

Western Australia

Evidence Act 1906

Evidence Act 1906

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The Second Schedule

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and Community Services Act 2004***

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of Drugs Act 1981***

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Schedule 7

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Defined Terms

Evidence Act 1906

An Act to consolidate and amend the statute law of evidence.

1. Short title

This Act may be cited as the *Evidence Act 1906* ¹.

[2. *Omitted under the Reprints Act 1984 s. 7(4)(f).*]

3. Terms used in this Act

In this Act, unless the context or subject matter otherwise indicates or requires, —

“**Act**” includes Ordinance;

“**Australasian colony**” means and includes New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia during such time as such possessions constituted separate colonies; New Zealand, and any part of New Zealand during such time as such part constituted a separate colony; Fiji; and any other British possession which may at any time be created within Her Majesty’s possessions in Australasia;

“**bank**” means —

- (a) an ADI (authorised deposit-taking institution) as defined in section 5 of the *Banking Act 1959* of the Commonwealth; or

(b) a bank constituted by a law of a State, a Territory or the Commonwealth;

“bankers’ books” and expressions referring to bankers’ books include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank however such books are compiled, recorded or stored, whether in written form or on microfilm or by electronic process or otherwise;

“colony” includes province;

“court” includes the High Court of Australia, the Supreme Court, the District Court, the Children’s Court, the Family Court, the Magistrates Court, a warden’s court under the *Mining Act 1978*, and a court of summary jurisdiction;

“document” includes a part of a document;

“examined copy” means a copy proved to have been examined with the original, and to correspond therewith. The examination may be made either by one person reading both the original and the copy or by 2 persons, one reading the original and the other the copy, and it is not necessary that each should alternately read both;

“Gazette” means and includes the *London Gazette*, the *Edinburgh Gazette*, the *Dublin Gazette*, the *Commonwealth of Australia Gazette* and the *Government Gazette, Royal Gazette*, or other official gazette of any State or Australasian colony;

“Government Printer” means and includes the Printer to Her Majesty, and any person printing for the Government of the Commonwealth or of any State or Australasian colony, and any printer purporting to be the printer authorised to print the Statutes, Ordinances, Acts of State, or other public Acts of the Legislature of any Australasian colony, or otherwise to be the Government Printer of such colony;

“judge” means a Justice of the High Court of Australia and a Judge of the Supreme Court of Western Australia, and includes a Judge of The District Court of Western Australia, a Judge of the Family Court of Western Australia, a Judge or magistrate of the Children’s Court of Western Australia, a magistrate of the Magistrates Court, a coroner within the meaning of the *Coroners Act 1996*, and also any justice or justices of the peace sitting in court;

“legal proceeding” or **“proceeding”** includes any action, trial, inquiry, cause, or matter, whether civil or criminal, in which evidence is or may be given, and includes an arbitration;

“person acting judicially” means any person having, in Western Australia, by law or by consent of parties, authority to hear, receive, and examine evidence;

“photograph” means a durable facsimile of an original obtained by any photographic, photostatic or similar process;

“prisoner” means and includes any person committed to prison for punishment, or on remand, or for trial, safe custody, or otherwise;

“State” means a State of the Commonwealth;

“the Commonwealth” means the Commonwealth of Australia;

“the State” means the State of Western Australia or the colony of Western Australia prior to the establishment of the Commonwealth;

“uncorroborated evidence”, in relation to the conviction of a person accused of an offence, means evidence that is not corroborated in some material particular by other evidence implicating the accused person;

“votes and proceedings” shall be deemed to include journals and minutes, and any papers purporting to be printed by the authority of and to be laid before either House of the

Parliament of the Commonwealth, or of any State or of any Australasian colony.

[Section 3 amended by No. 11 of 1964 s. 2; No. 111 of 1978 s. 2; No. 66 of 1987 s. 4; No. 70 of 1988 s. 35; No. 15 of 1991 s. 23; No. 73 of 1994 s. 4; No. 26 of 1999 s. 78(2); No. 71 of 2000 s. 3; No. 15 of 2003 s. 15; No. 59 of 2004 s. 89.]

4. Application of Act

All the provisions of this Act, except where the contrary intention appears, shall apply to every legal proceeding.

5. This Act not to derogate from existing powers

The provisions of this Act shall be in addition to and not in derogation of any powers, rights, or rules of evidence existing at common law, or given by any law at any time in force in the State not inconsistent with the provisions of this Act.

Competency and compellability of witnesses

6. Witnesses interested or convicted of offence

No person shall be excluded from giving evidence in any proceeding on the ground that he has or may have an interest in the matter in question, or in the result of the proceeding, or on the ground that he has previously been convicted of any offence.

7. Parties to civil proceedings and spouses and ex-spouses of parties

In any civil proceeding the parties thereto and the persons on whose behalf such proceeding is brought or defended, and the wives, former wives, husbands and former husbands of such parties or persons respectively, shall, subject to the provisions of this Act, be competent and compellable to give evidence on behalf of either or any of the parties to such proceeding.

[Section 7 amended by No. 48 of 1991 s. 5.]

8. Accused persons in criminal cases

- (1) Except as in this Act it is otherwise provided, every person charged with an offence shall be a competent but not a compellable witness at every stage of the proceedings whether the person so charged is charged solely or jointly with any other person: Provided as follows —

- (a) a person so charged shall not be called as a witness except upon his own application;

[(b) deleted]

- (c) the failure of any person charged with an offence to give evidence shall not be made the subject of any comment by the prosecution;

- (d) a person charged and being a witness in pursuance of this section may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to the offence charged;

- (e) a person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless —

- (i) the proof that he has committed or been convicted of such other offence is admissible in evidence to show that he is guilty of the offence wherewith he is then charged; or
- (ii) he has personally, or by his advocate, asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution or

a person who died as a result of the offence
wherewith he is then charged; or

- (iii) he has given evidence against any other person charged with the same offence;
- (f) when paragraph (e)(ii) or (iii) is or becomes applicable to any person charged who gives evidence for the defence, it shall be open to the prosecution, or to any other person charged against whom he has given evidence, to call evidence, that such person is of bad character or has been convicted of or charged with any offence other than that with which he then stands charged, notwithstanding that the case for the prosecution or of such other person charged may already have been closed;
- (g) every person called as a witness in pursuance of this section shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses give their evidence.

[(2) repealed]

[Section 8 amended by No. 16 of 1913 s. 2; No. 48 of 1991 s. 6; No. 71 of 2000 s. 4; No. 27 of 2002 s. 30; No. 84 of 2004 s. 41.]

9. Spouses and ex-spouses of accused persons in criminal cases

- (1) In any criminal proceeding (and at every stage of the proceeding), the wife or husband of an accused shall, subject to this Act, be —
 - (a) competent to give evidence on behalf of the prosecution, the accused or any person being tried jointly with the accused;
 - (b) compellable to give evidence on behalf of the accused or any person being tried jointly with the accused; and
 - (c) compellable to give evidence on behalf of the prosecution against the accused or any person being tried jointly with the accused if —

- (i) the accused is charged with an offence under a provision mentioned in the Second Schedule or under a repealed Code section;
 - (ii) the accused is charged with attempting or conspiring to commit, or with inciting the commission of, an offence under a provision mentioned in the Second Schedule or under a repealed Code section;
 - (iii) the accused is charged on the complaint of the wife or husband with an offence committed with respect to the property of the wife or husband; or
 - (iv) the wife or husband is compelled, under another enactment, to give that evidence.
- (2) In any criminal proceeding (and at every stage of the proceeding), a former wife or former husband of an accused shall, subject to this Act, be competent and compellable to give evidence on behalf of the prosecution, the accused or any person being tried jointly with the accused.
- [(3) *repealed*]
- (4) Nothing in this section shall operate to compel an accused in any criminal proceeding to give evidence in the proceeding.
- (5) If the wife or husband of an accused in any criminal proceeding is called as a witness for the prosecution but is not a compellable witness for the prosecution, it is the duty of the judge to inform the wife or husband that she or he is not compellable to give evidence on behalf of the prosecution if she or he is unwilling to do so.
- (6) In subsection (1) —
 “repealed Code section” means a repealed section of *The Criminal Code* that, before it was repealed, enacted an offence constituted by acts or omissions that are substantially the same as the acts or omissions that

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constitute an offence under a section of *The Criminal Code* that is mentioned in Part 1 of the Second Schedule.

[Section 9 inserted by No. 48 of 1991 s. 7; amended by No. 71 of 2000 s. 5; No. 27 of 2002 s. 31; No. 84 of 2004 s. 82.]

[10. Repealed by No. 48 of 1991 s. 8.]

11. Court may compel answer to incriminating question

- (1) Whenever in any proceeding any person called as a witness, or required to answer any interrogatory, declines to answer any question or interrogatory on the ground that his answer will criminate or tend to criminate him, the judge may, if it appears to him expedient for the ends of justice that such person should be compelled to answer such question or interrogatory, tell such person that, if he answers such question or interrogatory, and other questions or interrogatories that may be put to him, in a satisfactory manner, he will grant him the certificate hereinafter mentioned.
- (2) Thereupon such person shall no longer be entitled to refuse to answer any question or interrogatory on the ground that his answer will criminate or tend to criminate him; and thereafter if such person shall have given his evidence to the satisfaction of the judge, the judge shall give such person a certificate to the effect that he was called as a witness or interrogated in the said proceeding and that his evidence was required for the ends of justice, and was given to his satisfaction.
- (2a) Where in a proceeding a person is given a certificate under subsection (2) in respect of any evidence, a statement made by him, as part of that evidence, in answer to a question or interrogatory is not admissible in evidence in criminal proceedings against the person other than on a prosecution for perjury committed in the proceeding.
- (3) In subsections (1) and (2), “**judge**” does not include a justice of the peace when constituting the Magistrates Court or the

Children's Court, whether sitting alone or with another justice of the peace.

[Section 11 amended by No. 47 of 1990 s. 4²; No. 15 of 1991 s. 23; No. 59 of 2004 s. 89.]

11A. Judge may restrict publication of evidence where s. 11 certificate given

- (1) Where in a proceeding a judge gives to a person a certificate under section 11(2) in respect of any evidence and the judge considers that publication of a report of the evidence or of the giving of the certificate may tend to prejudice any prosecution that has been or may be brought against the person, the judge may make an order prohibiting publication of a report of or relating to the evidence, or any part of the evidence, and may extend the order to include a report of the fact that the certificate was granted.
- (2) A person who fails to comply with an order made under subsection (1) commits a contempt of the Supreme Court and is punishable accordingly by that court.
- (3) Where a body corporate fails to comply with an order made under subsection (1) and it is proved that the failure occurred with the consent, connivance, or authority of any director, manager, secretary or other officer of the body corporate, or of any member of the managing body of the body corporate, or of any person who was purporting to act in any such capacity, he or she as well as the body corporate commits the contempt and is punishable under subsection (2).

[Section 11A inserted by No. 47 of 1990 s. 5.]

12. Witnesses in revenue cases may be compelled to give evidence

- (1) In any proceeding for the breach of any Act relating to —
 - (a) stamp duties; or
 - (b) the public revenues; or
 - (c) the sale of intoxicating liquors,

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or in any proceeding brought by or on behalf of or against the Crown under or in pursuance of the provisions of any such Act, the judge may require any person, except the accused in proceedings under paragraph (c), to be examined as a witness.

- (2) A person so required to be examined as aforesaid shall not be excused from being so examined, or from answering any question put to him touching any such breach as aforesaid, on the ground that his evidence will tend to incriminate him.
- (3) If any such person refuses to be examined, or to answer any such question as aforesaid, he shall be deemed to be a witness appearing under a subpoena and refusing without lawful cause or excuse to be sworn or to give evidence.
- (4) Every person required to be examined under this section touching any such breach as aforesaid, who on such examination makes to the best of his knowledge true and faithful discovery of all matters whereon he is so examined touching such breach and thereby gives evidence tending to incriminate himself shall, on application, receive from the judge before whom he is examined a certificate in writing under his hand that he has made such true and faithful discovery.
- (5) In subsections (1) and (4), “**judge**” does not include a justice of the peace when constituting the Magistrates Court or the Children’s Court, whether sitting alone or with another justice of the peace.

[Section 12 amended by No. 15 of 1991 s. 23; No. 59 of 2004 s. 89.]

13. Certificate under s. 12 may be pleaded in bar to prosecution

If any person examined as a witness under section 12 receives the certificate therein mentioned (but not otherwise) he shall be freed from all criminal prosecutions and penal actions, and from all penalties, forfeitures, and punishments to which he was liable for anything done before that time in respect of the matters touching which he is so examined:

Provided that nothing herein contained shall make such certificate pleadable in bar of any indictment or information brought against such person for perjury committed in such proceedings as aforesaid.

[Section 13 amended by No. 47 of 1990 s. 6.]

14. Customs prosecutions, accused compellable

In every Customs prosecution, except for an indictable offence or for an offence directly punishable by imprisonment, the accused is compellable to give evidence.

[Section 14 amended by No. 84 of 2004 s. 82.]

15. Persons may be examined without a subpoena

Any person present at any legal proceeding wherein he might have been compellable to give evidence and produce documents by virtue of a subpoena or other summons or order duly issued and served for that purpose, shall be compellable to give evidence and produce documents then in his possession and power, in the same manner, and in case of refusal shall be subject to the same penalties and liabilities, as if he had been duly subpoenaed or summonsed for that purpose.

16. Witnesses failing to attend trial

- (1) Where any person duly bound by recognizance or served with a subpoena, summons, or order to attend in any court as a witness at the trial of any case, civil or criminal, fails to appear when called in open court, either at such trial or upon the day appointed for such trial, the court may —
 - (a) upon proof of such recognizance or of his having been duly served with such subpoena, summons, or order, call upon him to show cause why execution upon such recognizance or an attachment for disobedience to such subpoena, summons, or order should not be issued against him; or

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- (b) upon proof of such recognizance or service, and also that his non-appearance is without just cause or reasonable excuse, and upon oath that he will probably be able to give material evidence, issue a warrant to bring him before the court to give evidence at such trial.
- (2) Such proof may be oral before the court or by affidavit.

17. Procedure on non-appearance of a witness

- (1) Every rule or order to show cause as aforesaid may —
 - (a) be made returnable before the court itself at the then sittings or at some future sitting; or
 - (b) in respect of the non-appearance of a witness at a Circuit Court or on the trial of a case pending in the Supreme Court, be made returnable in the Supreme Court.
- (2) On the return of any such rule or order, the court may deal with the case as the Supreme Court might and would have done upon a rule to the like effect issued out of that court.

Privilege of witnesses

18. Communications during marriage

Subject to the provisions of section 9, a husband shall not be compellable in any proceeding to disclose any communication made to him by his wife, or by him to his wife, during the marriage, and a wife shall not be compellable in any proceeding to disclose any communication made to her by her husband, or by her to her husband, during the marriage:

Provided that this section shall not apply, in any proceeding in the Supreme Court in its divorce and matrimonial causes jurisdiction, or in any proceeding in the Family Court of Western Australia, to any husband and wife who are both parties to such proceeding.

[Section 18 amended by No. 111 of 1978 s. 3; No. 48 of 1991 s. 9.]

Spouses competent to give evidence as to non-access
[Heading inserted by No. 16 of 1956 s. 2.]

19. Evidence of non-access

In any proceedings including proceedings pending at the commencement of the *Evidence Act Amendment Act 1956*¹, either party to a marriage may give evidence proving or tending to prove that the parties to the marriage did not have sexual relations with each other at any particular time notwithstanding that such evidence would show or tend to show that any child born to the wife during the marriage was illegitimate.

[Section 19 inserted by No. 16 of 1956 s. 2.]

Sexual assault communications privilege
[Heading inserted by No. 46 of 2004 s. 10.]

19A. Terms used in these provisions

(1) In this section and sections 19B to 19M —

“application for leave” means an application for leave to disclose or require disclosure of a protected communication in, or in connection with, any criminal proceedings;

“counselling communication” means a communication —

- (a) made in confidence by a person upon or in respect of whom sexual assault was committed or is alleged to have been committed (the **“complainant”**) to another person (the **“counsellor”**) who is counselling the complainant in relation to any harm the complainant may have suffered;
- (b) made in confidence to or about the complainant by the counsellor in the course of the counselling process;
- (c) made in confidence about the complainant by a support person in the course of the counselling process; or

s. 19A

- (d) made in confidence by or to the counsellor to or by another person who is counselling, or has at any time counselled, the complainant,

and includes a communication made through an interpreter;

“counsels” has the meaning given to that term in subsection (2);

“disclose” a protected communication means to disclose, or adduce or produce anything that would disclose —

- (a) the protected communication; or
- (b) the contents of a document recording the protected communication;

“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 communication” means a counselling communication made by, to or about a complainant and includes —

- (a) a counselling communication made before the commission, or alleged commission, of sexual assault;
- (b) a counselling communication not made in connection with sexual assault or alleged sexual assault or any condition arising from sexual assault or alleged sexual assault; and
- (c) a counselling communication made before the protection provisions were inserted into this Act;

“protected person”, in relation to a protected communication, means —

- (a) the complainant;
- (b) any person who made the protected communication; or
- (c) an interpreter through whom the protected communication was made;

“require disclosure” of a protected communication includes —

- (a) to require (whether by the issue of a subpoena or any other process or procedure) the production of a document recording the protected communication; and
- (b) to seek an order of the court that will, if made, result in the disclosure of the protected communication or the production of a document recording the protected communication;

“support person” means a parent, carer or other supportive person who is present when a person counsels the complainant to facilitate communication between the complainant and the counsellor or to further the counselling process in some other way;

“supporting affidavit” means the affidavit accompanying an application for leave;

“the protection provisions” means this section and sections 19B to 19M.

- (2) A person **“counsels”** another person if —
 - (a) the person has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm; and
 - (b) the person —
 - (i) listens to and gives verbal or other support or encouragement to the other person; or
 - (ii) advises, gives therapy to or treats the other person,whether or not for fee or reward.
- (3) In the protection provisions, a reference to a document recording a protected communication —
 - (a) is a reference to any part of the document that records a protected communication or any report, observation, opinion, advice, recommendation or other matter that

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relates to the protected communication made by a protected person; and

- (b) includes a reference to any copy, reproduction or duplicate of that part of the document.
- (4) For the purposes of the definition of “counselling communication” in subsection (1), a communication can be regarded as being made in confidence even if it is made in the presence of a support person or through or in the presence of an interpreter.

[Section 19A inserted by No. 46 of 2004 s. 10.]

19B. Protected communications recorded electronically

For the purposes of the protection provisions, if —

- (a) a document recording a protected communication is stored electronically; and
- (b) a written document recording the protected communication could be created by use of equipment that is usually available for retrieving or collating such stored information,

the document stored electronically is to be dealt with as if it were a written document so created.

[Section 19B inserted by No. 46 of 2004 s. 10.]

19C. Protected communications not to be disclosed in criminal proceedings except with leave of court

- (1) A person cannot disclose or require disclosure of a protected communication in, or in connection with, any criminal proceedings except with, and in accordance with, the leave of the court.
- (2) If a subpoena that purports to require the disclosure of a protected communication is issued without the leave of the court required by subsection (1), the subpoena is of no effect.

- (3) An application for leave must be made to the court in writing and must be accompanied by an affidavit stating why the applicant has a legitimate forensic purpose for having leave to disclose or require disclosure of the protected communication.
- (4) If the court considers that the supporting affidavit establishes a prima facie case that the applicant has a legitimate forensic purpose for having the leave, the court is to —
- (a) fix a day and time for hearing the application; or
 - (b) determine that the application will be heard during the criminal proceedings referred to in subsection (1),
- and send notification of when the application will be heard, together with copies of the application and the supporting affidavit, to —
- (c) the applicant and each other party;
 - (d) each protected person identified in the application or the supporting affidavit; and
 - (e) any other person identified in the application or the supporting affidavit as a person to whom the protected communication was made.
- (5) If the court does not consider that the supporting affidavit establishes a prima facie case that the applicant has a legitimate forensic purpose for having the leave, the court is to notify the applicant accordingly and the application for leave is taken to have been refused.
- (6) Section 19E(2) and (3) apply in relation to the court's consideration of whether the supporting affidavit establishes a prima facie case that the applicant has a legitimate forensic purpose for having the leave.
- (7) In this section —
- “party”** means a party to the criminal proceedings referred to in subsection (1).

[Section 19C inserted by No. 46 of 2004 s. 10.]

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19D. Procedure on hearing of application for leave

- (1) A protected person or a person referred to in section 19C(4)(e) may appear, or be represented by counsel or solicitor, at the hearing of an application for leave and is to be informed of that right when a notification is sent under section 19C(4)(d) or (e).
- (2) If there is a jury, the court is to hear and determine an application for leave in the absence of the jury.

[Section 19D inserted by No. 46 of 2004 s. 10.]

19E. Application for leave to be dismissed if there is no legitimate forensic purpose for it

- (1) On the hearing of an application for leave, leave is to be refused by the court if the applicant does not satisfy the court —
 - (a) that the applicant has a legitimate forensic purpose for having leave to disclose or require disclosure of the protected communication; and
 - (b) that other evidence to the same effect as —
 - (i) the protected communication; or
 - (ii) the contents of the document recording the protected communication,as the case may be, is not available.
- (2) In order to establish that the applicant has a legitimate forensic purpose under subsection (1)(a) it is not sufficient for the applicant —
 - (a) to assert, without proving, one or more of the following —
 - (i) that the protected communication discloses a prior inconsistent statement of the complainant;
 - (ii) that the protected communication relates to the credibility of the complainant or another witness in the criminal proceedings;

- (iii) that the protected communication relates to the reliability of the testimony of the complainant merely because the complainant has received or is receiving counselling;
- or
- (b) to prove one or more of the following —
 - (i) that the protected communication exists;
 - (ii) that the protected communication relates to activity that is the subject of the criminal proceedings;
 - (iii) that the protected communication was made close in time to the activity that is the subject of the criminal proceedings;
 - (iv) that the protected communication reveals allegations of the commission of sexual assault against the complainant by a person other than the applicant.
- (3) Subsection (2) does not limit —
 - (a) the matters which the court can consider in deciding whether the applicant has a legitimate forensic purpose under subsection (1)(a); or
 - (b) the grounds on which the court can decide that the applicant does not have a legitimate forensic purpose under subsection (1)(a).

[Section 19E inserted by No. 46 of 2004 s. 10.]

19F. Determination of application

- (1) If the court is satisfied as to the matters set out in section 19E(1)(a) and (b), the court is to determine the application for leave.
- (2) The court may, if it thinks it necessary in order to enable it to determine the application, conduct a preliminary examination of the evidence that is the subject of the application.

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- (3) For the purpose of a preliminary examination the court may require a protected person —
 - (a) to provide written answers to questions; or
 - (b) to appear for oral examination.
- (4) A preliminary examination is to be conducted in the absence of the parties.

[Section 19F inserted by No. 46 of 2004 s. 10.]

19G. Public interest test

- (1) In determining the application for leave, the court may grant leave to disclose, or require the disclosure of, the protected communication if, and only if, the court determines that it is in the public interest to do so.
- (2) For the purposes of subsection (1) the court is to have regard to the following —
 - (a) the extent to which disclosing, or requiring the disclosure of, the protected communication is necessary to allow the applicant for leave to make a full defence;
 - (b) whether the evidence of the protected communication or the contents of the document recording the protected communication will have substantial probative value;
 - (c) the likelihood that disclosing, or requiring the disclosure of, the protected communication will affect the outcome of the proceedings;
 - (d) the public interest in ensuring that complainants receive effective counselling, and the extent to which failure to preserve the confidentiality of protected communications may dissuade complainants from seeking counselling or diminish the effectiveness of counselling;
 - (e) the public interest in ensuring that adequate records are kept of counselling communications;

- (f) the likelihood that disclosing, or requiring the disclosure of, the protected communication will cause harm to the complainant, and the nature and extent of that harm;
- (g) any other matter that the court considers relevant.

[Section 19G inserted by No. 46 of 2004 s. 10.]

19H. Effect of consent

- (1) The protection provisions do not prevent a protected communication from being disclosed or being required to be disclosed in, or in connection with, any criminal proceedings if the complainant has consented to the disclosure.
- (2) Consent is not effective for the purposes of this section unless —
 - (a) it is given in writing; and
 - (b) it is given expressly for the purposes of the protection provisions.
- (3) This section does not apply if the complainant is a child.

[Section 19H inserted by No. 46 of 2004 s. 10.]

19I. Loss of sexual assault communications privilege: misconduct

- (1) The protection provisions do not prevent the production or adducing of evidence of a communication made, or the production 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,

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

[Section 19I inserted by No. 46 of 2004 s. 10.]

19J. Ancillary orders

Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of, or the contents of a document recording, a protected communication, the court may —

- (a) order that all or part of the evidence be heard or document produced in camera;
- (b) make any orders relating to the production, inspection, copying or reproduction of the document that, in the opinion of the court, are necessary to protect the safety and welfare of any protected person;
- (c) make any orders relating to the suppression of publication of all or part of the evidence given before the court that, in its opinion, are necessary to protect the safety and welfare of any protected person; and
- (d) make any orders relating to disclosure of identity information that would tend to identify any protected person that, in the opinion of the court, are necessary to protect the safety and welfare of any protected person.

[Section 19J inserted by No. 46 of 2004 s. 10.]

19K. Inadmissibility of evidence that must not be adduced or given

Evidence that, because of the protection provisions, cannot be disclosed or required to be disclosed in proceedings is not admissible in the proceedings.

[Section 19K inserted by No. 46 of 2004 s. 10.]

