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Evidence Act 2004

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(No. 2, 2015)



EVIDENCE ACT 2004

Note: certain sections are omitted but their numbering remains in order to maintain parity in section numbering with the *Evidence Act 1995* of the Commonwealth.

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SCHEDULE 1

OATHS AND AFFIRMATIONS

DICTIONARY

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admission	criminal proceeding
another Territory	cross-examination
asserted fact	cross-examiner
associated defendant	de facto spouse
Australia	document
Australian court	examination in chief
Australian law	exercise
Australian Parliament	fax
business	foreign court
case	function
child	gazette
civil penalty	government or official gazette
civil proceeding	Governor of a State
client	Governor-General
coincidence evidence	hearsay rule
coincidence rule	identification evidence
Commonwealth owned body corporate	investigating official
Commonwealth record	joint sitting
confidential communication	judge
confidential document	law
court	lawyer
credibility of a person	leading question
credibility of a witness	Legislative Assembly
credibility rule	

**Member of the Australian Federal
Police**

Norfolk Island or overseas proceeding
Norfolk Island court
Norfolk Island Record
offence
official questioning
opinion rule
parent
picture identification evidence
police officer
postal article
previous representation

prior consistent statement
prior inconsistent statement
probative value
public document
re-examination
representation
seal
Statistician
tendency evidence
tendency rule
visual identification evidence
witness

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Evidence Act 2004

An Act about the law of evidence, and for related purposes.

BE IT ENACTED by the Legislative Assembly of Norfolk Island as follows:

CHAPTER 1 — PRELIMINARY

Introductory note:

Outline of this Act

This Act sets out the Norfolk Island rules of evidence. Generally speaking, the Act applies to proceedings in courts and before other persons or bodies required to apply the laws of evidence (see section 4).

Chapter 2 is about how evidence is adduced in proceedings.

Chapter 3 is about admissibility of evidence in proceedings.

Chapter 4 is about proof of matters in proceedings.

Chapter 5 deals with miscellaneous matters.

The Dictionary at the end of this Act defines terms and expressions used in this Act.

Related legislation

This Act is in most respects uniform with the *Evidence Act 1995* of the Commonwealth which in turn is similarly uniform with the *Evidence Act 1994* of New South Wales. This Act and the Commonwealth Act are drafted in identical terms except so far as differences are identified by appropriate annotations to the texts, and except so far as minor drafting variations are required because one Act is a Norfolk Island Act and one Act is a Commonwealth Act.

If the Commonwealth Act contains a provision that is not included in this Act, the numbering of the other Act is included and the word “omitted” appears or if the numbering is used for a different provision a note explains the change. Some notes are the same as the Commonwealth Act others explain differences with this Act.

PART 1.1 — FORMAL MATTERS

Name of Act

1. This Act may be cited as the *Evidence Act 2004*.

Commencement

2. (1) This Part and the Dictionary at the end of this Act commence on the day on which notification of assent to this Act is published in the Gazette.

- (2) The remaining provisions of this Act commence on a day or days to be fixed by the Administrator by notice in the Gazette.

- (3) If a provision referred to in subsection (2) has not commenced 60 days after the commencement of this Act, it commences on the next day.

Definitions

3. (1) Expressions used in this Act (or in a particular provision of this Act) that are defined in the Dictionary at the end of this Act have the meanings given to them in the Dictionary.

(2) Notes included in this Act are explanatory notes and do not form part of this Act.

(3) Without limiting the effect of, and subject to, section 15AB of the *Acts Interpretation Act 1901* of the Commonwealth (applying because of section 8A of the *Acts Interpretation Act 1979*) and section 10D of the *Acts Interpretation Act 1979*, material that may be used in the interpretation of a provision of this Act includes any relevant report of a Law Reform Commission laid before either House of the Parliament of the Commonwealth before the corresponding provision of the *Evidence Act 1995* of the Commonwealth was enacted.

Notes.

¹ Some expressions used in this Act are defined in the *Acts Interpretation Act 1979*, and have the meanings given to them in that Act.

² The Commonwealth Act includes a different subsection (3). Subsection (3) of this Act is covered by section 15AB of the *Acts Interpretation Act 1901* of the Commonwealth.

PART 1.2 — APPLICATION OF THIS ACT

Courts and proceedings to which Act applies

4. (1) This Act applies in relation to all proceedings in a Norfolk Island court, including proceedings that:

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

(2) If such a proceeding relates to sentencing:

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

(3) The court must make a direction if:

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

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

Notes.

¹ Section 4 of the Commonwealth Act differs from this section. It applies that Act to proceedings in a federal court or an ACT court. Some provisions of the Commonwealth Act extend beyond proceedings in federal courts and ACT courts (see sections 5, 185, 186 and 187 of the Commonwealth Act).

² "Norfolk Island court" is defined in the Dictionary. The definition includes persons or bodies required to apply the laws of evidence.

³ The Commonwealth Act includes 2 additional subsections that exclude the application of that Act to appeals from a court of a State (including appeals from a court of a State exercising federal jurisdiction) and certain other courts.

5. [Omitted]

6. [Omitted]

Act binds Crown

7. (a) This Act binds the Crown in right of Norfolk Island and also so far as possible in all its other capacities, and the Administration.
- (b) Nothing in this Act makes the Crown in any capacity, or the Administration, liable to be prosecuted for an offence.

Operation of other Acts

8. This Act does not affect the operation of the provisions of any other Act.

Note. The Commonwealth Act includes additional subsections relating to the operation of the *Corporations Act 2001* of the Commonwealth, the *Australian Securities and Investments Commission Act 2001* of the Commonwealth and certain laws in force in the ACT. It also provides for the regulations to have continued effect (until amended) after the commencement of the Commonwealth section.

....

Application of common law and equity

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

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

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

Note. This section differs from section 9 of the Commonwealth Act. That section preserves the written and unwritten laws of States and Territories in relation to various matters.

Parliamentary privilege preserved

10. (1) This Act does not affect the law relating to the privileges of the Legislative Assembly of Norfolk Island, any Australian Parliament or any House of any Australian Parliament.

(2) In particular, section 15(2) does not affect, and is in addition to, the law relating to such privileges.

General powers of a court

11. (1) The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.

(2) In particular, the powers of a court with respect to abuse of process in a proceeding are not affected.

CHAPTER 2 — ADDUCING EVIDENCE**Introductory note:****Outline of this Chapter**

This Chapter is about ways in which evidence is adduced.

Part 2.1 is about adducing evidence from witnesses.

Part 2.2 is about adducing documentary evidence.

Part 2.3 is about adducing other forms of evidence.

PART 2.1 — WITNESSES*Division 1 — Competence and compellability of witnesses***Competence and compellability**

12. Except as otherwise provided by this Act:

- (a) every person is competent to give evidence; and
- (b) a person who is competent to give evidence about a fact is compellable to give that evidence.

Competence: lack of capacity

13. (1) A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence is not competent to give sworn evidence.

(2) A person who because of subsection (1) is not competent to give sworn evidence is competent to give unsworn evidence if:

- (a) the court is satisfied that the person understands the difference between the truth and a lie; and
- (b) the court tells the person that it is important to tell the truth; and
- (c) the person indicates, by responding appropriately when asked, that he or she will not tell lies in the proceeding.

(3) A person who is incapable of giving a rational reply to a question about a fact is not competent to give evidence about the fact, but may be competent to give evidence about other facts.

(4) A person is not competent to give evidence about a fact if:

- (a) the person is incapable of hearing or understanding, or of communicating a reply to, a question about the fact; and
- (b) that incapacity cannot be overcome.

(5) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.

(6) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.

(7) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit.

Compellability: reduced capacity

14. A person is not compellable to give evidence on a particular matter if the court is satisfied that:

- (a) substantial cost or delay would be incurred in ensuring that the person would be capable of hearing or understanding, or of communicating replies to, questions on that matter; and
- (b) adequate evidence on that matter has been given, or will be able to be given, from one or more other persons or sources.

Compellability: Sovereign and others

15. (1) None of the following is compellable to give evidence:

- (a) the Sovereign;
- (b) the Governor-General;
- (c) the Administrator of Norfolk Island or another Territory;
- (d) the Governor of a State;
- (e) a foreign sovereign or the Head of State of a foreign country.

(2) A member of the Legislative Assembly or of a House of an Australian Parliament is not compellable to give evidence if the member would, if compelled to give evidence, be prevented from attending:

- (a) a sitting of the Legislative Assembly or that House, or a joint sitting of that Parliament; or
- (b) a meeting of a committee of the Legislative Assembly or that House or that Parliament, being a committee of which he or she is a member.

Competence and compellability: judges and jurors

16. (1) A person who is a judge or juror in a proceeding is not competent to give evidence in that proceeding. However, a juror is competent to give evidence in the proceeding about matters affecting the conduct of the proceeding.

(2) A person who is or was a judge in a proceeding in Norfolk Island or in an overseas proceeding is not compellable to give evidence about that proceeding unless the court gives leave.

Competence and compellability: defendants in criminal proceedings

17. (1) This section applies only in a criminal proceeding.

(2) A defendant is not competent to give evidence as a witness for the prosecution.

(3) An associated defendant is not compellable to give evidence for or against a defendant in a criminal proceeding, unless the associated defendant is being tried separately from the defendant.

(4) If a witness is an associated defendant who is being tried jointly with the defendant in the proceeding, the court is to satisfy itself (if there is a jury, in the jury's absence) that the witness is aware of the effect of subsection (3).

Note. "Associated defendant" is defined in the Dictionary.

Compellability of spouses and others in criminal proceedings generally

18. (1) This section applies only in a criminal proceeding.

(2) A person who, when required to give evidence, is the spouse, de facto spouse, parent or child of a defendant may object to being required:

- (a) to give evidence; or
- (b) to give evidence of a communication between the person and the defendant,

as a witness for the prosecution.

(3) The objection is to be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right so to object, whichever is the later.

(4) If it appears to the court that a person may have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person.

(5) If there is a jury, the court is to hear and determine any objection under this section in the absence of the jury.

(6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:

- (a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence; and

- (b) the nature and extent of that harm outweighs the desirability of having the evidence given.

(7) Without limiting the matters that may be taken into account by the court for the purposes of subsection (6), it must take into account the following:

- (a) the nature and gravity of the offence for which the defendant is being prosecuted;
- (b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it;
- (c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor;
- (d) the nature of the relationship between the defendant and the person;
- (e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.

(8) If an objection under this section has been determined, the prosecutor may not comment on:

- (a) the objection; or
- (b) the decision of the court in relation to the objection; or
- (c) the failure of the person to give evidence.

Compellability of spouses and others in certain criminal proceedings

19. Section 18 does not apply in proceedings for an offence against or referred to in the following provisions:

- (a) an offence against a provision of Part 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.9 or 3.10 of the *Criminal Code 2007* being an offence against a person under the age of 16 years;
- (b) an offence against section 174 or 175 of the *Child Welfare Act 2009*;
- (c) a domestic violence offence (as defined in section 11 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (NI)).

Comment on failure to give evidence

20. (1) This section applies only in a criminal proceeding for an indictable offence.

(2) The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.

(3) The judge or any party (other than the prosecutor) may comment on a failure to give evidence by a person who, at the time of the failure, was:

- (a) the defendant's spouse or de facto spouse; or
- (b) a parent or child of the defendant.

(4) However, unless the comment is made by another defendant in the proceeding, a comment of a kind referred to in subsection (3) must not suggest that the spouse, de facto spouse, parent or child failed to give evidence because:

- (a) the defendant was guilty of the offence concerned; or
- (b) the spouse, de facto spouse, parent or child believed that the defendant was guilty of the offence concerned.

(5) If:

- (a) 2 or more persons are being tried together for an indictable offence; and

- (b) comment is made by any of those persons on the failure of any of those persons or of the spouse or de facto spouse, or a parent or child, of any of those persons to give evidence,

the judge may, in addition to commenting on the failure to give evidence, comment on any comment of a kind referred to in paragraph (b).

Division 2 — Oaths and affirmations

Sworn evidence of witnesses to be on oath or affirmation

21. (1) A witness in a proceeding must either take an oath, or make an affirmation, before giving evidence.

(2) Subsection (1) does not apply to a person who gives unsworn evidence under sub section 13(2).

(3) A person who is called merely to produce a document or thing to the court need not take an oath or make an affirmation before doing so.

(4) The witness is to take the oath, or make the affirmation, in accordance with the appropriate form in Schedule 1 or in a similar form.

(5) Such an affirmation has the same effect for all purposes as an oath.

Interpreters to act on oath or affirmation

22. (1) A person must either take an oath, or make an affirmation, before acting as an interpreter in a proceeding.

(2) The person is to take the oath, or make the affirmation, in accordance with the appropriate form in Schedule 1 or in a similar form.

(3) Such an affirmation has the same effect for all purposes as an oath.

Choice of oath or affirmation

23. (1) A person who is to be a witness or act as an interpreter in a proceeding may choose whether to take an oath or make an affirmation.

(2) The court is to inform the person that he or she has this choice.

(3) The court may direct a person who is to be a witness to make an affirmation if:

(a) the person refuses to choose whether to take an oath or make an affirmation;
or

(b) it is not reasonably practicable for the person to take an appropriate oath.

Requirements for oaths

24. (1) It is not necessary that a religious text be used in taking an oath.

(2) An oath is effective for the purposes of this Division even if the person who took it:

(a) did not have a religious belief or did not have a religious belief of a particular kind; or

(b) did not understand the nature and consequences of the oath.

Abolition of right of accused to make unsworn statement

25. (1) Any rule of law or procedure or any practice permitting an accused person in criminal proceedings to make an unsworn statement or to give unsworn evidence in defence is abolished.

(2) Subsection (1) does not affect the operation of sections 13 and 14 of this Act.

Note. The Commonwealth Act includes a provision preserving any right of a defendant under the law of a State or Territory to make an unsworn statement. This Act has adopted section 68A of the *Evidence Act 1971* (ACT).

Division 3 — General rules about giving evidence

Court's control over questioning of witnesses

26. The court may make such orders as it considers just in relation to:
- (a) the way in which witnesses are to be questioned; and
 - (b) the production and use of documents and things in connection with the questioning of witnesses; and
 - (c) the order in which parties may question a witness; and
 - (d) the presence and behaviour of any person in connection with the questioning of witnesses.

Parties may question witnesses

27. A party may question any witness, except as provided by this Act.

Order of examination in chief, cross-examination and re-examination

28. Unless the court otherwise directs:
- (a) cross-examination of a witness is not to take place before the examination in chief of the witness; and
 - (b) re-examination of a witness is not to take place before all other parties who wish to do so have cross-examined the witness.

Manner and form of questioning witnesses and their responses

29. (1) A party may question a witness in any way the party thinks fit, except as provided by this Chapter or as directed by the court.

(2) A witness may give evidence wholly or partly in narrative form if:

- (a) the party that called the witness has applied to the court for a direction that the witness give evidence in that form; and
- (b) the court so directs.

(3) Such a direction may include directions about the way in which evidence is to be given in that form.

(4) Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

Interpreters

30. A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

Deaf and mute witnesses

31. (1) A witness who cannot hear adequately may be questioned in any appropriate way.

(2) A witness who cannot speak adequately may give evidence by any appropriate means.

(3) The court may give directions concerning either or both of the following:

- (a) the way in which a witness may be questioned under subsection (1);
- (b) the means by which a witness may give evidence under subsection (2).

(4) This section does not affect the right of a witness to whom this section applies to give evidence about a fact through an interpreter under section 30.

Attempts to revive memory in court

32. (1) A witness must not, in the course of giving evidence, use a document to try to revive his or her memory about a fact or opinion unless the court gives leave.

(2) Without limiting the matters that the court may take into account in deciding whether to give leave, it is to take into account:

- (a) whether the witness will be able to recall the fact or opinion adequately without using the document; and
- (b) whether so much of the document as the witness proposes to use is, or is a copy of, a document that:
 - (i) was written or made by the witness when the events recorded in it were fresh in his or her memory; or
 - (ii) was, at such a time, found by the witness to be accurate.

(3) If a witness has, while giving evidence, used a document to try to revive his or her memory about a fact or opinion, the witness may, with the leave of the court, read aloud, as part of his or her evidence, so much of the document as relates to that fact or opinion.

(4) The court is, on the request of a party, to give such directions as the court thinks fit to ensure that so much of the document as relates to the proceeding is produced to that party.

Evidence given by police officers

33. (1) Despite section 32, in any criminal proceeding, a police officer may give evidence in chief for the prosecution by reading or being led through a written statement previously made by the police officer.

(2) Evidence may not be so given unless:

- (a) the statement was made by the police officer at the time of or soon after the occurrence of the events to which it refers; and
- (b) the police officer signed the statement when it was made; and
- (c) a copy of the statement had been given to the person charged or to his or her lawyer a reasonable time before the hearing of the evidence for the prosecution.

(3) A reference in this section to a police officer includes a reference to a person who, at the time the statement concerned was made, was a police officer.

Attempts to revive memory out of court

34. (1) The court may, on the request of a party, give such directions as are appropriate to ensure that specified documents and things used by a witness otherwise than while giving evidence to try to revive his or her memory are produced to the party for the purposes of the proceeding.

(2) The court may refuse to admit the evidence given by the witness so far as it concerns a fact as to which the witness so tried to revive his or her memory if, without reasonable excuse, the directions have not been complied with.

Effect of calling for production of documents

35. (1) A party is not to be required to tender a document only because the party, whether under this Act or otherwise:

- (a) called for the document to be produced to the party; or
- (b) inspected it when it was so produced.

(2) The party who produces a document so called for is not entitled to tender it only because the party to whom it was produced, or who inspected it, fails to tender it.

Person may be examined without subpoena or other process

36. (1) The court may order a person who:

- (a) is present at the hearing of a proceeding; and
- (b) is compellable to give evidence in the proceeding,

to give evidence and to produce documents or things even if a subpoena or other process requiring the person to attend for that purpose has not been duly served on the person.

(2) A person so ordered to give evidence or to produce documents or things is subject to the same penalties and liabilities as if the person had been duly served with such a subpoena or other process.

(3) A party who inspects a document or thing produced to the court because of subsection (1) need not use the document in evidence.

Division 4 — Examination in chief and re-examination

Leading questions

37. (1) A leading question must not be put to a witness in examination in chief or in re-examination unless:

- (a) the court gives leave; or
- (b) the question relates to a matter introductory to the witness's evidence; or
- (c) no objection is made to the question and (leaving aside the party conducting the examination in chief or re-examination) each other party to the proceeding is represented by a lawyer; or
- (d) the question relates to a matter that is not in dispute; or
- (e) if the witness has specialised knowledge based on the witness's training, study or experience—the question is asked for the purpose of obtaining the witness's opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be, given.

(2) Unless the court otherwise directs, subsection (1) does not apply in civil proceedings to a question that relates to an investigation, inspection or report that the witness made in the course of carrying out public or official duties.

(3) Subsection (1) does not prevent a court from exercising power under rules of court to allow a written statement or report to be tendered or treated as evidence in chief of its maker.

Note. "Leading question" is defined in the Dictionary.

Unfavourable witnesses

38. (1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:

- (a) evidence given by the witness that is unfavourable to the party; or
- (b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence; or
- (c) whether the witness has, at any time, made a prior inconsistent statement.

(2) Questioning a witness under this section is taken to be cross-examination for the purposes of this Act (other than section 39).

(3) The party questioning the witness under this section may, with the leave of the court, question the witness about matters relevant only to the witness's credibility.

Note. The rules about admissibility of evidence relevant only to credibility are set out in Part 3.7.

(4) Questioning under this section is to take place before the other parties cross-examine the witness, unless the court otherwise directs.

(5) If the court so directs, the order in which the parties question the witness is to be as the court directs.

(6) Without limiting the matters that the court may take into account in determining whether to give leave or a direction under this section, it is to take into account:

- (a) whether the party gave notice at the earliest opportunity of his or her intention to seek leave; and
- (b) the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party.

(7) A party is subject to the same liability to be cross-examined under this section as any other witness if:

- (a) a proceeding is being conducted in the name of the party by or on behalf of an insurer or other person; and
- (b) the party is a witness in the proceeding.

Limits on re-examination

39. On re-examination:

- (a) a witness may be questioned about matters arising out of evidence given by the witness in cross-examination; and
- (b) other questions may not be put to the witness unless the court gives leave.

Division 5 — Cross-examination

Witness called in error

40. A party is not to cross-examine a witness who has been called in error by another party and has not been questioned by that other party about a matter relevant to a question to be determined in the proceeding.

Improper questions

41. (1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is:

- (a) misleading; or
- (b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

(2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:

- (a) any relevant condition or characteristic of the witness, including age, personality and education; and
- (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

Leading questions

42. (1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.

(2) Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which:

- (a) evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness; and
- (b) the witness has an interest consistent with an interest of the cross-examiner; and
- (c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter; and
- (d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.

(3) The court is to disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used.

(4) This section does not limit the court's power to control leading questions.

Note. "Leading question" is defined in the Dictionary.

Prior inconsistent statements of witnesses

43. (1) A witness may be cross-examined about a prior inconsistent statement alleged to have been made by the witness whether or not:

- (a) complete particulars of the statement have been given to the witness; or
- (b) a document containing a record of the statement has been shown to the witness.

(2) If, in cross-examination, a witness does not admit that he or she has made a prior inconsistent statement, the cross-examiner is not to adduce evidence of the statement otherwise than from the witness unless, in the cross-examination, the cross-examiner:

- (a) informed the witness of enough of the circumstances of the making of the statement to enable the witness to identify the statement; and
- (b) drew the witness's attention to so much of the statement as is inconsistent with the witness's evidence.

(3) For the purpose of adducing evidence of the statement, a party may re-open the party's case.

Previous representations of other persons

44. (1) Except as provided by this section, a cross-examiner must not question a witness about a previous representation alleged to have been made by a person other than the witness.

(2) A cross-examiner may question a witness about the representation and its contents if:

- (a) evidence of the representation has been admitted; or
- (b) the court is satisfied that it will be admitted.

(3) If subsection (2) does not apply and the representation is contained in a document, the document may only be used to question a witness as follows:

- (a) the document must be produced to the witness;
- (b) if the document is a tape recording, or any other kind of document from which sounds are reproduced—the witness must be provided with the means (for example, headphones) to listen to the contents of the document without other persons present at the cross-examination hearing those contents;
- (c) the witness must be asked whether, having examined (or heard) the contents of the document, the witness stands by the evidence that he or she has given;
- (d) neither the cross-examiner nor the witness is to identify the document or disclose any of its contents.

