pre-existing documents disclosed under the order.

2.64 A draft provision was put forward by the Committee of the Council of Chief Justices currently investigating the question of the harmonisation of the rules of court, practice notes and forms in relation to Mareva and Anton Piller orders. However, the commissions were concerned about the breadth of this draft. The commissions do not put forward a draft provision to give effect to the recommendation in the joint Final Report.

2.65 The commission has given this matter further consideration and prepared draft provisions which it considers deal appropriately with the concerns raised by the committee, although differing from the draft it put forward in several respects. The draft provisions appear as Appendix 2.

2.66 The draft is designed to:

- generally abrogate the privilege against self-incrimination in relation to pre-existing documents at all stages of court proceedings;
- confine the operation of the remaining provision to orders for disclosure by affidavit made in or in connection with Anton Piller or Mareva orders;

78 *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436.

79 ALRC, NSWLRC, VLRC (2005) above n 13, [15.133]–[15.134].

80 Ibid Recommendation 15–10.

- provide a procedure by which the evidence may be secured without compromising the ability of the deponent to claim the privilege, as was the case in NSW previously;
- in line with the operation of the privilege at trial under section 128, limit the court's ability to require disclosure to instances where the certificate procedure is able to provide either an absolute or a reasonable degree of protection.⁸¹

2.67 The commission takes an admittedly cautious approach to the abrogation of the privilege in these circumstances. We consider this to be warranted given the fundamental nature of the privilege, and the likelihood that initial orders for disclosure will be made at short notice in the absence of the person who should have an opportunity to claim the privilege.



RECOMMENDATION

17. The Victorian UEA should include sections 128A and 128B in the terms set out in Appendix 2.

EXCLUSION OF EVIDENCE OF REASONS FOR JUDICIAL DECISIONS—SECTION 129

2.68 Section 129 of the UEA excludes the admission of evidence of the reasons for decisions of judges, juries and arbitrators, unless they are published reasons. The section is designed to promote the finality of decisions and confidence in the judicial system.⁸² Exceptions are provided to the rule to allow for relevant evidence to be admitted about certain offences which are broadly termed 'administration of justice' offences. The Commonwealth, NSW and Tasmanian provisions differ in that each lists the administration of justice offences under their own laws in the exceptions in subsection 5.

2.69 The Victorian Act should likewise include exceptions for offences relating to the administration of justice.⁸³

81 This is done by excluding the power to require disclosure where the self-incrimination relates to an offence in a foreign jurisdiction and by making the power discretionary and subject to an 'interests of justice' test so that consideration can be given to the extent of the protection afforded by the certificate.

82 Australian Law Reform Commission (1985) above n 4, [873].

83 The Victorian Parliament Law Reform Committee published a report in relation to administration of justice offences making recommendations for the codification of a number of common law and new



RECOMMENDATION

18. Section 129(5) of the Victorian UEA should be drafted as follows:

(5) This section does not apply in a proceeding that is:

(a) a prosecution for one or more of the following offences:

(i) attempting to pervert the course of justice;

(ii) subornation of perjury;

(iii) embracery, bribery of public official, misconduct in public office;

(iv) section 52A *Summary Offences Act 1966*;

(v) sections 66 or 78 *Juries Act 2000*;

(vi) an offence connected with an offence mentioned in subparagraph (i), (ii), (iii), (iv) or (v), including an offence of conspiring to commit such an offence.

(b) in respect of contempt of court, or

(c) by way of appeal from, or judicial review of, a judgment, decree, order or sentence of a court, or

(d) by way of review of an arbitral award, or

(e) a civil proceeding in respect of an act of a judicial officer or arbitrator that was, and that was known at the time by the judicial officer or arbitrator to be, outside the scope of the matters in relation to which the judicial officer or arbitrator had authority to act.

Note: Subsection (5)(a) differs from section 129(5)(a) of the Commonwealth, NSW and Tasmanian Acts.

offences. If the recommendations are taken up, the new offences may be substituted for the current list. See Victorian Parliament Law Reform Committee, *Administration of Justice Offences*, Final Report (2004).

EXTENSION OF PRIVILEGE—SECTION 131A

OVERVIEW

2.70 Most of the privilege provisions in Part 3.10 apply to the adducing of evidence. This has the consequence that common law privileges continue to apply to pre-trial disclosure procedures and in matters outside court. The joint Final Report recommends the extension of a number of the privilege provisions in Part 3.10 to compulsory processes for disclosure, such as discovery and subpoenas.⁸⁴ Issues surrounding the extension of the privilege provisions are discussed at length in the joint Final Report.⁸⁵ However, the commissions do not put forward a draft amendment or provision as the preferred means of achieving the desired result.

2.71 The commission has examined this issue further and drafted a provision which achieves a limited extension of the privilege provisions of the UEA to compulsory process for disclosure in courts. We also make recommendations in relation to procedural aspects of claiming privilege in these contexts.

2.72 In relation to compulsory processes outside court proceedings, we recommend that extension of the UEA provisions be achieved through amendment of the Acts in which disclosure powers are located.

OPTIONS CONSIDERED

2.73 Section 4 of the UEA sets the basic parameters for the application of the Act. The Victorian UEA's sphere of operation will be limited to Victorian courts. In the commission's view, extending the privilege provisions of the Victorian UEA beyond that sphere of operation would be inconsistent with those parameters and could create uncertainty in construing the Act. The provision to extend the operation of the privilege provisions should be confined to court processes. In Victoria, all search warrants are issued by judicial officers and are returnable before judicial officers. The privilege provisions can therefore be extended to search warrants under Victorian legislation without extending the operation of the Victorian UEA beyond courts.

2.74 One option we considered was amending each section of Part 3.10 to refer to 'disclosure by compulsory process' instead of 'adducing evidence'. However, this form

84 ALRC, NSWLRC, VLRC (2005) above n 13, Recommendations 14–1, 14–6, 15–3, 15–6, 15–11.

85 Ibid [14.7]–[14.42].

of drafting put the language of the provisions out of place in the overall scheme of the Act and added complexity to those provisions.

2.75 Another option we considered was the amendment of court rules to apply the sections to pre-trial processes, as has occurred in NSW.⁸⁶ The commission rejected this option because it is doubtful that the current rule-making powers would support courts making rules which effectively override common law rights,⁸⁷ even where they were substantially re-enacted.

2.76 The commission's preferred option is to include a single flexible extension provision in the Act. This would apply the relevant privilege provisions to other compulsory disclosure processes with any appropriate modifications or, as it is said, *mutatis mutandis*.⁸⁸ Relevant privilege provisions of the Act will then apply to compulsory disclosure processes such as discovery of documents, subpoenas and warrants.

2.77 This option will have the flexibility to apply the privilege provisions with such changes as are necessary to the particular compulsory process. For example, if there is a dispute about whether a discoverable document is subject to the professional confidential relationships privilege, the court can resolve the dispute by applying section 126A. The power to direct that evidence not be adduced would become a power to direct that the document not be required to be produced for inspection. The court would then consider whether it is likely that harm would or might be caused to a protected confider if the document was required to be produced for inspection.

PROVISIONS TO BE GIVEN EXTENDED OPERATION

2.78 The joint Final Report recommends extension of the following privilege provisions:

- client legal privilege (Division 1),⁸⁹ excluding the provision lifting the privilege in respect to evidence adduced by a defendant in a criminal proceeding (section 123);⁹⁰

86 Ibid [14.29]–[14.32].

87 Pearce and Argument (2005) above n 44, [19.37].

88 This Latin phrase is used in legal parlance when applying a principle or rule which needs modification to fit a new set of facts. See Peter Nygh and Peter Butt (eds) *Butterworths Australian Legal Dictionary* (1997) 769.

89 ALRC, NSWLRC, VLRC (2005) above n 13, Recommendation 14–1.

90 Ibid Recommendation 14–6.

- professional confidential relationships privilege (Division 1A);⁹¹
- sexual assault communications privilege (Division 1B);⁹²
- exclusion of evidence of matters of state (section 130).⁹³

2.79 The commissions have not recommended extension of the privilege in respect of self-incrimination in other proceedings (section 128) because the policy justifying the abrogation and certificate procedure at trial do not apply to pre-trial processes. In those instances, the commissions consider it appropriate that the common law continue.⁹⁴

2.80 No recommendation is made in the joint Final Report in relation to the extension of sections 129 (exclusion of evidence of reasons for judicial decisions) and 131 (exclusion of evidence settlement negotiations). The extension of these provisions was not raised in consultations. The commission believes it is appropriate to extend the whole of Part 3.10, Division 3 of the UEA, including these provisions. There is no reason of policy why these provisions should not be extended. Extension will minimise the continued operation of two laws of privilege in legal proceedings.

2.81 The sexual assault communications privilege provisions as drafted apply to pre-trial processes for disclosure of documents. Accordingly, it is not necessary to include Division 1B in the extension provision.

RELEVANT COURT

2.82 The proposed new section provides for claims for privilege to be determined by the ‘relevant court’. For compulsory disclosure processes issued in proceedings, the relevant court will be the court hearing the proceedings. For search warrants, it will be the court issuing the warrant; in Victoria this will usually be the Magistrates’ Court.



RECOMMENDATION

19. The Victorian UEA should be drafted to include the following provisions:

91 Ibid Recommendation 15–3.
 92 Ibid Recommendation 15–6.
 93 Ibid Recommendation 15–11.
 94 Ibid [15.109].



RECOMMENDATION

Division 3A—Extension of Privilege

131A. Extension of privilege provisions

If:

(a) a person is required by a disclosure requirement to give information or produce a document which would result in the disclosure of a communication, document or information of a kind referred to in Divisions 1, 1A or 3 of Part 3.10, and

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

the objection shall be considered and determined by the relevant court by the application of the provisions of Part 3.10, excluding section 123, with any necessary modifications.

disclosure requirement means any court process or order requiring the disclosure of information and includes:

- (a) a subpoena to produce documents;
- (b) pre-trial discovery;
- (c) non-party discovery;
- (d) interrogatories;
- (e) notices to produce;
- (f) search warrants;
- (g) requests to produce documents under Division 1 of Part 4.6.

PROCEDURAL PROVISIONS

2.83 The proposed extension provision does not provide a structure or procedure to be followed for making and determining claims for privilege. With most court processes, however, court rules already provide that procedure. For example, court rules already have provision for claims for privilege to be made in affidavits of

documents⁹⁵ and for the court to determine disputed privilege claims.⁹⁶ With some modification of the rules, those procedures can simply continue.

2.84 However, procedure does need to be made more certain in relation to search warrants. This is the case whether the privilege claimed is under the UEA or at common law. Procedures for dealing with claims for privilege in relation to warrants are currently the subject of agreed protocols between law enforcement agencies and professional bodies. Commonly, these provide for the documents over which privilege is claimed to be placed in a sealed envelope and proceedings brought before the court which issued the warrant to determine the privilege claim. Some additional informal procedures are also adopted in some instances to expedite the process, such as involving an independent arbitrator to advise as to the likely success of a privilege claim, to reduce the areas of dispute.

2.85 The Victorian Parliamentary Law Reform Committee has recently recommended:

legislation be amended to include procedures for dealing with claims of legal professional privilege in all Victorian search warrant provisions using as a model, section 86VE of the *Police Regulation Act 1958* and section 61BE of the *Whistleblowers Protection Act 2001* ...⁹⁷

The sections referred to provide for a procedure to be followed similar to that in the agreed protocols.

2.86 The committee also recommends the formalisation of the ad hoc use of alternative dispute resolution mechanisms to resolve privilege disputes in the first instance.⁹⁸

2.87 The commission agrees with the recommendations of the Victorian Parliamentary Law Reform Committee that the procedures regarding claims for privilege in relation to search warrants be set out in legislation. This can be achieved by inserting provisions in Part 4 of the *Magistrates' Court Act 1989*.

95 See, eg, Supreme Court (General Civil Procedure) Rules 2005 r 29.04(d).

96 See, eg, *ibid*, r 29.11.

97 Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures*, No 170 of Session 2003–2005 (2005), Recommendation 65.

98 *Ibid* Recommendations 63, 64.



RECOMMENDATION

20. Provisions be inserted in Part 4, Division 3, sub-division 5 of the *Magistrates' Court Act 1989* reflecting the established protocols and practices relating to claims for privilege in relation to search warrants including:
- a form of warrant which advises of the right to claim privilege and how to do so;
 - the option of informal preliminary determination of privilege claims by an independent arbitrator;
 - the return of documents over which there is a disputed privilege claim in a sealed envelope or box to the relevant court for determination; and
 - time limits for application to be made to the court for determination of the privilege claim.

PRIVILEGE AND COMPULSORY PROCESSES OUTSIDE COURT

2.88 Extending the privilege provisions of the UEA to pre-trial processes and warrants is a significant step towards reducing the dual system of privileges. However, the above recommendations do not extend to the plethora of compulsory disclosure powers which exist outside courts. In those situations, the common law privileges will continue to apply (unless the privilege has been abrogated by statute). Ultimately, courts may be required to determine disputed privilege claims arising in these contexts by applying the common law.

2.89 Because of the range of compulsory powers, and the circumstances in which they are given, the commission believes it is more appropriate for privilege to be dealt with in the Acts which provide for compulsory disclosure processes. Where appropriate, these Acts could be amended to adopt the privilege provisions of the UEA or aspects of them. There is a current provision in the *Victorian Civil and Administrative Tribunal Act 1998* which picks up privileges as they apply in the Supreme Court with some modifications. Section 106(1) of that Act states:

Except as provided by section 80(3) or 105, a person is excused from answering a question or producing a document in a proceeding if the person could not be compelled to answer the question or produce the document in proceedings in the Supreme Court.

2.90 The provision currently picks up all privileges which apply in the Supreme Court—common law and statutory—apart from those abrogated by the named sections of the Act. This will pick up the privilege provisions of the UEA once it is

introduced. A similar provision could be incorporated into other Acts where bodies or individuals are invested with compulsory disclosure powers. Provision could also be made for appropriate procedures for the determination of privilege claims.⁹⁹

Coroner

2.91 One example where it may be desirable for an Act investing compulsory disclosure powers to be amended to pick up provisions of the UEA is the *Coroners Act 1985*. This Act is currently under review by the Victorian Parliamentary Law Reform Committee.¹⁰⁰ Coroners have powers of entry, search and seizure¹⁰¹ and may require the attendance of witnesses and production of documents at an inquest.¹⁰² They are not bound by the rules of evidence,¹⁰³ but common law privileges are available in relation to compulsory powers. Coroners therefore cannot require evidence to be given by a witness where it would tend to incriminate him or her.¹⁰⁴

2.92 The Discussion Paper published by the Victorian Parliamentary Law Reform Committee in relation to its review of the *Coroners Act 1985* notes that provision is made in Coroners Acts in other jurisdictions for coroners to require self-incriminatory evidence to be given in the interests of justice, with the witness being given the protection of a certificate similar to that granted under section 128 of the UEA.¹⁰⁵ The State Coroner has requested that a similar power be included in the Victorian Coroners Act.¹⁰⁶ If this was to be done, section 33AA of the *Coroners Act 1980* (NSW) could serve as an appropriate model.

2.93 Other issues of privilege may also arise in coronial investigations and inquests, such as legal professional privilege. It would be desirable for those issues to be determined in accordance with the UEA privilege provisions, to prevent the need for practitioners, police and magistrates (who may sit as coroners) to deal with two sets of privilege rules. This could be achieved by including a section in the *Coroners Act 1985* similar to section 106 of the *Victorian Civil and Administrative Tribunal Act 1998*.

99 Such as those in the *Police Regulation Act 1958*.

100 Victorian Parliament Law Reform Committee, *Coroners Act 1985: Discussion Paper* (2005).

101 *Coroners Act 1985* ss 26, 30A, 41.

102 *Coroners Act 1985* s 46.

103 *Coroners Act 1985* s 44.

104 *Re O'Callaghan* (1899) 24 VLR 957; *R v The Coroner; Ex parte Alexander* [1982] VR 731.

105 Victorian Parliament Law Reform Committee (2005) above n 100, 56.

106 *Ibid* 57.

Alternatively, it could include a section similar to the proposed section 131A by substituting ‘coroner’ for ‘relevant court’ and tailoring the definition of ‘disclosure requirement’. If certain privileges were considered inappropriate in the context of coronial investigations and inquests they could be omitted from the extension provision.



RECOMMENDATION

21. Consideration should be given to the adoption of appropriate UEA privilege provisions in Acts investing bodies or persons with compulsory disclosure powers.

MATTERS OF LAW—SECTION 143

2.94 Section 143 of the UEA provides that proof is not required of the provisions and coming into operation of Acts and subordinate instruments.¹⁰⁷ Section 143 of the *Evidence Act 1995* (Cth) is given extended operation by section 5 of that Act so that it applies in all Australian courts. The constitutionality of this part of the Commonwealth Act has been questioned by some commentators.¹⁰⁸ Power is conferred by section 51(xxv) of the Commonwealth Constitution on the federal parliament to legislate to give effect to section 118 of the constitution which provides:

Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

2.95 If valid, the extended application of the Commonwealth section to state courts removes the need to replicate the section in state Acts. Despite this, NSW and Tasmania have included section 143 in slightly altered form in their Acts. In view of the uncertainty of the operation of the Commonwealth Act, it would be prudent to include section 143 in the Victorian UEA as other states have done.

107 Such as regulations, rules, by-laws, proclamations and instruments of a legislative nature.

108 Discussed in Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC Discussion Paper 69, NSWLRC Discussion Paper 47 and VLRC Discussion Paper (2005) [15.9]–[15.11]; see also Odgers (2004) above n 21, [1.4.540].

**RECOMMENDATION**

22. Section 143 of the Victorian UEA should be in the same form as section 143 of the *Evidence Act 1995* (NSW).

SEALS AND SIGNATURES—SECTIONS 150 AND 151

2.96 Provision is made in the UEA for a presumption of regularity for seals and signatures affixed to official public documents. The *Evidence Act 1995* (Cth) contains two provisions: section 150, which is given extended operation by section 5 of that Act, and section 151, which only applies in federal and ACT courts.

2.97 NSW and Tasmania have a single provision—section 150—which deals with all seals and signatures. The Commonwealth’s power to give extended operation to some of the provisions of its Act has a separate legislative basis and is more limited than the power to legislate for federal courts. It can be presumed that the more limited operation of section 151 is due to a lack of Commonwealth legislative power to give it extended operation. As the state Acts do not have any extended operation, the separation of provisions is unnecessary. Victoria can simply adopt the NSW and Tasmanian approach of drafting an all-encompassing section 150 and omitting section 151.

**RECOMMENDATION**

23. Section 150 of the Victorian UEA should be in the same form as section 150 of the *Evidence Act 1995* (NSW) and include a note under section 151 as appears in that Act.

EVIDENCE OF COMMONWEALTH DOCUMENTS—SECTION 155A

2.98 Section 155A of the Commonwealth Act contains provisions about proof of Commonwealth documents with extended application to all Australian courts. This section is omitted from the state uniform Evidence Acts with a note that the Commonwealth Act includes a provision about evidence of Commonwealth documents. A similar approach is warranted in Victoria.



RECOMMENDATION

24. The Victorian UEA, under the heading ‘155A Evidence of Commonwealth documents’, should contain a note to the effect that the Commonwealth Act includes a provision relating to evidence of Commonwealth documents and that section 5 of the *Evidence Act 1995* (Cth) extends the operation of section 155A to all Australian courts.

PROOF OF LETTERS HAVING BEEN SENT BY COMMONWEALTH AGENCIES—SECTION 163

2.99 As with section 155A, section 163 of the *Evidence Act 1995* (Cth) need not be duplicated in the Victorian UEA but merely referred to in note form to alert practitioners to the Commonwealth provision.



RECOMMENDATION

25. The Victorian UEA, under the heading ‘163 Proof of letters having been sent by Commonwealth agencies’, should contain a note to the effect that the Commonwealth Act includes a provision relating to proof of letters having been sent by Commonwealth agencies and that section 5 of the *Evidence Act 1995* (Cth) extends the operation of section 163 of that Act to all Australian courts.

WARNINGS—SECTIONS 165–165B

2.100 Part 4.5 of the UEA contains provisions relating to jury warnings. The *Evidence Act 1995* (NSW) includes additional sections in this part relating to children’s evidence.¹⁰⁹ The joint Final Report recommends that the NSW provisions be adopted with some amendment in the *Evidence Act 1995* (Cth).¹¹⁰ A draft 165A is put forward in the joint final report encompassing the current sections 165A and 165B of the *Evidence Act 1995* (NSW).¹¹¹ This section should also be included in the Victorian UEA.

109 *Evidence Act 1995* (NSW) ss 165(6), 165A, 165B.

110 ALRC, NSWLRC, VLRC (2005) above n 13, Recommendation 18–2.

111 *Ibid* Appendix 1.

2.101 The joint Final Report also recommends that the UEA be amended to codify and alter the common law warning in respect of forensic disadvantage as a result of delay in complaint or prosecution.¹¹² The NSWLRC dissented on this point.

2.102 These *Longman* warnings frequently arise in sexual offence prosecutions. The commission made recommendations in the *Sexual Offences: Final Report* addressing what were identified as the deficiencies in the current law and practice.¹¹³ In particular those deficiencies were:

- the giving of *Longman* warnings where the delay in complaint was not significant and no specific forensic disadvantage was identified; and
- the use of the phrase ‘dangerous to convict’ in the warning to the jury.

2.103 The commission believes that the draft section 165B put forward in the joint Final Report substantially encompasses the commission’s previous recommendation and therefore supports its enactment in the Victorian UEA.



RECOMMENDATION

26. Sections 165, 165A and 165B of the Victorian UEA should be in the form recommended in the joint Final Report.

PERSON WHO MAY GIVE SUCH EVIDENCE—SECTION 171

2.104 Section 170 of the UEA provides that where certain listed sections of the UEA require a fact to be proved in relation to a document, evidence of that fact can be given by persons permitted by section 171 to give such evidence.¹¹⁴ Section 171(1) provides:

- (1) Such evidence can be given by
 - (a) a person who at the relevant time or afterwards had a position of responsibility in relation to making or keeping the document or thing; or
 - (b) except in the case of evidence of a fact that is to be proved in relation to a document or thing because of section 63, 64 or 65—an authorised person.

¹¹² The common law *Longman* warning deriving from the case of *Longman v The Queen* (1989) 168 CLR 79.

¹¹³ Victorian Law Reform Commission, *Sexual Offences: Law and Procedure: Final Report* (2004) Recommendation 170.

¹¹⁴ Uniform Evidence Act, ss 48, 63, 64, 65, 69, 70, 71, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 155A, 156, 157, 158, 159, 160, 161, 162, 163, 182.

2.105 Subsection 3 provides the definition of ‘authorised person’. Those listed as authorised people differ between jurisdictions. In NSW they include people authorised to take affidavits and statutory declarations outside the state or country, police officers and persons authorised by the Attorney-General.

2.106 Subsection 2 provides that an authorised person who does not fall within subsection (1)(a) must not give such evidence unless the court is satisfied that it would be impractical or cause undue expense and delay to require such a person to give the evidence.

2.107 The provisions effectively allow people who are considered trustworthy by reason of their office to perform the function of witness and avoid the inconvenience of having to call the witness who could more appropriately give the evidence. For example, under the NSW provisions, a police officer could give evidence of obtaining records from an overseas bank for funds held by a defendant and tender those records under the exception to the hearsay rule in section 69 if the court considered that it was not reasonably practicable to call the relevant bank officer, or that it would cause undue expense and delay. The evidence would be subject to exclusion under sections 135 and 137 if the evidence was unfairly prejudicial to the defendant.

2.108 In line with the NSW and Tasmanian approach, the commission recommends the Victorian definition of authorised person include those authorised to take affidavits outside Victoria under section 124 of the *Evidence Act 1958*,¹¹⁵ members of the police force above the rank of sergeant, and persons authorised by the Attorney-General.



RECOMMENDATION

27. Section 171 of the Victorian UEA should contain the following definition of ‘authorised person’ in subsection 3:

(3) In this section:

authorised person means:

(a) a person before whom an affidavit may be taken or made in a country or place outside the state under section 124 of the *Evidence Act 1958*, or

¹¹⁵ Or, if enacted, persons authorised under the relevant section of a new Oaths Act.

**RECOMMENDATION**

- (b) a member of the police force above the rank of sergeant, or
- (c) a person authorised by the Attorney-General for the purposes of this section.

APPLICATION OF CERTAIN SECTIONS IN RELATION TO COMMONWEALTH RECORDS—SECTION 182

2.109 Section 182 of the *Evidence Act 1995* (Cth) lists other provisions of the UEA about admission of documentary evidence and gives them extended operation in all Australian courts in relation to documents which are Commonwealth records. As a result, the hearsay exception for business records applies to Commonwealth records in all Australian courts. This section is not included in the state uniform Evidence Acts, but is referred to in a note. A similar approach should be adopted in drafting the Victorian UEA.

**RECOMMENDATION**

28. The Victorian UEA, under the heading ‘182 Application of certain sections in relation to Commonwealth records’ should contain a note to the effect that the *Evidence Act 1995* (Cth) includes a provision that extends the operation of certain provisions of the Commonwealth Act to all Australian courts in relation to Commonwealth records.

FULL FAITH AND CREDIT TO BE GIVEN TO DOCUMENTS PROPERLY AUTHENTICATED—SECTION 185

2.110 Like section 143, section 185 of the *Evidence Act 1995* (Cth) is a ‘full faith and credit’ provision.¹¹⁶ It relates to public acts, records and judicial proceedings of a state or territory, proved or authenticated in accordance with the Act.¹¹⁷ It is based on

¹¹⁶ See para 2.94.

¹¹⁷ The term ‘public acts’ refers to matters such as proclamations, commissions, orders, regulations and by-laws: *Breavington v Godleman* (1988) 169 CLR 41, at 94–5. See Peter Nygh, *Halsbury’s Laws of Australia* (2001) [85–25].

section 18 of the *State and Territory Laws and Records Recognition Act 1901* (Cth).¹¹⁸ Unlike section 143, it is not given extended operation by section 5 of the Commonwealth Act. It simply provides that such documents are to be given full faith and credit in ‘every court’. Section 185 is mentioned in a note to section 4 of the Commonwealth Act as one of the provisions of the Act which extend beyond proceedings in federal and ACT courts.

2.111 The section is not replicated in the state uniform Evidence Acts, however, it will apply to state courts.



RECOMMENDATION

29. The Victorian UEA, under the heading ‘185 Faith and credit to be given to documents properly authenticated’ should include a note to the effect that the *Evidence Act 1995* (Cth) includes a provision requiring full faith and credit to be given to the public acts, records and judicial proceedings of a state or territory by every court.

SWEARING AFFIDAVITS—SECTION 186

2.112 Section 186 of the Commonwealth Act provides that affidavits may be sworn before justices of the peace, notaries public and lawyers. NSW and Tasmania have retained their pre-existing provisions in other Acts in relation to taking affidavits. Section 186 in the *Evidence Act 1995* (NSW) and the *Evidence Act 2001* (Tas) contains only a note referring to the Commonwealth provision. Victoria has an established regime of affidavit provisions. The commission believes there is no benefit to be gained from adopting the narrower list of people who may witness affidavits in the *Evidence Act 1995* (Cth). It is preferable to retain the substantive provisions currently contained in sections 112 and 123C–125 of the *Evidence Act 1958*.¹¹⁹ The commission recommends that section 186 of the Victorian UEA include a provision directing practitioners to the affidavit provisions of the *Evidence Act 1958*.

¹¹⁸ Odgers (2004) above n 21, [1.5.240].

¹¹⁹ Although it is recommended that they eventually be re-enacted in an Oaths Act such as exists in NSW and Tasmania. See para 3.23.



RECOMMENDATION

30. Section 186 of the Victorian UEA should be drafted as follows:

186. Swearing of affidavits for use in Victorian courts

Affidavits for use in a Victorian court may be sworn and taken before any person, and in the manner authorised by the *Evidence Act 1958* for that purpose.

Note 1: Sections 112, 123C, 124, 125, 126, 126A of the *Evidence Act 1958* relate to swearing affidavits.¹²⁰

Note 2: The Commonwealth Act includes a provision about swearing affidavits before justices of the peace, notaries public and lawyers for use in court proceedings involving the exercise of federal jurisdiction and in courts of a territory.

NO PRIVILEGE AGAINST SELF-INCRIMINATION FOR BODIES CORPORATE— SECTION 187

2.113 Section 187 of the *Evidence Act 1995* (Cth) provides that bodies corporate are not entitled to invoke the privilege against self-incrimination where, under the law of the Commonwealth or the ACT, or in a proceeding in a federal or ACT court, a body corporate is required to answer questions, give information or produce documents. The section therefore has some application in proceedings in state courts under Commonwealth Acts. It also applies in situations other than court proceedings. NSW and Tasmania have included equivalent sections in relation to bodies corporate where the requirement is under state law or in a proceeding in a state court.

2.114 The privilege against self-incrimination is not available to corporations in Australia at common law.¹²¹ The commission is of the opinion that this should be continued in legislative form in Victoria.

120 On the enactment of an Oaths Act in Victoria, this section would be amended to refer to that Act and the note amended to refer to the relevant sections.

121 *Environmental Protection Authority v Caltex Refining Co Ltd* (1993) 178 CLR 477; *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96.



RECOMMENDATION

31. Section 187 of the Victorian UEA should be enacted in the same form as section 187 of the *Evidence Act 1995* (NSW).

WITNESS FAILING TO ATTEND PROCEEDINGS—SECTION 194

2.115 NSW and Tasmania have included in their uniform Evidence Acts a section dealing with witnesses failing to attend proceedings when duly summoned or subpoenaed. Section 194 of the NSW Act substantially re-enacts sections 13 and 14 of the *Evidence Act 1898* (NSW). The Commonwealth Act does not contain an equivalent provision. The matter is dealt with by the Federal Court Rules and by separate legislation in the ACT.

2.116 In Victoria, the issue of witnesses failing to attend is dealt with in three separate Acts. Section 150 of the *Evidence Act 1958* currently provides:

Where a subpoena or summons has been issued for the attendance of a person on the hearing of a cause or matter in the Supreme Court or the County Court and—

(a) a copy thereof has been served upon him and a reasonable sum of money paid or tendered to him for his costs and expenses in that behalf but he neglects or refuses to attend; or

(b) he is proved to be keeping out of the way to avoid service thereof—

the Supreme Court or County Court (as the case requires) may issue a warrant to apprehend him and bring him before the Court and may also order him to pay a fine of not more than 1 penalty unit, but no such fine shall exempt him from any other proceedings for disobeying the subpoena or summons.

2.117 Despite the fact that section 150 of the *Evidence Act 1958* is of general application to both criminal and civil proceedings¹²² another provision of similar effect is section 415 of the *Crimes Act 1958*, which states:

(1) Whenever—

122 *Re John Sanderson and Co (NSW) Pty Ltd (In Liq) (No 2)* [1976] VR 225. In that case, Kaye J held that the words ‘cause’ or ‘matter’ in s 150 should be interpreted in accordance with their definition in the *Supreme Court Act 1958* which defined cause as including ‘any suit or other judicial proceedings between a plaintiff and a defendant and any criminal proceedings by the Crown’.

- (a) any person has been bound over to appear and give evidence or to appear for the purpose of producing documents on any trial before the Supreme Court or before the County Court; or
- (b) a subpoena ad testificandum subpoena duces tecum or summons has been issued for the attendance of any person on any trial before the Supreme Court or the County Court and a copy thereof has been duly served upon such person, and a reasonable sum of money has been paid or tendered to him for his costs and expenses in that behalf—

the Supreme Court or the County Court may if such person neglects or refuses to attend issue its warrant to apprehend such person, and may also order any such person to pay a fine not exceeding 5 penalty units, but no such fine shall exempt such person from any other proceedings for disobeying such subpoena or summons.

(1A) Whenever it is proved to the satisfaction of the Supreme Court or the County Court (as the case requires)—

- (a) that any person referred to in paragraph (a) or paragraph (b) in sub-section (1) is likely to absent himself from the trial; or
- (b) that any person for whose attendance on a trial a subpoena ad testificandum subpoena duces tecum or summons has been issued is keeping out of the way to avoid service thereof—

the court may issue its warrant to apprehend such person, and may also order any such person to pay a fine not exceeding 5 penalty units, but no such fine shall exempt such person from any other proceedings for disobeying such subpoena or summons.

(2) When a witness has been apprehended under a warrant as hereinbefore provided any bail justice may discharge such witness upon his entering into a recognisance with or without sureties at the discretion of such bail justice conditioned for his appearance at the time and place mentioned in the said warrant.

2.118 In relation to witnesses in the Magistrates' Court, section 61 of the *Magistrates' Court Act 1989* provides in part:

(1) A warrant to arrest in the first instance may be issued—

...

(b) against a witness if the person issuing it is satisfied

(i) that it is probable that the witness will not answer a witness summons; or

(ii) that the witness has absconded, is likely to abscond or is avoiding service of a witness summons that has been issued; or ...

(5) A warrant to arrest other than in the first instance may be issued—

(a) when the defendant fails to appear before the Court in answer to a summons; or

(b) when a person has been duly served with a witness summons and fails to attend before the Court in answer to the witness summons; or ...

2.119 The Victorian sections differ from the NSW and Tasmanian provisions in that they not only deal with witnesses failing to attend court when required to by subpoena or other mechanisms, but also the situation of witnesses avoiding service. The Crimes Act and Magistrates' Court Act provisions go further than the Evidence Act and provide for the issue of warrants where it is shown that the witness is unlikely to attend.

2.120 The current situation of having three separate provisions is undesirable, particularly given the inconsistencies between the provisions. For example, the Evidence and Crimes Acts provide for fines to be imposed, but in different amounts. All three provisions differ in relation to bail upon arrest.

2.121 The enactment of the Victorian UEA would provide an opportunity to harmonise the provisions in relation to the non-attendance of witnesses in all Victorian courts in both civil and criminal proceedings. However, to effectively replace the existing provisions in Victorian law, the section would need to depart from that in the NSW and Tasmanian Acts.

2.122 In the commission's view it is preferable to include in section 194 of the Victorian UEA a provision to effectively replace section 150 of the *Evidence Act 1958*, section 415 of the *Crimes Act 1958* and sections 61(1)(b), 61(5)(b) and 79(1)(b) of the *Magistrates' Court Act 1989*, allowing one provision to apply to all Victorian courts. The commission considers it appropriate to depart from the drafting of the NSW and Tasmanian provisions to accommodate the current Victorian law.



RECOMMENDATION

32. Section 194 of the Victorian UEA should be drafted as follows:

194. Witness failing to attend proceedings

(1) If a witness fails to appear when called in any civil or criminal proceedings and it is proved that he or she had been:

(a) bound over to appear; or

**RECOMMENDATION**

(b) duly bound by recognisance or undertaking to appear;

(c) served with a summons or subpoena to attend and a reasonable sum of money has been provided to the witness for the costs and expense in that behalf,

the court may:

(d) issue a warrant to apprehend the witness and bring him or her before the court;

(e) order the witness to pay a fine of not more than 5 penalty units, but no such fine shall exempt such person from any other proceedings for disobeying such subpoena or summons;

(f) take such other action against the witness as is permitted by law.

(2) Where a subpoena or summons has been issued for the attendance of a witness on the hearing of a civil or criminal proceeding and it is proved, on application by the party seeking to compel his or her attendance, that the witness:

(a) is avoiding service thereof; or

(b) has been duly served, but is unlikely to comply with such subpoena or summons;

the court may issue a warrant to apprehend the witness and bring him or her before the court.

(3) The court issuing a warrant under this section may endorse the warrant with a direction that the person must, on arrest, be released on bail as specified in the endorsement.

(4) An endorsement under subsection (4) must fix the amounts in which the principal and the sureties, if any, are bound and the amount of any money or the value of any security to be deposited.



RECOMMENDATION

(5) The person to whom a warrant to arrest is directed must cause the person named or described in the warrant when arrested

(a) to be released on bail in accordance with any endorsement on the warrant; or

(b) if there is no endorsement on the warrant, to be brought before the court which issued the warrant; or

(c) discharge a person from custody on bail under section 10 of the *Bail Act 1977*;

(6) Matters may be proved under this section orally or by affidavit.

Note: This section differs from the NSW Act and Tasmanian Act. The Commonwealth Act does not include an equivalent provision.

PROHIBITED QUESTION NOT TO BE PUBLISHED— SECTION 195

2.123 Section 195 of the UEA prohibits the publication of questions disallowed under section 41 (improper questions) or the credibility rules. The section would replace section 41 of the *Evidence Act 1958*. It creates an offence and prescribes a maximum penalty of 60 penalty units. The NSW and Commonwealth Acts differ in that the Commonwealth Act provides that the offence is one of strict liability. The NSW provisions are an appropriate model for Victoria. A Victorian penalty unit¹²³ is approximately the same as a NSW penalty unit,¹²⁴ and a Commonwealth penalty unit.¹²⁵

123 As from 1 July 2005, the Victorian Treasurer fixed the value of one penalty unit as \$104.81; see order made 7 April 2004 pursuant to the *Monetary Units Act 2004* s 5.

124 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17 provides that one penalty unit equals \$110.

125 *Crimes Act 1914* (Cth) s 4AA provides that one penalty unit equals \$110.



RECOMMENDATION

33. Section 195 of the Victorian UEA should be drafted in terms similar to section 195 of the *Evidence Act 1995* (NSW).

PROCEEDINGS FOR OFFENCES—SECTION 196

2.124 Section 196 of the *Evidence Act 1995* (NSW) provides for proceedings for an offence against the Act or its Regulations to be dealt with summarily before a local court. Section 196 of the *Evidence Act 2001* (Tas) similarly provides for offences to be dealt with summarily. The *Evidence Act 1995* (Cth) does not contain an equivalent provision. The provision is not necessary in Victoria because, where no particular procedure is prescribed, an offence would be tried before a magistrate.¹²⁶



RECOMMENDATION

34. The Victorian UEA should not contain an equivalent to section 196 of the *Evidence Act 1995* (NSW).

DEFINITIONS

2.125 Most of the definitions contained in the UEA Dictionary can be used in the Victorian UEA without amendment. Only a few additional definitions need to be included. The definition of ‘Victorian court’ is discussed above.¹²⁷ Some definitions in the *Evidence Act 1995* (Cth) are unnecessary and can be omitted from the Victorian Act, although the approach of including referencing notes should again be adopted.



RECOMMENDATION

35. The following definitions should be included in the Dictionary of the Victorian UEA:

Victorian court means:

¹²⁶ *Interpretation of Legislation Act 1984* s 52.

¹²⁷ See para 2.9.

**RECOMMENDATION**

(a) the Supreme Court, or

(b) any other court created by parliament,

and includes any person or body (other than a court) that, in exercising a function under the law of the state, is required to apply the laws of evidence.¹²⁸

Governor of a State includes any person for the time being administering the government of a state.

Governor-General means Governor-General of the Commonwealth and includes any person for the time being administering the government of the Commonwealth.

36. The following definitions from other uniform Evidence Acts be excluded from the Victorian Act with referencing notes:

ACT court, federal court, NSW court, Tasmanian court

128 This will include, for example, a board of inquiry appointed under the *Parliamentary Administration Act 2005* s 15.

Chapter 3

Evidence Act 1958 and Crimes Acts

Evidence Act 1958	60
Repeal	60
Relocation of Provisions	65
New Acts	66
Staged Process	73
<i>Crimes Act 1958</i> and Related Acts	74

EVIDENCE ACT 1958

3.1 Victorian courts operate under a combination of the common law rules of evidence and statutory modifications made to those rules. A number of those modifications can be found in the *Evidence Act 1958*.

3.2 The Evidence Act has also become a receptacle for a large number of miscellaneous provisions with only a slight connection to ‘evidence’ in its broadest sense.

3.3 Each provision of the Evidence Act has been reviewed by the commission to determine:

- whether they should be repealed upon the introduction of a UEA in Victoria; or
- whether they should be retained, but might be more conveniently located elsewhere.

The results of that review appear in Appendix 3.

REPEAL

GENERALLY

3.4 Recommendations for repeal have been made either on the basis that the provision is replicated in the UEA, or that the same subject matter is dealt with by the UEA and its provisions are to be preferred to those in the Evidence Act. Appendix 3 provides references to the relevant UEA provisions to assist the transitional process from one Act to the other.

3.5 In some instances, repeal is recommended of provisions which were introduced to overcome common law rules. In those instances, section 14(2) of the *Interpretation of Legislation Act 1984* will operate to prevent the revival of the common law rule upon repeal of the section. In order to avoid doubt, the explanatory memorandum to the repealing legislation should refer to the fact that there is no intention to revive the common law rules which these sections abolished.



RECOMMENDATION

37. Upon the enactment of Victorian UEA, the following provisions of the *Evidence Act 1958* be repealed:

Sections 5, 10, 11, 13, 22, 23, 23A,¹²⁹ 24, 25, 26, 27, 28, 29, 31, 32, 32A, 32B, 32C, 32D, 32E, 32F, 32G, 33, 34, 35, 36, 37, 38, 39, 40, 41, 41B*, 41C*, 41F*, 42A, 42B, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 53A, 53B, 53C, 53D, 53E, 53F, 53G, 53H, 53J, 53K, 53L, 53M, 53N, 53P, 53R, 53S, 53T, 54, 55, 55A, 55AB, 55AC, 55B, 55C, 55D, 56, 57, 58, 58A, 58B, 58C, 58D, 58E, 58F, 58G, 58H, 58I, 58J, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 73, 74, 75, 75A, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 99, 101, 102, 103, 104, 145, 146, 147, 148, 149, 149A, 149AB, 149B, 149C, 150, Schedule 3.¹³⁰

3.6 Specific issues regarding sections 28 and 55AB of the Evidence Act were raised in consultations. The commission recommends repeal of these sections. However, the issues raised in relation to them are discussed below.