19L. Application of other laws

- (1) The protection provisions do not affect the operation of any rule of law in relation to evidence in criminal proceedings except to the extent that they expressly or necessarily have that effect.
- (2) Without limiting subsection (1), the protection provisions do not affect the operation of a rule of law so far as it relates to the inspection of a document required to be produced in, or in connection with, criminal proceedings.
- (3) Subject to subsections (4) and (4a), sections 238 and 239 of the *Children and Community Services Act 2004* and section 46 of the *Child Care Services Act 2007* do not apply to the production or disclosure of a protected communication in criminal proceedings.
- (4) If in criminal proceedings leave is given under the protection provisions to require disclosure of a departmental record as defined in subsection (1) of section 238 of the *Children and Community Services Act 2004*, subsections (5) to (8) of that section apply as if the departmental record had been produced in response to a requirement referred to in subsection (2) of that section.
- (4a) If in criminal proceedings leave is given under the protection provisions to require disclosure of a child care record as defined in subsection (1) of section 46 of the *Child Care Services Act 2007*, subsections (5) to (8) of that section apply as if the child care record had been produced in response to a requirement referred to in subsection (2) of that section.
- (5) The protection provisions do not affect the operation of section 240 of the *Children and Community Services Act 2004*.
[Section 19L inserted by No. 46 of 2004 s. 10; amended by No. 19 of 2007 s. 69.]

19M. Regulations as to disclosure of protected communications

The Governor may make regulations as to —

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- (a) the forms to be used for an application for leave and the supporting affidavit;
- (b) the manner in which a protected communication is to be described in an application for leave or the supporting affidavit;
- (c) other matters to be included in an application for leave or the supporting affidavit;
- (d) the procedure relating to an application for leave; and
- (e) any other matter that is necessary or convenient to be prescribed for the purposes of the protection provisions.

[Section 19M inserted by No. 46 of 2004 s. 10.]

Impeaching credit of witnesses

20. How far a party may discredit his own witness

A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but may contradict him by other evidence, if in the opinion of the judge he is hostile to the party producing him.

21. Cross-examination as to and proof of prior inconsistent statement

Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the proceeding, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he made such statement, proof may be given that he did in fact make it.

The same course may be taken with a witness upon his examination in chief or re-examination, if the judge is of opinion that the witness is hostile to the party by whom he was called and permits the question.

[Section 21 amended by No. 16 of 1913 s. 3.]

22. Procedure for purposes of s. 21

A witness under cross-examination, or a witness whom the judge, under the provisions of the last preceding section, has permitted to be examined by the party who called him as to previous statements inconsistent with his present testimony, may be questioned as to —

- (a) a previous statement made or supposed to have been made by him in writing or reduced into writing; or
- (b) evidence given or supposed to have been given by him before any justice,

without such writing or the deposition of such witness being shown to him.

But if it is intended to contradict him by such writing or deposition, his attention must, before such contradictory proof can be given, be called to those parts of the writing or deposition which are to be used for the purpose of so contradicting him.

Provided that the judge may, at any time during the trial, require the writing or deposition to be produced for his inspection, and may thereupon make use of it for the purposes of the trial as he thinks fit.

23. Cross-examination as to and proof of previous conviction

- (1) A witness may be questioned as to whether he has been convicted of any indictable offence, and, upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, the cross-examining party may prove such conviction.
- (2) A certificate containing the substance and effect only (omitting formal parts) of the conviction for such offence, purporting to be signed by the clerk of the court or other officer having the

custody of the records of the court where the offender was convicted, shall, upon proof of the identity of the person, be sufficient evidence of such conviction without proof of the signature or official character of the person appearing to have signed the same.

- (3) A fee of 50 cents, and no more, shall be payable for such certificate.

[Section 23 amended by No. 113 of 1965 s. 4.]

Protection in respect of certain questions

[Heading inserted by No. 47 of 1990 s. 7.]

24. Questions tending to criminate

Except as hereinbefore provided, nothing in this Act shall render any person compellable to answer any question tending to criminate himself.

25. Cross-examination as to credit

- (1) If any question put to a witness upon cross-examination relates to a matter not relevant to the proceeding, except in so far as it affects the credit of the witness by injuring his character, it shall be the duty of the court to decide whether or not the witness shall be compelled to answer it, and the court may, if it thinks fit, inform the witness that he is not obliged to answer it.
- (2) In exercising this discretion, the court shall have regard to the following considerations —
- (a) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies;
 - (b) such questions are improper if the imputation they convey relates to matters so remote in time, or of such character, that the truth of the imputation would not affect, or would affect in a slight degree only, the

opinion of the court as to the credibility of the witness on the matter to which he testifies;

- (c) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.
- (3) Nothing herein shall be deemed to make any witness compellable to give evidence upon any matter he is now by law privileged from disclosing.

25A. Cross-examination by accused in person

- (1) In any criminal proceeding where an accused person who is not represented by counsel wishes to cross-examine a witness, the court, having regard to the nature of the charge, the wishes of the witness, and the availability of any necessary facilities or equipment, may —
 - (a) order that during the cross-examination the accused person and the witness are to be in separate rooms and that either —
 - (i) the witness is to be in a room outside the courtroom that is connected to the courtroom by a video link as defined in section 120; or
 - (ii) the accused person is to be held in a room outside the courtroom that is connected to the courtroom by a video link as defined in section 120;
 - (b) if it is not possible to make an order under paragraph (a), an order that during the cross-examination the accused person and the witness are to be separated by a screen, one-way glass, or other device, that —
 - (i) prevents the witness from seeing the accused person; and
 - (ii) allows the accused person, the judge and any jury to see the witness;

- (c) whether or not an order is made under paragraph (a) or (b), make an order that forbids the accused person from putting a question to the witness directly and requires the question, having been first stated by the accused person to the judge or a person approved by the judge, to be repeated accurately to the witness by the judge or approved person.
- (2) An order made under subsection (1)(a)(ii) may be made despite section 88 of the *Criminal Procedure Act 2004*.
- (3) An order made under subsection (1) may be varied or revoked at any time.
- (4) If an order is made under subsection (1) in proceedings before a jury, the judge is to instruct the jury that the procedure used for the cross-examination is a routine practice of the court and that they should not draw any inference as to the accused person's guilt from the use of the procedure.
- (5) This section is in addition to and does not limit the operation of sections 106A to 106T, and does not prevent orders from being made under both subsection (1) and one or more of those sections.

[Section 25A inserted by No. 59 of 2004 s. 87; amended by No. 84 of 2004 s. 41.]

26. Improper questions

- (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) Subsection (1) extends to a question that is otherwise proper if the putting of the question is unduly annoying, harassing, intimidating, offensive or oppressive.

- (3) 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, language, personality and education; and
 - (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

[Section 26 inserted by No. 46 of 2004 s. 11.]

27. Prohibited questions not to be published

- (1) It shall not be lawful for any person to print or publish any question or inquiry which the court —
- (a) has, under the provisions of the last preceding section, disallowed and has ordered shall not be published; or
 - (b) has informed the witness he is not obliged to answer and has ordered shall not be published.
- (2) Every person who prints or publishes any question in breach of this section commits a contempt of court, and shall be liable to punishment for such contempt as if the contempt had been committed in face of the court against which the contempt is committed and on the like proceedings as in such, last-mentioned case.

[Section 27 amended by No. 46 of 2004 s. 12.]

Manner of giving evidence

[Heading inserted by No. 71 of 2000 s. 6.]

27A. Form of evidence

- (1) Evidence may be given in the form of a chart, summary or other explanatory document if it appears to the court that the document would be likely to aid comprehension of other evidence that has been given or is to be given.
- (2) Nothing in this section affects the operation of section 27B.

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[Section 27A inserted by No. 71 of 2000 s. 6.]

27B. Manner of giving voluminous or complex evidence

- (1) If a court is satisfied that particular evidence that a party to a proceeding proposes to adduce is so voluminous or complex that it would be difficult to assess or comprehend it if it were adduced in narrative form, the court may direct the party to adduce the evidence in another form, including in the form of a chart, summary or other explanatory document.
- (2) The direction may also —
 - (a) specify the form of the evidence;
 - (b) specify the witness who is to give the evidence;
 - (c) specify how any document is to be prepared;
 - (d) contain directions to ensure that each other party is served with copies of the evidence in the form in which it is to be given and is given sufficient time to examine it;
 - (e) contain directions as to the extent (if any) to which the voluminous or complex evidence is to be adduced by the party.
- (3) The opinion rule does not apply to evidence adduced in accordance with a direction under this section.
- (4) In subsection (3) —

“opinion rule” means the common law rule that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

[Section 27B inserted by No. 71 of 2000 s. 6.]

General rules of evidence

[28. *Repealed by No. 84 of 2004 s. 41.]*

29. Intention to defraud, proof of

On the trial of a person charged with any offence of which an intent to injure or deceive or defraud, or an intent to enable another person to deceive or defraud, is an element, it shall not be necessary to prove an intent to injure or deceive or defraud any particular person or an intent to enable any particular person to deceive or defraud any particular person.

30. Proof by attesting witness unnecessary in certain cases

It shall not be necessary to prove, by the attesting witness, any instrument to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness thereto.

31. Comparison of disputed hand-writing

Comparison of a disputed hand-writing with any writing proved to the satisfaction of the judge to be genuine may be made by witnesses, and such writings and the testimony of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

31A. Propensity and relationship evidence

(1) In this section —

“propensity evidence” means —

- (a) similar fact evidence or other evidence of the conduct of the accused person; or
- (b) evidence of the character or reputation of the accused person or of a tendency that the accused person has or had;

“relationship evidence” means evidence of the attitude or conduct of the accused person towards another person, or a class of persons, over a period of time.

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- (2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers —
 - (a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
 - (b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.
- (3) In considering the probative value of evidence for the purposes of subsection (2) it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

[Section 31A inserted by No. 46 of 2004 s. 13.]

32. Admissions by accused persons in criminal cases

An accused person, either personally or by his counsel or solicitor, in his presence, may admit on his trial any fact alleged or sought to be proved against him, and such admission shall be sufficient proof of the fact without other evidence.

32A. Derogation of privilege in civil proceedings

- (1) This section applies only in respect of —
 - (a) civil proceedings in or before a court;
 - (b) arbitrations; and
 - (c) civil proceedings in or before any tribunal that is not a court.
- (2) In this section —

“privilege” means privilege that would, apart from this section and the rules of court mentioned in subsection (3), attach to documents prepared for the purpose of pending or contemplated proceedings or in connection with the obtaining or giving of legal advice; and

“rules of court”, without affecting the operation of section 40 of the *Interpretation Act 1918*³, includes rules, regulations, and by-laws prescribing the practice and procedure for and in relation to proceedings in respect of which this section applies.

- (3) There shall be a derogation of privilege to the extent that rules of court applicable to expert evidence so provides.
- (4) Without limiting any other power to make rules of court in respect of any tribunal of the kind that is referred to in subsection (1)(c), such rules of court may make provision for prescribing matters relating to expert evidence, including the disclosure, by the furnishing of copies of reports or otherwise, of the nature and substance of the expert evidence to be given, and including the exclusion of expert evidence in case of non-compliance with the rules relating to expert evidence or with any order for the disclosure of the nature and substance of expert evidence, and in relation thereto —
 - (a) for the imposition of differing requirements depending on different classes of cases, different classes of matters, or other different circumstances; and
 - (b) for the conferring of a discretionary authority.

[Section 32A inserted by No. 111 of 1976 s. 3.]

Rules in particular cases

[33, 34. Repealed by No. 70 of 1988 s. 36.]

35. Perjury charge, corroboration not required

- (1) Notwithstanding any rule of law to the contrary, a person may be convicted of committing perjury or of counselling or procuring the commission of perjury upon the uncorroborated evidence of one witness.

[(2) repealed]

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[Section 35 inserted by No. 70 of 1988 s. 37; amended by No. 36 of 1992 s. 4.]

36. Perjury charge, proof of trial etc.

On the trial of a person charged with an offence of which the giving of false testimony by any person at the trial of a person charged with an offence is an element, a certificate setting out the substance and effect only, without the formal parts, of the indictment or prosecution notice, and the proceedings at the trial, and purporting to be signed by the officer having the custody of the records of the court where the indictment or prosecution notice was tried, or by his deputy, shall be sufficient evidence of the trial, without proof of the signature or official character of the person who appears to have signed the certificate.

[Section 36 amended by No. 84 of 2004 s. 80.]

36A. Terms used in s. 36A to 36C

- (1) In this section and in sections 36B, 36BA, 36BC, 36BD and 36C —

“**accused**” in relation to a hearing or trial, means any accused at the hearing or trial whether or not that accused is charged with a sexual offence;

“**complainant**” in relation to proceedings for a sexual offence means a person upon or in respect of whom it is alleged that a sexual offence was committed, attempted or proposed;

“**repealed Code section**” means a repealed section of *The Criminal Code* that, before it was repealed, enacted an offence constituted by acts or omissions that are substantially the same as the acts or omissions that constitute an offence under a section or Chapter of *The Criminal Code* that is mentioned in paragraph (a) or (b) of the definition of “sexual offence” in this subsection.

“sexual offence” means an offence —

- (a) under section 186 or 191(1)(a) of *The Criminal Code* or section 7, 15, or 18 of the *Prostitution Act 2000*;
 - (b) under Chapter XXXI of *The Criminal Code*;
 - (ba) under a repealed Code section;
 - (c) of attempting to commit any of the offences under paragraph (a), (b) or (ba); or
 - (d) of conspiring to commit any of the offences under paragraph (a), (b) or (ba).
- (2) In this section and in sections 36B, 36BA and 36BC, proceedings for a sexual offence means proceedings in which a person stands charged with a 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.

[Section 36A inserted by No. 74 of 1985 s. 15; amended by No. 70 of 1988 s. 38; No. 14 of 1992 s. 13; No. 17 of 2000 s. 64; No. 71 of 2000 s. 7; No. 70 of 2004 s. 19(3); No. 84 of 2004 s. 85(2).]

36B. Sexual reputation of complainant, evidence of

In proceedings for a sexual offence, evidence relating to the sexual reputation of the complainant shall not be adduced or elicited by or on behalf of an accused.

[Section 36B inserted by No. 74 of 1985 s. 15; amended by No. 14 of 1992 s. 13; No. 84 of 2004 s. 82.]

36BA. Sexual disposition of complainant, evidence of

In proceedings for a sexual offence, evidence relating to the disposition of the complainant in sexual matters shall not be adduced or elicited by or on behalf of an accused.

s. 36BC

[Section 36BA inserted by No. 74 of 1985 s. 15; amended by No. 14 of 1992 s. 13; No. 84 of 2004 s. 82.]

36BC. Sexual experience of complainant, evidence of

- (1) In proceedings for a sexual offence, evidence relating to the sexual experiences of the complainant, being sexual experiences of any kind, at any time and with any person, not being part of the *res gestae* of the proceedings, shall not be adduced or elicited by or on behalf of an accused unless leave of the court has first been obtained on application made in the absence of the jury (if any).
- (2) The court shall not grant leave under subsection (1) unless satisfied that —
 - (a) what is sought to be adduced or elicited has substantial relevance to the facts in issue; and
 - (b) the probative value of the evidence that is sought to be adduced or elicited outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission.

[Section 36BC inserted by No. 74 of 1985 s. 15; amended by No. 14 of 1992 s. 13; No. 84 of 2004 s. 82.]

36BD. Lack of complaint, jury warning about

Where on the trial of a person for a sexual offence or an offence under Chapter XXII of *The Criminal Code* (as enacted at any time) evidence is given or a question is asked of a witness which tends to suggest an absence of complaint in respect of the commission of the alleged offence by the complainant or to suggest delay by the complainant in making any such complaint, the judge shall —

- (a) give a warning to the jury to the effect that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false; and

- (b) inform the jury that there may be good reasons why a victim of an offence such as that alleged may hesitate in making or may refrain from making a complaint of that offence.

[Section 36BD inserted by No. 74 of 1985 s. 15; amended by No. 14 of 1992 s. 13; No. 71 of 2000 s. 8.]

[36BE. Repealed by No. 70 of 1988 s. 39.]

36C. Names of complainants not to be published

- (1) Subject to subsections (5) and (6) after a person is accused of a sexual offence no matter likely to lead members of the public to identify the complainant and, in the case of a complainant who is attending a school, no matter likely to lead members of the public to identify the school which the complainant attends, in relation to that accusation shall be published in a written publication available to the public or be broadcast, except by leave of the court which has or may have jurisdiction to try the person accused for that offence.
- (2) If any matter is published or broadcast in contravention of subsection (1), the following persons, namely —
 - (a) in the case of a publication in a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical;
 - (b) in the case of any other publication, the person who publishes it; and
 - (c) in the case of a broadcast, any body corporate which transmits or provides the programme in which the broadcast is made and any person having functions in relation to the programme corresponding to those of an editor of a newspaper,

shall be guilty of an offence and liable on summary conviction to a fine of, in the case of an individual, \$5 000 or, in the case of a body corporate, \$25 000.

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- (3) For the purposes of this section a person is accused of a sexual offence if —
- (a) the person is charged in a prosecution notice or an indictment with committing a sexual offence;
 - (b) the person appears before a court charged with a sexual offence; or
 - (c) a court before which the person is appearing commits him for trial on a new charge alleging a sexual offence,
- and references in this section to an accusation alleging a sexual offence shall be construed accordingly.
- (4) In this section —
- “a broadcast”** means a broadcast by wireless telegraphy of a sound or visual images intended for general reception, and cognate expressions shall be construed accordingly;
 - “complainant”**, in relation to a person accused of a sexual offence or an accusation alleging a sexual offence, means the person against whom the offence is alleged to have been committed; and
 - “written publication”** includes a film, a sound track and any other record in permanent form but does not include an indictment or other document prepared for use in particular legal proceedings.
- (5) Nothing in this section prohibits the publication or broadcasting, in consequence of an accusation alleging a sexual offence, of matter consisting only of a report of legal proceedings other than proceedings at, or intended to lead to, or on an appeal arising out of, a trial at which the accused is charged with that offence, and the giving of leave in pursuance of this section does not affect the operation of subsection (1) at any time before the leave is given.

- (6) Nothing in this section prohibits the publication or broadcasting of matter identifying a complainant if —
- (a) prior to the publication or broadcasting that complainant authorised in writing the publication or broadcasting of the matter; and
 - (b) at the time the complainant authorised the publication or broadcasting, he or she was at least 18 years old and was not a person who, because of mental impairment (as defined in *The Criminal Code*), is incapable of making reasonable judgments in respect of the publication or broadcasting of such matters,

proof of which lies on the publisher or broadcaster.

[Section 36C inserted by No. 145 of 1976 s. 6; amended by No 74 of 1985 s. 16; No. 14 of 1992 s. 13; No. 71 of 2000 s. 9; No. 59 of 2004 s. 89; No. 84 of 2004 s. 41 and 80.]

[37. Repealed by No. 70 of 1988 s. 40.]

[38. Repealed by No. 14 of 1992 s. 14.]

[39. Repealed by No. 108 of 1982 s. 29.]

40. Customs prosecutions, effect of averments in

In every Customs prosecution the averment of the prosecution or plaintiff contained in the information, declaration, or claim shall be deemed to be proved in the absence of proof to the contrary, but so that —

- (a) when an intent to defraud the revenue is charged, the averment shall not be deemed sufficient to prove the intent; and
- (b) in all proceedings for an indictable offence, or for an offence directly punishable by imprisonment, the guilt of the accused must be established by evidence.

[Section 40 amended by No. 84 of 2004 s. 82.]

41. Customs prosecutions, proof of appointment of officers

On the trial of a person charged with any offence of which the fact that some person was at some particular time an officer of Customs, or was at some particular time employed for the prevention of smuggling, is an element, the averment in the indictment or prosecution notice that any person therein mentioned was an officer of Customs, or was employed for the prevention of smuggling at any time therein stated, shall be sufficient evidence of the fact until the contrary is shown.

[Section 41 amended by No. 84 of 2004 s. 80.]

41A. Stealing and receiving charges, evidence of ownership of property stolen from ships, wharves, etc.

- (1) On the prosecution of any person for the stealing of any property in or from any vessel, barge, or boat, or from any dock, wharf, or quay, or from any store or shed used in connection with or adjoining any such dock, wharf, or quay, or for receiving any such property, knowing it to have been so stolen, or for having on his person or in any place or conveying in any manner anything which may be reasonably suspected of being so stolen —
 - (a) evidence may be given of any writing, printing, or marks upon the said property without producing the original writing, printing or marks, or requiring the production thereof by notice or otherwise; and
 - (b) any apparently genuine document purporting to be the bill of lading, manifest, shipping receipt, delivery order, specification, schedule, packing list, or invoice relating to the said property, or to property which from the description thereof in the document or from the writing, printing, or marks thereon, or on any package containing the same as detailed in the document, coupled with any other relevant circumstances, may be reasonably assumed to be the same as the property the subject of the prosecution, shall be admissible in evidence on

production and without further proof, and shall be prima facie evidence of the particulars and facts contained therein and that the ownership of the property, the subject matter of the prosecution, is in the consignee referred to in the document or his assignee.

- (2) In deciding whether any property described as aforesaid may be reasonably assumed to be the same as the property the subject of the prosecution, regard shall be had to the source from which the document was produced, and the circumstances of its receipt or custody by the person producing it, or from whom it was obtained for the purposes of the prosecution.
- (3) It shall be no objection to the admissibility in evidence of any such document as aforesaid that the statement of the place in or from which the stealing took place forms no part of the charge, if the evidence adduced on the prosecution indicates that the stealing did in fact take place in or from a place such as is hereinbefore mentioned.

[Section 41A inserted by No. 19 of 1921 s. 2.]

42. Evidence on trial for defamation

On the trial of a person charged with the unlawful publication of defamatory matter which is contained in a periodical, after evidence sufficient in the opinion of the court has been given of the publication by the accused person of the number or part of the periodical containing the matter complained of, other writings or prints purporting to be other numbers or parts of the same periodical previously or subsequently published, and containing a printed statement that they were published by or for the accused person, shall be admissible in evidence on either side, without further proof of publication of them.

The term “**periodical**” includes any newspaper, review, magazine, or other writing or print, published periodically.

[43. Repealed by No. 10 of 1960 s. 2.]

44. Stealing charges, proof of receipt of money by accused, proof of general deficiency

- (1) On the trial of a person charged with stealing money, an entry in any book of account shown to be kept by the accused person, or kept in, under, or subject to his charge or supervision, purporting to be an entry of the receipt of any money, shall be evidence that the money so purporting to have been received was so received by him.
- (2) On the trial of a person charged with any such offence, it shall not be necessary to prove the stealing by the accused person of any specific sum of money, if, on examination of the books of account or entries kept or made by him, or kept or made in, under, or subject to his charge or supervision, or by any other evidence, there is proof of a general deficiency and if the jury are satisfied that the accused person stole the deficient money or any part of it.

45. Seals and stamps for the revenue or post office, proof of

On the trial of a person charged with any offence relating to any seal or stamp used for the purposes of the public revenue, or of the post office in any part of Her Majesty's dominions, or in any foreign State, a despatch from one of Her Majesty's principal Secretaries of State, transmitting to the Governor any stamp, mark, or impression and stating it to be a genuine stamp, mark, or impression, of a die, plate, or other instrument, provided, made or used by or under the direction of the proper authority of the country in question, for the purpose of expressing or denoting any stamp duty or postal charge, shall be admissible as evidence of the facts stated in the despatch; and the stamp, mark, or impression, so transmitted may be used by the court and jury and by witnesses for the purposes of comparison.

46. Receiving charges, proof of knowledge that goods were stolen

Where proceedings are taken against any person for having received anything which has been obtained by means of any act constituting an indictable offence, knowing the same to have been so obtained, evidence may be given at any stage of the proceedings that there was found in the possession of such person any other thing obtained by such means within the preceding period of 12 months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property which forms the subject of the proceedings taken against him to have been obtained by means of an act constituting an indictable offence.

46A. Sunrise and sunset, proof of

Where in any proceedings it is material to prove the time of sunrise or sunset, or both, in the State, in any area of the State, or at any place in the State on a particular day and such a time has, under the authority of the Perth Astronomical Observatory or such other body as the Governor by proclamation nominates in lieu of the Perth Astronomical Observatory, been specified by a notice in the *Government Gazette*, the production of the *Government Gazette* containing the notice shall be evidence that the time of sunrise or sunset, or both, in the State, in that area, or in that place, as the case may be, on that day was the time so specified.

[Section 46A inserted by No. 33 of 1978 s. 2.]

47. Conviction, acquittal and identity, proof of

- (1) A conviction or an acquittal of any person may be proved in any proceeding whatever by producing a record or extract of such conviction or acquittal, and by giving proof of the identity of the person in respect of whom the conviction or acquittal is sought to be proved with the person appearing in the record or extract of conviction or acquittal to have been convicted or acquitted.

- (1a) For the purpose of proving the identity of a person alleged to have been convicted, whether before or after the commencement of the *Evidence Act Amendment Act 1956*¹, an affidavit substantially in the form in the Sixth Schedule shall be admissible in evidence in all courts and shall be prima facie evidence that the person whose fingerprints are exhibited thereto —
- (a) is the person, who, in any document exhibited to the affidavit and purporting to be a record or abstract or certificate of conviction or a certified copy of a record or abstract or certificate of conviction, is referred to as having been convicted;
 - (b) has been convicted of the offences mentioned in the affidavit.
- (2) A record or extract of a conviction or acquittal may, in the case of an indictable offence, consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction or acquittal), and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court before which such conviction or acquittal took place, or purporting to be signed by the deputy of such clerk or officer; and, in the case of a summary conviction or acquittal, may consist of a copy of such conviction or acquittal purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction or acquittal took place, or to be signed by the proper officer of the court before which such conviction or acquittal took place, or by the clerk or other officer of any court to which such conviction or acquittal has been returned.
- (3) A record or extract of any conviction or acquittal made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same.
- (4) A conviction or an acquittal in any part of Her Majesty's dominions may be proved under this section in respect of any

person, and a conviction or an acquittal before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof.