(4) A document that is so used may be marked for identification.

Production of documents

45. (1) This section applies if a party is cross-examining or has cross-examined a witness about:

- (a) a prior inconsistent statement alleged to have been made by the witness that is recorded in a document; or
- (b) a previous representation alleged to have been made by another person that is recorded in a document.

(2) If the court so orders or if another party so requires, the party must produce:

- (a) the document; or
- (b) such evidence of the contents of the document as is available to the party, to the court or to that other party.

(3) The court may:

- (a) examine a document or evidence that has been so produced; and
- (b) give directions as to its use; and
- (c) admit it even if it has not been tendered by a party.

(4) Subsection (3) does not permit the court to admit a document or evidence that is not admissible because of Chapter 3.

(5) The mere production of a document to a witness who is being cross-examined does not give rise to a requirement that the cross-examiner tender the document.

Leave to recall witnesses

46. (1) The court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, if the evidence concerned has been admitted and:

- (a) it contradicts evidence about the matter given by the witness in examination in chief; or
- (b) the witness could have given evidence about the matter in examination in chief.

(2) A reference in this section to a matter raised by evidence adduced by another party includes a reference to an inference drawn from, or that the party intends to draw from, that evidence.

PART 2.2 — DOCUMENTS

Definitions

47. (1) A reference in this Part to a **document in question** is a reference to a document as to the contents of which it is sought to adduce evidence.

(2) A reference in this Part to a copy of a document in question includes a reference to a document that is not an exact copy of the document in question but that is identical to the document in question in all relevant respects.

Proof of contents of documents

48. (1) A party may adduce evidence of the contents of a document in question by tendering the document in question or by any one or more of the following methods:

- (a) adducing evidence of an admission made by another party to the proceeding as to the contents of the document in question;
- (b) tendering a document that:
 - (i) is or purports to be a copy of the document in question; and
 - (ii) has been produced, or purports to have been produced, by a device that reproduces the contents of documents;
- (c) if the document in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing)—tendering a document that is or purports to be a transcript of the words;

- (d) if the document in question is an article or thing on or in which information is stored in such a way that it cannot be used by the court unless a device is used to retrieve, produce or collate it—tendering a document that was or purports to have been produced by use of the device;
- (e) tendering a document that:
 - (i) forms part of the records of or kept by a business (whether or not the business is still in existence); and
 - (ii) is or purports to be a copy of, or an extract from or a summary of, the document in question, or is or purports to be a copy of such an extract or summary;
- (f) if the document in question is a public document—tendering a document that is or purports to be a copy of the document in question and that is or purports to have been printed:
 - (i) by a person authorised by or on behalf of the government to print the document or by the Government Printer of Norfolk Island or of the Commonwealth or by the government or official printer of a State or another Territory; or
 - (ii) by the authority of the Administration of Norfolk Island, or the Government of the Commonwealth, State another Territory or a foreign country; or
 - (iii) by authority of the Legislative Assembly, an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of the Legislative Assembly or of an Australian Parliament.

(2) Subsection (1) applies to a document in question whether the document in question is available to the party or not.

(3) If the party adduces evidence of the contents of a document under subsection (1)(a), the evidence may only be used:

- (a) in respect of the party's case against the other party who made the admission concerned; or
- (b) in respect of the other party's case against the party who adduced the evidence in that way.

(4) A party may adduce evidence of the contents of a document in question that is not available to the party, or the existence and contents of which are not in issue in the proceeding, by:

- (a) tendering a document that is a copy of, or an extract from or summary of, the document in question; or
- (b) adducing from a witness evidence of the contents of the document in question.

Notes.

¹ Clause 5 of Part 2 of the Dictionary is about the availability of documents.

² Section 182 of the Commonwealth Act gives section 48 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

Documents in foreign countries

49. No paragraph of section 48(1) (other than paragraph (a)) applies to a document that is in a foreign country unless:

- (a) the party who adduces evidence of the contents of the document in question has, not less than 28 days (or such other period as may be prescribed by the regulations or by rules of court) before the day on which the evidence is adduced, served on each other party a copy of the document proposed to be tendered; or
- (b) the court directs that it is to apply.

Note. Section 182 of the Commonwealth Act gives section 49 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

Proof of voluminous or complex documents

50. (1) The court may direct that a party may adduce evidence of the contents of 2 or more documents in question in the form of a summary if:

- (a) application is made to it by the party before the hearing concerned; and
- (b) it is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question.

(2) The court may only make such a direction if the party seeking to adduce the evidence in the form of a summary has:

- (a) served on each other party a copy of the summary that discloses the name and address of the person who prepared the summary; and
- (b) given each other party a reasonable opportunity to examine or copy the documents in question.

(3) The opinion rule does not apply to evidence adduced in accordance with a direction under this section.

Original document rule abolished

51. The principles and rules of the common law that relate to the means of proving the contents of documents are abolished.

Note. Section 182 of the Commonwealth Act gives the provisions of Part 2.2 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

PART 2.3 — OTHER EVIDENCE**Adducing of other evidence not affected**

52. This Act (other than this Part) does not affect the operation of a law of Norfolk Island or rule of practice so far as it permits evidence to be adduced in a way other than by witnesses giving evidence or documents being tendered in evidence.

Views

53. (1) A judge may, on application, order that a demonstration, experiment or inspection be held.

(2) A judge is not to make an order unless he or she is satisfied that:

- (a) the parties will be given a reasonable opportunity to be present; and
- (b) the judge and, if there is a jury, the jury will be present.

(3) Without limiting the matters that the judge may take into account in deciding whether to make an order, the judge is to take into account the following:

- (a) whether the parties will be present;

- (b) whether the demonstration, experiment or inspection will, in the court's opinion, assist the court in resolving issues of fact or understanding the evidence;
- (c) the danger that the demonstration, experiment or inspection might be unfairly prejudicial, might be misleading or confusing or might cause or result in undue waste of time;
- (d) in the case of a demonstration—the extent to which the demonstration will properly reproduce the conduct or event to be demonstrated;
- (e) in the case of an inspection—the extent to which the place or thing to be inspected has materially altered.

(4) The court (including, if there is a jury, the jury) is not to conduct an experiment in the course of its deliberations.

(5) This section does not apply in relation to the inspection of an exhibit by the court or, if there is a jury, by the jury.

(6) A member or members of a jury must not conduct an experiment or demonstration or inspection other than in accordance with this section.

Penalty: 50 penalty units

Note: Subsection (6) is not found in the Commonwealth Act.

Views to be evidence

54. The court (including, if there is a jury, the jury) may draw any reasonable inference from what it sees, hears or otherwise notices during a demonstration, experiment or inspection.

CHAPTER 3 — ADMISSIBILITY OF EVIDENCE

Introductory note:

Outline of this Chapter

This Chapter is about whether evidence adduced in a proceeding is admissible. This Introductory Note and the diagram are explanatory notes and are not part of the Act

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

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

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

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

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

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

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

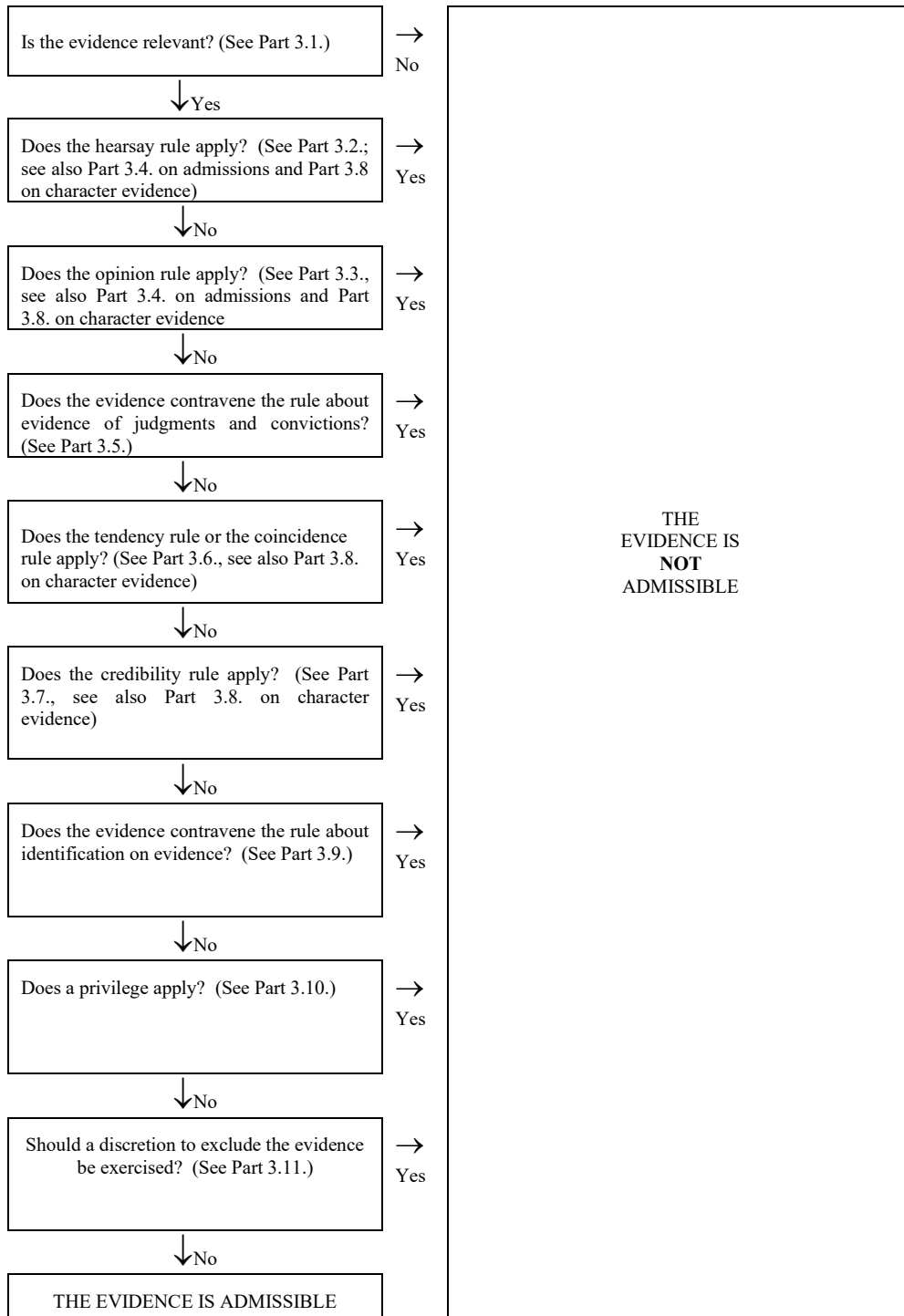
Part 3.8 is about character evidence and the extent to which it is admissible as exceptions to the hearsay rule, the opinion rule, the tendency rule and the credibility rule.

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

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

Part 3.11 gives courts discretions to exclude evidence even if it would otherwise be admissible.

The following diagram shows how this Chapter applies to particular evidence:



PART 3.1 — RELEVANCE

Relevant evidence

55. (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to:

- (a) the credibility of a witness; or
- (b) the admissibility of other evidence; or
- (c) a failure to adduce evidence.

Relevant evidence to be admissible

56. (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.

Provisional relevance

57. (1) If the determination of the question whether evidence adduced by a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant:

- (a) if it is reasonably open to make that finding; or
- (b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding.

(2) Without limiting subsection (1), if the relevance of evidence of an act done by a person depends on the court making a finding that the person and one or more other persons had, or were acting in furtherance of, a common purpose (whether to effect an unlawful conspiracy or otherwise), the court may use the evidence itself in determining whether the common purpose existed.

Inferences as to relevance

58. (1) If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.

(2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

PART 3.2 — HEARSAY

Division 1 — The hearsay rule

The hearsay rule—exclusion of hearsay evidence

59. (1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.

(2) Such a fact is in this Part referred to as an **asserted fact**.

(3) Subsection (1) does not apply to evidence of a representation contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

Notes. Specific exceptions to the hearsay rule are as follows:

- evidence relevant for a non-hearsay purpose (section 60),
- first-hand hearsay:
 - civil proceedings, if the maker of the representation is unavailable (section 63) or available (section 64)

- criminal proceedings, if the maker of the representation is unavailable (section 65) or available (section 66)
- business records (section 69)
- tags and labels (section 70)
- telecommunications (section 71)
- contemporaneous statements about a person's health etc (section 72)
- marriage, family history or family relationships (section 73)
- public or general rights (section 74)
- use of evidence in interlocutory proceedings (section 75)
- admissions (section 81)
- representations about employment or authority (section 87(2))
- exceptions to the rule excluding evidence of judgments and convictions (section 92(3))
- character of and expert opinion about accused persons (sections 110 and 111).

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

Examples:

¹ D is the defendant in a sexual assault trial. W has made a statement to the police that X told W that X had seen D leave a night club with the victim shortly before the sexual assault is alleged to have occurred. Unless an exception to the hearsay rule applies, evidence of what X told W cannot be given at the trial.

² P had told W that the handbrake on W's car did not work. Unless an exception to the hearsay rule applies, evidence of that statement cannot be given by P, W or anyone else to prove that the handbrake was defective.

³ W had bought a video cassette recorder and written down its serial number on a document. Unless an exception to the hearsay rule applies, the document is inadmissible to prove that a video cassette recorder later found in D's possession was the video cassette recorder bought by W.

Exception: evidence relevant for a non-hearsay purpose

60. The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

Exceptions to the hearsay rule dependent on competency

61. (1) This Part does not enable use of a previous representation to prove the existence of an asserted fact if, when the representation was made, the person who made it was not competent to give evidence about the fact because he or she was incapable of giving a rational reply to a question about the fact.

(2) This section does not apply to a contemporaneous representation made by a person about his or her health, feelings, sensations, intention, knowledge or state of mind.

Note. For the admissibility of such contemporaneous representations, see section 72.

(3) For the purposes of this section, it is presumed, unless the contrary is proved, that when the representation was made the person who made it was competent to give evidence about the asserted fact.

Division 2 — "First-hand" hearsay

Restriction to "first-hand" hearsay

62. (1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a previous representation that was made by a person who had personal knowledge of an asserted fact.

(2) A person has personal knowledge of the asserted fact if his or her knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact.

Exception: civil proceedings if maker not available

63. (1) This section applies in a civil proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to:

- (a) evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
- (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Notes.

¹ Section 67 imposes notice requirements relating to this subsection.

² Clause 4 of Part 2 of the Dictionary is about the availability of persons.

Exception: civil proceedings if maker available

64. (1) This section applies in a civil proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to:

- (a) oral evidence of the representation that is given by a person who saw, heard or otherwise perceived the representation being made; or
- (b) a document so far as it contains the representation, or another representation to which it is reasonably necessary to refer in order to understand the representation,

if it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person who made the representation to give evidence.

Note. Section 67 imposes notice requirements relating to this subsection. Section 68 is about objections to notices that relate to this subsection.

(3) If the person who made the representation has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

- (a) that person; or
- (b) a person who saw, heard or otherwise perceived the representation being made,

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(4) A document containing a representation to which subsection (3) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Note. Clause 4 of Part 2 of the Dictionary is about the availability of persons.

Exception: criminal proceedings if maker not available

65. (1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation was:

- (a) made under a duty to make that representation or to make representations of that kind; or
- (b) made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or

- (c) made in circumstances that make it highly probable that the representation is reliable; or
- (d) against the interests of the person who made it at the time it was made.

Note. Section 67 imposes notice requirements relating to this subsection.

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

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

Note. Section 67 imposes notice requirements relating to this subsection.

(4) If there is more than one defendant in the criminal proceeding, evidence of a previous representation that:

- (a) is given in a proceeding in Norfolk Island, in Australia, or in an overseas proceeding; and
- (b) is admitted into evidence in the criminal proceeding because of subsection (3),

cannot be used against a defendant who did not cross-examine, and did not have a reasonable opportunity to cross-examine, the person about the representation.

(5) For the purposes of subsections (3) and (4), a defendant is taken to have had a reasonable opportunity to cross-examine a person if the defendant was not present at a time when the cross-examination of a person might have been conducted but:

- (a) could reasonably have been present at that time; and
- (b) if present could have cross-examined the person.

(6) Evidence of the making of a representation to which subsection (3) applies may be adduced by producing a transcript, or a recording, of the representation that is authenticated by:

- (a) the person to whom, or the court or other body to which, the representation was made; or
- (b) if applicable, the registrar or other proper officer of the court or other body to which the representation was made; or
- (c) the person or body responsible for producing the transcript or recording.

(7) Without limiting paragraph (2)(d), a representation is taken for the purposes of that paragraph to be against the interests of the person who made it if it tends:

- (a) to damage the person's reputation; or
- (b) to show that the person has committed an offence for which the person has not been convicted; or
- (c) to show that the person is liable in an action for damages.

(8) The hearsay rule does not apply to:

- (a) evidence of a previous representation adduced by a defendant if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; or
- (b) a document tendered as evidence by a defendant so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

Note. Section 67 imposes notice requirements relating to this subsection.

(9) If evidence of a previous representation about a matter has been adduced by a defendant and has been admitted, the hearsay rule does not apply to evidence of another representation about the matter that:

- (a) is adduced by another party; and
- (b) is given by a person who saw, heard or otherwise perceived the other representation being made.

Note. Clause 4 of Part 2 of the Dictionary is about the availability of persons.

Exception: criminal proceedings if maker available

66. (1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

- (a) that person; or
- (b) a person who saw, heard or otherwise perceived the representation being made,

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

(3) If a representation was made for the purpose of indicating the evidence that the person who made it would be able to give in a proceeding in Norfolk Island, in Australia, or in an overseas proceeding, subsection (2) does not apply to evidence adduced by the prosecutor of the representation unless the representation concerns the identity of a person, place or thing.

(4) A document containing a representation to which subsection (2) applies must not be tendered before the conclusion of the examination in chief of the person who made the representation, unless the court gives leave.

Note. Clause 4 of Part 2 of the Dictionary is about the availability of persons.

Notice to be given

67. (1) Sub sections 63(2), 64(2) and 65(2), (3) and (8) do not apply to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the party's intention to adduce the evidence.

(2) Notices given under subsection (1) are to be given in accordance with any regulations or rules of court made for the purposes of this section.

(3) The notice must state:

- (a) the particular provisions of this Division on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence; and
- (b) if sub section 64(2) is such a provision—the grounds, specified in that provision, on which the party intends to rely.

(4) Despite subsection (1), if notice has not been given, the court may, on the application of a party, direct that one or more of those subsections is to apply despite the party's failure to give notice.

(5) The direction:

- (a) is subject to such conditions (if any) as the court thinks fit, and
- (b) in particular, may provide that, in relation to specified evidence, the subsection or subsections concerned apply with such modifications as the court specifies.

Objections to tender of hearsay evidence in civil proceedings if maker available

68. (1) In a civil proceeding, if the notice discloses that it is not intended to call the person who made the previous representation concerned because it:

- (a) would cause undue expense or undue delay; or
- (b) would not be reasonably practicable,

a party may, not later than 21 days after notice has been given, object to the tender of the evidence, or of a specified part of the evidence.

(2) The objection is to be made by giving to each other party a written notice setting out the grounds on which the objection is made.

(3) The court may, on the application of a party, determine the objection at or before the hearing.

(4) If the objection is unreasonable, the court may order that, in any event, the party objecting is to bear the costs (ascertained on a solicitor and client basis) incurred by another party:

- (a) in relation to the objection; and
- (b) in calling the person who made the representation to give evidence.

Note. This subsection differs from section 68 (4) of New South Wales Act because of the different way costs are ascertained by Norfolk Island courts.

Division 3 — Other exceptions to the hearsay rule

Exception: business records

69. (1) This section applies to a document that:

- (a) either:
 - (i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or
 - (ii) at any time was or formed part of such a record; and
- (b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.

(2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:

- (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or
- (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.

(3) Subsection (2) does not apply if the representation:

- (a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, a Norfolk Island or overseas proceeding; or
- (b) was made in connection with an investigation relating or leading to a criminal proceeding.

(4) If:

- (a) the occurrence of an event of a particular kind is in question; and
- (b) in the course of a business, a system has been followed of making and keeping a record of the occurrence of all events of that kind,

the hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with that system, of the occurrence of the event.

(5) For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).

Notes.

¹ Sections 48, 49, 50, 146, 147 and 150(1) are relevant to the mode of proof, and authentication, of business records.

² Section 182 of the Commonwealth Act gives section 69 of the Commonwealth Act a wider application in relation to Commonwealth records.

Exception: contents of tags, labels and writing

70. The hearsay rule does not apply to a tag or label attached to, or writing placed on, an object (including a document) if the tag or label or writing may reasonably be supposed to have been so attached or placed:

- (a) in the course of a business; and
- (b) for the purpose of describing or stating the identity, nature, ownership, destination, origin or weight of the object, or of the contents (if any) of the object.

Note. The Commonwealth Act has an additional subsection. It provides that the exception does not apply to Customs and Excise prosecutions. Section 5 of the Commonwealth Act extends the application of that subsection to proceedings in all Australian courts.

Exception: telecommunications

71. The hearsay rule does not apply to a representation contained in a document recording a message that has been transmitted by electronic mail or by a fax, telegram, lettergram or telex so far as the representation is a representation as to:

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

Notes.

¹ Division 3 of Part 4.3 contains presumptions about telexes, lettergrams and telegrams.

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

Exception: contemporaneous statements about a person's health etc

72. The hearsay rule does not apply to evidence of a representation made by a person that was a contemporaneous representation about the person's health, feelings, sensations, intention, knowledge or state of mind.

Exception: reputation as to relationships and age

73. (1) The hearsay rule does not apply to evidence of reputation concerning:

- (a) whether a person was, at a particular time or at any time, a married person; or
- (b) whether a man and a woman cohabiting at a particular time were married to each other at that time; or
- (c) a person's age; or
- (d) family history or a family relationship.

(2) In a criminal proceeding, subsection (1) does not apply to evidence adduced by a defendant unless:

- (a) it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted; or

- (b) the defendant has given reasonable notice in writing to each other party of the defendant's intention to adduce the evidence.