SECTION 28(2)–(5)

3.7 Section 28 of the Evidence Act currently provides a form of medical privilege in Victoria. Section 28(2) states that:

No physician or surgeon shall, without the consent of his patient divulge in any civil suit action or proceeding or an investigation by a Complaints Investigator under the *Accident Compensation Act 1985* any information which he has acquired in attending the patient and which was necessary to enable him to prescribe or act for the patient.

3.8 The privilege does not apply in criminal proceedings, or certain civil proceedings listed in section 28(5). The section is limited in its application to physicians and surgeons, but is absolute in its restriction in those circumstances.

3.9 The joint Final Report recommends the adoption of the professional confidential communications privilege in the Commonwealth Act, currently enacted in Division 1A of Part 3.10 of the *Evidence Act 1995* (NSW).¹³¹ This privilege applies

129 If not already repealed by the enactment of the Crimes (Sexual Offences) Bill 2005.

130 Provisions marked with an asterisk [*] have not yet been enacted; they are contained in the Crimes (Sexual Offences) Bill 2005.

131 ALRC, NSWLRC, VLRC (2005) above n 13, Recommendation 15–1.

in both criminal and civil proceedings, can encompass a range of professionals with obligations of confidence, and is discretionary.

Submissions and Consultations

3.10 A number of professional bodies responded to requests to address whether the professional confidential relationships privilege should be adopted in the Victorian UEA and whether section 28(2) should be repealed. Professional bodies whose members are not currently covered by section 28(2) were generally supportive of the privilege being adopted.¹³²

3.11 The Australian Medical Association does not support the substitution of the professional confidential relationships privilege in the UEA for section 28 of the Evidence Act. The association is concerned that the UEA privilege involves a discretion test with unpredictable outcomes and therefore may not adequately protect doctor–patient confidentiality. The association submitted that the doctor–patient relationship required distinct treatment and suggested that a specific provision be included in the UEA for the doctor–patient relationship to adequately protect confidentiality and replace section 28 of the Evidence Act.

Commission’s View

3.12 The commission recommends that a discretionary professional confidential relationships privilege be included in the Victorian UEA.¹³³ This provision will encompass both doctors and a range of other professionals. The commission does not support the retention of a separate and more absolute privilege in relation to confidential communications between doctor and patient. It believes the balancing test provided for in section 126B ensures that the competing public interests are appropriately balanced in deciding whether information is disclosed in the context of each case. The commission therefore recommends the repeal of section 28 of the Evidence Act.

132 See paras 2.46–2.50.

133 See Recommendation 13.

SECTION 55AB

3.13 On 10 August 2005, the Attorney-General wrote to the commission asking that it consider an issue raised in a report by the Office of Police Integrity regarding section 55AB of the Evidence Act as part of the current reference.¹³⁴

3.14 Section 55AB of the Evidence Act provides that depositions admitted in committal or coronial proceedings may be admitted as evidence in a criminal trial if the person who made the deposition is not available to give evidence for one of the reasons listed. In order to be admissible, the defendant in the criminal trial must have had the opportunity to cross-examine the witness.

3.15 The report by the Office of Police Integrity entitled *Review of the Victoria Police Witness Protection Program* raises the issue as to whether the confines of the section provide an incentive to some criminals to silence witnesses prior to committal proceedings.¹³⁵ The report discusses whether evidence provided by statement or recorded interview ought to be admissible at committal and/or trial where the witness has died. Alternatively, it raises the issue as to whether there should be scope for a witness in danger to give evidence and be cross-examined before committal proceedings or trial and for a record of that evidence to be admissible. The report recommends:

That section 55AB of the *Evidence Act 1958* be amended so as to preserve and admit, with due safeguards, evidence given by people who later died.¹³⁶

3.16 In its submission, the Office of Public Prosecutions also raised a separate issue in relation to section 55AB. Its concern was that the section does not apply to allow for the admission of depositions admitted in committal proceedings prior to 1 September 1990.¹³⁷ This was expressed to be of particular concern in the context of prosecutorial decisions in relation to ‘aged warrants’—proceedings where a defendant has failed to appear in accordance with an undertaking of bail and a warrant for his or her arrest has been issued. In these cases, there is a greater risk of witnesses being unavailable and therefore section 55AB becomes significant.

134 See page xv.

135 Office of Police Integrity, *Review of the Victorian Police Witness Protection Program: Report of the Director, Police Integrity*, PP No 145 (2005) 38.

136 Ibid 38.

137 Submission 29.

3.17 The commission believes that section 55AB should be repealed upon the enactment of the UEA in Victoria. Section 65 of the UEA provides exceptions to the hearsay rule in criminal proceedings where the maker of a previous representation is not available to give evidence. Section 65(3) of the UEA has a similar operation to section 55AB. It provides that:

The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the defendant in the proceeding to which this section is being applied:

- (a) cross examined the person who made the representation about it; or
- (b) had a reasonable opportunity to cross-examine the person who made the representation about it.

3.18 The provision is broader in its application than section 55AB. It is not restricted to depositions admitted in criminal proceedings, and therefore does not suffer from the deficiency identified by the Office of Public Prosecutions. The provision is, however, restricted to evidence given in a proceeding, and therefore does not allow the admission of statements or recorded interviews.

3.19 Section 65(2) may, however, allow for the admission of statements or recorded interviews if they were:

Made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or

Made in circumstances that make it highly probable that the representation is reliable; or

Against the interests of the person who made it at the time it was made and was made in circumstances that make it likely that the representation is reliable.¹³⁸

Commission's View

3.20 In the commission's view, section 65 of the UEA provides appropriate scope for the admission of hearsay evidence in criminal proceedings where the maker of the previous representation is unavailable to give evidence (including where they have died).

3.21 The other matter to be considered is the court's power to order evidence to be taken on commission or *de bene esse*. This power, found in section 4 of the Evidence

¹³⁸ These are the requirements of s 65(2)(b)–(d), incorporating the amendments recommended by the joint Final Report.

Act, is currently confined to the Supreme Court and requires application to be made by a party to a proceeding before the Supreme Court or County Court. In its current form, the section would not allow orders to be made by the Magistrates' Court, nor would it allow evidence to be taken before proceedings have been commenced in the County or Supreme Courts. However, as part of this review, the commission recommends that this provision be relocated to a new Evidence on Commission Act together with other provisions.¹³⁹ If it is considered necessary for there to be a mechanism for some witnesses' evidence to be taken before proceedings commence and be admissible at trial, then a modified version of this provision should be included in a new Evidence on Commission Act.

RELOCATION OF PROVISIONS

3.22 There are several provisions in the Evidence Act which have been identified for relocation to other existing Acts. The relocation of these provisions would allow the balance of the Evidence Act to be repealed if recommendations 37 and 42 are also implemented.

!	RECOMMENDATION
38.	<p>Upon the enactment of a Victorian UEA the following provisions of the <i>Evidence Act 1958</i> be repealed and re-enacted as indicated:</p> <ul style="list-style-type: none"> • section 12 (gaol orders) and Schedule 2 (form of order) to the <i>Corrections Act 1986</i>; • sections 21D–21H to the <i>Legal Aid Act 1978</i>; • sections 37A–37E,¹⁴⁰ 41A*, 41D*, 41E*, 41G*, 41H*, 42, 142–143; 152(1); 152(2)(aa) to the <i>Crimes Act 1958</i>, or one of the new Crimes Acts;¹⁴¹ • section 53Q (records may be preserved on microfilm) to the <i>Electronic Transactions (Victoria) Act 2001</i>; • section 72 (certified copies of maps) to the <i>Survey Co-ordination Act 1958</i>.

139 See Recommendation 43; para 3.23.

140 Section 37CA and 37E are to be inserted by the Crimes (Sexual Offences) Bill 2005.

141 Sections marked with an asterisk [*] are to be inserted by the Crimes (Sexual Offences) Bill 2005.

NEW ACTS

3.23 The commission is of the view that a number of the provisions of the Evidence Act should be retained, but that they would be more logically located in separate Acts. Suggestions appear in Appendix 3 for legislation which could be enacted to accommodate such provisions. The names of the Acts proposed, and the sections of the Evidence Act they would cover are:

- Evidence on Commission Act (sections 4, 6 and 9A–9Q);
- Royal Commissions Act (sections 14–21C and 30);
- Mediation Act (sections 21I–21N);
- Evidence (Transmission and Recording) Act (sections 42C–42Y, 130–140 and 144);
- Oaths Act (sections 100, 105–112, 123C, 124–128, 141, 151, 152(2)(a)–(b)).

A similar approach of relocating provisions to new Acts and repealing existing Evidence Acts was adopted in NSW and Tasmania when they introduced the UEA.¹⁴²

3.24 The subject matter of some of the above Acts, once removed from the Evidence Act, falls outside the commission's terms of reference. The commission has not examined the merits or form of these provisions unless they would be affected in some way by the implementation of the UEA in Victoria. Similarly, no recommendations are made as to the form and drafting of these Acts. However, following is a brief commentary on what each suggested Act could contain.

EVIDENCE ON COMMISSION ACT

3.25 Sections 4–9Q of the Evidence Act relate to what is termed 'evidence on commission'. This is a procedure by which a court may make an order for a witness' evidence to be given orally and recorded for use later in a proceeding.

3.26 This may arise where a party to a Victorian proceeding applies:

- for the evidence of a person in Victoria to be taken before trial (sections 4, 6);

142 In NSW, two Acts were passed at the same time as the *Evidence Act 1995*: the *Evidence on Commission Act 1995* and the *Evidence (Consequential and Other Provisions) Act 1995*, which repealed the *Evidence Act 1898* and made a number of other amendments. In Tasmania, s 199 of the *Evidence Act 2001* repealed the *Evidence Act 1910* and three new Acts were passed: *Oaths Act 2001*, *Evidence on Commission Act 2001* and *Evidence (Children and Special Witnesses) Act 2001*.

- for the evidence of a person outside Australia to be taken in that country either by a court appointed person, commission or by the judicial authorities of the other country via a letter of request (sections 9A–9E);
- for the evidence of a person in another Australian state to be taken in that state (sections 9F–9K).

Alternatively, it may involve a Victorian court making an order upon a request from a foreign court to take the evidence of a person in Victoria (sections 9L–9Q).

3.27 NSW and Tasmania both enacted Evidence on Commission Acts upon the adoption of the UEA.¹⁴³ The Scrutiny of Acts and Regulations Committee of the Parliament of Victoria in its 1996 Review of the Evidence Act, recommended that these sections be uplifted and moved to an Evidence on Commission Act.¹⁴⁴ The commission endorses this approach.

ROYAL COMMISSIONS ACT

3.28 Other Australian jurisdictions have long had separate Acts relating to royal commissions.¹⁴⁵ Victoria is unique in Australia in incorporating provisions in relation to royal commissions and boards of inquiry into its Evidence Act.

3.29 While some of the provisions of Division 5 of Part 1 of the Evidence Act are evidentiary in nature, a clear case can be made for relocating these sections to a separate Act. A Victorian Royal Commissions Act would provide uniformity in nomenclature across several Australian jurisdictions.

3.30 The enactment of a Royal Commissions Act in Victoria would necessitate a number of consequential amendments to other Acts. The powers and privileges which apply to a range of statutory tribunals are established by reference to the sections of the Evidence Act.¹⁴⁶

143 *Evidence on Commission Act 1995* (NSW); *Evidence on Commission Act 2001* (Tas).

144 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Evidence Act 1958 (Vic) and Review of the Role and Appointment of Public Notaries*, No 12 (1996) 11.

145 *Royal Commissions Act 1902* (Cth), *Royal Commissions Act 1923* (NSW), *Royal Commissions Act 1917* (SA), *Commissions of Inquiry Act 1950* (Qld), *Royal Commissions Act 1968* (WA), *Royal Commissions Act 1991* (ACT), *Commissions of Inquiry Act 1995* (Tas).

146 See Appendix 12 for a list of these provisions.

MEDIATION ACT

3.31 Divisions 7 and 8 of Part I of the Evidence Act contain provisions relating to family mediators and dispute settlement centres. They include sections providing that evidence of anything said at, or a document prepared for, the specified mediations is not admissible in any court or legal proceeding. Section 131 of the UEA provides for the exclusion of evidence of settlement negotiations, however, it is less absolute in its protection, and extends only to prohibit the admission of evidence in court proceedings, not other legal proceedings.

3.32 Submissions received by the commission from family mediators and the Dispute Settlement Centre supported the retention of the specific provisions of the Evidence Act upon the introduction of the UEA in Victoria. Relationships Australia supported the retention of provisions of the Evidence Act in order to protect communications in counselling and mediation sessions that are not directly related to dispute settlement of the kind envisaged in section 131.

Non-evidentiary Provisions

3.33 The provisions of the Evidence Act relating to family mediation centres and dispute settlement centres also contain provisions for the declaration and gazettal of mediators and duties of confidentiality. These are not evidentiary provisions and would be more logically found in an Act dealing with the regulation of mediation. There are a number of other provisions in other Acts prohibiting, to a greater or lesser extent, the admission of evidence in legal proceedings, of matters said in mediations, and other forms of alternative dispute resolution.¹⁴⁷ The collection and harmonisation of these provisions in a single Act, and the creation of an accreditation and/or regulatory scheme for mediators has been raised at a national level.¹⁴⁸ The issues involved are beyond the scope of this inquiry, however, the commission notes that the ACT has introduced a Mediation Act in order to accommodate these types of provisions and provide a more comprehensive regulatory regime.¹⁴⁹

3.34 Both Relationships Australia and the Family Mediation Centre supported the accreditation of mediators. The Department of Justice submitted, on behalf of the

147 A list of such provisions appears in Appendix 9.

148 See National Alternative Dispute Resolution Advisory Council, *Who says you are a mediator?: Towards a National System for Accrediting Mediators* (2004); National Alternative Dispute Resolution Advisory Council, *Who can refer to, or conduct, mediation?* (2004).

149 *Mediation Act 1997* (ACT).

Dispute Settlement Centre of Victoria, that while it had no plans for comprehensive regulation of mediation at this stage it continues to monitor developments.

3.35 Given the need to retain and accommodate the provisions of the Evidence Act, and the general desirability of an Act dealing with the issues of accreditation and registration, as well as the protection of communications in order to facilitate dispute resolution processed, the commission believes that consideration should be given to the enactment of a Mediation Act in Victoria.

3.36 Part of that consideration should be a review of provisions outside the Evidence Act which exclude evidence of anything said in the course of mediations and other forms of alternative dispute resolution in any subsequent court proceedings.

3.37 The policy behind such provisions is well established. The promotion of open and uninhibited discussion is more likely to lead to the settlement of disputes, thus lessening congestion in the court system and reducing the costs to individuals and the community. However, the absolute nature of some of these exclusions is concerning. The parties to mediations are by definition in dispute, which can lead to hostility, and potentially violence. To take an extreme example, there would seem to be no justification for these provisions to operate to prevent evidence being led of a threat to kill made in a mediation session. Currently, were this situation to arise, it is doubtful that any prosecution could be brought as the only evidence which could be given would be excluded by the operation of these sections. Therefore, a review of these sections should consider the policy behind each provision and whether the prohibition on the admission of evidence should be absolute or qualified.



RECOMMENDATION

39. The Department of Justice should consider a review of all sections in Victorian Acts which provide that evidence of things said at, or documents prepared in connection with, mediation or other alternative dispute resolution mechanisms are not admissible in legal proceedings.

Specific Drafting Issues

3.38 The commission has identified some drafting issues in relation to sections 21I and 21J requiring amendment. ‘Family mediator’ is defined in section 21I to include a ‘marriage counsellor under the *Family Law Act 1975* (Cth)’. This definition is out of

date. The *Family Law Act 1975* (Cth) has undergone numerous amendments since the enactment of the Victorian provisions and no longer uses this terminology.¹⁵⁰

3.39 Section 21J was introduced to provide complementary protection for communications made in conferences with family mediators outside the Family Law Act context, for example in mediations between unmarried couples. It provides no exceptions. The equivalent Commonwealth provision is in section 19N of the *Family Law Act 1975*.¹⁵¹ This has also been amended since the enactment of the Victorian provision, and now provides that communications that disclose abuse or risk of abuse of a child are not protected.

3.40 The exception in section 19N(3) was introduced by the *Family Law Amendment Act 2003* and implements a recommendation of the Family Law Council's report on Family Law and Child Protection.¹⁵² In its report, the council said:

It is uncontrovertible that the operation of these three sections of the *Family Law Act* pose a clear risk to children in some circumstances ... the gravity of the possible harm done in the small minority of cases by withholding salient evidence from a court outweighs the good done by quarantining counselling sessions from the normal operation of the laws of evidence.¹⁵³

3.41 The Family Mediation Centre supports the amendment of these provisions to account for both the change in terminology under the *Family Law Act 1975* (Cth) and the exception relating to disclosure of child abuse. The Family Mediation Centre also submitted that exceptions should be allowed for words or actions amounting to a criminal act and disclosure necessary to protect the safety of a person. Relationships Australia also supports the amendment of the Victorian provision to reflect the exception in the Commonwealth Act.

3.42 The exception is further supported by the fact that the provision excluding evidence of anything said or done at a dispute resolution conference under the *Children, Youth and Families Act 2005* is subject to the court's ability to grant leave for

150 The terminology now used includes a family and child counsellor, a court mediator, a community mediator or private mediator: *Family Law Act 1975* (Cth) s 19N.

151 At the time of the enactment of the Victorian provisions in 1985, the equivalent Commonwealth provision was section 18 of the *Family Law Act 1975*. The *Family Law Reform Act 1995* (Cth) repealed this section and enacted section 19N.

152 Family Law Council, *Family Law and Child Protection*, Final Report (2002).

153 Ibid [7.25].

the admission of the evidence if it is necessary to ensure the safety and wellbeing of the child.¹⁵⁴

3.43 The commission is of the view that sections 21I and 21J should be amended to reflect the changes in section 19N of the *Family Law Act 1975* (Cth) both in respect of terminology and the exception in relation to child abuse. Given that the consideration of a new Mediation Act is likely to take some time, these amendments should be made to the current provisions of the Evidence Act.



RECOMMENDATION

40. The definition of family mediator in section 21I of the *Evidence Act 1958* (or any equivalent re-enacted section) be amended to refer to the persons listed in section 19N(1) of the *Family Law Act 1975* (Cth).

41. Section 21J of the *Evidence Act 1958* (or any equivalent re-enacted section) be amended to provide that the section does not apply to:

- an admission by an adult that indicates that a child has been abused or is at risk of abuse; or
- a disclosure by a child that indicates that the child has been abused or is at risk of abuse

unless, in the opinion of the court there is sufficient evidence of the admission or disclosure available to the court from other sources.

EVIDENCE (TRANSMISSION AND RECORDING) ACT

3.44 An Evidence (Transmission and Recording) Act is proposed as a repository for provisions of the Evidence Act relating to the use of audio-visual links as a means of witnesses giving evidence (sections 42C–42Y) and provisions relating to recording and transcribing evidence (sections 130–140 and 144).

3.45 In relation to audiovisual links, the equivalent provisions in NSW are contained in the *Evidence (Audio and Audio-Visual Links) Act 1998* (NSW). At a Commonwealth level, the issue is largely addressed in individual court Acts and rules.

154 *Children, Youth and Families Act 2005* s 226.

3.46 The Department of Justice, on behalf of the Victorian Government Recording Service, supported the retention of the relevant provisions of the Evidence Act in their current form for the time being, while acknowledging that certain aspects of the provisions could be reviewed.

3.47 The commission believes that the provisions identified should be retained in an Act, rather than court rules, given that offence provisions will need to be included. The eventual enactment of a separate Act containing these provisions will make them more accessible. It would also provide an opportunity to review the operation of the provisions.

OATHS ACT

3.48 Although the UEA makes provision for the form of oath to be taken by witnesses in court, oaths are administered in a much broader range of circumstances. The commission is of the view that the provisions of the Evidence Act should be repealed in so far as they relate to oaths taken by witnesses in court, as these will be replaced with the UEA provisions. The same recommendation was made by the Victorian Parliamentary Law Reform Committee in its inquiry into oaths and affirmations.¹⁵⁵ However, a new Oaths Act is needed to accommodate the remaining provisions.¹⁵⁶ They include provisions relating to statutory declarations and affidavits.

3.49 In Chapter 2, the commission recommends that the Victorian provisions in relation to swearing affidavits be retained rather than including a section, similar to section 186 of the *Evidence Act 1995* (Cth), in the Victorian UEA.¹⁵⁷ The Commonwealth provision is more restrictive in terms of those authorised to take affidavits and would therefore make the process of obtaining affidavits more difficult in practice. Moving the affidavit provisions to an Oaths Act would be consistent with their location in other jurisdictions. The Oaths Act might also conveniently incorporate the provisions of the *Public Notaries Act 2001*.

3.50 Provisions relating to statutory declarations are also recommended to be moved to a new Oaths Act. The commission has received submissions from the Optometrists Association Australia, Australasian Institute of Mining and Metallurgy,

155 Victorian Parliament Law Reform Committee, *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community* (2002), Recommendation 19.

156 This was also the recommendation of the Scrutiny of Acts and Regulations Committee—Scrutiny of Acts and Regulations Committee (1996) above n 144, 13.

157 See Recommendation 30.

and Dental Prosthetists Association seeking to have their members included among those authorised to witness statutory declarations. The commission understands that the Department of Justice has also received correspondence on this issue. The commission has received a submission from the Registrar of Honorary Justices, raising concerns about the taking or demanding of a fee for the witnessing of statutory declarations as well as affidavits,¹⁵⁸ and the absence of provisions in relation to certifying true copies of documents.

3.51 The commission is of the view that any revision of provisions regarding the taking of affidavits and statutory declarations should be undertaken in a holistic manner. That task is beyond the terms of reference of this inquiry. These concerns should, however, be addressed in connection with the drafting of an Oaths Act.

STAGED PROCESS

3.52 The drafting and enactment of five new pieces of legislation in addition to a new Evidence Act requires a substantial investment of time and resources. The commission anticipates that there will be both a need and a desire not only to relocate but to redraft some of the provisions currently found in the Evidence Act. This would require detailed consideration and consultation which has been beyond the commission's current terms of reference. These practical considerations have led the commission to the conclusion that a staged approach may be needed in dealing with the provisions of the Evidence Act upon the enactment of a Victorian UEA.

3.53 Stage one would include repeal of those sections of the Evidence Act no longer required on the enactment of the Victorian UEA¹⁵⁹ and the relocation of some sections to existing Acts.¹⁶⁰ Those provisions requiring the enactment of new legislation could either remain in a skeletonised Evidence Act or be re-enacted or renamed the Evidence (Miscellaneous Provisions) Act. Stage two would involve the gradual relocation of those remaining provisions by the enactment of the suggested Acts.¹⁶¹ This would allow time for careful consideration of the form of the new Acts without unduly delaying the introduction of the UEA. It may be that at least some of the proposed Acts may be enacted in the time between the enactment of the Victorian UEA and its commencement.

158 *Evidence Act 1958* s 123C(5) is the affidavit provision.

159 As set out in Recommendation 37.

160 As set out in Recommendation 38.

161 See para 3.23.



RECOMMENDATION

42. Upon enactment of a Victorian UEA and the repeal of the sections referred to in recommendation 37 and the relocation of the provisions in recommendation 38 the remaining provisions of the *Evidence Act 1958* be retained in that Act or a Evidence (Miscellaneous Provisions) Act, pending relocation to the Acts listed in recommendation 43.
43. Consideration should be given to the drafting and enactment of the following Acts:
 - Evidence on Commission Act;
 - Royal Commissions Act;
 - Mediation Act;
 - Evidence (Transmission and Recording) Act;
 - Oaths Act.

CRIMES ACT 1958 AND RELATED ACTS

3.54 The Department of Justice is currently conducting a review of the principal Crimes Acts in Victoria with a view to enacting a new scheme of Crimes Acts. The commission has therefore identified the evidentiary provisions in the following Acts and dealt with them separately to the general body of Victorian legislation:

- *Crimes Act 1958*;
- *Crimes (Criminal Trials) Act 1999*;
- *Summary Offences Act 1966*.

3.55 As the Department of Justice review is considering the entirety of these Acts, the commission has focused only on whether the evidentiary provisions should be repealed upon the enactment of a UEA in Victoria. Evidentiary provisions in these Acts, which are not effectively replaced by UEA provisions and which can continue to operate upon the introduction of the UEA, are noted. The commission has not taken the next step of considering whether, from a policy point of view, these provisions should be retained. Many of them are offence specific, some are ancient in origin. The departmental review will assess the policy considerations behind the provisions and determine whether they should be retained. Therefore the commission has not entered into this area.

3.56 Appendices 4, 5 and 6 list the evidentiary provisions of the Crimes Acts and the commission's assessment of their interaction with the UEA. The commission has concluded that several sections should be repealed. There are no recommendations for repeal in relation to the *Summary Offences Act 1966*.



RECOMMENDATIONS

44. Upon the enactment of the Victorian UEA, the following provisions of the *Crimes Act 1958* be repealed:
 - sections 95(2), 395(7), 398A, 399, 400, 401, 411, 413, 415, 419.
45. Upon the enactment of the Victorian UEA, section 464J of the *Crimes Act 1958* be amended to include a subsection (ba) in terms similar to section 235(ba) of the *Crimes Act 1914* (Cth).
46. Upon the enactment of the Victorian UEA, section 18 of the *Crimes (Criminal Trials) Act 1999* be repealed.
47. Upon the enactment of the Victorian UEA, section 20 of the *Crimes (Criminal Trials) Act 1993* be amended to provide that: 'Nothing in this section affects the operation of sections 29 and 50 of the [Victorian UEA] or Part 2A of the *Evidence Act 1958*.'¹⁶²

162 Alternatively, the new Evidence (Transmission and Recording) Act.

Chapter 4

Interaction of the UEA with other Acts

Evidentiary Provisions in Victorian Statutes	80
Construing the UEA and Other Evidentiary Provisions	80
Categories of Provisions	82
Provisions Affecting the Legal and Evidentiary Onus of Proof	82
Onus of Proof Provisions	82
Presumptions and Deeming Provisions	84
Conclusive and Prima Facie Evidence	85
Facts Which Need Not Be Proved by Evidence	87
Averments	89
Prescribed Methods of Proof	90
Certificates	90
Expert Certificates	91
Gazettes	93
Certified Copies	94
Copies of Seized Documents	95
Affidavits and Statutory Declarations	96
Other Prescribed Methods of Proof	98
Admissions	100
Statement by an Officer Admissible Against the Corporation	100
Successor in Law and Subrogation Provisions	101

Other Provisions Regarding Admissions	102
Procedural Provisions	103
General Procedural Provisions	103
Proof of Prior Convictions	104
Standard of Proof Provisions	105
Privileges and Exclusionary Provisions	106
Privilege Against Self-Incrimination	106
Legal Professional Privilege/Client Legal Privilege	110
Terrorism (Community Protection) (Amendment) Bill 2005	113
Provisions Relating to Medical Privilege	116
Evidence of Settlement Negotiations	117
Parliamentary Privilege	118
Other Statutory Privileges	119
Adopting the Privileges Available in Court to Non-Curial Proceedings	122
Other Exclusionary Rules	123
Limitation on the Admissibility or Use of Evidence	124
Secrecy and Confidentiality Provisions	125
Certain Persons Not Competent or Compellable	126
Specific Evidentiary Regimes	127
Sentencing	127
Crimes Mental Impairment	133
Vehicular Offence Provisions	134
Magistrates' Court Criminal Procedure Provisions	137
Wills and Probate	140
Miscellaneous Provisions	141
Right of Defendant to Have Third Persons Before Court	141
Court Findings and Orders	142

Choice of Law	143
Codes of Practice	144
Stamp Duty	145
Road Management Act 2004	146
Crimes (Controlled) Operations Act 2004	147
Exclusion of Evidentiary Rules	148
Conclusion	149
Consequential Amendments	152
References to the Royal Commissions and Boards of Inquiry Provisions	153
References to the Audiovisual Provisions	154
References to the Document Provisions	155
References to Definitions in the <i>Evidence Act 1958</i>	157
References to the Affidavit and Statutory Declaration Provisions	160
References to the Transcript Provisions	161
Other References to the Evidence Act 1958	161
Section 57(3) <i>Coroners Act 1958</i>	162

EVIDENTIARY PROVISIONS IN VICTORIAN STATUTES

4.1 The commission has sought to identify all of the evidentiary provisions currently contained in Victorian statutes. The provisions are numerous, although similar sections are replicated across a number of Acts. The commission has sought to categorise these provisions and provide generalised recommendations in relation to them. Where a provision is exceptional, it has been dealt with separately.

4.2 Each evidentiary provision is enacted for its own reasons of policy, applying either generally to a particular subject matter, or in the limited context of particular proceedings. The commission has not attempted to review and assess the policy behind the hundreds of evidentiary provisions it has identified. Rather, the provisions have been scrutinised to determine whether any inconsistency or difficulty warranting amendment would arise upon the enactment of the UEA in Victoria.¹⁶³ The analysis begins with a general outline of the legal basis for the interaction of the UEA with other Acts, followed by a discussion of specific categories of evidentiary provisions found in Victorian Acts.

CONSTRUING THE UEA AND OTHER EVIDENTIARY PROVISIONS

4.3 The UEA was designed both to collect the rules of evidence of general application into a single repository and to operate together with other evidentiary provisions. It is necessary to understand the nature of the UEA provisions and the principles of statutory interpretation in order to appreciate how this is achieved.

4.4 The UEA as a whole does not operate as an exhaustive code. Allowance is made for the operation of both common law and other statutory provisions. Chapter 3, however, ‘constitutes a code for the rules relating to the admissibility of evidence, in the sense that common law rules of admissibility of evidence are abrogated.’¹⁶⁴ This flows from section 56(1) which provides that: ‘[e]xcept as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding’. Similarly, Division 1 of Part 2.1 of the UEA, in relation to the competence and compellability of witnesses, operates as a code by employing the same language as section 56.¹⁶⁵

163 On the assumption that the Victorian UEA would take the form outlined in Chapter 2.

164 Odgers (2004) above n 21, [1.1.40]. See also *Quick v Stoland Pty Ltd* (1998) 87 FCR 371; 157 ALR 615, 616.

165 UEA s 12.

4.5 While common law admissibility rules are effectively abrogated by the UEA, statutory provisions are not. They are preserved by the operation of section 8 of the UEA.

4.6 Applying ordinary principles of statutory interpretation, where the provisions of a later Act are inconsistent with the provisions of an earlier unrepealed Act, the earlier Act may be taken to have been impliedly repealed.¹⁶⁶ Many individual provisions in Victorian statutes deal with the admissibility of evidence and are therefore inconsistent with the code provided for by the UEA. Absent a provision preserving their operation, it could be argued that the sections would be impliedly repealed by enactment of the UEA.

4.7 The UEA, however, contains a mechanism to avoid this outcome. Section 8 of the *Evidence Act 1995* (NSW) provides that: 'This Act does not affect the operation of the provisions of any other Act'.¹⁶⁷ Repeal is therefore not to be implied from any inconsistency.

There is no room for implied repeal where there is an express provision such as s 8 to the effect that there shall not be any such implied repeal. The effect of that section is that the Evidence Act is not intended to, and does not affect other mechanisms which are provided in State or federal legislation for the admission of evidence...¹⁶⁸

4.8 In the event of an inconsistency between the code provisions of the UEA and a pre-existing Act, the pre-existing Act will prevail.¹⁶⁹

4.9 Where the provisions of specific Acts deal with the same subject matter as non-code provisions of the UEA (such as the facilitative provisions),¹⁷⁰ two situations might arise. Either there will be no conflict between the provisions or, if they cannot stand together, the specific provisions of the Act will override the more general provisions of

166 Dennis Pearce and Roger Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) [7.9]. The approach is summed up in the maxim *leges posteriores priores contraries abrogant*: later Acts repeal earlier inconsistent Acts.

167 *Evidence Act 1995* (Cth) s 8 is in different form to take account of a number of issues peculiar to the Commonwealth, such as the provisions of the *Judiciary Act 1901* (Cth).

168 *R v Gover* (2000) 118 A Crim R 8.

169 *Epeabaka v Minister for Immigration & Multicultural Affairs* (1997) 150 ALR 397, 409.

170 Uniform Evidence Act pt 4.3.

the UEA, both for reasons of statutory interpretation and the express operation of section 8.¹⁷¹

CATEGORIES OF PROVISIONS

4.10 In this chapter, we look at categories of evidentiary provisions which we have identified. The following broad categories are discussed:

- provisions affecting the legal and evidentiary onus of proof;
- prescribed methods of proof;
- provisions relating to admissions;
- procedural provisions;
- privileges and exclusionary provisions.

We then discuss specific evidentiary regimes and miscellaneous evidentiary provisions, followed by provisions which relieve bodies from compliance with the rules of evidence and provisions referring to the *Evidence Act 1958*. Each broad category contains a number of subcategories.

4.11 The operation of each type of provision is identified. The interaction of those provisions with the UEA is then discussed and a conclusion reached as to whether any amendment is required.

PROVISIONS AFFECTING THE LEGAL AND EVIDENTIARY ONUS OF PROOF

ONUS OF PROOF PROVISIONS

4.12 At common law, the identity of the party who bears the legal burden of proof on a particular issue varies depending on the issue. Some Victorian Acts contain provisions which alter the common law and cast the legal burden or onus of proving particular matters on a particular party to a proceeding. For example section 69 of the *Wildlife Act 1975* provides:

On proceedings for an offence against any of the provisions of this Act or the regulations or any proclamation with respect to taking or killing of wildlife alleged by the informant to

171 Pearce and Geddes (2001) above n 166 [7.18]–[7.21]. This principle is expressed in the maxim *generalia specialibus non derogant*: a general provisions does not impliedly repeal an earlier specific provision.

have been taken or killed in Victoria it shall be upon the person charged to prove that the wildlife was not taken or killed in Victoria.

4.13 Other provisions have a broader application, such as section 130 of the *Magistrates' Court Act 1989* which provides:

(1) If—

(a) an Act or subordinate instrument creates an offence and provides any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany the description of the offence; and

(b) the defendant wishes to rely on the exception, exemption, proviso, excuse or qualification—

the defendant must present or point to evidence that suggests a reasonable possibility of the existence of facts that, if they existed, would establish the exception, exemption, proviso, excuse or qualification.

(2) Any exception, exemption, proviso, excuse or qualification need not be specified or negated in the charge.

(3) No proof in relation to an exception, exemption, proviso, excuse or qualification is required on the part of the informant unless the defendant has presented or pointed to evidence in accordance with sub-section (1).

(4) The Court may, if satisfied that it is in the interests of justice to do so, allow the prosecutor or, if the informant is appearing in person, the informant to re-open the case for the prosecution in order to adduce evidence in rebuttal of evidence presented or pointed to by the defendant in accordance with sub-section (1).

CONCLUSION

4.14 The original ALRC reports proceeded on the basis that the onus of proof was a matter of substantive law rather than evidence law and therefore outside the terms of reference.¹⁷² As a result, the UEA does not deal with questions of onus. Statutory provisions allocating the burden of proof will not be affected by the introduction of the UEA.

172 Australian Law Reform Commission (1985) above n 4, [33]–[36].

PRESUMPTIONS AND DEEMING PROVISIONS

4.15 Deeming provisions and provisions which create presumptions provide that in a given situation (established by evidence) the existence of a relevant fact is to be assumed unless the contrary is shown. These provisions can shift the legal or evidential burden of proving an issue to an opposing party. An example of a deeming provision is contained in section 123 of the *Fisheries Act 1995*:

- (1) Any person having in a boat, any fish and commercial fishing equipment is deemed, until the contrary is proved, to have taken the fish by the use of that commercial fishing equipment and to have taken those fish for sale.
- (2) Any person having in a boat any abalone and commercial abalone equipment is deemed, until the contrary is proved, to have taken the abalone by the use of that commercial abalone equipment and to have taken those abalone for sale ...

Once certain facts are established by evidence other facts are deemed to be established unless the contrary is proved.

4.16 Section 289 of the *Water Act 1989* contains an example of a factual presumption:

- (1) A person must not, without the consent of the Authority or without any other lawful authority—
 - (a) take, use or divert water—
 - (i) that is under the control and management of an Authority; or
 - (ii) that is supplied by an Authority for the use of another person; or
 - (b) interfere with the flow of water in any waterway, aquifer or works under the control and management of an Authority.

...

- (3) If in a proceeding for an offence under sub-section (1) it is proved that water that is under the control and management of an Authority was used on, or taken or diverted to, land owned or occupied by a person, the using, taking or diversion must be presumed, in the absence of evidence to the contrary, to have been done by that person.

4.17 Another common instance is a provision which requires the inference of an intention from the establishment of certain facts. For example section 45(4) of the *Classification (Publications, Films and Computing Games) (Enforcement) Act 1995*:

(4) In proceedings for an offence against this section, evidence that a person made 10 or more copies of an unclassified computer game is evidence that the person intended to sell or demonstrate the computer game and, in the absence of evidence to the contrary, is proof of that fact.

CONCLUSIVE AND PRIMA FACIE EVIDENCE

4.18 Conclusive evidence provisions typically provide that evidence of a certain kind creates an irrebuttable presumption of the existence of a relevant fact. It follows that if evidence of that kind is adduced, a court must find that the fact is proved. They are generally enacted to provide a degree of assurance or certainty that a fact can be easily established in court.

4.19 For example, section 5 of the *Queen Victoria Medical Centre (Guarantees) Act 1982* provides:

The execution by the Treasurer either alone or jointly with some other person of a guarantee expressed to be given under this Act shall be conclusive evidence that the requirements of this Act with respect to the guarantee have been complied with.

This ensures that the guarantee can be relied on to secure funds lent.

4.20 Prime facie evidence provisions create a presumption which is open to rebuttal by other evidence. These provisions can be expressed in a number of ways. The phrase 'prima facie evidence' may be used, as in section 78 of the *Trade Measurement Act 1995*:

The possession of a measuring instrument by a person carrying on trade or the presence of a measuring instrument on premises or in a place used by a person for trade is prima facie evidence that the person uses the instrument for trade.

4.21 Another common phrasing appears in section 301(1) of the *Water Act 1989*:

If in any proceeding under this Act or the regulations or by-laws made under this Act the amount of water delivered to a property during any period is relevant, evidence of the amount of water recorded by a water meter as having passed through the meter to the property during that period is, in the absence of evidence to the contrary, proof that that amount of water was delivered to that property during that period.

4.22 An alternative approach is to state an evidentiary consequence as is done in section 126B of the Fisheries Act:

The statement on oath of an authorised officer that a sealed can was labelled with a statement to the effect that the contents of the can contained abalone is evidence that the can contained abalone.

The effect of these provisions, however phrased, is similar.

4.23 Such provisions are also frequently used where in proceedings under an Act it may be necessary to prove ownership of property. These Acts will often contain a *prima facie* evidence provision, such as in the Water Act:

In any proceeding under this Act or the regulations or by-laws made under this Act—

- (a) evidence that a person is subject to a fee imposed under a tariff set under this Act in respect of any land; or
- (b) evidence that a person's name appears in any records kept by an Authority as the owner or occupier of any land; or
- (c) evidence by the certificate of the Registrar of Titles or any Deputy Registrar of Titles or Assistant Registrar of Titles and authenticated by the seal of the Office of Titles that a person's name appears in the Register kept under the Transfer of Land Act 1958 as the proprietor of an estate in fee simple or of a leasehold estate held of the Crown in any land; or
- (d) evidence by the certificate of the Registrar-General or any Deputy Registrar-General that a person appears from a memorial of registration of any deed, conveyance or other instrument to be the owner of any land—

is, in the absence of evidence to the contrary, proof that that person is the owner or occupier (as the case requires) of that land.¹⁷³

CONCLUSION

4.24 Presumptions, deeming provisions, and *prima facie* and conclusive evidence provisions deal with the conclusions to be drawn from certain evidence. To that extent, they are not concerned with the admission of evidence, although they may often be accompanied by admissibility provisions.

4.25 In its original report, the ALRC expressed the view that such provisions did not necessarily fall within evidence law and in any event should not form part of the consideration of a new Act of general application.

173 *Water Act 1989* s 301(8).

Conclusive presumptions are rules of law which require the court to infer the presumed fact if the basic fact is proved. On proper analysis, such ‘presumptions’ are ‘only a form of expression for a positive rule of law’. Persuasive presumptions have the effect of allocating the legal burden of proof. They should be dealt with as part of the substantive law. First, rules that allocate the legal burden of proof are part of the substantive law. Secondly, the only justification for adopting a persuasive presumption is to achieve some policy objective of relevance to the particular area of substantive law to which the presumption relates. Therefore, such presumptions should be treated as part of the relevant area of substantive law or dealt with only in an examination of it.¹⁷⁴

4.26 The presumptive elements of the provisions do not affect the operation of the UEA in the proof of the basic fact from which the presumption is to be drawn. Where they provide for certain conclusions to be drawn or facts to be presumed, they operate as a matter of substantive law. Therefore, the provisions will not be affected by the introduction of the Victorian UEA.

