

QUEENSLAND

LAW REFORM COMMISSION

CONFIDENTIAL

WORKING PAPER ON A BILL TO CONSOLIDATE, AMEND
AND REFORM THE LAW OF EVIDENCE

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PREFACE

The Law Reform Commission has been functioning since 1st March, 1969 and has been constituted by the Law Reform Commission Act 1968 - 1972. The members are:-

The Honourable Mr. Justice D. G. Andrews, Chairman

Mr. P. R. Smith

Dr. J. M. Morris

Mr. B. H. McPherson

Mr. J. J. Rowell.

The Secretary of the Commission is Mr. K. J. Dwyer. The office of the Commission is at William Street, Brisbane.

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LAW REFORM COMMISSION

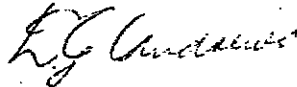
WORKING PAPER ON A BILL TO
CONSOLIDATE, AMEND AND REFORM
THE LAW OF EVIDENCE

The second programme of the Law Reform Commission of Queensland as approved by the Governor in Council includes a review of the law of evidence with a view to its codification.

This working paper contains a commentary and a proposed Bill to consolidate, amend and reform the law of Evidence. A proposed Bill to amend the Acts Interpretation Act 1954 - 1971 and a summary of other related recommendations are also enclosed. Neither the proposed Bills nor the commentary and recommendations represent the final views of the Commission. The Commission has not dealt with provisions for the collection of fees contained in the Evidence and Discovery Act 1867 - 1972 ss. 19, 36, 40 and 41.

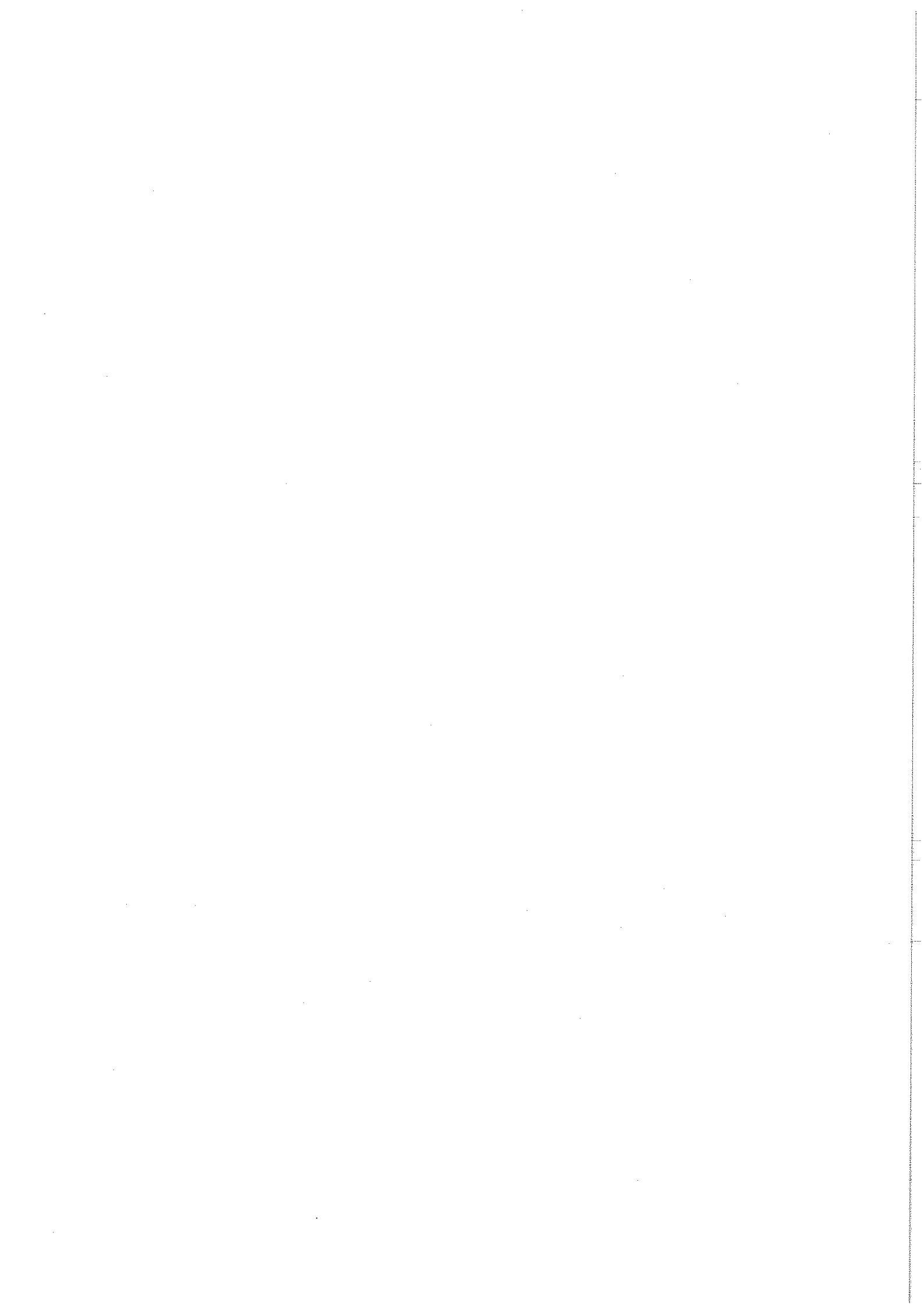
The working paper is being circulated to persons and bodies known to be interested in these matters, from whom comment and criticism are invited. It is circulated on a confidential basis and recipients are reminded that any recommendations for the reform of the law must have the approval of the Governor in Council before being laid before Parliament. No inferences should be drawn as to any Government Policy.

It is requested that any observations you may desire to make be forwarded to the Secretary, Law Reform Commission, P.O. Box 312, North Quay, Queensland, 4000, so as to be received no later than Monday 22nd September, 1975.



(D. G. Andrews)
CHAIRMAN

13th June, 1975.



EVIDENCE BILL

COMMENTARY

The Queensland law of evidence, like that of other Australian jurisdictions and of England and New Zealand, is a mixture of common law and statutory law. The common law developed over the course of many centuries and has been modified or added to by Act of Parliament from time to time as the need arose. Many of these statutory alterations took place in England during the nineteenth century and were copied in other countries where the English common law had been adopted. One early landmark in this process is the English Evidence Act 1843 (6 & 7 Vic. c. 85), still on the statute book in England, which abolished the common law rule making incompetent as witnesses persons who had an interest in the legal proceeding or who had committed certain crimes. Many other Acts of Parliament on evidence and related subjects were enacted in England during the remainder of the nineteenth century and many of their provisions were copied in the Australian jurisdictions, including Queensland.

During the twentieth century until quite recent times, there has been comparatively little change in the law of evidence in these jurisdictions. With the exception of the Evidence Act 1938 making admissible in evidence certain statements in documents, which has been copied in Australia and New Zealand, no evidence law of major importance was enacted in England until the Criminal Evidence Act 1965 - and this was enacted to modify a serious defect in the rule against hearsay evidence shown by the decision of the House of Lords in Myers v. Director of Public Prosecutions [1965] A.C. 1001. In England since then, the law of evidence for civil proceedings has been substantially modified by the Civil Evidence Act 1968 and the Civil Evidence Act 1972. Substantial changes of the law of evidence for criminal proceedings have been proposed by the English Criminal Law Revision Committee in its Eleventh Report: Cmnd. 4991 (1972). However these proposals have not yet been adopted. Indeed, they have met strong opposition as is shown by the debate on them in the House of Lords. See Hansard, H. L. Debates, vol. 338 (1973) cols. 1546 et seq. This illustrates how much more difficult it will be to change the law of evidence for criminal proceedings than for civil.

The Queensland Evidence and Discovery Act of 1867 was one of twenty-nine Acts passed in the Parliamentary session of that year to consolidate much of the statute law of Queensland. The Act is a consolidating statute, not a code. It assumes the continuing existence of the common law on evidence. For the most part, it is derived from the statute law of England either directly or indirectly through law inherited from New South Wales upon the separation of Queensland in 1859. It shows signs of having been put together in some haste. Moreover, although amended from time to time, it has never been thoroughly adjusted to the major changes in the legal system that have taken place since 1867, namely, the adoption of the Judicature system in 1876, and the inauguration of the Commonwealth of Australia, the commencement of the Queensland Criminal Code and of the Rules of the Supreme Court on 1 January, 1901. It is by far the oldest evidence Act of the states and territories of Australia,

the next being the Evidence Act 1898 of New South Wales. It differs greatly in both substance and form from the most recent comprehensive Australian legislation on the subject, the Evidence Ordinance 1971 of the A. C. T. Other Evidence Acts have been passed by the Queensland Parliament with little or no attempt to fit them in with the Evidence and Discovery Act. See, for example, the Evidence Further Amendment Act of 1874, the Bankers' Books Evidence Act of 1879 (now the Bankers' Books Evidence Act of 1949) and the Evidence Act 1898. Indeed, the amorphous character of the Evidence and Discovery Act would have made this very difficult.

In drawing the Draft Evidence Bill, our main purpose has been to state in modern form so much of the law of evidence as may be conveniently set out in such an instrument. We have not attempted to abolish the common law on the subject. In this respect, we have followed the tradition that still prevails elsewhere in Australia as well as in England and New Zealand. Nor have we attempted to incorporate in the Bill all of the rules of evidence that have been expressed in statutory form. There are many statutory rules of evidence that are more conveniently expressed in the Act to which they apply. See, for example, the evidentiary provisions in the Mental Health Act 1974 s. 65. We have sought to avoid highly controversial alterations of the existing law, especially so far as they might relate to criminal proceedings, for fear that they might unduly delay the adoption of modern evidence legislation in Queensland. Any such alteration might just as easily be made to a new evidence Act as to the existing conglomeration of provisions.

Although we have paid heed to all relevant information and discussion reasonably available to us, we would especially like to acknowledge the assistance gained from the legislation and reports of the other Australian jurisdictions, of England and New Zealand. We must also acknowledge the assistance gained from the Australian edition of Cross on Evidence edited by J. A. Gobbo. Because of the nature of our work, we have been able to make only very limited use of material from the United States. The law of evidence in that country appears to have embarked on a course that differs from our own due, it appears, to the intensely analytical examination to which it has been there subjected. This kind of examination is evident from the Model Code of Evidence adopted by the American Law Institute in 1942 and the Uniform Rules of Evidence approved by the National Conference of Commissioners on Uniform State Laws in 1953. A similar comment may be made on the study papers on the law of evidence prepared by the Law Reform Commission of Canada.

A number of matters have come to our notice which, though related to the law of evidence, we have decided not to deal with in the Draft Bill. Some of these are discussed elsewhere in this commentary. Some of the remainder may usefully be mentioned now.

Rules of civil procedure

In the Queensland Evidence and Discovery Act 1867 - 1972 (hereafter referred to as the Evidence and Discovery Act) there are a number of provisions relating to civil proceedings which, we think, ought not to be transferred into a new Evidence Act. They deal with matters of procedure rather than of evidence. Any of them that need

to be retained would be better placed in other legislation, such as a general Procedure Act, or in rules of court. Section 43, for example, regulates the order of addresses in a civil proceeding. It should not be transferred into a new Evidence Act. Until 1970, the equivalent provisions in New South Wales were to be found in their Common Law Procedure Act 1899 ss. 113-115. That Act was repealed by the Supreme Court Act 1970 and the order of addresses in the New South Wales Supreme Court is now governed by the Supreme Court Rules 1970, Part 34 rule 6.

Though s. 43 should not be transferred into a new Evidence Act, we think it should remain unrepealed until it can be examined in the course of the review of the rules regulating civil proceedings to be undertaken under Item 1 of the Second Programme of the Law Reform Commission. Unfortunately, this means that the Evidence and Discovery Act would remain on the statute book after a new Evidence Act is passed. However, there does not appear to be any other appropriate course to follow.

Other matters that should be reserved for a general Procedure Act or for rules of court are those now dealt with by the Common Law Practice Act 1867 - 1972 ss. 40 and 41 (refusal to make affidavit), s. 74 (persons may be examined without a subpoena) and ss. 75 and 76 (witnesses without just excuse neglecting to attend). So also should be the rule that a question as to the effect of a foreign law is a matter for the judge and should not be submitted to a jury. (See the South Australian Evidence Act 1929 - 1974 s. 63a.) Some of the matters referred to by the English Civil Evidence Act 1972 may also be conveniently dealt with in a general Procedure Act or in rules of court. We especially draw attention to s. 2 of that Act which provides for the making of rules of court enabling a court in any civil proceedings to direct, with respect to medical or other matters, that the parties shall each disclose to the others the expert evidence proposed to be adduced at the trial.

There are other sections in the existing Queensland Act whose usefulness is so open to question that we think they should be repealed upon the passage of a new Evidence Act even though they have not yet been examined in the course of the review of civil procedure to be undertaken. We refer here to ss. 50, 51, 52, 72, 73 and 74 of the Evidence and Discovery Act. Sections 50-52 deal with the administration of interrogatories in the Supreme Court, a matter that is now dealt with by the Rules of the Supreme Court O. 35. (These sections must be read in the light of s. 49, which was repealed by the Statute Law Revision Act of 1908.) Sections 72 and 73 deal with the discovery and inspection of documents in civil proceedings. These matters are now dealt with by the Rules of the Supreme Court O. 35, the District Court Rules 1968 rr. 182-196, and the Magistrates Courts Rules 1960 rr. 159-172. Section 74 deals with the inspection of property, a matter now dealt with by the Rules of the Supreme Court O. 58, the District Court Rules 1968 rr. 171 and 172, and the Magistrates Courts Rules 1960 r. 166. In addition, there is the legislation upon views contained in the Jury Act 1929 - 1972 s. 43, the Common Law Practice Act 1867 - 1972 s. 62, and the Criminal Code s. 623.

We therefore recommend that ss. 50, 51, 52, 72, 73 and 74 should be repealed upon the passage of a new Evidence Act. Later in the

commentary, we recommend that ss. 21, 22 and 23, which deal with certain related matters of civil procedure, should also be repealed. Section 43, on the other hand, should be retained in the existing Act until it can be examined in the course of the review of civil procedure to be undertaken.

Rules of criminal procedure

Item 2 of the Second Programme of the Law Reform Commission requires the Commission to investigate certain anomalies in the criminal law and the practice of the criminal courts. We think that any examination of the Criminal Law Amendment Act of 1894 s. 10, which deals with the admissibility of confessions in criminal proceedings, would be best undertaken in the course of such an investigation. Although from a technical point of view this rule is concerned with admissibility, in a real sense it is concerned with pre-trial procedure in criminal cases and would be best examined in that context.

Section 67 of the Evidence and Discovery Act provides that in certain circumstances the deposition of a witness for the accused may be read in evidence for the defence at a criminal trial. The section deals only with the depositions of defence witnesses. The corresponding provision dealing with the depositions of prosecution witnesses is to be found in s. 111 of the Justices Act 1886 - 1975. We think both provisions should be included in the new Justices Act which is now being drawn up by a committee established for that purpose. We therefore recommend that s. 67 be retained in the existing Evidence Act until the new Justices Act is passed.

Unstamped instruments

Sections 45-48 of the Evidence and Discovery Act contain a series of provisions dealing with the admissibility of unstamped, and insufficiently stamped, instruments. This matter is now dealt with by the Stamp Act 1894 - 1974 s. 4A. Sections 45-48 may therefore be repealed without replacement.

Oaths, attestations, etc.

In Queensland, legislative provisions for oaths and like matters are to be found mainly in the Oaths Acts 1867 to 1960, the Oaths Act Amendment Act of 1876, the Oaths Act Amendment Act of 1884, and the Oaths Act Amendment Act 1891 - 1974. This legislation has been regarded as distinct from that relating to evidence. Thus in the 1962 Reprint of the Queensland Statutes, legislation under the title "Evidence" is to be found in Volume 5 while legislation under the title "Oaths" is to be found in Volume 13. A similar pattern has been adopted in New South Wales, where the Evidence Act and the Oaths Act are quite distinct. In Victoria, on the other hand, legislation dealing with oaths is mainly to be found in Part IV of the Evidence Act 1958.

We think that the distinction hitherto recognized in Queensland between legislation on evidence and legislation on oaths should be maintained. An oath may be administered to a person other than a witness about to give evidence. There are oaths of office and allegiance. There are special oaths administered to jurors and to

bailiffs. See the Oaths Acts 1867 to 1960. We think it would be anomalous to include legislation upon these matters in an Evidence Act. For somewhat similar reasons, we think that general legislation upon affirmations, affidavits and statutory declarations should not be included in an Evidence Act. This legislation, like that on oaths, is concerned more with giving validity to something done by a person rather than with making admissible in evidence a statement made by him. If no other convenient place may be found for legislation of this sort, we think it would best be retained in an Oaths Act. The word "Oaths" connotes the general idea behind this legislation. Though a statutory declaration is not made under oath, it is quite meaningful for the declarant to state that he makes it by virtue of the provisions of the Oaths Act.

The same argument may be applied to attestations, verifications, acknowledgements, notarial acts and the like. General legislation upon these matters is more concerned with giving validity to something done by a person rather than with making admissible in evidence a statement made by him. It is true that these matters are more removed from the idea of an oath than are affirmations, affidavits and statutory declarations. However we think that general legislation upon them would be better placed in an Oaths Act than in an Evidence Act. A further important reason for this is that certain rules applicable to oaths, affirmations, affidavits and statutory declarations may also be applied to attestations, verifications, acknowledgements and notarial acts. See, for example, the Queensland Australian Consular Officers' Notarial Powers and Evidence Acts 1946 to 1963 s. 3 and the Victorian Evidence Act 1958 Part V. Another example is to be found in s. 3 of the Queensland Evidence (Attestation of Documents) Acts 1937 to 1950, which provides:

... where ... any document is required, authorised, or permitted to be attested or verified by or signed or sealed or sworn or acknowledged before a justice of the peace of this State, it shall be sufficient for all purposes if such document is attested or verified or signed or sealed or sworn or acknowledged in any part of His Majesty's Dominions outside of this State by or before a justice of the peace for that part of His Majesty's Dominions ...

We think that the equivalent of this provision should in future be placed in an Oaths Act rather than an Evidence Act.

If the distinction suggested above is observed - and we recommend that it should be observed - some of the legislation at present set out in Volume 5 of the 1962 Reprint of Queensland Statutes under the title "Evidence" should be kept for a consolidation of the Oaths Acts rather than be included in a new Evidence Act. The Australian Consular Officers' Notarial Powers and Evidence Acts 1946 to 1963 and the Evidence (Attestation of Documents) Acts 1937 to 1950 should be so kept. So also should ss. 37A, 38 and 61 of the Evidence and Discovery Act. Some of this legislation has an evidential character. See, for example, s. 38 of the last-mentioned Act. However, the evidential rules are only ancillary to other rules that are not truly evidential in character and they should not be separated from them. It should also be mentioned that ss. 38 and 61 are historically associated with one another. They are each derived from provisions of a Queensland Act of 1864, 28 Vic. No. 18.

The Second Programme of the Law Reform Commission does not contain any item calling for a review of the Oaths Acts. We recommend that such an item be included in any new programme for the Commission. This legislation, much of which was enacted in 1867, is now badly in need of review. Meanwhile, we recommend that ss. 37A, 38 and 61 of the Evidence and Discovery Act should remain unrepealed.

PART I - PRELIMINARY

The preliminary clauses of the Draft Bill (cll. 1-5) do not contain any provision preserving the common law such as that in the Queensland Evidence Act 1898 s. 14. Since the Draft Bill does not purport to be a code of evidence, it could not be successfully argued that it abrogates in a general way the common law on evidence still applicable in Queensland. Because of the very specific provisions in cl. 36 of the Draft Bill, it might perhaps be said that this clause does abrogate the common law and other statutory law dealing with the subject matter to which it refers. We have therefore included in cl. 36 a sub-clause preserving the common law and other statutory law dealing with that subject matter.

It will be noticed that cl. 3(2) and Part B of the First Schedule would not repeal the whole of the Evidence and Discovery Act. Sections 31 (proof of judgments and orders of the Supreme Court), 37A (powers as to oaths and notarial acts abroad), 38 (proof of certain documents in relation to notarial acts, etc.), 43 (speeches to the jury), 61 (a provision related to s. 38 above), 67 (depositions of prisoners' witnesses) and 79 (short title) would remain unrepealed. The reasons for this are set out elsewhere in this commentary.

By virtue of cl. 4, the provisions of the Draft Bill would not apply to criminal proceedings commenced, whether by arrest, complaint or ex officio indictment, before the commencement of the new Act. We think it possible that the interests of an accused person could be prejudiced if the rules of evidence applicable to him are changed during the course of the proceedings against him. With other proceedings, there is not the same degree of difficulty. Moreover, civil proceedings may be very protracted in duration and we think it would be inappropriate to exclude the new provisions if it is practicable to apply them in a particular case even though commenced before the commencement of the new Act. Clause 4(1)(b), which is modelled on s. 4(1)(b) of the Mental Health Act 1974, has been drawn with these considerations in mind. Clause 4(1)(c), which would preserve the admissibility of documents already in existence at the time of the commencement of the new Act, is modelled on s. 2 of the N. S. W. Evidence Act 1898 - 1966. Clause 4(2) refers to the transitional provisions that will be necessary to preserve the validity under the new Act of any steps taken under the Evidence (Reproductions) Act 1970, whose provisions have been incorporated into the Draft Bill.

In cl. 5, the interpretation provision, the definitions of "court" and "proceeding" have been taken from the Queensland Evidence (Reproductions) Act 1970 s. 4. Following the terminology used in the New Zealand Evidence Act 1908 and the A. C. T. Evidence Ordinance 1971, the Draft Bill uses the term "proceeding" rather than "legal

proceeding" or "proceedings". The definition of "document" and the associated provision in cl. 5(2) are taken in substance from the Victorian Evidence Act 1958 s. 3, which in turn is modelled in this respect on the English Civil Evidence Act 1968 s. 10. The reference in the definition of document to "any other record of information whatever" has been suggested by the N. S. W. Law Reform Commission in its report on Evidence (Business Records) L. R. C. 17 (1973) at p. 39 so as to include the various forms of computer storage, punched cards and punched paper tape. There is a somewhat similar reference in the English Criminal Evidence Act 1965 s. 1(4). The definition of "statement" is taken from the Evidence and Discovery Act s. 42A. Other definitions in cl. 5 will be referred to elsewhere in this commentary.

PART II - WITNESSES

Division 1 - Who may testify

6. Witnesses interested or convicted of offence. Clause 6 is a restatement in more modern form of s. 4 of the Queensland Evidence and Discovery Act. It may be compared with the N. Z. Evidence Act 1908 s. 3 and the A. C. T. Evidence Ordinance 1971 s. 53. The provision is derived from English legislation enacted in 1843 to overcome rules disqualifying persons from giving evidence if they had a pecuniary or proprietary interest in the proceedings or had been convicted of crime.

It is not necessary to include in the Draft Bill the provisions of ss. 11-15 of the existing Queensland Act. These provisions, which are designed to modify the rule disqualifying a person having an interest from giving evidence, are derived from various pieces of English legislation enacted before 1843, when the disqualifying rule was abolished. The provisions were probably not even necessary in 1867, when the existing Queensland Act was enacted. They should now be repealed without any replacement.

7. Parties, their wives and husbands as witnesses. Clause 7 is a restatement in more modern form of s. 5 of the Queensland Evidence and Discovery Act. It may be compared with the N. Z. Evidence Act 1908 s. 4 and the A. C. T. Evidence Ordinance 1971 s. 54. This provision also is derived from English legislation enacted to overcome rules disqualifying from giving evidence the parties to proceedings and the husbands and wives of parties. It will be noticed that cl. 7 is expressly limited to proceedings other than criminal proceedings. Section 5 of the existing Act does not expressly contain any such limit. Nevertheless, s. 5 is impliedly limited in its application to criminal proceedings, although the extent of the limitation is doubtful. See the Criminal Code s. 618A, the Justices Act 1886 - 1975 s. 75 and Finglas v. Cahill, Ex parte Cahill [1961] Qd. R. 323. We feel that it is best to clarify the situation by expressly limiting cl. 7 to proceedings other than criminal proceedings. This is the scheme adopted in the original English legislation and by the other Australian States and the Australian Capital Territory. Indeed it was the scheme adopted in Queensland until 1892, when the precursor of s. 618A of the Criminal Code was enacted. If this scheme is adopted, special provision must

be made elsewhere for criminal proceedings. Therefore, while cl. 7 is designed to apply to proceedings other than criminal proceedings, cl. 8 (below) is designed to apply to criminal proceedings.

8. Witnesses in a criminal proceeding. The general rule at common law is that neither the person charged nor the spouse of the person charged is competent to give evidence in a criminal proceeding either for the defence or the prosecution. To this general rule there is a limited common-law exception (still applicable in Queensland: R. v. Miller [1962] Qd. R. 594) allowing a spouse to give evidence for the prosecution in certain types of case, the most important being where the husband is charged with causing bodily injury to his wife. Of course, the general common-law rule has been substantially modified by statute. See Evidence and Discovery Act s. 5, the Criminal Code s. 618A, and the Justices Act 1886 - 1975 s. 75. Unfortunately, however, the combined effect of these statutory provisions and the common-law rule is not as clear as it ought to be, as an examination of Finglas v. Cahill, Ex parte Cahill [1961] Qd. R. 323 shows. Moreover, in one important respect the rules appear to be insufficient to meet the needs of a community that is becoming increasingly aware of the "battered baby" type of case - they do not allow a spouse to give evidence for the prosecution when the other spouse is charged with a serious offence against a child of the household. The common-law exception extends only to the case where one spouse is accused of personal violence against the other spouse.

In cl. 8 we have attempted to restate the law upon these matters so as, we hope, to clarify it and also to extend it in certain respects where there appears to be a need to do so. We feel that the proper place for such an important general rule of evidence is in an Evidence Act rather than in the Criminal Code or the Justices Act. Unlike the existing law in Queensland, cl. 8 does not make any distinction between indictable and other offences, a distinction which is complicated by the fact that many important indictable offences are triable summarily and are therefore also "simple offences" as defined by s. 4 of the Justices Act 1886 - 1975. We think that such a distinction is not warranted.

Under existing Queensland law, the person charged in a criminal proceeding is competent to give evidence on his own behalf. This would continue to be so under cl. 8(1). However cl. 8(1), by providing that the person charged is a competent witness on behalf of "the defence", would also make him a competent witness for a co-accused. This broader rule prevails in the other Australian States and in England but it is open to argument how far it is embodied in existing Queensland legislation. See Jong Song v. Joy Hoy (1897) 8 Q. L. J. 109. Under cl. 8(1), a person charged could not be compelled to give evidence for a co-accused. Throughout cl. 8 we have used the phrase "the person charged" rather than "the accused" because this phrase appears to be more commonly used in this context in Australian and English legislation. Moreover, the use of this phrase will ensure that a case such as R. v. Boal [1965] 1 Q. B. 402 is directly relevant in Queensland. In that case it was held (at p. 415) that a co-defendant who pleaded guilty was not "charged" within the terms of the analogous English rule and was therefore a compellable witness for the defence. The co-defendant was "not being charged with an offence actually within the consideration of the jury at the time". It should also be noticed that cl. 8(1), like s. 618A of the Criminal Code and the analogous English rule, does not

expressly stipulate that a person charged cannot give evidence for the prosecution against a co-accused. As in England and elsewhere in some of the States of Australia (though not in New South Wales), the incompetency of the person charged to give evidence for the prosecution would continue to depend on the original common-law rule if cl. 8(1) were enacted. This would have the advantage that pronouncements upon the common-law rule, such as those in Winsor v. R. (1866) L. R. 1 Q. B. 289 at pp. 311-312, would continue to be directly relevant in Queensland. It would be difficult to codify this rule in its entirety and it seems best at this stage not to attempt to do so. Some aspects of the rule are shown by J. D. Heydon in "Obtaining Evidence versus Protecting the Accused: Two conflicts" [1971] Crim. L. R. 13.

Under existing Queensland law, the husband or wife of the person charged is competent to give evidence on behalf of that person in all criminal cases. (Compellability will be discussed below). Clause 8(2) would continue this rule and also, by using the words "the defence", clearly extend it to allow the spouse to testify on behalf of a co-accused. In Victoria, New South Wales and Western Australia, the accused's spouse is a competent witness for a co-accused in all criminal cases without the consent of the accused. Clause 8(2) would also make the accused's spouse a competent witness for the prosecution in all criminal cases. Again, this is the law which at present prevails in Victoria, New South Wales and Western Australia and we feel it ought to be extended to Queensland. In the present-day community, there seems to be little justification for preventing a husband or wife of the accused from testifying for the prosecution provided he or she is willing to do so. Of course, the question whether the spouse ought to be compelled to testify for the prosecution raises a different, and much more difficult, issue but there seems to be no argument of substance against making the spouse competent to give evidence for the prosecution in all criminal cases. Under existing Queensland statutory law (putting aside the common-law exception to the general rule of incompetency), an accused's spouse is competent to give evidence for the prosecution only in limited classes of cases. The spouse is competent to give such evidence under the Evidence and Discovery Act s. 5 where the offence charged is a simple offence and also under a number of provisions of the Criminal Code (ss. 35, 212-220, 222, 223, 353, 360 and 363). Although there is no analogous provision in existing Queensland law, we recommend a provision (cl. 8(5)) that requires the court to warn a spouse who is a competent but not compellable witness that he or she is not compelled to give evidence if unwilling to do so. This provision is derived from the Victorian Crimes Act 1958 s. 400(2), introduced into that Act in 1967.

The compellability of the spouse of an accused to give evidence is dealt with (except insofar as it is governed by the common law) by sub-cl. (3) and (4) of cl. 8. The simplest issue here is whether the husband or wife of the person charged ought to be compellable to give evidence on behalf of that person. Under s. 618A of the Criminal Code, the spouse is not compellable to give such evidence: R. v. Miller [1962] Qd. R. 594. We feel that a person ought to be compellable to give evidence on behalf of his or her spouse in the same way as an ordinary witness is compellable to give evidence on behalf of an accused and we accept the reasoning of the English Criminal Law Revision Committee in its Eleventh Report upon this point: Cmnd. 4991 (1972) para. 153. Clause 8(3), if adopted, would bring this about. We also accept the reasoning of that Committee that, except in the

special circumstances mentioned below, the spouse of an accused ought not to be compellable to give evidence on behalf of a co-accused: Cmnd. 4991 para. 155.

The compellability of the spouse of an accused to give evidence for the prosecution is a more difficult issue. If the common-law exception to the general rule of incompetency is put to one side, a spouse is compellable to give evidence for the prosecution under existing Queensland law only in limited classes of cases. The spouse is so compellable under the Evidence and Discovery Act s. 5 for simple offences and under the Criminal Code s. 35 when one spouse is prosecuted on the complaint of the other for an offence committed with respect to his or her property. In Queensland, under the common-law exception referred to above, it is uncertain whether a spouse is compellable to give evidence for the prosecution against the other spouse when the latter is charged with personal violence against the former. Compare R. v. Netz [1973] Qd. R. 13 with R. v. Byrne [1958] Q.W. N. 18 and R. v. Sokal [1973] Qd. R. 301.

Clause 8(4) would specify those cases in which the spouse of the accused is a compellable witness for the prosecution. In our opinion, the law of evidence ought to be altered so that the husband or wife of the accused is compellable to give evidence for the prosecution wherever the offence charged is a serious one involving a child under seventeen years and of the same household as the accused. Upon this, we accept the reasoning of the English Criminal Law Revision Committee in its Eleventh Report: Cmnd. 4991 (1972) paras. 150-151. (We set the age at seventeen for consistency with other relevant provisions of the Criminal Code.) Considerations in favour of preserving unity and harmony within a household ought to give way to the need to bring out the truth when the victim of a serious offence is a child within that household. By "serious offence" we mean to include cases of actual or threatened violence to the person, sexual offences, and offences of neglect. In drawing up a list of offences we have been guided by the offences listed for a similar purpose in s. 400(3) of the Victorian Crimes Act 1958, introduced into that Act in 1967. It should be mentioned in passing that this Victorian provision does not require that the child be of the same household as the accused in order to make the spouse a compellable witness for the prosecution. The provision that we propose, cl. 8(4), is therefore significantly narrower in scope than its Victorian counterpart. Clause 8(4) is expressed so as to make the spouse compellable to give evidence on behalf of a co-accused as well as for the prosecution in the circumstances mentioned. (It will be remembered that under cl. 8(3) an accused's spouse would always be a compellable witness for that accused). As the English Criminal Law Revision Committee says (para. 155), it seems wrong to deny to the co-accused a right which is given to the prosecution.