- (5) The mode of proving a conviction or an acquittal or identity authorised by this section shall be in addition to, and not in exclusion of, any other authorised mode of proving such conviction or acquittal or identity.
- (6) A conviction shall be presumed not to have been appealed against or quashed or set aside until the contrary is shown.

[Section 47 amended by No. 16 of 1956 s. 3.]

[48. Repealed by No. 70 of 1988 s. 41.]

49. Actions for seduction

In any action to recover damages for seduction brought by a parent of the woman seduced, or by a person standing to her in the place of a parent, it shall not be necessary to allege or prove that she was in the service of the plaintiff, or that he sustained any loss of service by reason of the seduction.

50. Corroboration warnings not generally required

- (1) In this section “**corroboration warning**” in relation to a trial means a warning to the effect that it is unsafe to convict the person who is being tried on the uncorroborated evidence of one witness.
- (2) On the trial of a person on indictment for an offence —
 - (a) the judge is not required by any rule of law or practice to give a corroboration warning to the jury in relation to any offence of which the person is liable to be convicted on the indictment; and

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- (b) the judge shall not give a corroboration warning to the jury unless the judge is satisfied that such a warning is justified in the circumstances.

[Section 50 inserted by No. 70 of 1988 s. 42; amended by No. 36 of 1992 s. 5.]

50A. Transcripts, proof of

- (1) A document consisting of a transcript of a recording that is admitted in evidence in any proceedings is admissible in those proceedings as evidence of the contents of the recording if the transcript bears a certificate that purports to be signed by the person who transcribed the recording and meets the requirements of subsection (2).
- (2) A certificate under subsection (1) must —
 - (a) state the full name, address and occupation of the certifier;
 - (b) identify the recording to which the transcript refers;
 - (c) state the day upon which the certifier made the transcript, the condition of the recording at that time, the extent of any damage to the recording and the extent and nature of any difficulty encountered by the certifier in making an accurate and complete transcription of the contents of the recording;
 - (d) certify that the transcript has been made in good faith and is an accurate and complete transcription of the contents of the recording, except as stated under paragraph (c); and
 - (e) if the certifier was authorised under the *Surveillance Devices Act 1998* to listen to the recording to which the transcript relates, state the details of that authorisation.

[Section 50A inserted by No. 56 of 1998 s. 46.]

50B. DNA evidentiary certificate

- (1) In this section —

“authorised officer” means the person who holds the office prescribed for the purposes of this definition;

“business day” means a day that is not a Saturday, Sunday or public holiday;

“DNA profile” means the result from DNA analysis;

“examination”, of a thing, includes testing the thing;

“forensic scientist” means a person, or a person who holds an office, prescribed for the purposes of this definition;

“hearing day”, for a criminal proceeding, means the day fixed for the start of the trial of the proceeding;

“party”, to a criminal proceeding, means the prosecutor or a person charged in the proceeding;

“thing” includes anything in or on or otherwise attached to the thing.

- (2) This section applies to a criminal proceeding.
- (3) A certificate purporting to be signed by a forensic scientist and stating any of the following matters is evidence of the matter —
 - (a) that a stated thing was received at a stated laboratory on a stated day;
 - (b) that the thing was examined at the laboratory on a stated day or between stated days;
 - (c) that a DNA profile was, or a stated number of DNA profiles were, obtained from the thing;
 - (d) that a forensic scientist —
 - (i) examined the laboratory’s records relating to the receipt, storage and examination of the thing, including any examination of the thing that was done by a person other than the forensic scientist; and
 - (ii) confirms that the records indicate that all quality assurance procedures for the receipt, storage and examination of the thing that applied in the

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laboratory at the time the thing was examined were complied with.

- (4) If a party intends to rely on the certificate, the party must —
 - (a) at least 10 business days before the hearing day, give a copy of the certificate to each other party; and
 - (b) at the hearing, call the forensic scientist to give evidence, unless the parties agree otherwise.
- (5) If the authorised officer receives a written request from a party for a copy of the laboratory's records relating to the receipt, storage and examination of the thing, the authorised officer must give the party a copy of the records within 7 business days after receiving the request.
- (6) If a party intends to dispute a matter stated in the certificate, the party must, at least 5 business days before the hearing day, give the authorised officer and each other party written notice of the matter to be disputed.
- (7) A party disputing a matter stated in the certificate may, with the leave of the court, require the party relying on the certificate to call any person involved in the receipt, storage or examination of the thing to give evidence at the hearing.
- (8) The court may give leave only if satisfied —
 - (a) that an irregularity may exist in relation to the receipt, storage or examination of the thing about which the person to be called is able to give evidence; and
 - (b) that it is in the interests of justice that the person be called to give evidence.
- (9) Any equipment used in examining the thing at the laboratory is taken to have given accurate results in the absence of evidence to the contrary.
- (10) A document required to be given under this section may be given personally, by post or by facsimile or another form of electronic communication.

- (11) On application made to it, the court may, before or after a time fixed under this section expires, extend or abridge the time by an order fixing, extending or abridging the time, whether or not the application is made before the time expires.
- (12) The Governor may make regulations for the purposes of the definitions of “authorised officer” and “forensic scientist” in subsection (1).

[Section 50B inserted by No. 24 of 2004 s. 4.]

Evidence of witnesses in prison

51. Prisoner required to give evidence may be brought up on order

When any person is detained in any prison under sentence or awaiting trial, or on remand for any offence, or for any other cause, and a trial, inquiry, inquest, or inquisition is pending at which it is deemed necessary that such prisoner should be present, any judge, or, in criminal proceedings the Sheriff of Western Australia or the chief executive officer, within the meaning of that expression as defined in section 3 of the *Prisons Act 1981*, may make an order under his hand directing any gaoler to produce such person, and such order shall be sufficient warrant or authority to any gaoler for producing such prisoner.

[Section 51 amended by No. 31 of 1993 s. 41.]

52. Expense of bringing up prisoner

In every civil proceeding the judge shall, and in every other proceeding he may, before making such order, require the applicant to deposit a sum sufficient to pay the expense of bringing up the prisoner, maintaining him while out of prison, and returning him thither, including the expense of his custody from the time he leaves until the time he returns to the prison.

Judicial notice

53. Commonwealth and States etc., and their Acts to be judicially noticed

- (1) All courts and all persons acting judicially shall take judicial notice —
 - (a) of the Commonwealth and the States and of every Australasian colony, and the extent of their respective territories; and
 - (b) of all Acts of the Parliament of the United Kingdom and of the Commonwealth, and of any State, and of any Australasian colony, passed before or after the commencement of this Act.
- (2) Any paper purporting to be a copy of any Act of the Parliament of the United Kingdom or of the Commonwealth, or of any State, or of any Australasian colony, whether passed before or after the commencement of this Act, and purporting to be printed by the Government Printer, shall prima facie be deemed to be a correct copy of such Act without any further proof thereof.

The date which appears on any such copy purporting to be the day on which such Act received the Royal Assent, or was proclaimed to commence, shall be received for all purposes as evidence of the date of such assent, or commencement.

54. Seals of the Commonwealth and States to be judicially noticed

All courts and all persons acting judicially shall take judicial notice of the impression of the seal of the Commonwealth and of the seal of any State, and of the seal of any Australasian colony, without evidence of the seal having been impressed or any other evidence relating thereto.

55. Official seals to be judicially noticed

When by any Act any seal or stamp is authorised to be used by any court, officer, body corporate, or any other person, judicial

notice shall be taken of the impression of such seal or stamp without evidence of the same having been impressed or any other evidence relating thereto.

56. Certain signatures to be judicially noticed

All courts and all persons acting judicially shall take judicial notice of —

- (a) the official signature of any person who holds or has held the office of Governor-General, Minister of State, President of the Senate, Speaker of the House of Representatives, Secretary to the Federal Executive Council, Justice of the High Court, Principal Registrar, Deputy Registrar or District Registrar of the High Court, President or Deputy President of the Commonwealth Court of Conciliation and Arbitration, Industrial Registrar or Deputy Industrial Registrar, or President or Judge or member of any Federal Court, or of the Inter-State Commission, or any office to which the Governor-General, by order published in the *Gazette*, declares this section to apply; and
- (b) the official signature of every person who is for the time being, and of every person who has at any time been Governor, Minister of the Crown, Judge of the Supreme Court, Prothonotary, Master, Principal Registrar, Registrar, or Deputy Registrar, or Chief Clerk of the Supreme Court, Commissioner of Titles, Registrar of Titles, Deputy Commissioner of Titles or Assistant Registrar of Titles, the Registrar or a Deputy Registrar of Births, Deaths and Marriages, Government Statist or Assistant or Deputy Government Statist, Judge or Presiding Magistrate or Registrar or Deputy Registrar of any County Court, or District, Family or Local Court, or Court of Mines, Warden, Chairman of any Court of General or Quarter Sessions, Judge of any Court of Bankruptcy or Insolvency, or Police or stipendiary or other magistrate, or justice of the peace in any State or

part or district of any State, or in any Australasian colony or part of district of any Australasian colony, and of any person holding in any State or in any Australasian colony or part or district of any State or Australasian colony any office corresponding to any of the aforesaid offices, and of any person holding in any such State or colony any office to which the Governor may, at any time, by order published in the *Gazette*, declare this section to apply; and

- (c) the seal of every such court or person; and
- (d) the fact that such person holds or has held such office,

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

[Section 56 amended by No. 16 of 1956 s. 4; No. 111 of 1978 s. 4; No. 67 of 1979 s. 50; No. 40 of 1998 s. 12(a); No. 6 of 2003 s. 85(1); No. 59 of 2004 s. 89.]

Proof of certain documents

57. United Kingdom proclamations, regulations etc., proof of

- (1) Evidence of any Royal Proclamation, Order of Her Majesty's Privy Council, order, regulation, despatch, or any other instrument whatsoever made or issued before or after the commencement of this Act by Her Majesty, or by Her Majesty's Privy Council, or by or under the authority of any of Her Majesty's Secretaries of State, or any department of Her Majesty's Government in the United Kingdom may be given in any court or before any person acting judicially —
 - (a) by the production of a copy of the *London Gazette* or by the production of a copy of the *Government Gazette* purporting to contain a reprint or copy of such Proclamation, Order of the Privy Council, order, regulation, despatch, or other instrument;
 - (b) by the production of a copy of such proclamation purporting to be printed by the Government Printer, or under the authority of Parliament;

- (c) by the production in the case of any proclamation, order, or regulation issued by Her Majesty or by the Privy Council of a copy or extract purporting to be certified to be true by the Clerk of the Privy Council, or by any one of the Lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any departments of the Government or officers mentioned in the first column of the Fourth Schedule, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said Schedule in connection with such department or officer.
- (2) Any copy or extract made in pursuance of this section may be in print or in writing, or partly in print or partly in writing.
- (3) No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this section, to the truth of any copy of or extract from any proclamation, order, or regulation.
- (4) In this section the words “**Privy Council**” include Her Majesty in Council and the Lords and others of Her Majesty’s Privy Council, or any of them, and any Committee of the Privy Council that is not specially named in the Fourth Schedule.

[Section 57 amended by No. 16 of 1956 s. 5.]

58. Australasian proclamations, regulations etc., proof of

- (1) Evidence of any proclamation, order in council, commission, order, regulation, or other instrument whatsoever made or issued before or after the commencement of this Act by the Governor-General of the Commonwealth, or by the Governor of any State or of any Australasian colony, or by or under the authority of any Minister of the Crown for the Commonwealth, or for any State or Australasian colony, or of any public commission or board, may be given in any court or before any person acting judicially in any of the following modes, that is to say —

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- (a) by the production of a copy of the *Gazette* purporting to contain the same;
 - (b) by the production of a document purporting to be a copy thereof, and purporting to be printed by the Government Printer or by the authority of the Government;
 - (c) by the production (in the case of any proclamation, order, commission, or regulation issued or made by the Governor-General of the Commonwealth) of a document purporting to be certified by the Secretary to the Federal Executive Council as a true copy thereof or extract therefrom;
 - (d) by the production (in the case of any proclamation, order in council, commission, order, regulation, or other instrument whatsoever made or issued by the Governor of any State, or of any Australasian colony) of a copy or extract purporting to be certified by the Clerk of the Executive Council of such State or Australasian colony;
 - (e) by the production (in the case of any proclamation, order, commission, regulation, or other instrument made or issued by or under the authority of any Minister of the Crown) of a document purporting to be certified as a true copy thereof or extract therefrom by such Minister or any other Minister of the Crown.
- (2) No proof shall be required of the handwriting or official position of any person certifying in pursuance of this section.

59. *Customs Act 1901* (Cwlth) proclamations, regulations etc., proof of

The production of the *Commonwealth of Australia Gazette* containing any proclamation, gazette notice, or regulation appearing to have been issued or made under the *Customs Act 1901*, or the production of any document certified by the Comptroller General of Customs or a State Collector of Customs to be a true copy of or extract from any such proclamation, gazette notice, or regulation issued or made under

the said Act, shall be prima facie evidence of the issue or making of such proclamation, gazette notice, or regulation, and that the same is in force.

60. Australian States' proclamations and acts of State, proof of

Evidence of any proclamation or other act of State of any State may be given in any court or before any person acting judicially by the production of a copy thereof either —

- (a) proved to be an examined copy thereof; or
- (b) purporting to be sealed with the seal of that State.

61. WA proclamations, regulations etc., proof of

Evidence of any proclamation, order, regulation, or notice made or issued before or after the commencement of this Act by or under the authority of the Governor, or of the Governor in Executive Council, or of the Legislative Council or Legislative Assembly, or of the chief executive officer of any department of the Public Service, or of any body, listed in the first column of the Fifth Schedule mentioned, may be given in any court or before any person acting judicially by the production of a copy of or extract therefrom, such copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said Schedule in connection with the officer, department, or body in the said first column mentioned.

[Section 61 amended by No. 28 of 2006 s. 35.]

62. Documents admissible in the United Kingdom etc. to be admissible in WA

Every document admissible in evidence for any purpose in any court of justice in any part of Her Majesty's dominions, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the like purpose in any court or before any person acting judicially in Western Australia, without proof of the seal or stamp

or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

63. Foreign States' proclamations, acts of State etc., proof of

- (1) All proclamations, treaties, and other acts of State of any foreign State, or of any British possession may be proved in any court or before any person acting judicially, either by examined copies or by copies sealed with the seal of the foreign State or British possession to which the original document belongs.
- (2) Any copy purporting to be sealed as in this section directed shall be admitted in evidence in every case where the original document could have been so admitted, without any proof of the seal.

64. Foreign States' proclamations etc. admissible even if not sealed

Proclamations, international treaties, and orders in council of any country, although not proved in the manner provided by the last preceding section, may nevertheless be received in evidence in any court or before any person acting judicially, if such court or person considers the same to be authentic.

65. Copies of public documents admissible in some cases

- (1) Whenever in any part of Her Majesty's dominions any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, any copy thereof or extract therefrom shall be admissible in evidence in any court or before any person acting judicially, if —
 - (a) it is proved to be an examined copy or extract; or
 - (b) it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted.
- (2) Every officer to whose custody the original of any book or document of such a public nature as aforesaid is entrusted in Western Australia is hereby required to furnish a certified copy of such book or extract therefrom to any person applying at a

reasonable time, and paying a reasonable sum for the same, not exceeding 4 cents for every folio of 72 words.

[Section 65 amended by No. 113 of 1965 s. 4(1).]

65A. Certified photographs from library admissible

- (1) A photograph that is certified by an officer of the Library Board of Western Australia, as being a true reproduction of, or of part of, any book or other printed matter or of any document, in the custody and control of that board, is admissible in evidence, to the same extent that the book or other printed matter or the original document would, if produced, be admissible.
- (2) In this section, “**officer of the Library Board of Western Australia**” means an officer appointed by that board under the provisions of section 6 of the *Library Board of Western Australia Act 1951*; and judicial notice shall, for the purposes of this section, be taken of the official signature of every such officer.

[Section 65A inserted by No. 11 of 1964 s. 3.]

66. Parliamentary proceedings in Australasia, proof of

All documents purporting to be copies of the votes and proceedings of either House of the Parliament of the Commonwealth, or of any State, or of any Australasian colony, if purporting to be printed by the Government Printer, shall, on the mere production of the same, be admitted as evidence in any court, or before any person acting judicially.

67. Certain documents admissible without proof of signature, seal etc.

Whenever by any Act of the Imperial Parliament, or of the Parliament of any State or of any Australasian colony, now or hereafter to be in force —

- (a) any certificate; or
- (b) any official or public document; or
- (c) any document or proceeding of any corporation or joint-stock or other company; or

- (d) any copy of or extract from any document or by-law, or entry in any register or other book, or of or from any other proceeding,

is admissible in evidence in any legal proceeding in the United Kingdom or in the particular State or colony, the same shall respectively be admitted in evidence in all courts and before all persons acting judicially in Western Australia, if it purports to be certified or sealed, or impressed with a stamp, or sealed and signed, or signed alone, or impressed with a stamp and signed, as directed by such Act, without any proof —

- (i) of the seal or stamp, where a seal or stamp is necessary; or
- (ii) of the signature; or
- (iii) of the official character of the person appearing to have signed the same,

and without any further proof thereof.

68. Register of British vessels etc., proof of

- (1) Every register of a vessel kept under any of the Acts of the Imperial Parliament or of any British possession relating to the registry of any British or colonial vessels, may be proved in any court or before any person or persons acting judicially either by the production of the original, or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the person having the charge of the original, and which person is hereby required to furnish such certified copy to any person applying at a reasonable time for the same, upon payment of the sum of 25 cents.
- (2) Every such register or such copy of a register, and also every certificate of registry granted under any of the Acts of the Imperial Parliament or of any British possession relating to the registry of any British or colonial vessels, and purporting to be signed as required by law, shall be received in evidence in any court, or before any person acting judicially, as prima facie

proof of all the matters contained or recited in such register when the register or such copy thereof as aforesaid is produced, and of all the matters contained or recited in or endorsed on such certificate of registry when the said certificate is produced.

[Section 68 amended by No. 113 of 1965 s. 4.]

69. Newspaper proprietors, proof of register of

Every copy of an entry in or extract from the register of newspaper proprietors established under the *Newspaper Libel and Registration Act 1884*, purporting to be certified by the Registrar of the Supreme Court or his deputy for the time being, or under the official seal of the Registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract, without proof of the signature thereto, or of the seal of office affixed thereto.

Every such certified copy or extract shall, in all proceedings, civil or criminal, be accepted as sufficient prima facie evidence of all matters and things thereby appearing, unless and until the contrary thereto is shown.

[Section 69 amended by No. 74 of 2003 s. 142(2).]

69A. WA registers, proof of

When by any Statute in force in the State any person is required to keep any register, then any register purporting or appearing to be kept pursuant to the Statute shall (save in so far as the contrary may be proved) be deemed to be and be admissible in evidence as a complete and accurate register and record and —

- (a) any document purporting to be a copy of the register and to be certified as correct by the person aforesaid; or
- (b) a *Gazette* containing what purports to be a copy of the register; or

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- (c) any document purporting to be a copy of the register and to be printed by the Government Printer or by the authority of the Government of the State,

shall be prima facie evidence of the contents of the register as existing on the date when the document or *Gazette* purports to have been certified, or printed, or issued, and the production thereof in any court or before any person shall (save in so far as it may be proved not to be a true copy) be equivalent to the production of the original register.

[Section 69A inserted by No. 16 of 1913 s. 4.]

70. Statutes etc. of any country, proof of

Books purporting to have been printed or published, whether before or after the commencement of this Act, under the authority of the Government of any country, or by the printer to such Government, and purporting to contain Statutes, Ordinances, or other written laws in force in such country, shall, on production, be admitted and received by all courts and persons, acting judicially as prima facie evidence of such laws.

71. Certain law reports and texts may be referred to as evidence of laws

Printed books purporting to contain Statutes, Ordinances, or other written laws in force in any country, although not purporting to have been printed or published by authority as aforesaid, books purporting to contain reports of decisions of courts or judges in such country, and text-books treating of the laws of such country, may be referred to by all courts and persons acting judicially for the purpose of ascertaining the laws in force in such country; but such courts or persons shall not be bound to accept or act on the statements in any such books as evidence of such laws.

72. Authoritative texts on history, science etc., reference to

All courts and persons acting judicially may, in matters of public history, literature, science, or art, refer, for the purposes

of evidence, to such published books, maps, or charts as such courts or persons consider to be of authority on the subjects to which they respectively relate.

73. Documents admitted into evidence may be impounded

Where any document has been received in evidence, the court or person acting judicially admitting the same may direct that such document be impounded and kept in the custody of some officer of the court, or other proper person, until further order.

Reproduction of documents

[Heading inserted by No. 20 of 1966 s. 3.]

73A. Reproductions admissible (best evidence rule modified)

- (1) A document that accurately reproduces the contents of another document is admissible in evidence before a court in the same circumstances, and for the same purposes, as that other document, whether or not that other document still exists.
- (2) In determining whether a particular document accurately reproduces the contents of another, a court is not bound by the rules of evidence and —
 - (a) may rely on its own knowledge of the nature and reliability of the processes by which the reproduction was made;
 - (b) may make findings based on a certificate in the prescribed form signed by a person with knowledge and experience of the processes by which the reproduction was made;
 - (c) may make findings based on a certificate in the prescribed form signed by a person who has compared the contents of both documents and found them to be identical; or
 - (d) may act on any other basis it considers appropriate in the circumstances.

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- (3) This section applies to a reproduction made —
 - (a) by an instantaneous process;
 - (b) by a process in which the contents of a document are recorded by photographic, electronic or other means, and the reproduction is subsequently produced from that record;
 - (c) by a process prescribed for the purposes of this section; or
 - (d) in any other way.
- (4) If a reproduction is made by a process referred to in subsection (3)(c), the process shall be presumed to reproduce accurately the contents of the document purportedly reproduced unless the contrary is proved.
- (5) If so requested by a party to the proceedings, a court shall give reasons for determining that a document is or is not an accurate reproduction.
- (6) A person who signs a certificate for the purposes of this section knowing it to be false or misleading in any material particular commits an indictable offence and is liable on conviction to imprisonment for 7 years.
- (7) This section does not apply to or in respect of a copy of a document if the copy is admissible under another written law.

[Section 73A inserted by No. 71 of 2000 s. 10.]

73B. Certified reproductions of certain public documents etc., admissible without further proof

- (1) If a reproduction of a document that is or at any time was in the custody or under the control of the Registrar of Births, Deaths and Marriages, the Registrar of Titles, Commissioner for Corporate Affairs or the Government Statist bears a certificate that purports to be signed by the Registrar of Births, Deaths and Marriages, the Registrar of Titles, an Assistant Registrar of Titles, Commissioner for Corporate Affairs, a Deputy Commissioner for Corporate Affairs, an Assistant Commissioner for Corporate

Affairs, or the Government Statist, as the case requires, certifying that it is a reproduction of that document, the reproduction is admissible in evidence without further proof as if it were the document of which it is certified to be a reproduction.

- (2) If a reproduction of a document that is at any time filed in a court or of the official record of any proceedings in a court bears a certificate purporting to be signed by the registrar, clerk or other proper officer of that court certifying that it is a reproduction of that document or that record, the reproduction is admissible in evidence without further proof as if it were the document or record of which it is certified to be a reproduction.
- (3) Where the Registrar of Births, Deaths and Marriages, the Registrar of Titles, Commissioner for Corporate Affairs, the Government Statist or the registrar, clerk or proper officer of a court is served with legal process to produce a document or record in a court or before a person acting judicially, it is sufficient answer to that process if the person to whom it is addressed sends by prepaid post or causes to be delivered to the registrar, clerk or proper officer of the court in which the document or record is to be produced or the person before whom the document or record is to be produced, a reproduction of the document or record certified as provided in subsection (1) or (2) as the case requires.

[Section 73B inserted by No. 20 of 1966 s. 4; amended by No. 90 of 1975 s. 3; No. 67 of 1979 s. 51; No. 40 of 1998 s. 12(b).]

[73C-73M. Repealed by No. 71 of 2000 s. 11(a).]

73N. Reproductions of documents over 30 years old, presumptions as to

A presumption that may be made in respect of a document over 30 years old may be made with respect to a reproduction of that document admitted in evidence in all respects as if the reproduction were the document.

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[Section 73N inserted by No. 20 of 1966 s. 15; amended by No. 71 of 2000 s. 12.]

[73P. Repealed by No. 71 of 2000 s. 11(b).]

73Q. Reproduced official seals and signatures to be judicially noticed

Where an Act or law requires a court or person acting judicially to take judicial notice of the seal or signature of any court, person or body corporate appearing on a document and a reproduction of that document is admitted in evidence in any proceedings before the court or person acting judicially, the court or person acting judicially shall take judicial notice of the image of the seal or signature on the reproduction to the same extent as it or he would be required to take judicial notice of the seal or signature on the document.

[Section 73Q inserted by No. 20 of 1966 s. 17; amended by No. 71 of 2000 s. 13.]

[73R-73T. Repealed by No. 71 of 2000 s. 11(c).]