(3) In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

Exception: reputation of public or general rights

74. (1) The hearsay rule does not apply to evidence of reputation concerning the existence, nature or extent of a public or general right.

(2) In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

Exception: interlocutory proceedings

75. In an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source.

PART 3.3 — OPINION

The opinion rule

76. (1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

(2) Subsection (1) does not apply to evidence of an opinion contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

Note. Specific exceptions to the opinion rule are as follows:

- summaries of voluminous or complex documents (section 50(3))
- evidence relevant otherwise than as opinion evidence (section 77)
- lay opinion (section 78)
- expert opinion (section 79)
- admissions (section 81)
- exceptions to the rule excluding evidence of judgments and convictions (section 92(3))
- character of and expert opinion about accused persons (sections 110 and 111).

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

Examples:

¹ P sues D, her doctor, for the negligent performance of a surgical operation. Unless an exception to the opinion rule applies, P's neighbour, W, who had the same operation, cannot give evidence of his opinion that D had not performed the operation as well as his own.

² P considers that electrical work that D, an electrician, has done for her is unsatisfactory. Unless an exception to the opinion rule applies, P cannot give evidence of her opinion that D does not have the necessary skills to do electrical work.

Exception: evidence relevant otherwise than as opinion evidence

77. The opinion rule does not apply to evidence of an opinion that is admitted because it is relevant for a purpose other than proof of the existence of a fact about the existence of which the opinion was expressed.

Exception: lay opinions

78. The opinion rule does not apply to evidence of an opinion expressed by a person if:

- (a) the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and
- (b) evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

Exception: opinions based on specialised knowledge

79. If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

Ultimate issue and common knowledge rules abolished

80. Evidence of an opinion is not inadmissible only because it is about:

- (a) a fact in issue or an ultimate issue; or
- (b) a matter of common knowledge.

PART 3.4 — ADMISSIONS

Note. "Admission" is defined in the Dictionary.

Hearsay and opinion rules: exception for admissions and related representations

81. (1) The hearsay rule and the opinion rule do not apply to evidence of an admission.

(2) The hearsay rule and the opinion rule do not apply to evidence of a previous representation:

- (a) that was made in relation to an admission at the time the admission was made, or shortly before or after that time; and
- (b) to which it is reasonably necessary to refer in order to understand the admission.

Note. Specific exclusionary rules relating to admissions are as follows:

- evidence of admissions that is not first-hand (section 82)
- use of admissions against third parties (section 83)
- admissions influenced by violence and certain other conduct (section 84)
- unreliable admissions of accused persons (section 85)
- records of oral questioning of accused persons (section 86)

Example:

D admits to W, his best friend, that he sexually assaulted V. In D's trial for the sexual assault, the prosecution may lead evidence from W:

- (a) that D made the admission to W as proof of the truth of that admission; and
- (b) that W formed the opinion that D was sane when he made the admission.

Exclusion of evidence of admissions that is not first-hand

82. Section 81 does not prevent the application of the hearsay rule to evidence of an admission unless:

- (a) it is given by a person who saw, heard or otherwise perceived the admission being made; or
- (b) it is a document in which the admission is made.

Exclusion of evidence of admissions as against third parties

83. (1) Section 81 does not prevent the application of the hearsay rule or the opinion rule to evidence of an admission in respect of the case of a third party.

(2) The evidence may be used in respect of the case of a third party if that party consents.

(3) Consent cannot be given in respect of part only of the evidence.

(4) In this section:

third party means a party to the proceeding concerned, other than the party who:

- (a) made the admission; or
- (b) adduced the evidence.

Exclusion of admissions influenced by violence and certain other conduct

84. (1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by:

- (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or
- (b) a threat of conduct of that kind.

(2) Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced.

Criminal proceedings: reliability of admissions by defendants

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

- (a) in the course of official questioning; or
- (b) as a result of an act of another person who is capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued.

(2) Evidence of the admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

(3) Without limiting the matters that the court may take into account for the purposes of subsection (2), it is to take into account:

- (a) any relevant condition or characteristic of the person who made the admission, including age, personality and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and
- (b) if the admission was made in response to questioning:
 - (i) the nature of the questions and the manner in which they were put; and
 - (ii) the nature of any threat, promise or other inducement made to the person questioned.

Exclusion of records of oral questioning

86. (1) This section applies only in a criminal proceeding and only if an oral admission was made by a defendant to an investigating official in response to a question put or a representation made by the official.

(2) A document prepared by or on behalf of the official is not admissible to prove the contents of the question, representation or response unless the defendant has acknowledged that the document is a true record of the question, representation or response.

(3) The acknowledgement must be made by signing, initialling or otherwise marking the document.

(4) In this section:

document does not include:

- (a) a sound recording, or a transcript of a sound recording; or
- (b) a recording of visual images and sounds, or a transcript of the sounds so recorded.

Admissions made with authority

87. (1) For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that:

- (a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter with respect to which the representation was made; or
- (b) when the representation was made, the person was an employee of the party, or had authority otherwise to act for the party, and the representation related to a matter within the scope of the person's employment or authority; or
- (c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party.

(2) For the purposes of this section, the hearsay rule does not apply to a previous representation made by a person that tends to prove:

- (a) that the person had authority to make statements on behalf of another person in relation to a matter; or
- (b) that the person was an employee of another person or had authority otherwise to act for another person; or
- (c) the scope of the person's employment or authority.

Proof of admissions

88. For the purpose of determining whether evidence of an admission is admissible, the court is to find that a particular person made the admission if it is reasonably open to find that he or she made the admission.

Evidence of silence

89. (1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:

- (a) to answer one or more questions; or
- (b) to respond to a representation,

put or made to the party or other person in the course of official questioning.

(2) Evidence of that kind is not admissible if it can only be used to draw such an inference.

(3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.

(4) In this section:

inference includes:

- (a) an inference of consciousness of guilt; or
- (b) an inference relevant to a party's credibility.

Discretion to exclude admissions

90. In a criminal proceeding, the court may refuse to admit evidence of an admission, or refuse to admit the evidence to prove a particular fact, if:

- (a) the evidence is adduced by the prosecution; and
- (b) having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence.

Note. Part 3.11 contains other exclusionary discretions that are applicable to admissions.

PART 3.5 — EVIDENCE OF JUDGMENTS AND CONVICTIONS

Exclusion of evidence of judgments and convictions

91. (1) Evidence of the decision, or of a finding of fact, in a proceeding in Norfolk Island, in Australia, or in an overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.

(2) Evidence that, under this Part, is not admissible to prove the existence of a fact may not be used to prove that fact even if it is relevant for another purpose.

Note. Section 178 (Convictions, acquittals and other judicial proceedings) provides for certificate evidence of decisions.

Exceptions

92. (1) Section 91(1) does not prevent the admission or use of evidence of the grant of probate, letters of administration or a similar order of a court to prove:

- (a) the death, or date of death, of a person; or
- (b) the due execution of a testamentary document.

(2) In a civil proceeding, section 91(1) does not prevent the admission or use of evidence that a party, or a person through or under whom a party claims, has been convicted of an offence, not being a conviction:

- (a) in respect of which a review or appeal (however described) has been instituted but not finally determined; or
- (b) that has been quashed or set aside; or
- (c) in respect of which a pardon has been given.

(3) The hearsay rule and the opinion rule do not apply to evidence of a kind referred to in this section.

Savings

93. This Part does not affect the operation of:

- (a) a law that relates to the admissibility or effect of evidence of a conviction tendered in a proceeding (including a criminal proceeding) for defamation; or
- (b) a judgment *in rem*; or
- (c) the law relating to *res judicata* or *issue estoppel*.

PART 3.6 — TENDENCY AND COINCIDENCE

Application

94. (1) This Part does not apply to evidence that relates only to the credibility of a witness.

(2) This Part does not apply so far as a proceeding relates to bail or sentencing.

(3) This Part does not apply to evidence of:

- (a) the character, reputation or conduct of a person; or
- (b) a tendency that a person has or had,

if that character, reputation, conduct or tendency is a fact in issue.

Use of evidence for other purposes

95. (1) Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.

(2) Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.

Failure to act

96. A reference in this Part to doing an act includes a reference to failing to do that act.

The tendency rule

97. (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind, if:

- (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or
- (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) Paragraph (1)(a) does not apply if:

- (a) the evidence is adduced in accordance with any directions made by the court under section 100, or
- (b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note. The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

The coincidence rule

98. (1) Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if:

- (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or
- (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) For the purposes of subsection (1), 2 or more events are taken to be related events if and only if:

- (a) they are substantially and relevantly similar, and
- (b) the circumstances in which they occurred are substantially similar.

(3) Paragraph (1)(a) does not apply if:

- (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
- (b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

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

Requirements for notices

99. Notices given under section 97 or 98 are to be given in accordance with any regulations or rules of court made for the purposes of this section.

Court may dispense with notice requirements

100. (1) The court may, on the application of a party, direct that the tendency rule is not to apply to particular tendency evidence despite the party's failure to give notice under section 97.

(2) The court may, on the application of a party, direct that the coincidence rule is not to apply to particular coincidence evidence despite the party's failure to give notice under section 98.

(3) The application may be made either before or after the time by which the party would, apart from this section, be required to give, or to have given, the notice.

(4) In a civil proceeding, the party's application may be made without notice of it having been given to one or more of the other parties.

(5) The direction:

- (a) is subject to such conditions (if any) as the court thinks fit; and
- (b) may be given either at or before the hearing.

(6) Without limiting the court's power to impose conditions under this section, those conditions may include one or more of the following:

- (a) a condition that the party give notice of its intention to adduce the evidence to a specified party, or to each other party other than a specified party;
- (b) a condition that the party give such notice only in respect of specified tendency evidence, or all tendency evidence that the party intends to adduce other than specified tendency evidence;
- (c) a condition that the party give such notice only in respect of specified coincidence evidence, or all coincidence evidence that the party intends to adduce other than specified coincidence evidence.

Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

101. (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

(2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

(3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.

(4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

PART 3.7 — CREDIBILITY

The credibility rule

102. Evidence that is relevant only to a witness's credibility is not admissible.

Notes.

¹ Specific exceptions to the credibility rule are as follows:

- evidence adduced in cross-examination (sections 103 and 104)
- evidence in rebuttal of denials (section 106)
- evidence to re-establish credibility (section 108)
- character of accused persons (section 110).

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

² Section 108A makes provision as to the admission of evidence that is relevant only to the credibility of a person who has made a previous representation.

Exception: cross-examination as to credibility

103. (1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value.

(2) Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:

- (a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and
- (b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

Further protections: cross-examination of accused

104. (1) This section applies only in a criminal proceeding and so applies in addition to section 103.

(2) A defendant must not be cross-examined about a matter that is relevant only because it is relevant to the defendant's credibility, unless the court gives leave.

(3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the defendant:

- (a) is biased or has a motive to be untruthful; or
- (b) is, or was, unable to be aware of or recall matters to which his or her evidence relates; or
- (c) has made a prior inconsistent statement.

(4) Leave must not be given for cross-examination by the prosecutor about any matter that is relevant only because it is relevant to the defendant's credibility unless:

- (a) evidence has been adduced by the defendant that tends to prove that the defendant is, either generally or in a particular respect, a person of good character; or
- (b) evidence adduced by the defendant has been admitted that tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and that is relevant solely or mainly to the witness's credibility.

(5) A reference in paragraph (4)(b) to evidence does not include a reference to evidence of conduct in relation to:

- (a) the events in relation to which the defendant is being prosecuted, or
- (b) the investigation of the offence for which the defendant is being prosecuted.

(6) Leave is not to be given for cross-examination by another defendant unless:

- (a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine; and
- (b) that evidence has been admitted.

105. [Omitted]

Exception: rebutting denials by other evidence

106. The credibility rule does not apply to evidence that tends to prove that a witness:

- (a) is biased or has a motive for being untruthful; or
- (b) has been convicted of an offence, including an offence against the law of a foreign country; or
- (c) has made a prior inconsistent statement; or
- (d) is, or was, unable to be aware of matters to which his or her evidence relates; or
- (e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under a law of Norfolk Island, Australia, or a law of a foreign country, to tell the truth,

if the evidence is adduced otherwise than from the witness and the witness has denied the substance of the evidence.

107. [Omitted]**Exception: re-establishing credibility**

108. (1) The credibility rule does not apply to evidence adduced in re-examination of a witness.

(2) [Omitted]

Note. The Commonwealth Act includes a subsection referring to section 105 of that Act.

(3) The credibility rule does not apply to evidence of a prior consistent statement of a witness if:

- (a) evidence of a prior inconsistent statement of the witness has been admitted; or
- (b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion,

and the court gives leave to adduce the evidence of the prior consistent statement.

Admissibility of evidence of credibility of person who has made a previous representation

108A. (1) If:

- (a) because of a provision of Part 3.2, the hearsay rule does not apply to evidence of a previous representation; and
- (b) evidence of the representation has been admitted; and
- (c) the person who made the representation has not been called, and will not be called, to give evidence in the proceeding,

evidence that is relevant only to the credibility of the person who made the representation is not admissible unless the evidence has substantial probative value.

(2) Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:

- (a) whether the evidence tends to prove that the person who made the representation knowingly or recklessly made a false representation when the person was under an obligation to tell the truth; and
- (b) the period that elapsed between the doing of the acts or the occurrence of the events to which the representation related and the making of the representation.

PART 3.8 — CHARACTER**Application**

109. This Part applies only in a criminal proceeding.

Evidence about character of accused persons

110. (1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.

(2) If evidence adduced to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a person of good character.

(3) If evidence adduced to prove (directly or by implication) that a defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not a person of good character in that respect.

Note. The Commonwealth Act includes an additional subsection relating to unsworn statements.

Evidence about character of co-accused

111. (1) The hearsay rule and the tendency rule do not apply to evidence of a defendant's character if:

- (a) the evidence is evidence of an opinion about the defendant adduced by another defendant; and
- (b) the person whose opinion it is has specialised knowledge based on the person's training, study or experience; and
- (c) the opinion is wholly or substantially based on that knowledge.

(2) If such evidence has been admitted, the hearsay rule, the opinion rule and the tendency rule do not apply to evidence adduced to prove that that evidence should not be accepted.

Leave required to cross-examine about character of accused or co-accused

112. A defendant is not to be cross-examined about matters arising out of evidence of a kind referred to in this Part unless the court gives leave.

PART 3.9 — IDENTIFICATION EVIDENCE

Note. "Identification evidence" is defined in the Dictionary.

Application of Part

113. This Part applies only in a criminal proceeding.

Exclusion of visual identification evidence

114. (1) In this section:

visual identification evidence means identification evidence relating to an identification based wholly or partly on what a person saw but does not include picture identification evidence.

(2) Visual identification evidence adduced by the prosecutor is not admissible unless:

- (a) an identification parade that included the defendant was held before the identification was made; or
- (b) it would not have been reasonable to have held such a parade; or
- (c) the defendant refused to take part in such a parade, and the identification was made without the person who made it having been intentionally influenced to identify the defendant.

(3) Without limiting the matters that may be taken into account by the court in determining whether it was reasonable to hold an identification parade, it is to take into account:

- (a) the kind of offence, and the gravity of the offence, concerned; and
- (b) the importance of the evidence; and
- (c) the practicality of holding an identification parade having regard, among other things:
 - (i) if the defendant failed to cooperate in the conduct of the parade—to the manner and extent of, and the reason (if any) for, the failure; and

- (ii) in any case—to whether the identification was made at or about the time of the commission of the offence; and
- (d) the appropriateness of holding an identification parade having regard, among other things, to the relationship (if any) between the defendant and the person who made the identification.

(4) It is presumed that it would not have been reasonable to have held an identification parade if it would have been unfair to the defendant for such a parade to have been held.

- (5) If:
- (a) the defendant refused to take part in an identification parade unless a lawyer acting for the defendant, or another person chosen by the defendant, was present while it was being held; and
 - (b) there were, at the time when the parade was to have been conducted, reasonable grounds to believe that it was not reasonably practicable for such a lawyer or person to be present;

it is presumed that it would not have been reasonable to have held an identification parade at that time.

(6) In determining whether it was reasonable to have held an identification parade, the court is not to take into account the availability of pictures or photographs that could be used in making identifications.

Exclusion of evidence of identification by pictures

115. (1) In this section:

picture identification evidence means identification evidence relating to an identification made wholly or partly by the person who made the identification examining pictures kept for the use of police officers.

(2) Picture identification evidence adduced by the prosecutor is not admissible if the pictures examined suggest that they are pictures of persons in police custody.

(3) Subject to subsection (4), picture identification evidence adduced by the prosecutor is not admissible if:

- (a) when the pictures were examined, the defendant was in the custody of a police officer of the police force investigating the commission of the offence with which the defendant has been charged; and
- (b) the picture of the defendant that was examined was made before the defendant was taken into that police custody.

(4) Subsection (3) does not apply if:

- (a) the defendant's appearance had changed significantly between the time when the offence was committed and the time when the defendant was taken into that custody; or
- (b) it was not reasonably practicable to make a picture of the defendant after the defendant was taken into that custody.

(5) Picture identification evidence adduced by the prosecutor is not admissible if, when the pictures were examined, the defendant was in the custody of a police officer of the police force investigating the commission of the offence with which the defendant has been charged, unless:

- (a) the defendant refused to take part in an identification parade; or

- (b) the defendant's appearance had changed significantly between the time when the offence was committed and the time when the defendant was taken into that custody; or
- (c) it would not have been reasonable to have held an identification parade that included the defendant.

(6) Subsections 114(3), (4), (5) and (6) apply in determining, for the purposes of paragraph (5)(c) of this section, whether it would have been reasonable to have held an identification parade.

(7) If picture identification evidence adduced by the prosecutor is admitted into evidence, the judge must, on the request of the defendant:

- (a) if the picture of the defendant was made after the defendant was taken into that custody—inform the jury that the picture was made after the defendant was taken into that custody; or
- (b) otherwise—warn the jury that they must not assume that the defendant has a criminal record or has previously been charged with an offence.

Note. Sections 116 (Directions to jury) and 165 (Unreliable evidence) also deal with warnings about identification evidence.

(8) This section does not render inadmissible picture identification evidence adduced by the prosecutor that contradicts or qualifies picture identification evidence adduced by the defendant.

(9) This section applies in addition to section 114.

(10) In this section:

- (a) a reference to a picture includes a reference to a photograph; and
- (b) a reference to making a picture includes a reference to taking a photograph.

Directions to jury

116. (1) If identification evidence has been admitted, the judge is to inform the jury:

- (a) that there is a special need for caution before accepting identification evidence; and
- (b) of the reasons for that need for caution, both generally and in the circumstances of the case.

(2) It is not necessary that a particular form of words be used in so informing the jury.

PART 3.10 — PRIVILEGES

Division 1 — Client legal privilege

Definitions

117. (1) In this Division:

client includes the following:

- (a) an employer (not being a lawyer) of a lawyer;
- (b) an employee or agent of a client;
- (c) an employer of a lawyer if the employer is:
 - (i) the Administration, the Commonwealth or a State or another Territory; or
 - (ii) a body established by a law of Norfolk Island, the Commonwealth or a State or another Territory;

- (d) if, under a law of Norfolk Island, the Commonwealth, a State or another Territory, relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a client—a manager, committee or person so acting;
- (e) if a client has died—a personal representative of the client;
- (f) a successor to the rights and obligations of a client, being rights and obligations in respect of which a confidential communication was made.

confidential communication means a communication made in such circumstances that, when it was made:

- (a) the person who made it; or
- (b) the person to whom it was made,

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

confidential document means a document prepared in such circumstances that, when it was prepared:

- (a) the person who prepared it; or
- (b) the person for whom it was prepared,

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

lawyer includes an employee or agent of a lawyer.

party includes the following:

- (a) an employee or agent of a party;
- (b) if, under a law of Norfolk Island, the Commonwealth, a State or another Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a party—a manager, committee or person so acting;
- (c) if a party has died—a personal representative of the party;
- (d) a successor to the rights and obligations of a party, being rights and obligations in respect of which a confidential communication was made.

(2) A reference in this Division to the commission of an act includes a reference to a failure to act.

Legal advice

118. Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client or a lawyer,

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

Litigation

119. Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared,

for the dominant purpose of the client being provided with professional legal services relating to a Norfolk Island proceeding, an Australian proceeding, or to an overseas proceeding (including the proceeding before the court), or an anticipated or pending Norfolk Island proceeding, an Australian proceeding, or overseas proceeding, in which the client is or may be, or was or might have been, a party.

Unrepresented parties

120. (1) Evidence is not to be adduced if, on objection by a party who is not represented in the proceeding by a lawyer, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication between the party and another person; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared, either by or at the direction or request of, the party,

for the dominant purpose of preparing for or conducting the proceeding.

(2) [Omitted]

Loss of client legal privilege: generally

121. (1) This Division does not prevent the adducing of evidence relevant to a question concerning the intentions, or competence in law, of a client or party who has died.

(2) This Division does not prevent the adducing of evidence if, were the evidence not adduced, the court would be prevented, or it could reasonably be expected that the court would be prevented, from enforcing an order of a Norfolk Island court.

(3) This Division does not prevent the adducing of evidence of a communication or document that affects a right of a person.

Loss of client legal privilege: consent and related matters

122. (1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.

(2) Subject to subsection (5), this Division does not prevent the adducing of evidence if a client or party has knowingly and voluntarily disclosed to another person the substance of the evidence and the disclosure was not made:

- (a) in the course of making a confidential communication or preparing a confidential document; or
- (b) as a result of duress or deception; or
- (c) under compulsion of law; or
- (d) if the client or party is a body established by, or a person holding an office under, a Norfolk Island law—to the Minister, or the Minister of the Commonwealth, the State or Territory, administering the law, or the part of the law, under which the body is established or the office is held.

(3) Subsection (2) does not apply to a disclosure by a person who was, at the time, an employee or agent of a client or party or of a lawyer unless the employee or agent was authorised to make the disclosure.

(4) Subject to subsection (5), this Division does not prevent the adducing of evidence if the substance of the evidence has been disclosed with the express or implied consent of the client or party to another person other than:

- (a) a lawyer acting for the client or party; or

- (b) if the client or party is a body established by, or a person holding an office under, a Norfolk Island law—the Minister, or the Minister of the Commonwealth, the State or Territory, administering the law, or the part of the law, under which the body is established or the office is held.