The offences which would come within the ambit of cl. 8(4), as specified by the Second Schedule to the Draft Bill, are as follows:

Sections of the Criminal Code

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| 208. Unnatural offences. | 211. Indecent practices between males. |
| 209. Attempt to commit unnatural offences. | 212. Defilement of girls under twelve. |
| 210. Indecent treatment of boys under fourteen. | |

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| 214. Attempt to abuse girls under ten. | 320. Grievous bodily harm. |
| 215. Defilement of girls under seventeen and of idiots. | 321. Attempting to injure by explosive substances. |
| 216. Indecent treatment of girls under seventeen. | 322. Maliciously administering poison with intent to harm. |
| 222. Incest by man. | 323. Wounding and similar acts. |
| 223. Incest by adult female. | 324. Failure to supply necessaries. |
| 302. Murder. | 325. Endangering life or health of apprentices or servants. |
| 303. Manslaughter. | 326. Endangering life of children by exposure. |
| 306. Attempt to murder. | 335. Common assault. |
| 308. Written threats to murder. | 336. Assault with intent to commit unnatural offence. |
| 311. Aiding suicide. | 337. Indecent assault on males. |
| 315. Disabling in order to commit indictable offence. | 339. Assaults occasioning bodily harm. |
| 316. Stupefying in order to commit indictable offence. | 340. Serious assaults. |
| 317. Acts intended to cause grievous bodily harm or prevent apprehension. | 343. Common assaults. |
| 318. Preventing escape from wreck. | 344. Aggravated assaults. |
| 319. Intentionally endangering safety of persons travelling by railway. | 347. Rape. |
| 319A. Endangering safety of persons travelling by aircraft. | 349. Attempt to commit rape. |
| | 350. Indecent assaults on females. |

Section of the Children's Services Act 1965 - 1973

69. Offences in relation to the health of children.

Also within the ambit of cl. 8(4) would be an attempt to commit (Criminal Code s. 4), and an attempt to procure the commission of (Criminal Code s. 539), any such offence.

Before leaving cl. 8(4), we would draw attention to the fact that the concept of the "household" is already used in Queensland legislation in the Criminal Code s. 286.

Clause 8(5) has been considered above in relation to cl. 8(2).

Clause 8(6)(a) sets out expressly something that is presumably implied in some of the legislation upon this subject. For example, when the Criminal Code s. 216 (indecent treatment of girls under seventeen) states that "the wife of the accused person is a competent but not a compellable witness", this does not necessarily mean that the wife of a male accused would be a competent witness for the prosecution even if she is jointly charged with him. We recommend cl. 8(6)(a) so as to make it clear that sub-cl. (2), (3) and (4) do not apply without modification if the spouse of the accused is also charged in the criminal proceeding.

Clause 8(6)(b) would preserve the common-law rule, mentioned above, whereby the spouse of an accused person may give evidence for the prosecution in certain types of case, the most important being where the wife gives evidence against her husband charged with personal violence towards her. The wording of cl. 8(6)(b) is almost identical with the English Criminal Evidence Act 1898 s. 4(2), which has the same function. Although there is a conflict of judicial opinion in Queensland whether the spouse is a compellable as well as competent witness under this rule (see above), we feel the time has not yet come to codify it. One difficulty that would confront a codifier at this time would be to list definitively the offences to which the rule applies. Of course, if cl. 8(2) is adopted, the common-law rule would be important only to the extent that it makes the spouse of the accused a compellable, and not merely a competent, witness. In Victoria, the common-law rule has been preserved by s. 400(3) of the Crimes Act 1958, introduced into that Act in 1967. This legislation assumes that the spouse is a compellable witness under the common-law rule.

Clause 8(6)(c) is inserted to ensure that nothing in this legislation detracts from the privilege set out in cl. 11 relating to matrimonial communications.

Before leaving cl. 8, it should be mentioned that we have decided against making any recommendation upon any right in the trial judge or the prosecution to comment upon a failure of the accused, or the husband or wife of the accused, to give evidence in a criminal proceeding. At the present time, Queensland legislation does not deal with this matter. Compare the English Criminal Evidence Act 1898 s. 1 and the Victorian Crimes Act 1958 s. 399. See also the recommendations of the English Criminal Law Revision Committee in its Eleventh Report (Cmnd. 4991 (1972) paras. 108-113) and the debate on its recommendations in the House of Lords (Hansard, H. L. Debates, vol. 338 cols. 1546 et. seq.). The practice in Queensland is governed by judicial authority: R. v. Phillips [1967] Qd. R. 237 and R. v. Young [1969] Qd. R. 417. The course of the recent debate in England on this and related matters leads us to believe that it would be difficult to devise a legislative formula dealing with the right to comment that would win widespread acceptance. Perhaps with excessive caution, we therefore have decided not to make any recommendation upon this right. No doubt the law will continue to be developed, one way or another, by case decisions and judicial exposition.

If cl. 8 is adopted, we recommend that the existing provisions of the Criminal Code dealing with the compellability or competency of witnesses, referred to above, be repealed. The Evidence and Discovery Act s. 5 and the Justices Act 1886 - 1975 s. 75 should also be repealed.

9. Evidence of children. Clause 9, which deals with the unsworn evidence of children, extends the provisions of s. 146 of the Children's Services Act 1965 - 1973 to legal proceedings generally. At present, this section applies only to legal proceedings against a person for an offence against that particular Act. The analogous provisions in Victoria, Western Australia and Tasmania apply to civil and criminal proceedings generally. In Victoria, the provisions apply to "any child under the age of fourteen years", while in Western Australia and

Tasmania they apply to "any child of tender years". We recommend that in Queensland the word "child" be used without further qualification.

In existing legislation in Queensland and elsewhere, there is a provision that a person shall not be convicted of an offence on the uncorroborated evidence of a child received pursuant to the provision. In our view, this rule draws too sharp a distinction between the sworn and unsworn evidence of children. Unless there is some special provision to the contrary, the sworn evidence of a child need not be corroborated as a matter of law although a jury should be warned of the danger of acting on the uncorroborated evidence of young children: R. v. Kilbourne [1973] A.C. 729 at p. 740. It seems to us that the same rule ought to apply to the unsworn evidence of a child. The difference between the two types of evidence given by children is not so great as to warrant a different kind of rule about corroboration applying to each. We accordingly recommend sub-cl. 2 which would apply the same rule to unsworn evidence as applies to sworn evidence. It may be noted in passing that the Oaths Act Amendment Act of 1884 s. 2, which allows evidence to be given by persons who are incompetent to take an oath, does not as a matter of law require such evidence to be corroborated.

Sub-clause (5) has been inserted so that a rule about corroboration such as that in s. 215 of the Criminal Code is not affected. If cl. 9 is adopted, we recommend that s. 146 of the Children's Services Act 1965 - 1973 be repealed.

Division 2 - Privileges and obligations of witnesses

10. Privilege against self-incrimination. Clause 10, which is designed to preserve the privilege against self-incrimination, is almost identical with s. 7 of the Evidence and Discovery Act except that it concludes with a proviso which refers to a section dealing with the special situation that arises in a criminal proceeding where a person charged gives evidence.

We do not recommend the adoption of legislation upon incrimination such as that in the English Civil Evidence Act 1968, which followed on the Sixteenth Report of the English Law Reform Committee: Cmnd. 3472 (1967) paras. 9-11. In the first place, s. 14(1) of the English Act declares that in civil proceedings the privilege against self-incrimination does not apply to incrimination as to foreign law. In the second place, s. 14(1) declares that in civil proceedings the privilege applies also to the incrimination of a spouse. We are of the opinion that it would be inopportune to introduce either of these pieces of legislation into a new Evidence Act in Queensland at the present time. We feel that it is too early yet to say definitively by legislation that the privilege does not apply to incrimination as to foreign law, especially when facts such as those that occurred in Re S [1948] V.L.R. 11 are taken into account. Furthermore, we do not want to prejudice by such legislation the adoption in Queensland of Part III Division 2 of the Draft Bill.

So far as the incrimination of one spouse by the other is concerned, we are uncertain about the mischief aimed at by s. 14(1) of the English

Act. The English Law Reform Committee itself says that (so long as the rule against hearsay applies in criminal cases) no answer given or document disclosed in civil proceedings would be admissible on a prosecution of the spouse incriminated and that his or her spouse would not normally be a compellable witness in criminal proceedings: Cmnd. 3472 para. 9. Moreover, the legislation introduces substantial complexities into the law. Not only must there be ancillary provisions for civil proceedings, such as those contained in s. 14 of the English Act, but also provisions of greater complexity for criminal proceedings. See cl. 15 of the Draft Bill recommended by the English Criminal Law Revision Committee in its Eleventh Report: Cmnd. 4991 (1972) pp. 182-183. This legislation would make even more complex the law at present expressed by the second paragraph of s. 618A of the Criminal Code. We have therefore decided against recommending an equivalent provision for Queensland.

In our opinion s. 20 of the Evidence and Discovery Act may be repealed without substitution. All that need be said about self-incrimination is said by s. 7 (our cl. 10). Section 20 is derived from the English Witnesses Act 1806 (46 Geo. 3 c. 37). Of this Act the New South Wales Law Reform Commission, in its report on the application of Imperial Acts, has said, "This Act was probably unnecessary as being merely declaratory of the common law. The Judges were consulted and a substantial majority was of that view." L. R. C. 4 (1967) p. 124.

11. Communications to husband or wife. Clause 11 restates in a modified form the rule at present to be found in s. 9 of the Evidence and Discovery Act. Section 9, like the English provision from which it is derived and the legislation of most other Australian States, applies to both civil and criminal proceedings. Clause 11, which we now recommend, would apply only to criminal proceedings. The original rule was criticized by the English Law Reform Committee in its Sixteenth Report (Cmnd. 3472 (1967) paras. 42-43) and it was subsequently excluded from civil proceedings in England by the Civil Evidence Act 1968 s. 16(3). See also the A. C. T. Evidence Ordinance 1971 s. 54(2).

The English Criminal Law Revision Committee in its Eleventh Report has recommended a like exclusion from criminal proceedings: Cmnd. 4991 (1972) para. 173. We agree that the rule should be excluded from civil proceedings. However we are reluctant to recommend that it be excluded from criminal proceedings for two reasons. Firstly, we have not accepted the related recommendation of the English Law Reform Committee to extend the privilege against self-incrimination to the incrimination of a spouse (see above). Secondly, we have recommended above that a spouse should be a compellable witness against the other spouse in a class of criminal proceedings in which the spouse would not have been compellable before: see cl. 8(4). In these circumstances, we recommend a modified rule that would confer a privilege on the spouse who is a witness in a criminal proceeding but not in other proceedings.

If cl. 11 is adopted, we recommend that sub-cl. (6)(c) be added to cl. 8 to avoid any doubt about the relationship between these two provisions. This would enable a spouse to rely on the privilege defined by cl. 11 even though he or she is otherwise a compellable witness for the prosecution against the other spouse under cl. 8(4).

12. Admissibility of evidence as to access by husband or wife. This clause is almost identical with s. 3 of The Evidence Further Amendment Acts 1874 to 1962 s. 3 which was introduced into that Act in 1962 to abrogate the rule in Russell v. Russell [1924] A. C. 687.

13. Compellability of parties and witnesses as to evidence of adultery. This clause is almost identical with s. 3A of The Evidence Further Amendment Acts 1874 to 1962 which was introduced into that Act in 1962 to abolish the privilege against questions tending to show adultery. It may be noted in passing that s. 10 of the Evidence and Discovery Act, which deals with a related matter, is no longer necessary and may be repealed without substitution.

14. Abolition of certain privileges. Clause 14 adopts the recommendations of the English Law Reform Committee to abolish the privileges to which it applies: Sixteenth Report Cmnd. 3472 (1967) paras. 14, 16 and 30. The recommendations were adopted in England by the Civil Evidence Act 1968 s. 16(1) and (2). Clause 14, like the provisions of the English Act, would apply only to civil proceedings. In its Sixteenth Report, the English Law Reform Committee was concerned with privilege in civil proceedings only. However, the English Criminal Law Revision Committee has recommended that the provisions of the Civil Evidence Act 1968 s. 16(1) should be extended to criminal proceedings as well: Eleventh Report Cmnd. 4991 (1972) para. 173. Perhaps with excessive caution, we have decided not to go so far as this. Clause 14, which we recommend, would therefore not apply to criminal proceedings. In the Australian Capital Territory, the forfeiture rule has been abolished only for the purposes of civil proceedings while the document of title rule has been abolished for the purposes of legal proceedings of any kind: A. C. T. Evidence Ordinance 1971 s. 95.

Clause 14, like the English legislation from which it is derived, expressly describes the rules that it abrogates. We prefer this method of abrogating such rules to one which only expresses what a witness is not entitled to refuse to do. With the former method, there seems to be a greater certainty that the rules have been entirely abrogated.

Division 3 - Examination and cross-examination of witnesses

15. Questioning a person charged in a criminal proceeding. Clause 15 deals with matters at present dealt with by the second paragraph of s. 618A of the Criminal Code, namely, the questioning of a person charged in a criminal proceeding where that person gives evidence. We are of the opinion that this important rule of the law of evidence should be in an Evidence Act rather than the Criminal Code. This is the policy followed in a number of other jurisdictions. Equivalents of the rule are to be found in Evidence Acts of South Australia, Western Australia and Tasmania and in an Evidence Ordinance of the A. C. T. In England, it is contained in the Criminal Evidence Act 1898. We have placed cl. 15 in the Draft Bill with other provisions dealing with the examination and cross-examination of witnesses.

Clause 15, like the second paragraph of s. 618A of the Criminal Code, deals essentially with two matters. Firstly, sub-cl. (1) limits the privilege against self-incrimination (see cl. 10) so that a person

charged who gives evidence in a criminal proceeding may be questioned about the offence with which he is there charged. Secondly, sub-cl. (2) governs the extent to which the person charged may be questioned about an offence other than that with which he is charged or about his character.

Sub-clause (1) would limit the privilege against self-incrimination in a manner different from that at present adopted in s. 618A of the Criminal Code and the equivalent legislation of other jurisdictions. Section 618A, like s. 1(e) of the English Criminal Evidence Act 1898, says that the person charged "may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged". This formula has created a difficulty because it not only limits the privilege against self-incrimination but also expresses a positive rule about the admissibility of evidence in very wide terms, so wide that the courts have been forced to read them down. Jones v. D. P. P. [1962] A. C. 632 illustrates this process very well. We feel that this particular difficulty can fairly easily be avoided by designing sub-cl. (1) so that it does nothing more than limit the privilege against incrimination that would otherwise protect an accused. In this we have followed the approach of the English Criminal Law Revision Committee in cl. 15(2)(a) of its Draft Bill: Eleventh Report Cmnd. 4991 (1972) p. 182. We have also omitted the words "tendering himself as a witness" that are to be found in s. 618A so as to avoid any possibility of conflict with the decision in R. v. Rowland [1910] 1 K. B. 458. In view of R. v. Adams [1965] V. R. 563, it seems desirable to include in sub-cl. (1) a reference to the production of a document or thing.

Sub-clause (2) would govern the extent to which a person charged in a criminal proceeding may be questioned about an offence other than that with which he is there charged or about his character. The introductory part of the sub-clause prohibits questions about these matters. The significant words of the prohibition are identical with those in s. 618A of the Queensland Criminal Code, s. 399 of the Victorian Crimes Act 1958, s. 1 of the English Criminal Evidence Act 1898 and other equivalent legislation except that the phrase "wherewith he is then charged" has been altered to "with which he is there charged".

To the prohibition in the introductory part of sub-cl. (2) there are exceptions each of which is set out in a sub-paragraph. This scheme is similar to that in s. 618A. Sub-paragraph (a) of sub-cl. (2) would be a substantial modification of the analogous sub-para. (a) in s. 618A and equivalent legislation elsewhere. The weakness of the existing sub-para. (a) is well shown by the reasoning in Jones v. D. P. P. [1962] A. C. 635 where the equivalent English legislation was examined. The function of sub-para. (a) is to allow the accused to be asked a question about other misconduct provided the question tends to prove a matter of which proof would have been admissible during the case for the prosecution. That is to say, its function is to allow such a question to be asked provided the question goes to the issue and not only to credit or bad character. Hence the words "... is admissible evidence to show that he is guilty of the offence wherewith he is then charged". Unfortunately, however, the first half of the existing sub-para. (a) is too narrowly drawn to fulfil this function. The scope of the words "The proof that he has committed or been convicted of such other offence" is too narrow. As the facts in Jones v. D. P. P. [1962] A. C. 635 and Attwood v. The Queen (1960) 102 C. L. R. 353 show, a question on matters relevant to the proof of the charge may come within the scope of the introductory prohibition in s. 618A and yet not come within

the scope of the exception in sub-para. (a). Although in Attwood v. The Queen the High Court of Australia showed itself willing to fill in the legislative gap in the analogous Victorian provision, we feel that the defect ought to be remedied in a new Evidence Act and we recommend a modified sub-para. (a) accordingly. Our approach is similar to, though not identical with, that of the English Criminal Law Revision Committee in cl. 6(2) of its Draft Bill: Eleventh Report Cmnd. 4991 (1972) pp. 177-178.

Sub-paragraph (b) of sub-cl. (2) has no equivalent in s. 618A of the Criminal Code or the legislation of other jurisdictions. It is modelled on, though not identical with, cl. 6(3) of the English Draft Bill mentioned above: Cmnd. 4991 p. 178. In recommending it, we have accepted the argument of the English Criminal Law Revision Committee in support of a provision of this kind. See Cmnd. 4991 p. 219.

Sub-paragraph (c) of sub-cl. (2) is the equivalent of sub-para. (b) in s. 618A of the Criminal Code. The wording of the two is similar, the only differences being as follows:

- (i) The words "asked questions of the witnesses for the prosecution" have been altered to "asked questions of any witness". We feel that the relevant rule should apply to questions asked of any witness, not only of witnesses for the prosecution. Compare cl. 7(1)(a) of the English Draft Bill: Cmnd. 4991 p. 178. This change would not, we think, affect the decision in R. v. Barnowski [1969] S. A. S. R. 386.
- (ii) The words "imputations on the character of the prosecutor or the witnesses for the prosecution" have been altered to "imputations on the character of the prosecutor or of any witness for the prosecution or for any other person charged in that criminal proceeding". In recommending this change, we have accepted the argument of the English Criminal Law Revision Committee that the relevant rule should be extended to imputations on the character of any witness for a person jointly charged with the person who makes the imputation: Eleventh Report Cmnd. 4991 para. 131.
- (iii) The wording of the proviso has been altered so that the whole sub-paragraph may be applied to a criminal proceeding other than a trial by jury.

The changes set out above that sub-para. (c) would make in the law are more limited than the equivalent changes recommended by the English Criminal Law Revision Committee in its Eleventh Report (Cmnd. 4991 paras. 128-129) and those actually adopted in the A. C. T. in the Evidence Ordinance 1971 s. 70. However, we are not convinced that we can improve this branch of the law by further legislative change and feel, in these circumstances, that it is better to preserve the essential structure of sub-para. (b) in s. 618A of the Criminal Code (our sub-para. (c)) so that authorities like Curwood v. The King (1944) 69 C. L. R. 561, Selvey v. D. P. P. [1970] A. C. 304, Donnini v. The Queen (1972) 128 C. L. R. 114 and R. v. Langford [1974] Qd. R. 67 will continue to apply. This attitude may be unduly cautious. However, we notice that the English Criminal Law Revision Committee makes

its recommendation only after stating that the views of its members remained irreconcilable and that its recommendation was finally made only upon a majority decision (para. 128).

Sub-paragraph (d) of sub-cl. (2) is a modified version of sub-para. (c) in s. 618A of the Criminal Code. The existing provision is too narrow because it applies only when two or more persons charged in a criminal proceeding are charged with the same offence. In this we have followed the approach of the English Criminal Law Revision Committee in cl. 6(5) of their Draft Bill: Cmnd. 4991 p. 178.

Before leaving cl. 15, we should add that we have considered inserting into this clause a provision in these terms:

For the purposes of this section, the term "character" includes reputation and disposition.

There is authority that the word "character" in s. 618A of the Criminal Code and equivalent legislation elsewhere sometimes bears more than the restricted meaning it bears for the purpose of the common-law rules as to evidence of character, namely, general reputation. See, for example, Stirland v. D. P. P. [1944] A. C. 315 at pp. 324-325. It might therefore be argued that cl. 15 should contain a provision of the kind set out above. However, we have decided against recommending such a provision. It seems to us that the policy issues lying behind the meaning given to the term "character" have not yet been sufficiently identified to warrant a legislative declaration upon the matter in this context.

16. Witness may be questioned as to previous conviction. Clause 16 restates in a modified form s. 19 of the Queensland Evidence and Discovery Act, which in its turn is derived from English legislation. This legislation declares an exception to the general rule that an answer given by a witness in cross-examination upon a collateral matter must be treated as final. Clause 16 differs from the existing s. 19 as follows:

- (i) Clause 16 commences with the phrase "Subject to this Act". This is necessary to show that cl. 16 is subject to cl. 15, which does not have any equivalent in the existing Act, and also to other provisions governing the questioning of witnesses (see below) not in the existing Act.
- (ii) Clause 16 refers to "any indictable or other offence" while s. 19 refers only to "any felony or misdemeanour". In Bugg v. Day (1949) 79 C. L. R. 442 at p. 464, Dixon J., as he then was, thought it may be doubtful whether "misdemeanour" in the English Act covered all summary offences. We think it desirable that cl. 16 should extend to all such offences. The facts in Bugg v. Day would seem to support this view. Clause 16 has been drawn accordingly and, on this, follows the wording of the Victorian Evidence Act 1958 s. 33. Clause 16 would also overcome any difficulties caused by s. 659 of the Queensland Criminal Code, which provides that when a person has been summarily convicted of an indictable offence the conviction is to be deemed a conviction of a simple offence only and not of an indictable offence.

The effect of the recommended change would be limited by a provision to be recommended below (cl. 20) which would govern cross-examination as to credit.

- (iii) Clause 16, unlike s. 19, does not set out the means of proving a conviction. This is dealt with by cll. 45 and 46 of the Draft Bill.

17. How far a party may discredit his own witness. Clause 17 restates in a modified form s. 16 of the Queensland Evidence and Discovery Act. This is derived from English legislation that was passed to settle the law as to the proof by a party of previous inconsistent statements made by his own witness. The existing Queensland section, like the English provision from which it is derived, is defective in so far as it suggests that it is only when the witness proves adverse (that is, hostile) that the party calling him may contradict him by other evidence. This was referred to as a "great blunder" by Cockburn C. J. in Greenough v. Eccles (1859) 5 C. B. (N. S.) 786 at p. 806. Clause 23 follows the scheme of s. 34 of the Victorian Evidence Act 1958, where this defect has been avoided. We have not adopted the more extensive departures from the existing legislation recommended by the English Criminal Law Revision Committee (Cmd. 4991 (1972) paras. 162-165) or written into the A. C. T. Evidence Ordinance 1971 s. 60. These would allow the inconsistent statement of a witness to be proved by the party who called him though the witness has not been ruled to be adverse.

18. Proof of previous inconsistent statement of witness. Clause 18 restates in a slightly modified form s. 17 of the Queensland Evidence and Discovery Act, which allows a party to prove that a witness has previously made a statement that is inconsistent with his present testimony. The provision is derived from English legislation and has an equivalent in each Australian State and the A. C. T.

19. Witness may be cross-examined as to written statement without being shown it. Clause 19 restates in a modified form s. 18 of the Queensland Evidence and Discovery Act, which is derived from English legislation and has an equivalent in each Australian State and the A. C. T. This legislation has been enacted to overcome the difficulties created by The Queen's Case (1820) 2 Brod. & Bing. 286. It was there laid down that a party must show a document to a witness before asking him in cross-examination whether he made the statements contained in it. Under another rule laid down in the case, a cross-examining party was not allowed to read out part of a document to show that the witness had contradicted himself. The whole document had to be put in as evidence even if the witness admitted that the document contained his statements. Clause 19, like the legislation from which it is derived, is designed to abrogate these rules.

In our view, the modifications we suggest be made to ss. 16, 17 and 18 of the existing Act (our cll. 17, 18 and 19) would not detract from the opinion expressed in R. v. Cox [1972] Qd. R. 366 at p. 374 that the procedure laid down by s. 18 (our cl. 19) for cross-examination as to prior inconsistent statement in writing is as appropriate to the case of a witness declared hostile as to that of a witness under cross-examination in the ordinary course of events.

There is the further question whether inconsistent statements admitted under the abovementioned provisions ought to be evidence of the matters asserted in them. However, it is best to postpone

discussion of this question until the hearsay rule is examined in relation to later provisions of the Draft Bill. It is dealt with by cl. 90 of the Draft Bill.

20. Cross-examination as to credit. We recommend clause 20, which governs cross-examination as to credit, so as to introduce into Queensland statutory law a provision that has an equivalent in every other Australian State and the A. C. T. We have recommended the shorter form of the provision to be found in the New South Wales Evidence Acts 1898 - 1966 s. 56 and the A. C. T. Evidence Ordinance 1971 s. 58.

21. Scandalous and insulting questions. As with cl. 20, we recommend cl. 21 so as to introduce into Queensland statutory law provisions that have an equivalent in every other Australian State and the A. C. T. In the Queensland Supreme Court Rules, there is a more limited provision authorizing a Judge to disallow vexatious questions on cross-examination: O. 39 r. 34A.

PART III - MEANS OF OBTAINING EVIDENCE

Division 1 - Commissions, requests and orders to examine witnesses

22. Commission, request or order to examine witnesses. The Queensland Evidence and Discovery Act contains sections that provide for the examination of witnesses otherwise than at a hearing at places either within or out of Queensland. Section 53 empowers the Supreme Court or a judge thereof to issue an order or commission for the examination of witnesses on oath before an examiner for the purpose of "any action or suit depending in such Supreme Court or in any district or other inferior court". There are other sections which are ancillary to s. 53. Section 54 empowers the Supreme Court or judge to command the attendance of a witness to whom s. 53 applies for the purpose of being examined or of producing any documents. Section 56 authorises an examiner appointed under s. 53 to take the examinations upon oath of witnesses. Section 57 authorises an examiner to make a report, if need be, upon the examination and conduct of a witness. Section 58 provides for costs. Sections 59 and 60 specify the use that may be made of the depositions taken upon an examination. All of these sections, except s. 60, are derived from the English Evidence on Commission Act 1831 (1 Wm. 4 c. 22), which was repealed in England by the Statute Law Revision Act 1963. Section 60, which qualifies s. 59, is derived from s. 16 of an Act of New South Wales, 5 Vic. No. 9, of 1841. This New South Wales section was repealed in that State by the (N. S. W.) Witnesses Examination Act 1900.

The sections of the Queensland Evidence and Discovery Act referred to above now have very little practical significance. The rules of the Supreme Court, District Courts and Magistrates Courts respectively provide for the examination of witnesses otherwise than at a hearing for the purpose of civil proceedings in those courts. See the Rules of the Supreme Court O. 40 rr. 8-38, the District Courts Rules 1968 r. 208, and the Magistrates Courts Rules 1960 r. 185.

These rules, which should be read in the light of the Evidence by Commission Act 1859 (Imp., 22 Vic. c. 20), provide expressly or by implication for the examination of witnesses both within or out of the State. The significance of the sections of the Evidence and Discovery Act is further reduced by the fact that, unlike the Rules of the Supreme Court (see O. 40 r. 10), they do not make any provision for the issuing of "requests" to examine witnesses.

A considerable case might therefore be made out for the repeal of ss. 53, 54, 56, 57, 58, 59 and 60 of the Evidence and Discovery Act without any replacement. (Section 55 of the Act is a special provision dealing with the examination of prisoners.) Nevertheless, we feel that it would be advantageous to preserve out of these sections so much of them as confers upon the Supreme Court or judge a jurisdiction to issue orders or commissions for the purpose of civil proceedings in courts other than the Supreme Court. In this respect at least, the sections go beyond the rules of court. Though litigants may resort to this jurisdiction only very rarely, we feel that it ought to be preserved. Cases could occur in courts other than the Supreme Court in which it is thought desirable to have an order from the Supreme Court or judge for the examination of witnesses. A somewhat similar jurisdiction with respect to county courts is conferred on the Supreme Court of Victoria by the Victorian Evidence Act 1958 s. 4, and in England on the High Court by the English County Courts Act 1959 s. 85.

Clause 22 has been drawn to preserve the jurisdiction mentioned above. The wording of sub-cl. (1) is based in part upon that of the English County Courts Act 1959 s. 85(1). Like that provision, though unlike s. 53 of the Queensland Evidence and Discovery Act, it includes a reference to "requests" to examine witnesses. Since cl. 22 does not apply to civil proceedings in the Supreme Court, it would not overlap the Rules of the Supreme Court O. 40. There is such an overlapping with the existing s. 53, which does apply to civil proceedings in the Supreme Court. We feel that this overlapping is undesirable and should be avoided in a new Evidence Act.

It could perhaps be argued that the existing s. 53 is necessary to give statutory support to O. 40 r. 8 of those Rules, which empowers the Supreme Court or judge to order evidence to be taken before an examiner for the purpose of proceedings in the Supreme Court itself. However, in our opinion s. 53 is not, and ought not to be, necessary to support O. 40 r. 8. The Supreme Court Acts Amendment (Rule Ratification) Act of 1928 seems to be sufficient to validate the existing rule. If there is any doubt about the matter, consideration should be given to extending the rule-making power with respect to the Supreme Court so as to include a provision such as that contained in s. 124 of the New South Wales Supreme Court Act 1970, which by sub-para. (m) provides for the making of rules -

for regulating the means by which particular facts may be proved, and the mode in which evidence may be given (including the administration of oaths to and the taking of the evidence of witnesses in or out of New South Wales), in any proceedings, or on any application in connection with, or at any stage of, proceedings.

The basis for the Supreme Court rule ought to be such a provision rather than a section in an Evidence Act.

Clause 22 has been worded so as to make unnecessary some of the ancillary sections in the Evidence and Discovery Act. These sections, most of them taken from the English Evidence on Commission Act 1831, are an earlier version of some of the rules now to be found in the Rules of the Supreme Court. Section 54 is analogous to O. 40 rr. 11, 12, 13 and 29; section 56 to O. 40 r. 23; section 57 to O. 40 r. 21; and section 59 to O. 40 r. 22. However, O. 40 is more comprehensive in scope than the ancillary sections of the Act. Matters dealt with by O. 40 rr. 9, 10, 14, 15, 16, 17, 18, 19 and 20 are not dealt with by the Act. In these circumstances, we think it best to apply the Rules of the Supreme Court (with such adaptations as the circumstances may require) to any commission, request or order issued by the authority of sub-cl. (1) and proceedings taken thereunder. Sub-clause (2) has been designed to achieve this end. The alternative would be to place in the new Evidence Act a comprehensive set of ancillary provisions that will apply to proceedings taken only very infrequently. Sub-clauses (3) and (4) deal with ancillary matters that cannot conveniently be dealt with elsewhere. Sub-clause (3) deals with the matters at present dealt with by ss. 59 and 60 of the Act. Sub-clause (4) deals with the matter of cost at present dealt with by s. 58 of the Act.

If cl. 22 is adopted, ss. 53, 54, 57, 58, 59 and 60 of the Evidence and Discovery Act may be repealed. In our opinion, s. 49 of the Queensland Supreme Court Constitution Amendment Act of 1861 may also now be repealed. This section is derived from s. 15 of an Act of New South Wales, 5 Vic. No. 9, of 1841 which, like the Queensland provision, was enacted to adopt the provisions of the English Evidence on Commission Act 1831 (1 Wm. 4 c. 22) referred to above. The New South Wales section was repealed in that State by the (N. S. W.) Witnesses Examination Act 1900. It may be necessary to keep the content of s. 56 of the Queensland Act to support cl. 23 (discussed below). Such a provision would not be necessary to support cl. 22 since O. 40 r. 23 of the Rules of the Supreme Court provides that the examiner may administer the necessary oaths to a witness.

Section 55 of the Evidence and Discovery Act, which also was taken from the English Evidence on Commission Act 1831, provides for the production of a prisoner for examination under the authority of that Act by virtue of a writ of habeas corpus issued by the Supreme Court or a judge thereof. A more modern provision is now to be found in the Prisons Act 1958 - 1969 s. 31. Section 55 may therefore be repealed without any replacement.