73U. Reproduction admissible subject to *Stamp Act 1921*

- (1) Notwithstanding the provisions of this Division, but subject to section 27(3) of the *Stamp Act 1921*, where a document is chargeable with stamp duty under that Act a reproduction of the document is not admissible under this Division in any proceedings before a court or person acting judicially unless —
 - (a) the reproduction of the document shows or establishes to the satisfaction of the court or the person or it is otherwise so established that the document was stamped in accordance with that Act; or
 - (b) where the reproduction does not so show or establish and it is not otherwise so established, the provisions of that Act which relate to documents that are not stamped in accordance with that Act are complied with with

respect to the reproduction as though it were the document.

- (2) Subject to this section, stamp duty is not chargeable under the *Stamp Act 1921* on —
- (a) a reproduction of a document made in accordance with this Division; or
 - (b) an affidavit or statutory declaration made for the purposes of this Division.

[Section 73U inserted by No. 20 of 1966 s. 21; amended by No. 41 of 1995 s. 9; No. 45 of 2002 s. 11.]

[73V. Repealed by No. 71 of 2000 s. 11(d).]

Proof of certain matters

74. Gazettes of certain places, proof of

The mere production of a paper purporting to be the *London Gazette*, the *Edinburgh Gazette*, the *Dublin Gazette*, the *Commonwealth of Australia Gazette*, or the *Gazette* of any State or of any Australasian colony shall, before all courts and persons acting judicially, be evidence that the paper is such *Gazette*, and was published on the day on which it bears date.

75. Government Printers' publications, proof of

The mere production of a paper purporting to be printed by the Government Printer, or by the authority of the Imperial Government or the Government of the Commonwealth, or of any State, or of any Australasian colony, shall, before all courts and persons acting judicially, be evidence that the paper was printed by the Government Printer or by such authority.

76. Her Majesty's Stationery Office publications, status of

Where by this Act or any other enactment, whether passed before or after this Act, it is provided that a copy of any Act of Parliament, proclamation, order, regulation, rule, warrant, circular, list, gazette, or document, shall be conclusive evidence

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or have any other effect when purporting to be printed by the Government Printer, or the Queen's Printer, or a printer authorised by Her Majesty, whatever may be the precise expression used, such copy shall also be conclusive evidence, or evidence, or have the said effect as the case may be if it purports to be printed under the superintendence or authority of Her Majesty's Stationery Office.

77. Acts of governors and ministers of States, proof of

Where by any law at any time in force the Governor-General or the Governor of any State or of any Australasian colony, or any Minister of the Crown for the Commonwealth or a State, or any Australasian colony, is authorised or empowered to do any act, production of the *Gazette* purporting to contain a copy or notification of any such act shall, before all courts and persons acting judicially, be evidence of the act having been duly done.

78. Local laws, by-laws and regulations, proof of

Where by any Act of the Commonwealth or of any State, power to make local laws, by-laws or regulations is conferred upon any person or body, and any printed paper purporting to be such local laws, by-laws or regulations, and to be printed by the Government Printer or by the authority of the Government of the Commonwealth or of the State, shall, before all courts and persons acting judicially, be evidence —

- (a) that local laws, by-laws or regulations in the words printed in such paper were duly made by such person or body; and
- (b) that such local laws, by-laws or regulations have been approved of or confirmed by the Governor-General or the Governor of the State, if they appear by such paper to have been so approved or confirmed.

[Section 78 amended by No. 14 of 1996 s. 4.]

79. Incorporation of a company, proof of

- (1) All courts and persons acting judicially shall admit and receive as evidence of the incorporation of a company incorporated or registered in the United Kingdom or in any State or Territory of the Commonwealth, either before or after the commencement of this Act ¹, a certificate of the incorporation or registration thereof which purports to have been signed —
- (a) by the registrar or an assistant or deputy registrar of companies in England, Scotland, or Ireland, or in that State or Territory; or
 - (b) by a person whose authority to give the same shall be verified by a statutory declaration made before any judge or justice of the peace of such State or Territory, of whose signature such courts and persons aforesaid shall take judicial notice.

And the date of incorporation or registration mentioned in such certificate shall be evidence of the date on which the company was incorporated or registered.

- (2) Any copy of or extract from any document kept and registered at the office for the registration of companies in the United Kingdom or any part thereof, or in any State or Territory of the Commonwealth or of or from a transparency (within the meaning of the *Companies (Western Australia) Code* ⁴) of a document which has been kept and registered at any such office if certified under the hand of the registrar or an assistant or deputy registrar, shall, before all courts and persons acting judicially, be admissible in evidence in all cases in which the original document is admissible in evidence and for the same purposes and to the same extent.
- (3) A reference in subsection (1) or (2) to the registrar or an assistant or deputy registrar shall be construed —
- (a) as including a reference to the Corporate Affairs Commission of any State or Territory of the Commonwealth or to a Commissioner of or for

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Corporate Affairs, an Assistant Commissioner of or for Corporate Affairs or a Deputy Commissioner of or for Corporate Affairs of any State or Territory of the Commonwealth; and

- (b) as including a reference to a person holding within the office for the registration of companies in the United Kingdom or any part thereof or in any State or Territory of the Commonwealth an office which corresponds to the office of Commissioner for Corporate Affairs or Assistant Commissioner for Corporate Affairs or Deputy Commissioner for Corporate Affairs under the *Companies (Administration) Act 1982* ⁵, the *Companies Act 1961* ⁶, or any corresponding previous enactment.

[Section 79 amended by No. 10 of 1982 s. 28.]

79A. Document requiring attestation, proof of

Where a document requires attestation to be valid that document may, in any legal proceeding, be proved in the manner in which it might be proved if no attesting witness to the document were alive, but this section does not apply to the proof of a will or other testamentary document.

[Section 79A inserted by No. 12 of 1962 s. 2.]

79B. Terms used in s. 79B to 79G

In this section and in sections 79C, 79D, 79E, 79F and 79G —

“**business**” means any business, occupation, trade or calling and includes the business of any governmental body or instrumentality and of any local government;

“**business record**” means a book of account or other document prepared or used in the ordinary course of a business for the purpose of recording any matter relating to the business;

“**derived**” means derived, by the use of a computer or otherwise, by calculation, comparison, selection, sorting, consolidation or by accounting, statistical or logical procedures;

“document” means any record of information and includes, in addition to a document in writing —

- (a) any book, map, plan, graph or drawing;
- (b) any photograph;
- (c) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other device) of being reproduced therefrom; and
- (d) any film, negative, disc, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other device) of being reproduced therefrom;

“proceedings” includes arbitrations and references and **“court”** shall be construed accordingly;

“qualified person”, in relation to a statement, means a person who —

- (a) had, at the time of making of the statement, or may reasonably be supposed to have had at that time, personal knowledge of the matters dealt with by the statement; or
- (b) where the statement is not admissible in evidence unless made by an expert on the subject of the statement, was at the time of making of the statement such an expert;

“statement” includes any representation of fact or opinion whether made in words or otherwise.

[Section 79B inserted by No. 66 of 1987 s. 5; amended by No. 71 of 2000 s. 14.]

79C. Documentary evidence, admissibility of

- (1) Subject to subsection (2), in any proceedings where direct oral evidence of a fact or opinion would be admissible, any

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statement in a document and tending to establish the fact or opinion shall, on production of the document, be admissible as evidence of that fact or opinion if the statement —

- (a) was made by a qualified person; or
 - (b) directly or indirectly reproduces or is derived from one or other or both of the following —
 - (i) information in one or more statements, each made by a qualified person;
 - (ii) information from one or more devices designed for, and used for the purpose of, recording, measuring, counting or identifying information, not being information based on a statement made by any person.
- (2) Where a statement referred to in subsection (1) is made by a qualified person or reproduces or is derived from information in a statement made by a qualified person, that person must be called as a witness unless —
- (a) he is dead;
 - (b) he is unfit by reason of his bodily or mental condition to attend or give evidence as a witness;
 - (c) he is out of the State and it is not reasonably practicable to secure his attendance;
 - (d) all reasonable efforts to identify or find him have been made without success;
 - (e) no party to the proceedings who would have the right to cross-examine him requires him to be called as a witness;
 - (f) having regard to the time which has elapsed since he made the statement and to all the circumstances, he cannot reasonably be expected to have any recollection of the matters dealt with in the statement;
 - (g) having regard to all the circumstances of the case, undue delay, inconvenience or expense would be caused by calling him as a witness; or

- (h) he refuses to give evidence.
- (2a) Notwithstanding subsections (1) and (2), in any proceedings where direct oral evidence of a fact or opinion would be admissible, any statement in a document and tending to establish the fact or opinion shall, on production of the document, be admissible as evidence of that fact or opinion if —
 - (a) the statement is, or directly or indirectly reproduces, or is derived from, a business record; and
 - (b) the court is satisfied that the business record is a genuine business record.
- (2b) Where a statement referred to in subsection (2a) is made by a qualified person that person shall not be called as a witness unless the court orders otherwise.
- (3) This section makes a statement admissible notwithstanding —
 - (a) the rules against hearsay;
 - (b) the rules against secondary evidence of the contents of a document;
 - (c) that the person who made the statement or the person who made a statement from which the information in the statement is reproduced or derived is a witness in the proceedings, whether or not he gives evidence consistent or inconsistent with the statement; or
 - (d) that the statement is in such a form that it would not be admissible if given as oral evidence,but does not make admissible a statement which is otherwise inadmissible.
- (4) Notwithstanding subsections (1), (2) and (2a), in any criminal proceedings a statement in a document which was made in the course of or for the purpose of —
 - (a) the investigation of facts constituting or being constituents of the alleged offence being dealt with in the proceedings;

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- (b) an investigation which led to the discovery of facts constituting or being constituents of the alleged offence;
 - (c) the preparation of a defence to a charge for any offence; or
 - (d) the preparation of the case of the prosecution in respect of any offence,shall not be rendered admissible as evidence by this section.
- (5) For the purposes of this section a court may —
 - (a) for the purpose of deciding whether or not a statement is admissible as evidence, draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances;
 - (b) in deciding whether or not a person is fit to attend or give evidence as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner.
- (6) For the purposes of this section a court may, in its discretion, reject a statement notwithstanding that the requirements of this section are satisfied with respect thereto, if the court is of the opinion that the probative value of the statement is outweighed by the consideration that its admission or the determination of its admissibility —
 - (a) may necessitate undue consumption of time; or
 - (b) may create undue prejudice, confuse the issues, or in proceedings with a jury mislead the jury.

[Section 79C inserted by No. 66 of 1987 s. 5; amended by No. 71 of 2000 s. 15.]

79D. Evidence admitted under s. 79C, weight and effect of

- (1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by section 79C regard shall be had to all the circumstances from which any inference can

reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular —

- (a) to the question of whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated;
 - (b) to the question of whether or not the qualified person or any person concerned with making or keeping the document containing the statement, had any incentive to conceal or misrepresent the facts;
 - (c) to the question of whether or not the information in the statement was of a kind which was collected systematically;
 - (d) to the question of whether or not the information in the statement was collected pursuant to a duty to do so;
 - (e) where the statement wholly or in part reproduces or is derived from information from one or more devices, to the reliability of the device or devices; and
 - (f) where the statement reproduces or is derived from any information, to the reliability of the means of reproduction or derivation.
- (2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by virtue of section 79C shall not be treated as corroboration of the evidence given by the qualified person.

[Section 79D inserted by No. 66 of 1987 s. 5.]

79E. Qualified person, evidence as to credibility of

Where in any proceedings a statement is admitted as evidence under section 79C but the qualified person is not called as a witness in the proceedings —

- (a) any evidence —

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

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

- (b) any evidence proving that that person has been guilty of any indictable offence shall be admissible in the proceedings to the same extent as if he had been so called and on being questioned as to whether or not he had been convicted of an indictable offence had denied the fact or had not admitted the fact or had refused to answer the question.

[Section 79E inserted by No. 66 of 1987 s. 5.]

79F. Dispute as to happening of event

- (1) Where in any proceedings the happening of an event is in question, and a system has been followed to make and keep a record of the happening of all events of that description, oral or other evidence to establish that there is no record of the happening of the event is admissible to prove that the event did not happen.
- (2) Where evidence is, or is proposed to be, tendered under this section, a court may require that the whole or part of the record

concerned be produced and, in default, may reject the evidence or, if it has been received, exclude it.

- (3) In estimating the weight, if any, to be attached to evidence rendered admissible by this section, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the evidence, including whether or not any person concerned with the making or keeping of the relevant record had any incentive to omit recording the happening of the event in question.

[Section 79F inserted by No. 66 of 1987 s. 5.]

[79G. *Repealed by No. 71 of 2000 s. 16.]*

Proof of judicial proceedings

80. Judgments, orders etc., proof of

Evidence of any judgment, decree, rule, order, or other judicial proceeding of any court in any part of Her Majesty's dominions, or in any foreign State, including any affidavit, pleading, or legal document filed or deposited in any such court, may be given in all courts and before all persons acting judicially by the production of a document purporting to be a copy thereof, and —

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

81. Documents properly authenticated to be given faith and credit

All public acts, records, and judicial proceedings of any State, if proved or authenticated as required by this Act, shall have such faith and credit given to them before all courts and persons acting judicially, and in every public office, as they have by law or usage in the courts and public offices of the State from whence they are taken.

Proof of telegraphic messages

82. Telegraphic messages, notice to admit may be given in civil proceedings

- (1) Any party to any civil proceeding may, at any time after the commencement thereof, give notice to any other party that he proposes to adduce in evidence at the trial or hearing any telegraphic message that before the date of such notice shall have been received by electric telegraph in Western Australia:

Provided that —

- (a) the time between the giving of such notice and the day on which such evidence shall be tendered shall not in any case be less than 2 days before the day of such hearing or trial; and
 - (b) every such notice shall specify the names of the sender and receiver of such message, and its date as nearly as may be.
- (2) Any such notice may be served and the service thereof proved in the same manner as notices to admit and produce may now be served and proved respectively.

83. Telegraphic messages, proof of sending of

Whenever such notice is given, the production of any telegraphic message described in such notice, and purporting to have been sent by any person, together with evidence that the same was received from a telegraph station, shall be prima facie

evidence that such message was signed and sent by the person so purporting to be the sender thereof to the person to whom the same is addressed, without any further proof of the identity of the sender:

But the party against whom such message is given in evidence shall be at liberty to prove that the same was not in fact sent by the person by whom it purports to have been sent.

84. Telegraphic messages, proof of receipt of

In any civil proceeding, the production of any telegraphic message or a copy thereof verified on oath, together with evidence that such message was taken to a telegraph station, and that the fees (if any) for the transmission thereof were paid, shall be prima facie evidence that such message was duly delivered to the person named therein as the person to whom the same was to be transmitted; and the burden of proving that such message was not in fact received shall be upon the person against whom such message is given in evidence:

Provided that notice shall be first given by the party adducing the same in evidence to the other party of his intention to do so, and such notice may be given in such manner and at such times as by the practice of the court in which the proceeding is taken, notices to produce or admit are required to be given.

85. Official documents, procedure for sending by telegraph

It shall be lawful for the Governor, any member of the Executive Council, the President of the Legislative Council, the Speaker of the Legislative Assembly, the Chief Justice, or any other Judge of the Supreme Court, any magistrate of the Magistrates Court, any officer of Government or other person whom the Governor may authorise in that behalf by warrant under his hand, or any solicitor, to cause to be transmitted by electric telegraph, the contents of any writ, warrant, rule, authority, order, affidavit, statutory declaration, or other

communication requiring signature or seal, subject to the provisions following, that is to say:

- (1) The original document shall be delivered at the telegraph station in the presence and under the inspection of some justice of the peace or public notary.
- (2) The person to whom the contents of any such document shall be so sent shall forthwith and under the supervision of a justice of the peace or public notary cause to be sent back by electric telegraph a copy of the message received by him; and in the event of any error appearing therein the process shall be repeated under the like supervision until it shall appear that a true copy of such document has been received by the person to whom it shall have been sent.
- (3) When it shall appear that such true copy has been so received, such first-mentioned justice or notary public shall endorse upon the original document a certificate that a true copy thereof has been sent under the provisions of this Act to the person to whom the same shall have been so sent, and shall forthwith by electric telegraph inform such person that such certificate has been so endorsed, and such last-mentioned person shall forthwith endorse on such copy a certificate that such copy was duly received by him under the provisions of this Act, and this certificate shall be countersigned by the justice of the peace or notary public under whose supervision such copy was received.

[Section 85 amended by No. 59 of 2004 s. 89.]

86. Copies so transmitted to be as valid as originals

- (1) Every copy so endorsed, certified, and countersigned shall be as valid to all intents and purposes as the original whereof it purports to be a copy would have been, and shall be admissible as evidence in any case in which the original would have been so admissible.

- (2) Any person by whom such copy shall have been so received or who shall be thereby authorised, instructed or commanded, or who shall or may be lawfully charged with any duty in respect thereof, shall have and become liable to the same rights or duties in respect thereof as if he had received such original document duly signed and sealed, or signed, or sealed, or sworn or declared, as the case may be.
- (3) And in the case of documents intended to be served, or the efficacy or use whereof depends upon service, every such copy shall, for the purpose of such service, be deemed to be the original document whereof it purports to be a copy.

87. Original document may be inspected

Every original document a copy whereof shall have been transmitted under section 85 shall be kept at the telegraph station at which it was delivered for the purpose of such transmission, and shall, after the expiration of 2 days from the date of the certificate under subsection (3) of that section being endorsed upon it, be open within reasonable hours to the inspection of any person, upon payment of a fee of 10 cents.

[Section 87 amended by No. 113 of 1965 s. 4.]

88. Penalty for false certificates

Any justice of the peace or public notary who shall wilfully and falsely endorse upon any original document delivered at a telegraph station, for the purpose of being transmitted under the provisions of this Act, a certificate that a true copy thereof has been sent under this Act, or who shall by telegraph wilfully and falsely inform any person to whom such document shall have been so sent that a certificate under the provisions of this Act has been endorsed thereon, commits an offence.

Penalty: \$200.

[Section 88 amended by No. 113 of 1965 s. 4; No. 59 of 2004 s. 89.]

Bankers' books

89. Banker's book entries are evidence of transactions etc.

Subject to this Act —

- (a) any entry in a banker's book shall be evidence of the matters, transactions, and accounts therein recorded; and
- (b) a copy of any entry in a banker's book shall be evidence of the entry and of the matters, transactions, and accounts therein recorded.

[Section 89 inserted by No. 66 of 1987 s. 6.]

90. Banker's books, proof of

- (1) A copy of an entry in a banker's book shall not be received in evidence, unless it is first proved —
 - (a) that the book was, at the time of the making of the entry, one of the ordinary books of the bank; and
 - (b) that the entry was made in the usual and ordinary course of business.
- (2) Such proof may be given by a partner or officer of the bank, and may be given either orally or by affidavit.

[Section 90 amended by No. 66 of 1987 s. 7.]

91. Banker's books, copies to be certified

A copy of an entry in a banker's book shall not be received in evidence unless it is certified to be a true copy of the entry in such manner as is approved by the court.

[Section 91 inserted by No. 66 of 1987 s. 8.]

92. Bank accounts, bank officer may give evidence about

In any legal proceedings in which it is necessary to prove —

- (a) the state of an account in the books of any bank; or
- (b) that any person had not an account or any funds to his credit in such books,

it shall not be necessary to produce any such book, but evidence of the state of such account, or that no such account or funds existed, may be given either orally or by affidavit by any officer or clerk of such bank who has examined such books.

[Section 92 amended by No. 10 of 1960 s. 3.]

92A. Australian and foreign banks, application to of s. 89 to 92

Sections 89, 90, 91 and 92 apply to bankers' books, and banks and branches of banks, whether within or outside the Commonwealth.

[Section 92A inserted by No. 71 of 2000 s. 17.]

93. Bank officers not compellable in some cases

An officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable —

- (a) to produce any banker's book, the contents of which can be proved under the provisions of this Act; or
- (b) to appear as a witness to prove the matters, transactions, and accounts therein recorded,

unless by order of a Judge of the Supreme Court made for special cause.

[Section 93 amended by No. 26 of 1999 s. 78(3).]

94. Banker's books, Supreme Court may order inspection of

- (1) On the application of any party to a legal proceeding, the court or a Judge of the Supreme Court may order that such party be at liberty to inspect and take copies of any entries in a banker's book relating to the matters in question in such proceeding.
- (2) An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank by delivering a copy of the order to an officer of such bank at a principal or a branch office thereof, having the custody of the book of which inspection is desired, 3 clear days

s. 95

before the same is to be obeyed, unless the court or judge otherwise directs.

- (3) Sunday, Christmas Day, Good Friday, and any bank holiday shall be excluded from the computation of time under this section.

95. Costs under s. 93 and 94

- (1) The costs of —
- (a) any application to a court or judge under or for the purposes of sections 93 or 94; or of
 - (b) anything done or to be done under an order of a court or Judge made under or for the purposes of section 94,

shall be in the discretion of the court or judge, who may order the same or any part thereof to be paid to any party by the bank where the same have been occasioned by any default or delay on the part of the bank.

- (2) Any such order against a bank may be enforced as if the bank was a party to the proceeding.

96. Supreme Court Judge's powers may be exercised by other judicial officers

The powers of a Judge of the Supreme Court under this Act in regard to banker's books may be exercised in any legal proceeding presided over by —

- (a) a Judge of the District Court of Western Australia;
- (b) a Judge of the Family Court of Western Australia;
- (c) a person exercising the jurisdiction of the Magistrates Court;
- (d) a person exercising the jurisdiction of the Children's Court of Western Australia.

[Section 96 inserted by No. 59 of 2004 s. 88.]

*Mode of taking evidence***97. Evidence to be on oath except in some cases**

- (1) Subject to any other Act in which express provision is made to the contrary, in any civil or criminal proceeding, or in any inquiry or examination in any court or before any person acting judicially, every witness other than —
- (a) a witness the evidence of whom may be received pursuant to this Act though not given on oath;
 - (b) a witness called for the purpose only of producing a document, where there is another witness called or to be called who can identify the document;
 - (c) counsel giving evidence of the terms of a compromise reached between the parties to litigation in which he acted for one of those parties; and
 - (d) a judge, or counsel, giving evidence by way of explanation of a case in which he acted as such,
- shall give evidence on oath.
- (2) In any criminal proceeding, no accused person shall be entitled to make a statement of fact at his trial, otherwise than by way of admission of a fact alleged against him so as to dispense with proof of that fact, unless such statement is made by him as a witness.

- (3) The form of oath for a witness is as follows —

I [*insert an oath or affirmation according to the Oaths, Affidavits and Statutory Declarations Act 2005*] that the evidence I will give in this case will be the truth, the whole truth and nothing but the truth.

[Section 97 inserted by No. 142 of 1976 s. 2; amended by No. 24 of 2005 s. 44.]

[98-100. Repealed by No. 24 of 2005 s. 45.]

s. 100A

100A. Oath may be dispensed with in some cases

- (1) Where in any civil or criminal proceeding, or in an inquiry or examination in any court or before any person acting judicially the court or that person is satisfied that a person who is tendered as a witness does not understand the nature of, or the obligation imposed by, an oath or affirmation but does understand —
 - (a) that he is required to speak the truth and, where the witness is a compellable witness, to tell what he knows about the matter to which the testimony relates; and
 - (b) that he will be liable to punishment if he does not do so,the evidence of that person may be received without an oath and without formality.
- (2) In taking into account the weight and credibility that ought to be afforded to testimony given by a witness otherwise than on oath or affirmation regard shall be had to the manner and circumstances in which it is given and received and to the fact that it was given without the sanction of an oath or affirmation.
- [(3) repealed]*
- (4) Before evidence is received pursuant to this section the court or person acting judicially shall explain or cause to be explained to the person tendered as a witness that he is required to speak the truth and, where the witness is a compellable witness, to tell what he knows about the matter in question and that he will be liable to punishment if he does not do so.
- (5) A person who, in giving evidence pursuant to this section, knowingly makes a false statement material to the subject matter thereof is guilty of a crime and liable on conviction to imprisonment for a term of not more than 5 years.
- (6) References in this section to —
 - (a) a person who is tendered as a witness;
 - [(b) deleted]*

extend to a child who is of or over the age of 12 years and who is tendered as a witness; and the provisions of this section have effect accordingly.

- (7) Except as provided in subsection (6), this section does not apply to a child, as defined in section 106A.

[Section 100A inserted by No. 142 of 1976 s. 4; amended by No. 36 of 1992 s. 6; No. 70 of 2004 s. 82; No. 84 of 2004 s. 80; No. 24 of 2005 s. 46.]

[101. Repealed by No. 36 of 1992 s. 7.]

102. Interpreters, oaths etc. for

- (1) If a person is called to act as an interpreter in any court, or before any person acting judicially, and that person, had he or she been tendered as a witness, would have been required to take an oath or make an affirmation, he or she shall be required to take an oath or affirmation as follows —

I *[insert an oath or affirmation according to the Oaths, Affidavits and Statutory Declarations Act 2005]* that I will well and truly translate any evidence that I am asked to translate in this case.

- (2) A person who, having taken the oath or made an affirmation as an interpreter under this section, in interpreting any testimony pursuant to this section knowingly fails to translate or translates falsely any material matter is guilty of a crime and liable on conviction to imprisonment for a term of not more than 14 years.

[Section 102 inserted by No. 142 of 1976 s. 6; amended by No. 24 of 2005 s. 47.]