FACTS WHICH NEED NOT BE PROVED BY EVIDENCE

4.27 Many Victorian statutes contain provision for judicial notice to be taken of certain matters. One of the most common instances is where a body corporate is created by statute and provision is made for the body to have a common seal. These statutes commonly contain a provision in these terms:

All courts must take judicial notice of the imprint of the common seal on a document and, until the contrary is proved, must presume that the document was properly sealed.

4.28 Another common type of provision provides for judicial notice to be taken of the signature of an office holder, for example, section 59AA(3) of the *Environment Protection Act 1970*:

All courts and persons acting judicially—

(a) shall take judicial notice of —

- (i) the signature or facsimile signature of the Chairman affixed to any notice, certificate, order or other document;
- (ii) the signature or facsimile signature of any officer of the Authority to whom for the time being the Authority has delegated power to sign such notice, certificate, order or other document; and

174 Australian Law Reform Commission (1985) above n 4, [36].

(iii) the signature or facsimile signature of any authorized officer; and

(b) shall, until the contrary is proved, presume that the signature was properly affixed.

4.29 While these provisions use the language of judicial notice, they are, in fact, presumptive evidence provisions. They direct the court to presume that the seal or signature on a document is genuine and duly affixed. Otherwise, the documents must be proved in the ordinary way.

4.30 Section 150 of the *Evidence Act 1995* (NSW) and sections 150 and 151 of the *Evidence Act 1995* (Cth) provide that the seals and signatures of public bodies and some public office holders are presumed to be what they purport to be and to have been duly affixed to the documents in question unless the contrary is proved.

4.31 Provisions which more clearly conform to the common law notion of judicial notice are those which refer to matters of law. For example, section 212 of the *Gas Industry Act 2001* provides that: 'All courts and tribunals must take judicial notice of any proclamation, direction, prohibition or requisition made, given or imposed under this Part'.

4.32 Evidentiary proof is not required as to the provisions of domestic statutes or the common law. Provisions such as the above extend the doctrine of judicial notice to proclamations and other instruments made under that Act. Courts may take account of the existence of such matters without evidence being led as to their existence.

4.33 Section 143 of the UEA provides that proof is not required of various matters of law including governors' proclamations and instruments of a legislative character made under an Act which are required to be published.

4.34 Another set of provisions exists with a slightly different emphasis. They provide, in the context of proceedings under a particular Act, that proof is not required of matters such as the appointment of officers or the authority of the person bringing an action. For example, section 75(1) of the *Victorian Urban Development Authority Act 2003* provides:

Proof is not required in the absence of evidence to the contrary—

- (a) of the constitution of the Authority, the due appointment of its directors or the presence of a quorum at its meetings;
- (b) of the appointment of any member of the Authority's staff;
- (c) of the validity of appointment of a person purporting to act as delegate of the Authority;

(d) that a document appearing to be issued by or on behalf of the Authority was so issued;

(e) of the fixing of a charge by the Authority under this Act;

(f) of the validity of the contents of the Authority's records or minutes.

4.35 These are similar to the seals and signature provisions in that they are more in the nature of a legislative presumption of regularity rather than a judicial notice provision. In some Acts, provisions to the same effect are expressed as a presumption, for example, section 95(1A) of the *Estate Agents Act 1980*:

In proceedings for an offence against this Act or the regulations it must be presumed, in the absence of evidence to the contrary, that the person bringing the proceedings was authorised to bring the proceedings.

CONCLUSION

4.36 While the enactment of a Victorian UEA including sections 150 and 143 may remove the need for many of the existing judicial notice provisions, it would not entirely cover the field of judicial notice provisions currently in Victorian legislation. As these are facilitative provisions, no conflict arises with the UEA and the provisions may remain in operation.

AVERMENTS

4.37 Another form of prima facie evidence provision is one that allows for the averment of facts by a prosecutor to be prima facie evidence of those facts. For example, section 13 of the *Vital State Projects Act 1976* provides:

For the purposes of any proceedings in relation to any matter arising under this Act—

(a) the averment of the prosecutor or informant made in writing and served on the defendant as hereinafter provided shall be prima facie evidence of the matter or matters averred ...

4.38 The following extract from the judgment of Justice Dixon (as he then was) in the case of *R v Hush; Ex parte Devanny* is often cited as explaining the effect of such a provision:

this provision ... does not place upon the accused the onus of disproving the facts upon which his guilt depends but, while leaving the prosecutor the onus, initial and final, of

establishing the ingredients of the offence beyond reasonable doubt, provides, in effect, that the allegations of the prosecutor shall be sufficient in law to discharge that onus.¹⁷⁵

The averment therefore becomes a manner of proof.¹⁷⁶

CONCLUSION

4.39 If adduced as evidence in a proceeding, an averment would not be admissible under the provisions of the UEA. The allegations of prosecutors would be unlikely to meet even the relevance requirement in section 56. While these provisions conflict with the admissibility code, section 8 will preserve their operation in cases where they apply.

PREScribed METHODS OF PROOF

CERTIFICATES

4.40 Numerous statutes provide for the reception of certificates as evidence of the facts stated in them. The intention of such provisions is to facilitate proof by providing statutory exceptions principally to the rule against hearsay and the best evidence rule. Typically, such provisions also provide for the certificates to be prima facie or conclusive evidence of the matter contained in them.

4.41 Examples of certificates as evidence are found in:

- The *Adoption Act 1984* which provides that an adoption certificate is evidence, for the purposes of the law of Victoria, and that the adoption to which the certificate relates was carried out in accordance with the laws of the prescribed overseas jurisdiction whose adoption authority issued the certificate (section 69X).
- The *Births, Deaths and Marriages Registration Act 1996* which provides that a certificate issued by the registrar certifying particulars contained in an entry in the register or that no entry was located in the register about the relevant event, is admissible in legal proceedings as evidence to which the certificate relates and the facts recorded in the entry (section 46).

4.42 Examples of certificates as prima facie evidence provisions are as follows:

175 (1932) 48 CLR 487 at 507.

176 *Chief Executive Officer of Customs v El Hajje* (2005) 79 ALJR 1289; 218 ALR 457 [38].

- Under the *Building Act 1993* a certificate of the Registrar of the Building Practitioner's Board specifying that a person is or is not registered in the Register of Building Practitioners is evidence and, in the absence of evidence to the contrary, proof of the matters stated in the certificate (section 239).
- In any legal proceedings brought under the *Drugs, Poisons and Controlled Substances Act 1981*, a certificate that any person is or is not, or was or was not, a registered medical practitioner shall, if purporting to be signed by the President or any two members of the Medical Practitioners Board of Victoria, be prima facie evidence of the facts stated (section 119).

4.43 Where it is provided that a certificate is conclusive evidence, upon proof of the certificate, there is an irrebuttable presumption that the facts stated in the certificate exist. For example, section 44(2) of the *Associations Incorporation Act 1981* provides that a certificate of incorporation of an association is conclusive evidence of the incorporation of the association. Likewise, a certificate of incorporation under the *Co-operative Housing Societies Act 1958* is conclusive evidence that all the requirements of the Act in respect of registration and matters precedent or incidental thereto have been complied with (section 78(2)).

CONCLUSION

4.44 In so far as the certificate provisions provide for the admission of evidence, they may be inconsistent with the code provisions of the UEA. The operation of these provisions is preserved by section 8 of the UEA and will prevail over the UEA provisions which might otherwise render such evidence inadmissible.¹⁷⁷ As noted above, to the extent that the same provisions also create presumptions, they are matters of substantive law with which the UEA is not concerned.

EXPERT CERTIFICATES

4.45 It is not uncommon for evidentiary certificate provisions to relate to proof of matters which are the result of an expert's analysis, examination or investigation. For example, section 42A of the *Dangerous Goods Act 1985*:

- (1) In any legal proceedings for an offence against this Act relating to an explosive or HCDG the production of a certificate purporting to be signed by an approved analyst with respect to any analysis or examination made by the approved analyst is, without proof of

177 *Commissioner of Taxation v Karageorge* (1996) 22 ACSR 199; BC9605249.

the signature of the person appearing to have signed the certificate or that the person is an approved analyst, sufficient evidence of—

- (a) the identity or quantity or both the identity and quantity of the substance, article or thing analysed;
- (b) the nature of any substance analysed including whether the substance is pure or a mixture of other substances;
- (c) the result of the analysis;
- (d) any other matters relevant to the proceedings that are stated in the certificate.

4.46 The admission of the certificate may be subject to compliance with procedural requirements of service and/or notice or notice to cross-examine. Under the *Agricultural and Veterinary Chemicals (Control of Use) Act 1992*, a certificate issued by an analyst setting out the result of an analysis made by him or her of a substance, on behalf of an informant in respect of a prosecution, is admissible in evidence in the proceedings. The certificate is also proof of the facts and matters contained in it, unless the accused gives the requisite notice that the analyst is required to be called as a witness.¹⁷⁸

CONCLUSION

4.47 Section 177 of the UEA provides for the admission of certificates of expert evidence generally. It requires that the certificate contain a statement of the person's specialised knowledge and a statement that the opinion is based on that knowledge. The section also requires that notice be given to other parties of the intention to tender the certificate as evidence.¹⁷⁹ The certificate is not admissible if another party requires that the expert witness be called to give evidence in court. This is a facilitative provision of the UEA. It therefore operates as an additional means of tendering evidence. If a conflict did arise because, for example, a specific provision in an Act provided for a stricter regime for the admission of expert evidence by certificate than the UEA, both section 8 and the rules of statutory interpretation would operate to allow for the specific provision to override the UEA provision.

¹⁷⁸ *Agricultural and Veterinary Chemicals (Control of Use) Act 1992* s 71(3).

¹⁷⁹ The notice must be served on the other parties together with the certificate at least 21 days before the hearing.

GAZETTES

4.48 Some provisions allow for production of matters contained in government gazettes to stand as evidence. For example, section 43 of the *Education Act 1958* provides, in relation to the cancellation of the registration of schools, that:

- (4) The Board shall cause notice of the fact of any cancellation under this section to be published in the Government Gazette; and the production of a copy of the Government Gazette containing such notice shall be conclusive evidence of such cancellation and that all matters and things preliminary or incidental thereto or connected therewith have been properly done.

CONCLUSION

4.49 Section 153(1) of the UEA facilitates the admission of gazettes by creating a presumption that they are what they purport to be and were published when they purport to be published. Section 153(2) of the UEA relevantly provides that if a copy of any government or official gazette of the Commonwealth, a state, a territory or a foreign country is produced to a court and:

(b) the doing of an act:

- (i) by the Governor-General or by the Governor of a State or the Administrator of a Territory; or
- (ii) by a person authorised or empowered to do the act by an Australian law or law of a foreign country;

is notified or published in the copy or document;

it is presumed, unless the contrary is proved, that the act was duly done and, if the day on which the act was done appears in the copy or document, it was done on that day.

Government gazettes might also be admissible as business records under section 69 of the UEA.

4.50 The enactment of the above UEA provisions in Victoria would remove the need for some of the existing provisions, but would not replace them. Some existing sections go further than treating gazettes as prima facie evidence, such as the example above which is a conclusive evidence provision.

4.51 Provisions which allow proof of matters by producing the government gazette may or may not be inconsistent with the provisions of the UEA, however they will continue to operate by virtue of section 8.

CERTIFIED COPIES

4.52 Throughout Victorian legislation, statutory provisions exist that provide for certified copies of certain documents to be treated as the original and are admissible in evidence. Such provisions are designed to overcome the ‘best evidence rule’ and obviate the need to produce the original.

4.53 For example, section 82 of the *Co-operative Housing Societies Act 1958* provides:

A copy of any entry in a book of a society regularly kept in the course of business shall, if certified by statutory declaration of the secretary to be a true copy of the entry, be received in evidence in any case where and to the same extent as the original entry itself is admissible.

4.54 Some provisions relating to certified copies may also provide that the certified copy is admissible in evidence. A well known example is section 114 of the *Transfer of Land Act 1958* which provides:

(2) The Registrar shall furnish to any person who applies therefor a certified reproduction of any manual folio of the Register or registered instrument.

(3) Any such certified reproduction shall be admissible in evidence before all Courts and persons acting judicially within Victoria.

The section removes the need for such certificates to be authenticated and tendered through a witness.

4.55 Certified copy provisions may also include provision for the certified copy to be prima facie evidence of a particular matter, or proof of the facts or matters stated in the document. For example, section 28 of the *Children and Young Persons Act 1989* relevantly provides:

(1) The principal registrar must cause a register to be kept of all orders of the Court and of such other matters as are directed by this Act to be entered in the register.

...

(5) A document purporting to be an extract from the register and purporting to be signed by a registrar who certifies that in his or her opinion the extract is a true extract from the register is admissible in evidence in any proceedings and, in the absence of evidence to the contrary, is proof of the matters appearing in the extract.¹⁸⁰

180 To be replaced by *Children, Youth and Families Act 2005* s 537.

CONCLUSION

4.56 Section 48(1)(b) of the UEA allows a party to adduce evidence of the contents of a document by tendering a copy. Section 51 of the UEA abolishes common law rules that relate to the means of proving the contents of documents, thus removing the need for this type of section. The admissibility of the document must then be determined in accordance with other UEA provisions. Upon the enactment of a UEA, the certified copy provisions in other Acts would simply operate as another means of proving documents. Although it is likely they will not be utilised to the same degree, they can be retained without any difficulty.

4.57 Where a provision states that a certified copy is admissible to prove its contents, despite being inconsistent with the code of admissibility under the UEA, its operation would be preserved by section 8.

COPIES OF SEIZED DOCUMENTS

4.58 Where an Act contains provisions which allow for documents to be seized under warrant or otherwise, frequently provision is made for copies of the documents seized to be admissible in evidence. For example, section 70P of the *Estate Agents Act 1980* provides:

Copies of seized documents

- (1) If an inspector retains possession of a document taken or seized from a person under this Division, the inspector must give the person, within 21 days of the seizure, a copy of the document certified as correct by the inspector.
- (2) A copy of a document certified under sub-section (1) shall be received in all courts and tribunals to be evidence of equal validity to the original.

CONCLUSION

4.59 These sections are a safeguard to prevent a party's ability to tender evidence in legal proceedings being hindered by the seizure of original documents. As mentioned above, this situation can arise in Victoria due to rules relating to the admission of copies rather than original documents.¹⁸¹ As discussed above, while the UEA renders these provisions unnecessary, no difficulty is created by their retention. Further, the

181 *Evidence Act 1958* div 2A, pt III.

same provisions may also require copies to be made and provided to the person from whom they are seized, and should therefore be retained.

AFFIDAVITS AND STATUTORY DECLARATIONS

4.60 There is a strong common law tradition of requiring oral testimony at trial as the best means of testing the evidence. Evidence in the form of affidavits or witness statements has become a more common feature of common law civil trials only in relatively recent times, although it has longer history in equity. It remains rare in criminal trials.

4.61 The manner in which evidence is given is now largely a matter of court rules or legislative provision. For example, rule 40.02 of the Supreme Court (General Civil Procedure) Rules 2005 provides:

Except where otherwise provided by any Act or these Rules, and subject to any agreement between the parties, evidence shall be given—

- (a) on an interlocutory or other application in any proceeding, by affidavit;
- (b) at the trial of a proceeding commenced by writ, orally;
- (c) at the trial of a proceeding commenced by originating motion, by affidavit.

4.62 There is a range of provisions in Victoria which allow for the admission of affidavits or statutory declarations to stand as evidence of their contents, effectively allowing evidence in chief to be given in written form without requiring the witness to attend. For example, section 57D of the *Environment Protection Act 1970*:

(1) A statutory declaration signed by a person that states—

- (a) that the person is the owner or occupier of a specified premises; and
- (b) that on a specified date or dates—
 - (i) there was a specified receptacle, slot or place at the premises that was used for the deposit of mail or newspapers (as the case may be); and
 - (ii) there was a sign or marking on or near that receptacle, slot or place that stated “No Advertising Material” or “No Junk Mail” or other specified words indicating that advertising material was not to be deposited in that receptacle, slot or place; and
 - (iii) that that sign or marking was clearly visible to a person depositing an item in that receptacle, slot or place; and

(c) that on that date, or on one of those dates, (as the case may be) the person found specified material in that receptacle, slot or place—

is evidence of those matters.

...

(3) However, a statutory declaration is not admissible as evidence under this section in any proceeding unless—

(a) a copy of the statutory declaration was served on the defendant at least 21 days before the proceeding together with a statement—

(i) that the certificate is to be used as evidence at the proceeding; and

(ii) that the defendant has the right to require the prosecution to call as a witness the person who made the statutory declaration, and that the defendant must exercise that right if the defendant wishes to dispute any declaration; and

(iii) that specifies how the defendant is to exercise the right if he, she or it wishes to do so; and

(b) the defendant does not give the prosecution a written notice requiring the person who made the statutory declaration to be called as witness at least 7 days before the proceeding starts.

4.63 Another common example is where sections provide for proof of the service to be given by way of affidavit or statutory declaration. For example, section 278 of the *Children and Young Persons Act 1989*:

(1) Service of a document may be proved by—

(a) evidence on oath; or

(b) affidavit; or

(c) declaration.

(2) Evidence of service must identify the document served and state the time and manner in which service was effected.

(3) A document purporting to be an affidavit or declaration under sub-section (1)(b) or (1)(c) is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements in it.¹⁸²

182 To be replaced by *Children, Youth and Families Act 2005* s 595.

CONCLUSION

4.64 Other than the very limited provisions in sections 170–3 and 181, the UEA does not deal with the admission of affidavit evidence. In UEA jurisdictions it has been held that affidavits ‘read’ in a proceeding are not hearsay and their admission is not to be treated as a matter of admitting documentary evidence. However, this is on the basis of statute or court rules which provide for their admission in certain circumstances:¹⁸³

the Act (UEA) should not be interpreted as putting an end to the possibility of evidence being adduced by affidavit, in those circumstances where the practice of the court was to permit evidence to be adduced in this way prior to the passing of the Act.¹⁸⁴

4.65 The UEA leaves the manner in which evidence is to be given largely to the practice of courts. There is no conflict between the UEA and provisions allowing for evidence to be given by affidavit. Statutory declarations are not generally an accepted means of giving evidence in court. If provisions which allowed for their admission were in conflict with the UEA, section 8 would operate to preserve their admission.

OTHER PRESCRIBED METHODS OF PROOF

4.66 Various other items are deemed to be admissible as proof of various matters in a range of Acts. Examples include:

- determinations;¹⁸⁵
- assessments;¹⁸⁶
- statements in writing;¹⁸⁷

183 *Chang v Su* (2002) 170 FLR 244, [79]; *Protective Commissioner v B* (Unreported, New South Wales Supreme Court, Hodgson J, 23 June 1997) BC 9702917.

184 *Protective Commissioner v B* (Unreported, New South Wales Supreme Court, Hodgson J, 23 June 1997).

185 *Accident Compensation Act* 1985 s 98(2B); *Country Fire Authority Act* 1958 s 74T; *Guardianship and Administration Board Act* 1986 sch 2, cl 6; *Local Government Act* 1989 sch 4, cl 11(3); *Mental Health Act* 1986 sch 2, cl 6(3).

186 *Accident Compensation Act* 1985 s 129E; *Financial Institutions Duty Act* 1982 s 56(7).

187 *Adoption Act* 1984 s 55(8); *Architects Act* 1991 s 66; *Conservation Forests and Land Act* 1987 s 87; *Electoral Act* 2002 s 178; *Environmental Protection Act* 1970 ss 45ZJ(5), 59(4), 59A; *Firearms Act* 1996 s 141; *Fisheries Act* 1995 ss 124, 124A; *Magistrates’ Court Act* 1989 s 48(2)(b); *Transport Accident Act* 1986 s 124; *Wildlife Act* 1975 s 64.

- material printed by the Government Printer;¹⁸⁸
- registers;¹⁸⁹
- minutes;¹⁹⁰
- maps;¹⁹¹
- occupancy permits;¹⁹²
- reports;¹⁹³
- records;¹⁹⁴
- notices of assessment;¹⁹⁵
- information from prescribed tolling devices;¹⁹⁶
- residential tenancy condition reports;¹⁹⁷
- memorials.¹⁹⁸

These provisions cut across normal admissibility rules to ensure that certain evidence is admissible, sometimes in defined circumstances, or for specific purposes.

CONCLUSION

4.67 To the extent that each of these provisions provides for the admission of evidence, they are inconsistent with the admissibility code of the UEA, although the

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- 188 *Australian and New Zealand Banking Group Act 1970* ss 6, 15; *Australian and New Zealand Banking Group (NMRB) Act 1991* ss 5, 12; *Constitution Act 1975* s 19(3); *Interpretation of Legislation Act 1984* s 54(2A); *Melbourne City Link Act 1995* s 18A(2).
- 189 *Architects Act 1991* ss 65, 73; *Co-operative Housing Societies Act 1958* s 80; *Co-operatives Act 1996* s 448; *County Court Act 1958* s 21; *Health Act 1958* s 371; *Melbourne and Metropolitan Board of Works Act 1958* s 191; *Petroleum (Submerged Lands) Act 1982* s 87.
- 190 *Baker Medical Research Institute Act 1980* s 18; *Brotherhood of St. Laurence (Incorporation) Act 1971* cl 17; *Co-operative Housing Societies Act 1958* s 81; *Co-operatives Act 1996* s 444; *Planning and Environment Act 1987* s 144; *Rural Finance Act 1988* s 13.
- 191 *Fisheries Act 1995* s 125; *Forests Act 1958* s 73.
- 192 *Building Act 1993* ss 46, 58.
- 193 *Building Act 1993* s 241B; *Co-operatives Act 1996* s 413; *Domestic Building Contracts Act 1995* s 50(1); *Emerald Tourist Railway Act 1977* s 38(8); *Road Management Act 2004* s 116(5).
- 194 *Pollution of Waters by Oil and Noxious Substances Act 1986* s 27.
- 195 *Taxation Administration Act 1997* s 127.
- 196 *Melbourne City Link Act 1995* s 88; *Mitcham-Frankston Project Act 2004* s 220.
- 197 *Residential Tenancies Act 1997* ss 36, 98, 149.
- 198 *The Australian Alliance Assurance Company's Act 1867* s 2; *The Victoria Racing Club Act 1871* s 4.

same evidence might also have been admitted under the ordinary UEA provisions. Section 8 of the UEA will ensure the continued operation of these provisions.

ADMISSIONS

STATEMENT BY AN OFFICER ADMISSIBLE AGAINST THE CORPORATION

4.68 Out-of-court statements by parties may be admissible in evidence against them, as admissions against interest. In a proceeding against a corporation, difficulties can arise as to the admissibility of statements by officers of the corporation against the interests of the corporation as they are not the same legal entity. In Acts which create offences which may be committed by a corporation, this difficulty is often overcome by providing that statements by its officers may be admissible against the corporation. An example of this wording is contained in section 179(5) of the *Electoral Act 2002*.

4.69 A similar provision exists in relation to partners of firms:

An admission or representation made by any partner concerning the partnership affairs and in the ordinary course of business is evidence against the firm.¹⁹⁹

4.70 Admissions are an exception to the hearsay rule under the UEA.²⁰⁰ Admission is defined to mean:

a previous representation that is:

- (a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and
- (b) adverse to the person's interest in the outcome of the proceeding.²⁰¹

4.71 Section 87 of the UEA deals with admissions made with authority:

Admissions made with authority

(1) For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that:

199 *Partnership Act 1958* s 19.

200 UEA s 81.

201 Definitions are in the Dictionary appended to the UEA.

- (a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter with respect to which the representation was made; or
 - (b) when the representation was made, the person was an employee of the party, or had authority otherwise to act for the party, and the representation related to a matter within the scope of the person's employment or authority; or
 - (c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party.
- (2) For the purposes of this section, the hearsay rule does not apply to a previous representation made by a person that tends to prove:
- (a) that the person had authority to make statements on behalf of another person in relation to the matter, or
 - (b) that the person was an employee of another person or had authority otherwise to act for another person, or
 - (c) the scope of the person's employment or authority.

CONCLUSION

4.72 The various current Victorian sections provide that statements by officers of a corporation are admissible, on a presumption of authority. Therefore the sections are broader in scope than the UEA. They may allow evidence to be admitted that would not otherwise be admissible under the UEA and are therefore inconsistent.²⁰² When an inconsistency arises, section 8 of the UEA operates to preserve the operation of the specific sections of other Acts in those cases in which they apply.

SUCCESSOR IN LAW AND SUBROGATION PROVISIONS

4.73 When one government-created body is succeeded by another, or there is a merger of banks, legislation is passed making provision for the new body to become the successor in law of the other, taking over the rights and liabilities of the defunct body. Provisions exist in these Acts for evidence which would have been admissible for

202 Section 87(2) of the UEA may provide greater scope for establishing that a person had the authority required by section 87 by lifting the hearsay rule.

or against the defunct body to be admissible for or against its successor. For example, section 16(1) of the *State Bank (Succession of Commonwealth Bank) Act 1990* provides:

Documentary or other evidence that would have been admissible for or against the interests of the State Bank if this Act had not been passed, is admissible for or against the interests of the Commonwealth Bank.

4.74 Acts which provide for proceedings to be brought against a professional body rather than an individual may contain a provision to allow admissions by the individual (who is not a party) to be admitted against the professional body to prove a defalcation. For example, section 101(6) of the *Securities Industry Act 1975* provides:

In proceedings brought to establish a claim, evidence of an admission or confession by, or other evidence that would be admissible against, the person against whom a defalcation or fraudulent misuse of property is alleged is admissible to prove the defalcation or fraudulent misuse notwithstanding that the person is not the defendant in or a party to those proceedings, and all defences that would have been available to that person are available to the stock exchange.

CONCLUSION

4.75 These provisions attempt to provide for a legal transition which maintains the rights and liabilities of parties. Both at common law and under the UEA admissions against interest may be admissible against a party which would not be admissible against another person. Evidence may be admissible because it is tendered or authenticated by a party. As these Acts deal with one body taking over from another, they seek to transfer not only the legal rights and liabilities of the defunct body, but the evidentiary position accompanying those rights and liabilities. They are inconsistent with the UEA in that they will allow the admission of evidence which would otherwise not be admissible, such as admissions against interest made by the predecessor in law. Where such inconsistencies arise, section 8 of the UEA will preserve the operation of these provisions to allow the admission of evidence.

OTHER PROVISIONS REGARDING ADMISSIONS

4.76 Provisions concerning admissions made to police and the admissibility of records of interview are dealt with in our discussion of the *Crimes Act 1958*.²⁰³ Provisions regarding other investigating officials are contained in other Acts. For

203 See Appendix 4; Recommendation 45.

example, inspectors appointed under the *Charities Act 1978* may summon and examine witnesses. Section 11(5) of the Charities Act then provides:

The record of an examination which has been either signed by the person examined or certified by the inspector to be correct may, subject to this section, be used in evidence in any legal proceedings against that person.

CONCLUSION

4.77 While admissions against interest are an exception to the hearsay rule under section 81 of the UEA, a number of further provisions place restrictions on the admissibility of such evidence against a defendant in criminal proceedings, in particular where the admissions are made in the course of questioning by an investigating official.²⁰⁴ Provisions such as that in the Charities Act are inconsistent with these UEA provisions as they allow admission of the evidence without the same restrictions. Section 8 of the UEA will preserve the operation of these provisions.

PROCEDURAL PROVISIONS

GENERAL PROCEDURAL PROVISIONS

4.78 Some procedural provisions regarding evidence are purely procedural, such as provisions for giving evidence via closed-circuit television.²⁰⁵

4.79 While the UEA contains certain procedural provisions, it does not encompass all aspects of evidence-related procedure. For example, it does not include any provisions regarding evidence given by audiovisual link. These procedural requirements will operate alongside the provisions of the UEA.

4.80 Other procedural provisions include a requirement to comply with certain timelines, or service provisions with the sanction that the evidence is otherwise inadmissible. For example, section 93(6A) of the *Transport Accident Act 1986* provides for results of blood alcohol or breath tests lawfully taken under the *Road Safety Act 1986* to be admitted in evidence in proceedings under the Act. Section 93(6B) provides:

204 UEA ss 86, 90, 138, 139.

205 Eg, *Magistrates' Court Act 1989* s 4K.

A party must not adduce material referred to in sub-section (6A) in evidence in proceedings under this section unless—

- (a) the party provides to all other parties in the proceedings, copies of the document or documents which form the evidence at least 6 weeks before the commencement of the trial of the proceedings; and
- (b) if notice is given to that party by another party at least 2 weeks before the commencement of the trial of the proceedings, the party causes the person who supplied the information contained in the document or documents to attend the trial of the proceedings for the purpose of cross-examination.

4.81 These procedural requirements are designed to give opposing parties notice of the evidence so that they can consider any objections, obtain further evidence or call for witnesses to appear for cross-examination. The sanction of exclusion of evidence for failure to give proper notice is included as a matter of fairness.

CONCLUSION

4.82 Similar notice provisions are contained in the UEA in relation to tendency and coincidence evidence and hearsay. In addition to other requirements, reasonable notice must be given by the party intending to adduce such evidence to the other party before such evidence can be admitted.²⁰⁶ Any provision outside the UEA which prevents admission (even on procedural grounds) is inconsistent with the UEA. However, section 8 of the UEA would preserve the operation of these provisions.

PROOF OF PRIOR CONVICTIONS

4.83 The *Evidence Act 1958* provides a general means of proving prior convictions in legal proceedings.²⁰⁷ Simpler procedural provisions have been included in other Acts to avoid the need for certified copies to be obtained from court registries. Section 90 of the Road Safety Act is a typical example:

206 UEA ss 67 (hearsay), 97, 98 (tendency and coincidence).

207 *Evidence Act 1958* ss 87–9.

Proof of prior convictions

- (1) If a person is served with a summons for any infringement and it is alleged that he or she has been previously convicted or found guilty of any infringement or infringements there may be served with the summons a separate document containing the prescribed particulars signed by the informant setting out particulars of the alleged prior convictions or findings of guilt.
- (2) The document setting out the alleged prior convictions or findings of guilt—
 - (a) must be endorsed with a notice containing the prescribed particulars; and
 - (b) may be served in any manner in which the summons for the infringement may be served.
- (3) If the court by whom any person has been convicted or found guilty is satisfied that a copy of any such document was served on that person at least 14 days before the hearing of the information the document is admissible and is evidence—
 - (a) that the person was convicted or found guilty of the offences alleged in the document; and
 - (b) of the particulars relating to the convictions or findings of guilt set out in the document.
- (4) Any such document may not be tendered in evidence without the consent of the defendant if the defendant is present at the hearing of the information.

This and similar provisions allow for the admission of a convenient summary of prior convictions by consent if the defendant appears. If the defendant does not appear, the provision allows agreement as to its accuracy to be presumed.

CONCLUSION

4.84 Like the current *Evidence Act 1958*, section 178 of the UEA provides for prior convictions to be proved by certificate. These provisions are an additional means of doing so to avoid the need to obtain certificates. These provisions facilitate proof and are additional to those provided by the UEA. To the extent they are inconsistent with the UEA provisions, section 8 will preserve their operation.

STANDARD OF PROOF PROVISIONS

4.85 While it is relatively rare, some Acts contain provisions regarding the standard of proof required in certain proceedings. For example, section 135(1) of the *Children and Young Persons Act 1989* provides:

On the summary hearing of a charge, whether indictable or summary, the Court must be satisfied of a child's guilt on proof beyond reasonable doubt by relevant and admissible evidence.²⁰⁸

4.86 The section above is merely a restatement of what would otherwise be the law. Its inclusion in the Act is probably to distinguish the rules applicable in the criminal division of Children's Court from those applicable in the family division.

CONCLUSION

4.87 Sections 141 and 142 of the UEA provide for the standard of proof to be applied in criminal and civil proceedings respectively. These sections do not fall within the code provisions of the UEA. Section 8 would operate to preserve any existing provisions in particular legislation.

PRIVILEGES AND EXCLUSIONARY PROVISIONS

PRIVILEGE AGAINST SELF-INCRIMINATION

4.88 The privilege against self-incrimination has been stated as follows:

No one is bound to answer any question or produce any document if the answer or the document would have a tendency to expose that person to the imposition of a civil penalty or to conviction for a crime.²⁰⁹

4.89 The privilege is available in judicial or non-judicial proceedings.²¹⁰ At common law the privilege is available unless removed by express words or necessary implication in the relevant statute.²¹¹

208 To be replaced by *Children, Youth and Families Act* s 357.

209 JD Heydon, *Cross on Evidence* (7th ed, 2004) [25065].

210 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 340–1, 344.

211 *Ibid* 328, 341.

The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification. This is so when the object of imposing the obligation is to ensure the full investigation in the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation. In such cases it will be so, notwithstanding that the answers given may be used in subsequent legal proceedings.²¹²

4.90 Some Victorian statutes make clear their intention not to abrogate the privilege. For example, section 125 of the *Housing Act 1983* provides:

A person may refuse or fail to give information, produce a document or do any other thing that the person is required to do by or under this Division if the giving of the information, the production of the document or the doing of that other thing would tend to incriminate the person.

4.91 Some provisions distinguish between providing information and producing documents already in existence. For example, section 54I of the *Agricultural and Veterinary Chemicals (Control of Use) Act 1992* provides:

(1) It is a reasonable excuse for a natural person to refuse or fail to give information or do any other thing that the person is required to do by or under this Part, if the giving of the information or the doing of that other thing would tend to incriminate the person.

(2) Despite sub-section (1), it is not a reasonable excuse for a natural person to refuse or fail to produce a document that the person is required to produce by or under this Part, if the production of the document would tend to incriminate the person.

4.92 In other statutes the privilege is abrogated generally. Where a person is compelled to give self-incriminating evidence, there is often a provision which prevents the admission of the evidence given or statements made in proceedings against that person. For example, section 13(3) of the *Business Names Act 1962* provides:

212 Ibid 328, 341.

A person shall not be excused from furnishing any information where required to do so under sub-section (1) of this section on the ground that the information might tend to incriminate him or make him liable to a penalty but the information furnished by him shall not be admissible in evidence against him in any proceedings civil or criminal.

4.93 The following provision operates in the Victorian Civil and Administrative Tribunal:

- (1) A person is not excused from answering a question or producing a document in a proceeding on the ground that the answer or document might tend to incriminate the person.
- (2) If the person claims, before answering a question or producing a document, that the answer or document might tend to incriminate them, the answer or document is not admissible in evidence in any criminal proceedings, other than in proceedings in respect of the falsity of the answer.²¹³

4.94 The prohibition on the admission of the self-incriminating evidence in subsequent proceedings is not always absolute. Exception is usually made for perjury type proceedings.²¹⁴ Some statutes also permit the use of the evidence against the person in subsequent proceedings for certain offences. For example, section 26(2) of the *Casino Control Act 1991* provides:

A person is not excused from complying with a notice under this section on the ground that compliance might tend to incriminate the person but, if the person, in writing given to the Commission, claims, before complying with the notice, that compliance might tend to incriminate the person, information provided in compliance with the notice is not admissible in evidence against the person in criminal proceedings *other than proceedings under this Act*. (emphasis added)

4.95 The commission has found only two Victorian provisions where the privilege against self incrimination is abrogated in court proceedings. Section 98 of the *Confiscation Act 1997* provides for the court to make an order for the examination of any person for certain purposes. Section 99 of that Act then provides:

- (1) In an examination referred to in section 98(2), a person may not refuse or fail to answer a question that might tend to incriminate the person.

213 *Victorian Civil and Administrative Tribunal Act 1998* s 105.

214 If this were not done, the sanction of perjury would be effectively unavailable where evidence is given under the objection.

(2) A statement or disclosure made by a person in answer to a question put in the course of an examination referred to in section 98(2) is admissible against that person in—

- (a) any civil proceeding; or
- (b) a proceeding for giving false testimony in the course of the examination; or
- (c) any proceeding under this Act—

but is not otherwise admissible in evidence against that person.

4.96 Section 43 of the *Defamation Act 2005* contains a limited abrogation in relation to criminal defamation. It provides that:

- (1) A person who is required to answer a question, or to discover or produce a document or thing, in defamation proceedings is not excused from answering the question or discovering or producing the document or thing on the ground that the answer to the question or the discovery or production of the document or thing might tend to incriminate the person of an offence of criminal defamation.
- (2) However, any answer given to a question, or document or thing discovered or produced, by a natural person in compliance with the requirement is not admissible in evidence against the person in proceedings for criminal defamation.

CONCLUSION

4.97 Provisions regarding the privilege against self incrimination outside of court proceedings have no relevance for the UEA except in so far as they prevent the subsequent admission of the evidence compelled in court proceedings. There is no provision in the UEA specifically excluding self-incriminating evidence given under compulsion in other contexts from being used in court proceedings.²¹⁵ The provisions in various Acts which prevent the admission of this evidence, absolutely or in part, conflict with the admissibility code of the UEA. However, section 8 of the UEA will preserve the operation of those provisions.

4.98 Section 128 of the UEA preserves the privilege against self-incrimination in court proceedings, subject to a provision which allows the court to require the evidence to be given where the interests of justice require. Where the witness chooses or is compelled to give such evidence, the witness is granted a certificate by the court

215 Although the evidence might be excluded on fairness grounds—see UEA ss 90, 135, 137.

which prevents the incriminating evidence which the witness gives being admissible against the witness in subsequent proceedings.²¹⁶

4.99 Section 99 of the Confiscation Act and section 43 of the Defamation Act, which operate in court proceedings, are inconsistent with section 128 of the UEA, however, section 8 of the UEA operates to preserve their operation. In those instances section 128 of the UEA and the certificate procedure would not apply.

LEGAL PROFESSIONAL PRIVILEGE/CLIENT LEGAL PRIVILEGE

4.100 Like the privilege against self-incrimination, legal professional privilege is more than a rule of evidence.

Legal professional privilege is not merely a procedural right exercisable in judicial and quasi-judicial proceedings; it is a right generally conferred by law to protect from

compulsory disclosure confidential communications falling within the privilege.²¹⁷

The privilege is therefore available to resist compulsory disclosure processes unless excluded by statute. There are a handful of provisions in Victorian statutes which modify the availability of legal professional privilege.

4.101 One situation in which the privilege has been abrogated by statute in Victoria is in hearings before royal commissions.²¹⁸ Another is in the *Legal Profession Act 2004* where various powers are given to inspectors appointed by the Legal Services Board, including the power to require documents and compel answers from legal practitioners. Section 3.3.46 of that Act provides in relation to those powers:

(1) It is not a reasonable excuse for a person not to produce a document, give information, answer a question or do anything else he or she is required to do under this Division—

(a) on the ground of any duty of confidence, including any duty of confidence owed by a law practice or legal practitioner to a client; or ...

4.102 While legal professional privilege belongs to the client and not the lawyer, lawyers are duty bound to protect their client's confidence unless instructed otherwise. Ordinarily, a lawyer would seek to maintain the client's privilege until such time as the client's instructions can be obtained. The Legal Profession Act provisions prevent the lawyer from refusing disclosure on the basis of the client's privilege.

216 Exception is made for perjury type proceedings.

217 Heydon (2004) above n 209, [25250], citing *Baker v Campbell* (1983) 153 CLR 52.

218 *Evidence Act 1958* s 19D.

4.103 Some provisions in Victorian statutes preserve the privilege, but establish certain procedures around the claim. For example, section 401 of the *Co-operatives Act 1996* provides:

(1) A legal practitioner is entitled to refuse to comply with a requirement under section 393 or 396 relating to a relevant document if—

- (a) the document contains a privilege communication made by or on behalf of or to the legal practitioner in his or her capacity as a legal practitioner; or
- (b) the legal practitioner is not able to comply with the requirement without disclosing a privileged communication made by or on behalf of or to the legal practitioner in his or her capacity as a legal practitioner.

...

(4) If the legal practitioner refuses to comply with the requirement, he or she must immediately furnish in writing to the Registrar—

- (a) the name and address of the person to whom or by or on behalf of whom the communication was made (if known to the legal practitioner); and
- (b) sufficient particulars to identify the document containing the communication (if the communication was made in writing).

4.104 Similar provisions have been found not to abrogate legal professional privilege.²¹⁹

4.105 References in legislation to ‘legal professional privilege’ will raise an issue upon the introduction of the Victorian UEA. The UEA uses the terminology of ‘client legal privilege’ to reflect that the privilege belongs to clients and not their legal advisor. Questions of interpretation may arise as to whether provisions referring to legal professional privilege also refer to client legal privilege under the UEA. The significance of this will depend on the context of the provision.

4.106 For example, section 40(1) of the *Major Crime (Investigative Powers) Act 2004* provides:

If—

- (a) a person is required to answer a question at an examination or produce a document before the Chief Examiner; and

219 *Mansfield v Australian Crime Commission* (2003) 132 FCR 251; 140 A Crim R 228.

(b) the answer to the question would disclose, or the document contains, a communication that is recognised at law as privileged on the ground of legal professional privilege—

the person is, subject to sub-section (2), entitled to refuse to comply with the requirement.

4.107 This raises the question whether this phrase, ‘is recognised at law as privileged on the grounds of legal professional privilege’, means recognised at common law as privileged, under the UEA or both. Following the decision in *Esso Australia Resources Ltd v FCT*²²⁰ and assuming adoption of the proposed amendment to section 122 of the UEA,²²¹ the difference between the common law and the UEA has narrowed considerably. However, the question may arise.