Some mention must now be made of s. 62 of the Evidence and Discovery Act. This section, together with s. 63, is derived from s. 14 of an Act of New South Wales, 4 Vic. No. 22, of 1840. This New South Wales section was repealed in that State by the (N. S. W.) Witnesses Examination Act 1900. So far as civil proceedings are concerned, s. 62 of the Queensland Act would appear to be unnecessary in view of the broader provisions of s. 53 of that Act, considered above. Section 62 empowers "any judge" to issue a commission or order for the examination of a witness other than at the trial. Section 62 could be given a scope going beyond that of s. 53 if "any judge" were construed as a reference to judges, not only of the Supreme Court, but of other courts as well. However, such a construction would cause anomalous overlapping by s. 62 of the relevant District Courts and Magistrates Courts Rules dealing with the examination of witnesses otherwise than at the hearing.

Having these considerations in mind, we are of the opinion that s. 62 of the Evidence and Discovery Act ought to be repealed once cl. 22 is enacted. We suggest in passing, however, that the District Courts Rules 1968 r. 208 ought, perhaps, to be more strongly supported by a rule-making power in the District Courts Act relating to the examination of witnesses otherwise than at a hearing. The Magistrates Courts Acts 1921 to 1964 s. 14(1) confers a reasonably ample power in relation to the Magistrates Courts.

Mention must also be made of ss. 70 and 71 of the Evidence and Discovery Act. These sections are respectively derived from ss. 2 and 3 of an Act of New South Wales, 18 Vic. No. 13, of 1854. The New South Wales sections reappeared in a modified form in s. 5 of the (N. S. W.) Witnesses Examination Act 1900, which in turn was repealed by the (N. S. W.) Supreme Court Act 1970. The Victorian Evidence Act 1958 does not contain any equivalent provisions. The purpose of s. 70 of the Queensland Act is to make it clear that provisions for the examination of witnesses "de bene esse or under a commission" apply also to the parties to an action. In our opinion such a section is unnecessary in the light of the general provision, discussed above, making parties to actions competent and compellable witnesses. The purpose of s. 71 is to restrict the occasions when a "de bene esse examination" may be allowed on the ground of an intended departure by a party. In our opinion this section is also unnecessary. Though the matters to which the section refers are ones which may properly influence a judge in the exercise of his discretion to allow such an examination, they need not be expressed in an Evidence Act. We therefore recommend that ss. 70 and 71 be repealed without any replacement.

23. Commission or order in criminal cases. Section 63 of the Queensland Evidence and Discovery Act provides for the issuing of a commission or order in any criminal case for the examination of a witness otherwise than at the trial. This may be done on the application or with the consent of the Attorney-General or the Crown prosecutor as well as the prisoner but not otherwise. Section 63 refers to s. 62 and depends upon s. 62 for its content. Section 63 applies to criminal proceedings the same provisions that s. 62 applies to civil proceedings. If, as we have recommended above, s. 62 is repealed, s. 63 must be completely recast. Section 63 is derived, as mentioned above, from a New South Wales Act of 1840. The relevant provision has been remodelled in New South Wales and the existing provisions are to be found in the Witnesses Examination Act 1900, as amended by the Supreme Court Act 1970.

The practical importance of s. 63 of the Queensland Act would seem to be very limited. It cannot be applied in any criminal case except with the consent of the Attorney-General or Crown prosecutor as well as the prisoner. Nevertheless we are reluctant to obliterate such a jurisdiction of the Supreme Court though it might be exercised only rarely. Since s. 63 cannot be retained in its present form, if, as we have recommended, s. 62 is repealed, we recommend cl. 23 in substitution for s. 63. Sub-clauses (1) and (2) of cl. 23 are based upon sub-s. (1) and (2) of s. 6 of the New South Wales Act. Sub-clause (3) of cl. 23 is drawn in the same terms as sub-cl. (3) of cl. 22. Sub-clause (4) is largely based upon s. 56 of the existing Act. We think such a provision is desirable in order to clarify the relationship between cl. 23 and ss. 95 and 119 of the (Queensland) Criminal Code.

24. Power of person appointed by foreign authority to take evidence and administer oaths. Clause 24 provides for the taking of evidence in Queensland for use in a foreign country. Its provisions should be seen against the background of certain Imperial Acts, especially the Foreign Tribunals Evidence Act 1856 and the Evidence by Commission Acts 1859 and 1885.

The Imperial Foreign Tribunals Evidence Act 1856 (19 & 20 Vic. c. 113) provides a means by which evidence may be procured in Queensland for use in a foreign court. This Act authorizes the Supreme Court "in any of Her Majesty's colonies" to order the examination of witnesses to obtain testimony in relation to any civil or commercial matter pending before a foreign court. If it is made to appear by Commission Rogatoire or Letter of Request or otherwise that a foreign court desires to obtain such testimony, the Supreme Court or a judge thereof may order the examination of the witnesses upon oath, upon interrogatories or otherwise, before an examiner and may order the attendance of any person for the purpose of being examined, or the production of any documents. Any such order may be enforced in like manner as an order made in a cause pending in the Supreme Court. A witness has the same right to refuse to answer questions as he would have were the cause pending in the Supreme Court. The Imperial Act is supplemented in Queensland by the Rules of the Supreme Court O. 40 rr. 43-55.

It can be seen that the Foreign Tribunals Evidence Act 1856 makes it possible to have a person in Queensland compulsorily examined for the purpose of civil proceedings in a foreign court. The provisions of this Act have been extended to criminal proceedings pending in a foreign state, unless the matter is of a political character, by the Imperial Extradition Act 1870 (33 & 34 Vic. c. 52) s. 24. However, the Extradition (Foreign States) Act 1966 s. 6 of the Commonwealth of Australia purports to exclude the Imperial Extradition Acts 1870 to 1935. Section 27 of the Commonwealth Act provides for the taking of evidence in respect of criminal matters pending in courts of foreign states.

The Foreign Tribunals Evidence Act 1856 makes provision for procuring evidence to be used in proceedings "in a foreign country". There is separate provision for procuring evidence to be used in proceedings "in Her Majesty's dominions". For the latter proceedings, evidence may be procured in Queensland under the Imperial Evidence by Commission Acts 1859 and 1885 (22 Vic. c. 20 and 48 & 49 Vic. c. 74). Under these Acts, the Supreme Court of Queensland or a judge thereof may make in relation to proceedings in a British dominion an order for the examination of witnesses similar to that which may be made in relation to proceedings in a "foreign country" under the Foreign Tribunals Evidence Act 1856.

It may be noticed in passing that, though the Evidence by Commission Acts are similar in character and content to the Foreign Tribunals Evidence Act, the Rules of the Supreme Court in Queensland do not supplement the former as they do the latter. We recommend that this anomaly be corrected. In 1970, the Chief Justice of Victoria promulgated new rules under the power conferred on him by the Evidence by Commission Act 1859, s. 6. These rules apply the same provisions to proceedings under the Evidence by Commission Acts as apply to proceedings under the Foreign Tribunals Evidence Act 1856. This

avoids the necessity to determine whether a country is or was a "foreign country", on the one hand, or one of "Her Majesty's dominions" on the other.

In New Zealand, the Imperial provisions mentioned above were repealed in 1962 by an Act which inserted ss. 48-48F into the New Zealand Evidence Act 1908 by way of substitution. This has led to the convenient result in New Zealand that all or most of the relevant statutory law is now to be found in the New Zealand Evidence Act. However, for constitutional reasons such a course is not possible in Queensland, where any State law repugnant to the provisions of an Imperial Act extending to the State is to the extent of the repugnancy void and inoperative. At most, the Queensland Parliament could enact provisions conferring powers on Queensland courts that are cumulative upon the powers conferred by the Imperial Statutes. Therefore it must remain possible in Queensland for a litigant to procure evidence for a foreign court under the Imperial Foreign Tribunals Evidence Act 1856 and to procure evidence for a court of a British dominion under the Imperial Evidence by Commission Act 1859 and 1885.

At the present time, evidence may be procured in Queensland for use in a foreign country otherwise than by the procedures laid down by the Imperial Acts. This may be done under s. 62A of the Queensland Evidence and Discovery Act, inserted into that Act in 1967. Section 62A is derived from the English Oaths and Evidence (Overseas Authorities and Countries) Act 1963 s. 1 and is in terms very similar to the Victorian Evidence Act 1958 s. 111A, inserted into that Act in 1966. Section 62A does not extend to evidence for use in criminal proceedings.

Clause 24 reproduces the terms of s. 62A of the existing Act. If a litigant wishes to compel a witness to give evidence or to produce documents, he would still need to resort to the Imperial Acts or to provisions such as those embodied in cl. 25-34. Otherwise, he might proceed under the simpler provisions of cl. 24. The person appointed by the "authority" to which cl. 24 refers may take or receive evidence without first obtaining an order from a Queensland court. However, if the appointing authority is not a court or judge, the person so appointed could not act in Queensland under the authority of this provision unless he has first obtained the consent of the Attorney-General. In these respects cl. 24 conforms exactly with the existing s. 62A.

For the purposes of the law of perjury, a proceeding under s. 62A, and hence cl. 24, might well be a "judicial proceeding" within the definition in s. 119 of the Queensland Criminal Code. If this is so, a person who knowingly gives false testimony touching any material matter in that proceeding could be guilty of perjury under s. 123 of the Criminal Code. We do not think this aspect of s. 62A requires alteration at the present time and it is reproduced in cl. 24. We might point out in passing that s. 62A, and hence cl. 24, is not necessary to avoid the provisions of s. 95 of the Criminal Code relating to the administering of extra-judicial oaths. That section already allows any oath to be administered for some purpose which is lawful under the laws of another country.

Division 2 - Summary procedure for examination of
witnesses otherwise than at a hearing

Clauses 25-34 embody in substance the provisions of Division 1A of the Victorian Evidence Act 1958, inserted into that Act in November 1972. Division 1A of the Victorian Act provides summary procedures for the examination of witnesses otherwise than at a hearing. The procedures are intended to be reciprocal between Victoria and prescribed countries though this will depend upon the passage of reciprocal legislation in places other than Victoria. Almost identical provisions have been adopted in Western Australia by Act No. 18 of 1974. Somewhat similar provisions have been adopted in South Australia by Act No. 71 of 1974. We understand that the adoption of the provisions is still under consideration in Tasmania.

Clause 25 follows s. 9A of the Victorian Act by defining a "prescribed country" as any State or Territory of the Commonwealth, New Zealand and any other State, Territory or country which is declared by the regulations to be a prescribed country. Clause 25 also defines the terms "examiner" and "corresponding court". Throughout this Division we have used the term "legal proceedings" instead of "proceeding" in conformity with the Victorian Act.

Clause 26 is derived from s. 9B of the Victorian Act. It would apply when legal proceedings are pending in a Queensland court. Under cl. 26, a Queensland court could request a corresponding court in a prescribed country to order the examination of a witness or the production of documents for the purpose of the legal proceedings in the Queensland court. However, such a request could be made only if the Queensland court already has the power to authorise or order evidence to be taken otherwise than at the hearing of the relevant legal proceedings. The alteration brought about by cl. 26 would therefore be quite limited. It would only add to existing powers of a court to order the taking of evidence otherwise than at the hearing. Nevertheless, cl. 26 may facilitate the taking of evidence in prescribed countries for use in Queensland and, for this reason, we recommend that it be adopted. Under the Imperial Evidence by Commission Act 1859, an application for the examination of witnesses in another State for the purpose of legal proceedings in a Queensland District Court or Magistrates Court would need to be made in the Supreme Court of that State. Under cl. 26 (provided it has been adopted by reciprocal legislation in the other State) such an application could be made in the "corresponding court" in the other State, which of course need not be the Supreme Court.

Clause 27 is derived from s. 9C of the Victorian Act. It would apply when legal proceedings are pending in a court of a prescribed country. Under cl. 27, a Queensland court corresponding to the court in the prescribed country, upon receipt of a request from that court, could order the examination of a witness or the production of documents before an examiner. Clause 27 is supported by cll. 28, 29, 30 and 31, which are respectively derived from ss. 9D, 9E, 9F and 9G of the Victorian Act. Clause 27, like s. 9C of the Victorian Act, would confer a power to order the taking of evidence somewhat similar to that conferred by the Imperial Foreign Tribunals Evidence Act 1856 and Evidence by Commission Acts 1859 and 1885, which we have referred to above. However, there is this important difference - the Imperial

Acts confer their powers only upon the respective Supreme Courts while cl. 27, like s. 9C, would confer its powers to order the taking of evidence upon other courts as well. In other words, these latter provisions allow a direct correspondence between an inferior court in Queensland and that of a prescribed country without the necessity for any application to a Supreme Court. This seems to be a desirable feature of the Victorian legislation and we recommend its adoption in Queensland. Of course, all of these provisions differ from cl. 24 proposed above (and s. 111A of the Victorian Act) insofar as they provide for the compulsory examination of witnesses whereas cl. 24 does not provide for any element of compulsion.

Section 9F(2) of the Victorian Act (our cl. 30(2)) has caused us some concern. It provides that the validity of the ground for objecting to answer a question or for objecting to a question shall not be determined by the examiner but by the corresponding court at whose request the examination is being conducted. The Imperial Acts referred to above do not contain any analogous provision. It is true that under the Imperial Acts the evidence taken on an examination need not be confined to evidence that would be strictly admissible in a court of the examining jurisdiction and that, in general, the rules of evidence of the foreign court should be given effect in an examination of this kind: Desilla v. Fells & Co. (1879) 40 L. T. 423. This general principle is subject to the express provision in s. 5 of the Foreign Tribunals Evidence Act 1856 and s. 4 of the Evidence by Commission Act 1859 that every person examined shall have the same right to refuse to answer questions tending to criminate himself and other questions as a witness in any cause pending in the court that ordered the examination (that is, a court of the examining jurisdiction). Section 9D of the Victorian Act (our cl. 28) likewise provides that every person examined shall have and be subject to the same rights and liabilities as if he were summoned before the court that ordered the examination (that is, a court of the examining jurisdiction). In both cases, therefore, the principle that the foreign rules of evidence shall apply is subject to the preservation of the rights and liabilities of a witness according to the rules of the examining jurisdiction. It would also seem that in both cases the examiner does not have any power to determine the validity of an objection. The effect of the Queensland Rules of the Supreme Court O. 40 rr. 16 and 55, which apply to proceedings under the Foreign Tribunals Evidence Act 1856, is reproduced in s. 9F(2) of the Victorian Act (our cl. 30(2)) on this matter.

Apart from s. 9F(2) of the Victorian Act, therefore, there is a close correspondence between the effect of the Imperial Acts and of the Victorian Act upon these matters. However, the Victorian Act may differ from the Imperial Acts when it provides in s. 9F(2) that the validity of the ground for an objection shall be determined by the corresponding court at whose request the examination is being conducted. Under the Imperial Acts it is possible to have the validity of the ground of an objection determined in a court of the examining jurisdiction. This may be done during the course of the proceedings taken in the examining jurisdiction for the issue of the order for the examination of witnesses: see, for example, Radio Corp. of America v. Rauland Corp. [1956] 1 Q. B. 618. It may also be done during proceedings for a writ of attachment upon the failure of a witness to answer a question: cf. R. v. Borrett (1905) 24 N. Z. L. R. 584.

We think it desirable that it should be possible to test the validity of an objection in the examining jurisdiction. Firstly, this may be the most expeditious way to test the validity of an objection made by a witness. Secondly, a witness ought not to be required to argue the validity of his objection in another jurisdiction unless there is good reason why he should be made to do so. Nevertheless, we recommend the adoption of s. 9F(2) of the Victorian Act, which we have embodied in cl. 30(2). We are inclined to think that the wording of s. 9F(2) is not sufficiently explicit to deprive the courts of the examining jurisdiction of powers that they would otherwise have. In these circumstances, we believe that it is more important to maintain the uniformity of this important piece of legislation in Victoria and Queensland.

The same may be said of other suggestions that we could make. We are doubtful about the necessity for the introductory phrase of s. 9C(1) of the Victorian Act (our cl. 27(1)). We are also inclined to the view that there should be an express provision in s. 9C(1) to allow the order to be made upon an ex parte application. Otherwise it may be necessary to amend the rules of all of the various courts to allow this to be done: cf. Queensland Rules of the Supreme Court O.40 r. 43.

Clauses 27-31 are therefore substantially in the form of ss. 9C-9G of the Victorian Act. Clauses 32, 33 and 34 are ancillary provisions that respectively adopt ss. 9H, 9I and 9J of the Victorian Act.

PART IV - JUDICIAL NOTICE OF SEALS AND SIGNATURES

Clauses 35 and 36 provide that judicial notice shall be taken of certain seals and signatures. They deal with matters at present dealt with by the Queensland Evidence and Discovery Act s. 3 and the Queensland Evidence Act 1898 ss. 4 and 10.

Section 10 of the Evidence Act 1898 follows very closely the wording of s. 6 of the Federal Council Evidence Act 1886 (49 Vic. No. 2) enacted by the Federal Council of Australasia, a legislative body established by the Imperial Parliament in 1885. The latter Act still applies in Queensland. See Pain and Woolcock's Queensland Statutes Vol. II pp. 2560-2561 and Quick and Garran's Annotated Constitution of the Australian Commonwealth (1901) pp. 376-377. Besides Queensland, the Federal Council Evidence Act 1886 would apply in Australia to the other colonies represented on the Federal Council of Australasia at the time, namely, Victoria, Western Australia and Tasmania. Fiji was also represented. However New South Wales and New Zealand were never represented and South Australia only for a period of two years. The Federal Council of Australasia met for the last time in Melbourne in January 1899, not long before the establishment of the Commonwealth of Australia. See Quick and Garran, op. cit., pp. 114-115.

This history is important in this context because it helps to explain the enactment in Queensland of the Evidence Act 1898 and the use in that Act of the expression "Australasian Colony". The Act provides for the recognition by Queensland courts of the laws, records

and judicial proceedings of each "Australasian Colony", which term includes Queensland. It also includes New Zealand and Fiji. When speaking to the Bill in the Queensland Legislative Assembly, the Premier of the day, the Hon. T. J. Byrnes, explained that "its genesis may properly be traced from the colony of Victoria ... but the idea of the Bill is to be found also in one of the Acts passed by the Federal Council which only dealt with the particular colonies embraced within that form of federation". Debates (1898) Vol. 79 p. 456. There is similar legislation in Victoria, Western Australia and Tasmania but not in New South Wales, South Australia or New Zealand. The legislation is in addition to and not in derogation of the Federal Council Evidence Act 1886 (above).

After the establishment of the Commonwealth of Australia, the Commonwealth Parliament, under the authority of s. 51(xxv) of the Commonwealth Constitution, enacted the State Laws and Records Recognition Act 1901. This has subsequently been broadened into the State and Territorial Laws and Records Recognition Act 1901 - 1964. Much of the wording of this Act is similar to that of the Queensland Evidence Act 1898. But there are two important differences. Firstly, the Commonwealth Act binds the courts of all the States and the Territories of the Commonwealth - not only the Queensland courts. Secondly, it refers to the laws, records and judicial proceedings of these States and Territories - not to those of "Australasian Colonies", including New Zealand and Fiji.

It can be seen that on some matters there are now three lots of overlapping legislation in Queensland. For example, a Queensland court is bound to take judicial notice of the signature of a judge of the Victorian Supreme Court by s. 10 of the Evidence Act 1898 of the Queensland Parliament, by s. 5 of the State and Territorial Laws and Records Recognition Act 1901 - 1964 of the Commonwealth Parliament, and by s. 6 of the Federal Council Evidence Act 1886 of the Federal Council of Australasia.

We feel that it is no longer necessary for legislation such as the Queensland Evidence Act 1898 to provide for the recognition of laws and records of other Australian States and Territories. (The recognition of judicial proceedings will be dealt with separately below.) Within Australia, the matter is effectively dealt with by the Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964. New Zealand and Fiji can be dealt with in the same way as other overseas countries, such as Canada.

We therefore recommend the repeal without replacement of ss. 4 and 10 of the Evidence Act 1898 (and of s. 3 of the Evidence and Discovery Act). Clauses 35 and 36 represent only so much of ss. 4 and 5 of the Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964 as requires courts to recognize the seal of Queensland, and the signature and seals of Queensland courts and officials. That is, cl. 35 and 36 deal only with Queensland matters. In our view, there ought to be such Queensland legislation to deal with the Queensland content of this Commonwealth legislation. For the sake of uniformity, the list of offices in cl. 36 is similar to that in s. 5 of the Commonwealth Act although the title of some of them may not be entirely appropriate for Queensland. However, for the purposes of cl. 36 we have removed from s. 5 those offices which are

most unlikely to have any relevance in Queensland, namely -

Commissioner of Titles
 Presiding Magistrate of a Court
 Judge of a County or Local Court
 Chairman of any Court of General
 or Quarter Sessions.

Clause 36, following s. 5, does not refer to any Assistant or Deputy Registrar of the Supreme Court. However the Rules of the Supreme Court O. 1 r. 1 provide that in the construction of those rules the term "Registrar" includes a Deputy Registrar. Moreover, s. 34 of the Acts Interpretation Act 1954 - 1971 provides that where in any Act any person holding or occupying a particular office or position is mentioned or referred to in general terms, such mention or reference, unless the contrary intention appears, shall be deemed to include any person who at any time for the time being occupies, or performs the duties of, such office or position.

It is intended that cl. 36 should deal only with the seals and signatures mentioned in s. 5 of the Commonwealth Act, that is, to deal with the Queensland content of this Commonwealth legislation. It is not intended by cl. 36 to codify the whole of Queensland law dealing with the judicial notice of seals and signatures, still less the whole of Queensland law dealing with judicial notice generally. To make this quite clear, we recommend that cl. 36(2) be enacted in the terms set out.

We do not propose to include in the Draft Bill any provisions requiring courts to take judicial notice of Acts of Parliament, proclamations, orders in council or regulations. At the present time in Queensland, such provisions are to be found in the Acts Interpretation Act 1954 - 1971 (Acts and regulations) and the Evidence and Discovery Act (proclamations and orders). Section 11 of the Acts Interpretation Act 1954 - 1971 provides that every Act passed after the twenty-sixth day of July, one thousand eight hundred and fifty-two, shall be deemed and taken to be a public Act and shall be judicially noticed as such unless the contrary is expressly provided by the Act. Section 28A of the Acts Interpretation Act 1954 - 1971 provides for the judicial notice of regulations upon publication in the Gazette. Section 1 of the Evidence and Discovery Act provides that every proclamation or order of the Governor in Council made or purporting to be made in pursuance of any Act or statute and published in the Gazette shall be judicially taken notice of.

We think that for consistency the provision relating to proclamations and orders in council should also be placed in the Acts Interpretation Act. This is the policy followed in New South Wales: Interpretation Act 1897 - 1969 s. 34(1). We therefore recommend the repeal without any replacement in the new Evidence Act of s. 1 of the Evidence and Discovery Act and the insertion of the following into the Acts Interpretation Act:

28B. Proclamations and orders in council. Where any Act or Imperial Act confers power to make any proclamation or order in council, any proclamation or order in council made or purporting to be made under the Act or Imperial Act and published in the Gazette shall be judicially noticed.

Although the Acts Interpretation Act Amendment Act 1971 has defined "Order in Council" and "Proclamation" in terms of their being published in the Gazette, it seems best to set out the requirement of publication in the Gazette expressly in the proposed s. 28B.

We concede that it may not be entirely appropriate to have these judicial notice provisions in the Acts Interpretation Act. However it may equally be said that judicial notice provisions are out of place in an Evidence Act. Judicial notice of a matter avoids the need to prove that matter by evidence. The judicial notice provisions that we have recommended to be included in the Evidence Bill, cll. 35 and 36, are in reality prima facie evidence provisions dressed up in the language of judicial notice. They can have effect only if a court already has before it a purported seal or a signature and their function is to specify the evidential effect of that seal or the signature. We have recommended cll. 35 and 36 in their present form to maintain conformity with the language of the Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964 upon seals and signatures.

Part IV of the Draft Bill does not deal with the judicial notice of Commonwealth seals and signatures. This is dealt with by the Commonwealth Evidence Act 1905 - 1974 ss. 3 and 4. We have followed the style of s. 4 of this Act by introducing sub-cl. (c) into cl. 36 of the Draft Bill.

We would like to draw attention to s. 3(1) of the Queensland Evidence Act 1898, which provides that all courts and persons acting judicially within Queensland shall take judicial notice of every Australasian Colony and the extent of its territories and also of all Acts of Parliament of any Australasian Colony. We consider that the first portion of this provision (relating to the judicial notice of Colonies and the extent of their territories) is unnecessary and may be repealed without any replacement. The courts have a general power to take judicial notice of territorial and geographical divisions and it seems inappropriate to pick out the extent of Colonial (or State) territories for special mention. Clause 55 of the Draft Bill provides for the use of maps, charts, etc. where there is a question as to the territorial limits or situation of an area or place.

The second portion of s. 3(1) of the Queensland Evidence Act 1898 provides that Queensland courts shall take judicial notice of all Acts of Parliament of any Australasian Colony. There is an analogous provision in s. 3 of the Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964. In the light of these provisions, we think that s. 11 of the Queensland Acts Interpretation Act 1954 - 1971 ought to be modified. It will be remembered that this provides that "Every Act passed after the twenty-sixth day of July, one thousand eight hundred and fifty-two shall be deemed and taken to be a public Act and shall be judicially noticed as such unless the contrary is expressly provided by the Act". We recommend that the words "and shall be judicially noticed as such" be deleted from s. 11 and that s. 11A be inserted into the Act as follows:

11A. Judicial notice of Acts. Every Act shall be judicially noticed.

It may perhaps be that this change will make the modified s. 11 redundant. However, s. 11 could remain until the Acts Interpretation Act is reviewed. Section 3 of the Evidence Act 1898 (including s. 3(2), which has no analogue in the Commonwealth Act) may be repealed without any replacement. Section 2 of the Evidence and Discovery Act would become unnecessary to the extent that it provides for the proof of Acts not being public Acts.

PART V - PROOF OF DOCUMENTS AND OTHER MATTERS

Division 1 - Proof of official and judicial documents and matters

37. Proof by purported certificate, document etc. Clause 37 is a modified version of s. 42 of the Queensland Evidence and Discovery Act. Section 42 is derived from English legislation and has analogues in other Australian States. Clause 37 would apply only where a law makes admissible in evidence a document that is one of the kinds specified. When applicable, the clause would make unnecessary the strict proof of such a document. A document purporting to be the relevant document would do. We have introduced the words "unless the contrary intention appears" into cl. 37. They are not to be found in s. 42.

The list of documents specified in cl. 37 is taken from s. 12 of the A. C. T. Evidence Ordinance 1971. It differs slightly from the list in s. 42 of the existing Act. Sub-para. (c) of cl. 37 does not refer to a "joint stock or other company" as does s. 42. Sub-para. (d) of cl. 37 does not refer to a "by-law or entry in any registry or other book" as does s. 42. It should be remembered that cl. 5 of the Draft Bill defines "document" in very wide terms.

The second part of cl. 37 is a shortened version of the second part of s. 42. We have been encouraged to recommend this version by the existence of s. 12 of the A. C. T. Evidence Ordinance 1971. However, unlike s. 12 of the A. C. T. Evidence Ordinance 1971, cl. 37 does not reverse the onus of proof. We feel that it would be inappropriate to have a general provision of this kind, applying to criminal as well as civil proceedings, if it reverses the onus of proving the authenticity of a document. Under cl. 37, the probative weight to be given a purported document would always be a matter for the court. It is again emphasized that cl. 37 (like s. 42) applies only to the very special kinds of documents to which it refers.

Provisions similar to those in cl. 37 are to be found not only in s. 42 of the Queensland Evidence and Discovery Act but also in s. 11 of the Queensland Evidence Act 1898 and s. 8 of the Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964. For reasons similar to those discussed in relation to Part IV of the Draft Bill, we recommend that s. 11 of the Evidence Act 1898 be repealed without any replacement. It is true that the subject matter of s. 11 of the Queensland Act is not entirely covered by s. 8 of the Commonwealth Act. The latter provision, which depends on s. 51 (xxv) of the Commonwealth Constitution for its validity, is restricted to public documents and records. Nevertheless, we consider that s. 11 ought not to be replaced. In our opinion, any

remaining gap caused by its repeal that ought to be filled would be filled by other provisions of the Draft Bill. See especially cl. 59 of the Draft Bill.

38. Proof of Gazette.

39. Proof of printing by Government Printer. Clauses 38 and 39 adopt provisions which at present are to be found in the Evidence Acts of Victoria, South Australia, Western Australia and Tasmania as well as ss. 12 and 13 of the Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964. There is a similar provision, though serving a more limited purpose, in s. 4 of the Federal Council Evidence Act 1886, which applies in Queensland (see the commentary upon Part IV of the Draft Bill, above). Although cl. 37(b) will cover much of the area covered by these clauses, we recommend them as convenient statements of readily acceptable law.

Though the definition of "Government Printer" in s. 36 of the Acts Interpretation Act 1954 - 1971 includes "any person authorized by the Government of this State to print any matter", we feel that cl. 39 should expressly refer to a document printed "by the authority of the Government of the State".

40. Proof of votes and proceedings of Legislature. Clause 40 expresses so much of ss. 2 and 9 of the Queensland Evidence Act 1898 and s. 11 of the Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964 as applies to the Queensland Legislature. Section 36 of the Queensland Acts Interpretation Act 1954 - 1971 defines "Legislature" as "The Legislature of this State for the time being however constituted". Clause 40 could be applied to the Votes and Proceedings of the Queensland Legislative Council before it was abolished in 1922. We have added the words "by the authority of the Government of the State" to the existing section so that cl. 40 conforms in this respect with cll. 39 and 41.

41. Proof of Proclamations, Orders in Council etc. Clause 41 expresses so much of s. 6 of the Queensland Evidence Act 1898 and s. 6 of the Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964 as applies to Queensland instruments. Clause 41, like the existing sections, supplements the judicial notice provisions that already exist. For example, the courts may take judicial notice of proclamations, orders in council and regulations upon their publication in the Gazette (see commentary upon Part IV of the Draft Bill). Clause 41 could be relied upon, however, if for any reason a proclamation, order in council or regulation has not been published in the Gazette. Reliance might also be placed upon the Statutory Instruments Reprint Act of 1952 s. 6 and the Queensland Statutes (1962 Reprint) Act of 1962 s. 4 in the special circumstances in which those provisions apply.

For reasons discussed in relation to Part IV of the Draft Bill, we think that cll. 40 and 41, unlike the sections upon which they are modelled, ought to be limited in their application to Queensland proceedings and documents. If cll. 40 and 41 are adopted, s. 2 of the Evidence and Discovery Act would become unnecessary to the extent that it provides for the proof of proclamations, commissions and the proceedings of the Legislature.

We have not expressly referred in cl. 41 to by-laws and ordinances. The Local Government Act 1936 - 1974 s. 31(27)(ix) provides that "where the Governor in Council approves of a by-law, it shall be published in the Gazette and thereupon such by-law shall have the same force and effect as if it were enacted in this Act and shall not be questioned in any proceedings whatsoever". Once a by-law is published in the Gazette, this provision would require the courts to take judicial notice of it in the same way as they take judicial notice of the Act itself: Sankey v. Plover Ex parte Plover [1903] St. R. Qd. 63. See also s. 52(23) of the same Act. The law with respect to ordinances under the City of Brisbane Act 1924 - 1973 is not quite so explicit. Section 38(3B) provides that "where the Governor in Council approves of an ordinance, it shall be published in the Gazette and thereupon shall have the force of law in the City". Though there is no provision in the latter Act that an ordinance is to have the same force and effect as if it were enacted in the Act itself, it was held in Hughes v. Hi-Way Ads. Pty. Ltd., Ex parte Hughes [1963] Qd. R. 328 that, once published in the Gazette, the ordinance has the force of law and so must be judicially noticed.

We feel that it would be inappropriate for us in a review of the law of evidence to go deeper into the proof of by-laws and ordinances. We have noted the effect of the decision in Hughes v. Hi-Way Ads. Pty. Ltd., Ex parte Hughes (above) arising out of the date of the Gazette in which an ordinance is published, the provisions of the City of Brisbane Acts Amendment Act of 1966, and the publication in January 1972 (Gazette Vol. 239 No. 1 p. 38) of Part 7 of Chapter 4 of the City of Brisbane Ordinances, which provides that "A copy of any printed paper purporting to be or to contain any Ordinance made under 'The City of Brisbane Acts 1924 to 1967' for the time being in force and purporting to be printed by the Government Printer shall be prima facie evidence of the due making and existence thereof and of all preliminary steps necessary to give full force and effect to the same and of the contents thereof". The essential problem is to ensure that the printed paper before the court is an up-to-date copy of the by-law or ordinance. We think that this problem is not one that may appropriately be solved by the provisions of an Evidence Act.