103. Interpreters, oath etc. may be dispensed with

- (1) If any person is called to act as an interpreter in any court, or before any person acting judicially, and for any reason is not required to take an oath or make an affirmation such person may

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be admitted to act as interpreter, if the court or person acting judicially is satisfied as to his ability to do so competently and as to his impartiality, in the same way as if he had taken the usual oath required of a person so called where, had he been a person tendered as a witness, his evidence might have been received pursuant to this Act without an oath and without formality, and the provisions of section 100A shall apply to and in relation to any such person and to the testimony interpreted by him mutatis mutandis.

- (2) Any person who, in interpreting any testimony pursuant to this section, knowingly fails to translate or translates falsely any material matter is guilty of a crime and liable on conviction to imprisonment for a term of not more than 5 years.

[Section 103 inserted by No. 142 of 1976 s. 7; amended by No. 70 of 2004 s. 82; No. 24 of 2005 s. 48.]

[104. Repealed by No. 24 of 2005 s. 49.]

104A. Person appointed by foreign court etc. may take or receive evidence and administer oath

- (1) Where an authority desires to take or receive evidence in the State, the authority may by instrument in writing appoint a person to so take or so receive evidence.
- (2) Subject to subsection (3), a person appointed pursuant to subsection (1) has power to take or receive evidence in the State for the authority and for that purpose has power to administer an oath.
- (3) Where the authority is not a court or judge a person so appointed is not empowered to take or receive evidence or administer an oath in the State unless he has first obtained the consent in writing of the Attorney General.
- (4) This section does not authorise the taking or receiving of evidence by a person so appointed in or for use in criminal proceedings.

- (5) In this section “**authority**” means any court, judge, person or body that is authorised under the law of a foreign country to take or receive evidence on oath in that country.

[Section 104A inserted by No. 23 of 1967 s. 2.]

105. Oaths, Affidavits and Statutory Declarations Act 2005, application of

This Act does not limit the operation of the *Oaths, Affidavits and Statutory Declarations Act 2005* and in particular Part 2 of that Act.

[Section 105 inserted by No. 24 of 2005 s. 50.]

Evidence of children and special witnesses

[Heading inserted by No. 36 of 1992 s. 8.]

[106. Repealed by No. 24 of 2005 s. 51.]

106A. Terms used in s. 106B to 106T and Schedule 7

In sections 106B to 106T and in Schedule 7, unless the contrary intention appears —

“**accused**” —

- (a) in relation to an application referred to in clause 2 of Part A of Schedule 7 —
 - (i) means any party to the proceeding, other than the affected child and an applicant who is an officer as defined in section 3 of the *Children and Community Services Act 2004*;
 - (ii) in sections 106K(3)(a) and 106N as they apply to such an application, means any such party specified by the judge;
- (b) in relation to any other Schedule 7 proceeding, a person charged with an offence;

“**affected child**” means —

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- (a) in relation to an application referred to in clause 2 of Part A of Schedule 7, the child in respect of whom the application is made;
- (b) in relation to any other Schedule 7 proceeding, the child upon or in respect of whom it is alleged that an offence was committed, attempted or proposed;

“child” means —

- (a) any boy or girl under the age of 18 years;
- (b) in the absence of positive evidence as to age, any boy or girl apparently under the age of 18 years; and
- (c) in any proceeding in the Children’s Court, any boy or girl dealt with under section 19(2) of the *Children’s Court of Western Australia Act 1988*;

“counsel” includes a solicitor;

“proceeding” means any civil or criminal proceeding or any examination in any court or before any person acting judicially, and includes a special hearing under section 106K;

“prosecutor”, in relation to an application referred to in clause 2 of Part A of Schedule 7, means the applicant in that application;

“Schedule 7 proceeding” means a proceeding that comes within the provisions of Schedule 7;

“serious sexual offence” means —

- (a) an offence under a section or Chapter of *The Criminal Code* mentioned in Part B of Schedule 7 for which the maximum penalty that may be imposed is 7 years, or more than 7 years;
- (b) an offence under a repealed section of *The Criminal Code* if —

- (i) the acts or omissions that constituted an offence under that section are substantially the same as the acts or omissions that constitute an offence (the **“new offence”**) under a section or Chapter of *The Criminal Code* mentioned in Part B of Schedule 7; and
- (ii) the maximum penalty that may be imposed for the new offence is 7 years, or more than 7 years;

or

- (c) an offence of attempting to commit an offence described in paragraph (a) or (b);

“special witness” means a person declared to be a special witness under section 106R(1);

“visual recording” means any recording on any medium from which a moving image may be produced by any means, and includes the accompanying sound track;

“visual recording of evidence” means a visual recording of evidence made —

[(a) deleted]

- (b) in a special hearing held pursuant to an order under section 106K or 106RA; or
- (c) pursuant to section 106N(3a) or (5);

“visually recorded interview” has the meaning given to that term in section 106HA(3).

[Section 106A inserted by No. 36 of 1992 s. 8; amended by No. 53 of 1992 s. 37; No. 57 of 1997 s. 57; No. 71 of 2000 s. 18 and 29; No. 27 of 2002 s. 32; No. 34 of 2004 s. 251 (as amended by No. 84 of 2004 s. 85(4)); No. 46 of 2004 s. 14(1), (2) and 22(2); No. 84 of 2004 s. 41 and 85(4).]

s. 106B

106B. Children under 12 may give sworn evidence

- (1) A child who is under the age of 12 years may in any proceeding, if the child is competent under subsection (2), give evidence on oath or after making an affirmation.
- (2) A child who is under the age of 12 years is competent to take an oath or make an affirmation if in the opinion of the court or person acting judicially the child understands that —
 - (a) the giving of evidence is a serious matter; and
 - (b) he or she in giving evidence has an obligation to tell the truth.

[Section 106B inserted by No. 36 of 1992 s. 8; amended by No. 46 of 2004 s. 15; No. 24 of 2005 s. 52.]

106C. Children under 12 may give unsworn evidence

A child under the age of 12 years who is not competent to give evidence under section 106B may give evidence without taking any oath or making an affirmation if the court or person acting judicially forms the opinion, before the evidence is given, that the child is able to give an intelligible account of events which he or she has observed or experienced.

[Section 106C inserted by No. 36 of 1992 s. 8; amended by No. 24 of 2005 s. 53.]

106D. Corroboration warning on evidence of child not to be given

In any proceeding on indictment for an offence in which evidence is given by a child, the judge is not to warn the jury, or suggest to the jury in any way, that it is unsafe to convict on the uncorroborated evidence of that child because children are classified by the law as unreliable witnesses.

[Section 106D inserted by No. 36 of 1992 s. 8.]

106E. Child witness entitled to support

- (1) A child is entitled, while he or she is giving evidence in any proceeding in a court, to have near to him or her a person who may provide the child with support.
- (2) The person referred to in subsection (1) is to be approved by the court and is not to be a person who is a witness in or a party to the proceeding.

[Section 106E inserted by No. 36 of 1992 s. 8; amended by No. 46 of 2004 s. 16.]

106F. Child witness may be given assistance

- (1) Where a child is to give evidence in any proceeding in a court, the court may appoint a person that it considers suitable and competent to act as a communicator for the child.
- (2) The function of a person appointed under this section is, if requested by the judge, to communicate and explain —
 - (a) to the child questions put to the child; and
 - (b) to the court, the evidence given by the child.
- (3) A person appointed under this section is to take an oath or make a declaration, in such form as the court thinks fit, that he or she will faithfully perform his or her function under subsection (2).
- (4) A person appointed under this section who, while performing or purportedly performing his or her function under subsection (2), wilfully makes any false or misleading statement to the child or to the court commits a misdemeanour and is liable on conviction to imprisonment for 5 years.

[Section 106F inserted by No. 36 of 1992 s. 8; amended by No. 4 of 2004 s. 58; No. 46 of 2004 s. 17.]

s. 106G

106G. Cross-examination of protected witness by unrepresented accused

- (1) Where in any proceeding for an offence an accused who is not represented by counsel wishes to cross-examine a protected witness, the accused —
 - (a) is not entitled to do so directly; but
 - (b) may put any question to the protected witness by stating the question to the judge or a person approved by the court,
and that person is to repeat the question accurately to the protected witness.
- (2) Nothing in subsection (1) prevents a protected witness who is not a child from consenting to being cross-examined by the accused directly.
- (3) In this section —

“protected witness” means —

 - (a) a child; or
 - (b) if the proceeding is for a serious sexual offence, the person upon or in respect of whom it is alleged that the offence was committed, attempted or proposed irrespective of the person’s age.

[Section 106G inserted by No. 36 of 1992 s. 8; amended by No. 46 of 2004 s. 18; No. 84 of 2004 s. 82.]

106H. Child’s statement to another admissible in Sch. 7 proceedings

- (1) In any Schedule 7 proceeding, a relevant statement may, at the discretion of the judge, be admitted in evidence if —
 - (a) there has been given to the accused —
 - (i) a copy of the statement; or
 - (ii) if the statement is not recorded in writing or electronically, details of the statement;

and

- (b) the accused is given the opportunity to cross-examine the affected child.
- (2) If a relevant statement is to be admitted, evidence of the making and content of the affected child's statement shall be given by the person to whom the affected child made the statement.
- (2a) Subsection (1) does not affect the operation of section 106G.
- (2b) If a person to whom an affected child made a relevant statement makes a written statement in accordance with Schedule 3 clause 4(1) of the *Criminal Procedure Act 2004*, the written statement is admissible.
- (2c) A relevant statement recorded on a visual recording is admissible to the same extent as if it were given orally in the proceeding in accordance with the usual rules and practice of the court concerned.
- (3) In this section “**relevant statement**” means a statement that —
 - (a) relates to any matter in issue in the proceeding; and
 - (b) was made by the affected child to another person before the proceeding was commenced,
 whether the statement is recorded in writing or electronically or not, but does not include a visually recorded interview.

[Section 106H inserted by No. 36 of 1992 s. 8; amended by No. 71 of 2000 s. 19; No. 46 of 2004 s. 14(3) and 19; No. 59 of 2004 s. 89; No. 84 of 2004 s. 37 and 82.]

106HA. Visual recording of interviews with children

- (1) Section 106HB applies to a visual recording of an interview with a child conducted before or after the coming into operation of section 20 of the *Criminal Law Amendment (Sexual Assault and Other Matters) Act 2004* if —
 - (a) the interview was conducted by a person of a prescribed class who had reason to believe that the child, or another child, had, or may have, suffered physical or sexual abuse; and

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- (b) the manner in which the interview was conducted and recorded meets the prescribed requirements to the prescribed extent.
- (2) Section 106HB applies to a visual recording of an interview with a child whether or not the interview was conducted with the consent of a parent or guardian of the child.
- (3) A visual recording of an interview with a child to which section 106HB applies is referred to as a “**visually recorded interview**”.

[Section 106HA inserted by No. 46 of 2004 s. 20.]

106HB. Admissibility in criminal proceedings of a visual recording of an interview with a child

- (1) In any proceeding for an offence (the “**proceeding**”) one or more visually recorded interviews may be admitted as the whole or a part of the evidence in chief of a witness —
 - (a) irrespective of the age or maturity of the witness at the time of the proceeding; and
 - (b) even if the witness is capable of giving evidence at the proceeding.
- (2) A visually recorded interview is not to be admitted in the proceeding under subsection (1) unless —
 - (a) a transcript of it has been given to the accused; and
 - (b) the accused and his or her counsel have, in accordance with the regulations, been given a reasonable opportunity to view the visually recorded interview.
- (3) Neither the accused nor his or her counsel is entitled to have possession of, or of a copy of —
 - (a) a visually recorded interview; or
 - (b) a visual recording of evidence on which a visually recorded interview is recorded or which incorporates a visually recorded interview.

- (4) A visually recorded interview is admissible under subsection (1) to the same extent as if statements made in it by the witness were given orally in the proceeding in accordance with the usual rules and practice of the court concerned.
- (5) If a visually recorded interview is admissible under subsection (1), the judge in the proceeding may give any directions the judge thinks fit as to —
 - (a) the presentation of it and the excision of matters from it; and
 - (b) the manner in which further evidence in chief of the witness may be given and in which any cross-examination and any re-examination of the witness is to be conducted in the proceeding.
- (6) A visually recorded interview is not to be admitted under subsection (1) if it has been edited or altered otherwise than in accordance with a direction under subsection (5)(a).
- (7) The following provisions apply if the proceeding is on indictment —
 - (a) if a visually recorded interview is admitted under subsection (1), the judge is to instruct the jury that the procedure is a routine practice of the court and that they should not draw any inference as to the accused's guilt from the use of the procedure;
 - (b) if the judge is deciding whether or not to warn the jury that it may be dangerous to convict on the evidence of the complainant alone because of the length of the period between the offence and the proceeding, the admission under subsection (1) of a visually recorded interview with the complainant is not a relevant factor except to the extent that the length of the period between the offence and the admission of the official visually recorded interview may have affected the ability to test the evidence so admitted;

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- (c) the fact that there was a visually recorded interview that the prosecutor did not adduce under subsection (1) is not to be the subject of comment to the jury by the judge, the accused or the accused's counsel.

[Section 106HB inserted by No. 46 of 2004 s. 20; amended by No. 84 of 2004 s. 82.]

106HC. Regulations about visual recording of interviews with children

- (1) The Governor may make regulations —
 - (a) prescribing classes of persons for the purposes of section 106HA(1)(a) by reference to the offices or positions held by them, or their training or experience, or any combination of those criteria;
 - (b) prescribing requirements to be met for the purposes of section 106HA(1)(b), and the extent to which they are to be met, if section 106HB is to apply to a visual recording of an interview with a child;
 - (c) prescribing the manner in which the application of section 106HB to a visual recording of an interview with a child may be proved in proceedings;
 - (d) regulating the playing, broadcasting, custody, possession, storage, copying, transcription, erasure or destruction of a visually recorded interview;
 - (e) regulating the records that are to be kept about a visually recorded interview;
 - (f) providing for access to a visually recorded interview by the prosecutor for the purposes of proceedings referred to in section 106HB;
 - (g) providing for access to and use of a visually recorded interview for the purposes of proceedings in the Children's Court or the Family Court whether or not it has been admitted in evidence under section 106HB;

- (h) providing for access to and use of a visually recorded interview otherwise than for the purposes of proceedings referred to in section 106HB or paragraph (g); and
 - (i) prescribing any other matter that is necessary or convenient to be prescribed for the purposes of section 106HA or 106HB.
- (2) The regulations may create offences and provide, in respect of an offence so created, for the imposition of a penalty not exceeding a fine of \$100 000 with or without imprisonment for a term not exceeding 12 months.

[Section 106HC inserted by No. 46 of 2004 s. 20.]

106HD. Admissibility of visually recorded interviews generally

Section 106HB and regulations under section 106HC have effect in addition to, and do not limit the operation of, any other enactment or rule of law under which a visually recorded interview may be admissible in proceedings.

[Section 106HD inserted by No. 46 of 2004 s. 20.]

106I. Visual recording of child's evidence, application for directions

- (1) Where a Schedule 7 proceeding has been commenced in a court, the prosecutor may apply to a judge of that court for an order directing —

[(a) deleted]

- (b) that the whole of the affected child's evidence (including cross-examination and re-examination) be —
 - (i) taken at a special hearing and recorded on a visual recording; and
 - (ii) presented to the court in the form of that visual recording,and that the affected child not be present at the proceeding.

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- (2) The defendant is to be served with a copy of, and is entitled to be heard on, an application under subsection (1).

[Section 106I inserted by No. 36 of 1992 s. 8; amended by No. 71 of 2000 s. 20; No. 46 of 2004 s. 14(3), (4) and 21.]

[106J.] *Repealed by No. 46 of 2004 s. 22(1).]*

106K. Child's evidence in full, special hearing to take and record

- (1) A judge who hears an application under section 106I(1)(b) may make such order as the judge thinks fit which is to include —
- (a) directions, with or without conditions, as to the conduct of the special hearing, including directions as to —
 - (i) whether the affected child is to be in the courtroom, or in a separate room, when the child's evidence is being taken; and
 - (ii) the persons who may be present in the same room as the affected child when the child's evidence is being taken;
 - (b) subject to section 106HB(3), directions, with or without conditions, as to the persons, or classes of persons, who are authorised to have possession of the visual recording of the evidence,
- and, without limiting section 106M but subject to section 106HB(3), may include directions and conditions as to the giving up of possession and as to the playing, copying or erasure of the recording.
- (2) An order under subsection (1) may be varied or revoked by the judge who made the order or a judge who has jurisdiction co-extensive with that judge.
- (3) At a special hearing ordered under subsection (1) —
- (a) the accused —

- (i) is not to be in the same room as the affected child when the child's evidence is being taken; but
 - (ii) is to be capable of observing the proceedings by means of a closed circuit television system and is at all times to have the means of communicating with his or her counsel;
 - (b) no person other than a person authorised by the judge under subsection (1) is to be present in the same room as the affected child when the child's evidence is being taken;
 - (c) subject to the control of the presiding judge, the affected child is to give his or her evidence and be cross-examined and re-examined; and
 - (d) except as provided by this section, the usual rules of evidence apply.
- (4) If an order is made under subsection (1), nothing in this section or section 106I prevents a visually recorded interview from being presented under section 106HB as the whole or a part of the affected child's evidence in chief at the special hearing, and in that event the judge may give directions as to the manner in which the visually recorded interview is to be —
- (a) presented at the special hearing; and
 - (b) recorded on, incorporated with or referred to in the visual recording of the evidence taken at the special hearing.
- (5) Where circumstances so require, more than one special hearing may be held under this section for the purpose of taking the evidence of the affected child, and section 106I and this section are to be read with all changes necessary to give effect to any such requirement.

[Section 106K inserted by No. 36 of 1992 s. 8; amended by No. 53 of 1992 s. 39; No. 71 of 2000 s. 22 and 29; No. 46 of 2004 s. 14(4) and 23; No. 84 of 2004 s. 82.]

s. 106M

[106L. Repealed by No. 71 of 2000 s. 23.]

106M. Recording not to be altered without approval

- (1) The original visual recording of evidence made at a special hearing under section 106K for the purposes of a proceeding is not to be edited or altered in any way without the approval of a judge before it is presented to the court at the proceeding.
- (2) A visual recording that is edited or altered contrary to subsection (1) is inadmissible in evidence at the proceeding for which it was made.
- (3) In subsection (1) —
“**judge**” means the judge who presided at the special hearing or a judge who has jurisdiction co-extensive with that judge.

[Section 106M inserted by No. 36 of 1992 s. 8; amended by No. 71 of 2000 s. 24 and 29; No. 46 of 2004 s. 14(4), (5) and 24.]

106MA. Unauthorised possession or dealing in video-taped evidence

- (1) A person commits an offence who, without authority —
 - (a) has a visual recording of evidence in his possession; or
 - (b) supplies or offers to supply a visual recording of evidence to any person.
- (2) A person commits an offence who, without authority plays, copies, erases or permits a person to copy or erase a visual recording of evidence.
- (3) A person has authority for the purposes of subsection (1) or (2) only if he or she has possession of a visual recording of evidence or does anything mentioned in subsection (1) or (2), as the case may be —
 - (a) in the case of a public official, for a purpose connected with the proceeding for which the recording was made or any resulting proceeding by way of appeal; or

- (b) in any other case, as authorised by a judge under section 106K or 106RA.
- (4) A person who commits an offence against this section is liable to a fine of \$5 000.

[Section 106MA inserted by No. 53 of 1992 s. 40; amended by No. 46 of 2004 s. 14(4) and 22(3); No. 84 of 2004 s. 41.]

106MB. Broadcast of video-taped evidence prohibited

- (1) A person shall not broadcast a visual recording of evidence or any part of such a recording except with approval of the Supreme Court and in accordance with any condition attached to the approval.
Penalty: \$100 000 or imprisonment for 12 months, or both.
- (2) An approval under subsection (1) is only to be given in exceptional circumstances.
- (3) In subsection (1) “**broadcast**” means disseminate to the public by radio or television or otherwise by the transmission of light or sound.

[Section 106MB inserted by No. 53 of 1992 s. 40; amended by No. 46 of 2004 s. 14(4).]

106N. Video links or screening arrangements may be used

- (1) This section —
 - (a) applies only to a Schedule 7 proceeding, but subject to any order under section 106O;
 - (b) is to operate only to the extent that the giving of evidence by the affected child is not provided for by an order under section 106K; and
 - (c) has effect notwithstanding section 88 of the *Criminal Procedure Act 2004*.

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- (2) Where the necessary facilities and equipment are available one of the following arrangements is to be made by the judge for the giving of evidence by the affected child —
 - (a) he or she is to give evidence outside the courtroom but within the court precincts, and the evidence is to be transmitted to the courtroom by means of video link as defined in section 120; or
 - (b) while he or she is giving evidence the accused is to be held in a room apart from the courtroom and the evidence is to be transmitted to that room by means of video link as defined in section 120.
- (3) Where subsection (2)(b) applies the accused is at all times to have the means of communicating with his or her counsel.
- (3a) Where arrangements are made under subsection (2)(a) or (b) the affected child's evidence is to be recorded on a visual recording.
- (4) Where the necessary facilities and equipment referred to in subsection (2) are not available, a screen, one-way glass or other device is to be so placed in relation to the affected child while he or she is giving evidence that —
 - (a) the affected child cannot see the accused; but
 - (b) the judge, the jury (in the case of proceedings on indictment), the accused and his or her counsel can see the affected child.
- (5) Where arrangements are made under subsection (4) and where the necessary facilities are available to do so, the affected child's evidence is to be recorded on a visual recording.

[Section 106N inserted by No. 36 of 1992 s. 8; amended by No. 48 of 1998 s. 8; No. 71 of 2000 s. 25; No. 46 of 2004 s. 14(3); No. 84 of 2004 s. 41 and 82.]

106O. Court may order that s. 106N does not apply

- (1) Where any Schedule 7 proceeding has been commenced in a court the prosecutor may apply to a judge of that court for an order that section 106N does not apply to those proceedings.

- (2) A judge who hears an application under subsection (1) may grant the application if it is shown to the judge's satisfaction that the affected child is able and wishes to give evidence in the presence of the defendant in the courtroom or other room in which the proceedings are being held.
- (3) An order under subsection (2) may be varied or revoked.
[Section 106O inserted by No. 36 of 1992 s. 8.]

106P. Instructions to be given to jury

Where in any proceeding on indictment evidence of an affected child is given in a manner described in section 106N(2) or (4), the judge is to instruct the jury that the procedure is a routine practice of the court and that they should not draw any inference as to the accused's guilt from the use of the procedure.

[Section 106P inserted by No. 36 of 1992 s. 8; amended by No. 84 of 2004 s. 82.]

106Q. Identification of accused by child or special witness

Where evidence of an affected child or a special witness is given in a manner described in section 106N(2) or (4), and the identification of the accused is an issue, the affected child or special witness is not to be required to be in the presence of the accused for that purpose —

- (a) for any longer than is necessary for that purpose; and
- (b) before the evidence of the affected child or special witness (including cross-examination and re-examination) is completed.

[Section 106Q inserted by No. 36 of 1992 s. 8; amended by No. 46 of 2004 s. 25; No. 84 of 2004 s. 82.]

106R. Special witnesses, measures to assist

- (1) A judge of a court may make an order —

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- (a) declaring that a person who is giving, or is to give, evidence in any proceeding in that court is a special witness;
 - (b) directing that one or more of the arrangements referred to in subsection (4) are to be made for the giving of that evidence; and
 - (c) providing for any incidental or related matter.
- (2) An order may be made under subsection (1) on application by a party to a proceeding, on notice to the other parties, or of the court's own motion.
- (3) The grounds on which an order may be made are that if the person is not treated as a special witness he or she would, in the court's opinion —
 - (a) by reason of physical disability or mental impairment (as defined in the *Criminal Law (Mentally Impaired Accused) Act 1996*), be unlikely to be able to give evidence, or to give evidence satisfactorily; or
 - (b) be likely —
 - (i) to suffer severe emotional trauma; or
 - (ii) to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily,by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the court considers relevant.
- (3a) Despite subsection (3), in any proceeding for a serious sexual offence an order must be made under subsection (1) in respect of the person upon or in respect of whom it is alleged that the offence was committed, attempted or proposed unless the court is satisfied —
 - (a) that subsection (3) does not apply to the person; and
 - (b) that the person does not wish to be declared to be a special witness.

- (4) The arrangements that may be made under this section are —
- (a) that the person have near to him or her a person, approved by the court, who may provide him or her with support;
 - [(b) deleted]*
 - (c) in any proceeding for an offence, that an arrangement of the kind described in section 106N(2) or (4) is to be made.
- (4a) Where an arrangement under subsection (4)(c) is directed to be made, section 106N applies, with any necessary changes, as if the special witness were an affected child.
- (5) The court may at any time vary or revoke an order in force under this section.
- (6) This section does not apply to an affected child.
- (7) Where in any proceeding on indictment a person is declared to be a special witness, the judge is to instruct the jury that the making of the declaration is a routine practice of the court and that they should not draw any inference as to the accused's guilt from it.
- [Section 106R inserted by No. 36 of 1992 s. 8; amended by No. 53 of 1992 s. 41; No. 69 of 1996 s. 30; No. 71 of 2000 s. 26; No. 46 of 2004 s. 14(3), (4) and 26; No. 84 of 2004 s. 41 and 82.]*

106RA. Visually recording evidence of witnesses in criminal matters

- (1) Where a prosecution for an offence has commenced in a court, a judge of the court may make an order that the evidence of a person (the “**witness**”) whose evidence is or may be relevant in the prosecution be taken at a special hearing and recorded on a visual recording.
- (2) An order cannot be made under subsection (1) in respect of a person who is an affected child.