4.108 A number of other provisions refer to legal professional privilege—often to provide that it is not affected by the provisions of an Act.²²² Issues of interpretation also arise in those instances.

CONCLUSION

4.109 Legal professional privilege outside of court proceedings and processes will not be affected by the introduction of the UEA. In that context it may be appropriate for a provision to refer only to legal professional privilege. Even with the extended operation given to the privilege sections of the Victorian UEA by the proposed section 131A, the provisions will only have application in investigatory and other contexts where they are picked up in some way.²²³ If the UEA privilege is specifically picked up, consequential amendments may be required if the Act also refers to legal professional privilege.

4.110 In the event those provisions require disclosure of privileged information, and the communication is sought to be tendered in subsequent court proceedings, under the UEA that disclosure will not be taken to be a waiver of privilege.²²⁴

220 (1999) 201 CLR 49.

221 ALRC, NSWLRC, VLRC (2005) above n 13, Recommendation 14–5.

222 *Dangerous Goods Act 1985* s 19G; *Heath Records Act 2001* s 96; *Equipment (Public Safety) Act 1994* s 23A; *Occupational Health and Safety Act 2004* s 155; *Whistleblowers Protection Act 2001* s 11.

223 See Recommendation 21, paras 2.88–2.93.

224 Section 122(2)(c) of the current uniform Evidence Acts prevents the loss of the privilege in the event that disclosure has been made under compulsion of law. The joint Final Report recommends amendment to s 122, however, this provision is retained in s 122(4)(a)(iii) of the draft provision. See ALRC, NSWLRC, VLRC (2005) above n 13, Recommendation 14–5, Appendix 1.

4.111 In some provisions it may be necessary to refer to client legal privilege under the UEA. The context of the section needs to be examined in each case. Appendix 7 contains a list of provisions which refer to legal professional privilege and individually considers whether amendment is required. In some instances it is recommended that provisions be amended to refer to legal professional privilege and client legal privilege. This is done where the section needs to refer to both privileges, or, out of an abundance of caution, where the current provision provides that nothing in the Act affects the privilege.

TERRORISM (COMMUNITY PROTECTION) (AMENDMENT) BILL 2005

4.112 The proposed section 13ZG of the *Terrorism (Community Protection) Act 2003*²²⁵ is another provision which affects legal professional privilege.²²⁶ The proposed section 13ZF of that Act allows a person being detained under a preventative detention order to contact a lawyer for certain limited purposes relating to the order. The proposed section 13ZG then provides that conversations by the person with his or her lawyer must be able to be monitored. Communications which were made for the allowable limited purposes in section 13ZF are then made inadmissible against the person in any proceedings in a court or tribunal.²²⁷ There is no derivative use immunity provided. The proposed section 13ZU of the Act then provides that ‘to avoid doubt, this Part does not affect the law relating to legal professional privilege’.

4.113 Concern has been expressed that despite the statement in section 13ZU, legal professional privilege is affected by these provisions. Andrew Palmer has commented:

While this section may have been intended to preserve legal professional privilege, there are very strong reasons to be concerned that the new provisions may effectively deny privilege to communications between subjects and their lawyers.²²⁸

4.114 These provisions effectively require the disclosure of what would almost certainly be privileged communications; it is unusual in that it does so at the same time as the communications are being made. Disclosure can only be avoided by not communicating.

225 Contained in the *Terrorism (Community Protection) (Amendment) Bill 2005*.

226 Although the proposed section 13ZU would indicate to the contrary

227 Proposed *Terrorism (Community Protection) (Amendment) Act 2005* s 13ZG(5).

228 Andrew Palmer, ‘Investigating and Prosecuting Terrorism: The Counter-Terrorism Legislation and the Law of Evidence’ (2004) 27 (2) *University of New South Wales Law Journal* 373, 382.

4.115 The protection afforded by section 13ZG is less than that which would be afforded to a privileged communication under the common law or the UEA. It prohibits the admission of the evidence only in proceedings against the individual and only protects communications which remain within the limits permitted by the Act.²²⁹

4.116 Of greatest significance however is the fact that the provisions may effectively prevent any claim for privilege. As Palmer points out:

The fact that communications must be monitored by a third party, and that this would be known to the subject and his or her lawyer, could mean that any communication was not confidential, and therefore not privileged. This result, while regrettable and possibly unintended, is consistent with the ‘law relating to legal professional privilege’, which according to [the section 13ZU], is not affected by the new Division.²³⁰

4.117 Both at common law and under the UEA a communication must be confidential in order for privilege to be maintained.²³¹ Because people subject to the order will be aware that their communications are being monitored, communications with their lawyers may not be considered confidential and therefore may not be subject to legal professional privilege. The point is an arguable one because both at common law and under the UEA it has been held that the presence of a third party will not always destroy privilege:

... each case must be examined to see whether the communication was one which should be classed as confidential. The fact of the presence of a third party should be examined to see whether the presence indicates that the communication was not intended to be confidential, or whether the presence of the third party was caused by some necessity or some circumstances which did not affect the primary nature of communication as confidential...²³²

4.118 Palmer has pointed out the difficulties which this uncertainty is likely to create for lawyers in advising clients as to the privilege which may or may not attach to their conversation in this situation. He concludes that if the intention of parliament was

229 The proposed s 13ZG protects only those communications made for a purpose referred to in section 13ZF(1)(a), (b), (c), or (d). The proposed section 13ZF restricts the purposes for which a lawyer may be contacted by a person being detained under the Act.

230 Palmer (2004) above n 228, 384.

231 *R v Sharp* (2003) 143 A Crim R 344.

232 *R v Braham & Mason* [1976] VR 547, 549 cited with approval in *R v Sharp* (2003) 143 A Crim R 344, 352.

truly not to affect legal professional privilege, the legislation would need to be amended.²³³

CONCLUSION

4.119 If enacted, section 13ZG, although inconsistent with the admissibility code of the UEA, will be preserved by section 8 of the UEA and will prevent the admission of evidence of communications in the circumstances described in that section. Whether those communications would otherwise be held to be subject to legal professional privilege or client legal privilege is debatable. This uncertainty should be addressed. It should be made clear whether or not monitored communications will in addition to the protection afforded by section 13ZG, be subject to legal professional privilege despite the fact that they have been monitored.

4.120 As with other sections which provide that the Act does not affect the law of legal professional privilege, section 13ZU should be amended to include a reference to client legal privilege.



RECOMMENDATION

48. The following provisions be amended as specified in Appendix 7 on the introduction of the Victorian UEA:

- *Dangerous Goods Act 1985* ss 13C (Note 2) and 19G;
- *Equipment (Public Safety) Act 1994* ss 14B (Note 2) and 23A;
- *Health Records Act 2001* s 96;
- *Health Services (Conciliation and Review) Act 1987* s 27(10)(a);
- *Occupational Health and Safety Act 2004* ss 100, 155;
- *Terrorism (Community Protection) Act 2003* s 13ZU²³⁴
- *Transport Accident Act 1986* s 126A;
- *Whistleblowers Protection Act 2001* s 10;

²³³ Palmer (2004) above n 228, 386.

²³⁴ This provision has not yet been enacted; it is contained in the Terrorism (Community Protection) (Amendment) Bill 2005 s 4.

LEGAL AID AND PRIVILEGE

4.121 Provisions of the *Legal Aid Act 1978* operate to ensure that legal professional privilege extends to communications between applicants and recipients of legal aid and Victoria Legal Aid and its officers. They also provide that the privilege is not lost where communications are made between private practitioners (funded by Legal Aid) and Victoria Legal Aid for the purpose of the Act.²³⁵ This provision will pick up the UEA client legal privilege provisions and extend them (to the extent that they do not apply in their own terms) to the relationship of applicant or assisted person and Victoria Legal Aid.

CONCLUSION

4.122 To the extent that the provisions extend client legal privilege beyond the bounds of that provided under the UEA, it is inconsistent with the admissibility code. However, section 8 of the UEA will preserve the operation of the provision.

PROVISIONS RELATING TO MEDICAL PRIVILEGE

4.123 Although the common law recognises the duty of confidentiality owed by a doctor to a patient, there is no privilege for communications made to a medical practitioner at common law. Section 28(2) of the *Evidence Act 1958* provides a limited privilege preventing a physician or surgeon from divulging information acquired in attending a patient in civil proceedings without the consent of the patient. Sections in some Acts exclude the operation of this provision. For example, section 29 of the *Emergency Services Superannuation Act 1986* provides that the board may require a member to supply it with the reports of medical practitioners and:

(5) Despite any Act or rule of law or practice to the contrary, the Board is not prevented on the ground of medical professional privilege from producing in any legal proceedings any report referred to in sub-section (4).

CONCLUSION

4.124 The commission recommends the adoption of a professional confidential relationships privilege in the UEA and the repeal of section 28 of the Evidence Act.²³⁶ As a result of that change, provisions in other Acts which relate to ‘medical

²³⁵ *Legal Aid Act 1978* s 31.

²³⁶ See Recommendations 13, 37.

professional privilege’ may need to be amended to make reference to the UEA provision. Appendix 8 contains provisions relating to ‘medical privilege’ and the commission’s assessment of whether amendment is required.



RECOMMENDATION

49. The following provisions be amended, as specified in Appendix 8 on the introduction of the Victorian UEA:

- *Alcoholics and Drug Dependant Persons Act 1968* s 16(5);
- *Children, Youth and Families Act 2005* s 200;
- *Emergency Services Superannuation Act 1986* s 29(5);
- *State Superannuation Act 1988* s 86(3);
- *Transport Superannuation Act 1988* s 38(3).

EVIDENCE OF SETTLEMENT NEGOTIATIONS

4.125 The ‘without prejudice’ privilege was developed at common law to facilitate the resolution of disputes. It operates *inter alia* to prevent the admission of evidence of things said in the course of settlement negotiations. The rise of more formalised alternative dispute resolution mechanisms, such as mediation, has led to statutory provisions which prevent the admission of evidence of mediation sessions and the like.²³⁷ For example, section 24A of the *Supreme Court Act 1986* provides:

Where the Court refers a proceeding or any part of a proceeding to mediation, unless all the parties who attend the mediation otherwise agree in writing, no evidence shall be admitted at the hearing of the proceeding of anything said or done by any person at the mediation.

It is to be noted that this provision operates only to exclude the admission of the evidence in the relevant proceeding.

4.126 Other provisions are much broader, for example, section 4.3.11 of the Legal Profession Act provides in relation to mediations in civil disputes under that Act:

Admissibility of evidence and documents

²³⁷ Such as those in the *Evidence Act 1958*, discussed in Chapter 3.

(1) The following are not admissible in any proceedings in a court, tribunal or before a person or body authorised to hear and receive evidence—

- (a) evidence of anything said or done in the course of mediation; and
- (b) a document prepared for the purposes of mediation.

(2) Sub-section (1) does not apply to an agreement reached during mediation.

CONCLUSION

4.127 Section 131 of the UEA excludes evidence of settlement negotiations with a number of exceptions. Most Victorian provisions conferring privilege tend to be quite absolute in their exclusion and not include exceptions. As discussed in relation to provisions in the *Evidence Act 1958*, these absolute exclusions may be problematic in some circumstances and the commission recommends that there be a review of these types of provisions, possibly with a view to the enactment of a Mediation Act.²³⁸ Appendix 9 contains a list of current provisions which exclude evidence of various forms of dispute resolution in legal proceedings for consideration, should the suggested review take place.

4.128 In the meantime, section 8 of the UEA will preserve the operation of these sections.



RECOMMENDATION

50. The provisions in Appendix 9 should be considered as part of a broader review of mediation provisions in Victorian legislation recommended in recommendation 39.

PARLIAMENTARY PRIVILEGE

4.129 Section 19 of the *Constitution Act 1975* imports the parliamentary privilege ‘held enjoyed and exercised’ by the House of Commons of Great Britain and Ireland as at 21 July 1855, for the Victorian Parliament. The section goes on to provide that the parliament may legislate for or with respect to the privileges immunities and powers to be held enjoyed and exercised by the Legislative Council and the Legislative Assembly and by the committees and the members thereof respectively. There is a

238 Recommendation 39.

handful of Victorian provisions which relate to parliamentary privilege; most are contained in the Constitution Act.

CONCLUSION

4.130 The UEA expressly provides that the Act does not affect the law of parliamentary privilege.²³⁹ Therefore, parliamentary privilege will apply over and above the Act, even without the operation of section 8 of the UEA.

OTHER STATUTORY PRIVILEGES

COUNTER TERRORISM INFORMATION

4.131 There are some privileges which are entirely the creatures of statute. One of the most recently created privileges is contained in section 23 of the *Terrorism (Community Protection) Act 2003* which provides:

(1) If in any legal proceeding within the meaning of the Evidence Act 1958 an issue arises relating to the disclosure of counter-terrorism information and (but for this section) a person would be entitled to require another person to disclose that information, the court (within the meaning of that Act) may excuse that person from the requirement to disclose if satisfied that—

- (a) disclosure would prejudice the prevention, investigation or prosecution of a terrorist act or suspected terrorist act; and
- (b) the public interest in preserving secrecy or confidentiality outweighs the public interest in disclosure.

Note: Under the **Evidence Act 1958**, ‘legal proceeding’ includes a civil or criminal proceeding before a court, an inquest held by a coroner and a Royal Commission. Also under that Act, ‘court’ includes a person acting judicially.

(2) Without limiting the matters the court may consider for the purposes of sub-section (1), the court must consider the following—

- (a) the importance of the information in the legal proceeding; and
- (b) if the legal proceeding is a criminal proceeding, whether the party seeking disclosure of the information is the defendant or the prosecutor; and

239 UEA s 10.

- (c) if the legal proceeding is a criminal appeal proceeding, including an application for leave to appeal, whether the party seeking disclosure of the information was the defendant or the prosecutor in the judgment or order from which the appeal is brought; and
 - (d) the nature of the offence, cause of action or defence to which the information relates, and the nature of the subject matter of the proceeding; and
 - (e) the likely effect of disclosure of the information, and the means available to limit its publication; and
 - (f) whether the substance of the information has already been disclosed; and
 - (g) if the proceeding is a criminal proceeding and the party seeking disclosure of the information is the defendant, whether the order is to be made subject to the condition that the prosecution be stayed.
- (3) In deciding whether to excuse a person from a requirement to disclose information, the court may inform itself in any way it thinks fit.
- (4) In this section, “**disclosure**” includes disclosure, whether by order, subpoena or otherwise, by the—
- (a) inspection, production or discovery of documents; and
 - (b) giving of evidence; and
 - (c) answering of interrogatories; and
 - (d) provision of particulars.

4.132 This provision applies broadly to all legal proceedings and at all stages of proceedings. The section provides the court with power to excuse compliance with compulsory disclosure requirements, but does not require the court to do so in any particular circumstances.

Conclusion

4.133 No direct equivalent provision exists in the UEA.²⁴⁰ Section 130 of the UEA provides that the court may direct that certain evidence relating to matters of state not be adduced on public interest grounds. Evidence relating to matters of state can include evidence which would prejudice the security, defence or international relations of Australia. Other jurisdictions have introduced provisions with the same aim of

²⁴⁰ Although the drafting adopts the same considerations as those set out in the UEA s 130(5).

protecting certain information from disclosure despite the fact it would be admissible under the uniform Evidence Acts.²⁴¹ In Victoria the provisions of the *Terrorism (Community Protection) Act 2003* will be preserved by section 8 of the UEA.

PROTECTED INFORMANTS

4.134 Provisions exist in other Acts to protect the confidence of people reporting matters to authorities. For example, section 64 of the *Children and Young Persons Act 1989* provides for protection of the identity of those who notify the relevant authorities of potential child abuse. This is achieved by preventing the ordinary compulsory procedures of the court from applying and requiring leave:

(3A) In any legal proceeding evidence as to the grounds contained in a notification made under sub-section (1) or (1A) for the belief that the child is in need of protection may be given but evidence that a particular matter is contained in such a notification or evidence that identifies the person who made such a notification as the notifier, or is likely to lead to the identification of that person as the notifier is only admissible in the proceeding if the court or tribunal grants leave for the evidence to be given or if the notifier consents in writing to the admission of that evidence.

(3B) A witness appearing in a proceeding referred to in sub-section (3A) must not be asked and, if asked, is entitled to refuse to answer—

(a) any question to which the answer would or might identify the person who made a notification under sub-section (1) or (1A) as the notifier or would or might lead to the identification of that person as the notifier; or

(b) any question as to whether a particular matter is contained in a notification made under sub-section (1) or (1A)—

unless the court or tribunal grants leave for the question to be asked or the notifier has consented in writing to the question being asked.

(3C) A court or tribunal may only grant leave under sub-section (3A) or (3B) if—

(a) in the case of a proceeding in the Court or in any other court arising out of a proceeding in the Court or in the Victorian Civil and Administrative Tribunal on a review under section 122, it is satisfied that it is necessary for the evidence to be given to ensure the safety and well being of the child;

241 *National Security Information (Criminal Proceedings) Act 2004* (Cth) s 18 provides that the Act does not affect the provisions of any other Act apart from certain sections of the *Evidence Act 1995* (Cth) and the *Judiciary Act 1901* (Cth).

(b) in any other case, it is satisfied that the interests of justice require that the evidence be given.²⁴²

4.135 This provision and others like it exclude certain evidence to serve a particular public purpose.

Conclusion

4.136 While these provisions conflict with the code of admissibility under the UEA by excluding evidence which would otherwise be admissible, section 8 of the UEA will preserve their operation.

ADOPTING THE PRIVILEGES AVAILABLE IN COURT TO NON-CURIAL PROCEEDINGS²⁴³

4.137 There are some provisions in Victorian legislation which, rather than attempting to set out the privileges available in non-curial proceedings, adopt by reference the privileges which apply in court proceedings. For example, section 106 of the *Victorian Civil and Administrative Tribunal Act 1998* is in the following terms:

- (1) Except as provided by section 80(3) or 105, a person is excused from answering a question or producing a document in a proceeding if the person could not be compelled to answer the question or produce the document in proceedings in the Supreme Court.
- (2) The Tribunal may require a person to produce a document to it for the purpose of determining whether or not it is a document that the Tribunal has power to compel the person to produce.

CONCLUSION

4.138 These provisions currently pick up the common law and statutory privileges applicable in courts. The same provisions will pick up the privilege provisions of the UEA. This means that in addition to client legal privilege, the section will also pick up the confidential communications privilege and the sexual assault counselling privilege. Unless specifically excluded (such as under the Victorian Civil and Administrative Tribunal provision), these provisions may also pick up section 128 of the UEA relating to the privilege against self-incrimination.

242 To be replaced by *Children, Youth and Families Act* s 190.

243 Non-curial proceedings are proceedings which are not court proceedings, such as proceedings before a tribunal.

4.139 There may be instances where the certificate procedure under section 128 of the UEA is not appropriate. In that situation it may be that a provision picking up privileges which apply in courts should be amended to preserve the common law or substitute a different provision. Appendix 10 contains a list of provisions which pick up privileges as they apply in courts. In the commission's view, each situation needs to be considered in light of individual policy considerations to determine whether all the UEA privilege provisions should be adopted. That task is beyond the scope of the current inquiry. Having raised the issue, the commission recommends only that the provisions be reviewed.



RECOMMENDATION

51. The provisions in Appendix 10 should be considered as part of the review in Recommendation 21.

OTHER EXCLUSIONARY RULES

4.140 Provisions exist in a number of Acts which prohibit or restrict the admission of certain evidence. These are often in circumstances where the Act also provides for information to be disclosed or collected in a non-judicial context. The provisions can range from an absolute prohibition to more limited exclusions. An example of an absolute prohibition can be found in section 22(4) of the *Private Security Act 2004* which provides that:

Fingerprints that are provided to the Chief Commissioner under this section are not admissible as evidence in any proceedings.

4.141 An example of a more limited exclusion is clause 74 of Schedule 1 of the Victorian Civil and Administrative Tribunal Act which provides:

Evidence before the Tribunal in a proceeding under the **Residential Tenancies Act 1997** cannot be used in criminal proceedings except proceedings for an offence against this Act or the **Residential Tenancies Act 1997** or for perjury.

4.142 Another approach is that of section 65 of the *Victims of Crime Assistance Act 1996* which provides a discretion to admit evidence in the interests of justice:

Inadmissibility of evidence in other proceedings

(1) Evidence of anything said on the hearing of, or of any document prepared solely for the purpose of, an application is not admissible in any civil or criminal proceeding in a court or tribunal or in any other legal proceeding within the meaning of the **Evidence Act 1958** except:

- (a) a proceeding before the Tribunal or arising out of a proceeding before the Tribunal; or
 - (b) a proceeding for an offence against this Act; or
 - (c) a proceeding for an offence against section 81, 82, 83 or 83A of the **Crimes Act 1958** (fraud) or for an offence of conspiracy to commit, incitement to commit or attempting to commit any such offence; or
 - (d) a proceeding for an offence against section 314(1) of the **Crimes Act 1958** (perjury) or for any other offence that involves an interference with the due administration of justice; or
 - (e) with the consent of the person to whom the words or document principally refers or relates.
- (2) A court, tribunal or person acting judicially within the meaning of the **Evidence Act 1958** may rule as admissible in a proceeding before them any matter inadmissible because of sub-section (1) if satisfied, on the application of a party to the proceeding, that it is in the interests of justice to do so.

CONCLUSION

4.143 As with privilege provisions, these exclusionary rules are inconsistent with the admissibility code of the UEA, but their operation will be preserved by section 8 of the UEA.

LIMITATION ON THE ADMISSIBILITY OR USE OF EVIDENCE

4.144 Provisions in some Acts, while not excluding evidence entirely, limit its admission or use for a particular purpose. An example is section 22(5) of the *Prostitution Control Act 1994*, which provides in proceedings for the offence of carrying on an unlicensed prostitution service:

... evidence of the presence on premises of materials commonly used in safe sexual practices is inadmissible for the purpose of establishing that a prostitution service provider carried on business on those premises.

4.145 Some provisions simply provide that a certain matter is not evidence of a particular fact. For example, section 38(2) of the *Building Act 1993* which provides that:

A certificate of final inspection is not evidence that the building or building work concerned complies with this Act or the building regulations.

4.146 In statutes which have infringement penalty provisions it is common to also find a provision such as section 37F *Prevention of Cruelty to Animals Act 1986*:

(2) The payment of an infringement penalty under this Part is not and must not be taken to be—

(a) an admission of guilt in relation to the offence; or

(b) an admission of liability for the purpose of any civil claim or proceeding arising out of the same occurrence, and the payment does not in any way affect or prejudice any such claim or proceeding.

(3) The payment of an infringement penalty under this Part must not be referred to in any report provided to a court for the purpose of determining sentence for any offence.

CONCLUSION

4.147 By limiting the admissibility or use that can be made of certain evidence, these provisions conflict with the basic relevance provisions in sections 55 and 56 of the UEA. Section 8 of the UEA will, however, preserve their operation despite the conflict.

SECRECY AND CONFIDENTIALITY PROVISIONS

4.148 Many Acts impose confidentiality requirements on people likely to receive sensitive information while holding office or in the course of their employment. For example, section 40 of the *Sports Event Ticketing (Fair Access) Act 2002* provides:

(1) An authorised officer must not, except to the extent necessary to exercise his or her powers under this Part, give to any other person (whether directly or indirectly) information relating to a person's business or personal affairs acquired by the authorised officer in exercising those powers.

(2) Sub-section (1) does not apply to the giving of information—

(a) to a court or tribunal in the course of legal proceedings; or

(b) in accordance with an order of a court or tribunal; or...

4.149 In some instances the exceptions are more limited, for example, section 54 of the *Food Act 1984*:

(1) Except as provided by sub-section (2), an authorized officer shall not disclose information or publish a document or part of a document obtained by him in connexion with the administration of this Act unless the disclosure or publication is made—

- (a) with the consent of the person from whom the information or document was obtained;
- (b) in connexion with the administration of this Act; or
- (c) for the purposes of any proceedings under or arising out of this Act or a report of any such proceedings.

...

(4) Notwithstanding sub-section (1)(c), an authorized officer appearing as a witness in any proceedings under or arising out of this Act shall not be compelled to produce any reports made or received by him confidentially in his official capacity or containing confidential information.

CONCLUSION

4.150 Where exception is made in these provisions to allow compliance with a court order there will be no conflict with the UEA, as this will allow evidence to be given in judicial proceedings under subpoena. Where the provisions do not contain such an exception, excluding evidence which would otherwise be admissible, the provision will be inconsistent with the code of admissibility under the UEA. Section 8 of the UEA will, however, operate to preserve these provisions.

CERTAIN PERSONS NOT COMPETENT OR COMPELLABLE

4.151 Provision is made in relation to certain office holders to prevent them being called to give evidence in proceedings or to be questioned about matters which have come to their knowledge in the course of their duties. For example, section 62(1) of the *Coroners Act 1985* provides:

A coroner or a person acting under an authority given under this Act must not be called to give evidence in any court or judicial proceedings about anything coming to their knowledge in carrying out their powers, duties or functions under this Act.

4.152 Section 86J of the *Police Regulation Act 1958* provides that certain people may not be called to give evidence in any court or in any legal proceedings or before the

Appeals Board in respect of any matter coming to his or her knowledge in the exercise of functions under that Act.²⁴⁴

CONCLUSION

4.153 These provisions are inconsistent with the UEA provisions in relation to competence and compellability which operate as a code. Nevertheless, section 8 of the UEA will preserve their operation.

SPECIFIC EVIDENTIARY REGIMES

SENTENCING

4.154 The finding of guilt or the guilty plea of a defendant in a criminal proceeding establishes only the basic factual elements of the offence charged. Alone, these facts do not provide an adequate basis for sentencing. Where sentencing follows a trial, the evidence given at trial as to the facts surrounding the commission of the offence may be used to inform the sentencing decision. Where there has been a guilty plea, the material before the court may be more limited. Whether sentence is to be imposed following a guilty plea, or after conviction at trial, further evidence will usually be led on the hearing of the plea in mitigation. This can include evidence of the personal circumstances of the defendant.

4.155 There is generally a relaxation of requirements of proof and the laws of evidence in sentencing proceedings. However, unlike other states, no provision exists in Victoria that courts are not bound by the rules of evidence in sentencing proceedings.²⁴⁵ To a large extent, matters are put to the court by consent of the parties.

4.156 The relaxation of the rules of evidence in sentencing proceedings is subject to the common law rule that: ‘the judge may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt’.²⁴⁶

The counterpoint to this is that matters put in mitigation must be established by the defendant on the balance of probabilities.²⁴⁷

244 *Police Regulation Act 1958* s 86J(5).

245 Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999) [2.303].

246 *R v Storey* [1998] 1 VR 359, 371.

247 *Ibid.*

4.157 In Victoria, in addition to the general common law rules, there are a number of evidentiary provisions in the *Sentencing Act 1991* and the *Children and Young Persons Act 1989*²⁴⁸ which operate at the sentencing stage of criminal proceedings.

4.158 In UEA jurisdictions, section 4(2) provides that the Act only applies in sentencing proceedings where the court gives a direction. The court must make a direction if a party applies for such a direction and the court is of the opinion that:

- the fact sought to be proved by the evidence is or will be significant in determining a sentence to be imposed,²⁴⁹ or
- the court considers it appropriate to do so in the interests of justice.²⁵⁰

REPORTS TO THE COURT

4.159 Provision is made in the Sentencing Act, Magistrates' Court Act and the Children and Young Persons Act for the court to order reports to be prepared for admission in evidence to assist in the sentencing process.

4.160 Reports which may be ordered include pre-sentence reports, drug treatment order reports, drug and alcohol assessment reports, home detention assessment reports, and reports from the authorised psychiatrists of an approved mental health facility. For example, section 96 of the Sentencing Act allows, and in some instances requires, the court to order a report to establish the suitability of various sentencing options:

- (1) If a court finds a person guilty of an offence it may, before passing sentence, order a pre-sentence report in respect of the offender and adjourn the proceeding to enable the report to be prepared.
- (2) A court must order a pre-sentence report if it is considering making a combined custody and treatment order, an intensive correction order, a youth training centre order, a youth residential centre order or a community-based order so that it may—
 - (a) establish the person's suitability for the order being considered; and
 - (b) establish that any necessary facilities exist; and
 - (c) if the order being considered is an intensive correction order or a community-based order, gain advice concerning the most appropriate program condition or conditions to be attached to the order.

248 To be replaced by *Children, Youth and Families Act 2005* pt 5.2, div 5.

249 UEA s 4(3).

250 UEA s 4(4).

- (3) If a court orders a pre-sentence report, it must be prepared by—
 - (a) the Secretary if the court is considering making a youth training centre order or a youth residential centre order; or
 - (c) the Secretary to the Department of Justice in any other case.
- (4) The author of a pre-sentence report must conduct any investigation that he or she thinks appropriate or that is directed by the court.

4.161 This and similar provisions are accompanied by procedural requirements which provide for the completed report to be distributed to the parties, and for the parties to file a notice of intention to dispute the whole or part of the report. If such a notice is filed, the court is not to take account of the disputed contents of the report unless an opportunity has been given to lead evidence on the disputed matters and to cross-examine the author of the report.²⁵¹

4.162 These provisions are unusual in an adversarial system in that they provide for the court to obtain evidence, rather than leaving the parties to present evidence. They also allow the reception of evidence in an informal form likely to contain hearsay and opinion. The provisions are, however, consistent with the general relaxation of evidentiary requirements at the sentencing phase of the criminal process, with the ability to invoke formal requirements of proof if matters are disputed.

4.163 The provisions in relation to counselling orders under the *Crimes (Family Violence) Act 1987* are similar.²⁵² While not dealing with a sentencing situation, these provisions allow for reports to be obtained and admitted where an intervention order has been granted against a person in order to determine whether counselling orders should be made.

Conclusion

4.164 In sentencing proceedings under the UEA, if no direction is given under section 4, no inconsistency arises between the pre-sentence report provisions and the UEA because the UEA will not apply. Similar provisions regarding sentencing reports exist in NSW and operate without any apparent difficulty.²⁵³

251 See, eg, *Sentencing Act 1991* ss 98–9.

252 *Crimes (Family Violence) Act 1987* pt 2A.

253 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 68–69, 80–81, 88–89 relate to assessment reports which are similar to pre-sentence reports.

4.165 If a party takes issue with the contents of a pre-sentence report in a sentencing hearing, the Sentencing Act prescribes methods of disputing the contents of the report and requiring formal evidence. Within the scheme of the provisions it is unclear whether there is scope for objection to be taken to the admissibility of the report. If application was made under section 4(3) of the UEA for the Act to apply to the admission of a pre-sentence report prepared pursuant to section 96 of the Sentencing Act, section 8 of the UEA would still preserve the operation of the Sentencing Act provisions. To the extent that those provisions allow objection to the admission of evidence in reports on evidentiary grounds, the UEA admissibility rules would then apply.

HOSPITAL ORDERS

4.166 The Sentencing Act makes particular provision for the situation where a person is found guilty and it appears to the court that the person may be mentally ill and require treatment. Three types of orders may be made by the court: assessment orders; diagnosis, assessment and treatment orders; or hospital orders. The making of each order is conditional upon the court receiving either a certificate, a report, or both, from the authorised psychiatrist.²⁵⁴ The Sentencing Regulations 2002 prescribe the form of these certificates and reports.²⁵⁵ However, there is no further provision about how such certificates and reports are obtained or their admission in evidence.²⁵⁶

Conclusion

4.167 On the assumption that the material under the above sections is evidence admitted in sentencing proceedings, if an application was made under section 4 of the UEA for the Act to apply to the admission of this evidence, section 8 will preserve the operation of the Sentencing Act provisions. To the extent that evidentiary rules would apply, the UEA would allow evidentiary disputes to be resolved under the UEA provisions rather than the common law.

254 *Sentencing Act 1991* ss 90(c), 91(b), 91(c), 92, 93(1)(b), 93(1)(c). Note that the *Sentencing and Mental Health Acts (Amendment) Act 2005* makes amendments to these sections. These amendments had not commenced at the time of writing.

255 *Sentencing Regulations 2002* rr 11, 12.

256 See the difficulties that arose in *R v McMahon* [2002] VSC 244.

VICTIM IMPACT STATEMENTS

4.168 Victim impact statements are written, or written and oral, statements made by a person or body that has suffered injury, loss or damage as a direct result of an offence. Victim impact statements may be made and admitted in proceedings under the Sentencing Act²⁵⁷ and the Children and Young Persons Act.²⁵⁸

4.169 Under these provisions, objection may be taken to the admission of any part or the whole of a victim impact statement, and the court may rule part or all of a statement to be inadmissible. However, an objection needs to be more than one of form. In *R v Dowlan*, Justice Charles observed:

It would be quite destructive of the purpose of these statements if their reception in evidence were surrounded and confined by the sorts of procedural rules applicable to the treatment of witnesses in commercial cases. The reception of victim impact statements must, it seems to me, be approached by sentencing judges with a degree of flexibility; subject, of course, to the overriding concern that, in justice to the offender, the judge must be alert to avoid placing reliance on inadmissible matter. If objection is taken, on a matter of substance, to any part of the statement, the judge should either rule it inadmissible or make it clear, during the plea or in sentencing reasons, that no reliance would be, or was being, placed on that part of the statement.²⁵⁹

Conclusion

4.170 State UEA jurisdictions have similar provisions to Victoria in relation to victim impact statements.²⁶⁰ These provisions operate in the context of section 4 of the UEA.

4.171 The provisions in relation to victim impact statements would not conflict with provisions of a UEA if enacted in Victoria. Where objection is taken to the admissibility of certain parts of a statement, application should be made under section 4(2) for the UEA to be applied to the evidence objected to. If the court considers that

257 *Sentencing Act 1991* pt 6, div 1A.

258 *Children and Young Persons Act 1989* s 136A, to be replaced by *Children, Youth and Families Act 2005* s 359.

259 [1998] 1 VR 123, 140.

260 Eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 26–30A; *Sentencing Act 1997* (Tas) s 81A.

the evidence is significant in determining sentence, that application must be granted and admissibility determined in accordance with the UEA admissibility provisions.²⁶¹

ORDERS IN ADDITION TO SENTENCE

4.172 In addition to a sentencing regime, the Sentencing Act provides for applications to be made for restitution, compensation or cost recovery.²⁶² These provisions allow for certain findings of fact at the trial to be prima facie evidence on such an application.²⁶³ Evidence from the trial and depositions are also made admissible on some of these applications.²⁶⁴

4.173 Applications for compensation and the like are related to the main criminal proceeding but are not necessarily part of it. Where application is made by the victim rather than the Director of Public Prosecutions or police, the parties are not identical. Provisions are therefore required to make the evidence admitted in the main proceeding admissible on the application for these orders.

Conclusion

4.174 The commission has recommended that the Victorian UEA make clear that applications under these provisions are ‘proceedings relating to sentencing’ by the insertion of an additional subsection in section 4.²⁶⁵ Therefore, section 4 of the Victorian UEA would prevent the application of the Act unless application is made for it to apply. Were such application to be made, section 91 of the UEA would ordinarily prevent the admission of findings of fact from the trial in another proceeding. However, section 8 of the UEA will preserve the operation of the sections of the Sentencing Act which specifically provide for their admission and the admission of evidence from the trial on these applications. The admissibility of any further evidence sought to be led on these applications may be determined by the UEA if application is made for the Act to apply.

261 Difficulty arose in the NSW case of *R v Bourchas* (2002) 133 A Crim R 413, where evidence sought to be tendered by the Crown was objected to by the accused but no reference was made to the *Evidence Act 1995* (NSW) s 4. It is to be hoped that a greater awareness of the provisions of the UEA would prevent that situation arising.

262 *Sentencing Act 1991* pt 4.

263 *Sentencing Act 1991* s 85G(1)(c), 86(7), 87I(f).

264 *Sentencing Act 1991* s 84(7), 85G(1)(e), 86(8), 87H.

265 Recommendation 4, paras 2.14–2.16.

CRIMES MENTAL IMPAIRMENT

4.175 The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* creates a particular evidentiary regime for some of its processes.²⁶⁶ In investigations into a defendant's fitness to stand trial, the ordinary rules of evidence are abrogated in favour of a requirement to hear all relevant evidence. In addition, the court is empowered to call its own evidence, require the defendant to undergo examination, and admit the results of that examination.²⁶⁷ Procedures are set out whereby reports must be provided to the court on the mental condition of the person who is liable to be, or is, the subject of a supervision order.²⁶⁸

4.176 Where supervision orders have been made under the *Crimes (Mental Impairment and Unfitness to be Tried) Act*, the rules of evidence do not apply at the hearing of reviews and applications in relation to those orders.²⁶⁹ Provision is made for reports to be made by family members of the person, victims of the offence or in certain circumstances another person on behalf of the family member or the victim, to which the court must have regard.²⁷⁰ These are similar to victim impact statements in that they allow for family members or victims to address the court on the impact of the defendant's conduct, with provisions to allow the court to rule them inadmissible in whole or in part.²⁷¹

CONCLUSION

4.177 Hearings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act* are conducted by courts and would therefore ordinarily be subject to the provisions of the UEA by virtue of section 4. However, the abrogation of the rules of evidence to a greater or lesser extent in investigations and supervision order hearings will override the general application provision by virtue of section 8 of the UEA.

4.178 Aspects of the UEA may be reintroduced in two ways. The requirement in section 11 to hear all relevant evidence may import the relevance provisions of the

266 In 'special hearings' under the Act the rules of evidence remain unchanged: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 16(2)(d).

267 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 11(1).

268 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 41.

269 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* s 38.

270 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* ss 40(2)(d), 42.

271 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* ss 42(2) and 45.

UEA. The power of the court in section 45 to rule parts of reports inadmissible may import the admissibility provisions of the UEA.

4.179 As with other proceedings in which the court is not bound to apply the rules of evidence by statute, consideration needs to be given to whether the privilege provisions of the UEA should nevertheless remain applicable.²⁷²

VEHICULAR OFFENCE PROVISIONS

4.180 The Road Safety Act is one of the most complex pieces of Victorian legislation. It contains a large number of highly specific evidentiary provisions, including those in regard to proof of drug and alcohol related offences. These provisions are replicated in Acts such as the *Marine Act 1988* and the *Transport Act 1983*, which contain similar offences in relation to the operation of vehicles under the influence of drugs or alcohol.²⁷³

4.181 These Acts contain a number of presumptive provisions such as that a person returning a positive blood or breath test within three hours of an alleged offence had at the time of the offence a concentration of alcohol not less than that found on testing.²⁷⁴ As discussed,²⁷⁵ these presumptions form part of the substantive law and are not dealt with by the UEA. Other presumptive provisions more carefully prescribe the evidence required to rebut the presumption. For example, section 48(1AC) of the Road Safety Act which reads:

For the purposes of an alleged offence against paragraph (ba) of section 49(1) it must be presumed that a drug found by an analyst to be present in the sample of blood or urine taken from the person charged was not due solely to the consumption or use of that drug after driving or being in charge of a motor vehicle unless the contrary is proved by the person charged on the balance of probabilities by sworn evidence given by him or her which is corroborated by the material evidence of another person.²⁷⁶

272 See Recommendation 52; para 4.243.

273 *Marine Act 1988* ss 31–33; *Transport Act 1983* ss 96–99.

274 *Road Safety Act 1986* s 48(1); *Transport Act 1983* s 93(5); *Marine Act 1988* s 27(1).

275 See paras 4.24–4.26.

276 Similar provisions are found in the following sections: *Road Safety Act 1986* ss 48(1A), 48(1B); *Transport Act 1983* ss 93(6)–(6A); *Marine Act 1988* s 27(1A).

4.182 The legal burden on the issue is placed on the defendant, who must give sworn evidence in order to challenge the presumption (exposing them to cross-examination) and must provide corroborating evidence from another person.²⁷⁷

4.183 Certain evidence is admissible only for confined purposes. For example, section 49(6) of the Road Safety Act provides:

In any proceedings for an offence under paragraph (f) or (g) of sub-section (1) evidence as to the effect of the consumption of alcohol on the defendant is admissible for the purpose of rebutting the presumption created by section 48(1A) but is otherwise inadmissible.²⁷⁸

4.184 This provision allows the admission of evidence as to the effect of the consumption of alcohol on the defendant for the purposes of rebutting the presumption that the concentration of alcohol found was not due solely to consumption after driving the vehicle, but prevents admission for any other purpose.

4.185 Very prescriptive provisions relate to the admission of the results of scientific tests of breath, urine, blood and oral fluid. Certificates are admissible and are prima facie or even conclusive evidence of the facts and matters contained in them.²⁷⁹ In order to be admitted, some certificates must be served on the defendant at least 10 days before the trial or hearing.²⁸⁰ Some sections provide that a defendant must obtain the leave of the court before requiring the person who has given the certificate to attend for cross-examination and such leave is only to be granted where there is a reasonable possibility of error.²⁸¹ Provision is made for breath test certificates to be conclusive proof of a number of matters unless:

- the defendant gives notice that they require the person giving the certificate to be called as a witness, or

277 Contrary to UEA s 164.

278 Similar provisions are found in the following sections: *Road Safety Act 1986* s 49(6A); *Transport Act 1983* s 94(5); *Marine Act 1988* s 28(5A).

279 See *Road Safety Act 1986* ss 57(3)–(4B), 57A(3)–(5), 57B(3)–(4), 58(2); *Transport Act 1983* s 98(3)–(4B), 98A(3)–(5), 99(2); *Marine Act 1988* ss 32(3)–(4), 33(2).