42. Proof of act done by Governor or Minister. Clause 42, if accepted, would introduce into Queensland law a useful provision to be found in the Evidence Acts of Victoria, Western Australia, Tasmania and in s. 14 of the Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964.

43. Proof of public documents. Clause 43 is a slightly modified version of s. 41 of the Queensland Evidence and Discovery Act. Section 41 is derived from English legislation and has analogues in other Australian States and s. 10 of the Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964.

Section 41 of the Evidence and Discovery Act requires copies or extracts of public documents to be supplied at a specified fee. This provision may need to be inserted into a new Evidence Act if it can not be conveniently placed elsewhere.

44. Proof of registers of British vessels, etc. Clause 44 contains much of the content of s. 36 of the Evidence and Discovery Act drawn

in a more modern form. We have not included in cl. 44 the provision in s. 36 that requires the person having the charge of a register to furnish a certified copy for a specified fee. Section 36 is derived from the English Evidence Act 1851 (14 & 15 Vic. c. 99) s. 12, since repealed. Provisions having a similar effect are now to be found in the Imperial Merchant Shipping Act 1894 ss. 64 and 695. Although the latter Act applies to Queensland, we think it desirable to retain the existing Queensland provision in the form which we now recommend. There is a similar provision in the Victorian Evidence Act 1958 s. 52.

45. Proof of judicial proceedings. In cl. 45 we have attempted to draw a broad provision for the proof in Queensland courts of judicial proceedings wherever they might have taken place in the Commonwealth of Australia. There are five sections in the Queensland Evidence and Discovery Act dealing with the proof of judicial proceedings. Section 31 deals with the proof of the records of the Supreme Court of Queensland. It provides, in effect, that a copy of the record is admissible if it purports to be certified by the Registrar. Section 31 is supplemented by O. 87 r. 13 of the Rules of the Supreme Court, which provides for the admission in evidence of office copies of any record of that Court. Proof of the records of the District Courts and Magistrates Courts is dealt with by provisions in their respective Acts: District Courts Act 1967 - 1972 s. 37 and Magistrates Courts Acts 1921 to 1964 s. 10. In each case, a copy of the record is admissible if it is under the seal of the Court and purports to be certified by the Registrar. Rule 345 of the District Court Rules 1968 allows the proof of a District Court record by an office copy.

Sections 32 and 33 of the Evidence and Discovery Act deal with the proof of convictions, acquittals, sentences and orders to pay money occurring or imposed in Queensland Courts. These may be proved by the production of a certificate under the hand of the officer having ordinarily the custody of the record. Section 34 provides that the fact of a trial or inquiry in any court may be proved in a similar manner. Section 35 is an ancillary provision.

The proof in Queensland courts of judicial proceedings that have taken place out of Queensland is governed by s. 39 of the Queensland Act (proof of the records of "British foreign or colonial" courts) and s. 17 of the Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964 (proof of the records of courts of a State or Territory of the Commonwealth of Australia). In each case, a copy of the record is admissible if it purports to be under the seal of the Court or, where the Court has no seal, if it purports to be signed by a judge of the Court with a statement in writing that the Court has no seal.

We feel that there should be a general provision in a new Evidence Act dealing with the proof in Queensland courts of judicial proceedings wherever they might have taken place in the Commonwealth of Australia. We accordingly recommend cl. 45. The proof of judicial proceedings that have taken place out of Australia will be dealt with separately by cl. 58. Clause 45 provides for the proof of judicial proceedings by an examined or sealed copy or by the production of a certificate purporting to be under the hand of an officer of the relevant court. This clause would be in addition to the provisions in

the District Courts Act and the Magistrates Courts Acts referred to above. The provisions in s. 31 of the Evidence and Discovery Act, like those specifically applicable to District Courts and Magistrates Courts respectively, may remain unrepealed until they can be transferred to a new Supreme Court Act that is to be drawn up. However, if cl. 45 is adopted, ss. 32-35 of the existing Evidence Act should be repealed without further replacement. Of course, s. 17 of the Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964 would remain untouched and would provide an alternative method of proof should anyone wish to rely on it to prove an out of State record. Section 19 of that Commonwealth Act states that its provisions are in addition to and not in derogation of any powers given by any State law.

We have been encouraged to recommend cl. 45 in such broad terms by the existence of the Commonwealth Evidence Act 1905 - 1974 s. 11, the A. C. T. Evidence Ordinance 1971 s. 94 and the South Australian Evidence Act 1929 - 1974 s. 43. The Commonwealth provision, which deals with the proof of the judicial proceedings of the High Court and Federal Courts, allows proof by the production of an examined copy, of a copy purporting to be sealed with the seal of the relevant court or "purporting to be certified as a true copy by a registrar or chief officer" of that court. The A. C. T. provision, which deals with the proof of convictions acquittals and sentences, allows proof by a certificate "purporting to be signed by the Registrar or other proper officer" of the court. It applies to the proof of such proceedings wherever they might have taken place within the Commonwealth of Australia. The South Australian provision, which applies to the proof of summary proceedings wherever they might have taken place within the Commonwealth of Australia, allows proof by the production of a copy "purporting to be certified by the clerk of the court". The style of cl. 45(f), which does not insist upon the production of a copy of the original proceeding, follows that of the N. S. W. Evidence Act 1898 - 1966 s. 23(1).

46. Proof of identity of person convicted. In cl. 46 we have adopted the substance of s. 23A of the N. S. W. Evidence Act 1898 - 1966, which simplifies the procedure for identifying a person against whom a conviction has previously been recorded. A certificate of conviction is not sufficient to prove a previous conviction unless the person to whom the certificate refers is identified. Clause 46 would allow identity to be proved by the production of an affidavit to which the finger-prints of the person previously convicted are exhibited.

It will be noticed that, like s. 23A of the N. S. W. Act, cl. 46 allows the procedure to be followed to prove convictions recorded in other States and Territories of the Commonwealth of Australia. Unlike s. 23A, however, cl. 46 would also allow the procedure to be followed to prove convictions in the home State as well, in this case Queensland. We think the procedure should be allowable even to prove Queensland convictions.

47. Proof of incorporation of company. Clause 47 expresses so much of s. 16 of the Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964 as applies to companies incorporated or registered in Queensland. For reasons similar to those already discussed in relation to Part IV of the Draft Bill, we recommend that s. 13 of the Queensland Evidence Act 1898, which deals with a similar

subject-matter though in relation to companies incorporated or registered "in any Australasian Colony", be repealed without any replacement. The reference to the Commissioner and Assistant Commissioner for Corporate Affairs has been introduced into cl. 47 because of the amendments made to the Queensland Companies Act by the Securities Industry Act 1971.

Of course, cl. 47 would not be the only provision allowing proof of the incorporation of companies incorporated or registered in Queensland. Alternative provision is made by ss. 346 and 372 of the Queensland Companies Act 1961 - 1974. Nevertheless, we feel that cl. 47 should be included in the Draft Bill so as to express the Queensland content of the abovementioned Commonwealth legislation.

48. Proof of Crown Grants. Clause 48 is a modified version of s. 40 of the Queensland Evidence and Discovery Act which deals with the proof of letters patent and deeds of grant from the Crown. Section 40 is derived from an Act of New South Wales, 11 Vic. No. 38, of 1847, the substance of which is now to be found in s. 26 of the N. S. W. Evidence Act 1898 - 1966. Each of these provisions refers to both letters patent and deeds of grant. Although the matter is not free from doubt, the provisions seem to refer only to letters patent by which any land has been granted to any person, not to letters patent in general. For the sake of uniformity, we have used the wording of the N. S. W. Evidence Act s. 26 on this aspect of the matter. It is interesting to note that the analogous Victorian provision, s. 73 of the Victorian Evidence Act 1958, refers simply to the proof of "any grant of land from the Crown" without specifying the instrument by which the grant is effected.

Under s. 40 of the existing Queensland Act, copies are to be certified under the hand of the "Home Secretary or the Registrar-General for the time being". We think it more appropriate now to provide that copies should be certified under the hand of the Registrar of Titles or a Deputy Registrar of Titles.

There are other Queensland provisions dealing with a similar subject-matter, namely, ss. 33, 34 and 45 of the Real Property Act 1861 - 1973, s. 30 of the Registration of Deeds Act 1843 - 1972 (soon to be replaced by s. 249 of the Property Law Act 1974) and s. 6 of the Registrar of Titles Act of 1884. By virtue of the Real Property Act 1861 - 1973 s. 15, all land alienated by the Crown in fee after 1 January 1862 is subject to the provisions of that Act, including its registration provisions. Nevertheless we think it desirable to retain a provision in a new Evidence Act that deals expressly with the proof of Crown grants of land, as has been done in New South Wales and Victoria.

We have not included in cl. 48 the proviso as to fees which is to be found in s. 40 of the existing Act. This provision may need to be inserted into a new Evidence Act if it cannot be conveniently placed elsewhere.

Division 2 - Proof of certain miscellaneous documents and matters

49. Comparison of disputed writing. Clause 49 restates in a slightly modified form the rule at present to be found in s. 24 of the Evidence and Discovery Act. This is derived from an English provision and

has an equivalent in each of the other Australian States and the A.C.T. The history and effect of the South Australian equivalent were discussed by the High Court of Australia in Adami v. The Queen (1959) 108 C.L.R. 605 at pp. 616-617. For the purpose of proving the genuineness or otherwise of a disputed writing, it allows a comparison to be made between the disputed writing and a writing proved to the satisfaction of the judge to be genuine. Clause 49 differs from the existing s. 24 by omitting all reference to a jury. Although there is authority to the contrary (Wendt v. Lind [1913] St. R. Qd. 240), s. 24 could give the impression that it does not apply to a stipendiary magistrate or indeed any other court sitting without a jury. This impression can easily be avoided by omitting from cl. 49 the reference to a jury.

After some consideration, it has been decided not to adopt the form of the provision in s. 96 of the A.C.T. Evidence Ordinance 1971, which is derived in part from s. 36 of the N.S.W. Evidence Act 1898 - 1966. This provision does not expressly state that a comparison of the writings may be made by witnesses as well as by the court. Furthermore it is drawn in a form that does not include a comparison of the disputed writing with a writing proved to be that of some person other than the person alleged to have written the disputed writing. The proposed cl. 49, like the existing Queensland rule, does not exclude such a comparison.

50. Proof of instrument to validity of which attestation is not necessary. Clause 50 reproduces s. 25 of the Queensland Evidence and Discovery Act, which has an equivalent in each of the other Australian States and the A.C.T. Under English law until altered by statute in the nineteenth century, it was necessary to call one of the subscribing witnesses of an attested document unless they were all unavailable, even though attestation was not necessary to the validity of the document. Section 25 abolished this inconvenient rule. There does not appear to be any need to alter the terms of this provision.

51. Proof of instrument to validity of which attestation is necessary. Clause 51 reproduces the substance of s. 25A of the Queensland Evidence and Discovery Act, which has an equivalent in each of the other Australian States and the A.C.T. Under English law until altered by the Evidence Act 1938 s. 3, all attested documents to the validity of which attestation was necessary were in general to be proved by calling the attesting witness. Where the witness was dead or otherwise unavailable, secondary evidence of execution was to be given by proof of the handwriting of the witness or, if this was not obtainable, by other available evidence. See Nelson v. Whittall (1817) 1 B. & Ald. 19 and Phipson on Evidence (11th ed. 1970) paras. 1640 & 1643. Section 25A of the Queensland Act, which adopted the English provision of 1938, now allows such documents to be proved in all cases as if no attesting witness were alive. This alteration does not apply to wills or other testamentary documents.

Section 16(2) of the A.C.T. Evidence Ordinance 1971 provides that documents to the validity of which attestation is required may be proved "by evidence that the signature of the person by whom the document purports to have been executed is the signature of that person and by evidence that the signature of the person or of one of the persons by whom the document purports to have been attested is the signature of the person whose signature it purports to be".

This rule only partially expresses the existing Queensland law because it does not deal with the situation that would arise if the signature of the person executing the document or attesting the document cannot be proved. It is supplemented by other provisions in the A. C. T. Ordinance. We think that, rather than attempt a complete codification of the matter, it is better to leave the Queensland provision in its present form.

52. Presumptions as to documents twenty years old. Clause 52 reproduces the substance of s. 41A of the Queensland Evidence and Discovery Act, which has equivalents in N. S. W., Victoria, South Australia and the A. C. T. These provisions are derived from s. 4 of the English Evidence Act 1938. At common law, a document produced from proper custody and proved, or purporting, to be 30 years old or more is presumed to have been duly executed. No evidence of the handwriting, signature, sealing or delivery need in general be given. The statutory provisions reduce the relevant period to 20 years. Clause 52 would continue this reduction.

In cl. 52, the Queensland Act cited is "The Evidence Acts Amendment Act of 1962" rather than "The Evidence and Discovery Acts and Another Act Amendment Act of 1962" cited in s. 41A of the existing legislation.

53. Wills, deeds, etc. may be verified by declaration. Clause 53 reproduces the substance of ss. 27 and 28 of the Queensland Evidence and Discovery Act. Section 27 permits the execution of wills deeds and other instruments to be proved by a statutory declaration under the Oaths Act of 1867. It is derived from s. 16 of the English Statutory Declarations Act 1835 (5 & 6 Wm. 4 c. 62). There is an equivalent provision in s. 22 of the N. S. W. Oaths Act 1900 - 1953. Section 28 is an ancillary provision requiring a party who intends to adduce such a declaration in evidence to give such notice of his intention to do so as may be required by rules of court. Order 36 r. 4 of the Rules of the Supreme Court specifies the kind of notice that must be given. If cl. 53 is adopted, a consequential amendment must be made to the heading of this rule of court.

Clause 53 would probably be relied upon only rarely in litigation. In common form business, the due execution of a will would more frequently be proved by the affidavit rather than the statutory declaration of an attesting witness. See O. 71 rr. 2 & 14 of the Rules of the Supreme Court and the form of affidavit in Schedule 1 Form No. 381. Nevertheless, we are of the opinion that the provision is a potentially useful one and ought to be retained.

54. Evidentiary effect of probate, etc. Clause 54 would replace ss. 29 and 30 of the Queensland Evidence and Discovery Act. Analogous provisions are to be found in the Evidence legislation of N. S. W., Victoria, Tasmania and the A. C. T. The existing Queensland provisions are derived from ss. 64 & 65 of the English Court of Probate Act 1857 (20 & 21 Vic. c. 77). Clause 54 is modelled upon s. 14 of the A. C. T. Evidence Ordinance 1971. It will be noticed that cl. 54 would give evidentiary effect to a probate or letters of administration whether granted within or outside Queensland. However cl. 54 is merely an evidentiary provision and does not purport to confer on any person any authority to administer an estate. Compare the Companies Act 1961 - 1974 s. 95(3) & (4).

55. Maps, charts, etc. Clause 55 embodies the provision in s. 92 of the A. C. T. Evidence Ordinance 1971, which allows certain evidence to prove the territorial limits of an area or place or the distance between two places. We believe this to be a useful provision that ought to be incorporated into Queensland law.

Before leaving this Division of the Draft Bill, we must mention that we have thought it unnecessary to reproduce the provisions of ss. 21, 22 and 23 of the Evidence and Discovery Act. The subject-matter of ss. 21 & 22, admissions as to documents, is sufficiently dealt with by O. 36 rr. 2 & 6 of the Rules of the Supreme Court, rr. 200 & 203 of the District Courts Rules 1968 and rr. 176 & 179 of the Magistrates Courts Rules 1960. The subject-matter of s. 23, proof of a notice to produce, is sufficiently dealt with by O. 36 r. 7 of the Rules of the Supreme Court, r. 204 of the District Courts Rules 1968 and r. 180 of the Magistrates Courts Rules 1960.

Division 3 - Proof of certain Australian and overseas documents and matters

56. Interpretation. For the purposes of this Division, the terms "country" and "statute" are given extended meanings by cl. 56. In order to make provision for federal countries, such as the United States and Canada, we think it advisable to define the term "country" to include any part of a country. The term "statute" is defined to include any instrument of a legislative nature made under a statute. This latter definition is taken from s. 46 of the A. C. T. Evidence Ordinance 1971.

57. Proof of certain Australian and overseas written laws, etc. Clause 57 is intended to replace that portion of s. 39 of the Queensland Evidence and Discovery Act that deals with the proof of proclamations treaties and other acts of state "of the United Kingdom or of any foreign state or British colony". The existing provision is derived from the Imperial Evidence Act 1851 (14 & 15 Vic. c. 99) s. 7. Unlike s. 39 of the existing Act, cl. 57 would deal with statutes as well as proclamations, treaties and acts of state. The term "statute" is given an extended meaning by cl. 56, referred to above. We think it desirable to deal with all of these matters in the one provision and in this respect have adopted the policy followed in s. 47 of the A. C. T. Evidence Ordinance 1971. See also the Evidence (Colonial Statutes) Act 1907 of the United Kingdom.

The subject-matter of cl. 57 is partly dealt with by Commonwealth legislation so far as it relates to the States and Territories of Australia. The Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964 ss. 6 & 7 provides for the proof of proclamations and acts of state of the States and Territories. Section 3 of the same Act provides that all courts, which includes Queensland courts, shall take judicial notice of all State Acts. Section 15 provides for the proof of by-laws and regulations made in the States. The Commonwealth Evidence Act 1905 - 1974 s. 4A provides that judicial notice shall be taken of the Ordinances of a Territory of the Commonwealth and of regulations, rules and by-laws made under a law in force in a Territory.

Despite these Commonwealth provisions, we think it desirable to extend the provisions of cl. 57 to the States and Territories of Australia as well as to overseas countries. It is possible that there may be gaps in the Commonwealth provisions, especially those of the State and Territorial Laws and Records Recognition Act 1901 - 1964 and it may be as well to have a comprehensive piece of State legislation upon which a party may rely should such a gap appear. Section 19 of the last-mentioned Act provides that its provisions shall be in addition to, and not in derogation of, any powers given by any law at any time in force in any State. Unlike s. 47 of the A. C. T. Evidence Ordinance 1971, therefore, cl. 57 is not limited to apply only to overseas countries.

The methods of proof allowed by cl. 57 would go beyond those allowed by s. 39 of the existing Act. See especially sub-para. (f), which allows evidence to be given by the production of a book or publication that appears to the court to be a reliable source of information containing the relevant statute, proclamation, treaty or act of state. This is taken from s. 47 of the A. C. T. Evidence Ordinance 1971. Somewhat similar provisions are to be found in the Evidence legislation of South Australia, Western Australia and Tasmania. For example, see W. A. Evidence Act 1906 - 1974 ss. 64 & 71.

If cl. 57 is adopted, s. 39 of the Evidence and Discovery Act and s. 12 of the Evidence Act 1898 may be repealed.

58. Proof of judicial proceedings of an overseas country. Clause 58 is intended to replace that portion of s. 39 of the Queensland Evidence and Discovery Act not replaced by cl. 57, above. The existing provision deals with the proof in Queensland courts of the judicial proceedings of courts "in Great Britain and Ireland or of any foreign state or British colony". Clause 58 repeats the substance of s. 39 in a form similar to that adopted in several of the Australian jurisdictions. For example, see s. 17 of the Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964.

Clause 58 would apply to the proof of judicial proceedings of only overseas countries. Clause 45, which was examined earlier, would apply to the proof of judicial proceedings of courts in the States and Territories of Australia. Clause 58, the provision for overseas proceedings, retains the existing formula for the proof of such proceedings. In general, this requires a seal upon the relevant document. A similar requirement is to be found in s. 21 of the N. S. W. Evidence Act 1898 - 1966 and s. 49 of the Victorian Evidence Act 1958. Clause 45, the provision for Australian proceedings, would allow proof of such proceedings by the production of a certificate purporting to be under the hand of the registrar or other officer of the court whose proceedings are to be proved. In other words, there is no insistence upon the seal of a court as authentication for Australian proceedings. We think this distinction is desirable. A copy of the judicial proceedings of an overseas country should be authenticated by a seal except in the circumstances referred to in the clause. This degree of authentication is not necessary in the case of Australian judicial proceedings.

59. Proof of certain documents admissible elsewhere in Australia. Clause 59 would make admissible without further proof in Queensland courts a document that is admissible in some other State or Territory.

of Australia without proof of the seal or stamp or signature authenticating the document or of the judicial or official character of the person appearing to have signed the document. It reproduces so much of s. 7 of the Queensland Evidence Act 1898 as applies to the States and Territories of Australia. For reasons similar to those discussed in relation to Part IV of the Draft Bill, we recommend that the reference to "Australasian" colonies in the existing s. 7 ought not to be reproduced in cl. 59.

If a document comes within the ambit of cl. 59, it will be admissible in evidence though it only purports to be signed or sealed by the proper person. Proof of the genuineness of the signature or seal authenticating the document will not be required. The provision is therefore a far-reaching one. For this reason, we have decided against giving it a broad application such as that given by the W. A. Evidence Act 1906 - 1974 s. 62, which applies the provision to -

Every document admissible in evidence for any purpose in any court of justice in any part of Her Majesty's dominions, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

A similarly broad application is given by a provision in s. 50 of the A. C. T. Evidence Ordinance 1971. We have limited cl. 59 to documents admissible elsewhere only in Australia. It will be remembered that we have dealt specially with the proof of the written laws and judicial proceedings of overseas countries by cll. 57 and 58 respectively. Furthermore, we intend to make special provision for public documents, the incorporation of companies and births, deaths and marriages in cll. 61, 62 and 63 below.

Clause 59 will overlap s. 9 of the Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964, which is similarly worded. However, the latter provision has been restricted to public documents since it depends on s. 51(xv) of the Commonwealth Constitution for its validity. Clause 59, on the other hand, applies to private as well as public documents.

We have not reproduced in the Draft Bill the provisions of s. 37 of the Queensland Evidence and Discovery Act. This is a provision of the same kind as that examined above though applying to documents admissible in evidence "in England or Ireland". Section 37 does no more than reproduce the provisions of Imperial legislation already applicable to Queensland courts, namely, the Evidence Act 1851 (14 & 15 Vic. c. 99) s. 11. A provision of this kind would be anomalous in a new Evidence Act. The Imperial legislation will continue to apply to Queensland whatever the Queensland Parliament may enact. It may be noted that the N. S. W. Evidence Act 1898 - 1966 does not contain a provision equivalent to s. 37 of the Queensland Act. We therefore recommend the repeal of s. 37 without any replacement.

60. Royal Proclamations, Orders of the Privy Council, etc. Because of the constitutional relations existing between the United Kingdom and the State of Queensland, we have thought it advisable to preserve the substance of s. 5 of the Queensland Evidence Act 1898. This permits

the proof in Queensland courts of Royal proclamations, orders of the Privy Council, etc., by production of a copy of the London Gazette or of the Queensland Government Gazette. There are similar provisions in the Evidence legislation of Victoria, Western Australia and Tasmania. They are modelled on the Imperial Evidence Act 1868 (31 & 32 Vic. c. 37) s. 2, which still applies in Queensland. However cl. 60, like s. 5 of the Queensland Evidence Act 1898, covers a greater range of official instruments than does the provision in the Imperial Act. Sub-clause (1)(b) has been inserted to reproduce that portion of s. 9 of the Evidence Act 1898 that deals with Royal proclamations printed by the Government Printer of Queensland.

61. Proof of certain Australian and overseas public documents. In cl. 43, discussed above, we have inserted a provision into the Draft Bill that would allow evidence of Queensland public documents to be given by the production of a copy or extract either proved to be an examined copy or extract, or purporting to be certified as true by the person to whose custody the original is entrusted. Clause 61, which we now recommend, would extend this provision to the public documents of other places. The Queensland Evidence Act 1898 s. 8, extends a similar provision to the public documents of any "Australasian Colony". We are of the opinion that the provision may be safely extended to the public documents of all overseas countries. Clause 61 would achieve this end.

62. Proof of incorporation of certain Australian and overseas companies. Clause 62 extends to companies incorporated or registered in places other than Queensland the provisions in cl. 47(1) allowing evidence of the incorporation of a company to be given by a certificate of incorporation or registration. Under cl. 62, the relevant certificate would be one purporting to be signed or issued by the Registrar of Companies, Commissioner for Corporate Affairs "or other proper officer or body" in the State, Territory or country of incorporation or registration. To the extent that cl. 62 refers to the States and Territories of the Commonwealth, it overlaps s. 15(1) of the Commonwealth State and Territorial Laws and Records Recognition Act 1901 - 1964. The Queensland Evidence Act 1898 s. 13, which we have earlier recommended should be repealed without replacement, extends a similar provision to companies incorporated or registered in any "Australasian Colony". However, this latter provision is limited by a requirement that the authority of the person purporting to sign the certificate shall be verified by a statutory declaration.

We are of the opinion that the broader provision in cl. 62 may be safely extended to companies incorporated or registered in any overseas country, so that a certificate purporting to be signed or issued by a proper officer or body in that country may be produced as evidence of incorporation. Under existing law, evidence of the existence of a corporate body may be provided by the fact that acts of a business character have been done in Australia ostensibly by the corporation. See, for example, Purex Corporation Limited v. Vanguard Trading Company (1965) 112 C. L. R. 532 at p. 534, per Kitto J. In this state of the law, the production of a document from overseas purporting to be a certificate of incorporation or registration is more likely to be helpful to a court than otherwise. If relevant, therefore, such a document should be admissible. Clause 62 would make it so.

63. Proof of birth, death or marriage. Clause 63 adopts the provision in s. 13 of the A.C.T. Evidence Ordinance 1971 which allows a document purporting to be a certificate, entry or record of a birth, death or marriage alleged to have taken place whether in Australia or elsewhere to be admitted as evidence of the facts in the document. The wording of s. 13 is similar to that of the Commonwealth Matrimonial Causes Act 1959 s. 100, though the latter provision applies only to proceedings under that Act. Clause 57 would overlap s. 18 of the Queensland Registration of Births, Deaths and Marriages Act 1962 - 1974 which deals only with Queensland certificates.

Division 4 - Proof of telegraphic messages

This Division (cll. 64-66) incorporates into the Draft Bill the substance of ss. 1, 2 and 3 of the Queensland Telegraphic Messages Act of 1872. We are very doubtful about the usefulness of the remainder of this Act and of its amendment, the Telegraphic Messages Act Amendment Act of 1876 and, subject to any arguments to the contrary that we receive in response to this Working Paper, recommend that these Acts, except ss. 1, 2 and 3 abovementioned, be repealed without any replacement.

The Acts are mainly concerned with the transmission of official or formal documents by "electric telegraph" so that the copy transmitted is as valid and effectual as the original. See the Telegraphic Messages Act of 1872 ss. 4 and 5. There are similar provisions in the Evidence Acts of South Australia and Western Australia. It seems to us quite possible that these provisions are no longer relied upon in Queensland. "Electric telegraph" is defined by the Telegraphic Messages Act of 1872 s. 11 to mean "any telegraphic line the property of the Government and worked by electricity under their control within the colony". The word "Government" in this definition presumably still means the State Government. See the manner in which the word is used in the Queensland Acts Interpretation Act 1954 - 1971 s. 36. The reference in the definition to a "line" would seem to exclude modern forms of telecommunication. Moreover the method of transmission is somewhat cumbersome. The original document must be delivered "at the telegraph station" in the presence and under the inspection of a justice of the peace. The person to whom the contents of the document is sent must in the presence and under the supervision of a justice of the peace authenticate the message by repeating it back to the sender. A certificate must be endorsed on the original document and notification of this transmitted to the receiver of the message. There is also a provision in s. 6 of the Act that the original document "shall be kept at the telegraph station at which it was delivered and shall ... be open within reasonable hours to the inspection of any person upon payment of a fee of one shilling".

Although the remainder of the Acts may well be repealed without replacement, ss. 1, 2 and 3 of the Telegraphic Messages Act of 1872 ought, we think, to be preserved. The Tasmanian Evidence Act 1910 incorporates only these provisions: ss. 41-43. Their purpose is to facilitate the proof of telegraphic messages. Clauses 64-66 express the substance of the provisions in more modern form. The words "telegraph", "telegraph message" and "telegraph office" are defined

in cl. 5 of the Draft Bill. The first and the last of these definitions are modelled on definitions inserted into the South Australia Evidence Act in 1972.

Division 5 - Admissibility of convictions in
civil proceedings

Division 5 (cll. 67-71) is intended to modify the rule of evidence laid down by the English Court of Appeal in Hollington v. Hewthorn & Co. Ltd. [1943] K. B. 587. This rule is a particular application of the more general rule that excludes opinion evidence. The litigation in Hollington v. Hewthorn arose out of a collision between two cars in which the plaintiff's car was damaged. As a result of the collision, the driver of the defendant's car was convicted in a magistrates court for the summary offence of driving without due care and attention. The plaintiff brought a civil action for damages arising out of the collision against the convicted driver and his employer. Besides the defendant driver, there had been only one eye-witness of the accident, namely, the driver of the plaintiff's car. However, the latter died before the civil action came on for hearing. Consequently, in order to establish a prima facie case of negligence against the defendant driver, the plaintiff sought to put in evidence the conviction for the summary offence. However, the Court of Appeal held this to be inadmissible. On the trial of the issue in a civil court, the opinion of the criminal court expressed by the conviction was held to be irrelevant. The plaintiff's case failed for want of evidence.

The rule in Hollington v. Hewthorn was reviewed by the English Law Reform Committee in its Fifteenth Report: Cmnd. 3391 (1967). It said (para. 3):

Rationalise it how one will, the decision in this case offends one's sense of justice. The defendant driver had been found guilty of careless driving by a court of competent jurisdiction. The onus of proof of culpability in criminal cases is higher than in civil; the degree of carelessness required to sustain a conviction for careless driving is, if anything, greater than that required to sustain a civil course of action in negligence. Yet the fact that the defendant driver had been convicted of careless driving at the time and place of the accident was held not to amount even to prima facie evidence of his negligent driving at that time and place. It is not easy to escape the implication in the rule in Hollington v. Hewthorn that, in the estimation of lawyers, a conviction by a criminal court is as likely to be wrong as right. It is not, of course, spelt out in those terms in the judgment of the Court of Appeal, although, insofar as their decision was based mainly upon the ground that the opinion of the criminal court as to the defendant driver's guilt was as irrelevant as that of a bystander who witnessed the accident, the gap between the implicit and the explicit was a narrow one.

Following this report, the rule in Hollington v. Hewthorn was modified in England by the Civil Evidence Act 1968 s.11. Sub-section (1) of s. 11 provides that in any civil proceedings the fact that a person

has been convicted of an offence is admissible in evidence to prove, where relevant to do so, that he committed that offence. The conviction is admissible whether the person pleaded guilty or otherwise and whether or not he is a party to the civil proceedings. Sub-section (2) of s. 11 provides that in any civil proceedings where a person is proved to have been convicted of an offence, he shall be taken to have committed that offence unless the contrary is proved. The operation of these provisions is exemplified by Wauchope v. Mordecai [1970] 1 W.L.R. 317, Stupple v. Royal Insurance Co. Ltd. [1971] 1 Q.B. 50 and In re Raphael, Decd. [1973] 1 W.L.R. 998. Some of the issues raised by them have been discussed by A. Zuckerman in "Previous Convictions as Evidence of Guilt" (1971) 87 L.Q.R. 21.

The substance of the abovementioned legislation has been adopted by the A.C.T. Evidence Ordinance 1971 ss. 77, 79, 80 and 81. It is interesting to notice that in 1945, only a few years after Hollington v. Hewthorn, a more limited provision was adopted in South Australia by the insertion of s. 34a into its Evidence Act 1929. On the other hand, the Law Reform Committee of Western Australia has recommended that the rule in Hollington v. Hewthorn be not abolished by statute: Project No. 20 (1972) p. 2. In brief, the main reasons for this recommendation were (i) under s. 79C of the Evidence Act of Western Australia, evidence given and recorded in a criminal proceeding would if relevant be admissible in a subsequent civil action; (ii) the question of the weight to be given to the evidence of the conviction would raise real difficulties; and (iii) the abolition of the rule excluding such evidence would create as many problems as it would solve. The New Zealand Torts and General Law Reform Committee has recommended only a partial modification of the rule: Report (1972) p. 16.