(5) Subsections (2) and (4) do not apply to:

- (a) a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or
- (b) a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to a proceeding or an anticipated or pending proceeding in a Norfolk Island court, an Australian Court, or a foreign court.

(6) This Division does not prevent the adducing of evidence of a document that a witness has used to try to revive the witness's memory about a fact or opinion or has used as mentioned in section 32 (Attempts to revive memory in court) or 33 (Evidence given by police officers).

Loss of client legal privilege: defendants

123. In a criminal proceeding, this Division does not prevent a defendant from adducing evidence unless it is evidence of:

- (a) a confidential communication made between an associated defendant and a lawyer acting for that person in connection with the prosecution of that person; or
- (b) the contents of a confidential document prepared by an associated defendant or by a lawyer acting for that person in connection with the prosecution of that person.

Note. “Associated defendant” is defined in the Dictionary.

Loss of client legal privilege: joint clients

124. (1) This section only applies to a civil proceeding in connection with which 2 or more parties have, before the commencement of the proceeding, jointly retained a lawyer in relation to the same matter.

(2) This Division does not prevent one of those parties from adducing evidence of:

- (a) a communication made by any one of them to the lawyer; or
- (b) the contents of a confidential document prepared by or at the direction or request of any one of them,

in connection with that matter.

Loss of client legal privilege: misconduct

125. (1) This Division does not prevent the adducing of evidence of:

- (a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
- (b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.

(2) For the purposes of this section, if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that:

- (a) the fraud, offence or act, or the abuse of power, was committed; and
- (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power,

the court may find that the communication was so made or the document so prepared.

(3) In this section:

power means a power conferred by or under a Norfolk Island law or an Australian law.

Loss of client legal privilege: related communications and documents

126. If, because of the application of section 121, 122, 123, 124 or 125, this Division does not prevent the adducing of evidence of a communication or the contents of a document, those sections do not prevent the adducing of evidence of another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document.

Note.

Example:

A lawyer advises his client to understate her income for the previous year to evade taxation because of her potential tax liability “as set out in my previous letter to you dated 11 August 1994”. In proceedings against the taxpayer for tax evasion, evidence of the contents of the letter dated 11 August 1994 may be admissible (even if that letter would otherwise be privileged) to enable a proper understanding of the second letter.

Division 1A — Professional confidential relationship privilege

Note. The Commonwealth Act does not include this Division.

Definitions

126A. (1) In this Division:

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

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

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

protected confider means a person who made a protected confidence.

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

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

Exclusion of evidence of protected confidences

126B. (1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:

- (a) a protected confidence; or
- (b) the contents of a document recording a protected confidence; or
- (c) protected identity information.

(2) The court may give such a direction:

- (a) on its own initiative; or
- (b) on the application of the protected confider or confidant concerned (whether or not either is a party).

(3) The court must give such a direction if it is satisfied that:

- (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced; and
- (b) the nature and extent of the harm outweighs the desirability of the evidence being given.

(4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:

- (a) the probative value of the evidence in the proceeding;
- (b) the importance of the evidence in the proceeding;
- (c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding;
- (d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates;
- (e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider;
- (f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed;
- (g) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor;
- (h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.

(5) The court must state its reasons for giving or refusing to give a direction under this section.

Loss of professional confidential relationship privilege: consent

126C. This Division does not prevent the adducing of evidence given with the consent of the protected confider concerned.

Loss of professional confidential relationship privilege: misconduct

126D. (1) This Division does not prevent the adducing of evidence of a communication made or the contents of a document prepared in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.

(2) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:

- (a) the fraud, offence or act was committed; and
- (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,

the court may find that the communication was so made or the document so prepared.

Ancillary orders

126E. Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence or protected identity information, the court may:

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

Application of Division

126F. (1) This Division does not apply in relation to a proceeding the hearing of which began before the commencement of this Division.

(2) This Division applies in relation to a protected confidence within the meaning of this Division whether made before or after the commencement of this Division.

(3) This Division does not apply in relation to a protected confidence within the meaning of Division 1B of this Act.

(4) The court may give a direction under this Division in respect of a protected confidence or protected identity information whether or not the protected confidence or protected identity information is privileged under another section of this Part or would be so privileged except for a limitation or restriction imposed by that section.

Division 1B — Sexual assault communications privilege

Note. The Commonwealth Act does not include this Division which is taken from New South Wales. Part of the Division in the New South Wales Act is not applicable to Norfolk Island

Exclusion of evidence of protected sexual assault communications

126G. (1) This section applies only in a civil proceeding in which substantially the same acts are in issue as the acts that were in issue in relation to a criminal proceeding.

(2) If evidence was found to be privileged in a criminal proceeding, the evidence may not be adduced in a civil proceeding to which this section applies.

Application of Division

126H. (1) This Division does not apply in relation to a civil proceeding the hearing of which began before the commencement of this section.

(2) This Division applies, subject to subsection (1), in respect of a protected confidence whether made before or after the commencement of this section.

Division 2 — Other privileges

Religious confessions

127. (1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.

(2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose.

(3) This section applies even if an Act provides:

- (a) that the rules of evidence do not apply or that a person or body is not bound by the rules of evidence; or
- (b) that a person is not excused from answering any question or producing any document or other thing on the ground of privilege or any other ground.

(4) In this section:

religious confession means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination concerned.

Privilege in respect of self-incrimination in other proceedings

128. (1) This section applies if a witness objects to giving particular evidence on the ground that the evidence may tend to prove that the witness:

- (a) has committed an offence against or arising under a law of Norfolk Island, Australia, or a law of a foreign country, or
- (b) is liable to a civil penalty.

(2) Subject to subsection (5), if the court finds that there are reasonable grounds for the objection, the court is not to require the witness to give that particular evidence, and is to inform the witness:

- (a) that he or she need not give the evidence; and
- (b) that, if he or she gives the evidence, the court will give a certificate under this section; and
- (c) of the effect of such a certificate.

(3) If the witness gives the evidence, the court is to cause the witness to be given a certificate under this section in respect of the evidence.

(4) The court is also to cause a witness to be given a certificate under this section if:

- (a) the objection has been overruled; and
- (b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.

(5) If the court is satisfied that:

- (a) the evidence concerned may tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of Norfolk Island, and
- (b) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
- (c) the interests of justice require that the witness give the evidence,

the court may require the witness to give the evidence.

(6) If the court so requires, it is to cause the witness to be given a certificate under this section in respect of the evidence.

(7) In any proceeding in a Norfolk Island court:

- (a) evidence given by a person in respect of which a certificate under this section has been given, and
- (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence,

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

Note. This subsection differs from section 128(7) of the Commonwealth Act. The Commonwealth provision refers to an "Australian Court" rather than a "Norfolk Island court".

(8) In a criminal proceeding, this section does not apply in relation to the giving of evidence by a defendant, being evidence that the defendant:

- (a) did an act the doing of which is a fact in issue; or
- (b) had a state of mind the existence of which is a fact in issue.

(9) A reference in this section to doing an act includes a reference to failing to act.

Notes.

¹ Bodies corporate cannot claim this privilege. See section 187.

² Clause 3 of Part 2 of the Dictionary sets out what is a civil penalty.

³ The NSW Act does not include (10)-(13), the Commonwealth Act includes subsections (10)-(13). The subsections give effect to certificates in relation to self-incriminating evidence under the Norfolk Island Act in proceedings in federal and ACT courts and in prosecutions for Commonwealth and ACT offences.

Division 3 — Evidence excluded in the public interest

Exclusion of evidence of reasons for judicial etc decisions

129. (1) Evidence of the reasons for a decision made by a person who is:

- (a) a judge in a Norfolk Island proceeding, in an Australian proceeding, or in an overseas proceeding, or
- (b) an arbitrator in respect of a dispute that has been submitted to the person, or to the person and one or more other persons, for arbitration,

or the deliberations of a person so acting in relation to such a decision, must not be given by the person, or a person who was, in relation to the proceeding or arbitration, under the direction or control of that person.

(2) Such evidence must not be given by tendering as evidence a document prepared by such a person.

(3) This section does not prevent the admission or use, in a proceeding, of published reasons for a decision.

(4) In a proceeding, evidence of the reasons for a decision made by a member of a jury in another Norfolk Island proceeding, in an Australian proceeding, or in an overseas proceeding, or of the deliberations of a member of a jury in relation to such a decision, must not be given by any of the members of that jury.

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

- (a) a prosecution for one or more of the following offences:
 - (i) an offence against or arising Part III of the *Crimes Act 1914* (Commonwealth);
 - (ii) an offence connected with an offence mentioned in subparagraph (i), including an offence of conspiring to commit such an offence; or
- (b) in respect of a contempt of a court; or
- (c) by way of appeal from, or judicial review of, a judgment, decree, order or sentence of a court; or
- (d) by way of review of an arbitral award; or
- (e) a civil proceeding in respect of an act of a judicial officer or arbitrator that was, and that was known at the time by the judicial officer or arbitrator to be, outside the scope of the matters in relation to which the judicial officer or arbitrator had authority to act.

Note. Subsection (5)(a) differs from section 129(5)(a) of the Commonwealth Act.

Exclusion of evidence of matters of state

130. (1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.

(2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).

(3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit.

(4) Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would:

- (a) prejudice the security, defence or international relations of the Commonwealth; or
- (b) damage relations between Norfolk Island and the Commonwealth or a State or between 2 or more States; or
- (c) prejudice the prevention, investigation or prosecution of an offence; or
- (d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law; or
- (e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of Norfolk Island, the Commonwealth or a State; or
- (f) prejudice the proper functioning of the government of Norfolk Island, the Commonwealth or a State.

(5) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters:

- (a) the importance of the information or the document in the proceeding;
- (b) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the information or document is a defendant or the prosecutor;
- (c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;
- (d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication;
- (e) whether the substance of the information or document has already been published;
- (f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is a defendant—whether the direction is to be made subject to the condition that the prosecution be stayed.

(6) A reference in this section to a State includes a reference to **another Territory**.

Exclusion of evidence of settlement negotiations

131. (1) Evidence is not to be adduced of:

- (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
- (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

(2) Subsection (1) does not apply if:

- (a) the persons in dispute consent to the evidence being adduced in the proceeding concerned or, if any of those persons has tendered the communication or document in evidence in another proceeding in Norfolk Island, in an Australian proceeding, or in an overseas proceeding, all the other persons so consent; or
- (b) the substance of the evidence has been disclosed with the express or implied consent of all the persons in dispute; or
- (c) the substance of the evidence has been partly disclosed with the express or implied consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced; or
- (d) the communication or document included a statement to the effect that it was not to be treated as confidential; or
- (e) the evidence tends to contradict or to qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or
- (f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or
- (g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or
- (h) the communication or document is relevant to determining liability for costs; or
- (i) making the communication, or preparing the document, affects a right of a person; or
- (j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
- (k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.

(3) For the purposes of paragraph (2)(j), if commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:

- (a) the fraud, offence or act was committed, and
- (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,

the court may find that the communication was so made or the document so prepared.

(4) For the purposes of subsection (2)(k), if:

- (a) the abuse of power is a fact in issue; and
- (b) there are reasonable grounds for finding that a communication was made or document prepared in furtherance of the abuse of power,

the court may find that the communication was so made or the document was so prepared.

(5) In this section:

- (a) a reference to a dispute is a reference to a dispute of a kind in respect of which relief may be given in a proceeding in Norfolk Island, in an Australian proceeding, or in an overseas proceeding; and

- (b) a reference to an attempt to negotiate the settlement of a dispute does not include a reference to an attempt to negotiate the settlement of a criminal proceeding or an anticipated criminal proceeding; and
- (c) a reference to a communication made by a person in dispute includes a reference to a communication made by an employee or agent of such a person; and
- (d) a reference to the consent of a person in dispute includes a reference to the consent of an employee or agent of such a person, being an employee or agent who is authorised so to consent; and
- (e) a reference to commission of an act includes a reference to a failure to act.

(6) In this section:

power means a power conferred by or under a law of Norfolk Island.

Division 4 — General

Court to inform of rights to make applications and objections

132. If it appears to the court that a witness or a party may have grounds for making an application or objection under a provision of this Part, the court must satisfy itself (if there is a jury, in the absence of the jury) that the witness or party is aware of the effect of that provision.

Court may inspect etc documents

133. If a question arises under this Part relating to a document, the court may order that the document be produced to it and may inspect the document for the purpose of determining the question.

Inadmissibility of evidence that must not be adduced or given

134. Evidence that, because of this Part, must not be adduced or given in a proceeding is not admissible in the proceeding.

PART 3.11 — DISCRETIONS TO EXCLUDE EVIDENCE

General discretion to exclude evidence

135. The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

General discretion to limit use of evidence

136. The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing.

Exclusion of prejudicial evidence in criminal proceedings

137. In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

Exclusion of improperly or illegally obtained evidence

138. (1) Evidence that was obtained:

- (a) improperly or in contravention of a Norfolk Island law; or
- (b) in consequence of an impropriety or of a contravention of a Norfolk Island law,

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:

- (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
- (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:

- (a) the probative value of the evidence; and
- (b) the importance of the evidence in the proceeding; and
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
- (d) the gravity of the impropriety or contravention; and
- (e) whether the impropriety or contravention was deliberate or reckless; and
- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of a Norfolk Island law.

Note. The International Covenant on Civil and Political Rights is set out in Schedule 2 to the *Human Rights and Equal Opportunity Commission Act 1986* of the Commonwealth.

Cautioning of persons

139. (1) For the purposes of paragraph 138(1)(a), evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:

- (a) the person was under arrest for an offence at the time; and
- (b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person; and
- (c) before starting the questioning the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(2) For the purposes of paragraph 138(1)(a), evidence of a statement made or an act done by a person during official questioning is taken to have been obtained improperly if:

- (a) the questioning was conducted by an investigating official who did not have the power to arrest the person; and

- (b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence; and
- (c) the investigating official did not, before the statement was made or the act was done, caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.

(3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.

(4) Subsections (1), (2) and (3) do not apply so far as any law of Norfolk Island requires the person to answer questions put by, or do things required by, the investigating official.

(5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in the company of an investigating official for the purpose of being questioned, if:

- (a) the official believes that there is sufficient evidence to establish that the person has committed an offence that is to be the subject of the questioning; or
- (b) the official would not allow the person to leave if the person wished to do so; or
- (c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

(6) A person is not treated as being under arrest only because of subsection (5) if:

- (a) the official is performing functions in relation to persons or goods entering or leaving Norfolk Island and the official does not believe the person has committed an offence against a law of Norfolk Island, or
- (b) the official is exercising a power under a Norfolk Island law to detain and search the person or to require the person to provide information or to answer questions.

CHAPTER 4 — PROOF

Introductory note:

Outline of this Chapter

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

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

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

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

Part 4.4 is about requirements that evidence be corroborated.

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

Part 4.6 sets out procedures for proving certain other matters.

PART 4.1 — STANDARD OF PROOF

Civil proceedings: standard of proof

140. (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:

- (a) the nature of the cause of action or defence; and

- (b) the nature of the subject-matter of the proceeding; and
- (c) the gravity of the matters alleged.

Criminal proceedings: standard of proof

141. (1) In a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.

(2) In a criminal proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.

Admissibility of evidence: standard of proof

142. (1) Except as otherwise provided by this Act, in any proceeding the court is to find that the facts necessary for deciding:

- (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or
- (b) any other question arising under this Act,

have been proved if it is satisfied that they have been proved on the balance of probabilities.

(2) In determining whether it is so satisfied, the matters that the court must take into account include:

- (a) the importance of the evidence in the proceeding; and
- (b) the gravity of the matters alleged in relation to the question.

PART 4.2 — JUDICIAL NOTICE

Matters of law

143. (1) Proof is not required about the provisions and coming into operation (in whole or in part) of:

- (a) an enactment, an Imperial Act in force in Norfolk Island, a Commonwealth Act, an Act of a State or an Act or Ordinance of another Territory, or
- (b) a regulation, rule or by-law made, or purporting to be made, under such an enactment, Act or Ordinance, or
- (c) a proclamation or order of the Administrator or the Governor-General, the Governor of a State or Executive of a Territory made, or purporting to be made, under such an enactment, Act or Ordinance, or
- (d) an instrument of a legislative character (for example, a rule of court) made, or purporting to be made, under such an enactment, Act or Ordinance, being an instrument that is required by or under a law to be published, or the making of which is required by or under a law to be notified, in any government or official gazette (by whatever name called).

(2) A judge may inform himself or herself about those matters in any way that the judge thinks fit.

(3) A reference in this section to an enactment, being an enactment of the Legislative Assembly, includes a reference to a private enactment passed by that Assembly.

Note. Section 5 of the Commonwealth Act extends the operation of the equivalent Commonwealth section to proceedings in all Australian courts.

Matters of common knowledge

144. (1) Proof is not required about knowledge that is not reasonably open to question and is:

- (a) common knowledge in the locality in which the proceeding is being held or generally; or
- (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.

(2) The judge may acquire knowledge of that kind in any way the judge thinks fit.

(3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.

(4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

Certain Crown certificates

145. This Part does not exclude the application of the principles and rules of the common law and of equity relating to the effect of a certificate given by or on behalf of the Crown with respect to a matter of international affairs.

PART 4.3 — FACILITATION OF PROOF

Division 1 — General

Evidence produced by processes, machines and other devices

146. (1) This section applies to a document or thing:

- (a) that is produced wholly or partly by a device or process; and
- (b) that is tendered by a party who asserts that, in producing the document or thing, the device or process has produced a particular outcome.

(2) If it is reasonably open to find that the device or process is one that, or is of a kind that, if properly used, ordinarily produces that outcome, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document or thing on the occasion in question, the device or process produced that outcome.

Note.

Example:

It would not be necessary to call evidence to prove that a photocopier normally produced complete copies of documents and that it was working properly when it was used to photocopy a particular document.

Documents produced by processes, machines and other devices in the course of business

147. (1) This section applies to a document:

- (a) that is produced wholly or partly by a device or process; and
- (b) that is tendered by a party who asserts that, in producing the document, the device or process has produced a particular outcome.

(2) If:

- (a) the document is, or was at the time it was produced, part of the records of, or kept for the purposes of, a business (whether or not the business is still in existence); and
- (b) the device or process is or was at that time used for the purposes of the business,

it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that, in producing the document on the occasion in question, the device or process produced that outcome.

(3) Subsection (2) does not apply to the contents of a document that was produced:

- (a) for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or

- (b) in connection with an investigation relating or leading to a criminal proceeding.

Note. Section 182 of the Commonwealth Act gives section 147 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

Evidence of certain acts of justices, lawyers and notaries public

148. It is presumed, unless the contrary is proved, that a document was attested or verified by, or signed or acknowledged before, a justice of the peace, lawyer or notary public, if:

- (a) a law of Norfolk Island requires, authorises or permits it to be attested, verified, signed or acknowledged by a justice of the peace, a lawyer or a notary public, as the case may be; and
- (b) it purports to have been so attested, verified, signed or acknowledged.

Attestation of documents

149. It is not necessary to adduce the evidence of an attesting witness to a document (not being a testamentary document) to prove that the document was signed or attested as it purports to have been signed or attested.

Note. Section 182 of the Commonwealth Act gives section 149 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

Seals and signatures

150. (1) If the imprint of a seal appears on a document and purports to be the imprint of:

- (a) the Public Seal of the Administration of Norfolk Island; or
- (b) a Royal Great Seal; or
- (c) the Great Seal of Australia; or
- (d) another seal of the Commonwealth; or
- (e) a seal of State, another Territory or a foreign country; or
- (f) the seal of a body (including a court or a tribunal), or a body corporate, established by or under Royal Charter or by a law of Norfolk Island or the law of a foreign country,

it is presumed, unless the contrary is proved, that the imprint is the imprint of that seal, and the document was duly sealed as it purports to have been sealed.

Note. The Commonwealth and New South Wales Acts have a different subsection (1).

(2) If the imprint of a seal appears on a document and purports to be the imprint of the seal of an office holder, it is presumed, unless the contrary is proved, that:

- (a) the imprint is the imprint of that seal; and
- (b) the document was duly sealed by the office holder acting in his or her official capacity; and
- (c) the office holder held the relevant office when the document was sealed.

(3) If a document purports to have been signed by an office holder in his or her official capacity, it is presumed, unless the contrary is proved, that:

- (a) the document was signed by the office holder acting in that capacity; and
- (b) the office holder held the relevant office when the document was signed.

(4) In this section:

office holder means:

- (a) the Sovereign; or
- (b) the Governor-General; or
- (c) the Administrator; or
- (d) the Governor of a State; or

- (e) the Administrator of a Territory; or
- (f) a person holding any other office under a law of Norfolk Island or a law of a foreign country.

(5) This section extends to documents sealed, and documents signed, before the commencement of this section.

Notes.

¹ Section 5 of the Commonwealth Act extends the operation of this section of the Commonwealth Act to proceedings in all Australian courts.

² “Australian law” is defined in the Dictionary.

Seals of bodies established under a law

151. (1) If the imprint of a seal of a body established under Norfolk Island State or Commonwealth law appears on a document it is presumed, unless the contrary is proved, that the document was validly executed and the seal is imprinted.

(2) This section extends to documents sealed before the commencement of this section.

Note. The Commonwealth Act includes a provision dealing with certain seals of bodies established by Royal Charter or a law of a State.

Documents produced from proper custody

152. If a document that is or purports to be more than 20 years old is produced from proper custody, it is presumed, unless the contrary is proved, that:

- (a) the document is the document that it purports to be; and
- (b) if it purports to have been executed or attested by a person—it was duly executed or attested by that person.

Note. Section 182 of the Commonwealth Act gives section 152 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

Division 2 — Matters of official record

Gazettes and other official documents

153. (1) It is presumed, unless the contrary is proved, that a document purporting:

- (a) to be any government or official gazette (by whatever name called) of Norfolk Island, the Commonwealth, a State, another Territory or a foreign country; or
- (b) to have been printed by the government or official printer of Norfolk Island or the Commonwealth or by the government or official printer of a State or another Territory; or
- (c) to have been printed by authority of the Administration, the Commonwealth, a State, another Territory or a foreign country,

is what it purports to be and was published on the day on which it purports to have been published.