280 *Road Safety Act 1986* ss 57(5), 57A(6), 57B(5); *Transport Act 1983* ss 98(5), 98A(6); *Marine Act 1988* s 32(5).

281 *Road Safety Act 1986* ss 57(7)–(7A), 57A(8)–(9), 57B(8)–(9); *Transport Act 1983* ss 98(7)–(8), 98A(8)–(9); *Marine Act 1988* ss 32(7)–(8).

- they intend to call evidence to rebut it in which case the certificate is still admissible but not conclusive.²⁸²

4.186 The admission of test results in proceedings outside the Act is limited. For example section 56(6) of the Road Safety Act provides:

If a sample of a person's blood is taken in accordance with this section, evidence of the taking of it, the analysis of it or the results of the analysis must not be used in evidence in any legal proceedings except—

(a) for the purposes of section 57; or

(b) for the purposes of the Transport Accident Act 1986—

but may be given—

(c) to the Transport Accident Commission under the Transport Accident Act 1986 and, for the purposes of applications relating to that Act, to the Victorian Civil and Administrative Tribunal; and

(d) to the Corporation for the purposes of accident research.²⁸³

4.187 A number of provisions allow the admission of evidence from prescribed devices used in the prescribed manner as prima facie evidence of speed,²⁸⁴ mass,²⁸⁵ disobedience of traffic signals,²⁸⁶ or driving of unregistered vehicle.²⁸⁷ This evidence is usually rendered admissible in certificate form.²⁸⁸ Provision is also made under the Road Safety Act for evidence of average speed between two points to be given as evidence of speed and for a surveyor's certificate as to the distance to be admitted.²⁸⁹

282 *Road Safety Act 1986* ss 58(2), 58(2D); *Transport Act 1983* ss 99(2), 99(6); *Marine Act 1988* s 33(2), 33(2D).

283 Similar provisions are found in the following sections: *Road Safety Act 1986* ss 57A(11), 57B(11); *Transport Act 1983* s 97(5); *Marine Act 1988* s 31A(5).

284 *Marine Act 1988* s 88; *Road Safety Act 1986* ss 79, 81.

285 *Road Safety Act 1986* s 82.

286 *Road Safety Act 1986* s 80.

287 *Road Safety Act 1986* s 80A.

288 *Road Safety Act 1986* ss 83, 83A.

289 *Road Safety Act 1986* ss 78, 78A.

4.188 Numerous certificates are admissible in proceedings under the Road Safety Act as *prima facie* evidence including those issued under interstate or Commonwealth Acts.²⁹⁰ These facilitate the admission of evidence of matters such as registration.

CONCLUSION

4.189 The specific regime for the admission and exclusion of evidence in relation to vehicular offences conflicts to some extent with the admissibility provisions of the UEA. To the extent that it does so, section 8 of the UEA will preserve its operation. The commission has not identified any provisions in these Acts requiring amendment as a result of the introduction of the UEA.

MAGISTRATES' COURT CRIMINAL PROCEDURE PROVISIONS

4.190 The Magistrates' Court Act contains a number of provisions which are a mixture of procedural and evidentiary rules. In relation to summary offences, sections 37 and 37A set out detailed procedures which the informant may follow to either serve a brief of evidence or an outline of evidence on the defendant. Section 51 then provides that the hearing and determination of a summary offence be conducted in accordance with Schedule 2.

4.191 Schedule 2 contains further procedural provisions relating to discovery prior to the hearing. Clauses 5 and 6 of Schedule 2 contain provisions which may be used where the defendant does not appear. They allow for the statements contained in the brief of evidence or the outline of evidence served in accordance with sections 37 or 37A to be admitted in evidence. Clause 5 allows the statements of witnesses to be treated in the same way as oral evidence. The court retains the power to rule parts of the statement inadmissible just as it would rule such evidence inadmissible if given orally. Similar provision exists in the Magistrates' Court Act in relation to the County Court hearing an appeal from the Magistrates' Court where the appellant does not appear.²⁹¹

4.192 Clause 6 is a more recent inclusion in the Magistrates' Court Act. It allows the use of outlines of evidence.

6. Non-appearance of defendant—outline of evidence

(1) If—

290 *Road Safety Act 1986* ss 84(2),(4), (4B).

291 *Magistrates' Court Act 1989* s 86.

- (a) under section 41(2) or (3) the Court proceeds to hear and determine the charge in the defendant's absence; and
- (b) the informant has served an outline of evidence on the defendant in accordance with section 37A not less than 14 days before the mention date; and
- (c) the Court considers that the matters set out in the outline of evidence disclose the offence charged—

the following are admissible in evidence, despite the rule against hearsay—

- (d) the outline of evidence referred to in section 37A(1);
 - (e) any exhibit referred to in the outline of evidence.
- (2) Without limiting any other power conferred on the Court, if the Court considers that the matters set out in an outline of evidence do not disclose the offence charged, the Court may require the informant to provide additional evidence.
- (3) The additional evidence referred to in sub-section (2) is inadmissible unless—
- (a) it is in the form of written statements that comply with section 37A(3); and
 - (b) a copy of each statement has been served on the defendant not less than 14 days before the Court considers the additional evidence.
- (4) The Court must reject a statement, or any part of a statement, tendered in a proceeding if the statement or part is inadmissible because of this clause.
- (5) The Court may rule as inadmissible the whole or any part of an outline of evidence, a statement or an exhibit...

4.193 This provision goes beyond allowing evidence to be given in written form.²⁹² It allows the court to admit evidence in a document which may not have been admissible if it were given orally by the author. This is inconsistent with the admissibility provisions of the UEA, however, section 8 will preserve its operation.

4.194 Section 56 of the Magistrates' Court Act requires that committal proceedings be conducted in accordance with Schedule 5. Schedule 5 contains a number of procedural provisions for the conduct of committal proceedings. Two aspects are of particular significance. First, defendants must give notice of their intention and then obtain the leave of the court to cross-examine prosecution witnesses.²⁹³ Secondly, non-oral evidence is admissible on proof of service on the defendant in accordance with the

292 See paras 4.60–4.65.

293 *Magistrates' Court Act 1989* sch 5, cls 12, 13.

provisions for service of prosecution briefs. However, the court retains the power to rule any part of the evidence inadmissible and the defendant may seek leave to cross-examine the witness.²⁹⁴

4.195 Section 27 of the UEA provides that a ‘party may question any witness, except as provided by this Act’, using the language of a code. While other sections give the trial judge control over cross-examination, leave is not a general precondition. The requirement to obtain leave to cross-examine in committal proceedings is clearly in conflict with the UEA. Section 8 of the UEA will, however, preserve the operation of the schedule provisions.

4.196 One further matter for consideration is raised in relation to the committal provisions of the Magistrates’ Court Act. Committal proceedings fall within the definition of criminal proceedings under the UEA.²⁹⁵ Section 141 of the UEA provides for the standards of proof in criminal proceedings. These are readily applicable to criminal trials but not committal proceedings, as the matter to be determined by the magistrate on committal is whether there is evidence of sufficient weight to support a conviction for an indictable offence. On its proper construction, section 141 could not apply to committal proceedings because the magistrate is not considering whether ‘to find the case of the prosecution proved’.

4.197 Other evidentiary provisions in the Magistrates’ Court Act relating to criminal proceedings are the alibi notice requirement and the compulsory examination procedure. Section 47(1) of the Act provides:

A defendant who is represented by a legal practitioner must not without leave of the Court-

- (a) give evidence personally; or
- (b) adduce evidence from a witness-

in support of an alibi unless the defendant has given notice of alibi.

This is a procedural provision with evidentiary consequences and will be preserved by section 8 of the UEA.

294 *Magistrates’ Court Act 1989* sch 5, cl 18. Clause 41 of the Crimes (Sexual Offences) Bill 2005 contains an amendment to Schedule 5 of the *Magistrates’ Court Act 1989* which would prevent leave being granted to cross-examine complainants in sexual offence committal proceedings who are children or who have a cognitive impairment, if their statement has been served on the defendant.

295 See the definition of ‘criminal proceeding’ in the Dictionary of the UEA.

4.198 Section 56A of the Magistrates' Court Act provides for application to be made by an informant to examine a witness prior to committal. The provision can be used where a person has been charged and a witness refuses to make a statement. Where the application is granted the witness will be ordered to attend court and give evidence in chief. No cross-examination is permitted at that time, however, if a transcript of the examination under section 56A is sought to be tendered by the informant at committal, the defendant may seek leave to cross-examine the witness in the same way as other witnesses who have given statements.

4.199 The limitations on cross-examination conflict with the UEA, however, section 8 will preserve their operation.

WILLS AND PROBATE

4.200 A number of common law rules exist in relation to the evidence admissible in proceedings relating to deceased estates. In particular, rules exist in relation to extrinsic evidence of the intention of the deceased and construction of their will. In some instances these common law rules have been altered by statute. Part IV of the *Administration and Probate Act 1958* relates to testators' family maintenance applications. Section 94 of the *Administration and Probate Act* provides:

At the hearing of such application the Court shall inquire fully into the estate of the deceased, and for that purpose may—

- (a) summon and examine such witnesses as may be necessary; and
- (b) require the executor or administrator to furnish full particulars of the estate of the deceased; and
- (c) accept any evidence of the deceased person's reasons for making the dispositions in his or her will (if any) and for not making proper provision for the applicant, whether or not the evidence is in writing.

4.201 This provision overcomes both the general hearsay rule and the specific common law rules of admissibility in relation to evidence of the intention of the deceased.

4.202 In applications under section 21 of the *Wills Act 1997*, for the court to make or alter a will for a person lacking testamentary capacity, the court is not bound by the rules of evidence.²⁹⁶

296 *Wills Act 1997* ss 22, 27.

CONCLUSION

4.203 To the extent that specific evidentiary provisions in administration and probate proceedings are inconsistent with the admissibility provisions of the UEA, its operation will be preserved by section 8.

4.204 Where it is provided that the court is not bound to apply the rules of evidence, consideration needs to be given to whether the privilege provisions of the UEA should nevertheless remain applicable.²⁹⁷

MISCELLANEOUS PROVISIONS

RIGHT OF DEFENDANT TO HAVE THIRD PERSONS BEFORE COURT

4.205 Almost identical provisions exist in section 43 of the *Dangerous Goods Act 1985* and section 46 of the *Food Act 1984* which allow a defendant charged with an offence under the Act to have another person brought before the court who they allege is responsible for the offence. In that instance, the original defendant is to file a charge against the person they allege is responsible. The original defendant is therefore a defendant and prosecutor in a single hearing

4.206 On such a hearing, the original informant and the third person brought before the court by the original defendant are permitted to cross-examine the defendant's witnesses, including the defendant, if he or she chooses to give evidence.²⁹⁸ They are also able to call evidence in rebuttal. Each defendant is liable to conviction at the hearing.

CONCLUSION

4.207 The provisions regarding cross-examination and evidence in rebuttal clarify the position of the third person charged and brought before the court by the original defendant. This does not conflict with the provisions of the UEA which would allow this to occur in any event.

297 See Recommendation 52; para 4.243.

298 *Dangerous Goods Act 1985* s 43(4); *Food Act 1984* s 46(4).

COURT FINDINGS AND ORDERS

4.208 Findings of fact from other proceedings are generally not admissible as evidence of those facts. Outside the proceeding in which they are made, such findings are matters of judicial opinion which have a determinative effect only between the parties to the original proceeding. In the case of *Hollington v Hewthorn & Co Ltd*, it was held that a conviction for a criminal offence was not admissible in civil proceedings to prove the facts and circumstances of the offence.²⁹⁹

4.209 Provision is made in some Victorian Acts for findings of fact by a court in one proceeding to be admitted as evidence of those facts in subsequent proceedings. Section 90 of the Evidence Act is one such section which operates generally to allow evidence of conviction in criminal proceedings to be admissible in civil proceedings as evidence of the commission of the offence. Other provisions operate in more specific circumstances. For example, section 7 of the *Petroleum Retail Selling Sites Act 1981* provides:

(1) Where a person suffers loss or damage by reason of another person contravening or failing to comply with a provision of this Act or the regulations, the second-mentioned person is liable to compensate the first-mentioned person who may recover the amount of the compensation by action in the Court.

....

(3) A certified copy of a court order convicting a person for contravening or failing to comply with a provision of this Act or the regulations shall be evidence of such contravention or failure to comply in any proceedings for compensation brought under this Act.

CONCLUSION

4.210 The commission has recommended that section 90 of the Evidence Act be repealed in favour of sections 91 and 92 of the UEA.³⁰⁰ Those sections set out the general rule that evidence of the decisions or of a finding of fact in a proceeding are not admissible to prove the existence of a fact that was in issue in that proceeding, and also the exception for the admission of evidence of criminal convictions in civil cases.

299 [1943] KB 587.

300 See Recommendation 37; Appendix 3.

4.211 While these provisions of the UEA could effectively replace section 7 of the Petroleum Retail Selling Sites Act, other specific provisions are in conflict with section 91 of the UEA. For example, section 47B of the Dangerous Goods Act provides for application to be made for forfeiture and disposal of explosives. In so ordering, the court is also empowered to make findings of fact as to the quantity and nature of the explosives. Those findings of fact are then rendered conclusive evidence of the facts found in subsequent proceedings.³⁰¹ Those provisions which are inconsistent with the UEA will be preserved by section 8.

CHOICE OF LAW

4.212 There are some provisions in Victorian statutes which specify that a different law of evidence is to be applied in proceedings than would ordinarily be the case, or which clarify the law to be applied where it might otherwise be unclear. Clause 3 of Schedule 1 of the *Crimes at Sea Act 1999* specifies the laws of criminal investigation, procedure and evidence to be applied under the Act. Where a judicial proceeding has been initiated by a Commonwealth authority or concerns an investigation by a Commonwealth authority, Commonwealth evidence law applies. Where the proceeding is brought by a state authority, or concerns an investigation by a state authority, the law of the state applies.

4.213 The applicable law of evidence is determined by the involvement of the authority rather than the court in which it is brought, or the legislation under which a charge is made. While at times this provision will have the same result as the ordinary law, it could lead to different results in some circumstances.

4.214 The *Jurisdiction of Courts (Cross-Vesting) Act 1987* provides that where a Victorian court is exercising jurisdiction over a matter conferred by that Act:

the rules of evidence and procedure to be applied in dealing with that matter shall be such as the court considers appropriate in the circumstances, being rules that are applied in a superior court in Australia or in an external Territory.³⁰²

CONCLUSION

4.215 If the provisions of the Crimes at Sea Act resulted in a Victorian court applying the evidence law of another jurisdiction, it would conflict with the Victorian

301 *Dangerous Goods Act 1985* s 47B(6).

302 *Jurisdiction of Courts (Cross-Vesting) Act 1987* s 11(1)(c).

UEA. The provision would continue to operate, both by virtue of section 8 of the UEA and the provisions themselves which provide that they prevail over any inconsistent Act.³⁰³

4.216 Similarly, section 11 of the Jurisdiction of Courts (Cross-Vesting) Act may result in a Victorian court applying the evidence law of another state. To that extent, it would be inconsistent with section 4 of the UEA, however, section 8 will preserve the operation of this provision to allow the court to apply whichever law it considered more appropriate.

CODES OF PRACTICE

4.217 In some areas of government regulation a new form of quasi-legislative instrument has emerged: the approved code of practice. Provision is made within Acts for codes of practice to be approved by the relevant minister and published. While they are not binding in themselves, provision is made for their use in evidence in proceedings for breach of provisions of the Act. Section 60 of the Dangerous Goods Act provides a typical example:

If in any proceedings under this Act it is alleged that a person contravened a provision of this Act in relation to which an approved code of practice was in effect at the time of the alleged contravention—

- (a) the approved code of practice is admissible in evidence in those proceedings; and
- (b) if the court is satisfied in relation to any matter which it is necessary for the prosecution to prove in order to establish the alleged contravention that—
 - (i) any provision of the approved code of practice is relevant to that matter; and
 - (ii) the person failed at any material time to observe that provision of the approved code of practice—

that matter must be taken as proved unless the court is satisfied that in respect of that matter the person complied with that provision of this Act otherwise than by way of observance of that provision of the approved code of practice.

4.218 Proof of breach of an Act is ordinarily a matter of breach of the terms of the Act itself without reference to any extrinsic material as to what may constitute a breach. A code of practice would not ordinarily be relevant or admissible. Under this

303 *Crimes at Sea Act 1999* cl 3(3), sch 1.

provision, the code is made admissible regardless of relevance and, once admitted, serves as evidence as to how the Act may be complied with. Failure to comply with the code serves to create a rebuttable presumption of failure to comply with the Act and the onus of proof is shifted.

CONCLUSION

4.219 These provisions are inconsistent with the UEA in that they permit the admission of the codes which might not otherwise meet the test of logical relevance under the UEA.³⁰⁴ Section 8 of the UEA will allow for the continued operation of these sections.

STAMP DUTY

4.220 Section 272 of the *Duties Act 2000* provides:

(1) An instrument that effects a dutiable transaction or is chargeable with duty under this Act is not available for use in law or equity for any purpose and may not be presented in evidence in a court or tribunal exercising civil jurisdiction unless—

(a) it is duly stamped; or

(b) it is stamped by the Commissioner or in a manner approved by the Commissioner.

(2) A court or tribunal may admit in evidence an instrument that effects a dutiable transaction, or is chargeable with duty in accordance with the provisions of this Act, and that does not comply with sub-section (1)—

(a) if the instrument is after its admission transmitted to the Commissioner in accordance with arrangements approved by the court or tribunal; or

(b) if (where the person who produces the instrument is not the person liable to pay the duty) the name and address of the person so liable is forwarded, together with the instrument, to the Commissioner in accordance with arrangements approved by the court or tribunal.

(3) A court or tribunal may admit in evidence an unexecuted counterpart of an instrument that effects a dutiable transaction, or is chargeable with duty in accordance with the provisions of this Act, if the court or tribunal is satisfied that—

304 UEA s 55.

(a) the instrument of which it is a counterpart is duly stamped, or is stamped in a manner approved by the Commissioner; or

(b) the counterpart is duly stamped under section 263.

4.221 Similar provisions have existed in Victorian legislation for decades.³⁰⁵ The provisions create an evidentiary rule as a means of enforcing the requirement to pay duty on instruments. The operation of this provision extends to federal courts as section 9(3)(b) of the *Evidence Act 1995* (Cth) provides:

(3) For the avoidance of doubt, this Act does not affect a law of a State or Territory so far as the law provides for:

(b) the admissibility of a document to depend on whether stamp duty has been paid;...

CONCLUSION

4.222 As a rule affecting admissibility, this provision is inconsistent with the admissibility code of the UEA. However, section 8 will preserve its operation in state courts and section 9(3)(b) of the Commonwealth Act will preserve its operation in federal courts.

ROAD MANAGEMENT ACT 2004

4.223 The *Road Management Act 2004* sets out a procedure to be followed where an incident arises out of the condition of a public road. A person proposing to bring proceedings as a result of such an incident is required to give notice to the responsible road authority within 30 days of the incident to enable the authority to prepare a report on the condition of the road. That report is admissible in court proceedings.³⁰⁶ Section 115(4) of the Act then provides:

(4) If a person fails to give notice under this section and a report is not prepared under section 116, a court may in any proceeding based on a claim in relation to an incident arising out of the condition of a public road or infrastructure take the failure into account in deciding the weight to be given to evidence about that condition at the time of the incident having regard to—

(a) the reason why notice was not given;

305 *Stamps Act 1958* s 8 was to similar effect.

306 *Road Management Act 2004* ss 115, 116(5).

- (b) the length of the delay;
- (c) the extent of any prejudice caused to the road authority in the proceeding;
- (d) any other matter relevant in the interests of justice in the proceeding.

CONCLUSION

4.224 This provision does not affect admissibility, rather it directs the fact-finding process. Therefore no conflict arises between the provision and the UEA.

CRIMES (CONTROLLED) OPERATIONS ACT 2004

4.225 The *Crimes (Controlled Operations) Act 2004* was enacted as part of a scheme to introduce uniform model laws across jurisdictions concerning criminal investigations. At the time of writing, the Act had not commenced and is awaiting the enactment of cross-border model laws in other states and territories.

4.226 The Act provides a scheme whereby law enforcement agencies can be authorised to engage in criminal conduct for the purposes of investigating crime and gathering evidence. The main evidentiary provisions in the Act are subsections 4(2) and (3) which provide:

- (2) subject to sub-section 3, this Act is not intended to limit a discretion that a court has—
 - (a) to admit or exclude evidence in any proceedings; or
 - (b) to stay criminal proceedings in the interests of justice.
- (3) In determining whether evidence should be admitted or excluded in any proceedings, the fact that the evidence was obtained as a result of a person engaging in criminal activity is to be disregarded if—
 - (a) the person was a participant or corresponding participant acting in the course of an authorised operation or corresponding authorised operation; and
 - (b) the criminal activity was controlled conduct within the meaning of this Act or controlled conduct within the meaning of a corresponding law.

4.227 The provision is designed to overcome the problem of evidence being excluded on the basis that it was illegally obtained where the person was authorised to engage in that criminal activity under the Act. That Act inserts similar provisions in the Fisheries Act and the Wildlife Act.

CONCLUSION

4.228 Section 138 of the UEA relates to the exclusion of illegally obtained evidence. Such evidence is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting the evidence that has been obtained in that way. The provision requires the court to disregard the criminal conduct where it was authorised under the Act in making a ruling as to its admissibility. This would in some cases exclude the operation of section 138, however, the general discretions in sections 135–7 of the UEA would still apply. The operation of this provision would be preserved by section 8 of the UEA.

EXCLUSION OF EVIDENTIARY RULES

4.229 There are a several bodies in Victoria created by statute which hear evidence and are not courts. The Acts creating those bodies often contain a general provision that the body is not bound by the rules of evidence such as the following in section 47 of the *Veterinary Practice Act 1997*:

At a formal or informal hearing—

- (a) subject to this Part, the procedure of a panel is in its discretion; and
- (b) the proceedings must be conducted with as little formality and technicality as the requirements of this Act and the proper consideration of the matter permit; and
- (c) a panel is not bound by rules of evidence but may inform itself in any way it thinks fit; and
- (d) a panel is bound by the rules of natural justice.

4.230 Courts are also directed that they are not bound by the laws of evidence in certain instances. For example, section 44(1) of the *Accident Compensation Act 1985* provides:

In proceedings under this Act or the *Workers Compensation Act 1958*, the County Court is not bound by the rules or practice as to evidence, but may inform itself in any manner it thinks fit and may take evidence in writing or orally.

4.231 There are also a number of provisions where the court is directed to ‘hear any relevant evidence tendered’, for example, section 42 of the Food Act:

- (1) A person who is aggrieved by a decision of a registration authority refusing to grant an application for or for the renewal of the registration of any food premises under this Act or suspending or revoking any such registration may appeal to the Magistrates’ Court within one month after receiving notification of the refusal, suspension or revocation.

(2) Upon an appeal under sub-section (1) the court shall—

(a) reconsider the decision of the registration authority; and

(b) hear any relevant evidence tendered whether by the person aggrieved or by the registration authority...

4.232 In these situations the court is acting much like an administrative tribunal. In other situations a court is permitted to take into account any material it thinks fit. For example, section 33 of the *Confiscation Act 1997* permits the court on an application for a forfeiture order under section 32 to:

take into account in determining the application any material that it thinks fit, including evidence given in any proceeding relating to the offence in reliance on the conviction of which the application is made ...³⁰⁷

4.233 Another partial lifting of evidentiary rules in a court context is provided by section 5A(1) of the *Valuation of Land Act 1960* which provides:

Unless otherwise expressly provided where pursuant to the provisions of any Act a court board tribunal valuer or other person is required to determine the value of any land, every matter or thing which such court board tribunal valuer or person considers relevant to such determination shall be taken into account ...

4.234 This provision overcomes a number of evidentiary problems in valuation evidence, including the hearsay basis of most expert valuation evidence.

CONCLUSION

4.235 The terms of the UEA do not apply to tribunals and other quasi-judicial bodies. There is no conflict between provisions which relieve them from being bound by the rules of evidence and the UEA.

4.236 Provisions which lift the rules of evidence in court proceedings, however, conflict with the terms of section 4 of the UEA, which applies the UEA to all court proceedings. The commission recommends that a note be included in section 4 of the Victorian UEA setting out the major instances where courts are not bound by the rules of evidence and pointing to the fact that section 8 will preserve that situation despite the general language of section 4.³⁰⁸

307 *Confiscation Act 1997* s 33(4).

308 Recommendation 4.

4.237 There is, however, a further complication. In an article devoted to the effect of this type of provision, Justice Giles commented that ‘the few words by which the rules of evidence are typically dispensed with are deceptively simple’.³⁰⁹ A number of issues arise from these provisions, such as whether regard may at times be had to the rules of evidence, what constitutes the ‘rules of evidence’ and what does not, and what are the limitations on the reception of evidence if any.³¹⁰

4.238 It is clear that the provisions dispense with certain rules of evidence such as the hearsay rule, the rule in *Hollington v Hewthorn*, and the ‘best evidence’ rule.³¹¹ It is equally clear that sections providing that a court or body is not bound by the rules of evidence do not to exclude the operation of common law privileges as they are not merely ‘rules of evidence’.³¹²

4.239 The UEA effectively codifies the application of common law privileges in court proceedings. The privilege provisions therefore could be viewed as ‘rules of evidence’. Provisions which exclude the ‘rules of evidence’ in court proceedings could therefore exclude the privilege provisions of the UEA. Statutory privileges in the UEA with no common law equivalent would not be available, and courts would once again be faced with having to apply the common law privileges rather than the UEA.

4.240 The commission believes this is an undesirable outcome and therefore recommends that these sections be amended to provide that the court remains bound by the provisions of Part 3.10 of the UEA in these proceedings.

4.241 The commission has also considered whether other provisions of the UEA should nevertheless remain applicable in proceedings where courts are not bound by the rules of evidence. Potentially, this could include provisions such as those relating to competence and compellability;³¹³ examination of witnesses;³¹⁴ and facilitation of proof provisions.³¹⁵ While a case can be made for the application of these provisions in all court proceedings without exception, the commission does not believe it is

309 Justice Roger Giles, ‘Dispensing with the Rules of Evidence’ (1990) 7 *Australian Bar Review* 233, 247.

310 Ibid 236.

311 Ibid 239–40, citing among others *Wajnberg v Raynor* [1971] VR 665 and *Re Habchi and Minister for Immigration and Ethnic Affairs* (1980) 43 FLR 230; 2 ALD 623.

312 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Baker v Campbell* (1983) 153 CLR 52.

313 UEA ss 12–19.

314 In particular, UEA s 41.

315 See UEA pts 4.2, 4.3.

necessary to legislate to allow courts to effectively take the same approach to evidence as provided for under these sections while not being bound by them. Courts remain bound by the rules of natural justice, and the mere exclusion of the rules of evidence does not prohibit courts from adopting similar principles in the reception of evidence. Although in a dissenting judgment the following passage by Justice Evatt has been cited on a number of occasions with approval:

Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, 'bound by the rules of evidence'. Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of enquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of enquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'.³¹⁶

4.242 The need to include the UEA privilege provisions arises both to replace common law privileges which would otherwise apply and to continue the operation of the statutory privileges which would not necessarily arise by reason of natural justice considerations.

4.243 A list of all provisions which currently provide that courts are, to a greater or lesser extent, not bound by the rules of evidence in certain proceedings is found in Appendix 11. The partial lifting of the rules of evidence in some provisions does not require amendment to be made as this will not exclude operation of the privilege provisions of the UEA. Where the provision specifies that a court is 'not bound by the rules of evidence' amendment is usually required. Provisions which state that the court is to 'hear all relevant evidence', are more uncertain in their operation. They could be taken to allow the admission of all relevant evidence without the application of any of the exclusionary rules in the UEA. In the event that is their effect, amendment may be needed in some cases to ensure this does not exclude the operation of the UEA privilege provisions.

316 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 256.

! RECOMMENDATION

52. The following provisions should be amended as specified in Appendix 11 on the introduction of a Victorian UEA:

- *Accident Compensation Act 1985* s 44;
- *Bail Act 1977* s 8;
- *Children and Young Persons Act 1989* s 82;³¹⁷
- *Children Youth and Families Act 2005* s 215;
- *Confiscation Act 1997* ss 33, 59, 64;
- *Crimes (Family Violence) Act 1987* s 13A;
- *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* ss 11, 38;
- *Electoral Act 2002* s 127;
- *Food Act 1984* ss 19, 19B, 42;
- *Magistrates' Court Act 1989* ss 4G, 103(2);
- *Marine Act 1988* s 125;
- *Prostitution Control Act 1994* s 80(3A);
- *Road Safety Act 1986* ss 12(2)(b), 15A(8)(b), 16E(3)(b), 26(2)(b), 26A(2)(b), 33(15)(b), 50(5)(a), 50AAB(6)(a), 51(10B);
- *Sentencing Act 1991* ss 89(3E)(a), 89B(5)(a);
- *Wills Act 1997* ss 22, 27.

CONSEQUENTIAL AMENDMENTS

4.244 Reference is made to the provisions of the Evidence Act in a large number of Victorian statutes. The recommendations of the commission in relation to the provisions of the Evidence Act are twofold. Ultimately, the recommendations would result in the repeal of the entire Act, with some provisions being re-enacted elsewhere. However, the staged process recommended by the commission would see the retention

317 To be replaced by the *Children, Youth and Families Act 2005*.

of some provisions in the Evidence Act until such time as it can be ultimately repealed. The recommendations in relation to consequential amendments also reflect this staged approach.

REFERENCES TO ROYAL COMMISSIONS AND BOARDS OF INQUIRY PROVISIONS

4.245 The powers given to royal commissions and boards of inquiry by sections 14–21C of the Evidence Act are often picked up by other Acts to provide similar investigative powers to tribunals, panels, boards and others. For example, section 48 of the *Teaching Service Act 1981* which provides:

The provisions of sections 14, 15, 16 and 21A of the Evidence Act 1958 shall apply to and in relation to any investigation or proceedings which the Minister, Secretary, the delegate of the Minister or Secretary, a Merit Protection Board or a Disciplinary Appeals Board is authorized to conduct under this Act as if the Minister, Secretary, delegate, Merit Protection Board or Disciplinary Appeals Board were a Board appointed by the Governor in Council.

4.246 A number of Acts pick up these provisions in relation to the powers of disciplinary bodies for the health professions. The Department of Human Services recently conducted a review of the regulation of the health professions. Issues were raised about the summons provisions of the Evidence Act applied by Health Professions Acts.³¹⁸ The need for consistency was recognised. This review resulted in a new Act to govern the regulation of a range of health professions—the *Health Professions Regulation Act 2005*. This Act does not use the device of picking up the powers given to royal commissions by the Evidence Act. Disciplinary hearings may be conducted before panels appointed by the board for the relevant profession, or before the Victorian Civil and Administrative Tribunal. The Act repeals the Acts which individually govern the regulation of the health professions.³¹⁹ This will eliminate the need to make consequential amendments to these Acts.

CONCLUSION

4.247 For such time as the provisions relating to royal commissions and boards of inquiry are retained in the Evidence Act there is no need for consequential amendment. If the Evidence Act is renamed on the enactment of the UEA then

318 Department of Human Services, *Review of Regulation of the Health Professions in Victoria: Options for Structural and Legislative Reform* (2005).

319 At the time of writing the majority of the Act had not yet commenced.

consequential amendments to provisions which refer to it will be required.³²⁰ If a Royal Commissions Act is introduced which re-enacts the provisions of the Evidence Act in some form, then the relevant sections can be amended to refer to that Act. A list of the sections which would require amendment appears in Appendix 12.



RECOMMENDATION

53. The provisions in Appendix 12 should be amended as a consequence of the amendment or re-enactment of the royal commissions and boards of inquiry provisions of the *Evidence Act 1958*.

REFERENCES TO THE AUDIOVISUAL PROVISIONS

4.248 Several Acts contain references to the provisions of Part IIA of the Evidence Act relating to audiovisual links. For example, section 25(1) of the *Supreme Court Act 1986* gives the court power to make rules with respect to:

(eb) requirements for the purposes of Part IIA of the Evidence Act 1958 for or with respect to—

- (i) the form of audio visual or audio link;
- (ii) the equipment, or class of equipment, used to establish the link;
- (iii) the layout of cameras;
- (iv) the standard, or speed, of transmission;
- (v) the quality of communication;
- (vi) any other matter relating to the link;

(ec) applications to the Court under Division 2 or 3 of Part IIA of the Evidence Act 1958

...

CONCLUSION

4.249 As long as the provisions relating to audiovisual links and the like are retained in the Evidence Act, there is no need for amendment of the provisions which refer to them. If the Evidence Act is renamed on the enactment of the Victorian UEA, consequential amendments will be required to these provisions.³²¹ If an Evidence

320 Although reliance could be placed on the *Interpretation of Legislation Act 1984* s 16.

321 Although reliance could be placed on the *Interpretation of Legislation Act 1984* s 16.

(Transmission and Recording) Act is enacted which re-enacts the current Evidence Act provisions in some form, then consequential amendments would be required to refer to the provisions of the new Act. A list of the sections which would require amendment appears in Appendix 13.



RECOMMENDATION

54. The provisions in Appendix 13 should be amended as a consequence of the amendment or re-enactment of the audiovisual provisions of the *Evidence Act 1958*.

REFERENCES TO THE DOCUMENT PROVISIONS

4.250 References to the document provisions of the Evidence Act frequently occur with the successor in law provisions of bank merger or other succession Acts. For example, section 11 of the *National Australia Bank and Bank of New Zealand Act 1997* provides:

- (1) Any book or document which if this Part had not been enacted would have been evidence in respect of any matter for or against BNZ is, subject to this Part, to be admissible in evidence in respect of the same matter for or against National.
- (2) Without limiting sub-section (1), the books of account of BNZ are for the purposes of Division 3A of Part III of the Evidence Act 1958 deemed to be, and to have been, books of account used in the ordinary business of National.
- (3) For the purposes of this section, 'books of account' has the same meaning as in Division 3A of Part III in the Evidence Act 1958.

4.251 The principal section of the UEA which provides for admission of what is termed 'books of account' under the Evidence Act is section 69. This section provides an exception to the hearsay rule for business records. It is recommended above³²² that the sections of the Evidence Act in relation to books of account referred to be repealed, allowing the document provisions of the UEA to operate in their place.

CONCLUSION

4.252 The approach adopted in NSW and Tasmania has been to simply repeal the subsections which refer to the old 'books of account' provisions, while retaining the

322 Recommendation 37.

principal provision that evidence which would have been admissible for or against the previous entity will be admissible for or against the succeeding entity.³²³

4.253 A list of the sections which refer to the document provisions of the Evidence Act appears in Appendix 14 together with recommendations for their amendment or repeal upon the enactment of the Victorian UEA and the repeal of sections of the Evidence Act.

! RECOMMENDATION(S)

55. Section 301(6) of the *Water Act 1989* should be amended as specified in Appendix 14 on the introduction of a Victorian UEA.
56. The following provisions should be repealed, as specified in Appendix 14, on the introduction of a Victorian UEA:
 - *Australian and New Zealand Banking Group Act 1970* ss 8(1)–(2), 20(1)–(2);
 - *Australian and New Zealand Banking Group (NMRB) Act 1991* ss 10(2)–(3), 18(2)–(3), 19(2)–(3);
 - *Bank Integration Act 1992* s 20;
 - *Children, Youth and Families Act 2005* s 532(14)(a);
 - *Commonwealth Games Arrangements Act 2001* s 4ZE(2);
 - *Companies (Application of Laws) Act 1981* sch 1, cl 41;
 - *Construction Industry Long Service Leave Act 1997* ss 38(2)–(3);
 - *Electricity Industry (Residual Provisions) Act 1993* ss 75(2)–(3), 110(2)–(3), 128(2)–(3), 147(2)–(3), 153N(2)–(3), 153TK(2)–(3), 153TZB(2)–(3);
 - *Film Act 2001* ss 53(2)–(3);
 - *Gas Industry (Residual Provisions) Act 1994* ss 81(2)–(3), 126(2)–(3);
 - *Health Services Act 1988* ss 65K(2)–(3), 203(2)–(3), 218(2)–(3), 260(3)–(4);
 - *House Contracts Guarantee Act 1987* s 63(2);

323 *Evidence (Consequential and Other Provisions) Act 1995* (NSW); *Evidence (Consequential Amendment) Act 2001* (Tas).



RECOMMENDATION(S)

- *Magistrates' Court Act 1989* s 43(9)(a);
- *National Australia Bank and Bank of New Zealand Act 1997* ss 11(2)–(3);
- *National Mutual Royal Savings Bank Limited (Merger) Act 1987* ss 8(2)–(3);
- *Port Services Act 1995* ss 113(2)–(3), 161(2)–(3);
- *Project Development and Construction Management Act 1994* ss 58(2)–(3), 74(2)–(3);
- *Rail Corporations Act 1996* s 54(2);
- *State Bank (Succession of Commonwealth Bank) Act 1990* ss 16(2)–(3);
- *The Commercial Bank of Australia Limited (Merger) Act 1982* ss 10(2)–(3);
- *The Commercial Banking Company of Sydney Limited (Merger) Act 1982* ss 10(2)–(3);
- *Transfer of Land Act 1958* s 4, definition of reproduction;
- *Transfer of Land Act 1958* s 27D(7)(a);
- *Victorian Plantations Corporation Act 1993* ss 47(2)–(3);
- *Water Industry Act 1994* ss 166(2)–(3);
- *Water (Resource Management) Act 2005* s 115Q(2);
- *Westpac and Bank of Melbourne (Challenge Bank) Act 1996* ss 11(2)–(3), 22(2)–(3).

REFERENCES TO DEFINITIONS IN THE *EVIDENCE ACT 1958*

4.254 Certain definitions in the Evidence Act are picked up and applied in other legislation. For example, section 8 of the *Charities Act 1978* provides that: “document” has the same meaning as in the Evidence Act 1958’.

4.255 Two important defined phrases which are picked up are ‘legal proceedings’ and ‘persons acting judicially’. For example, section 65 of the Victims of Crime Assistance Act provides:

(1) Evidence of anything said on the hearing of, or of any document prepared solely for the purpose of, an application is not admissible in any civil or criminal proceeding in a court or tribunal or in any other legal proceeding within the meaning of the **Evidence Act 1958** except—

- (a) a proceeding before the Tribunal or arising out of a proceeding before the Tribunal; or
- (b) a proceeding for an offence against this Act; or
- (c) a proceeding for an offence against section 81, 82, 83 or 83A of the **Crimes Act 1958** (fraud) or for an offence of conspiracy to commit, incitement to commit or attempting to commit any such offence; or
- (d) a proceeding for an offence against sections 314(1) of the **Crimes Act 1958** (perjury) or for any other offence that involves an interference with the due administration of justice; or
- (e) with the consent of the person to whom the words or document principally refers or relates.

(2) A court, tribunal or person acting judicially within the meaning of the **Evidence Act 1958** may rule as admissible in a proceeding before them any matter inadmissible because of sub-section (1) if satisfied, on the application of a party to the proceeding, that it is in the interests of justice to do so.

4.256 Section 54(3) of the Interpretation of Legislation Act picks up three definitions from the Evidence Act.³²⁴

CONCLUSION

4.257 The amendments required to sections which refer to definitions in the Evidence Act depend on the definition to which they refer.

4.258 As the document provisions of the Evidence Act are to be repealed in favour of the UEA document provisions, sections which pick up the definition of ‘document’ in the Evidence Act should be amended to refer to the definition of ‘document’ in the UEA.

4.259 For such time as the Evidence Act remains in force after the introduction of the UEA, the definitions of ‘person acting judicially’ and ‘legal proceeding’ will remain in the Act and no amendment will be required to the sections which pick up those

324 These are ‘Act’, ‘Australasian State’ and ‘government printer’.

definitions. If the Evidence Act is renamed on the enactment of the UEA then consequential amendments will be required to a number of sections.³²⁵ When the entire Act is eventually repealed, these definitions should be re-enacted in the Interpretation of Legislation Act. Sections in other Acts which refer to these definitions should then be amended to refer to the definition in that Act rather than the Evidence Act. The definitions picked up in section 54(3) of the Interpretation of Legislation Act should also be re-enacted in that Act.

4.260 Appendix 15 sets out the provisions which make reference to definitions in the Evidence Act.



RECOMMENDATIONS

57. The following provisions should be amended to refer to the definition of document in the Victorian UEA:
 - *Australian and New Zealand Banking Group Act 1970* ss 7(2), 19(2);
 - *Charities Act 1978* s 8;
 - *Public Records Act 1973* s 2.
58. The definition of 'legal proceedings' should be inserted in the *Interpretation of Legislation Act 1984* and the following provisions amended to refer to it:
 - *Children and Young Persons Act 1989* ss 273(1), 274(1);³²⁶
 - *Children, Youth and Families Act 2005* ss 583(1), 584(1)(b);
 - *Corrections Act 1986* s 57A(1)(b);
 - *Terrorism (Community Protection Act) 2003* s 23(1);
 - *Victims of Crime Assistance Act 1996* s 65(1).
59. The definition of 'persons acting judicially' should be inserted in the *Interpretation of Legislation Act 1984* and the following provisions amended to refer to it:
 - *Education Act 1958* s 14B;

325 Although reliance could be placed on the *Interpretation of Legislation Act 1984* s 16.

326 To be replaced by *Children, Youth and Families Act* ss 583, 584.

! RECOMMENDATIONS

- *Infertility Treatment Act 1995* s 150;
- *Retail Leases Act 2003* s 89(4);
- *Victims of Crime Assistance Act 1996* s 65(2).