With respect, we recognize the force of the suggestion that any modification of the rule in Hollington v. Hewthorn could lead to other difficulties. Nevertheless, as a basis for consideration, we have included in the Draft Bill provisions that would modify it. These provisions are modelled on those of the A.C.T. Evidence Ordinance 1971.

67. Interpretation. The provisions of this clause are modelled on those of s. 81 of the A.C.T. Evidence Ordinance 1971. By virtue of the definition of "court", the convictions admissible under this Division would only be those resulting from criminal proceedings in Australian courts (not including courts-martial). The problem posed by a conviction against which an appeal is pending was dealt with in In re Raphael, Decd. (above).

68. Convictions as evidence in civil proceedings. Clause 68, which is modelled on s. 77 of the A.C.T. Evidence Ordinance 1971, would adopt the substance of the English legislation described above. Like that legislation, it does not extend to actions for defamation. Such actions are dealt with specially by cl. 69, below. If adopted, cl. 68 would change the rule enunciated in Origliasso v. Vitale [1952] St. R. Qd. 211 that evidence of a conviction for assault is not admissible against the defendant in an action for damages for the same assault.

69. Convictions as evidence in actions for defamation. Modelled on s. 78 of the A.C.T. Evidence Ordinance 1971 and following s. 13 of the English Civil Evidence Act 1968, cl. 69 would provide specially for actions for defamation. The problem sought to be overcome was discussed by the English Law Reform Committee in its Fifteenth Report (above) para. 26:

A fair and accurate report of criminal proceedings is, of course, absolutely privileged. But for a statement, not contained in such a report, which imputes that a person has committed a criminal offence, the only available defence is justification (whether standing by itself or joined with a defence of fair comment), unless the statement is made upon an occasion which is privileged for some other reason. If all that is said is that the plaintiff was convicted of the offence, proof of the conviction establishes the defence of justification; but if, as is likely to be the case, the statement imputes that he was guilty of the offence of which he was convicted, the defendant must prove the plaintiff's guilt de novo in the civil action for defamation. The conviction is not admissible evidence of guilt.

See Goody v. Odhams Press Ltd. [1967] 1 Q.B.333. (However, compare Jorgensen v. News Media (Auckland) Ltd. [1969] N.Z.L.R.961.)

The object of the legislation is, as the Law Reform Committee expressed it (para.31), to prevent the machinery of a civil action being used for the sole purpose of obtaining the re-trial of criminal proceedings which have already been heard and determined according to law by a court of criminal jurisdiction. In Queensland, the remarks of the Committee need modification to take account of the defamation provisions of the Queensland Criminal Code, especially s.376 which provides that "it is lawful to publish defamatory matter if the matter is true and if it is for the public benefit that the publication complained of shall be made". However the remarks remain pertinent in Queensland to an issue requiring it to be shown that defamatory matter is true.

The English Law Reform Committee recommended that, for the purposes of actions for defamation, acquittals as well as convictions be treated as conclusive evidence of the relevant facts (paras.29-31). However this recommendation was not adopted by the legislature. The Civil Evidence Act 1968 s.13 therefore makes conclusive of the relevant facts only a conviction, not an acquittal. The A.C.T. Evidence Ordinance 1971 s.78 also applies only to convictions. We recommend that cl.69 should similarly apply only to convictions. An acquittal shows only that the court had a reasonable doubt about the guilt of the accused.

In New South Wales, provisions derived from the English Civil Evidence Act 1968 s.13 have recently been enacted in the Defamation Act 1974 s.55. The legislation was adopted as a result of recommendations made by the N.S.W. Law Reform Commission in its report on defamation: L.R.C.11 (1971) pp.144-146.

70. Evidence identifying facts upon which conviction based. Clause 70 is intended to make admissible certain evidence that might not otherwise be admissible for the purpose of identifying the facts on which a conviction, admitted for the purposes of this Division, was based. This identification is necessary if the relevance of a conviction to an issue in a civil proceeding is to be established.

71. Operation of other laws not affected. This clause is self explanatory.

Division 6 - Books of account

Clauses 72-80 are recommended to replace the provisions of the Queensland Bankers' Books Evidence Act of 1949. This Act is derived from English legislation, the history of which was discussed by Fry L. J. in Arnott v. Hayes (1887) 36 Ch. D. 731, at pp. 739-740;

The legislation on this subject began in 1876. The Act of that year (39 & 40 Vict. c. 48) in its preamble states two objects: "Whereas serious inconvenience has been occasioned to bankers and also to the public by reason of the ledgers and other account books having been removed from the banks for the purpose of being produced in legal proceedings, and whereas it is expedient to facilitate the proof of the transactions recorded in such ledgers and account books." I see no reason to suppose that when the Act of 1879 (42 & 43 Vict. c. 11) was substituted for this Act, the legislature had not the same two motives. I think, therefore, that the facilitating the proof of the transactions recorded in the books was as much an object of the Act as the relief of bankers.

Thus, the legislation has two objects: firstly, to relieve bankers of the necessity to produce their books of account in proceedings to which they are not a party; and secondly, to facilitate the proof by parties of the transactions recorded in such books. The legislation may be compared with rules relating to books of account developed independently of the legislation. See Potts v. Miller (1940) 64 C. L. R. 282 at pp. 292, 301-305 and Re Montecatini's Patent (1973) 47 A. L. J. R. 161 at p. 169. The application of the legislation to criminal proceedings is exemplified by R. v. Mitchell [1971] V. R. 46 and Williams v. Summerfield [1972] 2 Q. B. 512.

Section 4 of the Queensland Act, which is central to the scheme of the Act, provides as follows:

Subject to the provisions of this Act, a copy of any entry in a bankers' book shall in all legal proceedings be received as prima-facie evidence of such entry and of the matters, transactions and accounts therein recorded.

Although, perhaps, there may be some doubt about the effect of such a provision - see the remarks of Windeyer J. in Elsey v. Commissioner of Taxation (1969) 43 A. L. J. R. 415, at p. 417 - it would seem to create a significant exception to the hearsay rule by allowing a transaction to be proved by the production of a copy of the entry in a bankers' book in which the transaction is recorded. See Myers v. Director of Public Prosecutions [1965] A. C. 1001, at pp. 1028 and 1033. The N. S. W. Law Reform Commission has assumed as much in its report Evidence (Business Records) L. R. C. 17 (1973) at p. 88.

In 1965, the principle in the Bankers' Books Evidence Act was extended in Victoria to the books of account of all businesses by the Victorian Evidence (Amendment) Act 1965. As a result, there were then two sets of provisions dealing with books of account in Victoria:

firstly, those dealing with bankers' books; secondly, those dealing with other books of account. These provisions were amalgamated into one set of provisions by the Victorian Evidence (Documents) Act 1971, which is now ss. 58A-58J of the Evidence Act 1958. This amalgamation had been recommended in 1971 by a sub-committee of the Victorian Chief Justice's Law Reform Committee.

Clauses 72-80 of the Draft Bill substantially follow the scheme of the Victorian provisions. They would extend the principle of the Bankers' Books Evidence Act to all books of account. We accept the idea that the special rules applicable to bankers' books may be applied with advantage to the books of account of other undertakings.

The definition of "book of account" in cl. 72 is a shortened version of an analogous definition in s. 58A of the Victorian Act: We have deleted the special reference to bankers' books that has been retained in the Victorian provision. This deletion would exclude from the definition any document used in the ordinary business of a bank that would not otherwise be called a book of account. Contrast the position in *Re L. G. Batten Pty. Ltd. (In Voluntary Liquidation)* [1962] Q. W. N. 2 where an entry in a bank diary was held to be admissible under the existing Queensland provision. We think that only books of account in the newly defined sense should be admissible under this Division. It is the special nature of books of account in this sense that warrants their being admitted upon a special basis.

Clause 78, which does not have any analogue in the Victorian Act, is derived from s. 10 of the Queensland Act. The latter sets out a manner of proving that a person does not have an account at a bank. We have extended this provision so that it also allows proof that a person does not have an account with an undertaking that is not necessarily a bank. We think this desirable now that there are many other institutions besides banks with which persons commonly have accounts.

We have departed from the scheme of the Victorian provisions in one important respect. The Victorian provisions define "book of account" in terms of any document used in the ordinary course of a "business" for recording the financial transactions of the "business" etc. Clause 72 of the Draft Bill, on the other hand, defines "book of account" in terms of any document used in the ordinary course of an "undertaking" for recording the financial transactions of the "undertaking" etc. In other words, we recommend the use of the word "undertaking" where in Victoria the word "business" is used. We think that a book of account should be admissible under this Division even though it is a book of account of an undertaking that is not a "business" in the ordinary sense of that word, such as a charitable, governmental or professional undertaking. ("Undertaking" is defined in cl. 5 of the Draft Bill.) Since we want to use the word "business" in its ordinary sense in cl. 82 (below), which will make business records - not necessarily books of account - admissible in criminal proceedings, we have avoided defining "business" in wide terms for the purposes of these clauses relating to books of account.

The course we propose may be contrasted with that adopted in Victoria. As we have said above, the Victorian Act defines "book of account" in terms of any document used in the ordinary course of a "business" etc. However s. 3(1) of the Victorian Act defines "business" to include:

... any business profession occupation calling trade or undertaking ...

Thus "business" includes any "undertaking". However this wide meaning given to the word "business" has repercussions in that part of the Victorian Act that makes "business" records admissible in criminal proceedings, repercussions that we would prefer to avoid. We feel that they are best avoided by using the word "undertaking" rather than "business" to define "book of account". It is then not necessary to define "business" in such wide terms. This matter will be considered further below in our discussion of Part VI of the Draft Bill.

It will be noticed that cl. 76, following the scheme of s. 58F of the Victorian Act and s. 8 of the existing Queensland Act, would provide as follows:

A person engaged in any undertaking or any employee of that person shall not in any legal proceeding to which the person is not a party be compellable to produce any book of account the contents of which can be proved under this Division or to appear as a witness to prove the matters transactions and accounts therein recorded unless by order of a court.

This provision would not necessarily allow a person engaged in an undertaking to ignore a subpoena in relation to his books of account. Discussing a similar provision in Emmott v. Star Newspaper Co. (1892) 62 L. J. Q. B. 77 at pp. 78-79, Lord Coleridge C. J. said:

The section does not say that he is not to be compellable in any cases where the contents of the books could formerly be proved at common law, but only in cases "where their contents can be proved in the manner provided by this Act". If the banker does not choose to follow out these provisions of the Act, he is left with the old burden of personal attendance and production of the books ... If the banker will not attend or supply the copies required at the trial, he must be subpoenaed to produce the books at the trial as before the Act.

A person engaged in an undertaking would thus not be entitled to the protection of the provision unless he has furnished or been willing to furnish verified copies of the required entries.

If Division 6 is adopted, it may be necessary to review the Rules of the Supreme Court O. 35 rr. 16 and 19.

PART VI - ADMISSIBILITY OF STATEMENTS

This Part of the Draft Bill sets out some statutory exceptions to the rule against hearsay. Ordinarily, a statement made otherwise than in the course of evidence given in a case is regarded as hearsay for the purposes of that case and is not admissible in evidence unless it comes within one of the exceptions to the rule against hearsay. Many exceptions to the hearsay rule have been developed by the courts without the assistance of legislation. See, for example, those

mentioned by D. E. Harding in "Modification of the Hearsay Rule" (1971) 45 A. L. J. 531. However, the decision of the House of Lords in Myers v. Director of Public Prosecutions [1965] A. C. 1001 shows that it is unlikely that the courts will develop further exceptions to any great extent.

A statement made otherwise than in the course of evidence given in a case is not regarded as hearsay if it is relevant to prove something in the case other than the truth of the matter asserted by the statement. For example, such a statement is not regarded as hearsay if its relevance to the case depends, not on its truth, but on its falsity: Mawaz Khan v. R. [1967] A. C. 454. Part VI of the Draft Bill is not intended to interfere with the already existing admissibility of a statement to prove something other than the truth of the matter asserted. For such a purpose, the statement is not regarded as hearsay.

The function of Part VI, therefore, is to specify certain kinds of statement that will be admissible in evidence though made otherwise than in the course of evidence given in the case concerned and though tendered to prove the truth of the matter asserted by the statement. One of two policies could be followed by the authors of such legislation. Firstly, they could attempt to codify all the circumstances in which hearsay is to be admissible. Such a policy was followed in the Model Code of Evidence proposed by the American Law Institute in 1942. Rule 502 of that Model Code provides that "Hearsay evidence is inadmissible except as stated in Rules 503 to 530". The Model Code then proceeds to set out all of the circumstances in which hearsay is to be admissible. A similar policy was followed in the English Civil Evidence Act 1968, s. 1(1) of which provides:

In any civil proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of any provision of this Part of this Act or by virtue of any other statutory provision or by agreement of the parties, but not otherwise.

The last three words of this sub-section abolish the common law exceptions to the rule against hearsay so far as civil proceedings are concerned.

Alternatively, this kind of legislation may not attempt to deal comprehensively with the rule against hearsay. It may simply add more exceptions to those already existing at common law. This was the policy followed in England until the enactment of the Civil Evidence Act 1968, and is the one hitherto followed in the States and Territories of Australia. It is the one we recommend should continue to be followed in a new Evidence Act. In our view, it is sufficient at present in Queensland to state in legislative form only some of the exceptions to the hearsay rule.

The existing Queensland provisions that specifically deal with the admissibility of hearsay statements are ss. 42A-42C of the Evidence and Discovery Act. These provisions, which were inserted into that Act in 1962, are derived from the English Evidence Act 1938. That English Act has been adopted in one form or another in each of the Australian States and Territories, though it has now been replaced in England by the much wider provisions of the Civil Evidence Act 1968.

The Queensland provisions embodied most of the alterations to the English Evidence Act 1938 that were recommended in 1953 by the English Committee on Supreme Court Practice and Procedure: Cmd. 8878 pp. 93-95. These recommendations were never adopted in England or in other Australian jurisdictions except Western Australia.

More recently, further amendments to the rule against hearsay have been made or proposed in many parts of the English-speaking world: in England, Scotland, Canada, New Zealand, and in a number of the Australian jurisdictions, not to mention the jurisdictions of the United States. The available material upon the subject has become very copious indeed. In the face of this material, which contains within it a wide range of proposals, we think it desirable to develop only in an evolutionary way the legislative exceptions to the rule against hearsay. We also think it desirable to pay a great deal of attention to the developments adopted or proposed in those other jurisdictions whose legislation and case law are the more familiar and the more accessible to us.

Mention must here be made of the report on Evidence (Business Records) of the Law Reform Commission of New South Wales: L.R.C. 17 (1973). This report proposes a Bill to make business records admissible as evidence in all proceedings. Its purpose is therefore somewhat similar to that of the Victorian Evidence Act 1958 ss. 58A-58J, which we have recommended be adopted in substance in Queensland: see cll. 72-80 above. However, unlike the Victorian (and our) provisions, the proposed Bill would extend to all business records, not only to books of account. Since the Bill defines "business" to include any "undertaking", the Bill would substantially modify the rule against hearsay. In effect, the Bill would make admissible the records of any undertaking, subject to the conditions and safeguards contained in the Bill. These conditions and safeguards are set out in detail and, at least in form, represent a significant departure from existing law. It is uncertain whether the proposed Bill will be enacted into law in New South Wales. In view of this, we think it would be premature to recommend the adoption of its principles in Queensland.

The existing Queensland provisions dealing specifically with hearsay statements apply only to civil proceedings. This limit was adopted from the English Evidence Act 1938. In England, special provision was subsequently made for criminal proceedings by the Criminal Evidence Act 1965. This provision, which creates a much narrower exception for criminal proceedings than for civil, has never been adopted in Queensland. It was enacted in England following the decision of the House of Lords in Myers v. Director of Public Prosecutions [1965] A.C. 1001, which showed the need to modify the hearsay rule for criminal proceedings as well as civil. In that case, the prosecution had called witnesses to produce microfilms of cards filled in by various workmen showing the numbers cast into the cylinder blocks of certain cars at the time of their manufacture. The workmen who had filled in the cards were unidentifiable at the time of the trial and therefore could not be called to prove these numbers. Nevertheless, the entries on the cards were held to be hearsay and therefore inadmissible because they were the assertions of persons not called as witnesses. Yet there can be little doubt that the entries would have been quite reliable records, even for a criminal case where a high standard of proof is required. The law has been modified for such cases in England, though not in Queensland.

It seems clear, therefore, that the rule against hearsay needs to be modified to some extent in Queensland for the purpose of criminal proceedings. However, we are of the opinion that the rule for criminal proceedings should be distinct from that for civil proceedings. There are characteristic features of criminal trials which suggest that hearsay should be admitted with greater caution than in civil trials. Some of these were discussed by the English Criminal Law Revision Committee in its Eleventh Report: Cmnd. 4991 (1972) para. 229. It said -

We recognize that there is a case for preserving the rule against hearsay in criminal trials. The principal arguments are related closely to the essential features of criminal trials as compared with civil trials. These are (i) the fact that in a criminal trial the evidence is mostly given orally, (ii) the fact that trials on indictment at least, once begun, are ordinarily continued without adjournments for further enquiries and (iii) the fact that there is little by way of preliminary proceedings (apart from committal proceedings) ... The high standard of proof required for a conviction (proof beyond reasonable doubt) is also an important consideration. Another argument which has much concerned us is the danger of manufactured evidence. Although this danger is not limited to the manufacture of evidence by the defence, it is perhaps greatest in the kind of case where a witness for the defence might give evidence that he heard somebody who must have seen the offence being committed, but who is said to be unavailable to give evidence, say something about the offence which is inconsistent with the guilt of the accused. We have no doubt that this is a real danger ...

For these reasons we think that the rule for criminal proceedings should be distinct from, and narrower than, the rule for civil proceedings. Indeed, we shall recommend below that the rules be drawn in such a way that the construction of one will have little effect upon the construction of the other. In particular, we shall recommend that the word "undertaking" be used in the rule for civil proceedings while the word "business" be used in the rule for criminal proceedings.

We now turn to the particular clauses recommended to be incorporated into Part VI of the Bill.

81. Admissibility of documentary evidence as to facts in issue. Clause 81 is a modified version of s. 42B of the existing Queensland Act. In the main, the modifications have been suggested by s. 55 of the Victorian Evidence Act 1958, which was introduced into that Act in 1971 upon the recommendation of a sub-committee of the Victorian Chief Justice's Law Reform Committee. Clause 81, like s. 42B, would not apply to criminal proceedings.

As before, cl. 81 extends only to documentary hearsay. Unlike the provisions of the English Civil Evidence Act 1968, it does not extend to oral hearsay. Nor does it contain the complex notice requirements of the English Act and associated rules of court, which have not found favour in Australia. See (1971) 45 A.L.J. pp. 566, 567 and 568. Like s. 55 of the Victorian Act, the first portion of cl. 81(1) avoids using the phrase "any statement made by a person". A

statement sought to be admitted under cl. 81(1)(b) may have been made by a business machine from information supplied by persons. It should also be noticed that the word "statement" is apt to include a statement of opinion: Lenehan v. Queensland Trustees Ltd. [1965] Qd. R. 559. The definition of "statement" in cl. 5 of the Draft Bill adopts that in s. 42A of the existing Act.

Section 42B of the existing Act makes two kinds of statement admissible, as follows -

- (a) A statement made by a person who had personal knowledge of the matters dealt with by the statement.
- (b) A statement made by a person where -
 - (i) the document in which the statement is made is or forms part of a record purporting to be a continuous record; and
 - (ii) the maker of the statement made the statement in the performance of a duty to record information.

The first description of statement needs no alteration and has been incorporated into cl. 81. The second description of statement is unsatisfactory. The continuity of a record is not, we suggest, a satisfactory criterion for the admissibility of statements. This description has therefore been altered in the manner suggested by s. 55 of the Victorian Act, whose wording has been taken from the English Criminal Evidence Act 1965 s. 1(1). However, in order to make the provision quite distinct from the clause we recommend below to apply to criminal proceedings (cl. 82), we suggest that the word "business" in the analogous Victorian provision be replaced by the word "undertaking". As we have remarked above in our discussion of cl. 72, the word "business" in the Victorian Act has been defined to include any "undertaking" but this has left no suitable word to be used in the narrower provision needed for criminal proceedings. We think that a court construing cl. 81 for a civil proceeding ought not to be concerned about the consequences of its construction upon criminal proceedings.

The word "undertaking" is defined in cl. 5 of the Draft Bill. The definition is modelled in part on the definitions of the word "business" respectively contained in the Victorian Evidence Act 1958 s. 3 and the report of the N. S. W. Law Reform Commission on Evidence (Business Records) L. R. C. 17 (1973) at p. 27.

Thus, cl. 81 would make two kinds of statement admissible in civil proceedings, as follows -

- (a) A statement made by a person who had personal knowledge of the matters dealt with by the statement.
- (b) A statement contained in a document that is or forms part of a record relating to any undertaking and made in the course of that undertaking from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied.

Clause 81(1) would require that in the first case the maker of the statement be called as a witness and in the second case the supplier of the information be called as a witness. However cl. 81(2) would modify this requirement in the circumstances there set out. The circumstances set out in sub-paras. (a), (b) and (e) of cl. 81(2) are to be found in s. 42B(1) of the existing Queensland Act. Sub-paragraphs (c) and (d) have been adopted from s. 55(5) and (6) of the Victorian Act.

Sub-paragraph (f) of cl. 81(2) would make a statement admissible notwithstanding that the maker of the statement or the supplier of the information is available but is not called as a witness if it appears to the court that undue delay or expense would be caused by calling him as a witness. Its wording is taken in part from s. 55(7) of the Victorian Act, which in turn is taken from the English Evidence Act 1938 s. 1(2). The English and Victorian provisions state that the court may admit the statement "if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused". Thus, they give the court a limited discretion to admit the statement. In 1953, the English Committee on Supreme Court Practice and Procedure recommended that the limit on the court's discretion to admit a statement be removed: Cmd. 8878 p. 93. This recommendation was adopted when the Queensland provisions were introduced in 1962. Thus the relevant Queensland provision, s. 42B(2), does not contain the limiting words quoted above. A Queensland court may therefore admit a statement notwithstanding that the maker of the statement is available but not called as a witness without first being satisfied that undue delay or expense would otherwise be caused.

Though the discretion conferred on Queensland courts by s. 42B(2) appears to be unlimited, it seems the provision has not been effective. The Bar Association of Queensland has suggested to us that the grounds for admitting statements contained in the proviso to s. 42B(1) - which we have incorporated into cl. 81(2) - should be extended to include a situation "...where the Court thinks, having regard to the nature of the evidence sought to be adduced and the likely expense or inconvenience involved in bringing such a person to Court, it is not necessary for the purposes of doing justice between the parties that the person who made the ... statement ... be called ...". Such an additional ground for admitting statements would not be necessary if the courts more readily exercised the discretion to admit statements that they already have under s. 42B(2).

We think the difficulty pointed out by the Bar Association can best be overcome by adding sub-para. (f) to cl. 81(2) in the form we propose. This would make a statement admissible once the court is satisfied that undue delay or expense would be caused by calling as a witness the maker of the statement or the supplier of the information recorded in it. We recognize that this would be a partial reversion to the original provision of the English Evidence Act 1938 s. 1(2). However, we think the suggested provision would be better than the existing Queensland provision (in s. 42B(2)), which gives the court a discretion to admit a statement without suggesting any of the circumstances in which the discretion should be exercised.

82. Admissibility of documentary evidence as to facts in issue in criminal proceedings. Clause 82 would introduce into Queensland law a statutory exception to the hearsay rule for the purpose of criminal proceedings. It is derived from the English Criminal Evidence Act

1965 s.1(1). A similar provision has been adopted in New South Wales and Western Australia. The form of cl. 82 has been adjusted to make it consonant with cl. 81. Clause 82(2) extends the word "business" to include business undertakings carried on by the Crown or other statutory body.

For reasons that have been set out above, the scope of cl. 82 is narrower than that of cl. 81. Clause 81, which applies to civil proceedings, refers to "a record relating to any undertaking". Clause 82, which applies to criminal proceedings, refers to "a record relating to any trade or business". The phrase "trade or business", with its narrower connotation, seems more suitable for the provision applicable to criminal proceedings. The word "business" has also been used in the analogous Victorian provision, s. 55(2) of the Evidence Act 1958. However "business" is there defined to include any undertaking. As a result of this, it was felt necessary to introduce into s. 55 a sub-section excluding statements made in the course of an investigation of a crime or of the preparation of a case. The Victorian section also excludes a statement made by a "person interested". These exclusions have not been found to be necessary where the narrower provisions of the English Criminal Evidence Act 1965 have been adopted.

It may also be noted that the Victorian provision, unlike cl. 82 and like provisions, allows a record to be admitted though the supplier of the information recorded is called as a witness and is able to give evidence about it. We would prefer not to allow this unless the narrower provision we recommended, and which has been adopted elsewhere, proves to be inadequate in practice.

83. Admissibility of evidence concerning credibility of persons responsible for statement. Clause 83 would make admissible certain evidence concerning the credibility of a person who is responsible for a statement admitted under cl. 81 or 82. It adopts in substance the provisions of s. 55A of the Victorian Evidence Act 1958, inserted into that Act in 1971. Sub-section (1) of the latter is derived from s. 7 of the English Civil Evidence Act 1968.

84. Admissibility of statements produced by computers. Clause 84 adopts in substance the provisions of s. 55B of the Victorian Evidence Act 1958, which was introduced into that Act in 1971 upon the recommendation of the sub-committee of the Victorian Chief Justice's Law Reform Committee, mentioned above. In general, s. 55B is based on s. 5 of the English Civil Evidence Act 1968. Unlike s. 55B, cl. 84 would not apply to criminal proceedings.

The subject-matter of these provisions is certain to be of increasing importance as computer technology has more and more influence upon society. It is likely that the provisions will need amendment or replacement as the evidential problems raised by this technology become more apparent. It is for this reason that we recommend that cl. 84 should not apply to criminal proceedings, at least for the time being.

The Law Reform Commission of New South Wales has recently made a detailed study of some of the problems posed for the law by computers: Report on Evidence (Business Records), L. R. C. 17 (1973).

In the course of its report, that Commission recommends a Bill relating to the admissibility of business records that takes into account the role now played by computers in business. However, since it is uncertain whether the proposed Bill will be enacted into law in New South Wales, we think it would be premature to recommend the adoption of its principles in Queensland. The report criticizes some features of the Victorian legislation mentioned above, and which we have substantially adopted in cl. 84. See pp. 89-91. However we feel that, at the present time at least, the benefit of having substantially uniform legislation with Victoria on this topic outweighs other considerations.

The Victorian legislation vests in the courts a discretion to reject any statement produced by computers notwithstanding that the requirements for its admissibility are otherwise satisfied: s. 55B(7). Since it is our intention to recommend below a general discretion in the courts to reject statements otherwise admissible under this Part of the Draft Bill, we have not included such a provision in cl. 84.

In sub-cl. (5) of cl. 84, we have recommended that the penalty for a false certificate relating to a computer statement be imprisonment for one year or a fine or both. If this penalty is thought to be inadequate, we suggest that the Criminal Code be amended to create a new indictable offence dealing with this matter. Sub-clause (5) creates only a simple offence.

85. Inferences concerning admissibility. With minor alterations, cl. 85 restates two of the provisions at present contained in s. 42B(4) of the existing Queensland Act. They deal with the manner in which a court determines whether a statement is admissible. Sub-clause (1) of cl. 85 has an equivalent in s. 55C of the Victorian Act. Sub-clause (2) has an equivalent in s. 55(8) of the Victorian Act.

86. Authentication. Clause 86 adopts the provisions of s. 55D of the Victorian Act, which are based on s. 6(1) of the English Civil Evidence Act 1968. These may be compared with s. 42B(2)(c) of the existing Queensland Act. The provisions of s. 42B(3) of the existing Queensland Act are not reproduced in the Draft Bill. They are not included in the recent English and Victorian legislation.

87. Rejection of evidence. Section 42B(4) of the existing Queensland Act states that, where proceedings are with a jury, the court may in its discretion reject a statement notwithstanding that the requirements of the section are satisfied if for any reason it appears to be inexpedient in the interests of justice that the statement should be admitted. A similar provision in s. 55(9) of the Victorian Act applies to all proceedings, not only proceedings with a jury. We propose that cl. 87 shall also apply to all proceedings, not only proceedings with a jury.

We had at first thought to adopt cl. 14CM of the Draft Bill recommended by the New South Wales Law Reform Commission in its report on Evidence (Business Records) L. R. C. 17 (1973) at p. 34. That provision has the advantage that it sets out specifically the grounds upon which evidence may be rejected or excluded. However, upon reconsideration we decided to retain the existing form of provision so as to ensure that the court has a general discretion to

reject evidence otherwise admissible under this Part. The general discretion of a court to disallow evidence in criminal proceedings will be preserved by cl. 118 in the Queensland Draft Bill.

88. Withholding statement from jury room. Clause 88 adopts a provision recommended by the New South Wales Law Reform Commission as cl. 14CN of its Draft Bill: L. R. C. 17, p. 34. We think it a useful provision to allow a court to withhold a statement from the jury during their deliberations if the jury might otherwise give the statement undue weight.

89. Corroboration. This clause repeats the substance of s. 42C(2) of the existing Queensland Act, which deals with corroboration. See also s. 56 of the Victorian Act.

90. Witness's previous statement, if proved, to be evidence of facts stated. Clause 90 adopts in substance the provisions of ss. 3 and 7(3) of the English Civil Evidence Act 1968. Clause 90 would apply to both civil and criminal proceedings. The previous statement of a person who is called as a witness may be used to attack his credibility, or to discredit him or to rebut a suggestion made in cross-examination that his evidence was fabricated. See cll. 17, 18 and 19. Though the previous statement may be admitted as evidence for these purposes, it is not ordinarily evidence of the facts contained in it. See, for example, R. v. Cox [1972] Qd. R. 366. Sub-clause (1) of cl. 90 would alter this rule so that a previous statement admitted for any of these purposes would also be evidence of the facts contained in it. Sub-clause (3) would achieve a similar object. Sub-clause (2) would extend this principle to any statement or information proved by virtue of cl. 83(1)(b).

91. Weight to be attached to evidence. This clause repeats in substance the provisions of s. 42C(1) of the existing Act relating to the weight to be attached to statements rendered admissible in evidence by this Part. There is no analogous provision in the Victorian Act. However, we think it would be useful to retain the existing Queensland provision. We would draw attention to the discussion about this kind of provision in the N. S. W. report on Evidence (Business Records) L. R. C. 17 (1973) at p. 47.

PART VII - REPRODUCTIONS OF DOCUMENTS

This Part (cll. 92-117) would incorporate into a new Evidence Act the provisions of the Queensland Evidence (Reproductions) Act 1970, whose function is to facilitate the use of reproductions of documents as evidence. In our opinion, this important piece of evidence legislation ought to be incorporated into any new comprehensive Act. The existing Queensland Act is almost identical in wording with the N. S. W. Evidence (Reproductions) Act 1967 - 1969, which in turn is derived from ss. 53-53T of the Victorian Evidence Act 1958, introduced into that Act in 1965. See also ss. 73A-73V of the Western Australian Evidence Act 1906 - 1974, introduced into that Act in 1966.

In order not to disturb administrative practices that may have developed under the existing Queensland Act and in order to maintain uniformity with the legislation adopted elsewhere, we have sought not

to change the substance of the Queensland legislation. In general, therefore, the existing provisions have been modified only so far as necessary to incorporate them into the Draft Bill. The definitions of "court", "document" and "legal proceeding" have been omitted because of the definitions in cl. 5 of the Draft Bill. For the purposes of this Part, cl. 92 defines "business" to include any undertaking, the word "undertaking" being defined in cl. 5. We have thought it preferable to use the word "business" throughout this Part rather than replace it with "undertaking". Clause 4(2) of the Draft Bill provides that the transitional provisions to be set out in Part H of the First Schedule should have effect for the purposes of the transition to the provisions of this Part of the Draft Bill from those of the Evidence (Reproductions) Act 1970.