(2) If:

- (a) there is produced to a court:
 - (i) a copy of any government or official gazette (by whatever name called) of Norfolk Island, the Commonwealth, a State, another Territory or a foreign country; or
 - (ii) a document that purports to have been printed by the government or official printer of Norfolk Island, the Commonwealth or by the government or official printer of a State or another Territory; or
 - (iii) a document that purports to have been printed by authority of the Administration, the Commonwealth, a State, another Territory or a foreign country; and

- (b) the doing of an act:
 - (i) by the Governor-General or by the Administrator or by the Governor of a State or the Administrator of a Territory; or
 - (ii) by a person authorised or empowered to do the act by a law of Norfolk Island, Australia, or a law of a foreign country,

is notified or published in the copy or document,

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

Note. Section 5 of the Commonwealth Act extends the operation of section 153 of the Commonwealth Act to proceedings in all Australian courts.

Documents published by authority of legislative bodies etc

154. It is presumed, unless the contrary is proved, that a document purporting to have been printed by authority of the Legislative Assembly, an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament:

- (a) is what it purports to be; and
- (b) was published on the day on which it purports to have been published.

Evidence of official records

155. (1) Evidence of a record or public record or public document of Norfolk Island, or of the Commonwealth, or of a State or another Territory may be adduced by producing a document that:

- (a) purports to be such a record or document and to be signed or sealed by:
 - (i) the Minister, a Minister of the Commonwealth, or a Minister of a State or another Territory, as the case requires; or
 - (ii) a person who might reasonably be supposed to have custody of the record or document; or
- (b) purports to be a copy of or extract from the record or document that is certified to be a true copy or extract by:
 - (i) the Minister, a Minister of the Commonwealth, or a Minister of a State or another Territory, as the case requires; or
 - (ii) a person who might reasonably be supposed to have custody of the record or document.

(2) If such a document is produced, it is presumed, unless evidence that is sufficient to raise doubt about the presumption is adduced, that:

- (a) the document is the record, public document, copy or extract that it purports to be; and
- (b) the Ministers, the Minister of the Commonwealth, Minister of the other State or Territory or person:
 - (i) signed or sealed the record; or
 - (ii) certified the copy or extract as a true copy or extract, as the case requires.

Note. This section differs from section 155 of the Commonwealth Act. The Commonwealth provision refers to evidence of a “public record” of a State or Territory rather than evidence of a “public document” of a State or Territory.

Public documents

156. (1) A document that purports to be a copy of, or an extract from or summary of, a public document and to have been:

- (a) sealed with the seal of a person who, or a body that, might reasonably be supposed to have the custody of the public document; or
- (b) certified as such a copy, extract or summary by a person who might reasonably be supposed to have custody of the public document,

is presumed, unless the contrary is proved, to be a copy of the public document, or an extract from or summary of the public document.

(2) If an officer entrusted with the custody of a public document is required by a court to produce the public document, it is sufficient compliance with the requirement for the officer to produce a copy of, or extract from, the public document if it purports to be signed and certified by the officer as a true copy or extract.

(3) It is sufficient production of a copy or extract for the purposes of subsection (2) if the officer sends it by prepaid post, or causes it to be delivered, to:

- (a) the proper officer of the court in which it is to be produced; or
- (b) the person before whom it is to be produced.

(4) The court before which a copy or extract is produced under subsection (2) may direct the officer to produce the original public document.

Note. Section 182 of the Commonwealth Act gives section 156 of the Commonwealth Act a wider application in relation to Commonwealth records.

Public documents relating to court processes

157. Evidence of a public document that is a judgment, act or other process of a Norfolk Island court, an Australian Court, or a foreign court, or that is a document lodged with a Norfolk Island court, an Australian court or a foreign court, may be adduced by producing a document that purports to be a copy of the public document and that:

- (a) is proved to be an examined copy; or
- (b) purports to be sealed with the seal of that court; or
- (c) purports to be signed by a judge, magistrate, registrar or other proper officer of that court.

Note. Section 5 of the Commonwealth Act extends the operation of section 157 of the Commonwealth Act to proceedings in all Australian courts.

Evidence of certain public documents

158. (1) If:

- (a) a public document, or a certified copy of a public document, of the Commonwealth, a State or another Territory is admissible for a purpose in the Commonwealth, that State or Territory under the law of the Commonwealth, the State or Territory; and
- (b) it purports to be sealed, or signed and sealed, or signed alone, as directed by the law of the Commonwealth, the State or Territory;

it is admissible in evidence to the same extent and for that purpose in all Norfolk Island courts:

- (c) without proof of:
 - (i) the seal or signature; or
 - (ii) the official character of the person appearing to have signed it; and
- (d) without further proof in every case in which the original document could have been received in evidence.

(2) A public document of the Commonwealth, a State or another Territory that is admissible in evidence for any purpose in the Commonwealth, that State or Territory under the law of the Commonwealth, that State or Territory without proof of:

- (a) the seal or signature authenticating the document; or

- (b) the judicial or official character of the person appearing to have signed the document,

is admissible in evidence to the same extent and for any purpose in all Norfolk Island courts without such proof.

(3) This section only applies to documents that are public records of the Commonwealth, a State or another Territory.

Official statistics

159. A document that purports:

- (a) to be published by the Statistician for Norfolk Island; and
 (b) to contain statistics or abstracts compiled and analysed by the Statistician under the *Census and Statistics Act 1961*,

is evidence that those statistics or abstracts were compiled and analysed by the Statistician under that Act.

Note. Section 5 of the Commonwealth Act extends the operation of section 159 of the Commonwealth Act to proceedings in all Australian courts.

Division 3 — Matters relating to post and communications

Postal articles

160. (1) It is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that a postal article sent by prepaid post addressed to a person to or from a specified address in Australia or an external Territory to or from an address in Norfolk Island was received at that address on the eighth working day after having been posted and between addresses in Norfolk Island on the day following the day of posting

(2) This section does not apply if:

- (a) the proceeding relates to a contract; and
 (b) all the parties to the proceeding are parties to the contract; and
 (c) subsection (1) is inconsistent with a term of the contract.

(3) In this section:

an address in Norfolk Island includes reference to the number of a post office box rented in the name of a person or at which a person's correspondence and notices may be ordinarily sent;

working day means a day that is not:

- (a) a Saturday or a Sunday, or
 (b) a public holiday in the place to which the postal article was addressed.

Note. Section 182 of the Commonwealth Act gives section 160 of the Commonwealth Act a wider application in relation to postal articles sent by a Commonwealth agency. This section in its application in Norfolk Island provides different times for delivery to those of the Commonwealth Act.

Telexes

161. (1) If a document purports to contain a record of a message transmitted by telex, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the message:

- (a) was so transmitted; and
 (b) was sent by the person from whom or on whose behalf it purports to have been sent; and
 (c) was sent on the day on which, at the time at which and from the place from which it purports to have been sent; and
 (d) was received at the destination to which it purports to have been sent; and

(e) was so received at the time at which its transmission to that destination was concluded.

(2) This section does not apply if:

- (a) the proceeding relates to a contract; and
- (b) all the parties to the proceeding are parties to the contract; and
- (c) subsection (1) is inconsistent with a term of the contract.

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

Lettergrams and telegrams

162. (1) If a document purports to contain a record of a message transmitted by means of a lettergram or telegram, it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the message was received by the person to whom it was addressed 24 hours after the message was delivered to a post office for transmission as a lettergram or telegram.

(2) This section does not apply if:

- (a) the proceeding relates to a contract; and
- (b) all the parties to the proceeding are parties to the contract; and
- (c) subsection (1) is inconsistent with a term of the contract.

Note. Section 182 of the Commonwealth Act gives section 162 of the Commonwealth Act a wider application in relation to Commonwealth records.

Facsimile and other electronic transmission

163. (1) If a document is sent by means of fax or other electronic transmission it is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that the message was received by the person to whom it was addressed at the time the facsimile or transmission is received or 15 minutes after it was sent whichever is earlier.

(2) If a fax or other electronic transmission is received after 4.00 p.m. on any day, it must be taken to have been received on the next working day.

(3) In this section:

working day means a day that is not:

- (a) a Saturday or a Sunday, or
- (b) a public holiday in the place to which the message was sent.

Note: The provisions of this section do not appear in the Commonwealth Act. **Fax** is defined in the Dictionary.

PART 4.4 — CORROBORATION

Corroboration requirements abolished

164. (1) It is not necessary that evidence on which a party relies be corroborated.

(2) Subsection (1) does not affect the operation of a rule of law that requires corroboration with respect to the offence of perjury or a similar or related offence.

(3) Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the judge:

- (a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect; or
- (b) give a direction relating to the absence of corroboration.

PART 4.5 — WARNINGS**Unreliable evidence**

165. (1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:

- (a) evidence in relation to which Part 3.2 (hearsay evidence) or 3.4 (admissions) applies;
- (b) identification evidence;
- (c) evidence the reliability of which may be affected by age, ill health (whether physical or mental); injury or the like,
- (d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding;
- (e) evidence given in a criminal proceeding by a witness who is a prison informer;
- (f) oral evidence of official questioning of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant;
- (g) in a proceeding against the estate of a deceased person—evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.

(2) If there is a jury and a party so requests, the judge is to:

- (a) warn the jury that the evidence may be unreliable; and
- (b) inform the jury of matters that may cause it to be unreliable; and
- (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.

(4) It is not necessary that a particular form of words be used in giving the warning or information.

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

Warnings about children's evidence

165A. (1) A judge in any proceeding in which evidence is given by a child must not warn a jury, or make any suggestion to a jury, that children as a class are unreliable witnesses.

(2) Without limiting subsection (1), that subsection prohibits a general warning to a jury of the danger of convicting on the uncorroborated evidence of any child witness.

(3) Sections 164 and 165 and Part 5A.3 of Chapter 5A are subject to this clause.

Warnings about a particular child's evidence

165B. (1) This section applies to evidence given by a child in proceedings before a jury.

(2) A judge in any proceedings in which evidence to which this section applies is given may —

- (a) warn or inform the jury that the evidence of the particular child may be unreliable because of the child's age; and

- (b) warn the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it.

(3) Such a warning or information may be given only —

- (a) if a party has requested that it be given; and
- (b) if that party has satisfied the court that there are circumstances particular to that child in those proceedings that affect the reliability of the child's evidence and that warrant the giving of a warning or the information.

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

Note: The Commonwealth Act does not include an equivalent provision to section 165B.

PART 4.6 — ANCILLARY PROVISIONS

Division 1 — Requests to produce documents or call witnesses

Note. Section 182 of the Commonwealth Act gives Division 1 of Part 4.6 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

Definition of request

166. In this Division:

request means a request that a party (“the **requesting party**”) makes to another party to do one or more of the following:

- (a) to produce to the requesting party the whole or a part of a specified document or thing;
- (b) to permit the requesting party, adequately and in an appropriate way, to examine, test or copy the whole or a part of a specified document or thing;
- (c) to call as a witness a specified person believed to be concerned in the production or maintenance of a specified document or thing;
- (d) to call as a witness a specified person in whose possession or under whose control a specified document or thing is believed to be or to have been at any time;
- (e) in relation to a document of the kind referred to in paragraph (b) or (c) of the definition of *document* in the Dictionary—to permit the requesting party, adequately and in an appropriate way, to examine and test the document and the way in which it was produced and has been kept;
- (f) in relation to evidence of a previous representation—to call as a witness the person who made the previous representation;
- (g) in relation to evidence that a person has been convicted of an offence, being evidence to which section 92(2) applies — to call as a witness a person who gave evidence in the proceeding in which the person was so convicted.

Requests may be made about certain matters

167. A party may make a reasonable request to another party for the purpose of determining a question that relates to:

- (a) a previous representation; or
- (b) evidence of a conviction of a person for an offence; or
- (c) the authenticity, identity or admissibility of a document or thing.

Time limits for making certain requests

168. (1) If a party has given to another party written notice of its intention to adduce evidence of a previous representation, the other party may only make a request to the party relating to the representation if the request is made within 21 days after the notice was given.

(2) Despite subsection (1), the court may give the other party leave to make a request relating to the representation after the end of that 21 day period if it is satisfied that there is a good reason to do so.

(3) If a party has given to another party written notice of its intention to adduce evidence of a person's conviction of an offence in order to prove a fact in issue, the other party may only make a request relating to evidence of the conviction if the request is made within 21 days after the notice is given.

(4) Despite subsection (3), the court may give the other party leave to make a request relating to evidence of the conviction after the end of that 21 day period if it is satisfied that there is good reason to do so.

(5) If a party has served on another party a copy of a document that it intends to tender in evidence, the other party may only make a request relating to the document if the request is made within 21 days after service of the copy.

(6) If the copy of the document served under subsection (5) is accompanied by, or has endorsed on it, a notice stating that the document is to be tendered to prove the contents of another document, the other party may only make a request relating to the other document if the request is made within 21 days after service of the copy.

(7) Despite subsections (5) and (6), the court may give the other party leave to make a request relating to the document, or other document, after the end of the 21 day period if it is satisfied that there is good reason to do so.

Failure or refusal to comply with requests

169. (1) If the party has, without reasonable cause, failed or refused to comply with a request, the court may, on application, make one or more of the following orders:

- (a) an order directing the party to comply with the request;
- (b) an order that the party produce a specified document or thing, or call as a witness a specified person, as mentioned in section 166;
- (c) an order that the evidence in relation to which the request was made is not to be admitted in evidence;
- (d) such order with respect to adjournment or costs as is just.

(2) If the party had, within a reasonable time after receiving the request, informed the other party that it refuses to comply with the request, any application under subsection (1) by the other party must be made within a reasonable time after being so informed.

(3) The court may, on application, direct that evidence in relation to which a request was made is not to be admitted in evidence if an order made by it under subsection (1)(a) or (b) is not complied with.

(4) Without limiting the circumstances that may constitute reasonable cause for a party to fail to comply with a request, it is reasonable cause to fail to comply with a request if:

- (a) the document or thing to be produced is not available to the party; or
- (b) the existence and contents of the document are not in issue in the proceeding in which evidence of the document is proposed to be adduced; or
- (c) the person to be called as a witness is not available.

(5) Without limiting the matters that the court may take into account in relation to the exercise of a power under subsection (1), it is to take into account:

- (a) the importance in the proceeding of the evidence in relation to which the request was made; and

- (b) whether there is likely to be a dispute about the matter to which the evidence relates; and
- (c) whether there is a reasonable doubt as to the authenticity or accuracy of the evidence that is, or the document the contents of which are, sought to be proved; and
- (d) whether there is a reasonable doubt as to the authenticity of the document or thing that is sought to be tendered; and
- (e) if the request relates to evidence of a previous representation—whether there is a reasonable doubt as to the accuracy of the representation or of the evidence on which it was based; and
- (f) in the case of a request referred to in paragraph (g) of the definition of request in section 166—whether another person is available to give evidence about the conviction or the facts that were in issue in the proceeding in which the conviction was obtained; and
- (g) whether compliance with the request would involve undue expense or delay or would not be reasonably practicable; and
- (h) the nature of the proceeding.

Note. Clause 5 of Part 2 of the Dictionary is about the availability of documents and things, and clause 4 of Part 2 of the Dictionary is about the availability of persons.

Division 2 — Proof of certain matters by affidavits or written statements

Note. Section 182 of the Commonwealth Act gives Division 2 of Part 4.6 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

Evidence relating to certain matters

170. (1) Evidence of a fact that is, because of a provision of this Act referred to in the Table, to be proved in relation to a document or thing may be given by a person permitted under section 171 to give such evidence.

TABLE

Provisions of this Act	Subject-matter
Section 48	Proof of contents of documents
Sections 63, 64 and 65	Hearsay exceptions for "first-hand" hearsay
Section 69	Hearsay exception for business records
Section 70	Hearsay exception for tags, labels and other writing
Section 71	Hearsay exception for telecommunications
The provisions of Part 4.3	Facilitation of proof

Note. The Table to section 170 of the Commonwealth Act includes a reference to section 182 (Commonwealth records) of that Act.

(2) Evidence may be given by affidavit or, if the evidence relates to a public document, by a written statement.

Persons who may give such evidence

171. (1) Such evidence may be given by:

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

(2) Despite subsection (1)(b), evidence must not be given under this section by an authorised person who, at the relevant time or afterwards, did not have a position of responsibility in relation to making or keeping the document or thing unless it appears to the court that:

- (a) it is not reasonably practicable for the evidence to be given by a person who had, at the relevant time or afterwards, a position of responsibility in relation to making or keeping the document or thing; or
- (b) having regard to all the circumstances of the case, undue expense would be caused by calling such a person as a witness.

(3) In this section:

authorised person means:

- (a) a person before whom an oath, declaration or affidavit may be taken or made
 - (i) in Norfolk Island; or
 - (ii) a country or place outside Norfolk Island under the *Oaths Act 1960*; or
- (b) a police officer of or above the rank of sergeant; or
- (c) a person authorised by the Minister for the purposes of this section.

Note. The Commonwealth Act contains a different definition of *authorised person*.

Evidence based on knowledge, belief or information

172. (1) Despite Chapter 3, the evidence may include evidence based on the knowledge and belief of the person who gives it, or on information that that person has.

(2) An affidavit or statement that includes evidence based on knowledge, information or belief must set out the source of the knowledge or information or the basis of the belief.

Notification of other parties

173. (1) A copy of the affidavit or statement must be served on each party a reasonable time before the hearing of the proceeding.

(2) The party who tenders the affidavit or statement must, if another party so requests, call the deponent or person who made the statement to give evidence but need not otherwise do so.

Division 3 — Foreign law

Evidence of foreign law

174. (1) Evidence of a statute, proclamation, treaty or act of state of a foreign country may be adduced in a proceeding by producing:

- (a) a book or pamphlet, containing the statute, proclamation, treaty or act of state, that purports to have been printed by the government or official printer of the country or by the authority of the government or administration of the country; or
- (b) a book or other publication, containing the statute, proclamation, treaty or act of state, that appears to the court to be a reliable source of information; or
- (c) a book or pamphlet that is or would be used in the courts of the country to inform the courts about, or prove, the statute, proclamation, treaty or act of state; or
- (d) a copy of the statute, proclamation, treaty or act of state that is proved to be an examined copy.

(2) A reference in this section to a statute of a foreign country includes a reference to a regulation or by-law of the country.

Evidence of law reports of foreign countries

175. (1) Evidence of the unwritten or common law of a foreign country may be adduced by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the unwritten or common law of the country.

(2) Evidence of the interpretation of a statute of a foreign country may be adduced by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the interpretation of the statute.

Questions of foreign law to be decided by judge

176. If, in a proceeding in which there is a jury, it is necessary to ascertain the law of another country which is applicable to the facts of the case, any question as to the effect of the evidence adduced with respect to that law is to be decided by the judge alone.

Division 4 — Procedures for proving other matters

Certificates of expert evidence

177. (1) Evidence of a person's opinion may be adduced by tendering a certificate ("expert certificate") signed by the person that:

- (a) states the person's name and address; and
- (b) states that the person has specialised knowledge based on his or her training, study or experience as specified in the certificate; and
- (c) sets out an opinion that the person holds and that is expressed to be wholly or substantially based on that knowledge.

(2) Subsection (1) does not apply unless the party seeking to tender the expert certificate has served on each other party:

- (a) a copy of the certificate; and
- (b) a written notice stating that the party proposes to tender the certificate as evidence of the opinion.

(3) Service must be effected not later than:

- (a) 21 days before the hearing; or
- (b) if, on application by the party before or after service, the court substitutes a different period—the beginning of that period.

(4) Service for the purposes of subsection (2) may be proved by affidavit.

(5) A party on whom the documents referred to in subsection (2) are served may, by written notice served on the party proposing to tender the expert certificate, require the party to call the person who signed the certificate to give evidence.

(6) The expert certificate is not admissible as evidence if such a requirement is made.

(7) The court may make such order with respect to costs as it considers just against a party who has, without reasonable cause, required a party to call a person to give evidence under this section.

Convictions, acquittals and other judicial proceedings

178. (1) This section applies to the following facts:

- (a) the conviction or acquittal before or by an applicable court of a person charged with an offence;

- (b) the sentencing of a person to any punishment or pecuniary penalty by an applicable court;
- (c) an order by an applicable court;
- (d) the pendency or existence at any time before an applicable court of a civil or criminal proceeding.

(2) Evidence of a fact to which this section applies may be given by a certificate signed by a judge, a magistrate or registrar or other proper officer of the applicable court:

- (a) showing the fact, or purporting to contain particulars, of the record, indictment, conviction, acquittal, sentence, order or proceeding in question, and
- (b) stating the time and place of the conviction, acquittal, sentence, order or proceeding, and
- (c) stating the title of the applicable court.

(3) A certificate given under this section showing a conviction, acquittal, sentence or order is also evidence of the particular offence or matter in respect of which the conviction, acquittal, sentence or order was had, passed or made, if stated in the certificate.

(4) A certificate given under this section showing the pendency or existence of a proceeding is also evidence of the particular nature and occasion, or ground and cause, of the proceeding, if stated in the certificate.

(5) A certificate given under this section purporting to contain particulars of a record, indictment, conviction, acquittal, sentence, order or proceeding is also evidence of the matters stated in the certificate.

(6) In this section:

acquittal includes the dismissal of the charge in question by an applicable court.

applicable court means a Norfolk Island court, an Australian court, or a foreign court.

Note. Section 91 excludes evidence of certain judgments and convictions.

Proof of identity of convicted persons—affidavits by members of State or Territory police forces

179. (1) This section applies if a member of the police force of a State or of another Territory:

- (a) makes an affidavit in the form prescribed by the regulations for the purposes of this section, and
- (b) states in the affidavit that he or she is a fingerprint expert for that police force.

(2) For the purpose of proving before a court the identity of a person alleged to have been convicted in that State or Territory of an offence, the affidavit is evidence in a proceeding that the person whose fingerprints are shown on a fingerprint card referred to in the affidavit and marked for identification:

- (a) is the person referred to in a certificate of conviction, or certified copy of conviction annexed to the affidavit, as having been convicted of an offence; and
- (b) was convicted of that offence; and
- (c) was convicted of any other offence of which he or she is stated in the affidavit to have been convicted.

(3) For the purposes of this section, if a Territory does not have its own police force, the police force performing the policing functions of the Territory is taken to be the police force of the Territory.