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- (3) An order may be made under subsection (1) on application by a party to the prosecution, on notice to the other parties, or of the court's own motion.
- (4) The grounds on which an order may be made under subsection (1) are —
 - (a) that the witness has been declared to be a special witness under section 106R(1)(a); or
 - (b) that it is likely the witness will be out of the State at the time of the proceeding for the offence and will not be able to give evidence at the proceeding by means of a video link or an audio link.
- (5) If an order is made under subsection (1) the order may include directions as to the conduct of the special hearing including whether the whole of the witness's evidence (including cross-examination and re-examination) or only the evidence in chief is to be recorded.
- (6) If the witness has been declared to be a special witness under section 106R(1)(a), subsection (4) does not affect the operation of sections 106Q and 106R.
- (7) The court may at any time vary or revoke an order in force under this section.

[Section 106RA inserted by No. 84 of 2004 s. 38.]

106S. Special hearings to consider what orders should be made

- (1) In any proceeding in which —
 - (a) the giving of evidence by a person; or
 - (b) a matter affecting a person as a witness,is likely to require the making of an order or the giving of directions under sections 106E(2), 106F(1), 106HB(5), 106K, 106O, 106R or 106RA, the party who is to call that person as a witness is to apply for a special hearing for the purpose of having all such matters dealt with before the proceeding.

- (2) In subsection (1) “**special hearing**” in relation to a court means a hearing provided for by rules of that court for the purposes of this section.

[Section 106S inserted by No. 36 of 1992 s. 8; amended by No. 71 of 2000 s. 27 and 29; No. 46 of 2004 s. 22(3) and 27; No. 84 of 2004 s. 41.]

106T. Use of recordings made under s. 106K or 106N

- (1) Evidence of an affected child recorded on a visual recording under section 106K or 106N in relation to a Schedule 7 proceeding is admissible in any hearing in relation to that proceeding to the same extent as if it were given orally in the hearing in accordance with the usual rules and practice of the court concerned.
- (2) Evidence of a special witness recorded on a visual recording under section 106K or 106N in relation to a proceeding is admissible in any hearing in relation to that proceeding to the same extent as if it were given orally in the hearing in accordance with the usual rules and practice of the court concerned.
- (2a) If evidence of a witness is visually recorded under an order made under section 106RA(1) on the ground in section 106RA(4)(a), the evidence is admissible in any hearing in relation to the proceeding for the offence concerned to the same extent as if it were given orally in the hearing in accordance with the usual rules and practice of the court concerned.
- (2b) If evidence of a witness is visually recorded under an order made under section 106RA(1) on the ground in section 106RA(4)(b), the evidence is admissible in any hearing in relation to the proceeding for the offence concerned to the same extent as if it were given orally in the hearing in accordance with the usual rules and practice of the court concerned if the court is satisfied at that proceeding that —

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- (a) the witness is dead;
 - (b) the witness's medical or mental condition is such that the witness is not able to give evidence, or to give evidence satisfactorily, in the proceeding;
 - (c) the witness is out of the State and is not able to give evidence at the proceeding by means of a video link or an audio link, notwithstanding that the witness might return at some future time;
 - (d) that the witness is being kept out of the way by the accused; or
 - (e) that all the parties consent and that the interests of justice do not require the presence of the witness.
- (2c) If under subsection (2a) or (2b), the evidence of a witness recorded on a visual recording is admitted into evidence in a hearing, the witness need not be present at the hearing.
- (2d) If there is a prospect that the witness referred to in subsection (2b) might recover or return, the court need not admit the evidence but may adjourn the hearing.
- (3) A judge of a court before which it is proposed to adduce evidence on a visual recording under subsection (1), (2), (2a) or (2b) in a hearing may order that the affected child or special witness or witness, as the case may be, attend the court for the purposes of giving further evidence in clarification of the evidence on the visual recording.
- (4) The making of an order under subsection (3) does not prevent the making of an application under section 106I or of an order under section 106K, 106N or 106RA in relation to the giving of the further evidence.
- (5) In this section —
- “hearing”**, in relation to a proceeding, means —
- [(a) deleted]*
 - (b) the trial or hearing of the proceeding; or

- (c) a retrial or rehearing of the proceeding.

[Section 106T inserted by No. 71 of 2000 s. 28; amended by No. 27 of 2002 s. 33; No. 46 of 2004 s. 14(3), (6) and 22(3); No. 84 of 2004 s. 39.]

[Heading deleted by No. 84 of 2004 s. 41.]

[107, 108. Repealed by No. 84 of 2004 s. 41.]

Examination of witnesses outside the State

[Heading inserted by No. 66 of 1987 s. 9.]

109. Terms used in s. 109 to 114

- (1) In this section and in sections 110 to 114, unless the contrary intention appears —
- “**Australia**” includes the Territories of the Commonwealth (whether internal or external) for the government of which as a Territory provision is made by any Commonwealth Act;
- “**examination**” includes any proceeding for the taking of evidence of a person conducted by the judicial authorities of a foreign country in relation to a letter of request issued as a result of an order made by a court under this Act;
- “**inferior court**” means a court of the State, except when exercising federal jurisdiction, not being a superior court;
- “**judicial authority**” in relation to a place outside the State, means a court or person prescribed as an appropriate judicial authority for that place;
- “**superior court**” means the Supreme Court, the District Court or the Family Court of Western Australia, except when exercising federal jurisdiction.
- (2) In sections 109 to 114, a reference to a place outside the State shall be taken to refer to a place outside the State whether within or outside Australia.

[Section 109 inserted by No. 66 of 1987 s. 9.]

110. Superior courts may make orders for obtaining evidence

- (1) In any civil or criminal proceedings before a superior court, the court may, in its discretion and where it appears in the interests of justice to do so, on the application of a party to the proceeding, make, in relation to a person outside the State, an order —
 - (a) for the examination of the person on oath or affirmation at any place outside the State 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 the person on oath or affirmation at any place outside the State; or
 - (c) for the issue of a letter of request to the judicial authorities of a place outside the State to take, or to cause to be taken, the evidence of the 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 matters to which the court shall have regard include the following —
 - (a) whether the person is willing or able to come to Western Australia 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;
 - (c) whether, having regard to the interests of the parties to the proceeding, justice will be better served by granting or refusing the order.
- (3) Where a court makes an order under subsection (1) of the kind referred to in subsection (1)(a) or (b), the court may, in its discretion, at the time of the making of the order or at a subsequent time, give such directions as it thinks just relating to the procedure to be followed in and in relation to the

examination, including directions as to the time, place and manner of the examination, and to any other matter that the court thinks relevant.

- (4) Where a court makes, in relation to a proceeding, an order under subsection (1) of the kind referred to in subsection (1)(c) in relation to the taking of evidence of a person, the court may, in its discretion, include in the order a request as to any matter relating to the taking of that evidence, including any of the following matters —
 - (a) the examination, cross-examination or re-examination of the person, whether the evidence of the person is given orally, upon affidavit or otherwise;
 - (b) the attendance of the legal representative of each party to the proceeding and the participation of those persons in the examination in appropriate circumstances;
 - (c) any prescribed matter.
- (5) Subject to subsection (6), the court may, on such terms, if any, as it thinks fit, permit a party to the proceeding to tender as evidence in the proceeding the evidence of a person taken in an examination held as a result of an order made under subsection (1) or a record of that evidence.
- (6) Evidence of a person so tendered is not admissible if —
 - (a) it appears to the satisfaction of the court at the hearing of the proceeding that the person is in Western Australia 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 of the proceeding.
- (7) Where it is in the interests of justice to do so, the court may, in its discretion, exclude from the proceeding evidence taken in an examination held as a result of an order made under subsection (1), notwithstanding that it is otherwise admissible.
- (8) In this section, a reference to evidence taken in an examination includes a reference to —

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- (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.

[Section 110 inserted by No. 66 of 1987 s. 9.]

111. Supreme Court may make orders for obtaining evidence for inferior courts

- (1) The Supreme Court may, in its discretion, 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 the kind referred to in section 110(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) Section 110(5), (6) and (7) apply in relation to evidence taken in an examination held as a result of an order made by a court by virtue of this section in relation to an inferior court as if —
 - (a) in subsections (5), (6) and (7) —
 - (i) a reference to the proceeding were a reference to the proceeding in the inferior court; and
 - (ii) a reference to the court were a reference to the inferior court;
 - and
 - (b) in subsections (5) and (7), a reference to an order made under subsection (1) were a reference to an order made by a court by virtue of this section.

[Section 111 inserted by No. 66 of 1987 s. 9.]

112. Exclusion of evidence in criminal proceeding

Sections 109 to 114 do not affect the power of a court in a criminal proceeding to exclude evidence that has been obtained illegally or would, if admitted, operate unfairly against the accused.

[Section 112 inserted by No. 66 of 1987 s. 9; amended by No. 84 of 2004 s. 82.]

113. Operation of other laws

Sections 109 to 114 are not intended to exclude or limit the operation of any law of the State, or of any rule or regulation made under, or in pursuance of, such a law, that makes provision for the examination of witnesses outside the State for the purpose of a proceeding in the State.

[Section 113 inserted by No. 66 of 1987 s. 9.]

114. Regulations and rules of court for s. 109 to 113

- (1) The Governor may make regulations for or with respect to any matter that by sections 109 to 113 is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to those sections and, in particular, for or with respect to the practice and procedure of a superior court in proceedings for the making of an order under section 110 or 111.
- (2) The power of an authority to make rules regulating the practice and procedure of a superior court extends, for the purpose of regulating proceedings brought under sections 109 to 113 in or before that court, to making any rules, not inconsistent with any regulations made under this section, prescribing all matters necessary or convenient to be prescribed for carrying out or giving effect to those sections and, in particular, for or with respect to the practice and procedure of that superior court in proceedings for the making of an order under section 110 or 111.
- (3) This section does not affect any power to make regulations or rules under any other law.

[Section 114 inserted by No. 66 of 1987 s. 9.]

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Taking of evidence for foreign and Australian courts

[Heading inserted by No. 34 of 1988 s. 4.]

115. Terms used in s. 115 to 118C

In this section and in sections 116 to 118C —

“**Australia**” includes the Territories of the Commonwealth (whether internal or external) for the government of which as a Territory provision is made by any Commonwealth Act;

“**proceedings**” means —

- (a) proceedings in any civil or commercial matter; or
- (b) proceedings in or before a court in relation to the commission of an offence or an alleged offence;

“**property**” includes any land, chattel or other corporeal property of any description;

“**request**” includes any commission, order or other process issued by or on behalf of a requesting court;

“**requesting court**” means a court or tribunal by or on whose behalf a request is issued, as referred to in section 116.

[Section 115 inserted by No. 34 of 1989 s. 4.]

116. Application to the Supreme Court for assistance in obtaining evidence for proceedings in other court

- (1) If an application is made to the Supreme Court for an order for evidence to be obtained in Western Australia and the Supreme Court is satisfied —
 - (a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal exercising jurisdiction in a place outside Western Australia; and
 - (b) that the evidence to which the application relates is to be obtained for the purposes of proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated,the provisions of sections 117 to 118B apply.

- (2) Sections 117 to 118B do not apply in respect of proceedings relating to the commission of an offence or an alleged offence unless the requesting court is a court of a place in Australia or of New Zealand.

[Section 116 inserted by No. 34 of 1989 s. 4.]

117. Supreme Court may make orders to assist in obtaining evidence

- (1) The Supreme Court has power, on any such application as is mentioned in section 116, by order to make such provision for obtaining evidence in Western Australia as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made.
- (2) An order under this section may require a specified person to take such steps as the court may consider appropriate for that purpose.
- (3) Without limiting the generality of subsections (1) and (2), an order under this section may, in particular, make provision —
- (a) for the examination of witnesses, either orally or in writing;
 - (b) for the production of documents;
 - (c) for the inspection, photographing, preservation, custody or detention of any property;
 - (d) for the taking of samples of any property and the carrying out of any experiments on or with any property;
 - (e) for the medical examination of any person;
 - (f) without limiting paragraph (e), for the taking and testing of samples of blood from any person.
- (4) An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of proceedings in the Supreme Court (whether or not proceedings

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of the same description as those 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 (either orally or in writing) otherwise than on oath where this is asked for by the requesting court.
- (6) An order under this section shall not require a person —
 - (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in the person's possession, custody or power; or
 - (b) to produce any documents other than particular documents specified in the order and appearing to the court making the order to be, or to be likely to be, in the person's possession, custody or power.
- (7) A person who, by virtue of an order under this section, is required to attend at any place shall be entitled to the like conduct money and payment for expenses and loss of time on attendance as a witness in proceedings before the Supreme Court.

[Section 117 inserted by No. 34 of 1989 s. 4.]

118. Privilege of witnesses

- (1) A person shall not be compelled by virtue of an order under section 117 to give any evidence which the person could not be compelled to give —
 - (a) in similar proceedings in Western Australia; or
 - (b) in similar proceedings in the place in which the requesting court exercises jurisdiction.
- (2) Subsection (1)(b) does not apply unless the claim of the person in question to be exempt from giving evidence is either —
 - (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 by any person is not so supported or conceded, the person may (subject to the other provisions of this section) be required to give the evidence to which the claim relates, but that evidence shall not be transmitted to the requesting court unless that court, on the matter being referred to it, dismisses the claim.
- (4) In this section, references to giving evidence include references to answering any question and to producing any document, and the reference in subsection (3) to the transmission of evidence given by a person shall be construed accordingly.

[Section 118 inserted by No. 34 of 1989 s. 4.]

118A. Rules of court for s. 116 to 118

- (1) Rules may be made under the *Supreme Court Act 1935* for or with respect to —
 - (a) the manner in which an application mentioned in section 116 is to be made;
 - (b) the circumstances in which an order can be made under section 117; and
 - (c) the manner in which any reference mentioned in section 118(3) is to be made.
- (2) Any such rules may include such incidental, supplementary and consequential provisions as are necessary or convenient.

[Section 118A inserted by No. 34 of 1989 s. 4.]

118B. Offence

If any person, in giving any testimony (either orally or in writing) otherwise than on oath, where required to do so by an order under section 117, makes a statement —

- (a) which the person knows to be false in a material particular; or

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- (b) which is false in a material particular and which the person does not believe to be true,

the person is guilty of a crime and is liable to imprisonment for 7 years.

[Section 118B inserted by No. 34 of 1989 s. 4.]

118C. Operation of other laws

Sections 115 to 118C are not intended to exclude or limit the operation of any other law of the State that makes provision for the taking of evidence in the State for the purpose of a proceeding outside the State.

[Section 118C inserted by No. 34 of 1989 s. 4.]

Allowances to witnesses and interpreters in specified proceedings

119. Fees to witnesses and interpreters in certain proceedings

- (1) In this section —

“public official” means a Minister of the Crown, a person employed in the Public Service of the State, a member of the Police Force, or a person employed by a local government or any other statutory body and includes any person acting as agent of or under the instructions of such a person or body.

- (2) The Governor may make regulations with respect to fixing and requiring the payment of fees and expenses to —

- (a) witnesses called, and interpreters arranged, by the prosecution —

- (i) in criminal trials and criminal appeal proceedings in the Supreme Court and in criminal trials in the District Court of Western Australia established under the *District Court of Western Australia Act 1969*; and

- (ii) in proceedings in a court of summary jurisdiction against a person charged with an offence by a public official acting or purporting to act by virtue of his office, and in proceedings on appeal therefrom;
 - (b) witnesses and interpreters at inquests held under the *Coroners Act 1996*;
 - (c) persons appointed under section 106F; and
 - (d) persons referred to in sections 106E(1) and 106R(4)(a).
- (2a) Without limiting subsection (2), the Governor may also make regulations authorising the payment of fees and expenses to —
- (a) children and persons who are, or may be, declared to be special witnesses under section 106R(1) in relation to their attendance at, and participation in, programmes in preparation for giving evidence in proceedings referred to in subsection (2)(a) and (b); and
 - (b) persons who accompany and assist children and persons who are, or may be, declared to be special witnesses under section 106R(1) in order to enable them to —
 - (i) attend and give evidence at proceedings referred to in subsection (2)(a) and (b); or
 - (ii) attend and participate in programmes referred to in paragraph (a).
- (3) The regulations made under this section —
- (a) may require that any information or account required to be given or furnished thereunder shall be verified by statutory declaration; and
 - (b) may confer a discretionary authority.
- (4) Where a fee or an allowance required to be paid pursuant to the regulations made under this section is with respect to proceedings of a kind mentioned in subsection (2)(a)(ii) in which the proceedings were commenced by a person employed by a local government, or any other statutory body, or was

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another person acting as agent of or under the instructions of such a person or body, the fee or allowance shall be paid by that body and shall be recoverable as a civil debt, but in all other cases a fee or allowance required to be paid pursuant to the regulations made under this section shall be charged to the Consolidated Account.

- (5) On an application made by a person charged with an offence, the Attorney General may order that all or some of the expenses of a witness or an interpreter called by the person be paid by the State.

[Section 119 inserted by No. 61 of 1975 s. 2; amended by No. 15 of 1991 s. 23; No. 36 of 1992 s. 9; No. 6 of 1993 s. 13; No. 73 of 1994 s. 4; No. 2 of 1996 s. 61; No. 14 of 1996 s. 4; No. 49 of 1996 s. 64; No. 46 of 2004 s. 28; No. 59 of 2004 s. 89; No. 84 of 2004 s. 40 and 80; No. 77 of 2006 s. 4.]

Interpretation of sections 120 to 132

[Heading inserted by No. 48 of 1998 s. 9.]

120. Terms used in s. 120 to 132

- (1) In this section and sections 121 to 132, unless the contrary intention appears —

“audio link” means facilities (including telephone) that enable, at the same time, a court at one place to hear a person giving evidence or making a submission at another place and vice versa;

“Australia” includes the Territories of the Commonwealth (whether internal or external) for the government of which as a Territory provision is made by any Commonwealth Act;

“participating jurisdiction” means —

- (a) another State or a Territory in which provisions of an Act in terms substantially corresponding to this section and sections 121 to 132, are in force; or
- (b) any other jurisdiction outside the State prescribed to be a participating jurisdiction;

“recognized court” means a court or tribunal of a participating jurisdiction —

- (a) that is authorised by the provisions of an Act of that jurisdiction in terms substantially corresponding to this section and sections 121 to 132 to direct that evidence be taken or a submission be made by video link or audio link from this State; or
- (b) that is prescribed to be a recognized court;

“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;

“video link” means facilities (including closed circuit television) that enable, at the same time, a court at one place to see and hear a person giving evidence or making a submission at another place and vice versa;

“WA court” means —

- (a) the Supreme Court; or
- (b) a court or tribunal established in this State under a written law.

- (2) In this section and sections 121 to 132, a reference to a place outside the State shall be taken to refer to a place outside the State whether within or outside Australia.

[Section 120 inserted by No. 48 of 1998 s. 9.]

Use of video links or audio links by WA courts

[Heading inserted by No. 48 of 1998 s. 9.]

121. WA court may take evidence or receive a submission by video link or audio link

- (1) Subject to this section, a WA court may, on its own initiative or on the application of a party to a proceeding in or before the court, direct that in that proceeding evidence be taken or a submission be received by video link or audio link from a

person at a place, whether in or outside this State, that is outside the courtroom or other place where the court is sitting.

- (2) The court shall not make such a direction unless the court is satisfied that —
 - (a) the video link or audio link is available or can reasonably be made available; and
 - (b) the direction is in the interests of justice.
- (3) For the purposes of taking evidence or receiving a submission by video link or audio link from a place in this State in accordance with such a direction, the place shall be taken to be part of the court.
- (4) For the purposes of taking evidence or receiving a submission by video link or audio link from a place in a participating jurisdiction, the court may exercise in that place any of its powers that the court is permitted, under the law of the jurisdiction, to exercise in that place.

[Section 121 inserted by No. 48 of 1998 s. 9.]

122. Counsel entitled to practise

Despite section 123 of the *Legal Practice Act 2003* a person who is entitled to practise as a legal practitioner in a participating jurisdiction is entitled to practise as a barrister, solicitor or both —

- (a) in relation to the examination, cross-examination or re-examination of a witness in the participating jurisdiction whose evidence is being given by video link or audio link before a WA court; and
- (b) in relation to the making of a submission by video link or audio link from the participating jurisdiction in a proceeding before a WA court.

[Section 122 inserted by No. 48 of 1998 s. 9; amended by No. 65 of 2003 s. 34.]

Use of video links or audio links in this State by recognized courts

[Heading inserted by No. 48 of 1998 s. 9.]

123. Recognized court may take evidence or receive a submission from a person in this State

A recognized court may, for the purposes of a proceeding in or before it, take evidence or receive a submission by video link or audio link from a person in this State.

[Section 123 inserted by No. 48 of 1998 s. 9.]

124. Recognized court's powers

- (1) For the purposes of the proceeding the recognized court may exercise in this State any of its powers in relation to the taking of evidence or the receipt of a submission except its powers —
 - (a) to punish for contempt; and
 - (b) to enforce or execute its orders or process.
- (2) The laws of the participating jurisdiction (including rules of court) that apply to the proceeding in that jurisdiction also apply, by force of this subsection, to the practice and procedure of the recognized court in taking evidence or receiving a submission by video link or audio link from a person in this State.
- (3) For the purposes of the court exercising its powers under subsection (1), the place in this State where the evidence is given or the submission is made shall be taken to be part of the court.

[Section 124 inserted by No. 48 of 1998 s. 9.]

125. Recognized court may make orders

Without limiting section 124, the recognized court may, by order —

- (a) direct that the proceeding, or a part of the proceeding, be conducted in private;

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- (b) require a person to leave a place in this State where the giving of evidence or the making of a submission 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.

[Section 125 inserted by No. 48 of 1998 s. 9.]

126. Enforcement of an order under section 125

- (1) An order under section 125 shall be complied with.
- (2) Subject to rules of court, the order may be enforced by the Supreme Court as if the order were an order of that court.
- (3) Without limiting subsection (2), a person who contravenes the order —
 - (a) shall be taken to be in contempt of the Supreme Court; and
 - (b) is punishable accordingly,

unless the person establishes that the contravention should be excused.

[Section 126 inserted by No. 48 of 1998 s. 9.]

127. Privileges, protection and immunity of participants in proceedings in a recognized court

- (1) A person acting judicially in a proceeding in or before a recognized court has, in connection with evidence being taken or a submission being received by video link or audio link from a person in this State, the same privileges, protection and immunity as a judge of the Supreme Court.
- (2) A person appearing as a legal practitioner in a proceeding in or before a recognized court has, in connection with evidence being taken or a submission being received by video link or audio link from a person in this State, the same protection and

immunity as a barrister has in appearing for a party in a proceeding, in or before the Supreme Court.

- (3) A person appearing as a witness in a proceeding in or before a recognized court by video link or audio link from this State has the same protection as a witness in a proceeding in or before the Supreme Court.

[Section 127 inserted by No. 48 of 1998 s. 9.]

128. Recognized court may administer an oath in the State

- (1) A recognized court may, for the purpose of obtaining in the proceeding by video link or audio link the testimony of a person in this State, administer an oath or affirmation in accordance with the practice and procedure of the recognized court.
- (2) Evidence given by a person on oath or affirmation so administered is, for the purposes of *The Criminal Code*, testimony given in a judicial proceeding.

[Section 128 inserted by No. 48 of 1998 s. 9.]

129. Assistance to a recognized court

An officer of a WA court may, at the request of a recognized court —

- (a) attend at the place in the State where evidence is to be or is being given, or submissions are to be or are being made, in the proceeding;
- (b) take such action as the recognized court directs to facilitate the proceeding; and
- (c) assist with the administering by the recognized court of an oath or affirmation.

[Section 129 inserted by No. 48 of 1998 s. 9.]

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130. Contempt of a recognized court

- (1) A person shall not, while evidence is being given or a submission is being made in this State by video link or audio link, in the proceeding in a recognized court —
- (a) threaten, intimidate or wilfully insult any of the following:
 - (i) a person acting judicially in the proceeding;
 - (ii) a Master, 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; or
 - (v) a juror in the proceeding;
 - (b) wilfully interrupt or obstruct the proceeding; or
 - (c) wilfully and without lawful excuse disobey an order or direction of the court.
- (2) A person who contravenes subsection (1) is taken to commit a contempt of the Supreme Court and is punishable accordingly by that court.

[Section 130 inserted by No. 48 of 1998 s. 9.]

General provisions relating to the use of video links or audio links

[Heading inserted by No. 48 of 1998 s. 9.]

131. Regulations for fees and expenses relating to the use of a video link or an audio link

The Governor may make regulations with respect to fixing and requiring the payment of fees and expenses relating to the taking of evidence or receiving of a submission by video link or audio link.

[Section 131 inserted by No. 48 of 1998 s. 9.]

132. Operation of other laws

Sections 120 to 132 are not intended to exclude or limit the operation of any other law of the State that makes provision for the taking of evidence or making of a submission —

- (a) in the State for the purpose of a proceeding in the State;
- (b) outside the State for the purpose of a proceeding in the State; and
- (c) in the State for the purpose of a proceeding outside the State.

[Section 132 inserted by No. 48 of 1998 s. 9⁷.]

[The First Schedule omitted under the Reprints Act 1984 s. 7(4)(f).]

The Second Schedule

[Section 9]

[Heading inserted by No. 48 of 1991 s. 10.]

Part 1 — Offences under *The Criminal Code*

[Heading inserted by No. 48 of 1991 s. 10.]