Apart from these necessary modifications and the transitional provisions, the only change of substance that we have made is to include cl. 104 in the Draft Bill. Clause 104 is not taken from the Evidence (Reproductions) Act 1970 but from the Evidence and Discovery Act s. 26. As can be seen, it would allow a copy of a document to be admitted in evidence upon proof to the satisfaction of the court that the copy was made from the original document by means of a machine, photographic or otherwise, which produces a facsimile copy of the document. There is such a provision in the A. C. T. Evidence Ordinance s. 87 (upon which cl. 104 is modelled) and a similar provision in the N. S. W. Evidence Act 1898 s. 34. It is interesting to notice that the latter provision was not repealed in New South Wales upon the enactment of the Evidence (Reproductions) Act 1967 - 1969.

PART VIII- MISCELLANEOUS

118. Rejection of evidence in criminal proceedings. In a criminal case, the judge has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused: Kuruma v. The Queen [1955] A. C. 197 at p. 204. Clause 118 is designed to preserve this rule against any provision in the Draft Bill that might otherwise derogate from it. There is a similar provision in the A. C. T. Evidence Ordinance 1971 s. 76.

119. Witnesses for defence to be sworn. Clause 119 restates the substance of s. 68 of the Evidence and Discovery Act, which in turn is derived from English legislation, 1 Anne st. 2 c. 9 s. 3. At common law, the accused could not call witnesses. This rule was partially altered so that, in the seventeenth century, witnesses for the defence could be called though they were not sworn. The abovementioned English legislation altered the rule still further in the early eighteenth century so that witnesses for the defence were to be sworn. 1 Anne st. 2 c. 9 s. 3 was expressly repealed in Queensland by the Criminal Code Act 1899 s. 3 and Schedule II. However, the Evidence and Discovery Act s. 68 still remains. Although there may be some doubt whether it is necessary to restate the substance of s. 68, we have decided to do so in cl. 119. We notice that the Victorian Imperial Acts Application Act 1922 s. 6 and the Second Schedule preserved the application in Victoria of 1 Anne st. 2 c. 9 s. 3.

120. Actions for breach of promise of marriage. Clause 120 restates the rule in the Evidence Further Amendment Act of 1874 s. 2 requiring the evidence of the plaintiff in an action for breach of promise of marriage to be corroborated.

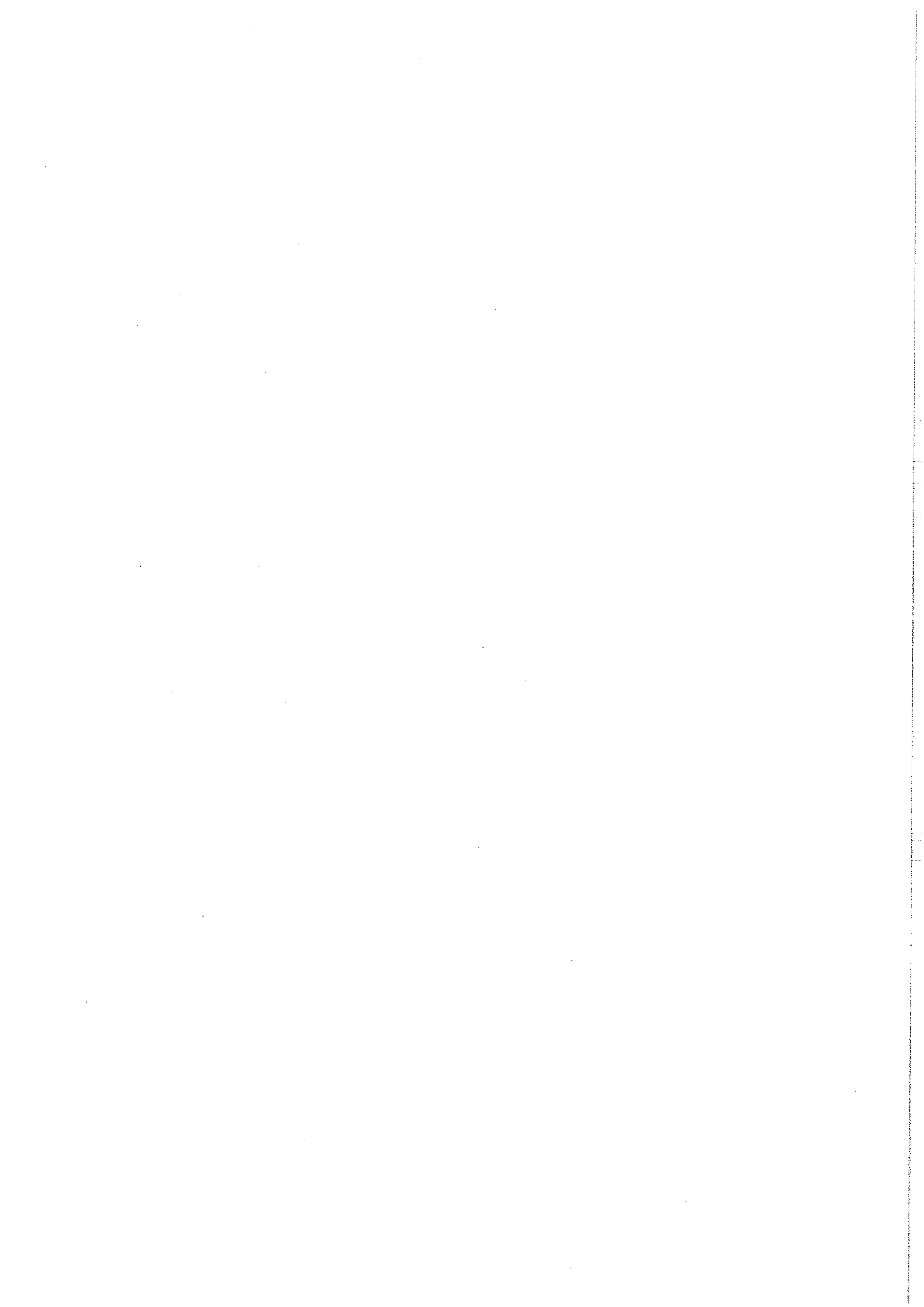
121. Impounding documents. Clause 121 restates the substance of s. 76 of the Evidence and Discovery Act regarding the impounding of documents tendered or produced before a court.

122. Power to appoint a Government Printer. Clause 122 restates the substance of s. 77 of the Evidence and Discovery Act except that the power to appoint a Government Printer would be vested in the Governor in Council rather than the Governor. The Acts Interpretation Act 1954 - 1971 s. 25 makes unnecessary the reference to suspension, removal and the appointment of another contained in s. 77.

In conclusion, we should draw attention to the fact that we have not included in the Draft Bill the provision in s. 78 of the Evidence and Discovery Act conferring on judges of the Supreme Court the power to make rules and orders for the effectual execution of the Act. Rules of Court for regulating the procedure and practice of the Supreme Court are now made under the Supreme Court Act of 1921 s. 11.

DRAFT BILL

EVIDENCE



A Bill to consolidate, amend, and reform the law of Evidence.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:-

PART I - PRELIMINARY

1. Short title, commencement and application. (1) This Act may be cited as the Evidence Act 1975.

(2) This Act shall commence on a date fixed by Proclamation.

(3) This Act binds the Crown not only in right of the State of Queensland but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

2. Arrangement of Act. This Act is arranged as follows:-

PART I - PRELIMINARY, ss. 1 - 5;

PART II - WITNESSES, ss. 6 - 21;

Division 1 - Who may testify, ss. 6 - 9;

Division 2 - Privileges and obligations of witnesses, ss. 10 - 14;

Division 3 - Examination and cross-examination of witnesses, ss. 15 - 21;

PART III - MEANS OF OBTAINING EVIDENCE, ss. 22 - 34;

Division 1 - Commissions, requests and orders to examine witnesses, ss. 22 - 24;

Division 2 - Summary procedure for examination of witnesses otherwise than at a hearing, ss. 25 - 34;

PART IV - JUDICIAL NOTICE OF SEALS AND SIGNATURES, ss. 35 - 36;

PART V - PROOF OF DOCUMENTS AND OTHER MATTERS, ss. 37 - 80;

Division 1 - Proof of official and judicial documents and matters, ss. 37 - 48;

Division 2 - Proof of certain miscellaneous documents and matters, ss. 49 - 55;

Division 3 - Proof of certain Australian and overseas documents and matters, ss. 56 - 63;

Division 4 - Proof of telegraphic messages, ss. 64 - 66;

Division 5 - Admissibility of convictions in civil proceedings, ss. 67 - 71;

Division 6 - Books of account, ss. 72 - 80;

PART VI - ADMISSIBILITY OF STATEMENTS, ss. 81 - 91;

PART VII - REPRODUCTIONS OF DOCUMENTS, ss. 92 - 117;

Division 1 - Preliminary, s. 92;

Division 2 - Reproduction of official documents, s. 93;

Division 3 - Reproduction of business documents, ss. 94 - 103;

Division 4 - General, ss. 104 - 117;

PART VIII - MISCELLANEOUS, ss. 118 - 122;

SCHEDULES.

Abbreviations. Abbreviations used in references to other Acts in notes appearing at the beginnings of sections have the following meanings:-

Qld. B. B. E. - Bankers' Books Evidence Act of 1949; Qld. C. C. - Criminal Code; Qld. C. S. - Children's Services Act 1965 - 1973; Qld. E. D. - Evidence and Discovery Act 1867 - 1972; Qld. T. M. - Telegraphic Messages Act of 1872; Qld. E. F. A. - Evidence Further Amendment Acts 1874 to 1962; Qld. E. 1898 - Evidence Act 1898; Qld. E. (R.) - Evidence (Reproductions) Act 1970; N. S. W. - Evidence Act 1898 - 1966; N. S. W. Crimes - Crimes Act 1900; N. S. W. W. E. - Witnesses Examination Act 1900; Vic. - Evidence Act 1958; Vic. Crimes - Crimes Act 1958; S. A. - Evidence Act 1929 - 1974; W. A. - Evidence Act 1906 - 1974; Tas. - Evidence Act 1910; A. C. T. - Evidence Ordinance 1971; Cth. Evid. - Evidence Act 1905 - 1974; Cth. S. T. L. R. R. - State and Territorial Laws and Records Recognition Act 1901 - 1964; Eng. 1898 - Criminal Evidence Act 1898; Eng. 1959 - County Courts Act 1959; Eng. 1965 - Criminal Evidence Act 1965; Eng. 1968 - Civil Evidence Act 1968; N. Z. - Evidence Act 1908.

3. Repeals and amendments. (1) The Acts specified in Part A of the First Schedule are repealed.

(2) (a) The Evidence and Discovery Act 1867 - 1972 is amended as and to the extent indicated in Part B of the First Schedule.

(b) That Act as so amended may be cited as the Evidence and Discovery Act 1867 - 1975.

(3) (a) The Common Law Practice Act 1867 - 1972 is amended as and to the extent indicated in Part C of the First Schedule.

(b) That Act as so amended may be cited as the Common Law Practice Act 1867 - 1975.

- (4) (a) The Justices Act 1886 - 1975 is amended as and to the extent indicated in Part D of the First Schedule.
- (b) That Act as so amended may be cited as the Justices Act 1886 - 1975.
- (5) (a) The Children's Services Act 1965 - 1973 is amended as and to the extent indicated in Part E of the First Schedule.
- (b) That Act as so amended may be cited as the Children's Services Act 1965 - 1975.
- (6) The Supreme Court Constitution Amendment Act of 1861 is amended as and to the extent indicated in Part F of the First Schedule.
- (7) The Criminal Code is amended as and to the extent indicated in Part G of the First Schedule.

4. Savings and transitional. (1) Without limiting the operation of the Acts Interpretation Act 1954 - 1971 -

- (a) criminal proceedings commenced prior to the commencement of this Act shall be continued and completed as if the Act had not commenced;
- (b) any other proceeding commenced prior to the commencement of this Act shall be continued, if practicable, under the provisions of this Act, but to the extent that it is not practicable so to apply this Act, then such proceedings shall continue as if this Act had not commenced;
- (c) the commencement of this Act shall not render inadmissible in evidence any certificate, entry, copy, extract or document in existence at the time of the commencement of this Act which would have been admissible in evidence if this Act had not commenced;
- (d) any person who immediately prior to the commencement of this Act held office under section 77 of the Evidence and Discovery Act 1867 - 1972 shall be deemed to have been appointed to his office under and for the purposes of section 122 of this Act and shall continue to hold that office in terms of his appointment without further or other appointment under this Act;
- (e) any document that has been directed to be impounded or to be kept in custody under section 76 of the Evidence and Discovery Act 1867 - 1972 shall be deemed to have been directed to be impounded and to be kept in custody under and for the purposes of section 121 of this Act and under the same conditions.
- (2) The transitional provisions set out in Part H of the First Schedule shall have effect for the purposes of the transition to the provisions of Part VII of this Act from the provisions of the Evidence (Reproductions) Act 1970.

5. Interpretation. [cf. Qld. E.D. s.42A; Qld. E.(R.) s.4; Qld. T.M. s.11; Vic. s.3; S.A. s.4; A.C.T. s.6; Eng. 1968 s.10; N.Z. s.2.]

(1) In this Act, unless the contrary intention appears -

"court" means the court, tribunal, judge, justice, arbitrator, body or person before whom or which a proceeding is held or taken;

"document" includes, in addition to a document in writing -

- (a) any part of a document in writing or of any other document as defined herein;
- (b) any book, map, plan, graph or drawing;
- (c) any photograph;
- (d) any label, marking or other writing which identifies or describes any thing of which it forms part, or to which it is attached by any means whatever;
- (e) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;
- (f) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom; and
- (g) any other record of information whatever;

"film" includes a microfilm;

"judge" means the member or members of a court;

"proceeding" means any civil, criminal or other proceeding or inquiry, reference or examination in which by law or by consent of parties evidence is or may be given, and includes an arbitration;

"statement" includes any representation of fact, whether made in words or otherwise;

"telegraph" means any system of telecommunication operated by the Postmaster-General of the Commonwealth or any other authority approved by proclamation;

"telegraphic message" means any message or other communication transmitted or intended for transmission or purporting to have been transmitted by telegraph;

"telegraph office" means any office or station established or used by the Postmaster-General of the Commonwealth or other authority approved by proclamation for the receipt or transmission of telegraphic messages;

"undertaking" includes public administration and any business, profession, occupation, calling, trade or undertaking whether engaged in or carried on -

- (a) by the Crown (in right of the State of Queensland or any other right), or by a statutory body, or by any other person;

- (b) for profit or not; or
- (c) in Queensland or elsewhere.

(2) In this Act, any reference to a copy of a document includes -

- (a) in the case of a document falling within paragraph (e) but not paragraph (f) of the definition of "document" in sub-section (1), a transcript of the sounds or other data embodied therein;
- (b) in the case of a document falling within paragraph (f) but not paragraph (e) of that definition, a reproduction or still reproduction of the image or images embodied therein, whether enlarged or not;
- (c) in the case of a document falling within both these paragraphs, such a transcript together with such a reproduction or still reproduction; and
- (d) in the case of a document not falling within the said paragraph (f) of which a visual image is embodied in a document falling within that paragraph, a reproduction or still reproduction of that image, whether enlarged or not -

any reference to a copy of the material part of a document shall be construed accordingly.

PART II - WITNESSES

Division 1 - Who may testify

6. Witnesses interested or convicted of offence. [cf. Qld. E. D. s. 4; Eng. 6 & 7 Vic. c. 85 s. 1.] No person shall be excluded from giving evidence in any proceeding on the ground -

- (a) that he has or may have an interest in the matter in question, or in the result of the proceeding; or
- (b) that he has previously been convicted of any offence.

7. Parties, their wives and husbands as witnesses. [cf. Qld. E. D. s. 5; Eng. 14 & 15 Vic. c. 99 s. 2; Eng. 16 & 17 Vic. c. 83 s. 1.] (1) Each of the parties to a proceeding (not being a criminal proceeding) and a person on whose behalf such a proceeding is brought or defended is competent and compellable to give evidence on behalf of either or any of the parties to the proceeding.

(2) The husband or wife of a party to a proceeding (not being a criminal proceeding) and the husband or wife of a person on whose behalf such a proceeding is brought or defended is competent and compellable to give evidence on behalf of either or any of the parties to the proceeding.

8. Witnesses in a criminal proceeding. [cf. Vic. Crimes s. 400; Eng. 1898; Qld. C. C. s. 618A; Qld. E. D. s. 5; W. A. ss. 8, 9.] (1) In a criminal proceeding, each person charged is competent to give evidence on behalf of the defence (whether that person is charged solely or jointly with any other person) but is not compellable to do so.

(2) In a criminal proceeding, the husband or wife of each person charged is competent to give evidence for the prosecution or on behalf of the defence.

(3) In a criminal proceeding, the husband or wife of each person charged is compellable to give evidence on behalf of that person.

(4) In a criminal proceeding, the husband or wife of each person charged is compellable to give evidence for the prosecution or on behalf of the defence wherever -

- (a) the offence charged against that person is under any provision mentioned in the Second Schedule to this Act or is an attempt to commit or an attempt to procure the commission of such an offence; and
- (b) it is alleged that any of these offences was committed against a person who was at the time of the commission of the offence of the same household as the person so charged and under the age of seventeen years.

(5) Where the husband or wife of a person charged is competent but not compellable to give evidence for the prosecution

or on behalf of the defence, the presiding judge, stipendiary magistrate or justice shall before the witness gives evidence and, where the proceeding is being conducted before a jury, in the absence of the jury, inform the witness that he or she is not compelled to give evidence if unwilling to do so.

- (6) Nothing in this section shall -
- (a) make the husband or wife of a person charged competent or compellable to give evidence for the prosecution or compellable to give evidence for the defence in a criminal proceeding in which that husband or wife is also charged;
 - (b) affect a case where a husband or wife of a person charged with an offence may at common law be called as a witness without the consent of that person; or
 - (c) affect the operation of section 11.

9. Evidence of children. [cf. W.A. s.101; Tas. s.128; Qld. C.S. s.146.] (1) Where in any proceeding a child called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if in the opinion of the court he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

(2) A person charged with an offence may be convicted upon evidence admitted by virtue of this section but in a trial by jury of a person so charged the judge shall warn the jury of the danger of acting on such evidence unless they find that it is corroborated in some material particular by other evidence implicating that person.

(3) A child whose evidence has been received by virtue of this section is liable to be convicted of perjury in all respects as if he had given the evidence upon oath.

(4) The evidence of a child, though not given upon oath, but otherwise taken and reduced into writing as a deposition, shall be deemed to be a deposition to all intents and purposes.

(5) Nothing in this section shall limit or affect any rule of law that prevents a person from being convicted of an offence upon uncorroborated evidence.

Division 2 - Privileges and obligations of witnesses

10. Privilege against self incrimination. [Qld. E.D. s.7.] Nothing in this Act shall render any person compellable to answer any question tending to criminate himself: Provided that in a criminal proceeding where a person charged gives evidence, his liability to answer any such question shall be governed by section 15.

11. Communications to husband or wife. [cf. S.A. s.18(iv); Eng. 1968 s.16(3).] A husband is not compellable in a criminal

proceeding to disclose any communication made to him by his wife during the marriage and a wife is not compellable in a criminal proceeding to disclose any communication made to her by her husband during the marriage.

12. Admissibility of evidence as to access by husband or wife.

[Qld. E.F.A. s. 3.] Notwithstanding anything contained in any Act or any rule of law, neither the evidence of any person nor any statement made out of court by any person shall be inadmissible in any proceeding whatever by reason of the fact that it is tendered with the object of proving, or that it proves or tends to prove, that marital intercourse did or did not take place at any time or during any period between that person and a person who is or was his or her wife or husband or that any child is or was, or is not or was not, their legitimate child.

13. Compellability of parties and witnesses as to evidence of adultery.

[Qld. E.F.A. s. 3A.] Notwithstanding anything in any Act or any rule of law, in any proceeding whatever, -

- (a) a party shall not be entitled to refuse to answer any interrogatory or to give discovery of documents;
- (b) a witness, whether a party or not, shall not be entitled to refuse to answer any question, whether relevant to any issue or relating to credit merely,

on the ground solely that such answer or discovery would or might relate to, or would tend or might tend to establish, adultery by that party or that witness, or by any other person with that party or that witness, as the case may be.

14. Abolition of certain privileges. [Eng. 1968 s. 16 (1) & (2); cf. A.C.T. s. 95.] (1) The following rules of law are hereby abrogated except in relation to criminal proceedings, that is to say -

- (a) the rule whereby, in any proceeding, a person cannot be compelled to answer any question or produce any document or thing if to do so would tend to expose him to a forfeiture; and
- (b) the rule whereby, in any proceeding, a person other than a party to the proceeding cannot be compelled to produce any deed or other document relating to his title to any land.

(2) The rule of law whereby, in any civil proceeding, a party to the proceeding cannot be compelled to produce any document relating solely to his own case and in no way tending to impeach that case or support the case of any opposing party is hereby abrogated.

Division 3 - Examination and cross-examination of witnesses

15. Questioning a person charged in a criminal proceeding. [cf. Qld. C.C. s. 618A.] (1) Where in a criminal proceeding a person charged gives evidence, he shall not be entitled to refuse to answer

a question or produce a document or thing on the ground that to do so would tend to prove the commission by him of the offence with which he is there charged.

(2) Where in a criminal proceeding a person charged gives evidence, he shall not be asked, 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 with which he is there charged, or is of bad character, unless -

- (a) the question tends to prove a matter of which the proof is admissible evidence to show that he is guilty of the offence with which he is there charged;
- (b) the question tends to prove a matter of which the proof is admissible evidence to show that any other person charged in that criminal proceeding is not guilty of the offence with which that other person is there charged;
- (c) he has by himself or his counsel asked questions of any witness 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 of any witness for the prosecution or for any other person charged in that criminal proceeding;

Provided that the permission of the court to ask any such question (to be applied for in a trial by jury in the absence of the jury) must first be obtained; or

- (d) he has given evidence against any other person charged in that criminal proceeding.

16. Witness may be questioned as to previous conviction. [Vic. s. 33; cf. Qld. E.D. s. 19.] Subject to this Act, a witness may be questioned as to whether he has been convicted of any indictable or other offence; and upon being so questioned if he either denies the fact or refuses to answer, it shall be lawful for the party so questioning to prove such conviction.

17. How far a party may discredit his own witness. [Vic. s. 34; cf. Qld. E.D. s. 16.] A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character but may contradict him by other evidence, or (in case the witness in the opinion of the court proves adverse) may by leave of the court prove that he has made at other times a statement inconsistent with his present testimony: Provided that, before such last-mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and he must be asked whether or not he has made such statement.

18. Proof of previous inconsistent statement of witness. [Qld. E.D. s. 17.] If a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the proceeding and inconsistent with his present testimony does not distinctly admit that he has made such statement, proof may be given that he did in fact make it: Provided that, before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and he must be asked whether or not

he has made such statement.

19. Witness may be cross-examined as to written statement without being shown it. [cf. Qld. E. D. s.18.] (1) A witness may be cross-examined as to a previous statement made by him in writing or reduced into writing relative to the subject-matter of the proceeding without such writing being shown to him: Provided that if it is intended to contradict him by the writing his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him.

(2) A court may at any time during the hearing of a proceeding direct that the writing containing a statement referred to in subsection (1) of this section be produced to the court and the court may make such use in the proceeding of the writing as the court thinks fit.

20. Cross-examination as to credit. [N.S.W. s.56; A.C.T. s.58.] Where any question put to a witness in cross-examination is not relevant to the proceeding except in so far as the truth of the matter suggested by the question affects the credit of the witness by injuring his character, the court has a discretion to disallow the question if, in its opinion, the matter is so remote in time or is of such a nature that an admission of its truth would not materially affect the credibility of the witness.

21. Scandalous and insulting questions. [A.C.T. s.59; cf. N.S.W. ss.57, 58.] (1) A court may disallow a question which, in the opinion of the court, is indecent or scandalous unless the question relates to a fact in issue in the proceeding or to matters necessary to be known in order to determine whether or not the facts in issue existed.

(2) A court may disallow a question which, in the opinion of the court, is intended only to insult or annoy or is needlessly offensive in form.

PART III - MEANS OF OBTAINING EVIDENCE

Division 1 - Commissions, requests and orders to examine witnesses

22. Commission, request or order to examine witnesses. [cf. Qld. E.D. ss.53, 58, 59, 60; Eng. 1959 s.85.] (1) The Supreme Court or a judge thereof, on application made in manner prescribed by rules of the Supreme Court, shall have the same powers to issue a commission, request or order to examine witnesses for the purpose of civil proceedings in any court other than the Supreme Court as it or he has for the purpose of civil proceedings in the Supreme Court.

(2) The rules of the Supreme Court, with such adaptations as the circumstances may require, shall apply and extend to a commission, request or order to examine witnesses issued by authority of subsection (1) and to all proceedings taken thereunder as if the commission, request or order were issued by authority of those rules.

(3) Subject to all just exceptions, the depositions taken upon the examination of a witness before an examiner by virtue of this section certified under the hand of the examiner are admissible in evidence, without proof of the signature to such certificate, unless it is proved that the witness is at the time of the hearing at which the depositions are offered in evidence within a convenient distance of the place of the hearing and able to attend.

(4) The costs of proceedings taken by virtue of this section shall be costs in the cause, unless otherwise directed either by the judge issuing the commission, request or order or by the court for the purpose of whose proceedings the examination is conducted.

23. Commission or order in criminal cases. [N. S. W. W. E. s. 6; Qld. E. D. s. 63.] (1) In any criminal proceeding, if any witness is out of the jurisdiction of the Supreme Court or above 320 kilometres from the intended place of trial or is from age or infirmity unable to attend the trial or if the testimony of any witness is in danger of being lost by reason of his age or infirmity or by reason of his being about to depart out of the jurisdiction or to some place beyond the said distance of 320 kilometres, the Supreme Court or a judge thereof may, on the application or with the consent of the Attorney-General or the Crown prosecutor as well as the person charged, but not otherwise, order -

- (a) that any such witness within the jurisdiction of the Supreme Court be examined on oath, either viva voce or upon interrogatories or otherwise, before a specified officer of the Court or other specified person; or
- (b) that a commission do issue for the examination of such witness on oath, either viva voce or upon interrogatories or otherwise, at any place in or out of the jurisdiction.

(2) The Supreme Court or a judge thereof may, at the same time or subsequently, give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction as without, and all other matters and circumstances connected with such examination as appear reasonable and just.

(3) Subject to all just exceptions, the depositions taken upon the examination of a witness before an examiner by virtue of this section certified under the hand of the examiner are admissible in evidence, without proof of the signature to such certificate, unless it is proved that the witness is at the time of the hearing at which the depositions are offered in evidence within a convenient distance of the place of the hearing and able to attend.

(4) Any person authorised by any order or commission under this section to take the examination of any witness shall take such examination upon the oath of such witness and may administer the necessary oaths to such witness.

24. Power of person appointed by foreign authority to take evidence and administer oaths. [Qld. E. D. s. 62A.] (1) Subject to the succeeding provisions of this section, where an authority desires to take or receive evidence in Queensland, that authority may appoint a person to take or receive evidence in Queensland and a person so

appointed has power to take or receive evidence in Queensland for that authority and for that purpose to administer an oath.

(2) Where the authority is not a court or judge, a person so appointed has no power to take or receive evidence, or to administer an oath, in Queensland unless he has first obtained the consent of the Attorney-General.

(3) This section does not authorize the taking or receiving of evidence by a person so appointed in or for use in criminal proceedings.

(4) In this section "authority" means any court, judge, or person who, or body which, is authorized under the law of a foreign country to take or receive evidence on oath in that country.

Division 2 - Summary procedure for examination
of witnesses otherwise than at a hearing

25. Interpretation. [Vic. s.9A.] In this Division -

"corresponding court" -

- (a) in relation to a court or person acting judicially in a prescribed country, means the court or person acting judicially in Queensland that is declared by notice in writing under the hand of the Attorney-General published in the Gazette to be the court or person in Queensland that corresponds to that court or person in the prescribed country; and
- (b) in relation to a court or person acting judicially in Queensland, means the court or person acting judicially in a prescribed country that is declared by notice in writing under the hand of the Attorney-General published in the Gazette to be the court or person in a prescribed country that corresponds to that court or person in Queensland;

"examiner" means a judge, magistrate, clerk of a Magistrates Court or any duly qualified legal practitioner;

"prescribed country" means any State or Territory of the Commonwealth, New Zealand and any other State Territory or country which is declared by the regulations to be a prescribed country for the purposes of this Division.

26. Power of Queensland court to request corresponding court in a prescribed country to take evidence for use in Queensland court. [Vic. s.9B.] (1) Where a court or person acting judicially in Queensland is authorized by or under any Act or law to authorize or order evidence to be taken otherwise than at the hearing of the legal proceedings in respect of which the evidence is required that court or person may on the application of a person who desires to lead evidence if it or he is satisfied that it is necessary in the interest

of justice request a corresponding court to order the examination of a witness or the production of documents by a person or both such examination and production.

(2) Any depositions received from a corresponding court which purports to have been signed by the deponent and the examiner or to have been certified as a correct record by the examiner may subject to all just exceptions be put in as evidence at the hearing of the legal proceedings and any documents received from a corresponding court may subject to all just exceptions be put in at the hearing as if produced at the hearing by the person who produced the documents pursuant to the order of the corresponding court.

(3) A court or person acting judicially shall take judicial notice of the seal of a corresponding court and of the signature of any examiner appointed by a corresponding court.

27. Power to take evidence on request from corresponding court of a prescribed country. [Vic. s. 9C.] (1) Where by or under any Act or law of a prescribed country provision is made for the evidence of any person that is required in connexion with any legal proceedings to be taken otherwise than at the hearing of those proceedings by a court or person acting judicially, a court or person acting judicially in Queensland that is a corresponding court to a court or person acting judicially in the prescribed country before which or whom legal proceedings are being held may upon receipt of a request in writing from that court or person in the prescribed country make an order for the examination of a witness and the production of documents by a person or both for such examination or production before an examiner named in the order at a time and place specified in the order.

(2) The order shall require reasonable notice to be given by post to each party to the legal proceedings at his address as shown in the request of the time when and place where the examination is to take place or the documents are to be produced.

28. Summons of witnesses. [Vic. s. 9D.] Upon service on a person of an order requiring him to attend for examination or to produce documents, together with the payment or tender of a reasonable sum for expenses, the person shall attend at the time and place appointed and shall have and be subject to the same rights and liabilities as if he were summoned before the court or person by which or whom the order was made.

29. Examination. [Vic. s. 9E.] (1) Subject to any directions contained in the order for examination -

- (a) any person ordered to be examined before the examiner may be cross-examined and re-examined; and
- (b) the examination, cross-examination and re-examination of persons before the examiner shall be conducted in like manner as they would have been conducted before the court or person acting judicially who made the order for the examination.

(2) The examiner may put any question to any person examined

before him as to the meaning of any answer made by that person or as to any matter arising in the course of the examination.

(3) An examiner shall have and may exercise such of the powers of the court or person acting judicially by whom he was appointed as are necessary for the proper exercises of his functions under this Division and may administer oaths and adjourn the examination from time to time as he thinks fit.

30. Objections. [Vic. s. 9F.] (1) If any person being examined before an examiner objects to answer any question put to him, or if objection is taken to any such question that question, the ground for the objection and the answer to any such question to which objection is taken shall be set out in the deposition of that person or any statement annexed thereto.

(2) The validity of the ground for objecting to answer any such question or for objecting to such question shall not be determined by the examiner but by the corresponding court at whose request the examination is being conducted.

31. Depositions to be signed. [Vic. s. 9G.] (1) Where pursuant to any such order -

(a) a witness has given evidence to the examiner, his depositions shall be signed by him and by the examiner or where the witness refuses to sign or requires alterations that the examiner considers to be unjustified the depositions shall be signed by the examiner who shall certify that the depositions are a correct record and the reasons for them not being signed by the witness;

(b) documents have been produced to the examiner by a person not giving evidence, the examiner shall attach to such documents a certificate signed by him stating the name of that person.

(2) All depositions and documents taken before or produced to the examiner pursuant to any such order shall be delivered by the examiner to the court or person by which or whom the order was made for transmission to the corresponding court.

32. Power of Queensland court to transmit requests to other places. [Vic. s. 9H.] Where a court or person acting judicially in Queensland receives a request from a corresponding court for the examination of a witness or the production of documents by a person and it appears to the court or person acting judicially that the witness or person is not in Queensland and is not proceeding to Queensland but is in or proceeding to another country that is a prescribed country under the law of the country of the corresponding court the court -

(a) may transmit the request to a corresponding court in that other prescribed country together with such information as it or he possesses concerning the whereabouts and intended movements of the person;

(b) shall give notice to the corresponding court from which it received the request that the documents have been so transmitted.