60. Definitions of 'Act', 'Australasian State' and 'government printer' should be inserted in the *Interpretation of Legislation Act 1984*.

REFERENCES TO AFFIDAVIT AND STATUTORY DECLARATION PROVISIONS

4.261 References to the affidavit and statutory declaration provisions of the Evidence Act appear in a number of other Acts.³²⁷ For example, section 75 of the Administration and Probate Act provides:

Registrars may exercise certain powers

(1) All registrars of the Magistrates' Courts may for the purposes of this Part administer oaths and take declarations and affirmations.

(2) In the absence of a registrar of the Magistrates' Court applicants under this Part may be sworn and execute any necessary documents before any person authorised under the **Evidence Act 1958**.

CONCLUSION

4.262 For such time as the provisions relating to affidavits and statutory declarations are retained in the Evidence Act, there is no need for amendment. If the Evidence Act is renamed on the enactment of the UEA, consequential amendments will be required to sections in other Acts which refer to it.³²⁸ If an Oaths Act is introduced which re-enacts the current Evidence Act provisions in some form, consequential amendments would be required to refer to the new Act. A list of the sections which would require amendment appears in Appendix 16.

327 *Evidence Act 1958* ss 123C–126A and ss 107–109 respectively.

328 Although reliance could be placed on the *Interpretation of Legislation Act 1984* s 16.

! RECOMMENDATION(S)

61. The provisions in Appendix 16 should be amended as a consequence of the amendment or re-enactment of the oaths provisions of the *Evidence Act 1958*.

REFERENCES TO TRANSCRIPT PROVISIONS

4.263 Limited reference is made in other Acts to the provisions of the Evidence Act for the recording and transcribing of evidence. One example is section 57(1) of the Coroners Act which provides that ‘Evidence must be recorded in accordance with section 131 of the *Evidence Act 1958*’.

CONCLUSION

4.264 For such time as the provisions relating to the recording and transcribing of evidence are retained in the Evidence Act, there is no need for amendment. If the Evidence Act is renamed on the enactment of the UEA then consequential amendments will be required.³²⁹ If an Evidence (Transmission and Recording) Act is introduced which re-enacts the current Evidence Act provisions in some form, consequential amendments would be required to refer to the new Act. A list of the sections which would require amendment appears in Appendix 17.

! RECOMMENDATION(S)

62. The provisions in Appendix 17 should be amended as a consequence of the amendment or re-enactment of the transcript provisions of the *Evidence Act 1958*.

OTHER REFERENCES TO THE EVIDENCE ACT 1958

4.265 Various other provisions of the Evidence Act are referred to in other legislation. These sections are identified and dealt with in Appendix 18.

4.266 There are instances in some Acts where the Evidence Act is referred to in its entirety. For example, section 21 of the *Securities Industry Act 1975*, after providing for the minister to compel those capable of giving information concerning a prosecution

329 Although reliance could be placed on the *Interpretation of Legislation Act 1984* s 16.

to give assistance in that prosecution, provides that: ‘Nothing in this section operates to diminish the protection afforded to witnesses by the **Evidence Act 1958**’.³³⁰ Such protections would include those in Part II of the Evidence Act.

CONCLUSION

4.267 As many of the provisions of Part II of the Evidence Act are to be repealed and replaced by sections of the UEA, sections such as section 21(9) of the Securities Industry Act will need to be amended. Until such time as the Evidence Act is repealed entirely, the commission recommends that these sections be amended to read:

Nothing in this section operates to diminish the protection afforded to witnesses by the *Evidence Act 1958* or the [Victorian UEA].

SECTION 57(3) CORONERS ACT 1958

4.268 Section 57 of the Coroners Act 1985 provides:

- (1) Evidence must be recorded in accordance with section 131 of the **Evidence Act 1958**.
- (2) If the evidence is recorded in writing, the record must be read to and signed by the witness.
- (3) Except as provided in section 55AB of the **Evidence Act 1958**, a record is not evidence in any court of any fact asserted in it.

4.269 A record of evidence given in a coronial inquest may therefore not be tendered as evidence of the facts asserted, other than in a criminal proceeding where the witness is dead or for some other reason not able to give evidence, with the proviso that the defendant must have had an opportunity to cross-examine the witness.

4.270 The origins of section 57(3) are unclear.³³¹ However, the provision is similar to sections in other Acts which prevent the subsequent admission in court proceedings of evidence given in a context where the rules of evidence do not apply.³³² The policy behind each of these provisions appears to be one of prioritising the need to obtain evidence in one context, while not prejudicing subsequent proceedings.

330 *Securities Industry Act 1975* s 21(9).

331 The *Coroners Act 1985* was enacted following a general review of its predecessor, the *Coroners Act 1958*; see John Norris, *The Coroner's Act 1958: A General Review* (1981). However, the origins of section 57(3) do not appear to be in that report.

332 Eg, *Accident Compensation Act 1985* s 44; *Guardianship and Administration Board Act 1986* s 10(6); *Police Regulation Act 1958* s 86Q.

4.271 Coronial proceedings are inquisitorial, they are not a proceeding *inter partes* and coroners are not bound by the rules of evidence. Therefore, the evidence which may be elicited in a coronial inquest will necessarily differ from that which would be able to be elicited in court proceedings. The subsequent use of evidence is a particular issue, as there is often the potential for legal proceedings, either criminal or civil, to be commenced concerning the same factual circumstances. The fact that the evidence cannot be used subsequently as evidence of the fact may assist the conduct of inquests by encouraging disclosure, as it will not prejudice subsequent civil or criminal proceedings.³³³

CONCLUSION

4.272 As section 57(3) refers to section 55AB of the Evidence Act, and that section is recommended to be repealed,³³⁴ it will need to be amended. Section 65 of the UEA provides a similar hearsay exception to section 55AB of the Evidence Act. Therefore the reference to section 55AB of the Evidence Act should be replaced by a reference to section 65 of the Victorian UEA.

4.273 This will maintain the current operation of the section in restricting the admission of records of evidence given in coronial proceedings as evidence of the facts asserted in subsequent court proceedings, with the same limited exception. The provision will be inconsistent with the other hearsay provisions of the UEA, however, section 8 will preserve its operation.

!

RECOMMENDATION(S)

63. The following provisions should be amended as specified in Appendix 18 on the introduction of the Victorian UEA:

- *Coroners Act 1985* s 57(3);
- *Companies (Application of Laws) Act 1981* sch 1, cl 48;
- *Emerald Tourist Railways Act 1977* s 38(9);
- *Futures Industry (Application of Laws) Act 1986* sch 1, cl 13;
- *Juries Act 2000* s 62;

333 Consultation with Graeme Johnstone, State Coroner, December 2005–January 2006.

334 See 37, paras 3.13–3.21.

!

RECOMMENDATION(S)

- *Magistrates' Court Act 1989* ss 129(1)–(2);
- *Magistrates' Court Act 1989* sch 5 (various clauses);
- *Magistrates' Court Act 1989* sch 8, cl 19;
- *Police Regulation Act 1958* s 86KC;
- *Securities Industry Act 1975* s 21(9);
- *Securities Industry (Application of Laws) Act 1981* sch 1, cl 12;
- *Sentencing Act 1991* ss 6F(2), 6J(2);
- *Transfer of Land Act 1958* s 114(4);
- *Victims of Crime Assistant Act 1996* s 63(3);
- *Whistleblowers Protection Act 2001* s 61I;
- *Working with Children Act 2005* s 47(3).

Chapter 5

Practical Implementation of the UEA

Introduction	166
Education	166
Judicial Officers and Legal Profession	166
Other Groups Affected	171
Commencement	172
Lead-in Time	172
Transitional Provisions	173
Other Matters to be Addressed Prior to Commencement	178

INTRODUCTION

5.1 In the previous chapters, we have dealt with the legal changes necessary for the effective introduction of the UEA in Victoria. To ensure that the transition is not only legally effective but also practically workable, some further matters need to be considered as part of the reform process.

5.2 The introduction of the UEA in Victoria will represent a significant change in the law of evidence in this state. Most affected will be those practising in and presiding over proceedings in Victorian courts, particularly those in the criminal jurisdiction where evidentiary questions arise frequently. The changes will also be relevant to legal practitioners practising in areas other than in litigation who will need to be aware of the provisions in relation to client legal privilege. Beyond courts, judicial bodies which adopt privileges as they apply in courts will also be affected by the change,³³⁵ as will people who are subject to compulsory processes such as subpoenas.

5.3 Two interrelated issues arise which need to be addressed in the context of practical implementation—first, the time between the enactment of the legislation and the commencement of the operation of the UEA and, secondly, the education of judicial officers, the legal profession and others. The time required for education will influence the commencement date.

EDUCATION

JUDICIAL OFFICERS AND LEGAL PROFESSION

FORM AND CONTENT OF EDUCATION

5.4 The operation of the *Evidence Act 1995* (Cth) in the federal courts since 1995 has meant that some Victorian-based judicial officers and legal practitioners practising in the Federal Court or Family Court have been exposed to the operation of the UEA. In addition, for a number of years, the curricula of some university law schools in Victoria have included the UEA for comparative purposes (although the UEA has not necessarily been an assessable component of undergraduate courses). Nonetheless, a significant majority of legal practitioners and judicial officers in Victoria will have little or no knowledge or experience of the provisions of the UEA. While one of the aims of the UEA is to make evidence law more accessible and its concepts and terms will be

335 See Appendix 10.

familiar, the task of acquiring an accurate working knowledge of the UEA will be considerable.

5.5 As a starting point, education programs about the UEA should attempt to give participants an understanding of the policy underlying the Act. It is that policy which informs the construction and application of the provisions. Similarly, the structure of the UEA and rules of admissibility should also be addressed as the basis of understanding the operation of the Act.

5.6 It is essential that legal practitioners and judicial officers have a working knowledge of evidence law. Evidentiary issues can arise frequently and without notice, particularly in criminal trials. For example, objections to questions in jury trials are often required to be dealt with quickly, if not instantaneously, in order to ensure the smooth running of the trial. Preparing the profession for the introduction of the UEA therefore differs from the introduction of other significant legal changes which can be researched as required at the preparatory stage of litigation through aids such as textbooks, loose-leaf services and case law. Rather, evidence is an area of the law which can best be understood when applied in practice. In particular, practice in its application is needed to be able to identify issues and their solutions.

5.7 The law of evidence lends itself to problem-based learning. The commission suggests that engaging judicial officers and the profession in programs which involve examples taken from the facts of leading cases is likely to be the most effective method of demonstrating and appreciating the operation of the UEA.

5.8 An important aspect of programs will be developing an awareness of the areas of significant change for Victoria as well as an understanding of the interaction of the UEA with evidentiary provisions found outside the Act. The operation of section 8 of the UEA will be important for practitioners to remember when dealing with sections outside the Act.

5.9 It will also be important to ensure that full advantage is taken of the experience of other jurisdictions, particularly NSW and Tasmania, in introducing similar legislation. The commission suggests that approaches be made to courts and professional bodies and organisations, such as the NSW Judicial Commission, with a view to learning from the experience in those states of attempting to impart a working knowledge of the UEA.

! RECOMMENDATION(S)

64. The development of education programs about the UEA in Victoria should address, in particular:
- the policy underlying the UEA;
 - the structure of the UEA and the rules of admissibility;
 - the areas of significant change for Victoria;
 - the interaction between the UEA and other evidentiary provisions.

MEANS OF DELIVERY

5.10 In a submission to the reference, Justice Kirby noted that evidence ‘is a pervasive area of the law which makes it one of the highest practical importance’. Hence, the delivery of education about the introduction of the UEA in Victoria should aim to reach all sectors of the legal profession across the state. It should also involve a range of strategies which take into account different modes of learning and information dissemination.

5.11 The commission has sought views about what form of education might be needed and how it might best be conducted. Submissions from the Law Institute of Victoria, Victoria Legal Aid and Victoria Police pointed to a need to combine different sorts of education programs and to the deliver material through a variety of media and formats.

5.12 An important component of the education of the profession is the preparation of authoritative, high-quality written materials which can be disseminated broadly throughout the state and which address the matters referred to in our recommendations. The commission proposes that, given our familiarity with the UEA and the implications of its implementation in Victoria, we develop practically-focused materials as a guide to using the UEA, which address significant areas of change for Victoria and point to major case law. To aid accessibility and dissemination, the commission proposes that the materials be made available electronically on the commission’s website.

5.13 Formalised professional development programs directed to the specific needs of different sectors of the legal profession in Victoria, in particular the judiciary, solicitors and barristers, provide one of the most appropriate means to familiarise current members of the profession with the operation of the UEA. Bodies such as the

Office of Public Prosecutions, Victoria Legal Aid and Victoria Police can also assist in the development of training about the UEA tailored to the differing and specialised roles of their members or employees.

5.14 The Judicial College of Victoria provides Victorian judicial officers in all courts with programs addressing developments in the law. It adopts a range of education strategies. These include face-to-face programs (which are interactive and scenario-based) and electronic resources for self-directed learning. The college develops programs in particular areas through consultation with committees comprised of members of the judiciary. The commission is of the view that the college is well placed to take the lead in developing programs about the UEA that will meet the needs of the judiciary at all levels.

5.15 Through the development of the Judicial Officers Information Network, a cross-jurisdictional intranet for judicial officers, the college also has particular expertise in the use of technology to disseminate and share knowledge and information. As well as publishing bench books and other relevant written materials available online to the judiciary, the college is in the process of developing more interactive, problem-solving electronic tools. The commission suggests that the UEA would be an appropriate vehicle for such an electronic tool and that it would be a particularly valuable resource for members of the judiciary who are called upon to solve evidentiary matters on a daily basis. Other bodies involved in the education of the legal profession more widely may also have an interest in contributing to and accessing such a tool.

5.16 In 2004, a compulsory continuing professional development scheme was introduced for solicitors.³³⁶ In the same year, a compulsory continuing legal education scheme was introduced for barristers.³³⁷ When applying for a practising certificate, both schemes require practitioners to certify that they have accumulated annual units or points, which can be earned by participation in approved activities, including seminars, lectures, workshops and conferences. Both the Law Institute of Victoria and the Victorian Bar have expressed support for education of the profession about the UEA through these schemes.

336 For practitioners regulated by the Law Institute of Victoria, the current relevant rules are the Continuing Professional Development Rules 2005 made under *Legal Practice Act 1996* s 72 and taken to be approved by the Legal Services Board by virtue of *Legal Profession Act 2004* sch 2, cl 2.5(2).

337 For practitioners regulated by the Victorian Bar, the current relevant rules are the Compulsory Continuing Legal Education Rules made under *Legal Practice Act 1996* s 72 and taken to be approved by the Legal Services Board by virtue of *Legal Profession Act 2004* sch 2, cl 2.5(1).

5.17 The Law Institute of Victoria and the Bar also have roles to play through their specialist sections or associations. In particular, the regional law sections can provide a means of communicating with or disseminating educational materials to solicitors outside of Melbourne.

5.18 The specialist sections of the professional organisations, particularly those comprised of practitioners in criminal law, will also have a particular interest in informing their members about the implications of the introduction of the UEA. For example, the Criminal Bar Association noted in its submission that the ‘most significant working application of the UEA will be in criminal trials’ and has indicated its intention to ‘play an integral part in proposing and structuring a comprehensive education program’.

5.19 The gradual process of education about the UEA will also be assisted by its inclusion, where relevant, in the practical legal training programs designed as prerequisites for admission to practice in Victoria (such as those offered by the Leo Cussen Institute, Monash University and the College of Law Victoria). These programs generally focus on the skills required for legal practice, rather than on teaching substantive law. There is also some variation between courses in the extent to which they include instruction in evidence law. Nonetheless, where such instruction is relevant, focus on the UEA in such courses will assist to build on knowledge acquired by students in university law courses.

5.20 Similarly, the Victorian Bar Readers’ Course, which is concerned with the training of new barristers, is an educational forum for those seeking to sign the Victorian Bar Roll. The course focuses upon the teaching of advocacy skills. Although a certain level of knowledge of evidence law is assumed by virtue of the reader’s admission to practice, a significant component of the course focuses on the practical application of the laws of evidence. The commission considers that it would be appropriate for the course content to be adapted to take into account the changes brought about by the UEA.

!**RECOMMENDATIONS**

65. Material on the UEA should be incorporated in professional admission, professional development or continuing legal education programs across the state in a variety of different modes or formats and be tailored to the specific needs of different sectors of the legal profession. In particular, the commission recommends that teaching about the UEA be delivered by:



RECOMMENDATIONS

- the Judicial College of Victoria;
- the providers of professional admission, continuing professional development or continuing legal education programs for barristers and solicitors;
- the specialist sections and associations of the Law Institute of Victoria and the Victorian Bar;
- the Victorian Bar Readers' course;
- the Office of Public Prosecutions, Victoria Legal Aid and Victoria Police.

66. The Department of Justice and/or the providers of judicial education and continuing professional development should produce an interactive, problem-solving electronic resource for application of the UEA to be made available to and adapted to the particular needs of judicial officers and members of the legal profession.

OTHER GROUPS AFFECTED

5.21 It will also be necessary to alert non-legal professional bodies potentially affected by the introduction of the UEA in Victoria to relevant changes. In particular, the UEA provisions in relation to protected confidences which will replace section 28 of the *Evidence Act 1958* will be of relevance to persons acting in a professional capacity.

5.22 Submissions have been received from a number of non-legal professional bodies (including the Australian Medical Association Victoria, the Australian Dental Association Victoria, the Australian Naturopathic Practitioners Association, the Australian Nursing Federation Victorian Branch, the Australian Association of Occupational Therapists Victoria and the Pharmaceutical Society of Australia) indicating that their members would benefit from educational material regarding the UEA. These organisations have also indicated a general willingness to disseminate information through their membership networks using such methods as websites, publications, educational activities and professional accreditation processes.

5.23 Non-legal professionals, like members of the legal profession, will benefit from the publication of authoritative, high-quality written materials about the UEA which can be disseminated widely (as suggested above). The materials the commission

proposes preparing and making available electronically on its website could provide this resource. The relevant parts of the materials could then be accessed by way of links from the websites maintained by other organisations.

COMMENCEMENT

LEAD-IN TIME

5.24 When the Act was introduced in NSW in 1995, less than three months was allowed between the enactment of the legislation and the commencement of its operation in NSW courts.³³⁸ The Commonwealth Act had a similarly short period between enactment and commencement.³³⁹ Anecdotally, the commission has heard that this was felt to be too short a time. When Tasmania introduced the UEA, a period of approximately six months was allowed.³⁴⁰

5.25 A number of matters need to be considered in determining the time frame necessary before the Act commences and is required to be applied. The educative programs outlined above are significant and will take some time to prepare and conduct. Time will also be required for court rules to be reviewed and if necessary redrafted in light of the Act. Regulations will also need to be made mirroring those in other states.

SUBMISSIONS

5.26 The Victorian Bar submitted that a lead-in time of six months would be appropriate. The Criminal Bar Association submitted that an education program for the profession and the judiciary should commence three to six months prior to the commencement of the legislation. Victoria Legal Aid submitted that the time between introduction of the Act and commencement should be at least 12 months. Victoria Police submitted that a lead-in period of 18 months to two years should be considered given the time it would take to educate their workforce in relation to the change. The Law Institute of Victoria submitted that sufficient time be allowed for practitioners to prepare matters in line with the new regime, but did not specify any particular length of time.

338 The NSW Act was assented to on 19 June 1995 and commenced on 1 September 1995.

339 The Commonwealth Act was assented to on 23 February 1995 and commenced on 18 April 1995.

340 The Tasmanian Act was assented to on 17 December 2001 and commenced on 1 July 2002.

COMMISSION'S VIEW

5.27 When introducing the UEA, Victoria has the significant advantage of 10 years of operation in other state and federal courts and the experience and case law this has yielded. At the same time, this means that there is a greater body of law for practitioners to assimilate. The time allowed before commencement of the UEA must balance the need for time to prepare with the need not to unduly delay introduction. Other major reviews of Victorian legislation are currently being conducted, particularly in the criminal area. It would be preferable for the UEA to be in force before other major changes commence.

5.28 Another recent uniformity exercise, the *Legal Profession Act 2004*, allowed a lead-in time of 12 months between the passing of the Act and the commencement of all its provisions.³⁴¹ In some ways the introduction of the Act was more complex than the introduction of the UEA because it established new bodies.

5.29 In the commission's view, 12 months is an appropriate time between the enactment of the UEA in Victoria and the commencement of its operation in courts. While the commission has recommended that the commencement provision of the Act in section 2 be simply 'a day to be proclaimed', it is important that the commencement date be announced well in advance. This is necessary to allow practitioners to account for the changes brought about by the Act in preparing matters for trial.



RECOMMENDATION

67. A period of approximately 12 months should be allowed between the enactment of the Victorian UEA and commencement of the operation of its provisions.

TRANSITIONAL PROVISIONS

5.30 Legislation which affects the conduct of court proceedings requires particular consideration to be given to transitional provisions. If enacted, the UEA would impact upon court proceedings at different stages. While the provisions apply largely to the trial stage of a proceeding, some provisions operate at earlier stages. The extension of

341 The *Legal Profession Act 2004* was assented to on 14 December 2004 and commenced on 12 December 2005.

privilege provisions to pre-trial processes means that the Act will apply earlier in the life of a proceeding.

5.31 One submission received by the commission addressed the issue of transitional provisions. The Law Institute of Victoria submitted that the Act apply to proceedings filed with the court after a certain date, with the current law continuing to apply to proceedings filed before that date. This is a standard method of providing certainty as to the application of an Act to a court proceeding. However, transitional provisions based on the date of filing would lead to courts having to apply dual evidence regimes for a period of years. Civil proceedings vary considerably in the time between filing and hearing. Delays may occur for a number of reasons. Originating processes may not be served for 12 months or more.³⁴² The time taken to complete interlocutory steps varies enormously between cases, from weeks to years. Proceedings may be held in abeyance pending the outcome of significant appeals in other cases.

5.32 The Commonwealth and NSW both passed Acts dealing with transitional issues and consequential amendments together with the principal Evidence Acts in 1995.³⁴³ The main transitional provision of each of those Acts provided that, subject to other provisions of the Act, the *Evidence Act 1995* was not to apply to proceedings the hearing of which began before the commencement of the provision.³⁴⁴ These Acts also provide that sections repealed by it continue to apply to proceedings the hearing of which began before their repeal.³⁴⁵ The Acts go on to make detailed provisions relating to notices, which allowed them to be given before the commencement of the Act and to have effect after the commencement of the Act.

5.33 Past amendments to the *Evidence Act 1958* have been accompanied by transitional provisions based around the commencement of trials and hearings rather than the commencement of proceedings by the filing of court processes.³⁴⁶

COMMISSION'S VIEW

5.34 Evidentiary rules do not alter the substantive rights of the parties. Applying different rules to proceedings which have already commenced does not alter a pre-

342 Supreme Court (General Civil Procedure) Rules 2005 r 5.12.

343 *Evidence (Transitional Provisions and Consequential Amendments) Act 1995* (Cth); *Evidence (Consequential and Other Provisions) Act 1995* (NSW).

344 *Evidence Act 1995* (Cth) s 4(1); *Evidence Act 1995* (NSW) s 2(1).

345 *Evidence Act 1995* (Cth) s 4(2); *Evidence Act 1995* (NSW) s 2(2).

346 See *Evidence Act 1958* ss 153, 154.

existing right retrospectively. Therefore, it is common for evidentiary amendments to be applied to existing proceedings. The commission believes it is appropriate for the transitional provisions for the introduction of the UEA in Victoria to allow for the Act to apply to matters which were commenced (ie filed with the court) prior to the commencement of the UEA. The transitional provisions should not, however, apply the Act to matters which are part heard at the time of commencement.

5.35 The transitional provisions of the Act should be as clear as possible. The phrase used in the NSW and Commonwealth transitional provisions to describe the situation in which the Act will not apply is ‘proceedings the hearing of which began before commencement’. The term ‘proceeding’ is commonly used to refer to an action or criminal charge. It is also commonly used to refer to a step within an action such as an interlocutory application, an appeal or a retrial. Several cases in NSW courts required the determination of whether the Act applied in a given circumstance based on whether it could be said the hearing of the proceeding has commenced before the relevant date.

5.36 In *Sved v Council of the Municipality of Woollahra*,³⁴⁷ Giles CJ Comm D commented that ‘the word “proceeding” may or may not, depending on its context and purpose, refer to a step in an action’.

Cl 2(1) took as the criterion the beginning of a hearing, not the commencement of an action, and so made clear that the Act would apply to the adduction of evidence after the commencement of any provision material to its admissibility—what mattered was the hearing in which the evidence was tendered. In the description of the hearing as the hearing of a proceeding, the proceeding could be, as s 4 of the Act indicated, something less than the action as a whole, and the hearing could be the hearing of an application prior to the substantive hearing in the action, the substantive hearing, or the hearing of an application after the substantive hearing. This pointed to the intention that the provisions of the Act apply to the hearing of discrete portions of an action, the portions including interlocutory and similar steps in the action.³⁴⁸

5.37 His Honour went on to say:

347 (Unreported, Supreme Court of NSW, Giles CJ Comm D, 15 April 1998) BC 9801219.

348 Ibid 7.

There is no compelling reason why discrete portions of an action should not be heard under different rules of evidence, and it is undesirable that the Act should have been intended to have wide immediate effect.³⁴⁹

5.38 In *R v Heffernan*,³⁵⁰ the NSW Court of Criminal Appeal held that evidentiary questions in a proceeding should be determined in accordance with the pre-UEA law where the defendants were arraigned prior to the commencement of the Act—although it was conceded that if the appeal was upheld and a new trial ordered, the re-trial would be conducted applying the UEA.

5.39 In the case of *R v Pearson*,³⁵¹ the trial judge had granted a stay on the basis that the accused was unable to obtain access to documents over which legal professional privilege was claimed. It was conceded that such documents would have been available to the accused under the UEA, but there was no agreement as to whether the UEA applied. The NSW Court of Criminal Appeal held that in a criminal trial upon indictment, the hearing of the proceeding begins at the time of arraignment. In the event a new trial is ordered on appeal, and that trial began after the commencement of the UEA, the UEA would apply.

5.40 While ultimately courts appear to have been able to resolve issues of the application of the Act in NSW, Victoria can learn from this experience and draft transitional provisions which make the application of the Act clearer, without the need for judicial interpretation.

!

RECOMMENDATION

68. The transitional provisions on the introduction of the UEA should provide:

349 Ibid 8.

350 (Unreported, NSW Court of Criminal Appeal, Smart, James and Sperling JJ, 16 June 1998) BC9802596.

351 (Unreported, Supreme Court of New South Wales, Court of Criminal Appeal, Gleeson CJ, Smart and Sully JJ, 5 March 1996) BC 9600553.



RECOMMENDATION

- that the UEA does not apply to a hearing in a proceeding that is part heard³⁵² at the time of commencement, but otherwise applies to all hearings beginning on or after the commencement date whether or not an earlier hearing in a matter was conducted prior to the commencement of the UEA;
- that provisions of the *Evidence Act 1958* and other provisions repealed at the time of the commencement of the UEA continue to apply to a hearing in a proceeding which began before their repeal;
- a definition of when various hearings such as committals and trials of criminal proceedings are taken to have commenced;
- that where there is an order for a new trial on appeal, and the hearing of that new trial commences after the commencement of the Act, that the Act applies to that hearing.

Proposed Section 131A and Transitional Provisions

5.41 The proposed extension of the privilege provisions of the UEA through section 131A requires a particular transitional provision, because it applies not to hearings but to warrants and pre-trial processes like discovery.

5.42 It is inevitable that there will be situations in which the UEA will apply to the hearing of a proceeding, but has not applied at an earlier stage and therefore it may have been necessary to disclose documents, which would not have been required to be disclosed had the UEA applied. The UEA will, however, prevent their admission at the hearing.



RECOMMENDATION

69. A transitional provision be drafted to apply section 131A to:

- subpoenas to produce documents returnable after the commencement of the Act;

352 That is, a discrete hearing which began on a day preceding the commencement day and which continued after the commencement day or was adjourned until the commencement day or a day following the commencement day.

! RECOMMENDATION

- discovery ordered or required after the commencement of the Act;
- interrogatories served after the commencement of the Act;
- notices to produce served after the commencement of the Act;
- warrants issued after the commencement of the Act.

OTHER MATTERS TO BE ADDRESSED PRIOR TO COMMENCEMENT

DRAFTING OF COURT RULES

5.43 As mentioned above, court rules will have to be reviewed and, to an extent, modified in light of the UEA. The 12 month lead-in time will allow this to be done. The rules committees of each court are established to undertake this kind of task and may receive assistance from the experience in other jurisdictions.

5.44 Areas which may require attention include procedural provisions in relation to subpoenas regarding claims for privilege and procedural provisions in relation to expert reports.

! RECOMMENDATION

70. Following the enactment of a Victorian UEA, the Supreme, County and Magistrates' Courts should review their respective court rules and make such amendments to those rules as are necessary to facilitate the operation of the new Act.

REGULATIONS

5.45 The Evidence Regulation 1995 (Cth) and the Evidence Regulation 2005 (NSW) provide forms of notices, certificates and affidavits. Similar regulations will be required in Victoria in time for the commencement of the Act.

! RECOMMENDATION

71. Following the enactment of a Victorian UEA, regulations should be drafted for Victoria based on the Evidence Regulation 1995 (Cth) and Evidence Regulation 2005 (NSW) with any necessary modifications.

Appendix 1

SEXUAL ASSAULT COMMUNICATIONS PRIVILEGE³⁵³

Division 1B—Sexual assault communications privilege

126G Interpretation

Definitions

(1) In this Division:

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

preliminary criminal proceedings means any of the following:

- (a) committal proceedings;
- (b) proceedings relating to bail (including proceedings during the trial or sentencing of a person),

whether or not in relation to a sexual assault offence.

principal protected confider means the victim or alleged victim of a sexual assault offence by, to or about whom a protected confidence is made.

protected confidence is defined in section 126H

protected confider, in relation to a protected confidence, means:

- (a) the principal protected confider; or
- (b) any other person who made the protected confidence.

sexual assault offence means

- (a) an offence specified in clause 1 of Schedule 1 of the *Sentencing Act 1991*; or
- (b) an equivalent offence under the law of another State or country; or

353 The following draft provision appears in the joint Final Report, Appendix 1, as a recommended amendment to the *Evidence Act 1995* (Cth). The underlined subsections are proposed for a Victorian UEA.

- (c) any other offence prescribed by the regulations.

Document recording a protected confidence

(2) In this Division a reference to a document recording a protected confidence:

- (a) is a reference to any part of the document that records a protected confidence or any report, observation, opinion, advice, recommendation or other matter that relates to the protected confidence made by a protected confider; and
- (b) includes a reference to a copy, reproduction or duplicate of that part of the document.

Electronic documents

(3) For the purposes of this Division, if a document recording a protected confidence is stored electronically and a written document recording the protected confidence could be created by use of equipment that is usually available for retrieving or collating such stored information, the document stored electronically is to be dealt with as if it were a written document so created.

126H What is a protected confidence?

(1) In this Division:

protected confidence means a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence.

(2) A counselling communication is a protected confidence for the purposes of this section even if it:

- (a) was made before the acts constituting the relevant sexual assault offence occurred or are alleged to have occurred; or
- (b) was not made in connection with a sexual assault offence or alleged sexual assault offence or any condition arising from a sexual assault offence or alleged sexual assault offence.

(3) For the purposes of this section, a communication may be made in confidence even if it is made in the presence of a third party if the third party is present to facilitate communication or to otherwise further the counselling process.

(4) In this section *counselling communication* means a communication:

- (a) made in confidence by a person (the *counselled person*) to another person (the *counsellor*) who is counselling the person in relation to any harm the person may have suffered; or
- (b) made in confidence to or about the counselled person by the counsellor in the course of counselling; or
- (c) made in confidence about the counselled person by a counsellor or a parent, carer or other supportive person who is present to facilitate communication between the counselled person and the counsellor or to otherwise further the counselling process; or
- (d) made in confidence by or to another counsellor or by or to a person who is counselling, or has at any time counselled, the person.

(5) For the purposes of this section, a person counsels another person if:

- (a) the person has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm; and
- (b) the person:
 - (i) listens to and gives verbal or other support or encouragement to the other person; or
 - (ii) advises, gives therapy to or treats the other person, whether or not for fee or reward.

126I Evidence of sexual assault communications not to be required to be produced or adduced in or in connection with preliminary criminal proceedings

(1) A person cannot be required by (whether by subpoena or any other procedure) to produce a document recording a protected confidence in, or in connection with, any preliminary criminal proceedings.

(2) Evidence is not to be adduced in any preliminary criminal proceedings if it would disclose:

- (a) a protected confidence; or
- (b) the contents of a document recording a protected confidence.

126J Evidence of sexual assault communications may be required to be produced in or in connection with proceedings or adduced with leave

(1) A person who objects to production of a document recording a protected confidence on the ground that it is privileged under this Division cannot be required (whether by subpoena or any other procedure) to produce the document for inspection by a party in, or in connection with, a proceeding unless:

- (a) the document is first produced for inspection by the court for the purposes of ruling on the objection; and
- (b) the court is satisfied (whether on inspection of the document or at some later stage in the proceedings) that:
 - (i) the contents of the document will, either by themselves or having regard to other evidence adduced or to be adduced by the party seeking production of the document, have substantial probative value, and
 - (ii) other evidence of the protected confidence or the contents of the document is not available, and
 - (iii) the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm is substantially outweighed by the public interest in allowing inspection of the document.

(2) Without limiting the matters that the court may take into account for the purposes of subparagraph (1)(b)(iii) the court must take into account:

- (a) the likelihood, and the nature or extent, of harm that would be caused to the principal protected confider if the document is produced for inspection;
- (b) in criminal proceedings, the extent to which disclosure of the information is necessary to allow the accused to make a full defence;

- (c) the need to encourage victims of sexual offences to seek counselling and the extent to which such disclosure discourages victims from seeking counselling or diminishes its effectiveness;
- (d) whether admission of the evidence is being sought on the basis of a discriminatory belief or bias;
- (e) whether the protected confider objects to disclosure of the communication;
- (f) the attitude of the person to whom the communication relates; and
- (g) the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of any person.

(3) Evidence is not to be adduced in a proceeding if it would disclose:

- (a) a protected confidence; or
- (b) the contents of a document recording a protected confidence,

unless the court gives leave.

(4) The court must not give leave to adduce evidence that discloses a protected confidence or the contents of a document recording a protected confidence unless the court is satisfied that:

- (a) the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have substantial probative value; and
- (b) other evidence of the protected confidence or the contents of the document recording the protected confidence is not available; and
- (c) the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm is substantially outweighed by the public interest in admitting into evidence information or the contents of a document of substantive probative value.

(5) Without limiting the matters that the court may take into account for the purposes of subparagraph (4)(c) the court must take into account:

- (a) the likelihood, and the nature or extent, of harm that would be caused to the principal protected confider if the evidence that discloses the protected confidence or the contents of the document recording the protected confidence is adduced;
- (b) in criminal proceedings, the extent to which disclosure of the information is necessary to allow the accused to make a full defence;
- (c) the need to encourage victims of sexual offences to seek counselling and the extent to which such disclosure discourages victims from seeking counselling or diminishes its effectiveness;
- (d) whether admission of the evidence is being sought on the basis of a discriminatory belief or bias;
- (e) whether the protected confider objects to disclosure of the communication;
- (f) the attitude of the person to whom the communication relates; and
- (g) the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of any person.

(6) The court must state its reasons for requiring production or giving or refusing to give leave under this section.

(7) A protected confider who is not a party to the relevant proceedings may, with the leave of the court, appear in the proceeding.

(8) If there is a jury, the court is to hear and determine any objection or application under this section referred to in subsection (1) or (3) in the absence of the jury.

126K Notice required before evidence is produced for inspection or adduced

(1) A document recording a protected confidence is not to be required to be produced for inspection by a party in, or in connection with a proceeding unless the party seeking production of the document has given reasonable notice in writing that production has been sought to:

- (a) each other party; and

- (b) if the protected confider is not a party—the protected confider.

(2) Evidence disclosing a protected confidence or the contents of a document recording a protected confidence is not be adduced in a proceeding unless the party adducing the evidence has given reasonable notice in writing of that party's intention to adduce the evidence to:

- (a) each other party; and
- (b) if the protected confider is not a party—the protected confider.

(3) Notice given under this section to a protected confider who is not a party must:

- (a) advise the protected confider that he or she may, with the leave of the court, appear in the proceedings concerned; and
- (b) in the case of notice given under paragraph (1)(b)—advise the protected confider of the day on which the document is (by the subpoena or other procedure concerned) to be produced; and
- (c) in the case of notice given under paragraph (2)(b)—advise the protected confider of the day (if known) when the proceedings are to be heard.

(4) In a criminal proceeding, it is sufficient compliance with a requirement under paragraph (1)(b) or 2(b) to give notice to a protected confider who is not a party and who is the principal protected confider if the party gives reasonable notice that the party has sought production, or of the party's intention to adduce the evidence, to the informant and the informant gives, or uses the informant's best endeavours to give, a copy of the notice to the principal protected confider within a reasonable time after the informant receives the notice.

(5) Despite subsections (1) and (2), a document recording a protected confidence may, with the leave of the court, be required to be produced for inspection, or evidence disclosing a protected confidence or the contents of a document recording a protected confidence adduced, although notice has not been given to a protected confider who is not a party (not being the principal protected confider) as required by those subsections.

(6) In this section

informant, in relation to criminal proceedings with respect to an offence, means any of

- (a) the police officer who instituted the proceeding;
- (b) the public official within the meaning of the *Public Administration Act 2004* who instituted the proceeding;
- (c) the Director of Public Prosecutions

126L Effect of consent

(1) This Division does not prevent the production of any document recording a protected confidence or the adducing of evidence disclosing a protected confidence or the contents of a document recording a protected confidence, in, or in connection with, a proceeding if the principal protected confider to whom the proceeding relates has consented to the production of the document or adducing of the evidence.

(2) Consent is not effective for the purposes of this section unless:

- (a) the consent is given in writing; and
- (b) the consent expressly relates to the production of a document or adducing of evidence that is privileged under this Division or would be so privileged except for a limitation or restriction imposed by this Division.

126M Loss of sexual assault communications privilege: misconduct

(1) This Division does not prevent the adducing of evidence of a communication made, or the production or adducing of a document prepared, in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.

(2) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:

- (a) the fraud, offence or act was committed; and

- (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,

the court may find that the communication was so made or document so prepared.

126N Ancillary orders

(1) Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of, or the contents of a document recording, a protected confidence, the court may:

- (a) order that all or part of the evidence be heard or document produced in camera; and
- (b) make such orders relating to the production and inspection of the document as, in the opinion of the court, are necessary to protect the safety and welfare of any protected confider; and
- (c) make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of any protected confider; and
- (d) make such orders relating to disclosure of protected identity information as, in the opinion of the court, are necessary to protect the safety and welfare of any protected confider.

(2) In this section:

protected identity information means information about, or enabling a person to ascertain, the private, business or official address, email address or telephone number of a protected confider.

Appendix 2

DRAFT PROVISIONS IN RELATION TO THE PRIVILEGE AGAINST SELF-INCRIMINATION

128A. No privilege against self-incrimination for pre-existing documents

At no stage of any proceeding is any person entitled to refuse or fail to comply with an order for production, inspection or copying of a pre-existing document or thing that was not created pursuant to a court order, or to object to the inspection or admissibility of evidence of such a document or thing, on the ground that to do so might tend to incriminate the person or make the person liable to a civil penalty.

128B. Privilege in respect of self-incrimination—exception for certain orders etc

(1) In this section—

disclosure order means an order made by a Victorian court in a civil proceeding requiring a person to swear an affidavit disclosing information, as part of, or in connection with:

- (a) a search order; or
- (b) a freezing order.³⁵⁴

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

(2) If a relevant person objects to complying with a disclosure order on the grounds that some or all of information required to be disclosed may tend to prove that the person:

- (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
- (b) is liable to a civil penalty,

³⁵⁴

The Uniform Rules to be drafted by the committee appointed by the Council of Chief Justices use the terminology of ‘search and freezing orders’ instead of Anton Piller and Mareva orders. This language can be utilised to provide consistency between the Act and Rules. The Act could adopt definitions of these terms from the Uniform Rules.

that person must

- (c) file and serve an affidavit in compliance with the order containing so much of the information ordered to be disclosed to which no objection is taken; and
- (d) prepare an affidavit in compliance with the order containing so much of the information required to be disclosed to which objection is taken ('the privilege affidavit') and deliver it to the court in a sealed envelope; and
- (e) file and serve an affidavit setting out the basis of the objection.

(3) The sealed envelope containing the privilege affidavit is not to be opened except as directed by the court.

(4) Subject to subsection (5), if the court finds that there are reasonable grounds for the objection, the court is not to require the privilege affidavit to be disclosed and is to return it to the relevant person.

(5) If the court is satisfied that:

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

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

(6) If the privilege affidavit or part thereof is disclosed (including by order under subsection (5)), the court is to cause the relevant person to be given a certificate in respect of the information referred to in subsection 5(a).