Provision	Description of offence
s. 58	Threatening a person who is to give, or has given, evidence before Parliament
s. 68	Going armed in public so as to cause fear
s. 74	Threatening violence in relation to a dwelling house
s. 98	Undue influence of an elector
s. 123	Threatening a juror or corruption of or by a juror
s. 128	Threatening a witness before a Royal Commission or public inquiry
s. 144	Using force to rescue a person undergoing, or liable to, strict security life imprisonment
s. 186	Occupier or owner permitting a young person to be on premises for unlawful carnal knowledge
s. 191	Procuration
s. 192(1), (3) and (4)	Procuring unlawful carnal knowledge of a person by threats, intimidation or drugs
s. 199	Abortion
s. 278 (as read with s. 282)	Wilful murder
s. 279 (as read with s. 282)	Murder
s. 280 (as read with s. 287)	Manslaughter
s. 281 (as read with s. 287)	Killing on provocation
s. 281A (as read with s. 287A)	Infanticide
s. 283	Attempt to murder
s. 288	Procuring, inducing or aiding suicide

Provision	Description of offence
s. 290	Killing an unborn child
s. 292	Disabling in order to commit an indictable offence or facilitate the flight of an offender
s. 293	Stupefying in order to commit an indictable offence or facilitate the flight of an offender
s. 294	Acts intended to maim, disfigure or disable, do grievous bodily harm, or resist or prevent arrest
s. 294A	Offences relating to dangerous goods on aircraft
s. 295	Preventing or obstructing escape or rescue from a wreck
s. 297	Grievous bodily harm
s. 301(1)	Unlawful wounding
s. 301(2)	Unlawful administration of poison etc., with intent to injure or annoy
s. 304	Acts or omissions causing bodily harm or danger
s. 305	Setting dangerous things for people
s. 313	Common assaults
s. 317	Assaults occasioning bodily harm
s. 317A	Assaults with intent
s. 318	Serious assaults
s. 318A	Assaulting or threatening a member of the crew of an aircraft
s. 320	Child under 13: Sexual offences against
s. 321	Child of or over 13 and under 16: Sexual offences against
s. 321A	Child under 16: Sexual relationship with
s. 322	Child of or over 16: Sexual offences against by person in authority etc.
s. 323	Indecent assault
s. 324	Aggravated indecent assault
s. 325	Sexual penetration without consent
s. 326	Aggravated sexual penetration without consent
s. 327	Sexual coercion
s. 328	Aggravated sexual coercion

Provision	Description of offence
s. 329	Relatives and the like: Sexual offences by
s. 330	Incapable person: Sexual offences against
s. 331B	Sexual servitude
s. 331C	Conducting business involving sexual servitude
s. 331D	Deceptive recruiting for commercial sexual services
s. 332	Kidnapping
s. 333	Deprivation of liberty
s. 336	Procuring apprehension or detention of persons not suffering from mental illness or impairment
s. 337	Unlawful detention or custody of persons who are mentally ill or impaired
s. 338A	Threats with intent to influence
s. 338B	Threats
s. 338C	False statements as to the existence of threats or plans to harm persons or property
s. 343	Child stealing
s. 344	Desertion of a child
s. 392	Robbery
s. 393	Assault with intent to rob
s. 396	Demanding property with threats with intent to steal
s. 397	Demanding property with threats with intent to extort or gain
s. 399	Procuring execution, destruction etc., of documents by violence or restraint or by threats
s. 444	Criminal damage
s. 449	Casting away, destroying or endangering vessels
s. 451	Obstructing or damaging railways
s. 451A	Endangering the safe use of aircraft
s. 451B	Unlawful interference with mechanism of aircraft
s. 454	Causing explosion likely to do serious damage to property
s. 455	Attempting to cause explosion likely to do serious damage to property

Provision	Description of offence
s. 456	Attempts to damage or obstruct mines
s. 457	Interfering with marine signals
s. 458	Interfering with navigation works
<i>[Part 1 inserted by No. 48 of 1991 s. 10; amended by No. 14 of 1992 s. 15(2); No. 82 of 1994 s. 13(4)(a); No. 69 of 1996 s. 31; No. 15 of 1998 s. 6(1); No. 23 of 2001 s. 10(3); No. 3 of 2002 s. 41(3); No. 4 of 2004 s. 24, 26 and 61(6).]</i>	

Part 2 — Offences under the *Road Traffic Act 1974*

[Heading inserted by No. 48 of 1991 s. 10.]

Provision	Description of offence
s. 54	Failure to stop when a vehicle is involved in an accident
s. 56	Failure to report an accident involving a vehicle whereby bodily injury is caused
s. 57	Failure of the owner etc., to identify the driver or person in charge or control of a vehicle involved in an accident
s. 59	Dangerous driving causing death or grievous bodily harm
s. 59A	Dangerous driving causing bodily harm
s. 60	Reckless driving
s. 61	Dangerous driving

[Part 2 inserted by No. 48 of 1991 s. 10.]

[Part 3 repealed by No. 70 of 2004 s. 82.]

Part 4 — Offences under the *Children and Community Services Act 2004*

[Heading inserted by No. 34 of 2004 s. 251.]

Provision	Description of offence
s. 101(1)	Failing to protect child from harm
s. 102	Leaving child unsupervised in vehicle

[Part 4 inserted by No. 34 of 2004 s. 251.]

Part 5 — Offences under the *Misuse of Drugs Act 1981*

[Heading inserted by No. 48 of 1991 s. 10.]

Provision	Description of offence
s. 6(1)	Indictable offences concerned with prohibited drugs
s. 7(1)	Indictable offences concerned with prohibited plants
s. 33(1)	Attempting to commit an indictable offence under section 6(1) or 7(1)
s. 33(2)	Conspiring with another to commit an indictable offence under section 6(1) or 7(1)
s. 33(3)	Inciting another to commit, or becoming an accessory after the fact to, a crime under section 6(1) or 7(1)

[Part 5 inserted by No. 48 of 1991 s. 10; amended by No. 62 of 2004 s. 9(2).]

[The Third Schedule repealed by No. 70 of 1988 s. 44.]

The Fourth Schedule

[Section 57]

Column 1	Column 2
Name of Department or Officer	Names of Certifying Officers
The Commissioners of the Treasury	Any Commissioner, Secretary, or Assistant Secretary of the Treasury
The Commissioners for executing the office of Lord High Admiral	Any of the Commissioners for executing the office of Lord High Admiral or either of the Secretaries to the said Commissioners
Secretaries of State	Any Secretary or Under Secretary of State
Committee of Privy Council for Trade	Any member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Committee
The Poor Law Board	Any Commissioner of the Poor Law Board, or any Secretary or Assistant Secretary of the said board.

The Fifth Schedule

[Section 61]

Column 1	Column 2
Name of Officer, Department, Body or Board	Names of Certifying Officers
The Governor	The Governor or his Private Secretary
The Governor in Executive Council	The Clerk of the Executive Council
The Legislative Council or Legislative Assembly	The Clerk or Clerk Assistant
Any department of the Public Service	The chief executive officer of that department
Any body, whether incorporated or not, that is established for a public purpose by a written law	The chief executive officer, the chief employee, the chairman or the secretary (whichever is relevant) of the body
The Police Force	The Commissioner of Police

[The Fifth Schedule amended by No. 8 of 1925 s. 2; No. 6 of 2003 s. 85(2); No. 28 of 2006 s. 37.]

The Sixth Schedule

[Heading inserted by No. 16 of 1956.]

[s. 47(1a)]

Western Australia

Evidence Act 1906

(In the (a))

(b)

IN THE MATTER of (c) by

..... against

.....

I of

....., a fingerprint expert

attached to the (d)

make oath and say as follows —

1. I have examined the fingerprint card, now produced and shown to me marked “A”. The fingerprints on the card are identical with those on a fingerprint card, portion of the records of the (d) being the fingerprints of one alias
.....

2. According to those records, which I believe to be accurate, the said has been convicted of the offences set out below, namely —

(Here insert description of offences, the courts in which the convictions took place and the dates of the convictions.)

3. From an examination of those records I believe that the person referred to as having been convicted, in the document(s) now shown to me and marked respectively “B” (“C”, “D”, etc.), is identical with the person whose fingerprints are on the card marked “A”.

Sworn at
this day of
..... 20 . }

Before me

.....

A person having authority to take affidavits in

.....

((a) Designation of court) ((b) Parties) ((c) Description of legal proceedings, e.g. “an action”, “a prosecution notice”, “an indictment”) ((d) Designation of department)

[The Sixth Schedule inserted by No. 16 of 1956; amended by No. 84 of 2004 s. 80.]

Schedule 7

(Section 106A)

[Heading inserted by No. 36 of 1992 s. 10.]

Part A

[Heading inserted by No. 36 of 1992 s. 10.]

1. (1) A proceeding comes within the provisions of this Schedule if —
 - (a) it is a proceeding in which a person stands charged with an offence under a section or Chapter of *The Criminal Code* mentioned in Part B or C or under a repealed Code section or a section of the *Prostitution Act 2000* mentioned in Part B —
 - (i) whether as a single offence or together with any other offence as an additional or alternative count; and
 - (ii) whether or not the person is liable on the charge to be found guilty of any other offence;
 - and
 - (b) the complainant was a child on the day on which proceedings for the offence were commenced; and
 - (c) in the case of a proceeding for an offence mentioned in Part C or under a repealed Code section, the accused is a person to whom this paragraph applies.
- (2) In subclause (1) —

“repealed Code section” means a repealed section of *The Criminal Code* that, before it was repealed, enacted an offence constituted by acts or omissions that are substantially the same as the acts or omissions that constitute an offence under a section or Chapter of *The Criminal Code* that is mentioned in Part B or C, as the case requires.
2. A proceeding also comes within the provisions of the Schedule if it is an application under Part 4 or 5 of the *Children and Community Services Act 2004*.
3. A proceeding also comes within the provisions of the Schedule if it is a proceeding by way of appeal from a decision made, or a penalty imposed, in any proceeding that comes within clause 1 or 2.

4. Clause 1(1)(c) applies to —
- (a) a parent, step-parent, grandparent, step-grandparent, brother, sister, step-brother, step-sister, uncle, aunt, nephew or niece of the complainant and a child of any uncle or aunt of the complainant;
 - (b) a person who is or was, at the time when the offence was committed, living in the same household as the complainant; or
 - (c) a person who at any time had the care of, or exercised authority over, the complainant in the household on a regular basis,

and it is immaterial whether a relationship referred to in paragraph (a) is of the whole blood or of the half blood.

[Part A inserted by No. 36 of 1992 s. 10; amended by No. 17 of 2000 s. 64; No. 71 of 2000 s. 30; No. 34 of 2004 s. 251; No. 46 of 2004 s. 29.]

Part B

[Heading inserted by No. 17 of 2000 s. 64.]

Chapter or Section	Matter to which Chapter or section relates
<i>The Criminal Code</i>	
181	Carnal knowledge of animal
186	Occupier or owner allowing certain persons to be on premises for unlawful carnal knowledge
191	Procuration
192	Procuring person to have unlawful carnal knowledge by threats, fraud, or administering drugs
XXXI	Sexual offences
<i>Prostitution Act 2000</i>	
5	Seeking prostitute in or in view or within hearing of public place
6	Seeking client in or in view or within hearing of public place
14(a)	Acting as a prostitute while a child
15	Acting as a prostitute for a child
16	Causing, permitting, or seeking to induce child to act as prostitute

Chapter or Section	Matter to which Chapter or section relates
17	Obtaining payment for prostitution by a child
18	Agreement for prostitution by a child
20	Prostitution at place where child present
21	Allowing child to be at place involving prostitution

[Part B inserted by No. 17 of 2000 s. 64; amended by No. 3 of 2002 s. 35(2).]

Part C

[Heading inserted by No. 36 of 1992 s. 10.]

Chapter or Section	Matter to which Chapter or section relates
XXVIII	Homicide; suicide; concealment of birth
292	Disabling in order to commit indictable offence
293	Stupefying in order to commit indictable offence
294	Acts intended to cause grievous bodily harm or prevent arrest
294A	Dangerous goods on aircraft
297	Grievous bodily harm
301	Wounding and similar acts
304	Acts or omissions causing bodily harm or danger
313	Common assaults
317	Assaults occasioning bodily harm
317A	Assaults with intent
318	Serious assaults
332	Kidnapping
333	Deprivation of liberty
347	Child stealing

[Part C inserted by No. 36 of 1992 s. 10; amended by No. 82 of 1994 s. 13(4)(b); No. 4 of 2004 s. 24; No. 84 of 2004 s. 41 and 82.]

Notes

- ¹ This is a compilation of the *Evidence Act 1906* and includes the amendments made by the other written laws referred to in the following table^{1a, 8, 9}. The table also contains information about any reprint.

Compilation table

Short title	Number and year	Assent	Commencement
<i>Evidence Act 1906</i>	28 of 1906 (6 Edw. VII No. 28)	14 Dec 1906	14 Dec 1906
<i>Evidence Act Amendment Act 1913</i>	16 of 1913 (4 Geo. V No. 16)	30 Dec 1913	30 Dec 1913
<i>Evidence Act Amendment Act 1921</i>	19 of 1921 (12 Geo. V No. 19)	29 Nov 1921	29 Nov 1921
<i>Ministers' Titles Act 1925</i> s. 2	8 of 1925 (16 Geo. V No. 8)	24 Sep 1925	24 Sep 1925
Reprint of the <i>Evidence Act 1906</i> in Appendix Session Volume 1928 (includes amendments listed above)			
<i>Evidence Act Amendment Act 1930</i>	34 of 1930 (21 Geo. V No. 34)	22 Dec 1930	22 Dec 1930
<i>Matrimonial Causes and Personal Status Code 1948</i> s. 3(2)	73 of 1948 (12 and 13 Geo. VI No. 73)	4 Mar 1949	1 Jan 1950 (see s. 1 and <i>Gazette</i> 19 Oct 1949 p. 2499)
Reprint of the <i>Evidence Act 1906</i> approved 13 Jun 1956 in Volume 10 of Reprinted Acts (includes amendments listed above)			
<i>Evidence Act Amendment Act 1956</i>	16 of 1956 (5 Eliz. II No. 16)	26 Oct 1956	26 Oct 1956
<i>Evidence Act Amendment Act 1960</i>	10 of 1960 (9 Eliz. II No. 10)	6 Oct 1960	6 Oct 1960
<i>Evidence Act Amendment Act 1962</i>	12 of 1962 (11 Eliz. II No. 12)	1 Oct 1962	1 Oct 1962

Short title	Number and year	Assent	Commencement
<i>Evidence Act Amendment Act 1963</i>	54 of 1963 (12 Eliz. II No. 54)	17 Dec 1963	1 Jul 1964 (see s. 2 and <i>Gazette</i> 26 Jun 1964 p. 2525)
<i>Evidence Act Amendment Act 1964</i>	11 of 1964 (13 Eliz. II No. 11)	2 Oct 1964	2 Oct 1964
<i>Decimal Currency Act 1965</i>	113 of 1965	21 Dec 1965	Act other than s. 4-9: 21 Dec 1965 (see s. 2(1)); s. 4-9: 14 Feb 1966 (see s. 2(2))
Reprint of the <i>Evidence Act 1906</i> approved 4 Aug 1966 (not in a Volume) (includes amendments listed above)			
<i>Evidence Act Amendment Act 1966</i>	20 of 1966	17 Oct 1966	1 Feb 1967 (see s. 2 and <i>Gazette</i> 20 Jan 1967 p. 89)
<i>Evidence Act Amendment Act 1967</i>	23 of 1967	27 Oct 1967	27 Oct 1967
<i>Evidence Act Amendment Act (No. 2) 1967</i>	69 of 1967	5 Dec 1967	5 Dec 1967
Reprint of the <i>Evidence Act 1906</i> approved 2 Jul 1971 (includes amendments listed above)			
<i>Evidence Act Amendment Act 1971</i>	41 of 1971	10 Dec 1971	10 Dec 1971
<i>Evidence Act Amendment Act 1975</i>	61 of 1975	24 Oct 1975	24 Oct 1975
<i>Evidence Act Amendment Act (No. 2) 1975</i>	90 of 1975	20 Nov 1975	20 May 1977 (see s. 2 and <i>Gazette</i> 20 May 1977 p. 1489)
<i>Acts Amendment (Expert Evidence) Act 1976 Pt. I</i>	111 of 1976	25 Nov 1976	25 Nov 1976
<i>Evidence Act Amendment Act (No. 2) 1976</i>	142 of 1976	13 Dec 1976	13 Dec 1976
<i>Evidence Act Amendment Act 1976</i>	145 of 1976	13 Dec 1976	20 May 1977 (see s. 2 and <i>Gazette</i> 20 May 1977 p. 1489)
Reprint of the <i>Evidence Act 1906</i> approved 4 Nov 1977 (includes amendments listed above)			
<i>Evidence Act Amendment Act 1978</i>	33 of 1978	21 Aug 1978	21 Aug 1978
<i>Evidence Act Amendment Act (No. 2) 1978</i>	111 of 1978	12 Dec 1978	12 Dec 1978

Short title	Number and year	Assent	Commencement
<i>Acts Amendment (Master, Supreme Court) Act 1979 Pt. X</i>	67 of 1979	21 Nov 1979	11 Feb 1980 (see s. 2 and <i>Gazette</i> 8 Feb 1980 p. 383)
Reprint of the Evidence Act 1906 approved 28 Jan 1981 (includes amendments listed above)			
<i>Companies (Consequential Amendments) Act 1982 s. 28</i>	10 of 1982	14 May 1982	1 Jul 1982 (see s. 2(1) and <i>Gazette</i> 25 Jun 1982 p. 2079)
<i>Acts Amendment (Betting and Gaming) Act 1982 Pt. IV</i>	108 of 1982	7 Dec 1982	31 Dec 1982 (see s. 2 and <i>Gazette</i> 31 Dec 1982 p. 4968)
<i>Artificial Conception Act 1985 s. 8</i>	14 of 1985	12 Apr 1985	1 Jul 1985 (see s. 2 and <i>Gazette</i> 28 Jun 1985 p. 2291)
<i>Acts Amendment (Sexual Assaults) Act 1985 Pt. III</i>	74 of 1985	20 Nov 1985	1 Apr 1986 (see s. 2 and <i>Gazette</i> 28 Feb 1986 p. 605)
Reprint of the Evidence Act 1906 as at 14 Aug 1986 (includes amendments listed above)			
<i>Acts Amendment (Recording of Depositions) Act 1986 Pt. III</i>	81 of 1986	9 Dec 1986	1 Aug 1987 (see s. 2 and <i>Gazette</i> 10 Jul 1987 p. 2607)
<i>Evidence Amendment Act 1987</i>	66 of 1987	1 Dec 1987	s. 1 and 2: 1 Dec 1987; Act other than s. 1, 2, 9 and 10: 8 Apr 1988 (see s. 2 and <i>Gazette</i> 8 Apr 1988 p. 1107); s. 9 and 10: 8 Mar 1991 (see s. 2 and <i>Gazette</i> 8 Mar 1991 p. 1030)
<i>Criminal Law Amendment Act 1988 Pt. 3</i>	70 of 1988	15 Dec 1988	1 Feb 1989 (see s. 2(1) and <i>Gazette</i> 20 Jan 1989 p. 110)
<i>Evidence Amendment Act 1989</i>	34 of 1989	22 Dec 1989	s. 1 and 2: 22 Dec 1989; Act other than s. 1 and 2: 8 Mar 1991 (see s. 2 and <i>Gazette</i> 8 Mar 1991 p. 1029)
<i>Evidence Amendment Act 1990</i> ²	47 of 1990	4 Dec 1990	4 Dec 1990 (see s. 2)
<i>Children's Court of Western Australia Amendment Act (No. 2) 1991 s. 23</i>	15 of 1991	21 Jun 1991	9 Aug 1991 (see s. 2(2) and <i>Gazette</i> 9 Aug 1991 p. 4101)

Short title	Number and year	Assent	Commencement
<i>Acts Amendment (Evidence) Act 1991 Pt. 2</i>	48 of 1991	17 Dec 1991	31 Mar 1992 (see s. 2 and <i>Gazette</i> 24 Mar 1992 p. 1317)
<i>Acts Amendment (Sexual Offences) Act 1992 Pt. 4</i>	14 of 1992	17 Jun 1992	1 Aug 1992 (see s. 2 and <i>Gazette</i> 28 Jul 1992 p. 3671)
Reprint of the Evidence Act 1906 as at 1 Aug 1992 (includes amendments listed above)			
<i>Acts Amendment (Evidence of Children and Others) Act 1992 Pt. 2</i>	36 of 1992	22 Sep 1992	16 Nov 1992 (see s. 2 and <i>Gazette</i> 6 Nov 1992 p. 5415)
<i>Acts Amendment (Jurisdiction and Criminal Procedure) Act 1992 Pt. 6</i>	53 of 1992	9 Dec 1992	9 Dec 1992 (see s. 2)
<i>Financial Administration Legislation Amendment Act 1993 s. 13</i>	6 of 1993	27 Aug 1993	1 Jul 1993 (see s. 2(1))
<i>Acts Amendment (Ministry of Justice) Act 1993 Pt. 9</i>	31 of 1993	15 Dec 1993	1 Jul 1993 (see s. 2)
<i>Statutes (Repeals and Minor Amendments) Act 1994 s. 4</i>	73 of 1994	9 Dec 1994	9 Dec 1994 (see s. 2)
<i>Criminal Law Amendment Act 1994 s. 13(4)</i>	82 of 1994	23 Dec 1994	20 Jan 1995 (see s. 2(2))
<i>Stamp Amendment Act 1995 s. 9</i>	41 of 1995	24 Oct 1995	24 Oct 1995 (see s. 2)
<i>Coroners Act 1996 s. 61</i>	2 of 1996	24 May 1996	7 Apr 1997 (see s. 2 and <i>Gazette</i> 18 Mar 1997 p. 1529)
<i>Local Government (Consequential Amendments) Act 1996 s. 4</i>	14 of 1996	28 Jun 1996	1 Jul 1996 (see s. 2(1))
Reprint of the Evidence Act 1906 as at 10 Sep 1996 (includes amendments listed above except those in the <i>Coroners Act 1996</i>)			
<i>Financial Legislation Amendment Act 1996 s. 64</i>	49 of 1996	25 Oct 1996	25 Oct 1996 (see s. 2(1))
<i>Mental Health (Consequential Provisions) Act 1996 Pt. 7</i>	69 of 1996	13 Nov 1996	13 Nov 1997 (see s. 2)
<i>Statutes (Repeals and Minor Amendments) Act 1997 s. 57</i>	57 of 1997	15 Dec 1997	15 Dec 1997 (see s. 2(1))

Evidence Act 1906

Short title	Number and year	Assent	Commencement
<i>Acts Amendment (Abortion) Act 1998 s. 6</i> ¹⁰	15 of 1998	26 May 1998	26 May 1998 (see s. 2)
<i>Acts Repeal and Amendment (Births, Deaths and Marriages Registration) Act 1998 s. 12</i>	40 of 1998	30 Oct 1998	14 Apr 1999 (see s. 2 and <i>Gazette</i> 9 Apr 1999 p. 1433)
<i>Acts Amendment (Video and Audio Links) Act 1998 Pt. 3</i> ⁷	48 of 1998	19 Nov 1998	18 Jan 1999 (see s. 2 and <i>Gazette</i> 15 Jan 1999 p. 109)
<i>Surveillance Devices Act 1998 s. 46</i>	56 of 1998	11 Jan 1999	22 Nov 1999 (see s. 2 and <i>Gazette</i> 22 Nov 1999 p. 5843)
<i>Acts Amendment and Repeal (Financial Sector Reform) Act 1999 s. 78</i>	26 of 1999	29 Jun 1999	1 Jul 1999 (see s. 2(1) and <i>Gazette</i> 30 Jun 1999 p. 2905)
Reprint of the Evidence Act 1906 as at 22 Nov 1999 (includes amendments listed above)			
<i>Prostitution Act 2000 s. 64</i>	17 of 2000	22 Jun 2000	29 Jul 2000 (see s. 2 and <i>Gazette</i> 28 Jul 2000 p. 3987)
<i>Criminal Property Confiscation (Consequential Provisions) Act 2000 s. 14</i> ¹¹	69 of 2000	6 Dec 2000	1 Jan 2001 (see s. 2 and <i>Gazette</i> 29 Dec 2000 p. 7903)
<i>Acts Amendment (Evidence) Act 2000 Pt. 2</i>	71 of 2000	6 Dec 2000	3 Jan 2001
Reprint of the Evidence Act 1906 as at 4 Jan 2001 (includes amendments listed above)			
<i>Criminal Law Amendment Act 2001 s. 10(3)</i>	23 of 2001	26 Nov 2001	24 Dec 2001
<i>Acts Amendment (Lesbian and Gay Law Reform) Act 2002 s. 35(2) and 41(3)</i>	3 of 2002	17 Apr 2002	21 Sep 2002 (see s. 2 and <i>Gazette</i> 20 Sep 2002 p. 4693)
<i>Criminal Law (Procedure) Amendment Act 2002 Pt. 4 Div. 5</i>	27 of 2002	25 Sep 2002	27 Sep 2002 (see s. 2 and <i>Gazette</i> 27 Sep 2002 p. 4875)
<i>Taxation Administration (Consequential Provisions) Act 2002 s. 11</i> ¹²	45 of 2002	20 Mar 2003	1 Jul 2003 (see s. 2(1) and <i>Gazette</i> 27 Jun 2003 p. 2383)