Proof of identity of convicted persons—affidavits by members of Australian Federal Police or the Norfolk Island Police

180. (1) This section applies if a member of the Australian Federal Police and/or the Norfolk Island Police:

- (a) makes an affidavit in the form prescribed by the regulations for the purposes of this section; and
- (b) states in the affidavit that he or she is a fingerprint expert for the Australian Federal Police and/or the Norfolk Island Police.

(2) For the purpose of proving before a court the identity of a person alleged to have been convicted of an offence against a law of the Commonwealth or of Norfolk Island, the affidavit is evidence in a proceeding that the person whose fingerprints are shown on a fingerprint card referred to in the affidavit and marked for identification:

- (a) is the person referred to in a certificate of conviction, or certified copy of conviction annexed to the affidavit, as having been convicted of an offence; and
- (b) was convicted of that offence; and
- (c) was convicted of any other offence of which he or she is stated in the affidavit to have been convicted.

Proof of service of statutory notifications, notices, orders and directions

181. (1) The service, giving or sending under a law of Norfolk Island of a written notification, notice, order or direction may be proved by affidavit of the person who served, gave or sent it.

(2) A person who, for the purposes of a proceeding, makes an affidavit referred to in this section is not, because of making the affidavit, excused from attending for cross-examination if required to do so by a party to the proceeding.

CHAPTER 4A - TAKING EVIDENCE IN PARTICULAR CIRCUMSTANCES

PART 4A.1 - EXAMINATION OF WITNESSES OUTSIDE NORFOLK ISLAND BUT WITHIN AUSTRALIA

Application

181A. This Part applies only in relation to an examination within Australia, and accordingly a reference in this Part to a person or place outside Norfolk Island is to be read as not including a reference to a person or place outside Australia.

Interpretation

181B. In this Part, unless the contrary intention appears —

Australia includes Norfolk Island and the other external Territories;

examination includes any proceeding for the taking of evidence of a person conducted by a judicial authority of a place outside Norfolk Island in accordance with a letter of request issued pursuant to an order made by the Supreme Court under this Part;

inferior Court means a Court established by an enactment;

judicial authority, in relation to a place outside Norfolk Island, means a Court or person prescribed as a judicial authority for that place.

Supreme Court proceedings

181C. (1) In any civil or criminal proceeding in the Supreme Court, the Court may, where it appears in the interests of justice to do so, make an order —

- (a) for the examination of a person on oath or affirmation at a place outside Norfolk Island before a Judge of the Court, an officer of the Court or such other person as the Court may appoint;
- (b) for the issue of a commission for the examination of a person on oath or affirmation at a place outside Norfolk Island; or
- (c) for the issue of a letter of request to a judicial authority of a place outside Norfolk Island to take, or to cause to be taken, the evidence of a person.

(2) In determining whether it is in the interests of justice to make an order under subsection (1) in relation to the taking of evidence of a person, the Supreme Court must have regard to —

- (a) whether the person is willing or able to come to Norfolk Island to give evidence in the proceeding;
- (b) whether the person will be able to give evidence material to any issue to be tried in the proceeding; and
- (c) whether, having regard to the interests of the parties to the proceeding, justice will be better served by making or refusing to make the order.

(3) Where the Supreme Court makes an order of the kind referred to in paragraph (1)(a) or (b), the Court may, then or subsequently, give such directions as it thinks just with respect to the place, time and manner of the examination, the procedure to be followed in relation to it, and any other matter that the Court thinks relevant.

(4) Where the Supreme Court makes an order of the kind referred to in paragraph (1)(c), the Court may include in the order a request as to any matter relating to the taking of the evidence, including any of the following matters —

- (a) the examination, cross-examination or re-examination of the person, whether the evidence is to be given orally, by affidavit or otherwise;
- (b) the attendance of the legal representative of each party to the proceeding and the participation of those representatives in the examination in appropriate circumstances;
- (c) any prescribed matter.

(5) Subject to subsection (6), the Supreme Court may, on such terms, if any, as it thinks just, permit a party to the proceeding to tender as evidence in the proceeding the evidence taken in an examination held pursuant to an order under subsection (1) or a record of that evidence.

(6) Evidence so tendered is not admissible if —

- (a) at the hearing of the proceeding the Supreme Court is satisfied that the person is in Norfolk Island and is able to attend the hearing; or
- (b) the evidence would not have been admissible had it been given or produced at the hearing.

(7) Where it is in the interests of justice to do so, the Supreme Court may exclude from the proceeding evidence taken in an examination held pursuant to an order under subsection (1) even if it is otherwise admissible.

(8) In this section, a reference to evidence taken in an examination is to be read as including a reference to —

- (a) a document produced at the examination; and

- (b) answers made, whether in writing, or orally and reduced to writing, to any written interrogatories presented at the examination.

Inferior Court proceedings

181D. (1) The Supreme Court may, on the application of a party to a civil or criminal proceeding before an inferior Court, exercise the same power to make an order of a kind referred to in subsection 181C(1) for the purpose of that proceeding as the Supreme Court has under that subsection for the purpose of a proceeding in the Supreme Court.

(2) Subsections 181C(5), (6) and (7) apply in relation to evidence taken in an examination held pursuant to an order made by the Supreme Court by virtue of this section as if —

- (a) in those subsections —
 - (i) a reference to the proceeding were a reference to the proceeding in the inferior Court; and
 - (ii) a reference to the Supreme Court were a reference to the inferior Court; and
- (b) in subsections 181C(5) and (7), a reference to an order under subsection (1) were a reference to an order made by the Supreme Court by virtue of this section.

Other proceedings

181E. (1) Where the Supreme Court makes an order under subsection 181D(1) for the purpose of a committal proceeding, it may include in the order an order that evidence taken outside Norfolk Island pursuant to the first-mentioned order may, subject to this section, be tendered in a proceeding (in this section called a “subsequent proceeding”) that is —

- (a) a criminal proceeding that results from the committal proceeding; or
- (b) a related civil proceeding.

(2) Where the Supreme Court makes an order under subsection 181C(1) or 181D(1) for the purpose of a criminal proceeding other than a committal proceeding, it may include in the order an order that evidence taken outside Norfolk Island pursuant to the first-mentioned order may, subject to this section, be tendered in a proceeding (in this section called a “subsequent proceeding”) that is a related civil proceeding.

(3) Subject to subsection (4), where the Supreme Court has included in an order under subsection 181C(1) or 181D(1) an order under this section, the Court before which the subsequent proceeding is instituted may, on such terms (if any) as it thinks just, permit a party to the subsequent proceeding to tender as evidence in the subsequent proceeding the evidence of a person taken in an examination held pursuant to the order made under subsection 181C(1) or 181D(1) or a record of that evidence.

(4) Evidence so tendered is not admissible if —

- (a) at the hearing of the subsequent proceeding the Court is satisfied that the person is in Norfolk Island and is able to attend the hearing; or
- (b) the evidence would not have been admissible had it been given or produced at the hearing.

(5) Where it is in the interests of justice to do so, the Court before which the subsequent proceeding is instituted may exclude from the subsequent proceeding evidence taken in an examination held pursuant to an order under subsection 181C(1) or 181D(1) even if it is otherwise admissible.

(6) In this section, unless the contrary intention appears —

related civil proceeding, in relation to a criminal proceeding, means any civil proceeding relating to a cause of action arising from the same subject-matter.

Variation or revocation of orders

181F. (1) The Supreme Court may vary or revoke an order made under subsection 181C(1) or 181D(1) (in this section called a “primary order”).

(2) The power conferred by subsection (1) includes the power to —

- (a) include in a primary order an order under section 181E; or
- (b) vary or revoke an order under section 181E that is included in a primary order.

(3) Where a primary order that includes an order under section 181E is revoked, the last-mentioned order is to be taken to have been revoked at the same time.

Exclusion of evidence in criminal proceeding

181G. This Part is not to be taken to affect the power of a Court hearing a criminal proceeding to exclude evidence that has been obtained illegally or that would, if admitted, operate unfairly against the defendant.

Operation of other laws

181H. This Part is not intended to exclude or limit the operation of any law of Norfolk Island that makes provision for the examination of witnesses outside Norfolk Island for the purpose of a proceeding in Norfolk Island.

Regulations and rules of Court

181J. (1) The Administrator may make Regulations, not inconsistent with this Part, prescribing matters —

- (a) required or permitted by this Part to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Part,

and, in particular, for or with respect to the practice and procedure of the Supreme Court in a proceeding for the making of an order under subsection 181C(1) or 181D(1).

(2) The power under section 19 of the *Supreme Court Act 1960* to make rules regulating the practice and procedure of the Supreme Court extends to making rules, not inconsistent with this Part or Regulations made under this section, for or with respect to all matters necessary or convenient to be prescribed for carrying out or giving effect to this Part and, in particular, for or with respect to the practice and procedure of the Supreme Court in a proceeding for the making of an order under subsection 181C(1) or 181D(1) and in default of any such Rules the Rules of the Supreme Court of the Australian Capital Territory from time to time (if any) for taking evidence outside the Australian Capital Territory shall *mutatis mutandis* apply.

(3) This section does not affect any power to make Regulations or rules under any other enactment.

PART 4A.2 — TAKING OF EVIDENCE FOR FOREIGN AND AUSTRALIAN COURTS

Interpretation

181K. In this Part, unless the contrary intention appears —

Australia includes the external Territories, other than Norfolk Island;

property includes any land, chattel or other corporeal property of any description;

request includes any commission, order or other process issued for the making of an application under subsection 181L(1);

requesting Court means a Court or tribunal by or on behalf of which a request is issued.

Power of Supreme Court

181L. (1) If, on an application made to the Supreme Court for an order for evidence to be obtained in Norfolk Island, the Supreme Court is satisfied —

- (a) that the application is made pursuant to a request issued by or on behalf of a Court or tribunal exercising jurisdiction in a place outside Norfolk Island; and
- (b) that the evidence to which the application relates is sought to be obtained for the purpose of a proceeding which has been or may be instituted before the requesting Court;

the Supreme Court may, by order, make such provision for obtaining evidence in Norfolk Island as appears to the Court to be appropriate for the purpose of giving effect to the request.

(2) An order under subsection (1) must not be made in respect of a criminal proceeding unless the requesting Court is a Court of a place in Australia or New Zealand.

(3) Without limiting the generality of subsection (1), an order under that subsection may make provision for all or any of the following matters —

- (a) the examination of witnesses, orally or in writing;
- (b) the production of documents;
- (c) the inspection, photographing, preservation, custody or detention of property;
- (d) any experiments on or with property;
- (e) the medical examination of a person;
- (f) without limiting paragraph (e), the taking and testing of samples of blood from a person.

(4) An order under subsection (1) may require a specified person to take such steps as the Supreme Court considers appropriate, being steps of a kind that could be required to be taken to obtain evidence for the purpose of a proceeding in the Supreme Court (whether or not a proceeding of the same kind as that to which the application for the order relates).

(5) Subsection (4) does not preclude the making of an order requiring a person to give testimony, orally or in writing, otherwise than on oath where this is asked for by the requesting Court.

(6) An order under subsection (1) must not require a person —

- (a) to state what documents relevant to the proceeding to which the application for the order relates are or have been in the person's possession, custody or control; or
- (b) to produce any documents other than particular documents specified in the order and appearing to the Supreme Court to be, or to be likely to be, in the person's possession, custody or control.

(7) A person who, by virtue of an order under subsection (1), is required to attend at any place is entitled to the like conduct money and payment for expenses and loss of time on attendance as a witness in a proceeding in the Supreme Court.

Privilege of witnesses

181M. (1) A person must not be compelled by virtue of an order under subsection 181L(1) to give any evidence which the person could not be compelled to give in similar proceedings in —

- (a) Norfolk Island; or
- (b) the place where the requesting Court exercises jurisdiction.

(2) Paragraph (1)(b) does not apply unless the claim of the person to be exempt from giving evidence is —

- (a) supported by a statement contained in the request (whether it is so supported unconditionally or subject to conditions that are fulfilled); or
- (b) conceded by the applicant for the order.

(3) Where such a claim is not so supported or conceded, the person may, subject to this section, be required to give the evidence to which the claim relates, but that evidence shall not be transmitted to the requesting Court if that Court, on the matter being referred to it, upholds the claim.

(4) In this section, a reference to giving evidence is to be read as including a reference to answering a question or to producing a document.

Operation of other laws

181N. This Part is not intended to exclude or limit the operation of any law of Norfolk Island that makes provision for the taking of evidence in Norfolk Island for the purpose of a proceeding outside Norfolk Island.

Rules of Court

181O. The power under section 19 of the *Supreme Court Act 1960* to make rules regulating the practice and procedure of the Supreme Court extends to making rules, not inconsistent with this Part, for or with respect to —

- (a) the manner in which an application under subsection 181L(1) is to be made;
- (b) the circumstances in which an order may be made under subsection 181L(1);
- (c) the manner in which any reference referred to in subsection 181L(3) is to be made; and
- (d) any incidental, supplementary or consequential matters.

And in default of any such Rules the Rules of the Supreme Court of the Australian Capital Territory from time to time (if any) for taking evidence for foreign and Australian Courts outside the Australian Capital Territory shall *mutatis mutandis* apply.

False statement in evidence on commission

181P. A person must not, in giving oral or written testimony otherwise than on oath where required to do so pursuant to an order under subsection 181L(1), make a statement —

- (a) which the person knows to be false in a material particular; or
- (b) which is false in a material particular and which the person does not believe to be true.

Penalty: Imprisonment for 3 years.

PART 4A.3 — EVIDENCE IN SEXUAL OFFENCES PROCEEDINGS**Application of Part**

181Q. This Part applies to a proceeding in the Supreme Court or the Court of Petty Sessions and to an inquest under the *Coroners Act 1927*.

Interpretation

181R. In this Part, unless the contrary intention appears —

accused person, in relation to any proceedings, means the person who stands, or any of the persons who stand, charged in the proceedings with a prescribed sexual offence;

complainant, in relation to any proceedings, means the person, or any of the persons, in relation to whom the accused person is alleged to have committed a prescribed sexual offence;

prescribed sexual offence means:

- (a) an offence against Part 3.6 of the *Criminal Code 2007*; or
- (b) if a person charged with an offence (the **offence charged**) is alleged, as an element of that offence, to have intended to commit an offence against Part 3.6 of the *Criminal Code 2007*—the offence charged.

prescribed sexual offence proceedings means proceedings in which a person stands charged with a prescribed sexual offence, whether the person stands charged with that offence alone or together with any other offence (as an additional or alternative count) and whether or not the person is liable, on the charge, to be found guilty of any other offence.

Evidence of complaint

181S. (1) Any rule of law or practice permitting evidence to be admitted in any proceedings in respect of a sexual offence, being evidence relating to the making of a complaint, or the terms of a complaint, by the complainant, is abolished and no such evidence shall be admitted in any prescribed sexual offence proceedings.

(2) Nothing in this section affects the admissibility of evidence in relation to a complaint, or the terms of a complaint, by the complainant in prescribed sexual offence proceedings where that evidence is otherwise admissible under any other rule of law or practice but if there is any doubt as to the admissibility of that evidence subsection (1) shall be applied.

Proceedings in camera

181T. (1) Any evidence given by the complainant in prescribed sexual offence proceedings (including evidence given under cross-examination) shall be given *in camera* unless the complainant otherwise consents.

(2) Where the complainant in prescribed sexual offence proceedings gives evidence *in camera* under subsection (1), a person nominated by the complainant is entitled to be present in court when the complainant gives that evidence in those proceedings.

Prohibition of publication of identity of complainant

181U. A person shall not, without the consent of the complainant in any prescribed sexual offence proceedings, publish the name of that complainant or any reference or allusion by which the identity of that complainant is disclosed or from which the identity of that complainant might reasonably be inferred.

Penalty: 10 penalty units or imprisonment for 6 months, or both.

Abolition of rules of law or practice requiring corroboration

181V. (1) Any rule of law or practice requiring the corroboration of evidence or requiring the judge to give a warning to the jury in criminal proceedings to the effect that it is unsafe to convict a person on uncorroborated evidence is abolished in so far as the rule applies to or in relation to evidence given by the complainant in the trial of a person for a prescribed sexual offence.

(2) Nothing in this section shall affect the right of the judge in prescribed sexual offence proceedings to comment on any evidence that may be unreliable but the judge shall not, in such proceedings, give a warning to the jury to the effect that it is unsafe to convict the accused person on the uncorroborated evidence of the complainant.

Note: See also sections 165A and 165B.

Admissibility of evidence relating to sexual experience, etc

181W. (1) In prescribed sexual offence proceedings, evidence relating to the sexual reputation of the complainant is inadmissible.

(2) No evidence may be adduced and no question may be asked in prescribed sexual offence proceedings, except with the leave of the judge, relating to any sexual experience of the complainant with a person other than the accused person.

(3) The judge shall not give leave in pursuance of subsection (2) for any evidence to be adduced or any question to be asked unless —

- (a) an application for leave is made to the judge, in the absence of the jury; and
- (b) the judge is satisfied that a refusal to allow the evidence to be adduced or the question to be asked would prejudice the fair trial of the accused person.

(4) Nothing in this section authorises the admission of evidence of a kind which was inadmissible immediately before the commencement of this section.

CHAPTER 4B — TAKING EVIDENCE BY AUDIO/VISUAL LINKS

PART 4B.1 - PRELIMINARY

Interpretation

181X. (1) In this Chapter —

accused child detainee means an accused detainee who is a child.

accused detainee means a person who is being held in custody in a correctional centre, detention centre, police station or other place of detention and includes, in relation to a proceeding for a summary offence, a defendant who is so being held.

audio link means facilities (including telephone) that enable audio communication between persons at different places.

audio visual link means facilities (including closed-circuit television) that enable audio and visual communication between persons at different places.

participating State or Territory means another State or Territory in which provisions of a law in terms substantially corresponding to Parts 4B.2 and 4B.3 are in force.

preliminary criminal proceeding means any of the following criminal proceedings —

- (a) any proceeding relating to bail (other than a proceeding relating to bail referred to in paragraph (f) of the definition of *relevant criminal proceeding*);
- (b) where a person has previously been remanded in custody, any subsequent proceeding with respect to the remand of the person in custody for the same offence;
- (c) any interlocutory proceeding held in connection with any criminal proceeding;
- (d) without limiting paragraph (c), any application for an adjournment;
- (e) any arraignment on a day other than the day appointed for the trial of a person.

recognised court means a court or tribunal of a participating State or Territory that is authorised by the provisions of a law of that State or Territory in terms substantially corresponding to Parts 4B.2 and 4B.3 to direct that evidence be taken or submissions made by audio link or audio visual link from Norfolk Island.

relevant criminal proceeding means any of the following criminal proceedings —

- (a) any committal proceeding;
- (b) any inquiry into a person's unfitness to be tried for an offence;
- (c) any trial (including an arraignment on the day appointed for the trial) or hearing of charges;
- (d) any sentencing hearing (including a redetermination of sentence);
- (e) any hearing of an appeal arising out of a trial or hearing;
- (f) any proceeding relating to bail —
 - (i) brought before a Magistrate in respect of the period between a person being charged with an offence and the person's first appearance before a court in relation to the offence; or
 - (ii) on a person's first appearance before a court in relation to an offence.

tribunal of a State or Territory means a person or body authorised by or under a law of the State or Territory to take evidence on oath or affirmation.

(2) A reference in this Chapter (other than Part 4B.3) to making a submission to a court includes a reference to making an appearance before the court.

Appearances and entitlements to be present before courts

181Y. (1) A requirement by or under any other Act that a person appear (or be brought or be present) before a court is taken to be satisfied if the person appears before the court by way of an audio link or audio visual link under this Chapter.

Note: Part 4B.3 of this Chapter contains provisions with respect to the appearance by audio visual link of accused detainees who are in custody in preliminary criminal proceedings and relevant criminal proceedings.

(2) Any entitlement of a person under any other Act or law for a person to be present in proceedings before a court concerning bail is taken to be satisfied if audio visual links are used in relation to the person under this Chapter.

(3) Any entitlement of a person to be present in proceedings on the hearing of an appeal is taken to be satisfied if audio visual links are used in relation to the person under this Chapter.

Application of Chapter 4B

181Z. (1) This Chapter is not intended to exclude or limit the operation of any other law of Norfolk Island or a participating State or Territory that makes provision for the taking of evidence or making of submissions —

- (a) outside Norfolk Island or participating State or Territory for the purposes of a proceeding in Norfolk Island or that State or Territory, or
- (b) in Norfolk Island or participating State or Territory for the purposes of a proceeding outside Norfolk Island or that State or Territory.

(2) This Chapter is not intended to exclude or limit the operation of any other law of Norfolk Island or another place that makes provision for the taking of evidence or making of submissions in Norfolk Island for the purposes of a proceeding in Norfolk Island.

(3) Unless a contrary intention is shown, nothing in this Act limits or otherwise affects any discretion that a Norfolk Island court or an Australian court has with respect to the conduct of a proceeding.

(4) This Chapter (other than Parts 4B.2 and 4B.3) extends to any proceeding pending in a Norfolk Island court or an Australian court on the commencement of this section.

PART 4B.2 - USE OF AUDIO LINKS OR AUDIO VISUAL LINKS WITH PLACES IN NORFOLK ISLAND, NON-PARTICIPATING STATE OR TERRITORIES AND FOREIGN COUNTRIES IN PROCEEDINGS IN NORFOLK ISLAND COURTS

Application of this Part

181AA. (1) This Part applies to any proceeding (including a criminal proceeding) in or before a Norfolk Island court.

(2) An application cannot be made, and the court may not give a direction, under this Part for the giving of evidence or making of a submission to the court by audio link or audio visual link from any place outside Norfolk Island that is a participating State or Territory.

(3) An application cannot be made, and the court may not give a direction, under this Division for the giving of evidence or making of a submission to the court by audio link or audio visual link from any place in New Zealand.

Note: Parts 4 and 5 of the *Evidence and Procedure (New Zealand) Act 1994* of the Commonwealth applies in Norfolk Island and make provision for audio links and audio visual links with New Zealand.

Taking evidence and submissions from outside courtroom or place where court is sitting - proceedings generally

181AB. (1) Subject to any applicable rules of court and subsection (3), a Norfolk Island court may, either on its own motion in, or on the application of a party to, a proceeding before the court, direct that a person (whether or not a party to the proceeding) give evidence or make a submission to the court by audio link or audio visual link from any place within or outside Norfolk Island, including a place outside Australia, other than the courtroom or other place at which the court is sitting.