(7) In any proceeding in a Victorian court:

- (a) evidence of information disclosed by a relevant person in respect of which a certificate under this section has been given; and
- (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the relevant person having disclosed that information,

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

Appendix 3

EVIDENCE ACT 1958

CURRENT VICTORIAN SECTION	COMMENTS AND RECOMMENDATIONS
1. Short title and commencement	Repeal.
2. <i>Repealed</i>	
3. Definitions	Repeal as a consequence of the repeal of other sections of the Act. Relevant definitions to be re-enacted as appropriate.
PART I—THE MEANS OF OBTAINING EVIDENCE	
Division 1—Orders and Commissions to Examine Witnesses	
4. Order to examine witnesses	Retain in a new Evidence on Commission Act. There is no equivalent provision in the UEA. County Court and Supreme Court General Civil Procedure Rules (O 41) provides for evidence to be taken by an examiner before trial (<i>de bene esse</i>). Magistrates’ Court Rules (r 16.07) provides for evidence to be taken before trial if the witness will not be in the state at the time of trial. These rules may require amendment if an Evidence on Commission Act is introduced.
5. Exclusion of evidence in criminal proceeding	Repeal. UEA ss 90, 135–8 provide discretions to exclude evidence in criminal proceedings.
6. Operation of other laws	Retain in a new Evidence on Commission Act.
7–9. <i>Repealed</i>	
Division 1A—Examination of Witnesses Abroad	
9A. Definitions	Retain in a new Evidence on Commission Act. There is no UEA equivalent to these provisions. Similar provisions exist in other states. NSW enacted the <i>Evidence on Commission Act 1995</i> when it introduced the UEA. The <i>Foreign Evidence Act 1994</i> (Cth) is also relevant in this area. Court rules may need to be amended as a consequence of the relocation of the sections.
9B. Proceedings in superior courts	
9C. Proceedings in inferior courts	
9D. Exclusion of evidence in criminal proceeding	
9E. Operation of other laws	
Division 1B—Examination of Witnesses Outside the State but within Australia	

9F. Application of Division	Retain in a new Evidence on Commission Act. There is no UEA equivalent to these provisions. Similar provisions exist in other states. NSW enacted the <i>Evidence on Commission Act 1995</i> when it introduced the UEA. Court rules will need to be amended as a consequence of the relocation of the sections.
9G. Definitions	
9H. Proceedings in superior courts	
9I. Proceedings in inferior courts	
9J. Exclusion of evidence in criminal proceedings	
9K. Operation of other laws	
Division 1C—Taking of Evidence for Foreign and Australian Courts	
9L. Definitions	Retain in a new Evidence on Commission Act. There is no UEA equivalent to these provisions. Similar provisions exist in other states. NSW enacted the <i>Evidence on Commission Act 1995</i> when it introduced the UEA. Tasmania has also enacted an <i>Evidence on Commission Act 2001</i> as a result of introduction of the UEA in that state. Court rules will need to be amended as a consequence of the relocation of the sections.
9M. Application to the Supreme Court for assistance in obtaining evidence for proceedings in other court	
9N. Power of the Supreme Court to give effect to application for assistance	
9O. Privilege of witnesses	
9P. Offence	
9Q. Operation of other laws	
Division 2—Subpoenas etc. and Examination Without Subpoena	
10. Subpoena and summonses to witnesses	Repeal. We have not been able to identify the origins of this provision. It is likely that it was designed to overcome some restriction previously imposed at common law. It is therefore unnecessary to retain this provision. The current court rules provide for an unlimited number of people to be named in witness subpoenas: Supreme Court (General Civil Procedure) Rule 1996 and County Court (General Civil Procedure) Rules 1996, r 42.03(3); Magistrates' Court Civil Procedure Rules 1999, r 17.02(2).
11. Persons present may be examined without a subpoena	Repeal. UEA s 36 provides that people present in court may be called to give evidence without a subpoena having been issued.
Division 3—Prisoners	
12. Prisoner may be brought before court to give evidence without writ of habeas corpus	To be retained by re-enactment in the <i>Corrections Act 1986</i> . There is no equivalent provision in the UEA. The approach taken in NSW and at the federal level is to have provisions in each court Act and/or court rules to allow for gaol orders to be issued, eg Federal Court Rules, r 33.14. However, as gaol orders may be required in civil or criminal proceedings, or

	proceedings before a person acting judicially, the provision needs to be included in a general Act.
Division 4—Inspection of Property	
13. Party may be ordered to allow inspection of realty or personalty	Repeal. UEA s 167 provides for inspection of things as between parties to proceedings, however, it does not deal with inspection of non-party property. Provision exists in the court rules for orders to be made allowing inspection of non-party property: Magistrates' Court Rules, r 35.05; County Court Rules, r 37.01; Supreme Court Rules, r 37.01. If it is necessary to retain a section in an Act to support these rules, it could be located in the Magistrates', County and Supreme Courts Acts.
Division 5—Boards Appointed and Commissions Issued by the Governor in Council	
14. Power to send for persons and papers	Move to new Royal Commissions Act. Both the Commonwealth and NSW have Royal Commissions Acts to accommodate these types of provisions (<i>Royal Commissions Act 1902</i> (Cth) and <i>Royal Commissions Act 1923</i> (NSW)). Consideration may be given to whether the new Act adopts some or all of the privilege provisions of the UEA.
15. Power of member of board to examine upon oath	
16. Penalty for non-attendance or refusing to give evidence etc.	
17. Power to send for witnesses and documents	
18. Power of commissioner to examine upon oath etc.	
19. Penalty for non-attendance, refusing to give evidence etc.	
19A. Application of Division	
19B. Public may be excluded in certain circumstances	
19C. Incriminating answers	
19D. Legal professional privilege ³⁵⁵	
19E. Powers of entry, inspection and possession	
20. Chairman to report to law officer if witness fails to attend	

355 Section 19D excludes the operation of legal professional privilege in royal commissions. If privileged matters are revealed in evidence before a royal commission under compulsion, the privilege may still be invoked in court proceedings. Under UEA s 122(2)(c), client legal privilege is not lost where disclosure has been made under compulsion of law.

etc.	
20A. Summons to require continuous attendance	
21. Allowances to witnesses	
21A. Privileges and immunities in relation to inquiries	
21B. Express reference necessary to include section 21A	
21C. Sections 20 and 20A to apply in certain cases	
Division 6—Disclosure of Information Relating to Applications for Legal Aid	
21D. Definitions	Retain, but move to the <i>Legal Aid Act 1978</i> .
21E. Disclosure of information etc. relating to proposed applications	This section was introduced to provide protection against disclosure of information obtained where legal professional privilege may not strictly apply. It was in response to situations in which legal aid officers are subpoenaed to give evidence of information acquired in the course of processing applications for legal aid. The protected confidences provisions currently in the NSW Evidence Act, and recommended for inclusion in other UEA jurisdictions, may operate to protect communications to legal aid but they fall short of the protections of this provision as they are discretionary and only apply to evidence in court.
21F. Disclosure of information etc. relating to applications	
21G. Disclosure of information etc. where applicant has died	
21H. Application of this Division	
Division 7—Family Mediations	
21I. Definitions	Retain in a new Mediation Act. The reference to a ‘marriage counsellor’ under the <i>Family Law Act 1975</i> (Cth) is to be amended to reflect current terminology. Section 21J to be amended to include an exception for admissions or disclosures which indicate abuse of children in line with that in the <i>Family Law Act 1975</i> (Cth) s 19N.
21J. Admissions etc. made at mediation conferences	
Division 8—Dispute Settlement Centres	
21K. Definitions	Retain in a new Mediation Act. UEA s 131 excludes evidence of settlement negotiations with exceptions for consent, previous disclosure etc in court proceedings. However, a broader provision is necessary and the non-evidentiary provisions need to be accommodated. This and similar provisions to be reviewed to determine whether exceptions should be made to the absolute privilege.
21L. Admissions etc. at mediation conferences	
21M. Confidentiality	
21N. Exoneration from liability	

PART II—WITNESSES	
Division 1—Who May Testify	
22. Witness not to be incapacitated by crime or interest	Repeal. UEA s 12 overcomes any common law incapacity issues.
23. Evidence of children and people with impaired mental functioning	Repeal. Crimes (Sexual Offences) Bill 2005 cl 25 substantially amends this section. Upon amendment its terms will be substantially similar to the re-drafted competence provisions of the UEA (ss 12, 13, 14) recommended by the joint Final Report. ³⁵⁶
23A. Questioning of complainant who is not competent to give evidence	Repeal. Inquiries indicate that this provision has not been used in Victoria in its 12 years of operation. Crimes (Sexual Offences) Bill 2005 cl 26 provides for the repeal of this section.
24. Parties and husbands and wives may be witnesses	Repeal. UEA ss 12, 18, 19 deal with issues of competence and compellability. Under the UEA, spouses are competent to give evidence, but may object to doing so. Such objections are determined by the court, weighing the harm that may result against the desirability of the witness giving evidence. The joint Final Report recommends extension of the operation of UEA s 18 by including a gender-neutral definition of de facto relationship.
25. Abolition of accused's right to make unsworn statement or to give unsworn evidence	Repeal. UEA s 21 provides that a witness must either take an oath or make affirmation before giving evidence (unless incompetent to give sworn evidence) The repeal of this section will not revive the accused's right to make an unsworn statement. ³⁵⁷
Division 2—Privileges Disabilities and Obligations of Witnesses	
26. Exceptions as to criminal cases	Repeal. UEA ss 12, 18, 19 deal with issues of competence and compellability (see notes re s 24).
27. Communications to husband or wife privileged	Repeal. All persons are compellable witnesses in civil proceedings under the UEA, unless otherwise provided (s 12). There is no spousal privilege in civil proceedings under the UEA. ³⁵⁸ The lack of such a

356 Recommendations 4–1, 4–2, 4–3.

357 *Interpretation of Legislation Act 1983* s 14(2).

358 In criminal proceedings, objection can be taken by a spouse or de facto partner of the defendant under UEA s 18(2)(b) to giving evidence of a communication between the person and the defendant.

	privilege has not been raised in the joint review and therefore, in the interests of uniformity, this section should be repealed.
28. Confessions to clergymen and medical men	Repeal. UEA s 127 provides for a religious confessions privilege. The UEA privilege is invoked at the discretion of the clergyman, whereas s 28 provides that a clergyman shall not divulge without the confessor's consent. The joint review Final Report recommends the inclusion of a professional confidential relationship privilege in the UEA as currently exists in the <i>Evidence Act 1995</i> (NSW) s 126. That provision encompasses the doctor–patient relationship. The protection is not absolute, but provides a framework for the court to determine whether the confidence is to be protected. ³⁵⁹
29. Where witness must answer questions which disgrace or criminate	Repeal. UEA s 128 provides a privilege against self-incrimination with the proviso that a witness may be compelled to answer if it is determined to be in the interests of justice. In that situation a certificate is provided, preventing the admission of that evidence against the witness in subsequent proceedings.
30. Statements made by witness before board or commission not to be used against witness	To be retained in a new Royal Commissions Act. There is no equivalent provision in the UEA. Similar provisions exist in other jurisdictions: <i>Royal Commission Act 1902</i> (Cth) s 6DD and <i>Royal Commissions Act 1923</i> (NSW) s 17(2).
31. Admissibility of evidence or statements as to access by husband or wife	Repeal. This provision abrogates an archaic common law rule. Repeal will not revive that rule. ³⁶⁰
32. Compellability of parties and witnesses regarding evidence relating to or establishing adultery	Repeal. As for s 31.
32A. Documents relating solely to party's case	Repeal. As for s 31.

359 See discussion at Recommendation 13.

360 *Interpretation of Legislation Act 1983* s 14(2).

Division 2A—Confidential Communications	
32B. Definitions	Repeal. The commission recommends the enactment of a sexual assault communications privilege in the UEA. ³⁶¹ Crimes (Sexual Offences) Bill 2005 cls 27–32 make amendments to these provisions. However, upon the enactment of the UEA, the Division will no longer be required.
32C. Exclusion of evidence of confidential communications	
32D. Restriction on granting leave	
32E. Limitations on privilege	
32F. Ancillary orders available on a granting of leave	
32G. Operation of Division	
Division 3—Examination and Cross-examination of Witnesses	
33. Witness may be questioned as to previous conviction	Repeal. UEA s 102 provides a general rule that evidence relevant only to credibility is not admissible. UEA s 103 provides that the general rule does not apply in cross-examination where the evidence has substantial probative value. Therefore, where a witness’s previous conviction is of substantial probative value, the evidence will be admissible in cross-examination. UEA s 106(b) allows evidence of a witness’s prior conviction to be tendered through another witness where the witness denies the conviction.
34. Adverse witness may be contradicted by party calling witness	Repeal. UEA s 38 provides that parties may cross-examine an unfavourable witness called by them with the leave of the court. It also allows cross-examination by the party calling witnesses as to any prior inconsistent statements and where it appears no genuine attempt is being made to give evidence of which it can reasonably be supposed they have knowledge. This is substantially wider than the Victorian provision.
35. Evidence of previous statement of witness	Repeal. UEA s 43 deals with admission of prior inconsistent statements. UEA s 106(c) contains a general exception to the credibility rule to allow evidence of prior inconsistent statements to be adduced where a witness denies the substance of the statement.
36. Witness may be cross-	Repeal. UEA s 43 provides that a party may cross-

361 See Recommendation 14.

examined as to written statements without producing them	examine the witness on a prior inconsistent statement without showing the statement to the witness.
37. Cross-examination as to credit	Repeal. UEA s 103 provides that the credibility rule does not apply in cross-examination if the evidence has substantial probative value.
37A. Special rules of evidence in relation to certain offences which relate to rape	Retain by moving to one of the new Crimes Acts. UEA ss 102, 103 should contribute to reducing cross-examination as to credit. However, specific provisions are required in relation to sexual assault. The Crimes (Sexual Offences) Bill 2005 contains amendments to this provision implementing the commission's recommendations in the <i>Sexual Offences: Final Report</i> . ³⁶² Those amendments should be reflected in the relocated provision.
37B. Use of recorded evidence-in-chief in certain proceedings	Retain by moving to one of the new Crimes Acts. There are no equivalent provisions in the UEA. The Crimes (Sexual Offences) Bill 2005 contains amendments to this provision implementing the commission's recommendations in the <i>Sexual Offences: Final Report</i> . Those amendments should be reflected in the relocated provision.
37C. Alternative arrangements for giving evidence in certain proceedings	Retain by moving to one of the new Crimes Acts. There are no equivalent provisions in the UEA. Note: The Crimes (Sexual Offences) Bill 2005 contains amendments to this provision.
37CA. Special Rules for Cross-examination of protected witnesses*	Retain in one of the new Crimes Acts. The Crimes (Sexual Offences) Bill 2005 provides for the insertion of this provision which prevents protected witnesses from being personally cross-examined by an accused in sexual offence proceedings.
37D. Video link evidence from overseas in certain proceedings	Retain in one of the new Crimes Acts. There are no equivalent provisions in the UEA. Note: Minor amendments are made to this section by the Crimes (Sexual Offences) Bill 2005.
	Retain in one of the new Crimes Acts. Crimes (Sexual Offences) Bill 2005 cl 37 inserts a new

* Not yet enacted. Inserted by Crimes (Sexual Offences) Bill 2005.

	provision of specialised knowledge in certain cases implementing recommendations of the commission in the <i>Sexual Offences: Final Report</i> . ³⁶³ This is an offence-specific provision and therefore should be accommodated within a Crimes Act.
38. Saving existing rights	Repeal. Unnecessary.
39. Indecent or scandalous questions	Repeal. UEA s 41 permits court to disallow improper questions. The commission recommends amendment of s 41 in the Victorian Act to strengthen the discretion and impose a duty on the court to prevent improper questioning of vulnerable witnesses. ³⁶⁴
40. Questions intended to insult or annoy	Repeal. See notes above regarding s 39.
41. Prohibited questions not to be published	Repeal. UEA s 195 creates an offence for publication of prohibited questions.
Division 3AA—Examination and Cross-examination of Certain Witnesses (not yet enacted)	
41A. Definition*	Retain in one of the new Crimes Act.*
41B. Application of Division*	Repeal.*
41C. Evidence of specialised knowledge to determine competency*	Repeal.* The joint Final Report recommends amendment of UEA s 13(7) to clarify that the court may receive expert opinion evidence in determining issues of competency. ³⁶⁵
41D. Evidence of previous representations made by child complainants*	Retain in one of the new Crimes Acts.* This is an offence-specific provision. The section may require some amendment to clarify its interaction with provisions of the UEA.
41E. Alternative arrangements for giving evidence in certain proceedings*	Retain in one of the new Crimes Acts.* This an offence-specific provisions with no UEA equivalent.
41F. Improper questions*	Repeal.* UEA s 41 enacted in accordance with the recommendations of this report will replace this section.
41G. Pre-recording evidence at special hearing*	Retain in one of the new Crimes Acts.* This is an offence-specific provision.
41H. Use of pre-recorded	Retain in one of the new Crimes Acts.* This is an

363 Ibid.

* Not yet enacted. Inserted by Crimes (Sexual Offences) Bill 2005.

364 Recommendation 11.

365 ALRC, NSWLRC, VLRC (2005) above n 13, Recommendation 4–2.

evidence*	offence-specific provision.
Division 3A—Witness Orders	
42. Victim who is a witness entitled to be present in court unless the court otherwise orders	Retain in one of the new Crimes Acts. No equivalent provision in the UEA.
Division 4—Manner of Giving Evidence	
42A. Form of evidence	Repeal. UEA s 29(4) is in identical form.
42B. Manner of giving voluminous or complex evidence	Repeal. UEA s 50 allows for voluminous or complex documentary evidence to be given by way of summary under a prescribed procedure with leave of the court. UEA s 29(4) also assists in this regard.
PART IIA—USE OF AUDIO VISUAL AND AUDIO LINKS	
Division 1—Definitions	Retain in a new Evidence (Transmission and Recording) Act. There are no equivalent provisions in the UEA. NSW has these types of provisions in the <i>Evidence (Audio and Audio-Visual Links) Act 1998</i> . The Commonwealth has provisions in the courts Acts, eg <i>Federal Court of Australia Act 1977</i> s 47A. These are largely technical and procedural matters which would be suitably dealt with by a separate Act. It may be that the provisions are overly cumbersome, but in the absence of any specific problems being raised, it may be simpler to re-enact them as they are.
42C. Definitions	
Division 2—Persons other than Accused	
42D. Application of Division	
42E. Appearance, etc. by audio visual link or audio link	
42F. Special provisions applicable to certain proceedings involving children	
42G. Technical requirements	
42H. Costs	
42I. Certain other laws not affected	
Division 3—Appearance by Accused Persons	
42J. Application of Division	
42K. Appearance of adult accused person before court	
42L. Making of direction for physical appearance in section 42K(1) proceedings	
42M. Making of direction for audio visual appearance in section 42K(2) proceedings	
42N. Application for making of direction under section 42K(4)	
42O. Appearance before court of	

an accused person who is a child	
42P. Making of direction for audio visual appearance by child	
42Q. Practice directions	
42R. Requirements for audio visual appearance by accused	
42S. Protection of communication between accused and legal representative	
42T. Application of <i>Surveillance Devices Act 1999</i>	
Division 4—General	
42U. Putting documents to a remote person	
42V. Direction to jury in criminal trial	
42W. Application of laws about witnesses, etc.	
42X. Arraignment	
42Y. Administration of oaths and affirmations	
PART III—PROOF OF DOCUMENTS AND OF FACTS BY DOCUMENTS	
Division 1—Introductory	
43. Provisions to be additional	Repeal. Both the proof and admissibility of documentary evidence is dealt with in the UEA.
44. Provisions relating to evidence apply to all persons acting judicially	Repeal. This section provides for evidence to be admissible before courts and persons acting judicially. While the equivalent UEA provisions will only apply to courts, persons acting judicially who are not bound by the rules of evidence are not bound by strict requirements of proof.
45. Copies admissible without further proof of sealing, signing etc.	Repeal. UEA s 150 provides a presumption that documents with the seal of a government body or seal or signature of an office holder are duly sealed/signed by that body/office holder.
46. Effect of copies same as original	Repeal. UEA s 48 allows evidence of the contents of a document to be admitted by tendering a copy.
47. No proof necessary that document printed by government printer	Repeal. UEA s 153 is to the same effect.
Division 2—General	
48. British and foreign treaties	Repeal. UEA s 174 provides the means for proving

may be proved by copies	treaties or acts of state of any foreign country with more options and additional means of proof.
49. British and foreign wills, judgments etc. may be proved by copies	Repeal. UEA s 157 is in very similar terms and relates to all Australian and foreign courts.
50. Mode of proving Royal proclamations Orders of Privy Council or rules etc. of Her Majesty's Imperial Government	Repeal. UEA s 174 provides the means for proving a statute or proclamation of any foreign country. UEA s 153 also assists.
51. Documents admissible in England, Wales or Ireland without proof to be equally admissible in Victoria	Repeal. There is no direct UEA equivalent of this provision, but there is no apparent need to retain it in light of the comprehensive code of the UEA.
52. Register of vessels to be proved by original or copy	Repeal. There is no direct UEA equivalent of this provision. However, such evidence is likely to be admissible as either a business record or a public document under UEA ss 48, 156, 58, 69 or 183.
Division 2A—Reproductions of Documents	
53. Definitions	Repeal. Documentary evidence is dealt with in UEA Part 2.2 (ss 47–51).
53A. Certified reproductions of certain public documents admissible without further proof	Repeal. The equivalent provisions in UEA s 155 are broader. UEA s 158 provides for mutual recognition of official copies of public documents admissible under the laws of each state and territory.
53B. Admissibility of reproductions of business documents destroyed, lost or unavailable	Repeal. UEA s 48(e) provides that a copy may be tendered whether or not the original has been destroyed.
53C. Attorney-General may approve machines for micro-filming etc.	Repeal. UEA s 48(d) provides that a party may tender a document produced by device (no need for approval of machines etc).
53D. Proof where document processed by independent processor	Repeal. As for s 53C.
53E. Affidavit or declaration of maker of print from micro-film etc. to be evidence	Repeal. As for s 53C.
53F. Proof of destruction of documents etc.	Repeal. As for s 53C.
53G. Certified copy of affidavit or declaration to be admissible	Repeal. As for s 53C.
53H. One affidavit or declaration	Repeal. As for s 53C.

sufficient where series of documents copied	
53J. Reproductions not to be admitted as evidence unless negative in existence etc	Repeal. As for s 53C.
53K. Changes in colour or tone	Repeal. As for s 53C.
53L. Notice to produce not required	Repeal. As for s 53C.
53M. Presumptions as to ancient documents	Repeal. As for s 53C.
53N. Reproductions made in other States etc.	Repeal. As for s 53C.
53P. Judicial notice	Repeal. As for s 53C.
53Q. Micro-film etc. may be preserved in lieu of document	This provision allows records required by law to be kept for a period of time on microfilm. Old records may still be kept in the form of microfilm. The option to preserve archives in this form should be retained, although it may eventually become unnecessary. The section could be relocated to the <i>Electronic Transactions (Victoria) Act 2000</i> which allows for documents required to be kept by law to be retained in electronic form: s 11.
53R. Factors determining admissibility	Repeal. There is a general discretion under UEA s 135 to refuse to admit evidence on the grounds that it is misleading or confusing.
53S. Estimation of importance of reproduction rendered admissible	Repeal.
53T. Interpretation of provisions of this Division	Repeal.
Division 3—Admissibility and Effect of Documentary Evidence	
54. Saving	Repeal.
55. Admissibility of documentary evidence as to facts in issue	Repeal. UEA Div 2 of Pt 3.2 (ss 62–8) provides various exceptions to the hearsay rule in relation to first hand hearsay and documents. UEA s 177 should allow provisions under s 55(8) (allowing court to act on medical certificate in determining whether witness is fit to attend court and testify) to occur.
55A. Admissibility of evidence concerning credibility of person responsible for statement	Repeal. UEA s 108A provides that evidence relevant to the credibility of a person whose representations have been admitted without them being called may only be admitted where it is capable of substantially affecting the assessment of the credibility of the

	person.
55AB. Certain depositions may be used at trial	Repeal. Authorship and accuracy of the transcript can be deposed to by the transcript provider under UEA ss 170–3. Courts may draw inference from the transcript itself under UEA ss 58, 183. UEA Pt 3.2, Div 2 lifts the hearsay rule for first-hand hearsay in certain circumstances. UEA s 65 lifts the hearsay rule in criminal proceedings in relation to representations made by a person where they are not available to give evidence at trial. Section 65(3) specifically lifts the rule for evidence given in an Australian or overseas legal proceeding if the defendant had an opportunity to cross-examine the witness in that proceeding. Section 65(6) provides for the tender of transcript authenticated by an appropriate person. The definition of ‘unavailable’ in the UEA differs in some respects from the circumstances set out in s 55AB(2). The Final Report recommends the definition of ‘unavailable’ be broadened to include a person who is unfit to be a witness because of the person’s bodily or mental condition. If a witness refuses to be sworn, UEA s 38 would allow cross-examination as to their prior statements and UEA s 60 would allow prior statements tendered in evidence to be used for a hearsay purpose.
55AC. Evidence of a witness at a subsequent trial	Repeal. As for s 55AB.
55B. Admissibility of statements produced by computers	Repeal. UEA s 48(d) provides a simplified method of proof of documents produced by a computer.
55C. Whether a statement is admissible	Repeal. Consequent upon repeal of ss 55, 55B.
55D. Where a statement is to be given in evidence	Repeal. Consequent upon repeal of ss 55, 55B.
56. As to effect of Division on rules requiring corroboration	Repeal. UEA s 164 abolishes corroboration requirements.
57. Proof of instrument to validity of which attestation is necessary	Repeal. UEA s 149 removes need to adduce evidence of an attesting witness (testamentary document excluded from s 149).
58. Presumptions as to documents twenty years old	Repeal. There is a presumption at common law that documents more than 30 years old and produced from the proper custody are presumed duly executed.

	UEA s 152, like this section, applies the same presumption to documents more than 20 years old.
Division 3A—Books of Account	
58A. Definitions	Repeal.
58B. Entries in book of account to be evidence	Repeal. UEA ss 48, 69 allow admission of business records. See also ss 170–1 which allow admission of affidavit evidence in this regard.
58C. Where person in business party to proceedings, other party entitled to inspect etc. books of account	Repeal. UEA ss 166–9, 193 provide processes for discovery and inspection of documents.
58D. Proof that book is a book of account	Repeal. As for s 58C.
58E. Verification of copy	Repeal. As for s 58C.
58F. Matters which may be proved under this Division ordinarily to be so proved	Repeal. As for s 58C.
58G. Court may order that books of account or copies be made available	Repeal. As for s 58C.
58H. Costs of application	Repeal. As for s 58C.
58I. Application of sections 58B, 58D and 58E	Repeal. As for s 58C.
58J. Computation of time	Repeal. As for s 58C.
Division 4—Further Provisions Relating to Australasian Documents	
59. Definitions	Repeal.
60. Votes and proceedings of Legislature of any Australasian State proved by copy	Repeal. UEA ss 48, 69, 154 allow admission of this evidence.
61. Royal proclamation in Australasian State proved by copy	Repeal. UEA s 143(1)(c) allows admission of this evidence.
62. Proof of Government Gazette	Repeal. UEA s 153(1) allows admission of this evidence.
63. Mode of proving proclamations etc. of Governor or Ministers of the Crown of Australasian State	Repeal. UEA s 143 provides that no proof is required of proclamations or orders in council. Where a proclamation is gazetted, UEA s 153(2) will allow admission of the gazette as proof of the proclamation. If it is not gazetted, UEA s 155 provides for admission of public documents. See also ss 48(1)(f), 69.
64. Government Gazette to be evidence of acts of Governor,	Repeal. UEA s 153(2) allows admission of this evidence.

Ministers etc.	
65. Proof of certain public and corporation documents	Repeal. UEA s 158 provides a similar mutual recognition provision relating to official or public documents of other states.
66. Documents admissible in Australasian States without proof to be equally admissible in Victoria	Repeal. UEA s 158 allows admission of this evidence.
67. Documents of Australasian State which if Victorian admissible on mere production provable by certified copy	Repeal. UEA ss 156, 158 allow admission of this evidence. No regulations currently exist prescribing fees for certified copies under this section.
68. Incorporation of any company how authenticated	Repeal. <i>Corporations Act 2001</i> (Cth) s 1274(7A) provides that a certificate of incorporation is conclusive evidence of contents. <i>Associations Incorporation Act 1981</i> (Vic) s 44 is to similar effect. UEA s 158 would allow admission of certificates issued under provisions of laws of other states.
69. Copies of documents relating to companies	Repeal. <i>Corporations Act 2001</i> (Cth) s 1274(4C) provides that certified copies of documents lodged with ASIC are admissible as prima facie evidence in a court. <i>Associations Incorporation Act 1981</i> (Vic) s 44 is to similar effect. UEA s 158 would allow admission of documents lodged under provisions of laws of other states.
Division 5—Further Provisions Relating to Victorian Documents	
70. Mode of proving proclamations, orders and regulations of Board of Land and Works	Repeal. If gazetted or printed by government printer these would be admissible under UEA s 153(2). UEA s 151 allows presumptions to be made in regard to seals of bodies established by law. In addition, depending on the circumstances, UEA s 143 may remove the need for proof and allow judicial notice to be taken.
71. Government Gazette to be evidence of act of Board of Land and Works	Repeal. UEA s 153(2) allows admission of this evidence.
72. Certified copies of certain maps and documents to be prima facie evidence	To be retained in the interests of certainty and re-enacted in the <i>Survey Co-ordination Act 1958</i> . The <i>Public Land and Works Act 1964</i> has been repealed.
73. Proof of Crown grants	Repeal. UEA s 155 allows admission of a certified copy of a public record.
74. Proof of will and death	Repeal. UEA ss 69, 157 allow admission of this

	evidence. Note also UEA s 150(3).
75. Signature of clerks of courts to be evidence	Repeal. UEA ss 155, 157 relate to evidence of official records and public documents relating to court processes.
Division 5A—Scientific Tests	
75A. Evidence of results of scientific tests	Repeal. UEA s 177 provides for a procedure whereby a party may adduce opinion evidence by tendering an expert certificate if notice has been given to the other side and no requirement has been made that the witness be called to give evidence. UEA s 76(2) also provides an exception to the opinion rule to allow admission of evidentiary certificates prescribed by other legislation.
Division 6—Judicial Notice	
76. Acts of Parliament of the United Kingdom to be judicially noticed	Repeal. UEA s 143 provides for judicial notice of Imperial Acts in force in Australia. UEA s 144 provides for judicial notice of matters capable of verification by reference to documents the authority of which cannot reasonably be questioned. UEA s 174 provides for evidence to be received of foreign legislation.
77. Australasian States and their Acts to be judicially noticed	Repeal. UEA s 143 is to the same effect.
78. Public seals of States	Repeal. UEA s 150 is to the same effect.
79. Certain signatures and seals to be judicially noticed	Repeal. As for s 78.
80. All persons acting judicially to take judicial notice	Repeal. UEA s 8 provides for the operation of other Acts. Section 5 of Victorian UEA to be drafted to give extended operation to certain sections beyond courts.
81. Effect of judicial notice of seal or signature in certain cases	Repeal. UEA s 150 is to the same effect.
Division 7—By-laws and Minutes	
82. Definitions	Repeal.
83. Proof of by-laws	Repeal. UEA s 143(1)(b) provides for judicial notice of by-laws.
84. Form of certificate	Repeal. As for s 83.
85. Technical proof unnecessary	Repeal. As for s 83.
86. Proof of proceedings of councils, committees etc.	Repeal. UEA ss 48, 69, 156 will allow admission of this evidence.
Division 8—Convictions and Acquittals	
87. Proof of trial or conviction or	Repeal. UEA s 178 provides for proof of convictions

acquittal for an indictable offence by certified copy	and acquittals.
88. Mode of proving previous convictions in other countries	Repeal. As for s 87.
89. Evidence of previous summary conviction	Repeal. As for s 87.
Divisions 9, 10—<i>Repealed</i>	
91–98C. <i>Repealed</i>	
PART IIIA—ADMISSIBILITY OF FINDINGS OF GUILT IN CIVIL PROCEEDINGS	
90. Convictions etc. as evidence in civil proceedings	Repeal. UEA s 91 generally prevents the admission of evidence of judgments or convictions as evidence of the fact in issue in that proceeding. UEA s 92(2) provides that s 91 does not prevent admission of evidence of conviction of a party in civil proceedings so long as conviction not subject to appeal, quashed or pardoned. Section 92 does not, however, allow the admission of evidence of the conviction of any person (only a party).
91. <i>Repealed</i> ³⁶⁶	
PART IV—OATHS AFFIRMATIONS AFFIDAVITS DECLARATIONS	
Division 1—Introductory	
99. Definition	Repeal.
Division 2—Oaths and Affirmations	
100. Manner of administration of oaths	To be retained in a new Oaths Act. The new section will be limited in its operation to the administration of oaths outside court (oaths of office etc) and rewritten to reflect the UEA as recommended by the report of the Victorian Parliament Law Reform Committee. ³⁶⁷ UEA s 21(4) and the Schedule provide a flexible form of oath or affirmation in court.
101. Swearing with uplifted hand	Repeal. Obsolete section.
102. When affirmation may be made instead of oath	Repeal. UEA s 21 provides that either an oath or affirmation may be made; there is no need to object to being sworn etc. UEA s 23 provides that the court is to inform witnesses of choice of oath or

366 Repealed as at 1 January 2006 by the *Defamation Act 2005*.

367 Victoria Parliament Law Reform Committee, *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community* (2002).

	affirmation.
103. Form of oral affirmation	Repeal. The form of oaths and affirmations appears in the UEA Schedule.
104. Validity of oath not affected by absence of religious belief	Repeal. UEA s 24 covers this situation and in addition provides that the oath is effective even if the person does not understand the nature and consequences of it.
Division 3—Declarations in Public Departments	
105. Declarations may be substituted for oaths and affidavits	To be retained in a new Oaths Act with application to administrative actions out of court.
106. Such substitution to be notified in Gazette	As for s 105.
Division 4—Statutory Declarations	
107. Statutory declarations	To be retained in a new Oaths Act. There is no regime for statutory declarations under the UEA.
107A. List of persons who may witness statutory declarations	
108. Objection that matter is not one requiring verification not to be taken	
109. Name and address of person witnessing declaration to appear on declaration	
Division 5—Courts and Officers	
110. Courts etc. may administer oaths to witnesses	To be retained in a new Oaths Act. There is no provision under the UEA requiring who may administer oaths and affirmations.
110A. <i>Repealed</i>	
111. Power of certain officers of courts etc. to administer oaths	As for s 110.
111A. Person appointed by foreign authority may take evidence and administer oaths	To be retained in a new Oaths Act.
Division 6—Gaolers	
112. Affidavits of prisoners	To be retained in a new Oaths Act. <i>Evidence Act 1995</i> (Cth) s 186 provides for affidavits for use in an Australian court exercising federal jurisdiction to be sworn before any justice of the peace, notary public or lawyer only. This provision ensures the access of prisoners to legal process and should be retained.
Division 7, 8— <i>Repealed</i>	
113–123B. <i>Repealed</i>	

Division 9—Affidavits in Victoria	
123C. Affidavits in Victoria how sworn and taken	To be retained in a new Oaths Act. <i>Evidence Act 1995</i> (Cth) s 186 provides for affidavits for use in an Australian court exercising federal jurisdiction to be sworn before any justice of the peace, notary public or lawyer only. This is more restrictive than the current regime in Victoria. It is recommended that the Victorian approach be maintained to avoid confusion and technical deficiencies delaying cases. NSW have provisions in relation to swearing affidavits in its <i>Oaths Act 1900</i> (ss 26, 27).
Division 10—Affidavits in Places out of Victoria	
124. Taking oaths out of Victoria	To be retained in a new Oaths Act. <i>Oaths Act 1900</i> (NSW) s 26 is in similar terms.
125. Affidavits and declarations required to be made before a justice sufficient if made before a justice elsewhere	As for s 124.
Division 11—Jurat	
126. Jurat to state where and when oath is taken	To be retained in a new Oaths Act.
126A. Jurat etc. to affidavit to be prima facie evidence of execution	To be retained in a new Oaths Act.
PART 5—ATTESTATIONS VERIFICATIONS ACKNOWLEDGMENTS NOTARIAL ACTS ETC.	
127. Provision of Part 4 extended to attestations, notarial acts etc.	To be retained in a new Oaths Act in a simplified form.
128. Attestations etc. before a justice	To be retained in a new Oaths Act in a simplified form.
129. <i>Repealed</i>	
PART 6—RECORDING OF EVIDENCE	
130. Power to person acting judicially to direct that evidence be recorded	To be retained in a new Evidence (Recording and Transmission) Act. There are no equivalent provisions in the UEA. Different approaches have been adopted in other UEA jurisdictions. Similar provisions exist in <i>Justices Act 1959</i> (Tas) s 50A; <i>Criminal Procedure Act 1986</i> (NSW) s 39; <i>Local Courts Act 1982</i> (NSW) s 53.
131. As to methods of recording evidence	
132. <i>Repealed</i>	
133. <i>Repealed</i>	
134. Persons recording evidence under this Part to be officers of the court	Retain in a new Evidence (Transmission and
135. Records made under this	

Part to be received as prima facie evidence of matter therein contained	Recording) Act. UEA s 48(1)(c) allows for transcripts to be tendered as evidence of sound recordings. See also UEA s 65(6). It may be worthwhile including a note in the Victorian UEA referring to relocated section.
136. <i>Repealed</i> 166	
137. Penalty for falsely recording evidence	Retain in a new Evidence (Transmission and Recording) Act.
138. <i>Repealed</i>	
139. <i>Repealed</i>	
140. Power to Governor in Council to regulate fees	To be retained in a new Evidence (Transmission and Recording) Act. Note: Regulations are made under this section.
PART 7—OFFENCES PERJURY FORGERY FALSE CERTIFICATES ETC.	
141. Persons making wilful false statements on oath, declaration etc. guilty of perjury	To be retained in a new Oaths Act.
142. Forgery, using etc. false documents an indictable offence	To be retained in a Crimes Act.
143. Printing or using documents falsely purporting to be printed by government printer an indictable offence	To be retained in a Crimes Act.
144. Giving false certificates an indictable offence	To be retained in a new Evidence (Transmission and Recording) Act.
145. Interpretation provisions to apply to this Part	Repeal.
PART 8—MISCELLANEOUS	
146. Impounding documents	Repeal. UEA s 188 is in similar terms.
147. Attesting witness	Repeal. UEA s 149 is in similar terms.
148. Comparison of handwriting	Repeal. Similar evidence may be admitted under UEA ss 78, 79.
149. Confession after promise or threat or purporting to be on oath	Repeal. UEA s 84 provides that evidence of an admission is not admissible unless court is satisfied that it was not influenced by violent conduct or threats of conduct. Section 85 relates to admissions in official questioning and excludes those made in circumstances where truth is adversely affected by circumstances. UEA s 90 provides a general discretion to exclude admissions in criminal proceedings. UEA s 138 provides a discretion whether to admit

	evidence improperly obtained.
149A. Admissions of fact in criminal proceedings	Repeal. UEA s 184 allows for admissions by accused to be made on the advice of counsel.
149AB. Agreed facts	Repeal. UEA s 191 is in nearly identical terms.
149B. Directions by judge where parties consent	Repeal. UEA s 190 provides for the waiver of certain rules of evidence with the consent of the parties. In criminal proceedings the consent of the accused must be on the advice of a legal practitioner.
149C. Variation or revocation of direction under section 149B	Repeal. While no express equivalent provision exists under the UEA, any direction made by a court may be revoked if the circumstances require.
150. Issue of warrant when witness does not appear	Repeal. <i>Evidence Act 1995</i> (NSW) s 194 contains a provision to this effect. <i>Evidence Act 1995</i> (Cth) omits this section. It is recommended that Victoria enact a similar s 194 to NSW with changes to reflect existing Victorian provision. ³⁶⁸
151. Abolition of extra-judicial oaths	To be retained in a new Oaths Act.
152. Regulations	To be retained and relocated. Section 152(1) is a power to make regulations prescribing fees and expenses for Crown witnesses in criminal cases and in the Coroner's Court. It is proposed to consult with the OPP and the Coroner on a suitable place to relocate the section. One option would be to enact a section in one of the Crimes Acts, have regulations made under that Act and then have a provision adopting those regulations in the Coroners Act. Move s 152(2)(aa) to one of the new Crimes Acts. Section 152(2)(a)–(b) to be retained in a new Oaths Act. Repeal s 152(2)(c). UEA s 197 contains a general regulation-making power.
153. Transitional provisions (Crimes (Amendment) Act 1997)	Repeal to be determined by Parliamentary Counsel.
154. Transitional provisions (Division 2A of Part II)	As for s 153.
155. Transitional provision—Magistrates' Court (Committal	As for s 153.