33. Saving as to personal attendance. [Vic. s.9I.] Nothing in this Division limits or abridges the power of a court or a person acting judicially to require a witness to attend in person before the court or person.

34. Regulations. [Vic. s.9J.] The Governor in Council may make regulations for or with respect to -

- (a) fixing and requiring the payment of fees and expenses for or incurred in taking evidence under this Division; and
- (b) anything which is required or is necessary to be prescribed for carrying this Division into effect.

PART IV - JUDICIAL NOTICE OF SEALS AND SIGNATURES

35. Seal of Queensland. [cf. Cth. S. T. L. R. R. s.4; Qld. E. 1898 s.4.] All courts shall take judicial notice of the impression of the seal of Queensland without evidence of such seal having been impressed or any other evidence relating thereto.

36. Certain signatures, etc., to be judicially noticed. [cf. Cth. S. T. L. R. R. s.5; Qld. E. 1898 s.10.] (1) All courts shall take judicial notice of -

- (a) the signature of any person who holds or has held in Queensland the office of Governor, Judge of the Supreme Court, Prothonotary, Master Registrar or Chief Clerk of the Supreme Court, Judge or Commissioner of any Court of Bankruptcy or Insolvency, Curator of Intestate Estates, Registrar of Titles, Assistant or Deputy Registrar of Titles, Registrar-General, Assistant or Deputy Registrar-General, Government Statistician, Assistant or Deputy Government Statistician, Judge of any District Court or Court of Mines, Warden of any Wardens Court, or Police or Stipendiary or Special Magistrate or Justice of the Peace, or any office corresponding to any of the aforesaid offices, or any office to which this section may be declared by Order in Council to apply;
- (b) the official seal of every such person or Court; and
- (c) the fact that such person holds or has held such office;

if the signature or seal purports to be attached or appended to any judicial or official document.

(2) The provisions of this section shall be in addition to and not in derogation of any powers existing at common law, or given by any law in force in Queensland.

PART V - PROOF OF DOCUMENTS AND OTHER MATTERS

Division 1 - Proof of official and judicial documents and matters

37. Proof by purported certificate, document, etc. [cf. Cth. S.T.L.R.R. s.8; Qld. E. 1898 s.11.] Where by a law in force in Queensland -

- (a) a certificate;
- (b) an official or public document;
- (c) a document of a corporation; or
- (d) a copy of, or extract from, a document,

is admissible in evidence for any purpose, a document purporting to be the certificate, document, copy or extract shall, unless the contrary intention appears, be admissible in evidence to the same extent and for the same purpose provided that it purports to be authenticated in the manner, if any, directed by that law.

38. Proof of Gazette. [cf. Cth. S.T.L.R.R. s.12.] The production of a document purporting to be the Gazette shall be evidence that the document is the Gazette and was published on the day on which it bears date.

39. Proof of printing by Government Printer. [cf. Cth. S.T.L.R.R. s.13.] The production of a document purporting to be printed by the Government Printer or by the authority of the Government of the State shall be evidence that the document was printed by the Government Printer or by such authority.

40. Proof of votes and proceedings of Legislature. [cf. Cth. S.T.L.R.R. s.11; Qld. E. 1898 ss.2, 9.] (1) All documents purporting to be copies of the Votes and Proceedings of the Legislature or of any House of the Legislature, if purporting to be printed by the Government Printer or by the authority of the Government of the State, shall on their production be admitted as evidence thereof.

(2) In this section, "Votes and Proceedings" shall be deemed to include Journals and Minutes, and any papers purporting to be printed by the authority of and to be laid before the Legislature or any House of the Legislature.

41. Proof of Proclamations, Orders in Council, etc. [cf. Cth. S.T.L.R.R. s.6; Qld. E. 1898 s.6.] (1) Evidence of -

- (a) a proclamation, order in council, commission, order, rule, regulation or other instrument made or issued by the Governor or Governor in Council; or
- (b) an order, rule, regulation or other instrument made or issued by or under the authority of any Minister of the Crown or of any public commission or board,

may be given -

- (c) by the production of the Gazette purporting to contain it;
- (d) by the production of a document purporting to be a copy of it and purporting to be printed by the Government Printer or by the authority of the Government of the State;

- (e) by the production (in the case of a proclamation, order in council, commission, order, rule, regulation or other instrument made or issued by the Governor or Governor in Council) of a copy or extract purporting to be certified as a true copy or extract under the hand of the Clerk of the Executive Council; or
- (f) by the production (in the case of any order, rule, regulation or other instrument made or issued by or under the authority of any Minister of the Crown) of a copy or extract purporting to be certified as a true copy or extract under the hand of any Minister of the Crown.

(2) No proof shall be required of the handwriting or official position of any person certifying in pursuance of this section.

42. Proof of act done by Governor or Minister. [cf. Cth. S. T. L. R. R. s. 14.] Where by any law at any time in force the Governor or the Governor in Council or a Minister of the Crown is authorized or empowered to do any act, production of the Gazette purporting to contain a copy or notification of any such act shall be evidence of such act having been duly done.

43. Proof of public documents. [cf. Cth. S. T. L. R. R. s. 10.] Where a document is of such a public nature as to be admissible in evidence on its mere production from proper custody, a copy of or extract from the document shall be admissible in evidence if -

- (a) it is proved to be an examined copy or extract; or
- (b) it purports to be certified as a true copy or extract under the hand of a person described in the certificate as the person to whose custody the original is entrusted.

44. Proof of registers of British vessels, etc. [Qld. E. D. s. 36.]

(1) Every register of a vessel kept under any of the Acts relating to the registry of British vessels may be proved by the production of -

- (a) the original;
 - (b) an examined copy of the original; or
 - (c) a copy purporting to be certified as a true copy under the hand of the person having the charge of the original.
- (2) (a) Every such register or such copy of a register; and
- (b) every certificate of registry granted under any of the said Acts relating to the registry of British vessels and purporting to be signed as required by law,

shall be admissible in evidence of -

- (c) all the matters contained or recited in such register when the register or such copy of the register is produced; and
- (d) all the matters contained recited in or indorsed on such certificate of registry when the said certificate is produced.

45. Proof of judicial proceedings. [cf. Cth. S.T.L.R.R. s.17; Cth. Evid. s.11; Qld. E.D. ss.31-35.] (1) Where it is sought to prove any of the following matters -

- (a) a judgment, decree, rule, conviction, acquittal, sentence or other order or decision of any court;
- (b) an affidavit, pleading, will, codicil, indictment or other legal document filed, deposited or presented in any court; or
- (c) the pendency or existence at any time before any court of any proceeding.

evidence of such matter and, as the case may be, of any particulars relating thereto may be given by the production of -

- (d) a document proved to be an examined copy of the order, decision or document;
- (e) a document purporting to be a copy of the order, decision or document and to be sealed with the seal of the court; or
- (f) a certificate showing such matter and such particulars and purporting to be under the hand of -
 - (i) a registrar of the court;
 - (ii) a person having the custody of the records or documents of the court;
 - (iii) any other proper officer of the court; or
 - (iv) a deputy of such registrar, person or officer.

(2) For the purposes of this section, the term "court" means any court in Queensland, in the Commonwealth or in any other State or Territory of the Commonwealth.

46. Proof of identity of a person convicted. [cf. N.S.W. s.23A.] (1) An affidavit purporting to be made by a finger-print expert who is an officer of the police force of Queensland or of the Commonwealth or of any other State or Territory of the Commonwealth and in the form set out in the Third Schedule or to the like effect shall be admissible in evidence for the purpose of proving the identity of any person alleged to have been convicted in Queensland, in the Commonwealth or in the other State or Territory of any offence.

(2) Any such affidavit shall be evidence that the person, a copy of whose finger-prints is exhibited to such affidavit -

- (a) is the person who, in any document exhibited to such affidavit and purporting to be a certificate of conviction or certified copy of such conviction, is referred to as having been convicted; and
- (b) has been convicted of the offences mentioned in such affidavit.

47. Proof of incorporation of company. [cf. Cth. S. T. L. R. R. s. 16; Qld. E. 1898 s. 13.] (1) Evidence of the incorporation of a company incorporated or registered in Queensland may be given by the production of a certificate of the incorporation or registration of that company which purports to be signed by the Registrar or an Assistant or Deputy Registrar of Companies or the Commissioner or an Assistant Commissioner for Corporate Affairs in Queensland, and the date of incorporation or registration mentioned in such certificate shall be evidence of the date on which the company was incorporated or registered.

(2) Any copy of or extract from any document kept and registered in the office for the registration of companies in Queensland, if certified under the hand of the Registrar or an Assistant or Deputy Registrar of Companies or the Commissioner or an Assistant Commissioner for Corporate Affairs, shall be admissible in evidence in all cases in which the original document is admissible and for the same purposes and to the same extent.

48. Proof of Crown grants. [cf. Qld. E. D. s. 40; N. S. W. s. 26; Vic. s. 73.] Upon its production in any proceeding wherein it is sought to prove any letters patent or deed of grant by which land that is situated within the State has been granted to any person by the Crown a document that purports -

(a) to be a copy of -

(i) such letters patent or deed of grant; or

(ii) an entry of such letters patent or deed of grant; and

(b) to be certified under the hand of the Registrar of Titles or a Deputy Registrar of Titles,

shall be evidence and, in the absence of evidence to the contrary, conclusive evidence of the matters contained therein.

Division 2 - Proof of certain miscellaneous documents and matters

49. Comparison of disputed writing. [cf. Qld. E. D. s. 24.] Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same may be submitted as evidence of the genuineness or otherwise of the writing in dispute.

50. Proof of instrument to validity of which attestation is not necessary. [Qld. E. D. s. 25.] It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise as if there had been no attesting witness thereto.

51. Proof of instrument to validity of which attestation is necessary. [Qld. E. D. s. 25A.] Any instrument to the validity of which attestation is requisite may, instead of being proved by an attesting witness, be proved in the manner in which it might be proved if no attesting witness were alive; Provided that nothing in this section shall apply to the proof of wills or other testamentary documents.

52. Presumption as to documents twenty years old. [Qld. E.D. s. 41A.] Where any document is proved, or purports, to be not less than twenty years old, there shall be made any presumption which immediately before the date of the passing of "The Evidence Acts Amendment Act of 1962" would have been made in the case of a document of like character proved, or purporting, to be not less than thirty years old.

53. Wills, deeds, etc. may be verified by declaration. [cf. Qld. E.D. ss. 27, 28.] (1) Any attesting witness to the execution of any will or codicil, deed, or instrument in writing, and any other competent person, may verify and prove the signing, sealing, publication, or delivery of any such will, codicil, deed or instrument in writing by declaration in writing made under the "Oaths Act of 1867".

(2) A party who intends to adduce in evidence as proof of the execution of a will, codicil, deed or instrument in writing a declaration made in accordance with subsection (1) shall give such notice of his intention to do so as may be required by rules of court.

54. Evidentiary effect of probate, etc. [A.C.T. s. 14; cf. Qld. E.D. ss. 29, 30.] (1) The probate of a will or letters of administration with a will annexed are evidence of the due execution of the will.

(2) The copy of a will annexed to a probate or to letters of administration is evidence of the contents of the will.

(3) The probate of a will is evidence of the death of the testator and, if the probate states the date of death of the testator, of the date of his death.

(4) Letters of administration of the estate of a deceased person are evidence of the death of the person and, if the letters of administration state the date of death of the person, of the date of his death.

(5) In this section -

(a) a reference to probate shall be read as a reference to probate, and to an exemplification of probate, whether granted within or outside the State; and

(b) a reference to letters of administration shall be read as a reference to letters of administration, to an exemplification of letters of administration, whether granted within or outside the State and to an order to administer the estate of a deceased person granted to the Public Curator.

55. Maps, charts, etc. [A.C.T. s. 92.] Where, in a proceeding, there is a question as to the territorial limits or situation of an area or place, or the distance between two places, a court may admit in evidence -

(a) a published book, map, chart or document that appears to the court to be a reliable source of information in relation to the question; or

- (b) a certificate purporting to be signed by a person occupying, or performing the duties of, an office which, in the opinion of the court, qualifies him to express an opinion in relation to the question.

Division 3 - Proof of certain Australian and overseas documents and matters

56. Interpretation. [cf. A.C.T. s.46.] For the purposes of this Division -

"country" includes any part of a country;

"statute" includes any instrument of a legislative nature made, granted or issued under a statute.

57. Proof of certain Australian and overseas written laws, etc.
[cf. Cth. S.T.L.R.R. ss.6, 7, 15; A.C.T. s.47; Qld. E.D. s.39.]
Evidence of -

- (a) a statute, proclamation or act of state of a State or Territory of the Commonwealth other than Queensland; or
- (b) a statute, proclamation, treaty or act of state of an overseas country,

may be given by the production of -

- (c) a copy proved to be an examined copy thereof;
- (d) a copy purporting to be sealed with the seal of that State, Territory or country;
- (e) a book or pamphlet purporting to be published by the authority of the government of that State, Territory or country or by the government or official printer of that State, Territory or country containing the statute, proclamation, treaty or act of state;
- (f) a book or publication that appears to the court to be a reliable source of information containing the statute, proclamation, treaty or act of state; or
- (g) a book or pamphlet that is proved to the satisfaction of the court to be admissible in the courts in that State, Territory or country as evidence of the statutes, proclamations, treaties or acts of state of that State, Territory, or country contained in that book or pamphlet.

58. Proof of judicial proceedings of an overseas country. [cf. Qld. E.D. s.39; N.S.W. s.21; Vic. s.49.] Evidence of -

- (a) a judgment, decree, rule, conviction, acquittal, sentence or other order or decision of any court in an overseas country; or
- (b) an affidavit, pleading, will, codicil, indictment or

other legal document filed, deposited or presented in any such court,

may be given by the production of a copy thereof -

- (c) proved to be an examined copy thereof;
- (d) purporting to be sealed with the seal of such court; or
- (e) purporting to be signed by a judge of such court with a statement in writing attached by him to his signature that such court has no seal and without proof of his judicial character or of the truth of such statement.

59. Proof of certain documents admissible elsewhere in Australia. [cf. Cth. S.T.L.R.R. s.9; Qld. E. 1898 s.7.] Any document which by any law at any time in force in any State or Territory of the Commonwealth other than Queensland is admissible in evidence for any purpose in any court of that State or Territory without proof of -

- (a) the seal or stamp or signature authenticating the same; or
- (b) the judicial or official character of the person appearing to have signed the same,

shall be admissible in evidence to the same extent and for the same purpose in all courts in Queensland without such proof.

60. Royal proclamations, orders of the Privy Council, etc. [cf. Qld. E. 1898 s.5; Imp. 31 & 32 Vic. c.37 s.2.] (1) Evidence of any Royal proclamation, order of Her Majesty's Privy Council, order, regulation, despatch, or any other instrument made or issued by Her Majesty or by Her Majesty's Privy Council, or by or under the authority of any of Her Majesty's Secretaries of State, or of any department of Her Majesty's Government in the United Kingdom, may be given -

- (a) by the production of a document purporting to be a copy of the London Gazette or of the Government Gazette purporting to contain a reprint of such proclamation, order of the Privy Council, order, regulation, despatch or other instrument; or
- (b) by the production in the case of any such proclamation of a copy purporting to be printed by the Government Printer.

(2) In this section (but without affecting the generality of the expression when used elsewhere) the expression "Her Majesty" includes any predecessors of Her Majesty.

61. Proof of certain Australian and overseas public documents. [cf. Qld. E. 1898 s.8.] Where a document of a State or Territory of the Commonwealth other than Queensland or of an overseas country is of such a public nature that it would if it were a Queensland document be admissible in evidence in Queensland on its mere production from proper custody, a copy of or extract from the document shall be admissible in evidence if -

- (a) it is proved to be an examined copy or extract; or
- (b) it purports to be certified as a true copy or extract under the hand of a person described in the certificate as the person to whose custody the original is entrusted.

62. Proof of incorporation of certain Australian and overseas companies. [cf. Cth. S.T.L.R.R. s.16.] Evidence of the incorporation of a company incorporated or registered in a State or Territory of the Commonwealth other than Queensland or in an overseas country may be given by the production of a certificate of the incorporation or registration of that company which purports to be signed or issued by the Registrar of Companies, Commissioner for Corporate Affairs or other proper officer or body in that State, Territory or country, and the date of incorporation or registration mentioned in such certificate shall be evidence of the date on which the company was incorporated or registered.

63. Proof of birth, death or marriage. [A.C.T. s.13.] A document purporting to be either the original or a certified copy of a certificate, entry or record of a birth, death or marriage alleged to have taken place whether in Australia or elsewhere is evidence in a proceeding of the facts in the document.

Division 4 - Proof of telegraphic messages

64. Notice of intention to adduce telegraphic message in evidence. [cf. Qld. T.M. s.1; S.A. s.53.] (1) In any proceeding (not being a criminal proceeding), any party may at any time after the commencement thereof give notice to any other party that he proposes to adduce in evidence at the trial or hearing any telegraphic message that has been sent by telegraph from any place in the Commonwealth to any other place in the Commonwealth: Provided that -

- (a) the time between the giving of such notice and the day on which such evidence shall be tendered shall not in any case be less than two days; and
- (b) every such notice shall specify the names of the sender and receiver of the message, the subject matter thereof, and the date as nearly as may be.

(2) Any such notice may be served and the service thereof proved in the same manner as notices to produce may now be served and proved.

65. Proof of message. [cf. Qld. T.M. s.2; S.A. s.54.] Where a notice under section 64 has been given the production of any telegraphic message described in the notice and purporting to have been sent by any person, together with evidence that the same was duly received from a telegraph office, shall be evidence that such message was sent by the person so purporting to be the sender thereof to the person to whom the same shall be addressed.

66. Proof of sending a message. [cf. Qld. T.M. s.3; Tas. s.43.] (1) In any proceeding (not being a criminal proceeding) the production

of any telegraphic message, or a copy thereof verified on oath, together with evidence that such message was sent to or delivered at a telegraph office and that the fees (if any) for the transmission thereof were duly paid shall be evidence that such message was duly delivered to the person named therein as the person to whom the same was to be transmitted.

(2) A party who proposes to adduce in evidence under this section a telegraphic message or a copy thereof shall, before adducing it, give notice to the other party of his intention to do so.

(3) Any such notice may be served and the service thereof proved in the same manner as notices to produce may now be served and proved.

Division 5 - Admissibility of convictions in
civil proceedings

67. Interpretation. [A.C.T. s. 81.] For the purposes of this Division -

"conviction" does not include -

- (a) a conviction that has been set aside or quashed; or
- (b) where the person convicted of an offence has been granted a pardon in respect of that offence, such a conviction,

and the term "convicted" has a corresponding meaning;

"court" means any court in Queensland, in the Commonwealth or in any other State or Territory of the Commonwealth but does not include a court-martial.

68. Convictions as evidence in civil proceedings. [A.C.T. s. 77; cf. Eng. 1968 s. 11.] (1) In this section, "civil proceeding" does not include an action for defamation.

(2) In any civil proceeding the fact that a person has been convicted of an offence by a court is admissible in evidence for the purpose of proving, where to do so is relevant to any issue in that proceeding, that he committed that offence.

(3) In any civil proceeding in which by virtue of this section a person is proved to have been convicted of an offence by a court he shall be taken to have committed that offence unless the contrary is proved.

(4) This section applies -

- (a) whether or not a person was convicted upon a plea of guilty; and
- (b) whether or not the person convicted is a party to the civil proceeding.

69. Convictions as evidence in actions for defamation. [A.C.T. s.78; cf. Eng. 1968 s.13.] In an action for defamation in which the question whether a person did or did not commit a criminal offence is relevant to an issue arising in the action, proof that at the time when the issue falls to be determined that person stands convicted by a court of that offence is conclusive evidence that he committed that offence.

70. Evidence identifying facts upon which conviction based. [cf. A.C.T. s.79; Eng. 1968 ss.11, 13.] Without prejudice to the reception of any other evidence for the purpose of identifying the facts on which a conviction was based -

- (a) the contents of any document which is admissible as evidence of the conviction; and
- (b) the contents of any document which is admissible as evidence of the complaint, information, indictment or charge on which the person in question was convicted,

shall be admissible for that purpose where by virtue of sections 68 or 69 evidence of the conviction may be given.

71. Operation of other laws not affected. [A.C.T. s.80.] Nothing in this Division derogates from the operation of any other law under which a conviction or finding of fact in a criminal proceeding is, for the purposes of any proceeding, made evidence or conclusive evidence of any fact.

Division 6 - Books of account

72. Interpretation. [cf. Vic. s.58A; Qld. B.B.E. s.3.] For the purposes of this Division unless the contrary intention appears -

"book of account" includes any document used in the ordinary course of any undertaking for recording the financial transactions of the undertaking and also includes any document used in the ordinary course of any undertaking to record goods produced in, or stock in trade held for, the undertaking;

"court" means -

- (a) in relation to any proceeding in the Supreme Court, the Supreme Court or a judge thereof;
- (b) in relation to any proceeding in a District Court, the District Court or a judge thereof;
- (c) in relation to any proceeding in a Magistrates Court or before justices, the Magistrates Court, a stipendiary magistrate or a justice; and
- (d) in relation to any other proceeding, the Supreme Court or a judge thereof.

73. Entries in book of account to be evidence. [Vic. s.58B; cf. Qld. B.B.E. s.4.] Subject to the provisions of this Division in all proceedings -

- (a) an entry in a book of account shall be evidence of the matters transactions and accounts therein recorded; and
- (b) a copy of an entry in a book of account shall be evidence of the entry and of the matters transactions and accounts therein recorded.

74. Proof that book is a book of account. [Vic. s.58D; cf. Qld. B.B.E. s.6.] (1) An entry or a copy of an entry in a book of account shall not be admissible in evidence under this Division unless it is first proved that the book was at the time of the making of the entry one of the ordinary books of account of the undertaking to which it purports to relate and that the entry was made in the usual and ordinary course of that undertaking.

(2) Such proof may be given by a responsible person familiar with the books of account of the undertaking and may be given orally or by an affidavit sworn or by a declaration made before a commissioner or person authorized to take affidavits or statutory declarations.

75. Verification of copy. [Vic. s.58E; cf. Qld. B.B.E. s.7.] (1) A copy of an entry in a book of account shall not be admissible in evidence under this Division unless it is further proved that the copy has been examined with the original entry and is correct.

(2) Such proof may be given by some person who has examined the copy with the original entry and may be given either orally or by an affidavit sworn or by a declaration made before a commissioner or person authorized to take affidavits or statutory declarations.

76. Matters which may be proved under this Division ordinarily to be so proved. [Vic. s.58F; cf. Qld. B.B.E. s.8.] A person engaged in any undertaking or an employee of that person shall not in any proceeding to which the person is not a party be compellable to produce any book of account the contents of which can be proved under this Division or to appear as a witness to prove the matters transactions and accounts therein recorded unless by order of a court.

77. Court may order books of account or copies to be made available. [cf. Vic. ss.58C, 58G, 58J; Qld. B.B.E. ss.5, 9, 12.] (1) On the application of any party to a proceeding, a court may order that such party be at liberty to inspect and take copies of or extracts from any entries in a book of account of any undertaking for any of the purposes of such proceeding.

(2) An order under this section may be made either with or without summoning the person engaged in the undertaking or any other party and shall be served on the person engaged in the undertaking three clear days before the same is to be obeyed unless the court otherwise directs.

(3) An order under this section may direct that the person engaged in the undertaking shall, on payment of such fee as is specified in the order, prepare and deliver to the party who obtained that order a duly verified copy of such entries as may be required for evidence in the proceeding.

(4) For the purposes of sub-section (2), Saturday, Sunday, and any day which is a public holiday throughout the State or in that part of the State in which the order is to be obeyed shall be excluded from the computation of time.

(5) Where a person engaged in any undertaking is a party to any proceeding, the other party or parties thereto shall be at liberty to inspect and make copies of or extracts from the original entries and the accounts of which such entries form a part and the documents in respect of which such entries were made as though this Division had not been enacted.

78. Proof that a person has no account. [cf. Qld. B.B.E. s.10; N.S.W. Crimes s.415.] (1) Where it is sought to prove for the purposes of a proceeding that a person did not at a given time have an account with an undertaking or with any branch thereof, evidence of the fact may be given by a responsible person familiar with the books of account of the undertaking or, as the case may be, of the branch thereof.

(2) Such evidence may be given by such person orally or by an affidavit sworn or by a declaration made before a commissioner or person authorized to take affidavits or statutory declarations.

79. Costs. [Vic. s.58H; cf. Qld. B.B.E. s.11.] (1) The costs of any application to a court under or for the purposes of this Division and the costs of anything done or to be done under an order of a court made under or for the purposes of this Division shall be in the discretion of the court, who may order the same or any part thereof to be paid to any party by the person engaged in the undertaking concerned where the same have been occasioned by any default or delay on the part of that person.

(2) Any such order against a person engaged in an undertaking may be enforced as if he was a party to the proceeding.

80. Application of ss. 73, 74, 75 and 78. [Vic. s.58I; cf. Qld. B.B.E. s.13.] Sections 73, 74, 75 and 78 shall apply to and in relation to books of account and persons engaged in undertakings in any State or Territory of the Commonwealth.

PART VI - ADMISSIBILITY OF STATEMENTS

81. Admissibility of documentary evidence as to facts in issue. [cf. Vic. s.55; Qld. E.D. s.42B.] (1) In any proceeding (not being a criminal proceeding) where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this Part, be admissible as evidence of that fact if -

(a) the maker of the statement had personal knowledge of the matters dealt with by the statement, and is called as a witness in the proceeding; or

- (b) the document is or forms part of a record relating to any undertaking and made in the course of that undertaking from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied, and the person who supplied the information recorded in the statement in question is called as a witness in the proceeding.

(2) The condition in sub-section (1) that the maker of the statement or the person who supplied the information, as the case may be, be called as a witness need not be satisfied where -

- (a) he is dead, or unfit by reason of his bodily or mental condition to attend as a witness;
- (b) he is out of the State and it is not reasonably practicable to secure his attendance;
- (c) he cannot with reasonable diligence be found or identified;
- (d) it cannot reasonably be supposed (having regard to the time which has elapsed since he made the statement, or supplied the information, and to all the circumstances) that he would have any recollection of the matters dealt with by the statement he made or in the information he supplied;
- (e) no party to the proceeding who would have the right to cross-examine him requires his being called as a witness; or
- (f) at any stage of the proceeding it appears to the court that, having regard to all the circumstances of the case, undue delay or expense would be caused by calling him as a witness.

82. Admissibility of documentary evidence as to facts in issue in criminal proceedings. [cf. Eng. 1965 s.1; N.S.W. ss.14CA, 14CB; W.A. s.79E.] (1) In any criminal proceeding where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this Part, be admissible as evidence of that fact if -

- (a) the document is or forms part of a record relating to any trade or business and made in the course of that trade or business from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied; and
- (b) the person who supplied the information recorded in the statement in question -
 - (i) is dead, or unfit by reason of his bodily or mental condition to attend as a witness;

- (ii) is out of the State and it is not reasonably practicable to secure his attendance;
- (iii) cannot with reasonable diligence be found or identified; or
- (iv) cannot reasonably be supposed (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied.

(2) In this section "business" includes any public transport, public utility or similar undertaking carried on in Queensland or elsewhere by the Crown (in right of the State of Queensland or any other right) or a statutory body.

83. Admissibility of evidence concerning credibility of persons responsible for statement. [cf. Vic. s.55A; Eng. 1968 s.7.]

(1) Where in any proceeding a statement is given in evidence by virtue of section 31 or 32 and the person who made the statement or supplied the information recorded in it is not called as a witness in the proceeding -

- (a) any evidence which, if that person had been so called, would be admissible for the purpose of destroying or supporting his credibility as a witness shall be admissible for that purpose in that proceeding;
- (b) any evidence tending to prove that, whether before or after he made that statement or supplied that information, he made another statement or supplied other information (whether orally or in a document or otherwise) inconsistent therewith shall be admissible for the purpose of showing that he has contradicted himself -

but nothing in paragraphs (a) or (b) shall enable evidence to be given of any matter of which, if the person in question had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

(2) Where in any proceeding a statement is given in evidence by virtue of section 31 or 32 and the person who made the statement or supplied the information recorded in it is not called as a witness in the proceeding any evidence proving that that person has been guilty of any indictable or other offence shall, with the leave of the court, be admissible in the proceeding to the same extent as if that person had been so called and on being questioned as to whether he had been convicted of an indictable or other offence had denied the fact or refused to answer the question.

84. Admissibility of statements produced by computers. [cf. Vic. s.55B; Eng. 1968 s.5.] (1) In any proceeding (not being a criminal proceeding) where direct oral evidence of a fact would be admissible, any statement contained in a document produced by a computer and tending to establish that fact shall, subject to this Part, be admissible as evidence of that fact, if it is shown that the conditions mentioned in sub-section (2) are satisfied in relation to the statement and computer in question.

(2) The said conditions are -

- (a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any person;
- (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
- (c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
- (d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub-section (2) was regularly performed by computers, whether -

- (a) by a combination of computers operating over that period; or
- (b) by different computers operating in succession over that period; or
- (c) by different combinations of computers operating in succession over that period; or
- (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers -

all the computers used for that purpose during that period shall be treated for the purposes of this Part as constituting a single computer; and references in this Part to a computer shall be construed accordingly.

(4) In any proceeding where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say -

- (a) identifying the document containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

- (c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate -

and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) Any person who in a certificate tendered in evidence by virtue of sub-section (4) wilfully makes a statement material in those proceedings which he knows to be false or does not believe to be true, is guilty of an offence.

Penalty: Imprisonment with hard labour for one year or a fine of \$1000 or both such imprisonment and such fine.

(6) For the purposes of this Part -

- (a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
- (b) where, in the course of activities carried on by any person, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;
- (c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

(7) Subject to sub-section (3), in this section "computer" means any device for storing or processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

85. Inferences concerning admissibility. [cf. Qld. E.D. s.42B; Vic. ss. 55, 55C.] (1) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of this Part, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances.

(2) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of section 81 or 82, the court may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be a certificate of a legally qualified medical practitioner.

86. Authentication. [Vic. s. 55D; cf. Qld. E. D. s. 42B.] Where in any proceeding a statement contained in a document is proposed to be given in evidence by virtue of this Part, it may be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or the material part thereof, authenticated in such manner as the court may approve.

87. Rejection of evidence. [cf. Vic. s. 55; Qld. E. D. s. 42B.]

(1) The court may in its discretion reject any statement notwithstanding that the requirements of this Part are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

(2) This section does not affect the admissibility of any evidence otherwise than by virtue of this Part.

88. Withholding statement from jury room. Where in a proceeding there is a jury, and a statement in a document is admitted in evidence under this Part, and it appears to the court that if the jury were to have the document with them during their deliberations they might give the statement undue weight, the court may direct that the document be withheld from the jury during their deliberations.

89. Corroboration. [Vic. s. 56; cf. Qld. E. D. s. 42C.] For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Part shall not be treated as corroboration of evidence given by the maker of the statement or the person who supplied the information from which the record containing the statement was made.

90. Witness's previous statement, if proved, to be evidence of facts stated. [cf. Eng. 1968 ss. 3, 7.] (1) Where in any proceeding -

- (a) a previous inconsistent or contradictory statement made by a person called as a witness in that proceeding is proved by virtue of section 17, 18 or 19; or
- (b) a previous statement made by a person called as aforesaid is proved for the purpose of rebutting a suggestion that his evidence has been fabricated,

that statement shall be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

(2) Sub-section (1) of this section shall apply to any statement or information proved by virtue of paragraph (b) of section 83(1) as it applies to a previous inconsistent or contradictory statement made by a person called as a witness which is proved as mentioned in paragraph (a) of the said sub-section (1) of this section.

(3) Nothing in this Part shall affect any of the rules of law relating to the circumstances in which, where a person called as a witness in any proceeding is cross-examined on a document used by him to refresh his memory, that document may be made evidence in that proceeding; and where a document or any part of a document is received in evidence in any such proceeding by virtue of any such

rule of law, any statement made in that document or part by the person using the document to refresh his memory shall by virtue of this sub-section be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

91. Weight to be attached to evidence. [cf. Qld. E. D. s.42C.] In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including -

- (a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and
- (b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts.