(2) The court must not make such a direction if —

- (a) the necessary facilities are unavailable or cannot reasonably be made available; or
- (b) the court is satisfied that the evidence or submission can more conveniently be given or made in the courtroom or other place at which the court is sitting; or
- (c) the court is satisfied that the direction would be unfair to the party, or
- (d) the court is satisfied that the person in respect of whom the direction is sought will not give evidence or make the submission.

(3) A court must not make direction under this Part in relation to the giving of evidence or making of a submission by audio visual link by any accused detainee in any preliminary criminal proceeding or relevant criminal proceeding in relation to the detainee concerning an offence alleged to have been committed by the detainee. However, this subsection does not prevent the making of such a direction in relation to an accused detainee in any other proceeding to which this Part applies.

Note: Part4B.3 of this Chapter contains provisions with respect to the appearance of accused detainees who are in custody in preliminary criminal proceedings and relevant criminal proceedings.

(4) In a proceeding in which a party opposes the making of a direction for the giving of evidence or making of a submission to the court by audio link or audio visual link from any place within Norfolk Island other than the courtroom or other place where the court is sitting, the court must not make the direction unless the party making the application satisfies the court that it is in the interests of the administration of justice for the court to do so.

PART 4B.3 - USE OF AUDIO VISUAL LINKS WITHIN PLACES IN NORFOLK ISLAND FOR APPEARANCES OF ACCUSED DETAINEES IN PROCEEDINGS IN NORFOLK ISLAND COURTS

Appearances of accused detainee (other than accused child detainee) by audio visual link in preliminary criminal proceedings

181AC. (1) An accused detainee (other than an accused child detainee) who is required to appear (or be brought or be present) before a Norfolk Island court in any preliminary criminal proceedings in relation to the detainee concerning an offence alleged to have been committed by the detainee —

- (a) may be directed by the court to appear before the court by audio visual link from any place within Norfolk Island at which the accused detainee is in custody other than the courtroom or place at which the court is sitting, and
- (b) may give any evidence or make any submission to the court by that audio visual link.

Note : accused detainee and preliminary criminal proceeding are defined in section 181X.

(2) Subsection (1) does not apply unless the necessary audio visual links are available or can reasonably be made available.

(3) The court may make a direction under subsection (1) on its own motion or on the application of any party to the proceeding.

(4) The court may not make such a direction unless it is satisfied that in the circumstances the interests of the administration of justice do not require the accused detainee to appear physically before the court.

Appearances of accused detainee (other than accused child detainee) by audio visual link in relevant criminal proceedings

181AD. (1) An accused detainee (other than an accused child detainee) who is required to appear (or be brought or be present) before a Norfolk Island court in any relevant criminal proceedings must, unless the court otherwise directs, appear physically before the court in any relevant criminal proceedings in relation to the detainee concerning an offence alleged to have been committed by the detainee.

Note: accused detainee and relevant criminal proceeding are defined in section 181X.

(2) Subsection (1) does not apply if the parties to the proceeding consent to the accused detainee appearing before the court by audio visual link from any place within Norfolk Island at which the accused detainee is in custody other than the courtroom or place where the court is sitting.

(3) The court may make a direction under subsection (1) on its own motion or on the application of any party to the proceeding.

(4) The court may make such a direction only if it is satisfied that it is in the interests of the administration of justice for the accused detainee to appear before the court by audio visual link from a place within Norfolk Island at which the person is in custody other than the courtroom or place where the court is sitting.

(5) Without limiting the factors that the court may take into account in determining whether it is in the interests of the administration of justice to make a direction under subsection (1), the court must take into account such of the following factors as are relevant in the circumstances of the case —

- (a) the risk that the personal security of a particular person or persons (including the accused detainee) may be endangered if the accused detainee appears in the courtroom or place where the court is sitting;
- (b) the risk of the accused detainee escaping, or attempting to escape, from custody when attending the courtroom or place where the court is sitting;

- (c) the behaviour of the accused detainee when appearing before a court in the past;
- (d) the conduct of the accused detainee while in custody, including the accused detainee's conduct during any period in the past during which the accused detainee was being held in custody in a correctional centre or detention centre.

Appearances of accused child detainee by audio visual link in preliminary criminal proceedings and relevant criminal proceedings

181AE. (1) An accused child detainee who is required to appear (or be brought or be present) before a Norfolk Island court in any preliminary criminal proceedings, or in any relevant criminal proceedings, in relation to the child concerning an offence alleged to have been committed by the child must, unless the court otherwise directs, appear physically before the court in those proceedings.

(2) Subsection (1) does not apply if—

- (a) the accused child detainee chooses to give evidence or make any submission by audio visual link from any place within Norfolk Island at which the accused child detainee is in custody other than the courtroom or place where the court is sitting; and
- (b) all other parties to the proceeding consent to the accused child detainee appearing before the court by audio visual link from that place.

(3) The court may make a direction under subsection (1) on its own motion or on the application of any party to the proceeding.

(4) The court may make such a direction only if it is satisfied, after taking into account any factors that are relevant in the circumstances of the case and that are specified in rules of court, that it is in the interests of the administration of justice for the accused child detainee to appear before the court by audio visual link from the place within Norfolk Island at which the child is in custody other than the courtroom or place where the court is sitting.

(5) Without limiting rules of court that may be made with respect to factors to be taken into account under subsection (4), rules of court may require a court to take into account in relation to an accused child detainee any factor of a kind referred to in section 181AD(5) (a)-(d).

(6) A person who was a child when a direction was made to appear before a court by audio visual link as referred to in subsection (4) is entitled to continue to appear before the court by audio visual link in accordance with the direction even if the person becomes an adult before the conclusion of the proceeding concerned.

Facilities for private communication

181AF. Facilities are to be made available for private communication between an accused detainee appearing by audio visual link under this Division in a preliminary criminal proceeding or a relevant criminal proceeding and the person's representative in the proceeding if the person's representative is at the place where the court is sitting.

PART 4B.4 - PROVISIONS APPLYING TO PART 4B.2 AND 4B.3 GENERALLY

Premises to be considered part of court

181AG. (1) Any place within or outside Norfolk Island at which audio link or audio visual link facilities are being used for the purpose of a person giving evidence or making a submission in any proceeding under Part 4B.2 or 4B.3 is taken to be part of the Norfolk Island court that is sitting at a courtroom or other place for the purpose of conducting the proceeding.

(2) Subsection (1) has effect, for example, for the purposes of the laws relating to evidence, procedure, contempt of court or perjury.

(3) Subsection (1) also has the effect that any offence committed at the place where the person giving the evidence or making the submission is located is to be taken to have been committed at the courtroom or other place where the court is sitting for the purposes of the laws in force in Norfolk Island.

Administration of oaths and affirmations

181AH. (1) Subject to subsection (2), an oath to be sworn or affirmation to be made by a person giving evidence by audio link or audio visual link under Part 4B.2 or 4B.3 may be administered either —

- (a) by means of the audio link or audio visual link, as nearly as practicable in the same way as if the person were to give evidence in the courtroom or other place where the Norfolk Island court is sitting; or
- (b) at the direction of, or on behalf of, the court at the place where the person is giving the evidence by a person authorised by the court.

(2) A person giving evidence by audio link or audio visual link under Division 1 or 2 from a foreign country is not required to give the evidence on oath or affirmation if —

- (a) the law in force in that country:
 - (i) does not permit the person to give evidence on oath or affirmation for the purposes of the proceeding; or
 - (ii) would make it inconvenient for the person to give evidence on oath or affirmation for the purposes of the proceeding; and
- (b) the Norfolk Island court is satisfied that it is appropriate for the evidence to be given otherwise than on oath or affirmation.

(3) If evidence is given otherwise than on oath or affirmation, the Norfolk Island court is to give the evidence such weight as it thinks fit in the circumstances.

(4) Subsections (2) and (3) apply despite anything to the contrary in this Act or any other law of Norfolk Island.

PART 4B.5 - USE OF INTERSTATE OR TERRITORY AUDIO LINKS OR AUDIO VISUAL LINKS WITH A PARTICIPATING STATE OR TERRITORY IN PROCEEDINGS IN OR BEFORE NORFOLK ISLAND COURTS

Application of Part

181AI. This Part applies to any proceeding (including a criminal proceeding) in or before a Norfolk Island court.

Norfolk Island courts may take evidence and submissions from outside Norfolk Island

181AJ. (1) A Norfolk Island court may, on the application of a party to a proceeding before the court, direct that evidence be taken, or submissions made, by audio link or audio visual link, from a participating State or Territory.

- (2) The court must not make such a direction if:
- (a) the necessary facilities are unavailable or cannot reasonably be made available; or
 - (b) the court is satisfied that evidence or submissions can more conveniently be given or made in Norfolk Island; or
 - (c) the court is satisfied by a party opposing the making of the direction that the direction would be unfair to the party.

(3) The court may exercise in the participating State or Territory, in connection with taking evidence or receiving submissions by audio link or audio visual link, any of its powers that the court is permitted, under the law of the participating State or Territory, to exercise in the participating State or Territory.

Counsel entitled to practise

181AK. (1) A person who is entitled to practise as a legal practitioner in a participating State or Territory is entitled to practise as a barrister, solicitor or both —

- (a) in relation to the examination in chief, cross-examination or re-examination of a witness in the participating State or Territory whose evidence is being given by audio link or audio visual link in a proceeding before a Norfolk Island court; and
- (b) in relation to the making of submissions by audio link or audio visual link from the participating State or Territory in a proceeding before a Norfolk Island court.

(2) Nothing in this section limits the *Legal Profession Act 1993*.

PART 4B.6 - USE OF INTERSTATE OR TERRITORY AUDIO LINKS OR AUDIO VISUAL LINKS WITH NORFOLK ISLAND IN PROCEEDINGS IN PARTICIPATING STATE OR TERRITORY

Application of Part

181AL. This Part applies to any proceeding (including a criminal proceeding) in or before a recognised court.

Recognised courts may take evidence or receive submissions from persons in Norfolk Island

181AM. A recognised court may, for the purposes of a proceeding before it, take evidence or receive submissions, by audio link or audio visual link, from a person in Norfolk Island.

Powers of recognised courts

181AN. (1) The recognised court may, for the purposes of the proceeding, exercise in Norfolk Island, in connection with taking evidence or receiving submissions by audio link or audio visual link, any of its powers except its powers:

- (a) to punish for contempt, and
- (b) to enforce or execute its judgments or process.

(2) The laws of the participating State or Territory (including rules of court) that apply to the proceeding in that State or Territory also apply, by force of this subsection, to the practice and procedure of the recognised court in taking evidence or receiving submissions by audio link or audio visual link from a person in Norfolk Island.

(3) For the purposes of the recognised court exercising its powers, the place in Norfolk Island where evidence is given or submissions are made is taken to be part of the court.

Orders made by recognised court

181AO. Without limiting section 181AN, the recognised court may, by order —

- (a) direct that the proceeding, or a part of the proceeding, be conducted in private, or
- (b) require a person to leave a place in Norfolk Island where the giving of evidence or the making of submissions is taking place or is going to take place; or

- (c) prohibit or restrict the publication of evidence given in the proceeding or of the name of a party to, or a witness in, the proceeding.

Enforcement of order

181AP. (1) An order of a recognised court under section 181AN or 181AO must be complied with.

(2) Subject to any applicable rule of court, the order may be enforced by the Supreme Court as if the order were an order of the Supreme Court.

(3) Without limiting subsection (2), a person who contravenes the order:

- (a) is taken to be in contempt of the Supreme Court; and
 (b) is punishable accordingly,

unless the person establishes that the contravention should be excused.

Privileges, protection and immunity of participants in proceedings in courts of participating State or Territory

181AQ. (1) A judge or other person presiding at or otherwise taking part in the proceeding of a recognised court has, in connection with evidence being taken or submissions being received by audio link or audio visual link from a person in Norfolk Island, the same privileges, protection and immunity as a judge of the Supreme Court.

(2) A person appearing as a legal practitioner in the proceeding of a recognised court has, in connection with evidence being taken or submissions being received by audio link or audio visual link from a person in Norfolk Island, the same protection and immunity as a legal practitioner has in appearing for a party in a proceeding before the Supreme Court.

(3) A person appearing as a witness in a proceeding of a recognised court by audio link or audio visual link from Norfolk Island has the same protection as a witness in a proceeding in the Supreme Court.

Recognised court may administer oath in the State or Territory

181AR. (1) A recognised court may, for the purpose of obtaining in the proceeding, by audio link or audio visual link, the testimony of a person in Norfolk Island, administer an oath or affirmation in accordance with the practice and procedure of the recognised court.

(2) Evidence given by a person on oath or affirmation so administered is, for the purposes of the law of Norfolk Island, testimony given on oath in a judicial proceeding.

Note: Chapter 7 of the *Criminal Code 2007* contains offences relating to perjury and giving of false testimony in judicial proceedings.

Assistance to recognised court

181AS. An officer of a Norfolk Island court may, at the request of a recognised court

-
- (a) to be or is being taken, or submissions are to be or are being made, in a proceeding of the recognised court; and
 (b) take such action as the recognised court directs to facilitate the proceeding; and
 (c) assist with the administering by the recognised court of an oath or affirmation.

Contempt of recognised courts

181AT. A person must not, while evidence is being given or a submission is being made in Norfolk Island, by audio link or audio visual link, in a proceeding in a recognised court —

- (a) assault in Norfolk Island any of the following —
 (i) a person appearing in the proceeding as a legal practitioner;

- (ii) a witness in the proceeding;
 - (iii) an officer of a Norfolk Island court giving assistance under section 181AS; or
- (b) threaten, intimidate or wilfully insult any of the following —
- (i) a judge or other person presiding at or otherwise taking part in the proceeding;
 - (ii) a Registrar, Deputy Registrar or other officer of that court who is taking part in or assisting in the proceeding;
 - (iii) a person appearing in the proceeding as a legal practitioner;
 - (iv) a witness in the proceeding;
 - (v) a juror in the proceeding; or
- (c) wilfully interrupt or obstruct the proceeding; or
- (d) wilfully and without lawful excuse disobey an order or direction of the court.
- Penalty: Imprisonment for 3 months.

PART 4B.7 - MISCELLANEOUS

Giving evidence or making submissions by audio visual link

181AU. Evidence must not be given, and a submission must not be made, by audio visual link under this Act unless the courtroom or other place where a Norfolk Island court is sitting, and the place where the evidence would be given or the submission would be made, are equipped with audio visual link facilities that enable —

- (a) persons who are at the courtroom or other place to see and hear the person giving the evidence or making the submission; and
- (b) persons who are at the place where the evidence is given or the submission is made to see and hear persons at the courtroom or other place.

Giving evidence or making submissions by audio link

181AV. Evidence must not be given, and a submission must not be made, by audio link under this Act unless the courtroom or other place where a Norfolk Island court is sitting, and the place where the evidence would be given or the submission would be made, are equipped with audio link facilities that enable —

- (a) persons who are at the courtroom or other place to hear the person giving the evidence or making the submission; and
- (b) persons who are at the place where the evidence is given or the submission is made to hear persons at the courtroom or other place.

Expenses

181AW. If a Norfolk Island court directs evidence to be taken, or submissions to be made, by audio link or audio visual link from a person under this Chapter, the court may make such orders as it considers just for payment of expenses incurred in connection with taking the evidence or making the submissions or providing the audio link or audio visual link.

Failure of audio link or audio visual link

181AX. If an audio link or audio visual link being used in accordance with this Chapter for the purposes of a proceeding before a Norfolk Island court fails during the proceeding, the court may adjourn the proceeding or make such other orders as are appropriate in the circumstances as if a person present at the place at which the audio link or audio visual link facilities are located were in the presence of the court.

Putting documents to a remote person

181AY. If in the course of examination of a person by audio link or audio visual link it is necessary to put a document to the person, the Norfolk Island court may permit the document to be put to the person —

- (a) if the document is at the courtroom or other place where the court is sitting, by transmitting by any means a copy of it to the place where the person is giving evidence or making a submission and the copy so transmitted being then put to the person; or
- (b) if the document is at the place where the person is giving evidence or making a submission, by putting it to the person and then transmitting by any means a copy of it to the courtroom or other place.

Directions

181AZ. A Norfolk Island court may at any time vary or revoke a direction given by it under this Chapter in a proceeding, either on its own motion or on application by a party to the proceeding.

Proceedings for offences

181BA. Proceedings for an offence against this Chapter or the Regulations are to be dealt with summarily before the Court of Petty Sessions

CHAPTER 5 — MISCELLANEOUS

Application of certain sections in relation to Commonwealth records

182. (1) Subject to this section, the provisions of this Act referred to in the following Table apply in relation to documents that:

- (a) are, or form part of, Commonwealth records; or
- (b) at the time they were produced were, or formed part of, Commonwealth records;

TABLE

Provisions of this Act	Subject matter
Sections 47, 48, 49 and 51	Documentary evidence
Section 69	Hearsay exception for business records
Subsection 70(1)	Hearsay exception for tags, labels and other writing
Section 71	Hearsay exception for telecommunications
Section 147	Documents produced by processes, machines etc in the course of business
Section 149	Attestation of documents
Section 152	Documents produced from proper custody
Section 156	Public documents
Sections 160, 161 and 162	Postal articles, telexes, lettergrams and telegrams
Division I of Part 4.6	Requests to produce documents or call witnesses
Division 2 of Part 4.6	Proof of certain matters by affidavit or written statements
Section 183	Inferences about documents, etc

(2) For the purposes of subsection (1), section 69, subsection 70(1) and section 71 apply in relation to proceedings, other than proceedings in a federal court as if the references in those sections to the hearsay rule were references to any rule of law restricting the admissibility or use of hearsay evidence.

(3) Subsection (1) applies to subsection 70(1) only in relation to tags or labels that may reasonably be supposed to have been attached to objects in the course of carrying on an activity engaged in by a body, person or organisation referred to in the definition of **Commonwealth record** in the Dictionary.

(4) For the purposes of subsection (1) in relation to the application of subsection 70(1):

- (a) the reference in subsection (1) to documents includes a reference to writing placed on objects; and
- (b) the reference in subsection (3) to tags or labels attached to objects includes a reference to writing placed on objects.

(5) This section does not derogate from the operation of a law of Norfolk Island, a State or Territory that enables evidence of a matter referred to in this section to be given.

Inferences

183. If a question arises about the application of a provision of this Act in relation to a document or thing, the court may:

- (a) examine the document or thing; and
- (b) draw any reasonable inferences from it as well as from other matters from which inferences may properly be drawn.

Note. Section 182 of the Commonwealth Act gives section 183 of the Commonwealth Act a wider application in relation to Commonwealth records and certain Commonwealth documents.

Accused may admit matters and give consents

184. In or before a criminal proceeding, a defendant may, if advised to do so by his or her lawyer:

- (a) admit matters of fact; and
- (b) give any consent,

that a party to a civil proceeding may make or give.

185. [Omitted]

Swearing of certain affidavits before justices of the peace, notaries public and lawyers

186. (1) Affidavits for use in proceedings involving the exercise of jurisdiction conferred by a Commonwealth Act may be sworn before any justice of the peace, notary public or lawyer without the issue of any commission for taking affidavits.

- (2) In this section *proceedings* includes proceedings that:
 - (a) relate to bail; or
 - (b) are interlocutory proceedings or proceedings of a similar kind; or
 - (c) are heard in chambers; or
 - (d) relate to sentencing.

No privilege against self-incrimination for bodies corporate

187. (1) This section applies if, under a law of or in a proceeding, a body corporate is required to:

- (a) answer a question or give information; or
- (b) produce a document or any other thing; or
- (c) do any other act whatever.

(2) The body corporate is not entitled to refuse or fail to comply with the requirement on the ground that answering the question, giving the information, producing the document or other thing or doing that other act, as the case may be, might tend to incriminate the body or make the body liable to a penalty.

Impounding documents

188. The court may direct that a document that has been tendered or produced before the court (whether or not it is admitted in evidence) is to 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.

The voir dire

189. (1) If the determination of a question whether:

- (a) evidence should be admitted (whether in the exercise of a discretion or not); or
- (b) evidence can be used against a person; or
- (c) a witness is competent or compellable,

depends on the court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.

(2) If there is a jury, a preliminary question whether:

- (a) particular evidence is evidence of an admission, or evidence to which section 138 (Discretion to exclude improperly or illegally obtained evidence) applies; or
- (b) evidence of an admission, or evidence to which section 138 applies, should be admitted,

is to be heard and determined in the jury's absence.

(3) In the hearing of a preliminary question about whether a defendant's admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the defendant.

(4) If there is a jury, the jury is not to be present at a hearing to decide any other preliminary question unless the court so orders.

(5) Without limiting the matters that the court may take into account in deciding whether to make such an order, it is to take into account:

- (a) whether the evidence to be adduced in the course of that hearing is likely to be prejudicial to the defendant; and
- (b) whether the evidence concerned will be adduced in the course of the hearing to decide the preliminary question; and
- (c) whether the evidence to be adduced in the course of that hearing would be admitted if adduced at another stage of the hearing (other than in another hearing to decide a preliminary question or, in a criminal proceeding, a hearing in relation to sentencing).

(6) Section 128(8) does not apply to a hearing to decide a preliminary question.

(7) In the application of Chapter 3 to a hearing to determine a preliminary question, the facts in issue are taken to include the fact to which the hearing relates.

(8) If a jury in a proceeding was not present at a hearing to determine a preliminary question, evidence is not to be adduced in the proceeding of evidence given by a witness at the hearing unless:

- (a) it is inconsistent with other evidence given by the witness in the proceeding; or
- (b) the witness has died.

Waiver of rules of evidence

190. (1) The court may, if the parties consent, by order dispense with the application of any one or more of the provisions of:

- (a) Division 3, 4 or 5 of Part 2.1; or
- (b) Part 2.2 or 2.3; or
- (c) Parts 3.2–3.8,

in relation to particular evidence or generally.

(2) In a criminal proceeding, a defendant's consent is not effective for the purposes of subsection (1) unless:

- (a) the defendant has been advised to do so by his or her lawyer; or
- (b) the court is satisfied that the defendant understands the consequences of giving the consent.