368 Recommendation 32.

Proceedings) Act 2000	
156A Transitional provision— Sentencing (Further Amendment) Act 2005	As for s 153.
157. Transitional provision— Children and Young Persons (Age Jurisdiction) Act 2004	As for s 153.
SCHEDULES	
SCHEDULE 1— <i>Repealed</i>	
SCHEDULE 2—Form of order of prisoner to be brought before court	Retain in <i>Corrections Act 1986</i> .
SCHEDULE 3—Form of certificate for authentication of by-law	Repeal.
SCHEDULE 4— <i>Repealed</i>	

Appendix 4

CRIMES ACT 1958

<i>CURRENT VICTORIAN SECTION</i>	<i>COMMENTS AND RECOMMENDATIONS</i>
9A. Treason subsection (3)	No need to repeal. Essentially a pleading requirement related to relevance.
9AH. Family violence	No need to repeal. Offence-specific provision clarifying relevance.
10. Child destruction subsection (2)	No need to repeal. Offence-specific provision.
44. Incest subsection (7)	No need to repeal. Offence-specific provision.
61. Jury warnings	No need to repeal. Offence-specific provision.
62. Abrogation of obsolete rules of law	No need to repeal.
73. Further explanation of theft subsection (14)	No need to repeal. Offence-specific conclusive evidence provision.
91(3). Going equipped for stealing etc.	No need to repeal. Offence-specific presumption.
93. Procedure and evidence subsection (3)	No need to repeal. Offence-specific facilitation of proof provision allowing a statutory declaration to be given as evidence.
95(2). Husband and wife	Repeal. This section was introduced to overcome the common law rule that husband and wife were one. UEA s 12 provides that all persons are competent unless otherwise provided.
184. Protection of witness giving answers criminating himself	No need to repeal. Offence-specific provision (relates only to secret commissions prosecutions). UEA s 128 contains similar provisions relating to self-incrimination. However, under this section a certificate is only granted if the court considers that the witness has answered the questions truly. There may be policy reasons for retaining this as an offence-specific provision, given the nature of the offence.

192. Evidence of financial position of the company	No need to repeal. Offence-specific facilitation of opinion evidence, removing need to prove basis of opinion.
314. Perjury	No need to repeal.
315. All evidence material with respect to perjury	No need to repeal. Note: UEA s 128(7) provides that the provisions preventing the tender of self-incriminating evidence given under certificate do not apply in relation to criminal proceedings in respect of the falsity of evidence and perjury. If this is considered sufficient, the section could be repealed in the Crimes Acts review.
336. Marital coercion subsection (5)	No need to repeal. Burden of proof provision in relation to defence of marital coercion. Burden of proof not dealt with in UEA.
374. Savings	No need to repeal. Provides that provisions in relation to joint trials etc do not affect laws of evidence.
391. Hearing of application for exclusion of evidence	No need to repeal; procedural provision. No provision in UEA regarding order of cases.
395. Trial where accused has previous convictions	Repeal s 395(7); not necessary to repeal other provisions. UEA s 110 governs the situation where a defendant puts his or her character in issue. UEA s 178 provides for certificates signed by registrars of courts to be evidence of convictions, sentences etc. However, systems may be in place for the proof of convictions which would warrant the retention of the provisions relating to certified statements of convictions being retained in a Crimes Act.
398A. Admissibility of propensity evidence	Repeal. UEA ss 97, 98, 101 deal with propensity evidence.
399. The accused husbands and wives as witnesses for the defence; evidence of character of the accused	Repeal.
(1) Subject to this section, where a person is charged with an offence he shall at every stage of the proceedings against him be a competent, but not compellable, witness in his own defence or in	Repeal. UEA s 12 provides that all persons are competent and compellable unless otherwise provided. UEA s 17(2) provides that a defendant in criminal proceedings is not competent to give evidence for the prosecution.

defence of any other person charged in those proceedings.	
(2) Subject to this section, where a person is charged with an offence, the wife or former wife or husband or former husband (as the case may be) of that person shall at every stage of the proceedings against that person be a competent and, unless he or she is also charged in those proceedings, compellable witness for the defence of that person or of any other person charged in those proceedings as if the marriage had never taken place.	Repeal. UEA s 12 provides that all persons are competent and compellable unless otherwise provided.
(3) The failure of any person charged with an offence to give sworn evidence shall not be made the subject of comment to the jury by either the prosecution, or by the presiding judge	Repeal. UEA s 20 provides that the judge (but not the prosecutor) may comment on the failure of the accused to give evidence but must not suggest defendants failed to give evidence because they were guilty.
(4) A person charged and being a witness pursuant to this section may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged.	Repeal. UEA s 128(8) provides that privilege against self-incrimination does not apply to evidence by a defendant in a criminal proceeding in relation to facts in issue.
(5) A person charged and called as a witness pursuant to this section shall not be asked,	Repeal. UEA ss 97, 98 provide that tendency and coincidence evidence is not admissible unless notice is given and it is of significant probative value. Section 101 provides that such evidence can only be

<p>and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—</p> <p>a) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or</p> <p>(b) he has personally or by his advocate asked questions of the witnesses for the prosecution (other than his wife or former wife or her husband or former husband as the case may be) with a view to establishing his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution (other than his wife or former wife or her husband or former husband as the case may be); or</p> <p>(c) he has given evidence against any other person</p>	<p>admitted in criminal proceedings against a defendant if the probative value of evidence substantially outweighs the prejudicial effect. UEA s 104 provides that leave must be obtained to cross-examine about matters relevant only to credibility and leave to be granted only where accused has led evidence of own good character or sort to impugn character of a witness. UEA s 110 provides that the shields of the hearsay, opinion, tendency and credibility rules are lost where defendant adduces evidence to prove his or her own good character. UEA s 104(6) prevents cross-examination by another defendant unless the accused has given evidence adverse to that defendant.</p>
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charged with the same offence.	
399A. Alibi evidence	Retain; procedural provision.
399B. Provision relating to witnesses to alibis	Retain; procedural provision.
400. Wife or husband etc. of the accused to be competent and compellable witnesses	Repeal. UEA ss 12, 17, 18 provide a similar regime relating to competence and compellability of spouses.
401. Provision for simplifying proof of previous offences	Repeal. UEA ss 178, 180 provide mechanisms for proof of previous convictions. Section 401 is unintelligible in its current form. If it is thought desirable to retain proof of prior convictions by proof of admissions to further presentments on a previous conviction, a simplified provision should be enacted.
402. Previous convictions to be noted in new sentence	No need to repeal; procedural/administrative provision regarding noting admission of prior convictions on the sentencing record.
403. <i>Repealed</i>	
404. Proof of marriage on trial for bigamy	No need to repeal; offence-specific facilitation of proof provision. Means of proof exist under the UEA but may wish to retain a specific provision.
405. Meaning of term 'official record'	No need to repeal; definition section relating to s 404.
411. Determination of age	Repeal. UEA s 54 allows inferences to be drawn from observations.
412. Prisoners entitled to inspect depositions on trial	No need to repeal; procedural/discovery type provision.
413. Depositions taken on one charge may be read in prosecution of others	Repeal. This provision allows depositions taken and statements adopted at committal to be tendered in evidence at trial where such evidence is admissible (<i>Evidence Act 1958</i> s 55AB currently provides for the situations in which this evidence may be admitted; it is recommended that this section be repealed in preference to the UEA regime). UEA s 65(3) lifts the hearsay rule to allow such evidence to be admitted in criminal trials where the maker of the statement is unavailable.
414. Subpoenas in criminal cases	No need to repeal; procedural provision.

may be issued by sheriffs etc.	
415. Issue of warrant when witness does not appear	Repeal. Recommendation is made for a Victorian provision similar to <i>Evidence Act 1995</i> (NSW) s 194 to replace this section and <i>Evidence Act 1958</i> s 150.
416. Amendments in criminal proceedings	No need to repeal; procedural provision.
417. Rights of prosecution on trials before juries	No need to repeal; procedural provision.
418. Procedure for evidence by accused	Retain; procedural provision not in UEA.
419. View	Repeal. UEA s 53 allows for views (as well as experiments, demonstrations and inspections). Unlike the common law position, UEA s 54 provides that the view can be used as evidence. There is no need to have a statutory provision addressing irregularity in the conduct of the view.
464A(3). Detention of person in custody	Retain. UEA s 139 provides that evidence given without caution is deemed to be improperly obtained and is therefore subject to discretionary exclusion.
464H. Tape-recording or video-recording of confessions and admissions	Retain. These sections provide that evidence of confessions or admissions made in custody are only admissible where they have been tape/video recorded in accordance with the requirements of the section (with certain exceptions). Equivalent provisions are found in UEA jurisdictions. <i>Crimes Act 1914</i> (Cth) s 23V and <i>Criminal Procedure Act 1986</i> (NSW) s 281 have been retained ³⁶⁹ adding a further requirement before this evidence can be admitted. UEA s 85 adds a further layer by requiring that the admissions be made in circumstances which make it unlikely that their truth was adversely affected.
464J. Right to remain silent etc not affected	Retain in amended form. Under the UEA there is no requirement to establish voluntariness. UEA s 85 requires that evidence of admissions not be admitted unless it can be shown that the admissions were made

369 The NSW provision lifts the hearsay rule and opinion rules for the admission of tape or video recordings under that section. However, this is not considered necessary in Victoria.

	in circumstances which make it unlikely the truth of the admission was adversely affected. <i>Crimes Act 1914</i> (Cth) s 23S provides a suitable model for amending this section.
464NA. Fingerscanning for identification purposes subsection (6)	No need to repeal.
464Q. Evidence of fingerprints	No need to repeal. Other UEA jurisdictions have retained these types of provisions in separate legislation: see <i>Crimes Act 1914</i> (Cth) s 23XX and <i>Crimes (Forensic Procedures) Act 2000</i> (NSW). <i>Forensic Procedures Act 2000</i> (Tas) s 46 applies the ordinary rules of evidence in relation to illegally obtained evidence to evidence not obtained in accordance with the provisions of the Act.
464ZE. Evidence relating to forensic procedures	No need to repeal. Other UEA jurisdictions have retained these types of provisions in separate legislation: see <i>Crimes Act 1914</i> (Cth) pt ID, ss 23XX, 23XY and <i>Crimes (Forensic Procedures) Act 2000</i> (NSW). <i>Forensic Procedures Act 2000</i> (Tas) s 46 applies the ordinary rules in relation to illegally obtained evidence to evidence not obtained in accordance with the provisions of the Act.
479C Escape and related offences subsection (5)	No need to repeal; offence-specific presumption.
574. Supplemental powers of Court	No need to repeal; procedural provision clarifying powers to Court of Appeal to receive evidence.

Appendix 5

CRIMES (CRIMINAL TRIALS) ACT 1999

<i>CURRENT VICTORIAN SECTION</i>	<i>COMMENTS AND RECOMMENDATIONS</i>
5. Directions hearing subsection 5	No need to repeal; procedural provision.
6. Summary of prosecution opening and notice of pre-trial admissions	As for s 5.
7. Defence response to summary of prosecution opening and notice of pre-trial admissions	As for s 5.
9. Expert evidence	No need to repeal. Procedural provision which assists in determining issue of admissibility before trial.
10. Disclosure of questions of law	No need to repeal. The section would allow evidentiary issues to be identified and resolved prior to trial.
11. Taking of evidence from a witness prior to trial	No need to repeal; procedural provision.
15. Evidence at trial	No need to repeal; procedural provision to regulate the prosecution taking an accused by surprise.
16. Comment on departure or failure	No need to repeal. This is a comment provision concerned with departures from agreements or opening statements, not the failure of the accused to give evidence (s 20).
18. Cross-examination	UEA s 41 provides a broader discretion to exclude inappropriate cross-examination. The commission recommends that s 41 of the Victorian UEA be drafted to impose a duty on courts to prevent inappropriate questioning of vulnerable witnesses. ³⁷⁰ There is no direct equivalent in the UEA of

³⁷⁰ Recommendation 11.

	subsection (2). However, a trial judge under the UEA would still have the power to do what is articulated in that subsection. If the section is retained, the opening words will preserve the concurrent operation of UEA s 41.
19. Jury documents	No need to repeal; procedural provision about material which may be given to juries to assist in deliberations.
20. Manner of giving evidence	No need to repeal; procedural provision regarding methods of giving evidence. If retained, subsection (3) would need to be amended to refer to the relevant UEA sections which will replace <i>Evidence Act 1958</i> ss 42A, 42B; UEA ss 29(4), 50.
21. Retrial	No need to repeal; procedural provision which allows adoption of rulings in retrial.

Appendix 6

SUMMARY OFFENCES ACT 1966

<i>CURRENT VICTORIAN SECTION</i>	<i>COMMENTS AND RECOMMENDATIONS</i>
9. Wilful destruction, damage etc. of property subsection (1A)	No need to repeal; offence-specific facilitation of proof provision.
26. Unexplained possession of personal property reasonably suspected to be stolen	No need to repeal; offence-specific deeming provision.
33. Examination of persons through whose hands property has passed	No need to repeal; offence-specific provision to allow court to call a witness.
49B. Loitering with intent to commit an indictable offence subsection (2)	No need to repeal; offence-specific provision. Having prior convictions forms part of the elements of the offence. Therefore, evidence not admitted as propensity evidence.
49D. Possessing housebreaking implements	No need to repeal; offence-specific burden of proof provision.
49F. Consorting subsection (2)	As for s 49D.
50A. Trespass—land used for primary production subsection (7)	As for s 49D.
60AF. Payment not to have certain consequences	No need to repeal; offence-specific provision. Penalty system which allows for expiation of the offence without admission of guilt.

Appendix 7

PROVISIONS WHICH REFER TO OR AFFECT LEGAL PROFESSIONAL PRIVILEGE

ACT	SECTIONS	AMENDMENT REQUIRED
<i>Australian Crime Commission (Victorian Provisions) Act 2003</i>	23 (3), (7) ³⁷¹	No amendment required; non-curial context. Requirement to furnish name and address of client.
<i>Co-operatives Act 1996</i>	401	No amendment required; non-curial context. Requirement to furnish name and address of client.
<i>Constitution Act 1975</i>	87AAF ³⁷²	No amendment required. Picks up <i>Evidence Act 1958</i> s 19D (see below).
<i>Dangerous Goods Act 1985</i>	13C (Note 2), 19G	After ‘legal professional privilege’, wherever appearing, insert ‘or client legal privilege’. Express provisions that nothing in the Act affects legal professional privilege.
<i>Equipment (Public Safety) Act 1994</i>	14B(Note 2), 23A	After ‘legal professional privilege’, wherever appearing, insert ‘or client legal privilege’. Express provisions that nothing in the Act affects legal professional privilege.

371 The Commonwealth equivalent of this section (*Australian Crime Commission Act 2002* (Cth)) has been held not to abrogate legal professional privilege: *Mansfield v Australian Crime Commission* (2003) 132 FCR 251 [53]–[54].

372 Not yet commenced; to be inserted by the *Courts Legislation (Judicial Conduct) Act 2005*.

<i>Evidence Act 1958</i>	19D ³⁷³	No amendment required; non-curial context. Abrogates legal professional privilege in royal commissions.
<i>Health Records Act 2001</i>	96	After 'legal professional privilege', wherever appearing, insert 'or client legal privilege'. Express provisions that nothing in the Act affects legal professional privilege.
<i>Health Services (Conciliation and Review) Act 1987</i>	26	No amendment required; non-curial context. Common law privilege preserved.
	27(10)(a)	After 'legal professional privilege', wherever appearing, insert 'or client legal privilege'. Warrant provision; UEA s 131A will apply.
<i>Housing Act 1983</i>	126	No amendment required; non-curial context. Requirement to furnish name and address of client.
<i>Legal Aid Act 1978</i>	31	No amendment required. Section encompasses both UEA and common law privilege.
<i>Legal Profession Act 2004</i>	2.7.13, 2.7.23, 2.7.42	No amendment required. Refers to both client legal privilege and legal professional privilege.
	3.3.24, 3.3.46	No amendment required. Provision broad enough to cover both common law and UEA.

373 Note: if retained this provision is recommended to be re-enacted in a Royal Commissions Act. See Recommendation 43.

<i>Legal Profession Act 2004</i>	4.2.15	No amendment required. Client who makes a complaint about a legal practitioner is taken to have waived privilege to allow practitioner to disclose matters to the Legal Services Commissioner to deal with the complaint. Information can then be used in proceedings.
	4.3.5(3)	No amendment required.
	7.2.7	No amendment required. Provision broad enough to cover both common law and UEA.
<i>Major Crime (Investigative Powers) Act 2004</i>	31	No amendment required; non-curial context. Common law privilege preserved.
	40	No amendment required; non-curial context. Common law privilege preserved. Requirement to furnish name and address of client.
	41, 42	No amendment required. Procedure for determining claims of privilege before the Chief Examiner.
<i>Occupational Health and Safety Act 2004</i>	100, 155	After 'legal professional privilege', wherever appearing, insert 'or client legal privilege'. Express provisions that nothing in the Act affects legal professional privilege.
<i>Police Regulation Act 1958</i>	86VB, 86VC, 86VE, 86VF	No amendment required; non-curial context. Common law privilege preserved. Procedure for determining claims of privilege.

<i>Securities Industry Act 1975</i>	23	No amendment required; non-curial context. Requirement to furnish name and address of client.
<i>Terrorism (Community Protection) Act 2003</i>	13ZG ³⁷⁴	No amendment required.
	13ZU ³⁷⁵	After 'legal professional privilege', insert 'or client legal privilege'.
<i>Transport Accident Act 1986</i>	126A	After 'legal professional privilege', wherever appearing, insert 'or client legal privilege'.
<i>Whistleblowers Protection Act 2001</i>	10	After 'legal professional privilege' insert 'or client legal privilege'.
	61BC, 61BE, 61BF	No amendment required; non-curial context. Common law privilege preserved. Procedure for determining claims of privilege.

374 This provision has not yet been enacted; it is contained in the Terrorism (Community Protection) (Amendment) Bill 2005 s 4.

375 This provision has not yet been enacted; it is contained in the Terrorism (Community Protection) (Amendment) Bill 2005 s 4.

Appendix 8

PROVISIONS WHICH AFFECT OR REFER TO MEDICAL PRIVILEGE

<i>ACT</i>	<i>SECTIONS</i>	<i>AMENDMENT REQUIRED</i>
<i>Accident Compensation Act 1985</i>	47, 48, 129I	No amendment required.
<i>Alcoholics and Drug Dependant Persons Act 1968</i>	16(5)	Substitute ‘the provisions of Division 1A of Part 3.10 of the [Victorian UEA] shall not apply in respect to any proceedings under this Act.’
<i>Children, Youth and Families Act 2005</i>	200(1)	For ‘medical professional privilege’ substitute ‘professional confidential relationships privilege’.
	200(2)	For ‘Sections 28(2), 28(3) and 32C of the Evidence Act 1958’ substitute ‘Division 1A and 1B of Part 3.10 of the [Victorian UEA]’.
<i>Emergency Services Superannuation Act 1986</i>	29(5)	For ‘on the ground of medical professional privilege’ substitute ‘by Division 1A of Part 3.10 of the [Victorian UEA]’.
<i>State Superannuation Act 1988</i>	86(3)	For ‘on the ground of medical professional privilege’ substitute ‘by Division 1A of Part 3.10 of the [Victorian UEA]’.
<i>Transport Superannuation Act 1988</i>	38(3)	For ‘on the ground of medical professional privilege’ substitute ‘by Division 1A of Part 3.10 of the [Victorian UEA]’.

Appendix 9

PROVISIONS CONCERNING EVIDENCE OF SETTLEMENT NEGOTIATIONS

ACT	SECTIONS
<i>Accident Compensation Act 1985</i>	61A
<i>Children and Young Persons Act 1989</i> ³⁷⁶	82B
<i>Children, Youth and Families Act 2005</i>	226
<i>County Court Act 1958</i>	47B
<i>Defamation Act 2005</i>	19
<i>Equal Opportunity Act 1995</i>	116, 158(4)
<i>Health Records Act 2001</i>	62
<i>Health Services (Conciliation and Review) Act 1987</i>	20(14)
<i>Information Privacy Act 2000</i>	36
<i>Legal Aid Act 1978</i>	40L
<i>Legal Profession Act 2004</i>	4.3.5(4), 4.3.11
<i>Magistrates' Court Act 1989</i>	108(2)
<i>Retail Leases Act 2003</i>	88
<i>Supreme Court Act 1986</i>	24A
<i>Victorian Civil and Administrative Tribunal Act 1998</i>	85, 92, Schedule 1 Part 7 cl 26

376 To be replaced by the *Children, Youth and Families Act 2005* s 226.

Appendix 10

PROVISIONS ADOPTING PRIVILEGES AVAILABLE IN COURT PROCEEDINGS

<i>ACT</i>	<i>SECTIONS</i>
<i>Commercial Arbitration Act 1984</i>	17(2)
<i>Major Crime (Investigative Powers) Act 2004</i>	63(3)
<i>Ombudsman Act 1973</i>	18(5)
<i>Police Regulation Act 1958</i>	86PA(3)
<i>Victorian Civil and Administrative Tribunal Act 1998</i>	106
<i>Whistleblowers Protection Act 2001</i>	56(3), 61B(2)

Appendix 11

PROVISIONS WHEREBY COURTS NOT BOUND BY THE RULES OF EVIDENCE TO SOME DEGREE

ACT	SECTIONS	COMMENT
<i>Accident Compensation Act 1985</i>	44	Amend to ensure the continued operation of UEA Part 3.10.
<i>Bail Act 1977</i>	8	Amend to ensure the continued operation of UEA Part 3.10.
<i>Children and Young Persons Act 1989</i> ³⁷⁷	82	Amend to ensure the continued operation of UEA Part 3.10.
<i>Children, Youth and Families Act 2005</i>	215	Amend to ensure the continued operation of UEA Part 3.10.
<i>Confiscation Act 1997</i>	33, 59, 64	Amend to ensure the continued operation of UEA Part 3.10. ³⁷⁸
<i>Crimes (Family Violence) Act 1987</i>	8(6), 13A	Section 8(6) relates to ex parte telephone applications, therefore privilege issues won't arise—no need to amend. Amend s 13A to ensure continued operation of UEA Part 3.10.
<i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i>	11, 38	Amend to ensure continued operation of UEA Part 3.10.

³⁷⁷ To be replaced by the *Children, Youth and Families Act 2005*.

³⁷⁸ These sections provide that the court, in applications under the Act, may take into account any material that it thinks fit, including evidence in other proceedings. One of those other proceedings is an examination under Part 12 of the Act. Under the provisions of Part 12, a person may be ordered to undergo an examination and required to answer questions without the protection of the privilege against self-incrimination. While that evidence is not admissible in criminal proceedings, it may be admissible in other proceedings under the Act (s 99). Applying UEA Part 3.10 to applications under the Act will not prevent the admission of evidence of the examination.

<i>Electoral Act 2002</i>	127	Amend to ensure continued operation of UEA Part 3.10.
<i>Food Act 1984</i>	19, 19B, 42	Amend to provide that, for the avoidance of doubt, the court remains bound to apply UEA Part 3.10.
<i>Imprisonment of Fraudulent Debtors Act 1958</i>	22	No amendment required. Partial lifting for proof of certain matters.
<i>Magistrates' Court Act 1989</i>	4G, 103(2)	Amend s 4G, relating to sentencing in the Koori Court, to provide that, for the avoidance of doubt, application may still be made pursuant to UEA s 4(2), for UEA Part 3.10 to apply. Amend s 103(2), relating to the court conducting an arbitration, to ensure continued operation of UEA Part 3.10.
<i>Marine Act 1988</i>	125	Amend to provide that, for the avoidance of doubt, the court remains bound to apply UEA Part 3.10.
<i>Property Law Act 1958</i>	84(5), 171(6)	No amendment required. Partial lifting for proof of certain matters.
<i>Prostitution Control Act 1994</i>	80(3A)	Amend to provide that, for the avoidance of doubt, the court remains bound to apply UEA Part 3.10.

<i>Road Safety Act 1986</i>	12(2)(b), 15A(8)(b), 16E(3)(b), 26(2)(b), 26A(2)(b), 33(15)(b), 50(5)(a), 50AAB(6)(a), 51(10B)	Amend to provide that, for the avoidance of doubt, the court remains bound to apply UEA Part 3.10.
<i>Sentencing Act 1991</i>	89(3E)(a), 89B(5)(a) ³⁷⁹	Amend to provide that, for the avoidance of doubt, the court remains bound to apply UEA Part 3.10.
<i>Valuation of Land Act 1960</i>	5A	No amendment required. Partial lifting for proof of certain matters.
<i>Wills Act 1997</i>	22, 27	Amend to ensure the continued operation of UEA Part 3.10.

379 These provisions relate to the cancellation of a defendant's driver's licence on conviction for certain offences and applications for a new driver's licence after a period of disqualification. Such applications would not be proceedings related to sentencing.

Appendix 12

REFERENCES TO ROYAL COMMISSION PROVISIONS OF THE *EVIDENCE ACT 1958*

ACT	SECTIONS
<i>Accident Compensation Act 1985</i>	249B(3A)
<i>Ambulance Services Act 1986</i>	13(2)
<i>Appeal Costs Act 1998</i>	27(1)
<i>Architects Act 1991</i>	31
<i>Building Act 1993</i>	Schedule 3, cl 15(2)
<i>Charities Act 1978</i>	10(1)
<i>Children and Young Persons Act 1989</i> ³⁸⁰	212, 223
<i>Children, Youth and Families Act 2005</i>	117, 439, 450
<i>Chinese Medicine Registration Act 2000</i> ³⁸¹	52
<i>Chiropractors Registration Act 1996</i> ³⁸²	49
<i>Constitution Act 1975</i>	87AAF(1)
<i>Co-operative Housing Societies Act 1958</i>	55(3), 69
<i>Corrections Act 1986</i>	71
<i>Country Fire Authority Act 1958</i>	74N
<i>Dental Practice Act 1999</i> ³⁸³	51
<i>Firearms Act 1996</i>	166(2)
<i>Gambling Regulation Act 2003</i>	10.1.20(2)
<i>Health Services Act 1988</i>	144(2)(a)
<i>Health Services (Conciliation and Review) Act 1987</i>	25, 26(2), 31(1)
<i>Local Government Act 1989</i>	9(3), 214(2)
<i>Marine Act 1988</i>	84(3)

380 To be replaced by the *Children, Youth and Families Act 2005*.

381 To be repealed by the *Health Professions Registration Act 2005* s 163.

382 Ibid.

383 Ibid.

<i>Medical Practice Act 1994</i> ³⁸⁴	53
<i>Metropolitan Fire Brigades Act 1958</i>	79M
<i>Mineral Resources Development Act 1990</i>	99(2)
<i>Nurses Act 1993</i> ³⁸⁵	51
<i>Ombudsman Act 1973</i>	18(1), 20(1)(a)(ii), 20(3)
<i>Optometrists Registration Act 1996</i> ³⁸⁶	51
<i>Osteopaths Registration Act 1996</i> ³⁸⁷	49
<i>Pharmacy Practice Act 2004</i> ³⁸⁸	79
<i>Physiotherapists Registration Act 1998</i> ³⁸⁹	48
<i>Podiatrists Registration Act 1997</i> ³⁹⁰	49
<i>Police Regulation Act 1958</i>	75(4), 86KA(1), 86KB(1), 86PA(1)&(6), 86PB(1)(a), 86PC(1), 86PD(1), 86PE(1)(a), 86ZB, 86ZD(1)(a), 86ZE(1), 102F(2)
<i>Psychologists Registration Act 2000</i> ³⁹¹	52
<i>Public Administration Act 2004</i>	53(2), 57(2), 111
<i>Public Transport Competition Act 1995</i>	21(2)
<i>Racing Act 1958</i>	85(9)
<i>State Electricity Commission Act 1958</i>	Schedule 6, cl 9
<i>Surveying Act 2004</i>	29
<i>Teaching Service Act 1981</i>	48
<i>Telecommunications (Interception)(State Provisions) Act 1988</i>	20(3)(b), 22(b)(ii)
<i>Transfer of Land Act 1958</i>	104(2)

384 Ibid.

385 Ibid.

386 Ibid.

387 Ibid.

388 Ibid.

389 Ibid.

390 Ibid.

391 Ibid.

<i>Transport Act 1983</i>	128(2), 129(3), 129UA(2), 228O(2)
<i>Veterinary Practice Act 1997</i>	48
<i>Victims of Crime Assistance Act 1996</i>	37(1)
<i>Victoria Grants Commission Act 1976</i>	18
<i>Victorian Curriculum and Assessment Authority Act 2000</i>	18F
<i>Victorian Institute of Teaching Act 2001</i>	45
<i>Whistleblowers Protection Act 2001</i>	61BA(1)(a), 61BAB(1), 61G(1), 61H(1), 61K(1), 61L(1)(a), 105B, 105D(1)(a), 105E(1), 108(2)(a)
<i>Wrongs Act 1958</i>	14I (definition of civil proceeding)

Appendix 13

REFERENCES TO THE AUDIOVISUAL PROVISIONS OF THE *EVIDENCE ACT 1958*

ACT	SECTIONS
<i>Bail Act 1977</i>	9
<i>Children, Youth and Families Act 2005</i>	490, 530, 589
<i>County Court Act 1958</i>	78
<i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i>	36
<i>Magistrates' Court Act 1989</i>	16(1A)(p)(q)(r), 82, 128
<i>Supreme Court Act 1986</i>	25

Appendix 14

REFERENCES TO DOCUMENT PROVISIONS OF THE *EVIDENCE ACT 1958*

ACT	SECTIONS	AMENDMENT REQUIRED
<i>Australian and New Zealand Banking Group Act 1970</i>	8(1)–(2), 20(1)–(2)	Repeal
<i>Australian and New Zealand Banking Group (NMRB) Act 1991</i>	10(2)–(3), 18(2)–(3), 19(2)–(3)	Repeal
<i>Bank Integration Act 1992</i>	20	Repeal
<i>Children, Youth and Families Act 2005</i>	532(14)(a)	Repeal
<i>Commonwealth Games Arrangements Act 2001</i>	4ZE(2)	Repeal
<i>Companies (Application of Laws) Act 1981</i>	Schedule 1, cl 41	Repeal
<i>Construction Industry Long Service Leave Act 1997</i>	38(2)–(3)	Repeal
<i>Electricity Industry (Residual Provisions) Act 1993</i>	75(2)–(3), 110(2)–(3), 128(2)–(3), 147(2)–(3), 153N(2)–(3), 153TK(2)–(3), 153TZB(2)–(3)	Repeal
<i>Film Act 2001</i>	53(2)–(3)	Repeal
<i>Gas Industry (Residual Provisions) Act 1994</i>	81(2)–(3), 126(2)–(3)	Repeal
<i>Health Services Act 1988</i>	65K(2)–(3), 203(2)–(3), 218(2)–(3), 260(3)–(4)	Repeal
<i>House Contracts Guarantee Act 1987</i>	63(2)	Repeal

<i>Magistrates' Court Act 1989</i>	43(9)(a)	Repeal
<i>National Australia Bank and Bank of New Zealand Act 1997</i>	11(2)–(3)	Repeal
<i>National Mutual Royal Savings Bank Limited (Merger) Act 1987</i>	8(2)–(3)	Repeal
<i>Port Service Act 1995</i>	113(2)–(3), 161(2)–(3)	Repeal
<i>Project Development and Construction Management Act 1994</i>	58(2)–(3), 74(2)–(3)	Repeal
<i>Rail Corporations Act 1996</i>	54(2)	Repeal
<i>State Bank (Succession of Commonwealth Bank) Act 1990</i>	16(2)–(3)	Repeal
<i>The Commercial Bank of Australia Limited (Merger) Act 1982</i>	10(2)–(3)	Repeal
<i>The Commercial Banking Company of Sydney Limited (Merger) Act 1982</i>	10(2)–(3)	Repeal
<i>Transfer of Land Act 1958</i>	Repeal definition of 'reproduction' only (s 4)	Repeal
	27D(7)(a)	Repeal
<i>Victorian Plantations Corporation Act 1993</i>	47(2)–(3)	Repeal
<i>Water Act 1989</i>	301(6)	Substitute 'The provisions of subsection(5) are additional to and do not take away from the provisions of s 153 of the [Victorian UEA]'
<i>Water Industry Act 1994</i>	166(2)–(3)	Repeal
<i>Water (Resource Management) Act 2005</i>	115Q(2)	Repeal
<i>Westpac and Bank of Melbourne (Challenge Bank) Act 1996</i>	11(2)–(3), 22(2)–(3)	Repeal

Appendix 15

REFERENCES TO DEFINITIONS IN THE *EVIDENCE ACT 1958*

ACT	SECTIONS
‘document’	
<i>Australian and New Zealand Banking Group Act 1970</i>	7(2), 19(2)
<i>Charities Act 1978</i>	8 (definition of document)
<i>Public Records Act 1973</i>	2 (definition of record)
‘legal proceedings’	
<i>Children and Young Persons Act 1989</i> ³⁹²	273(1), 274(1)
<i>Children, Youth and Families Act 2005</i>	583(1), 584(1)(b)
<i>Corrections Act 1986</i>	57A(1)(b)
<i>Terrorism (Community Protection Act) 2003</i>	23(1)
<i>Victims of Crime Assistance Act 1996</i>	65(1)
‘persons acting judicially’	
<i>Education Act 1958</i>	14B
<i>Infertility Treatment Act 1995</i>	150
<i>Retail Leases Act 2003</i>	89(4)
<i>Victims of Crime Assistance Act 1996</i>	65(2)
other	
<i>Interpretation of Legislation Act 1984</i>	54(3)

392 To be replaced by *Children, Youth and Families Act 2005* ss 583, 584.

Appendix 16

REFERENCES TO THE AFFIDAVIT AND STATUTORY DECLARATION PROVISIONS OF THE *EVIDENCE ACT 1958*

ACT	SECTIONS
<i>Administration and Probate Act 1958</i>	75(2)
<i>County Court Act 1958</i>	22(2)
<i>Fisheries Act 1995</i>	44(4)(b)
<i>Health Professions Registration Act 2005</i>	4(3)(b), 29(3)(b)
<i>Instruments Act 1958</i>	68, 82
<i>Interpretation of Legislation Act 1984</i>	38 (definition of 'statutory declaration' and 'solemn declaration')
<i>Nurses Act 1993</i>	5(3)(b), 8B(5)(b), 8C(4)(b)
<i>Optometrists Registration Act 1996</i>	5(3)(b), 11(4)(b)
<i>Osteopaths Registration Act 1996</i>	4(3)(b)
<i>Pharmacy Practice Act 2004</i>	4(3)(b)
<i>Physiotherapists Registration Act 1998</i>	4(3)(b)
<i>Podiatrists Registration Act 1997</i>	4(3)(b)
<i>Psychologists Registration Act 2000</i>	4(3)(c)
<i>Religious Successory and Charitable Trusts Act 1958</i>	39(1)
<i>Surveying Act 2004</i>	4(3)(b)
<i>Veterinary Practice Act 1997</i>	4(3)(b), 8(4)(b)

Appendix 17

REFERENCES TO THE TRANSCRIPT PROVISIONS OF THE *EVIDENCE ACT 1958*

ACT	SECTIONS
<i>Co-operative Housing Societies Act 1958</i>	71B(4)
<i>Coroners Act 1985</i>	57(1)
<i>Magistrates' Court Act 1989</i>	Schedule 5, cl 15(5), 17(3)(g)

Appendix 18

OTHER REFERENCES TO THE *EVIDENCE ACT 1958*

ACT	SECTIONS	AMENDMENT REQUIRED
<i>Coroners Act 1985</i>	57(3)	Substitute ‘except as provided in section 65 of the [Victorian UEA], a record is not evidence in any court of any fact asserted in it’.
<i>Companies (Application of Laws) Act 1981</i>	Schedule 1 cl 48	Insert after <i>Evidence Act 1958</i> ‘or the [Victorian UEA]’.
<i>Emerald Tourist Railways Act 1977</i>	38(9)	Insert after <i>Evidence Act 1958</i> ‘or the [Victorian UEA]’.
<i>Futures Industry (Application of Laws) Act 1986</i>	Schedule 1 cl 13	Insert after <i>Evidence Act 1958</i> ‘or the [Victorian UEA]’.
<i>Juries Act 2000</i>	62	Change reference to <i>Evidence Act 1958</i> Division 2, Part IV to the appropriate provision of the Oaths Act, once enacted.
<i>Magistrates’ Court Act 1989</i>	129(1)–(2)	Repeal; UEA s 25 will operate instead.
	Schedule 5 cl 6(1)(h), cl 9(1), cl 11(1)(a) cl 23(2)(b)(ii), cl 24A(4)(c)	Amend references to <i>Evidence Act 1958</i> ss 37A, 37B to the relocated sections in the Crimes Acts.
	Schedule 5 cl 24(3)(a)(ii)	Amend reference to ‘the regulations made under section 152 of the <i>Evidence Act 1958</i> ’ to regulations made under the Crimes Acts, when the relevant sections are relocated.

<i>Magistrates' Court Act 1989</i>	Schedule 5 cl 19(1)	Substitute 'section 184 of the [Victorian UEA]' for 'section 149A of the <i>Evidence Act 1958</i> '.
	Schedule 8 cl 14	Amend reference to the <i>Evidence Act 1958</i> to the new Oaths Act when appropriate.
<i>Police Regulation Act 1958</i>	86KC	Amend reference to <i>Evidence Act 1958</i> to the new Royal Commissions Act, when appropriate.
<i>Securities Industry Act 1975</i>	21(9)	Insert after <i>Evidence Act 1958</i> : 'or the [Victorian UEA]'.
<i>Securities Industry (Application of Laws) Act 1981</i>	Schedule 1 cl 12	Insert after <i>Evidence Act 1958</i> : 'or the [Victorian UEA]'.
<i>Sentencing Act 1991</i>	6F(2)	Substitute with: 'Despite anything to the contrary in the [Victorian UEA] or the <i>Crimes Act 1958</i> , a statement of the fact that an offender was sentenced for a relevant offence as a serious offender may be included in a certificate issued under section 178 of the [Victorian UEA] or in a certified statement of conviction issued under section 395 of the <i>Crimes Act 1958</i> .'
<i>Sentencing Act 1991</i>	6J(2)	Substitute with: 'Despite anything to the contrary in the [Victorian UEA] or the <i>Crimes Act 1958</i> , a statement of the fact that an offender was sentenced for a continuing criminal enterprise offence as a continuing criminal enterprise offender may be included in a certificate issued under section 178 of the [Victorian UEA] or

		in a certified statement of conviction issued under section 395 of the <i>Crimes Act 1958</i> ’.
<i>Transfer of Land Act 1958</i>	114(4)	Repeal.
<i>Victims of Crime Assistance Act 1996</i>	63(3)	Amend reference to <i>Evidence Act 1958</i> to the new Royal Commissions Act when appropriate.
<i>Whistleblowers Protection Act 2001</i>	61I	Amend reference to <i>Evidence Act 1958</i> to the new Royal Commissions Act when appropriate.
<i>Working with Children Act 2005</i>	47(3)	Repeal.

Appendix 19

SUBMISSIONS

No	Name	Date
1	Optometrists Association Australia (Victorian Division) Incorporated	13 Dec 2004
2	Australasian Institute of Mining and Metallurgy	14 Feb 2005
3	Victorian Legal Aid	22 Feb 2005
4	Andrew Kirkham RFD QC	7 Mar 2005
5	Commercial Bar Association	7 Mar 2005
6	Registrar of Honorary Justices	10 Mar 2005
7	Marcus Hoyne, Barrister	24 Mar 2005
8	Ian F Turnbull, Barrister	24 Mar 2005
9	The Hon Justice Michael Kirby	30 Mar 2005
10	KP Hanscombe SC	1 April 2005
11	Dental Prosthetists Association of Victoria	14 June 2005
12	Confidential	August 2005
13	Records Management Association of Australasia	9 Sept 2005
14	Associate Professor Kenneth Arenson	13 Sept 2005
15	Australian Naturopathic Practitioners Association	14 Sept 2005
16	Pharmaceutical Society of Australia (Victorian Branch)	14 Sept 2005
17	Australian Dental Association, Victorian Branch	16 Sept 2005
18	Australian Nursing Federation, Victorian Branch	19 Sept 2005
19	Relationships Australia Victoria	19 Sept 2005

20	Lisa Hannan, Magistrates' Court of Victoria	22 Sept 2005
21	Criminal Bar Association	22 Sept 2005
22	Family Mediation Centre	23 Sept 2005
23	Australian Medical Association Victoria	30 Sept 2005
24	Criminal Law and Litigation Lawyers Sections, Law Institute of Victoria	28 Sept 2005
25	Victoria Police	30 Sept 2005
26	Victoria Legal Aid	30 Sept 2005
27	Victoria Legal Aid	10 Oct 2005
28	Victorian Bar	25 Oct 2005
29	Office of Public Prosecutions	15 Nov 2005
30	Australian Association of Occupational Therapists Victoria	21 Nov 2005
31	Department of Justice	21 Nov 2005

CONSULTATIONS

No	Participants	Date
1	Roundtable consultation with members of the Victorian legal community	18 Aug 2005
2	Roundtable consultation with members of the Victorian legal community	23 Aug 2005
3	Roundtable consultation with members of the Victorian legal community	30 Aug 2005
4	Roundtable consultation with members of the Victorian legal community	5 Sept 2005
5	Associate Professor Sue McNicol, Barrister	16 Sept 2005
6	Maria Lusby, Judicial College of Victoria	14 Dec 2005
7	Paul Coghlan QC, Director of Public Prosecutions	19 Dec 2005

8	Graeme Johnstone, State Coroner	Dec 2005–Jan 2006
9	Supreme Court Litigation Committee	29 Sept 2005

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