Short title	Number and year	Assent	Commencement
<i>Transfer of Land Amendment Act 2003</i> s. 85	6 of 2003	25 Mar 2003	3 May 2003 (see s. 2 and <i>Gazette</i> 2 May 2003 p. 1491)
<i>Coroners Amendment Act 2003</i> s. 15	15 of 2003	17 Apr 2003	16 Jul 2003 (see s. 2 and <i>Gazette</i> 15 Jul 2003 p. 2831)
Reprint 12: The Evidence Act 1906 as at 10 Oct 2003 (includes amendments listed above)			
<i>Acts Amendment and Repeal (Courts and Legal Practice) Act 2003</i> s. 34	65 of 2003	4 Dec 2003	1 Jan 2004 (see s. 2 and <i>Gazette</i> 30 Dec 2003 p. 5722)
<i>Statutes (Repeals and Minor Amendments) Act 2003</i> s. 142(2)	74 of 2003	15 Dec 2003	15 Dec 2003 (see s. 2)
<i>Criminal Code Amendment Act 2004</i> s. 24, 26, 58 and 61(6)	4 of 2004	23 Apr 2004	21 May 2004 (see s. 2)
<i>Evidence Amendment Act 2004</i>	24 of 2004	7 Oct 2004	s. 1 and 2: 7 Oct 2004; Act other than s. 1 and 2: 18 Jun 2005 (see s. 2 and <i>Gazette</i> 17 Jun 2005 p. 2658)
<i>Children and Community Services Act 2004</i> s. 251 (Sch. 2 cl. 9)	34 of 2004 (as amended by No. 84 of 2004 s. 85(4))	20 Oct 2004	Sch. 2 cl. 9(1), (3) and (4): 1 Mar 2006 (see s. 2 and <i>Gazette</i> 14 Feb 2006 p. 695); Sch. 2 cl. 9(2): 11 Mar 2006 (see s. 2 and <i>Gazette</i> 10 Mar 2006 p. 987)
<i>Criminal Law Amendment (Sexual Assault and Other Matters) Act 2004</i> Pt. 3 and 4 ¹³	46 of 2004	9 Nov 2004	1 Jan 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7130)
<i>Courts Legislation Amendment and Repeal Act 2004</i> Pt. 11	59 of 2004	23 Nov 2004	1 May 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7128)
<i>Misuse of Drugs Amendment Act 2004</i> s. 9(2)	62 of 2004	24 Nov 2004	1 Jan 2005 (see s. 2 and <i>Gazette</i> 10 Dec 2004 p. 5965)
<i>Criminal Law Amendment (Simple Offences) Act 2004</i> s. 19(3) and 82	70 of 2004	8 Dec 2004	31 May 2005 (see s. 2 and <i>Gazette</i> 14 Jan 2005 p. 163)

Short title	Number and year	Assent	Commencement
<i>Criminal Procedure and Appeals (Consequential and Other Provisions) Act 2004</i> Pt. 8, s. 80, 82 and 85 ¹⁴	84 of 2004	16 Dec 2004	2 May 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7129 (correction in <i>Gazette</i> 7 Jan 2005 p. 53))
Reprint 13: The Evidence Act 1906 as at 1 Jul 2005 (includes amendments listed above except those in the <i>Children and Community Services Act 2004</i>)			
<i>Oaths, Affidavits and Statutory Declarations (Consequential Provisions) Act 2005</i> Pt. 12	24 of 2005	2 Dec 2005	1 Jan 2006 (see s. 2(1) and <i>Gazette</i> 23 Dec 2005 p. 6244)
<i>Machinery of Government (Miscellaneous Amendments) Act 2006</i> Pt. 3 Div. 2 ¹⁵	28 of 2006	26 Jun 2006	1 Jul 2006 (see s. 2 and <i>Gazette</i> 27 Jun 2006 p. 2347)
<i>Financial Legislation Amendment and Repeal Act 2006</i> s. 4	77 of 2006	21 Dec 2006	1 Feb 2007 (see s. 2(1) and <i>Gazette</i> 19 Jan 2007 p. 137)
<i>Child Care Services Act 2007</i> Pt. 7 Div. 3	19 of 2007	3 Jul 2007	10 Aug 2007 (see s. 2(b) and <i>Gazette</i> 9 Aug 2007 p. 4071)

Reprint 14: The Evidence Act 1906 as at 8 Feb 2008 (includes amendments listed above)

^{1a} On the date as at which this compilation was prepared, provisions referred to in the following table had not come into operation and were therefore not included in this compilation. For the text of the provisions see the endnotes referred to in the table.

Provisions that have not come into operation

Short title	Number and year	Assent	Commencement
<i>Criminal Law and Evidence Amendment Act 2008</i> Pt. 5 ¹⁶	2 of 2008	12 Mar 2008	To be proclaimed (see s. 2)
<i>Acts Amendment (Justice) Act 2008</i> Pt. 11 ¹⁷	5 of 2008	31 Mar 2008	To be proclaimed (see s. 2(d))

² The *Evidence Amendment Act 1990* s. 4(2) reads as follows:

“

- (2) Subsection (2a) inserted in section 11 of the principal Act by subsection (1) applies to a certificate given under subsection (2) of that section in respect of evidence given on or after the day on which this section comes into operation.

”.

³ The *Interpretation Act 1918* was repealed by the *Interpretation Act 1984*.

⁴ The *Companies (Western Australia) Code* was superseded by the Corporations Law which, on 15 July 2001, was superseded by the *Corporations Act 2001* of the Commonwealth. See Part 13 Division 2 of the *Corporations (Western Australia) Act 1990* and Part 2 of the *Corporations (Ancillary Provisions) Act 2001* respectively.

⁵ Largely, but not completely, superseded by the Corporations Law which, on 15 July 2001, was superseded by the *Corporations Act 2001* of the Commonwealth.

⁶ The *Companies Act 1961* was superseded by the *Companies (Western Australia) Code* which has also been superseded (see endnote 4); see section 18 of the *Companies (Application of Laws) Act 1981*.

⁷ The *Acts Amendment (Video and Audio Links) Act 1998* s. 3 reads as follows:

“

3. Power to use certain technology

- (1) Nothing in the amended provisions is to be taken as preventing the use by a court or other person acting judicially of a video link or audio link (as those terms are defined in section 121 of the *Evidence Act 1906*) in any case where the court or person thinks fit and where the use of the video link or audio link would not be contrary to law.

- (2) In subsection (1) —

“**amended provisions**” means —

- (a) *The Criminal Code*;
- (b) the *Evidence Act 1906*;
- (c) the *Justices Act 1902*; and
- (d) the *Sentencing Act 1995*,

as amended by this Act.

”.

⁸ The amendment in the *Land Information Authority Act 2006* s. 133 to the Fifth Schedule is not included because the entry it sought to amend had been amended by the *Machinery of Government (Miscellaneous Amendments) Act 2006* s. 37.

⁹ The *Evidence Act Amendment Act 1974* is not included as it was repealed by the *Evidence Amendment Act 1987* s. 10.

¹⁰ The *Acts Amendment (Abortion) Act 1998* s. 6(2) reads as follows:

“

- (2) In relation to an offence committed before the commencement of this Act, the *Evidence Act 1906* applies as if subsection (1) had not been enacted.

”

¹¹ The *Criminal Property Confiscation (Consequential Provisions) Act 2000* s. 14(2) reads as follows:

“

- (2) Despite the amendment effected by subsection (1), the *Evidence Act 1906* as in force before the commencement of this Act continues to apply on and after that commencement in relation to an embargo notice that has effect under section 8 of this Act.

”

¹² The *Taxation Administration (Consequential Provisions) Act 2002* s. 33 and 34 read as follows:

“

33. Definitions

In this Part —

“**commencement day**” means the day on which the *Taxation Administration Act 2003* comes into operation;

“**old Act**” means —

- (a) an Act repealed by section 5;
- (b) the old Stamp Act; or
- (c) section 41 of the *Metropolitan Region Town Planning Scheme Act 1959* as in force immediately before the commencement day;

“**old Stamp Act**” means the *Stamp Act 1921* as in force immediately before the commencement day;

“**substantive provisions**”, in relation to an old Act, means the provisions of the old Act other than those dealing with matters dealt with in the *Taxation Administration Act 2003*.

34. General transitional arrangements

- (1) Section 37(1) of the *Interpretation Act 1984*, except paragraphs (a) and (b), does not apply in relation to the repeal of an old Act.

- (2) The repeal of an old Act does not, unless the contrary intention appears —
- (a) affect any right, interest, title, power or privilege created, acquired, accrued, established or exercisable or any status or capacity existing prior to the repeal;
 - (b) affect any duty, obligation, liability, or burden of proof imposed, created, or incurred prior to the repeal;
 - (c) subject to section 11 of *The Criminal Code* and section 10 of the *Sentencing Act 1995*, affect any penalty or forfeiture incurred or liable to be incurred in respect of an offence committed against the old Act; or
 - (d) affect any investigation, legal proceeding or remedy in respect of any such right, interest, title, power, privilege, status, capacity, duty, obligation, liability, burden of proof, penalty or forfeiture.
- (3) Subject to subsections (4) and (5) —
- (a) a right, interest, title, power, privilege, duty, obligation, liability or burden of proof referred to in subsection (2)(a) or (b) may be exercised or enforced;
 - (b) a penalty or forfeiture referred to in subsection (2)(c) may be imposed and enforced; and
 - (c) an investigation, legal proceeding or remedy referred to in subsection (2)(d) may be instituted, continued, or enforced,
- as if the substantive provisions of the relevant old Act —
- (d) had not been repealed;
 - (e) were a taxation Act for the purposes of the *Taxation Administration Act 2003*; and
 - (f) had been amended to make any modifications necessary for this section to have effect.
- (4) If an objection, appeal or other legal proceeding (the “**action**”) was instituted under an old Act and was not finally determined before the commencement day —
- (a) the action may be continued;
 - (b) any requirement to pay interest on an amount of tax determined in the action to have been overpaid applies and may be enforced;
 - (c) any penalty may be imposed and enforced; and
 - (d) any decision, order or determination made in the action has effect, and may be enforced,
- as if this Act and the taxation Acts had not commenced.

- (5) If the time limited by an old Act for doing anything is longer than the time limited by a taxation Act for doing the equivalent thing under that Act, then in relation to a matter to which subsection (3) applies, the time limited under the old Act applies in relation to the doing of the thing under the taxation Act.
- (6) If the time limited by an old Act for commencing proceedings in relation to an offence under that Act is shorter than the 5 year period limited by section 111 of the *Taxation Administration Act 2003*, then despite section 111, proceedings in relation to an offence under the old Act (including an offence under a provision of the old Act that is continued in force under this Part) cannot be commenced after the expiry of the shorter period provided for by the old Act.
- (7) In this section a reference, in relation to the *Stamp Act 1921*, to the repeal of the old Act is a reference to the amendment of the Act by the *Stamp Amendment Act 2003*.

”

¹³ The *Criminal Law Amendment (Sexual Assault and Other Matters) Act 2004* Pt. 4 reads as follows:

“

Part 4 — Transitional and validation

30. Validation of payments

- (1) In this section —
“**fee regulations**” means regulations 6(2) and 13 of the *Evidence (Witnesses’ and Interpreters’ Fees and Expenses) Regulations 1976*.
- (2) Any payment purporting to have been made under the fee regulations before the coming into operation of section 28 is taken to have been, and to have always been, as valid as it would have been if section 28 had come into operation before the fee regulations were made.

”

¹⁴ The amendment in the *Criminal Procedure and Appeals (Consequential and Other Provisions) Act 2004* s. 78 to amend s. 56(1) is not included because the subsection it sought to amend was replaced by s. 82 (Sch. 2 it. 118) of the same Act.

¹⁵ The amendment in the *Machinery of Government (Miscellaneous Amendments) Act 2006* s. 36 to s. 106A is not included because the paragraph it sought to amend had been amended by the *Children and Community Services Act 2004* Sch. 2 cl. 9.

¹⁶ On the date as at which this compilation was prepared, the *Criminal Law and Evidence Amendment Act 2008* Pt. 5 had not come into operation. It reads as follows:

“

“Part 5 — Evidence Act 1906 amended

41. The Act amended in this Part

The amendments in this Part are to the *Evidence Act 1906*.

42. Section 36BE inserted and consequential amendments

- (1) After section 36BD the following section is inserted —

“

36BE. Expert evidence of child behaviour

- (1) This section applies to any proceedings for a sexual offence in respect of a complainant who was under the age of 18 years at the time of the alleged offence.
- (2) Evidence by an expert on the subject of child behaviour about any or all of the following —
- (a) child development and behaviour generally;
 - (b) child development and behaviour in cases where children have been the victims of sexual offences,
- that is relevant to the proceedings is admissible in them notwithstanding that the evidence —
- (c) relates to a fact in issue or to an ultimate issue in the proceedings; or
 - (d) is a matter of common knowledge; or
 - (e) is relevant only to the credibility of the complainant.
- (3) If evidence described in subsection (2) is admitted in a trial by jury, this section does not affect any duty of the trial judge to warn the jury about any matter relating to the complainant’s evidence; but any such warning must be consistent with that evidence.

”.

- (2) Section 36A(1) is amended by inserting after “36BD” —

“ , 36BE ”.

- (3) Section 36A(2) is amended by deleting “and 36BC,” and inserting instead —

“ , 36BC and 36BE, ”.

43. Section 100A amended

After section 100A(7) the following subsection is inserted —

“

- (8) This section does not apply to a person who is tendered as a witness and who has a mental impairment, as that term is defined by section 8 of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

”

44. Section 106A amended

Section 106A is amended by inserting in the appropriate alphabetical position —

“

“**mental impairment**” has the meaning given to that term by section 8 of the *Criminal Law (Mentally Impaired Accused) Act 1996*;

”

45. Section 106B amended

- (1) Section 106B(1) is amended by deleting “subsection (2),” and inserting instead —

“ subsection (3), ”.

- (2) Section 106B(2) is repealed and the following subsections are inserted instead —

“

- (2) Irrespective of the person’s age, a person with a mental impairment may in any proceeding, if the person is competent under subsection (3), give evidence on oath or after making an affirmation.
- (3) A person referred to in subsection (1) or (2) is competent to take an oath or make an affirmation if in the opinion of the court or person acting judicially the person understands that —
- (a) the giving of evidence is a serious matter; and
 - (b) he or she in giving evidence has an obligation to tell the truth.

”

46. Section 106C replaced

Section 106C is repealed and the following section is inserted instead —

“

106C. Child under 12 and mentally impaired witness may give unsworn evidence

A person referred to in section 106B(1) or (2) who is not competent to give evidence under section 106B(3) may give evidence without taking an oath or making an affirmation if the court or person acting judicially forms the opinion, before the evidence is given, that the person is able to give an intelligible account of events which he or she has observed or experienced.

”

47. Section 106F amended

Section 106F(4) is amended by deleting “misdemeanour” and inserting instead —

“ crime ”.

48. Section 106HA amended

- (1) After section 106HA(1) the following subsection is inserted —

“

- (1a) Section 106HB applies to a visual recording of an interview with a person with a mental impairment conducted before or after the coming into operation of section 48 of the *Criminal Law and Evidence Amendment Act 2008* if —

- (a) the interview was conducted by a person of a prescribed class who had reason to believe that the person had, or may have, suffered physical or sexual abuse; and
- (b) the manner in which the interview was conducted and recorded meets the prescribed requirements to the prescribed extent.

”

- (2) Section 106HA(2) is repealed and the following subsection is inserted instead —

“

- (2) Section 106HB applies to a visual recording of an interview with a person with a mental impairment, or a child, whether or not the interview was conducted with the consent of a parent or guardian of the person or child.

”

- (3) Section 106HA(3) is amended by inserting after “child” —

“ , or a person with a mental impairment, ”.

49. Section 106HB amended

- (1) After section 106HB(1) the following subsection is inserted —

“

- (1a) A visually recorded interview with a person with a mental impairment is not to be admitted in the proceeding under subsection (1) unless the person is a special witness.

”

- (2) After section 106HB(6) the following subsection is inserted —

“

- (6a) If a visually recorded interview of a witness is admitted under subsection (1), then, while the recording is played to the court, the witness must not be present in court, or be visible or audible by closed-circuit television or by means of any similar technology to anyone in the court other than, in the case of a trial by jury, the judge.

”

- (3) After section 106HB(7) the following subsection is inserted —

“

- (8) Subsection (7)(c) does not prevent a judge from directing a jury about a breach of subsection (7)(c) by the accused or the accused’s counsel, if it is in the interests of justice to do so.

”

50. Section 106HC amended

Section 106HC(1) is amended as follows:

- (a) after paragraph (b) by inserting —

“

- (ba) prescribing classes of persons for the purposes of section 106HA(1a)(a) by reference to the offices or positions held by them, or their training or experience, or any combination of those criteria; and
- (bb) prescribing requirements to be met for the purposes of section 106HA(1a)(b), and the extent to which they are to be met, if section 106HB is to apply to a visual recording of an interview with a person with a mental impairment; and

”

- (b) in paragraph (c) by inserting after “child” —

”

- “ , or a person with a mental impairment, ”;
- (c) after each of paragraphs (a), (b), (c), (d), (e), (f) and (g) by inserting —
- “ and ”.

51. Section 106I amended

Section 106I(2) is amended by deleting “The defendant” and inserting instead —

“ The accused ”.

52. Section 106O amended

Section 106O(2) is amended by deleting “defendant” and inserting instead —

“ accused ”.

53. Section 106R amended

- (1) Section 106R(3)(a) is amended by deleting “(as defined in the *Criminal Law (Mentally Impaired Accused) Act 1996*)”.

- (2) After section 106R(4)(a) the following paragraph is inserted —

“

- (b) that the person have a communicator while he or she is giving evidence;

”.

- (3) After section 106R(4a) the following subsection is inserted —

“

- (4b) Where an arrangement under subsection (4)(b) is directed to be made, section 106F applies, with any necessary changes, as if the special witness were an affected child.

”.

- (4) After section 106R(7) the following subsections are inserted —

“

- (8) If in any proceeding before a jury for a serious sexual offence a person referred to in subsection (3a) does not wish to be declared to be a special witness or declines any arrangement that may be made under subsection (4) —

- (a) the person must not be questioned in the proceeding about the fact; and
- (b) neither the judge, the prosecutor, the accused nor the accused’s counsel must comment on the fact to the jury.

- (9) Subsection (8) does not prevent a judge from directing a jury about a breach of subsection (8) by the prosecutor, the accused or the accused's counsel, if it is in the interests of justice to do so.

”

54. Section 106RA amended

- (1) Section 106RA(1) is amended by deleting “the evidence” and inserting instead —

“

the whole of the evidence (including any cross-examination and re-examination)

”

- (2) Section 106RA(5) is repealed and the following subsection is inserted instead —

“

- (5) If an order is made under subsection (1), the order may include —
- (a) directions as to the conduct of the special hearing;
 - (b) directions, with or without conditions, as to the persons, or classes of persons, who are authorised to have possession of the visual recording of the evidence;
 - (c) directions and conditions as to the giving up of possession and as to the playing, copying or erasure of the recording.

”

55. Second Schedule amended

The Second Schedule is amended in Part 1 in the item relating to “s. 321A” by deleting the description of offence and inserting instead —

“ Persistent sexual conduct with child under 16 ”.

”

¹⁷ On the date as at which this compilation was prepared, the *Acts Amendment (Justice) Act 2008* Pt. 11 had not come into operation. It reads as follows:

“

Part 11 — Evidence Act 1906 amended

52. The Act amended in this Part

The amendments in this Part are to the *Evidence Act 1906*.

53. Section 119 replaced

Section 119 is repealed and the following section is inserted instead —

“

119. Service as a witness etc., payments for

- (1) In this section —
 - “**criminal proceedings**” includes an appeal in criminal proceedings;
 - “**eligible service**” has the meaning given in subsections (2) and (3);
 - “**inquest**” means an inquest held under the *Coroners Act 1996*;
 - “**liable person**”, in respect of any payment that has to be made under this section in respect of eligible service, means —
 - (a) if the eligible service is in criminal proceedings and the prosecution was commenced by or on behalf of —
 - (i) a local government; or
 - (ii) a statutory body, the local government or statutory body;
 - (b) in any other case, the State.
- (2) For the purposes of this section a person does eligible service if he or she is, or attends at any place in order to be, any of the following —
 - (a) a witness who is called by the prosecutor in criminal proceedings;
 - (b) a witness who is called by the accused person in criminal proceedings and who —
 - (i) is a child; or
 - (ii) is declared under section 106R to be a special witness;
 - (c) a witness in an inquest;
 - (d) an interpreter in criminal proceedings or an inquest;
 - (e) a person approved under section 106E or 106R(4)(a) in any proceeding in a court;
 - (f) a person appointed under section 106F in any proceeding in a court.
- (3) For the purposes of this section a person does eligible service if he or she does, or attends at any place in order to do, any of the following —
 - (a) participate in a programme to prepare —

- (i) children who may be witnesses; or
 - (ii) persons who are or may be declared under section 106R to be special witnesses,to give evidence in criminal proceedings or an inquest;
- (b) accompany and assist a child or person described in paragraph (a)(i) or (ii) in order to enable him or her —
 - (i) to attend a programme described in paragraph (a); or
 - (ii) to attend and be a witness in criminal proceedings or an inquest.
- (4) A person who does eligible service is entitled to be paid by the liable person the allowances and expenses that are prescribed by the regulations in respect of doing the eligible service.
- (5) If a person does eligible service for a period when he or she is employed by an employer under a contract of service, the employer must pay the person the earnings that he or she could reasonably expect to have been paid in that period under the contract, despite any breach of the contract caused by doing the eligible service.
Penalty: a fine of \$2 000.
- (6) An employer who in accordance with subsection (5) pays a person during any period when the person does eligible service is entitled to be paid by the liable person the fees in accordance with the regulations for the person's service, unless the employer is in a class of employer prescribed by the regulations.
- (7) If a person to whom subsection (5) applies is not paid under that subsection, the person is entitled to be paid by the liable person the fees in accordance with the regulations for the eligible service, unless the person is in a class of person prescribed by the regulations.
- (8) A person who does eligible service but to whom subsection (5) does not apply is entitled to be paid by the liable person the fees in accordance with the regulations for the service, unless the person is in a class of person prescribed by the regulations.
- (9) A claim to a liable person for a payment under this section must be made and determined under the regulations.
- (10) The Governor may make regulations prescribing all matters that are necessary or convenient to be prescribed for the purposes of this section including regulations —
 - (a) that confer a discretionary authority;

- (b) that require information in support of a claim to the State for a payment to be verified by a statutory declaration.
- (11) On the application of an accused person who calls a witness in criminal proceedings, the Attorney General may authorise the State to pay all or some of the amounts that would be payable under this section if the witness were called by the prosecutor in the proceedings.
- (12) Any amount paid under this section by the State is to be charged to the Consolidated Account.

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54. Section 121 amended

Section 121(2) is repealed and the following subsections are inserted instead —

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- (2) The court shall not make such a direction unless satisfied the video link or audio link is available or can reasonably be made available.
- (2a) The court shall not make such a direction if satisfied the direction is not in the interests of justice.

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Defined Terms

Defined Terms

[This is a list of terms defined and the provisions where they are defined.

The list is not part of the law.]

Defined Term	Provision(s)
a broadcast	36C(4)
accused	36A(1), 106A
Act	3
affected child	106A
application for leave	19A(1)
audio link	120(1)
Australasian colony	3
Australia	109(1), 115, 120(1)
authorised officer	50B(1)
authority	104A(5)
bank	3
bankers' books	3
broadcast	106MB(3)
business	79B
business day	50B(1)
business record	79B
child	106A
colony	3
complainant	19A(1), 36A(1), 36C(4)
corroboration warning	50(1)
counsel	106A
counselling communication	19A(1)
counsellor	19A(1)
counsels	19A(1), 19A(2)
court	3, 79B
derived	79B
disclose	19A(1)
DNA profile	50B(1)
document	3, 79B
examination	50B(1), 109(1)
examined copy	3
forensic scientist	50B(1)
<i>Gazette</i>	3
Government Printer	3
harm	19A(1)
hearing	106T(5)
hearing day	50B(1)
inferior court	109(1)
judge	3, 11(3), 12(5), 106M(3)

Defined Terms

judicial authority	109(1)
legal proceeding	3
new offence	106A
officer of the Library Board of Western Australia	65A(2)
opinion rule	27B(4)
participating jurisdiction	120(1)
party	19C(7), 50B(1)
periodical	42
person acting judicially	3
photograph	3
prisoner	3
privilege	32A(2)
Privy Council	57(4)
proceeding	3, 106A, 106HB(1)
proceedings	79B, 115
propensity evidence	31A(1)
property	115
prosecutor	106A
protected communication	19A(1)
protected person	19A(1)
protected witness	106G(3)
public official	119(1)
qualified person	79B
recognized court	120(1)
relationship evidence	31A(1)
relevant statement	106H(3)
repealed Code section	9(6), 36A(1), Sch. 7 Pt. A cl. 1(2)
request	115
requesting court	115
require disclosure	19A(1)
rules of court	32A(2)
Schedule 7 proceeding	106A
serious sexual offence	106A
sexual offence	36A(1)
special hearing	106S(2)
special witness	106A
State	3
statement	79B
superior court	109(1)
support person	19A(1)
supporting affidavit	19A(1)
the Commonwealth	3
the protection provisions	19A(1)
the State	3
thing	50B(1)

Defined Terms

tribunal	120(1)
uncorroborated evidence	3
video link	120(1)
visual recording	106A
visual recording of evidence	106A
visually recorded interview	106A, 106HA(3)
votes and proceedings	3
WA court	120(1)
witness	106RA(1)
written publication	36C(4)