(3) In a civil proceeding, the court may order that any one or more of the provisions mentioned in subsection (1) do not apply in relation to evidence if:

- (a) the matter to which the evidence relates is not genuinely in dispute; or
- (b) the application of those provisions would cause or involve unnecessary expense or delay.

(4) Without limiting the matters that the court may take into account in deciding whether to exercise the power conferred by subsection (3), it is to take into account:

- (a) the importance of the evidence in the proceeding; and
- (b) the nature of the cause of action or defence and the nature of the subject-matter of the proceeding; and
- (c) the probative value of the evidence; and
- (d) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

Agreements as to facts

191. (1) In this section:

agreed fact means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.

(2) In a proceeding:

- (a) evidence is not required to prove the existence of an agreed fact; and
- (b) evidence may not be adduced to contradict or qualify an agreed fact,

unless the court gives leave.

(3) Subsection (2) does not apply unless the agreed fact:

- (a) is stated in an agreement in writing signed by the parties or by lawyers representing the parties and adduced in evidence in the proceeding; or
- (b) with the leave of the court, is stated by a party before the court with the agreement of all other parties.

Leave, permission or direction may be given on terms

192. (1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:

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

Additional powers

193. (1) The powers of a court in relation to:

- (a) the discovery or inspection of documents; and
- (b) ordering disclosure and exchange of evidence, intended evidence, documents and reports,

extend to enabling the court to make such orders as the court thinks fit (including orders about methods of inspection, adjournments and costs) to ensure that the parties to a proceeding can adequately, and in an appropriate manner, inspect documents of the kind referred to in paragraph (b) or (c) of the definition of *document* in the Dictionary.

(2) The power of a person or body to make rules of court extends to making rules, not inconsistent with this Act or the regulations, prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(3) Without limiting subsection (2), rules made under that subsection may provide for the discovery, exchange, inspection or disclosure of intended evidence, documents and reports of persons intended to be called by a party to give evidence in a proceeding.

(4) Without limiting subsection (2), rules made under that subsection may provide for the exclusion of evidence, or for its admission on specified terms, if the rules are not complied with.

Witnesses failing to attend proceedings

194. (1) If a witness fails to appear when called in any civil or criminal proceedings and it is proved that he or she has been duly bound by recognisance or served with a summons or subpoena, the court may:

- (a) order the witness to show cause at those or later proceedings why execution of the recognisance or an attachment for disobedience to the summons or subpoena should not be issued against the witness; or
- (b) if it is proved that the non-appearance is without just cause or reasonable excuse and that the witness will probably be able to give relevant evidence in the proceeding, issue a warrant to bring the witness before the court to give the evidence.

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

(3) On return of an order to show cause under this section the Court of Petty Sessions may deal with the case in the same way as the Supreme Court would deal with an order to similar effect made by that court.

Note. The Commonwealth Act does not include an equivalent provision to section 194. There are provisions to the same effect in federal court rules and ACT legislation applying to proceedings before federal courts and ACT courts.

Prohibited question not to be published

195. A person must not, without the express permission of a court, print or publish:

- (a) any question that the court has disallowed under section 41 (Improper questions); or
- (b) any question that the court has disallowed because any answer that is likely to be given to the question would contravene the credibility rule; or
- (c) any question in respect of which the court has refused to give leave under Part 3.7 (Credibility).

Maximum penalty: 60 penalty units.

Proceedings for offences

196. Proceedings for an offence against this Act or the regulations are to be dealt with summarily before the Court of Petty Sessions constituted by the Chief Magistrate sitting alone.

Note. The Commonwealth Act does not include an equivalent provision to section 196.

Regulations

197. (1) The Minister may make regulations, not inconsistent with this Act, prescribing matters for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) (a) The Minister may make regulations, not inconsistent with Chapter 4B, for or with respect to any matter that by that Part is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to that Part.

(b) A regulation may create an offence punishable by a maximum penalty not exceeding 5 penalty units.

(3) Rules of court may (subject to the regulations) make provision for or with respect to the taking of evidence, or making of submissions, by audio link or audio visual link under Chapter 4B.

(4) Without limiting subsections (2) and (3), provision may be made for or with respect to the circumstances in which taking of evidence, or making of submissions, by audio link or audio visual link under Chapter 4B may be terminated or interrupted.

(5) Without limiting subsections (2) and (3), provision may be made with respect to factors to be taken into account by a court in determining whether an accused child detainee should appear before the court by audio visual link.

Repeal and savings

198. The provisions of the *Evidence Act 1960* are repealed.

SCHEDULE 1
OATHS AND AFFIRMATIONS

(Sections 21(4) and 22(2))

Oaths by witnesses

I swear *(or the person taking the oath may promise)* by Almighty God *(or the person may name a god recognised by his or her religion)* that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

Oaths by interpreters

I swear *(or the person taking the oath may promise)* by Almighty God *(or the person may name a god recognised by his or her religion)* that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

Affirmations by witnesses

I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

Affirmations by interpreters

I solemnly and sincerely declare and affirm that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

DICTIONARY

(Section 3)

PART 1 — DEFINITIONS

admission means a previous representation that is:

- (a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and
- (a) adverse to the person's interest in the outcome of the proceeding.

another Territory means an Australian Territory other than Norfolk Island.

asserted fact is defined in section 59.

associated defendant, in relation to a defendant in a criminal proceeding, means a person against whom a prosecution has been instituted, but not yet completed or terminated, for:

- (a) an offence that arose in relation to the same events as those in relation to which the offence for which the defendant is being prosecuted arose; or
- (b) an offence that relates to or is connected with the offence for which the defendant is being prosecuted.

Australia includes the external Territories and where appropriate Norfolk Island.

Australian court means:

- (a) the High Court, or
- (b) a court exercising federal jurisdiction, or
- (c) a court of a State or Territory or, where appropriate, Norfolk Island, or
- (d) a judge, justice or arbitrator under an Australian law, or
- (e) a person or body authorised by an Australian law, or by consent of parties, to hear, receive and examine evidence, or
- (f) a person or body that, in exercising a function under an Australian law, is required to apply the laws of evidence.

Australian law means a law of the Commonwealth, a State or another Territory.

Note. See clause 9 of Part 2 of this Dictionary for the meaning of "law".

Australian Parliament means Parliament, the Parliament of the Commonwealth or a State or the Legislative Assembly of another Territory.

business is defined in clause 1 of Part 2 of this Dictionary.

case of a party means the facts in issue in respect of which the party bears the legal burden of proof.

child means a child of any age and includes the meaning given in clause 10(1) of Part 2 of this Dictionary.

civil penalty is defined in clause 3 of Part 2 of this Dictionary.

civil proceeding means a proceeding other than a criminal proceeding.

client is defined in section 117.

coincidence evidence means evidence of a kind referred to in section 98(1) that a party seeks to have adduced for the purpose referred to in that subsection.

coincidence rule means section 98(1).

Commonwealth owned body corporate means a body corporate that, were the Commonwealth a body corporate, would, for the purposes of the *Corporations Act 2001* of the Commonwealth, be:

- (a) a wholly-owned subsidiary of the Commonwealth, or

- (b) a wholly-owned subsidiary of another body corporate that is, under this definition, a Commonwealth owned body corporate because of the application of paragraph (a) (including the application of that paragraph together with another application or other applications of this paragraph).

Commonwealth record means a record made by:

- (a) a Department within the meaning of the *Public Service Act 1999* of the Commonwealth, or
- (b) the Parliament, a House of the Parliament, a committee of a House of the Parliament or a committee of the Parliament, or
- (c) a person or body other than a Legislative Assembly holding office, or exercising power, under or because of the Commonwealth Constitution or a law of the Commonwealth, or
- (d) a body or organisation other than a Legislative Assembly, whether incorporated or unincorporated, established for a public purpose:
- (i) by or under a law of the Commonwealth or of a Territory (other than the Australian Capital Territory, the Northern Territory or Norfolk Island), or
- (ii) by the Governor-General, or
- (iii) by a Minister of the Commonwealth, or
- (e) any other body or organisation that is a Commonwealth owned body corporate,

and kept or maintained by a person, body or organisation of a kind referred to in paragraph (a), (b), (c), (d) or (e), but does not include a record made by a person or body holding office, or exercising power, under or because of the Commonwealth Constitution or a law of the Commonwealth if the record was not made in connection with holding the office concerned, or exercising the power concerned.

confidential communication is defined in section 117.

confidential document is defined in section 117.

court means Norfolk Island court.

Notes.

¹ Norfolk Island court is defined in this Dictionary.

² The Commonwealth Act does not include this definition.

credibility of a person who has made a representation that has been admitted in evidence means the credibility of the representation, and includes the person's ability to observe or remember facts and events about which the person made the representation.

credibility of a witness means the credibility of any part or all of the evidence of the witness, and includes the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence.

credibility rule means section 102.

criminal proceeding means a prosecution for an offence and includes:

- (a) a proceeding for the committal of a person for trial or sentence for an offence; and
- (b) a proceeding relating to bail,

but does not include a prosecution for an offence that is a prescribed taxation offence within the meaning of Part III of the *Taxation Administration Act 1953* of the Commonwealth.

cross-examination is defined in clause 2(2) of Part 2 of this Dictionary.

cross-examiner means a party who is cross-examining a witness.

de facto spouse:

- (a) of a man, means a woman who is living with the man as his wife on a genuine domestic basis although not married to him; and
- (b) of a woman, means a man who is living with the woman as her husband on a genuine domestic basis although not married to her.

document means any record of information, and includes:

- (a) anything on which there is writing; or
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- (d) a map, plan, drawing or photograph.

Note. See also clause 8 of Part 2 of this Dictionary on the meaning of “document”.

examination in chief is defined in clause 2(1) of Part 2 of this Dictionary.

exercise of a function includes performance of a duty.

fax, in relation to a document, means a copy of the document that has been reproduced by facsimile telegraphy.

foreign court means any court (including any person or body authorised to take or receive evidence, whether on behalf of a court or otherwise and whether or not the person or body is empowered to require the answering of questions or the production of documents) of a foreign country or a part of such a country.

function includes power, authority or duty.

Gazette means the Norfolk Island Government Gazette

government or official gazette includes the Gazette

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

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

Note. The Commonwealth Act does not include definitions of ***Governor of a State*** and ***Governor-General***. These definitions are covered by sections 16A and 16B of the *Acts Interpretation Act 1901* of the Commonwealth.

hearsay rule means section 59(1).

identification evidence means evidence that is:

- (a) an assertion by a person to the effect that a defendant was, or resembles (visually, aurally or otherwise) a person who was, present at or near a place where:
 - (i) the offence for which the defendant is being prosecuted was committed, or
 - (ii) an act connected to that offence was done,
 at or about the time at which the offence was committed or the act was done, being an assertion that is based wholly or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time, or
- (b) a report (whether oral or in writing) of such an assertion.

investigating official means:

- (a) a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior), or
- (b) a person appointed by or under an Australian law (other than a person who is engaged in covert investigations under the orders of a superior) whose functions include functions in respect of the prevention or investigation of offences.

joint sitting means:

- (a) in relation to the Parliament of the Commonwealth—a joint sitting of the members of the Senate and of the House of Representatives convened by the Governor-General under section 57 of the Commonwealth Constitution or convened under any Act of the Commonwealth, or
- (b) in relation to a bicameral legislature of a State—a joint sitting of both Houses of the legislature convened under a law of the State.

judge, in relation to a proceeding, means the judge, magistrate or other person before whom the proceeding is being held.

law is defined in clause 9 of Part 2 of this Dictionary.

lawyer means a barrister or a solicitor or a barrister and solicitor.

leading question means a question asked of a witness that:

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

Legislative Assembly means:

- (a) the Legislative Assembly of Norfolk Island; or, as appropriate
- (b) any present or former Legislative Assembly of another Territory, and includes the Australian Capital Territory House of Assembly.

member of the Australian Federal Police includes a special member or a staff member of the Australian Federal Police.

Norfolk Island or overseas proceeding means a proceeding (however described) in a Norfolk Island court or a foreign court.

Norfolk Island court means:

- (a) the Supreme Court; or
- (b) the Court of Petty Sessions; or
- (c) any other court created by the Legislative Assembly,

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

Note. The Commonwealth Act does not include this definition.

Norfolk Island record means a record made by:

- (a) the Administration or the public service, or
- (b) the Legislative Assembly, or of a committee of the Legislative Assembly, or
- (c) a body or organisation other than the Legislative Assembly, whether incorporated or unincorporated, established for a public purpose:
 - (i) by or under a law of Norfolk Island, or
 - (ii) by the Administrator, or
 - (iii) by a Minister, or

- (d) any other body or organisation that is a Norfolk Island owned body corporate,

and kept or maintained by a person, body or organisation of a kind referred to in paragraph (a), (b), (c), or (d), but does not include a record made by a person or body holding office, or exercising power, under or because of the Norfolk Island Act or a law of Norfolk Island if the record was not made in connection with holding the office concerned, or exercising the power concerned.

Note. The Commonwealth Act does not include this definition.

offence means an offence against or arising under a Norfolk Island Law or an Australian law.

official questioning means questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence.

opinion rule means evidence of opinion referred to in section 76.

parent includes the meaning given in clause 10(2) of Part 2 of this Dictionary.

picture identification evidence is defined in section 115.

police officer means:

- (a) a member of the police force of Norfolk Island, or
 (b) a member of the Australian Federal Police.

postal article has the same meaning as in the *Postal Services Act 1983*.

previous representation means a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced.

prior consistent statement of a witness means a previous representation that is consistent with evidence given by the witness.

prior inconsistent statement of a witness means a previous representation that is inconsistent with evidence given by the witness.

probative value of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

public document means a document that:

- (a) forms part of the records of the Crown in any of its capacities; or
 (b) forms part of the records of the government of a foreign country; or
 (c) forms part of the records of a person or body holding office or exercising a function under or because of a Norfolk Island law, the Commonwealth Constitution, an Australian law or a law of a foreign country, or
 (d) is being kept by or on behalf of the Crown, such a government or such a person or body,

and includes the records of the proceedings of, and papers presented to:

- (e) the Legislative Assembly, an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament, and
 (f) a legislature of a foreign country, including a House or committee (however described) of such a legislature.

re-examination is defined in clause 2(3) and (4) of Part 2 of this Dictionary.

representation includes:

- (a) an express or implied representation (whether oral or in writing); or
 (b) a representation to be inferred from conduct; or
 (c) a representation not intended by its maker to be communicated to or seen by another person; or

- (d) a representation that for any reason is not communicated.

seal includes a stamp.

Statistician means:

- (a) the Statistician appointed under the *Census and Statistics Act 1961* and includes any person to whom the powers of the Statistician have been delegated; or
- (b) the Australian Statistician referred to in subsection 5(2) of the *Australian Bureau of Statistics Act 1975* of the Commonwealth and includes any person to whom the powers of the Australian Statistician under section 12 of the *Census and Statistics Act 1905* of the Commonwealth have been delegated

as the case may be.

tendency evidence means evidence of a kind referred to in section 97(1) that a party seeks to have adduced for the purpose referred to in that subsection.

tendency rule means section 97(1).

visual identification evidence is defined in section 114.

witness includes the meaning given in clause 7 of Part 2 of this Dictionary.

PART 2 — OTHER EXPRESSIONS

References to businesses

1. (1) A reference in this Act to a **business** includes a reference to the following:

- (a) a profession, calling, occupation, trade or undertaking;
- (b) an activity engaged in or carried on by the Crown in any of its capacities;
- (c) an activity engaged in or carried on by the government of a foreign country;
- (d) an activity engaged in or carried on by a person or body holding office or exercising power under or because of a Norfolk Island law, the Commonwealth Constitution, an Australian law or a law of a foreign country, being an activity engaged in or carried on in the performance of the functions of the office or in the exercise of the power (otherwise than in a private capacity);
- (e) the proceedings of the Legislative Assembly, an Australian Parliament, a House of an Australian Parliament, a committee of such a House or a committee of an Australian Parliament;
- (f) the proceedings of a legislature of a foreign country, including a House or committee (however described) of such a legislature.

(2) A reference in this Act to a business also includes a reference to:

- (a) a business that is not engaged in or carried on for profit; or
- (b) a business engaged in or carried on outside Norfolk Island.

References to examination in chief, cross-examination and re-examination

2. (1) A reference in this Act to **examination in chief** of a witness is a reference to the questioning of a witness by the party who called the witness to give evidence, not being questioning that is re-examination.

(2) A reference in this Act to **cross-examination** of a witness is a reference to the questioning of a witness by a party other than the party who called the witness to give evidence.

(3) A reference in this Act to **re-examination** of a witness is a reference to the questioning of a witness by the party who called the witness to give evidence, being questioning (other than further examination in chief with the leave of the court) conducted after the cross-examination of the witness by another party.

(4) If a party has recalled a witness who has already given evidence, a reference in this Act to re-examination of a witness does not include a reference to the questioning of the witness by that party before the witness is questioned by another party.

References to civil penalties

3. For the purposes of this Act, a person is taken to be liable to a civil penalty if, in a Norfolk Island, an Australian, or and overseas proceeding (other than a criminal proceeding), the person would be liable to a penalty arising under a Norfolk island law, an Australian law, or a law of a foreign country.

Unavailability of persons

4. (1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if:

- (a) the person is dead; or
- (b) the person is, for any reason other than the application of section 16 (Competence and compellability: judges and jurors), not competent to give the evidence about the fact; or
- (c) it would be unlawful for the person to give evidence about the fact; or
- (d) a provision of this Act prohibits the evidence being given; or
- (e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success; or
- (f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.

(2) In all other cases the person is taken to be available to give evidence about the fact.

Unavailability of documents and things

5. For the purposes of this Act, a document or thing is taken not to be available to a party if and only if:

- (a) it cannot be found after reasonable inquiry and search by the party; or
- (b) it was destroyed by the party, or by a person on behalf of the party, otherwise than in bad faith, or was destroyed by another person; or
- (c) it would be impractical to produce the document or thing during the course of the proceeding; or
- (d) production of the document or thing during the course of the proceeding could render a person liable to conviction for an offence; or
- (e) it is not in the possession or under the control of the party and:
 - (i) it cannot be obtained by any judicial procedure of the court; or
 - (ii) it is in the possession or under the control of another party to the proceeding concerned who knows or might reasonably be expected to know that evidence of the contents of the document, or evidence of the thing, is likely to be relevant in the proceeding; or
 - (iii) it was in the possession or under the control of such a party at a time when that party knew or might reasonably be expected to have known that such evidence was likely to be relevant in the proceeding.

Representations in documents

6. For the purposes of this Act, a representation contained in a document is taken to have been made by a person if:

- (a) the document was written, made or otherwise produced by the person; or
- (b) the representation was recognised by the person as his or her representation by signing, initialling or otherwise marking the document.

Witnesses

7. (1) A reference in this Act to a witness includes a reference to a party giving evidence.

(2) A reference in this Act to a witness who has been called by a party to give evidence includes a reference to the party giving evidence.

(3) A reference in this clause to a party includes a defendant in a criminal proceeding.

References to documents

8. A reference in this Act to a document includes a reference to:

- (a) any part of the document; or
- (b) any copy, reproduction or duplicate of the document or of any part of the document; or
- (c) any part of such a copy, reproduction or duplicate.

References to laws

9. (1) A reference in this Act to a law or enactment of Norfolk Island, the Commonwealth, a State, another Territory or a foreign country is a reference to a law (whether written or unwritten) of or in force in that place.

(2) A reference in this Act to an Australian law is a reference to an Australian law (whether written or unwritten) of or in force in Australia.

References to children and parents

10. (1) A reference in this Act to a child of a person includes a reference to:

- (a) an adopted child or ex-nuptial child of the person; or
- (b) a child living with the person as if the child were a member of the person's family.

(2) A reference in this Act to a parent of a person includes a reference to:

- (a) an adoptive parent of the person; or
- (b) if the person is an ex-nuptial child—the person's natural father; or
- (c) the person with whom a child is living as if the child were a member of the person's family.

NOTES

The *Evidence Act 2004* as shown in this consolidation comprises Act No. 19 of 2004 and amendments as indicated in the Tables below.

Enactment	Number and year	Date of commencement	Application saving or transitional provision
<i>Evidence Act 2004</i>	19, 2004	1.12.2004	
<i>Evidence (Amendment) Act 2005</i>	8, 2005	1.12.2004	
<i>Evidence (Amendment No. 2) Act 2005</i>	25, 2005	28.10.2005	
<i>Criminal Code Act 2007</i>	11, 2007	1.1.2008	

[Previously consolidated as at 15 January 2008 as re-issued 31 December 2008 to rectify error in numbering of 117(1)]

<i>Interpretation (Amendment) Act 2012</i> <i>[to substitute throughout —Commonwealth Minister for Minister; and to substitute Minister for executive member]</i>	14, 2012	28.12.12
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[Previously consolidated as at 2 August 2013]

Ordinance	Registration	Commencement	Application, saving and transitional provisions
Norfolk Island Continued Laws Amendment Ordinance 2015 (No. 2, 2015) (now cited as Norfolk Island Continued Laws Ordinance 2015 (see F2015L01491))	17 June 2015 (F2015L00835)	Sch 1 (items 96, 97, 344, 345): 18 June 2015 (s 2(1) item 1)	Sch 1 (items 344, 345, 375A-381)
as amended by			
Norfolk Island Legislation Amendment (Protecting Vulnerable People) Ordinance 2018	28 Sept 2018 (F2018L01377)	Sch 5 (item 10): 29 Sept 2018 (s 2(1) item 1)	—

Table of Amendments

ad = added or inserted

am = amended

rep = repealed

rs = repealed and substituted

Provisions affected	How affected	
3	am	Ord No 2, 2015
7	am	Ord No 2, 2015
8A	rep	11, 2007
19	am	Ord No 2, 2015 (as am by F2018L01377)
65	am	8, 2005
66	am	8, 2005
91	am	8, 2005
106	am	8, 2005
119	am	8, 2005

ad = added or
inserted

am = amended

rep = repealed

rs = repealed and
substituted

Provisions affected	How affected	
122	am	8, 2005
125	am	8, 2005
128	am	8, 2005
129	am	8, 2005
131	am	8, 2005
153	am	8, 2005
157	am	8, 2005
165A	ad	25, 2005
165B	ad	25, 2005
178	am	8, 2005
181R	am	Ord No 2, 2015 (as am by F2018L01377)
181AR	am	Ord No 2, 2015 (as am by F2018L01377)