PART VII - REPRODUCTIONS OF DOCUMENTS

Division 1 - Preliminary

92. Interpretation. [cf. Qld. E.(R.) s.4.] In this Part, unless the contrary intention appears -

"affidavit" includes statutory declarations;

"business" includes any undertaking;

"machine-copy" in relation to a document means a copy of the document made by a machine performing a process -

- (a) involving the production of a latent image of the document (not being a latent image on photo-sensitive material on a transparent base) and the development of that image by chemical means or otherwise; or
- (b) that, without the use of photo-sensitive material, produces a copy of the document simultaneously with the making of the document;

"Minister" means the Minister for Justice and Attorney-General or other Minister of the Crown for the time being administering this Act;

"original document" means -

- (a) when referred to in connexion with the production of a document in answer to legal process issued by a court, the document that would, if this Part had not been enacted, be required to be produced in answer to that process; or

- (b) when referred to in connexion with the admissibility of a document in evidence in a proceeding -
- (i) a document that would, if this Part had not been enacted, be admissible in evidence in that proceeding in lieu of another document where a party to the proceeding failed to produce that other document in response to notice to do so given to him by another such party; or
 - (ii) any other document that would, if this Part had not been enacted, be admissible in evidence in that proceeding;

"reproduction" in relation to a document means a machine-copy of the document or a print made from a transparency of the document; and "reproduce" and any derivatives thereof have a corresponding meaning;

"transparency" in relation to a document means -

- (a) a developed negative or positive photograph of that document (in this definition referred to as an original photograph) made, on a transparent base, by means of light reflected from, or transmitted through, the document;
- (b) a copy of an original photograph made by the use of photo-sensitive material (being photo-sensitive material on a transparent base) placed in surface contact with the original photograph; or
- (c) any one of a series of copies of an original photograph, the first of the series being made by the use of photo-sensitive material (being photo-sensitive material on a transparent base) placed in surface contact with a copy referred to in paragraph (b) of this definition, and each succeeding copy in the series being made, in the same manner, from any preceding copy in the series.

Division 2 - Reproduction of official documents

93. Certified reproductions of certain official documents, etc., to be admissible without further proof. [Qld. E.(R.) s.5.] (1) In this section "approved person" means -

- (a) any person or official who is the holder of, or is acting in, an office in a department, instrumentality or agency of the government of the State or under a Minister of the Crown, public officer, person, board or body corporate acting for or on behalf of, or as agent of, or as representing, the Crown declared by the Minister, by notification published in the Gazette, to be an approved person for the purposes of this section;
- (b) where an original document to which this section relates is a document filed in a court or the official

record of a proceeding, the registrar or other proper officer of the court in which the document was filed or before which the proceeding took place.

(2) In a notification published for the purposes of paragraph (a) of sub-section (1), the Minister is authorized to describe an official by designating the office that he holds or in which he acts and where, in such a notification, an official is so described -

- (a) a person who holds or is acting in the designated office at the time of publication of the notification shall be an approved person;
- (b) that official shall cease to be an approved person -
 - (i) if he ceases to hold or act in the designated office; or
 - (ii) if the notification is revoked in so far as it relates to the designated office,

whichever first occurs; and

- (c) a person who succeeds to or acts in the designated office while the notification remains unrevoked in so far as it relates to that office shall be an approved person -
 - (i) while he holds or acts in that office; or
 - (ii) until the notification is sooner revoked in so far as it relates to the designated office,

whichever first occurs.

(3) A person shall not fail or cease to be an approved person by reason only of a misdescription, or an abbreviated description, of a designated office referred to in sub-section (2) by virtue of which he would, but for the misdescription or abbreviated description, be an approved person, where the misdescription or abbreviation does not materially affect identification of that person.

(4) The Minister may, by notification published in the Gazette, revoke wholly or in part a notification published for the purposes of paragraph (a) of sub-section (1).

(5) A document that purports to be a copy of an original document shall, without further proof, be admissible in evidence in a proceeding as if it were the original document of which it purports to be a copy, if it bears or is accompanied by a certificate, purporting to have been signed by an approved person, that it is a reproduction of a document that was in the custody or control of that person in his official capacity -

- (a) where the reproduction is a machine-copy, at the time the machine-copy was made; or
- (b) where the reproduction is a print made from a transparency, at the time when the transparency was made.

(6) Where an approved person is served with legal process to produce a document to a court it shall be a sufficient answer to such process if the person to whom the process is addressed sends by post, or causes to be delivered, to the registrar or proper officer of the court requiring the production of the document a reproduction, certified as provided by this section, of the document and, where more than one document is specified howsoever in the legal process, further certifies that, to the best of his knowledge and belief, the reproductions so sent or caused to be delivered are reproductions of the whole of the documents in question.

(7) For the purposes of this section and without prejudice to any form of custody or control, an approved person shall be deemed to have custody or control of a document at the time the transparency of the document was made if -

(a) he has custody or control of the transparency; and

(b) the transparency -

(i) incorporates a transparency of a certificate purporting to have been signed by an approved person to the effect that the transparency was made as a permanent record of a document in the custody or under the control of the person who signed the certificate; or

(ii) is one of a series of transparencies that incorporates, as part of the series, a transparency of such a certificate relating to the transparencies in the series.

(8) Division 3 of this Part shall not apply to or in respect of a reproduction of a document referred to in this Division.

Division 3 - Reproduction of business documents

94. Admissibility of reproductions of business documents destroyed, lost or unavailable. [Qld. E. (R.) s. 6.] (1) Subject to this Part, a document that purports to be a copy of an original document made or used in the course of a business shall, upon proof that it is a reproduction made in good faith and that the original document has been destroyed or lost, whether wholly or in part, or that it is not reasonably practicable to produce the original document or to secure its production, be admissible in evidence in any proceeding to the extent to which the contents of the original document of which it purports to be a copy would have been admissible and it shall, subject to proof of the same matters, be a sufficient answer to legal process issued by a court, requiring production of a document to the court, for the person, required by that process to produce the document, to produce such a reproduction of the document.

(2) Without prejudice to any other mode of proof an affidavit purporting to have been made by a person at or about the time he made a machine-copy of, or photographed, a document -

(a) stating his full name, address and occupation;

- (b) identifying or describing the document and indicating whether the document is itself a reproduction;
- (c) stating the day upon which he made the machine-copy or photograph, the condition of the document at that time with respect to legibility and the extent of any damage thereto;
- (d) describing the machine or process by which he made the machine-copy or photograph;
- (e) stating that the making of the machine-copy or photograph was properly carried out by the use of apparatus or materials in good working condition with the object of making a machine-copy or, as the case may be, a transparency of the document; and
- (f) stating that the machine-copy or photograph is a machine-copy or photograph made in good faith,

shall be evidence, whether or not such person is available to be called as a witness, that the machine-copy, or as the case may be a transparency, of the document referred to in the affidavit is a machine-copy or transparency made in good faith and, in the case of a machine-copy is, or in the case of a transparency can be used to produce, a reproduction of the document.

95. Minister may approve photographing machines. [Qld. E.(R.) s. 7.] (1) For the purposes of this Part the Minister may, by notification published in the Gazette, approve for photographing documents in the ordinary course of business any make, model or type of machine and any such machine, so approved, is in this Division referred to as an "approved machine".

(2) Any approval given by the Minister under sub-section (1) may be given subject to such conditions as the Minister thinks fit, and may, by notification published in the Gazette, be revoked or varied by the Minister.

(3) Subject to this Part, but in addition to and without derogating from the provisions of sub-section (1) of section 94, a print made from a transparency of an original document (being a document made or used in the course of business) shall be admissible in evidence in a proceeding to the extent to which the contents of the original document would have been admissible, whether the document is still in existence or not, upon proof that the transparency was made in good faith by using a machine that, at the time the transparency was made, was an approved machine and that the print is a print of the image on the transparency.

(4) Without prejudice to any other mode of proof an affidavit purporting to have been made by a person at or about the time he photographed a document by means of an approved machine -

- (a) stating his full name, address and occupation and his functions or duties (if any) in relation to copying documents;

- (b) identifying or describing the document and indicating whether the document is itself a reproduction;
- (c) stating the day upon which the document was photographed, the condition of the document at that time with respect to legibility and the extent of any damage to the document;
- (d) stating the person from whose custody or control the document was produced for photographing or on whose behalf or in the course of whose business the document was photographed;
- (e) identifying the make, model or type of the approved machine citing the number and date of the Gazette in which approval of such machine was notified and stating that the photographing was properly carried out in the ordinary course of business by the use of apparatus and materials in good working order and condition and in accordance with the conditions, if any, attaching to the approval of such machine as so notified; and
- (f) stating that the document was photographed in good faith,

shall be evidence, whether such person is available to be called as a witness or not, that a transparency of the document referred to in the affidavit was made in good faith by using an approved machine and bears an image of the document.

96. Affidavit of maker of print from transparency to be evidence. [Qld. E.(R.) s. 8.] Without prejudice to any other mode of proof an affidavit purporting to have been made by a person at or about the time he made a print from a transparency of a document -

- (a) stating his full name, address and occupation;
- (b) identifying the transparency;
- (c) stating the day upon which the print was made, the condition of the transparency and the extent of any damage thereto;
- (d) describing the process by which he made the print;
- (e) stating that the printing was properly carried out by the use of apparatus and materials in good working order and condition with the object of reproducing the whole of the image on the transparency; and
- (f) stating that the print was made in good faith,

shall be evidence, whether such person is available to be called as a witness or not, that the print was made in good faith and reproduces the whole of the image on the transparency.

97. Proof where document processed by independent processor. [Qld. E.(R.) s. 9.] Where a person having the custody or control of a document -

- (a) delivers the document, or causes it to be delivered to another person (in this section called "the processor") whose business is or includes the reproduction or photographing of documents for other persons; and
- (b) receives from the processor -
 - (i) a machine-copy or transparency of a document; and
 - (ii) an affidavit by the processor under section 94 or 95,

an affidavit made by him at or about that time giving particulars of his custody or control of the document, its delivery to the processor and his receipt from the processor, of the document and the machine-copy or transparency shall, whether the person who had the custody or control of the document is available to be called as a witness or not, be admissible in a proceeding as evidence of the facts stated therein.

98. Reproduction not to be admitted as evidence unless transparency in existence. [Qld. E.(R.) s.10.] (1) Save as provided in sub-section (2) a reproduction made from a transparency shall not be admitted as evidence pursuant to this Division in any proceeding unless the court is satisfied -

- (a) that the transparency is in existence at the time of the proceeding; and
- (b) that the document reproduced was -
 - (i) in existence for a period of at least twelve months after the document was made; or
 - (ii) delivered or sent by the party tendering the reproduction to the other party or one of the other parties to the proceeding,

(2) The provisions of paragraph (b) of sub-section (1) do not apply with respect to a print made from a transparency made by using an approved machine where, at the time the print was made, the transparency was in the custody or control of -

- (a) a Minister of the Crown in right of the Commonwealth of Australia or of the State of Queensland or of any other State of the Commonwealth of Australia or any officer in any Government Department under the direct control of any such Minister;
- (b) any council, board, commission, trust or other body established or constituted by or under the law of the Commonwealth of Australia or of the State of Queensland or of any other State of the Commonwealth of Australia or a Territory of the Commonwealth of Australia for any public purpose;
- (c) a bank as defined in section 5 of the Banking Act 1959 of the Parliament of the Commonwealth of Australia, as amended by subsequent Acts of that Parliament, or any statutory corporation for the time being authorized

to carry on any banking business in the State of Queensland or in any other State, or a Territory, of the Commonwealth of Australia; or

- (d) any corporation that is registered under the Life Insurance Act 1945 of the Parliament of the Commonwealth of Australia, as amended by subsequent Acts of that Parliament, where the document reproduced relates to the life insurance business of that corporation.

99. Transparency, etc., may be preserved in lieu of document. [Qld. E.(R.) s.11.] Where any Act passed before or after the commencement of this Act requires a document to which this Division applies to be preserved for any purpose for a longer period of time than three years it shall be a sufficient compliance with such a requirement to preserve, in lieu of any such document over three years old, a transparency thereof made by using an approved machine together with an affidavit relating to the transparency being a transparency and an affidavit to which section 103 applies.

100. Proof of destruction of documents, etc. [Qld. E.(R.) s.12.] A statement by any person in an affidavit made for the purposes of this Division -

- (a) that he destroyed or caused the destruction of a document;
- (b) that after due search and inquiry a document cannot be found;
- (c) that, for the reasons specified therein, it is not reasonably practicable to produce a document or secure its production;
- (d) that a transparency of a document is in the custody or control of a person, corporation or body referred to in sub-section (2) of section 98;
- (e) that a document was made or was used in the course of his or his employer's business; or
- (f) that he has made transparencies of a series of documents including the affidavit by photographing them in their proper order,

shall be evidence of the fact or facts stated, whether that person is available to be called as a witness or not.

101. One affidavit sufficient in certain circumstances. [Qld. E.(R.) s.13.] (1) This section applies to and in respect of transparencies, made by using an approved machine, of a series of documents that -

- (a) bear or have been given serial numbers in arithmetical order;
- (b) bear or have been marked with the same distinctive identification mark; or

- (c) purport from their contents to relate to the same subject-matter, to the same person or persons or to a matter between persons,

where the documents are photographed in their proper order on a continuous length of film or, where the documents are marked in accordance with paragraph (a) or (b), on separate films.

(2) An affidavit made pursuant to this Division shall be deemed to be an affidavit in respect of all or any of the transparencies of a series of documents to which this section applies if it is photographed as part of the series and in lieu of identifying or describing each individual document photographed, it states the general nature of the documents in the series and -

- (a) the serial numbers of the first and last document in the series;
- (b) the distinctive identification mark; or
- (c) the person or persons, or the matter between persons, to which the documents refer,

as the case may require.

(3) Notwithstanding anything contained in this Division, a print that purports to be made from a transparency of an affidavit referred to in sub-section (2) shall be admissible in evidence in a proceeding as if it were the affidavit from which the transparency was made, if -

- (a) it is produced or tendered with a print made from a transparency of a document in the series to which the affidavit relates; and
- (b) an affidavit under section 96, relating to both prints is also produced or tendered.

102. Certification required when affidavit, etc., not contained in length or series of film. [Qld. E.(R.) s.14.] Where any affidavit relating to the reproduction of a document is not an affidavit referred to in sub-section (2) of section 101, a copy thereof duly certified to be a true copy -

- (a) in the case of an affidavit in the custody of a body corporate, by the chairman, secretary or by a director or manager thereof; or
- (b) in any other case, by a justice of the peace,

shall, unless the court otherwise orders, be admissible in evidence in a proceeding as if it were the affidavit of which it is certified to be a true copy.

103. Discovery, inspection and production where document destroyed or lost. [Qld. E.(R.) s.15.] (1) In this section "affidavit" includes -

- (a) a transparency, made as provided in section 101, of an affidavit; and

(b) a copy, certified as provided in section 102, of an affidavit.

(2) This section applies to -

(a) a transparency of a destroyed or lost document, where a print made from the transparency would, subject to compliance with the conditions prescribed by this Part for the purpose, be admissible in evidence in a proceeding; and

(b) an affidavit that would be evidence or, where the affidavit is itself in the form of a transparency, that could be the means of providing evidence, pursuant to this Part, of compliance with those conditions in so far as they relate to the making of the transparency and the destruction or loss of the document.

(3) Where any person has the custody or control of a transparency and an affidavit to which this section applies and, but for the destruction or loss of the document from which the transparency was made would be required by any law, order of court, practice or usage -

(a) to give discovery of the document;

(b) to produce the document for inspection;

(c) to permit the making of a copy of the document or the taking of extracts therefrom; or

(d) to supply a copy of the document,

the law, order, practice or usage shall, subject to this section, be deemed to extend to the transparency and affidavit.

(4) For the purposes of this section -

(a) the obligation imposed by this section in respect of a requirement referred to in paragraph (b) of sub-section (3) shall be deemed to include an obligation -

(i) to provide proper facilities for reading the image on the transparency and, where the affidavit is itself in the form of a transparency, the image on the transparency of the affidavit; or

(ii) to produce for inspection a print made from the transparency and, where the affidavit is itself in the form of a transparency, a print made from the transparency of the affidavit, together in each case, with an affidavit that would under section 96, be evidence that the print was made in good faith and reproduces the image on the transparency; and

(b) the obligation imposed by this section in respect of a requirement referred to in paragraph (d) of sub-section (3) shall be deemed not to include an obligation to

supply a copy of any transparency but to include, in lieu thereof, an obligation to supply the print and affidavit or, as the case may require, the prints and affidavits, referred to in sub-paragraph (ii) of paragraph (a) of this sub-section.

(5) Where any person has the custody or control of a transparency and an affidavit to which this section applies and is required by legal process issued by a court to produce to the court the document from which the transparency was made, that legal process shall be deemed to require the production by him of -

- (a) a print, made in good faith, that reproduces the image on the transparency; and
- (b) the affidavit or, where the affidavit is itself in the form of a transparency, a print, made in good faith, that reproduces the image on the transparency of the affidavit.

Division 4 - General

104. Copies to be evidence. [A. C. T. s. 87; cf. Qld. E. D. s. 26; N. S. W. s. 34.] Notwithstanding any other provision of this Part, where a document has been copied by means of a photographic or other machine which produces a facsimile copy of the document, the copy is, upon proof to the satisfaction of the court that the copy was taken or made from the original document by means of the machine, admissible in evidence to the same extent as the original document would be admissible in evidence without -

- (a) proof that the copy was compared with the original document; and
- (b) notice to produce the original document having been given.

105. Further reproduction may be ordered by court. [Qld. E. (R.) s. 16.] (1) Subject to this section, where a print made from a transparency is, in a proceeding, tendered in evidence pursuant to the provisions of this Part and -

- (a) the court is not satisfied that the print is a legible copy of the original document; or
- (b) a party to the proceeding questions the authenticity of the print and applies for an order under this section,

the court may reject the print tendered and order that a further print be made from a transparency of the original document.

(2) A further print made in compliance with an order made under this section shall be made -

- (a) where the order is made under paragraph (a) of sub-section (1), at the cost of the party who tendered the rejected print; or

- (b) where the order is made under paragraph (b) of that sub-section, in the presence of a person appointed by the court for the purpose and at the cost of the party who applied for the order.

(3) Where a print to which Division 2 of this Part relates is rejected under this section, a print made in compliance with an order under this section shall be made in the same premises as the rejected print or, where this is not practicable, in accordance with directions given by the court.

106. Colours and tones of reproductions. [Qld. E.(R.) s.17.]

(1) For the purposes of this Part, the production of a reproduction of a document to a court in answer to a legal process, or the admission of such a reproduction in evidence in a proceeding, shall not be precluded on the ground that it is not a copy of an original document or, where the reproduction is a print made from a transparency, on the ground that the transparency does not bear an image of an original document, if the reproduction is not such a copy, or the transparency does not bear such an image, by reason only of the fact -

- (a) that, in the process by which the reproduction or transparency was made, the colours or tones appearing in the original document were altered or reversed in the reproduction or transparency; or
- (b) that any number or mark of identification added for the purposes of section 101 appears in the reproduction or transparency.

(2) A document may be certified under Division 2 of this Part to be a reproduction of an original document notwithstanding that -

- (a) any writing or representation describing or identifying colours in the original document appears in the reproduction; or
- (b) any colours appearing in the reproduction were added after it was made and before certification.

107. Notice to produce not required. [Qld. E.(R.) s.18.] Where a reproduction of a document is admissible in evidence pursuant to this Part, it shall be so admissible whether or not notice to produce the document of which it is a reproduction has been given.

108. Proof of comparisons not required. [Qld. E.(R.) s.19.] Where a reproduction of a document is tendered as evidence pursuant to this Part, no proof shall be required that the reproduction was compared with the original document.

109. Presumptions as to ancient documents. [Qld. E.(R.) s.20.] Any presumption that may be made in respect of a document over twenty years old may be made with respect to any reproduction of that document admitted in evidence under this Part in all respects as if the reproduction were the document.

110. Reproductions made in other States. [Qld. E.(R.) s.21.] Where a reproduction is made of a document in another State or in a Territory

of the Commonwealth of Australia and would be admissible in evidence in a proceeding in that State or Territory under a law of that State or Territory corresponding with this Part, or a law of that State or Territory that the Minister, by notification published in the Gazette, declares to correspond with this Part, the reproduction shall be admissible in evidence in a proceeding in Queensland in the same circumstances, to the same extent and for the like purpose as it would be admissible in evidence in a proceeding in that State or Territory under the law of that State or Territory.

111. Judicial notice. [Qld. E.(R.) s. 22.] Where any Act or law requires a court to take judicial notice of the seal or signature of any court, person or body corporate appearing on a document and a reproduction of that document is, pursuant to this Part, admitted in evidence in a proceeding, the court shall take judicial notice of the image of the seal or signature on the reproduction to the same extent as it would be required to take judicial notice of the seal or signature on the document.

112. A Court may reject reproduction. [Qld. E.(R.) s. 23.] Notwithstanding anything contained in this Part, a court may refuse to admit in evidence a reproduction tendered pursuant to this Part if it considers it inexpedient in the interests of justice to do so as a result of any reasonable inference drawn by the court from the nature of the reproduction, the machine or process by which it or, in the case of a print from a transparency, by which the transparency was made, and any other circumstances.

113. Weight of evidence. [Qld. E.(R.) s. 24.] In estimating the weight to be attached to a reproduction of a document admitted in evidence pursuant to this Part, regard shall be had to the fact that, if the person making an affidavit pursuant to this Part is not called as a witness, there has been no opportunity to cross-examine him, and to all the circumstances from which any inference may reasonably be drawn as to -

- (a) the necessity for making the reproduction or, in the case of a print from a transparency, the transparency or for destroying or parting with the document reproduced;
- (b) the accuracy or otherwise of the reproduction; or
- (c) any incentive to tamper with the document or to misrepresent the reproduction.

114. Provisions of Part are alternative. [Qld. E.(R.) s. 25.] The provisions of this Part shall be construed as in aid of and as alternative to any other law or any practice or usage with respect to the production to a court or the admissibility in evidence in a proceeding of reproductions of documents.

115. Stamp duty. [Qld. E.(R.) s. 26.] Notwithstanding the provisions of this Part, where a document is chargeable with stamp duty under the Stamp Act 1894 - 1974 a reproduction of the document shall not be admissible in evidence under this Part unless -

- (a) the reproduction of the document shows or establishes to the satisfaction of the court or it is otherwise so established that the document was duly stamped in accordance with that Act; or
- (b) the provisions of that Act which relate to documents that are not duly stamped in accordance therewith are complied with in respect of the reproduction as if it were the document of which it is a reproduction.

116. Minister may exclude provisions of Part. [Qld. E. (R.) s. 27.]

(1) The Minister may, by notification published in the Gazette, exclude the operation of this Part or any Division of this Part in respect of any document or class of documents specified in the notification.

(2) The Minister may, by a subsequent notification published in the Gazette, revoke any notification under sub-section (1).

(3) The provisions of this Part referred to in a notification published under sub-section (1) shall not, while the notification remains unrevoked, apply to and in respect of any document or class of documents specified in the notification.

117. Act 7 Geo. 6 No. 39 as amended not affected. [Qld. E. (R.) s. 28.]
Nothing in this Act shall be construed as affecting the provisions of Part IV of The Libraries Acts 1943 to 1949.

PART VIII - MISCELLANEOUS

118. Rejection of evidence in criminal proceedings. [cf. A. C. T. s. 76.]
Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence.

119. Witnesses for defence to be sworn. [cf. Qld. E. D. s. 68; Eng. 1 Ann. st. 2 c. 9 s. 3.] In a criminal proceeding, any person who gives evidence on behalf of the defence shall first take an oath in such manner as he would by law be obliged to do if he were a witness for the prosecution.

120. Actions for breach of promise of marriage. [cf. Qld. E. F. A. s. 2.]
The plaintiff in an action for breach of promise of marriage shall not recover a verdict unless his or her testimony is corroborated by some other material evidence in support of such promise.

121. Impounding documents. [A. C. T. s. 88; cf. Qld. E. D. s. 76.]
Where a document has been tendered or produced before a court, the court may, whether or not the document is admitted in evidence, direct that the document shall be impounded and kept in the custody of an officer of the court or of another person for such period and subject to such conditions as the court thinks fit.

122. Power to appoint a Government Printer. [cf. Qld. E. D. s. 77.]
The Governor in Council may appoint a Government Printer for the State.

SCHEDULES
FIRST SCHEDULE

Part A

Repealed Acts	[Section 3(1)]
Title of Act	Year and Number
<u>The Telegraphic Messages Act of 1872</u>	1872 36 Vic. No. 13
<u>The Evidence Further Amendment Act of 1874</u>	1874 37 Vic. No. 9
<u>The Telegraphic Messages Act Amendment Act of 1876</u>	1876 40 Vic. No. 3
<u>The Evidence Act, 1898</u>	1898 62 Vic. No. 15
<u>Evidence and Discovery Act Amendment Act of 1927</u>	1928 18 Geo. 5 No. 18
<u>The Bankers' Books Evidence Act of 1949</u>	1949 13 Geo. 6 No. 32
<u>The Evidence Act Amendment Act of 1959</u>	1959 8 Eliz. 2 No. 46
<u>The Evidence Acts Amendment Act of 1962</u>	1962 No. 9 of 1962
<u>The Evidence and Discovery Acts Amendment Act of 1967</u>	1967 No. 53 of 1967
<u>Evidence (Reproductions) Act 1970</u>	1970 No. 22 of 1970

Part B

Amendments of the Evidence and Discovery Act 1867 - 1972
[Section 3(2)]

The following sections of the Evidence and Discovery Act 1867 - 1972 are repealed:-

Sections 1 to 5 (inclusive), section 7, sections 9 to 30 (inclusive), sections 32 to 37 (inclusive), sections 39 to 42C (inclusive), sections 45 to 48 (inclusive), sections 50 to 60 (inclusive), sections 62 to 63 (inclusive), section 68, sections 70 to 74 (inclusive), section 76 to 78 (inclusive).

Part C

Amendment of the Common Law Practice Act 1867 - 1972
[Section 3(3)]

Section 41 is amended by omitting the words "the Evidence and Discovery Act" and inserting in their stead the words "The Rules of the Supreme Court".

Part D

Amendment of the Justices Act 1886 - 1975 [Section 3(4)]

Section 75 is repealed.

Part E

Amendment of the Children's Services Act 1965 - 1973
[Section 3(5)]

Section 146 is repealed.

Part F

Amendment of The Supreme Court Constitution Amendment Act of 1861 [Section 3(6)]

Section 49 is repealed.

Part G

Amendments of The Criminal Code [Section 3(7)]

Provisions amended	Amendment
Section 35	1. Section 35 is amended by omitting the paragraph commencing with the words "Upon the prosecution of" and ending with the words "compellable witness".

Provisions amended	Amendment
Sections 212, 214, 215, 216 and 222	2. Each of sections 212, 214, 215, 216 and 222 is amended by omitting therefrom the sentence "The wife of the accused person is a competent but not a compellable witness".
Sections 213, 217, 218, 219, 220 and 363	3. Each of sections 213, 217, 218, 219, 220 and 363 is amended by omitting therefrom the sentence "The husband or wife of the accused person is a competent but not a compellable witness".
Section 223	4. Section 223 is amended by omitting therefrom the sentence "The husband of the accused person is a competent but not a compellable witness".
Section 353	5. Section 353 is repealed.
Section 360	6. Section 360 is amended by omitting the paragraph commencing with the words "The wife" and ending with the words "accused person".
Section 618A	7. Section 618A is repealed.

Part H

Transitional Provisions [Section 4(2)]

[Transitional provisions for the purposes of the transition to the provisions of Part VII of the Draft Bill from the provisions of the Evidence (Reproductions) Act 1970.]

SECOND SCHEDULE

[Section 8(4)]

Year and Number	Title	Provisions referred to
1899 63 Vic. No. 9	<u>The Criminal Code</u>	Sections 208, 209, 210, 211, 212, 214, 215, 216, 222, 223, 302, 303, 306, 308, 311, 315, 316, 317, 318, 319, 319A, 320, 321, 322, 323, 324, 325, 326, 335, 336, 337, 339, 340, 343, 344, 347, 349, 350.

Year and Number	Title	Provisions referred to
1965 No. 42 of 1965	<u>Children's Services Act 1965 - 1973</u>	Section 69.

THIRD SCHEDULE

[Section 46(1)]

Queensland

In the (insert name of court).

The Queen against

[or In the matter of a Complaint by

against

or, as the case may be,]

I of

..... in the (State or Territory) make oath and say as follows:-

1. I am a finger-print expert and an officer of the police force of the said State [or the Commonwealth of Australia or the said Territory].
2. I have examined the finger-print card now produced and shown to me marked "A".
3. The finger-prints on the said card are identical with those appearing on a finger-print card in the records of the said police force, being the finger-prints of one (name of person; and alias, if any).
4. According to the said records, which I believe to be accurate, the said was convicted in the said State [or the Commonwealth of Australia or the said Territory] of the following offences -

[Set out description of offences, dates of conviction, and courts in which the person was convicted.]

- 5. From an examination of the said records I believe that the person referred to as having been convicted in the document(s) now shown to me and marked "B" ["C", "D", etc., respectively] is identical with the person whose finger-prints are on the said card marked "A".

SWORN at

this day of

..... 19

Before me:-

.....
 A person authorised to take affidavits
 in the State [or Territory] of

..... [or the
 Commonwealth of Australia.]

DRAFT BILL

ACTS INTERPRETATION

ACT AMENDMENT

A Bill to amend the Acts Interpretation Act 1954 - 1971 in certain particulars

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:-

1. Short title and citation. (1) This Act may be cited as the Acts Interpretation Act Amendment Act 1975.

(2) The Acts Interpretation Act 1954 - 1971 is in this Act referred to as the Principal Act.

(3) The Principal Act as amended by this Act may be cited as the Acts Interpretation Act 1954 - 1975.

2. Amendment of section 11. Section 11 of the Principal Act is amended by omitting the words "and shall be judicially noticed as such".

3. New section 11A. The Principal Act is amended by inserting after section 11 the following section:-

"11A. Judicial notice of Acts. Every Act shall be judicially noticed."

4. New section 28B. The Principal Act is amended by inserting after section 28A the following section:-

"28B. Proclamations and orders in council. Where any Act or Imperial Act confers power to make any proclamation or order in council, any proclamation or order in council made or purporting to be made under the Act or Imperial Act and published in the Gazette shall be judicially noticed."

SUMMARY OF OTHER
RECOMMENDATIONS

SUMMARY OF OTHER RECOMMENDATIONS

- (A) The following should be reserved for examination under Item 1 of the Second Programme of the Law Reform Commission relating to the regulation of civil proceedings:

Evidence and Discovery Act 1867 - 1972 ss. 31 and 43.

Common Law Practice Act 1867 - 1972 ss. 40, 41, 74, 75 and 76.

English Civil Evidence Act 1972 s. 2.

A rule that a question as to the effect of a foreign law is a matter for the judge and shall not be submitted to a jury.

(Commentary pp. 2, 3, 35, 36.)

- (B) The following should be reserved for examination under Item 2 of the Second Programme of the Law Reform Commission relating to the practice of the criminal courts:

Criminal Law Amendment Act of 1894 s. 10.

(Commentary p. 4.)

- (C) The provisions of the Evidence and Discovery Act 1867 - 1972 s. 67 should be included in a new Justices Act.

(Commentary p. 4.)

- (D) The following should be reserved for examination in the course of a general review of the Oaths Acts:

Evidence and Discovery Act 1867 - 1972 ss. 37A, 38 and 61.

Australian Consular Officers' Notarial Powers and Evidence Acts 1946 to 1963.

Evidence (Attestation of Documents) Acts 1937 to 1950.

(Commentary pp. 4-6.)

- (E) The rule-making power supporting the Rules of the Supreme Court should be reviewed to ensure that it is adequate to support O. 40 r. 8 of those Rules.

(Commentary p. 21.)

- (F) The rule-making power supporting the District Court Rules 1968 should be reviewed to ensure that it is adequate to support r. 208 of those Rules.

(Commentary p. 23.)

- (G) Rules similar to the Chief Justice's (Evidence by Commission) Rules 1970 of Victoria should be made in Queensland pursuant to the powers conferred by the Imperial Evidence by Commission Acts 1859 and 1885 (22 Vic. c. 20 and 48 & 49 Vic. c. 74).

(Commentary pp. 24-25.)

- (H) The following Rules of the Supreme Court should be examined with a view to amendments that may be made necessary by the enactment of a new Evidence Act:

Order 35 rr. 16 & 19.

Order 36 r. 4.

(Commentary pp. 39, 50.)