

Model Evidentiary Provisions



The Commonwealth

Office of Civil and
Criminal Justice Reform

Model Evidentiary Provisions



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Introduction

Whereas the law of evidence is well established in all Commonwealth jurisdictions, developments in law, technology, and international cooperation require that evidentiary provisions are kept under continuous review, in order to ensure a modern and effective approach to legal evidence.

These Model Evidentiary Provisions address seven key topics:

- Documentary Evidence (including computer evidence and foreign documents)
- Foreign Testimonial Evidence
- Evidence by Technology (Foreign)
- Measures for the Assistance of Witnesses
- Witness Anonymity
- Corroboration and Competency to Testify
- DNA

The Model Provisions are intended to be a flexible tool that Commonwealth jurisdictions can use to modernise existing laws or to adopt new provisions in relation to the specific evidence topics.

Each part of the Model Provisions can be used separately to develop laws on the individual subject areas. Alternatively, a jurisdiction may use the Model as a whole, in order to enact a general miscellaneous evidence law.

There are two optional approaches to Section 26 of the Model relating to evidence of sexual reputation or sexual experience with a person other than the accused, reflecting different policy views. It is left to countries using the Model to choose as between the options.

Background

Law Ministers and Attorneys General of Small Commonwealth Jurisdictions at their meeting in Jersey in May 2000 recognised that existing laws of evidence were not adequate to deal with technological advances.

They welcomed the convening of an Expert Group to consider modernisation of laws in that respect. They requested that the group consider hearsay evidence, including business and computer records, corroboration, receiving of evidence by video-link of both vulnerable witnesses and witnesses in foreign jurisdictions, DNA evidence and the questioning of victims of sexual violence.

Given the broad range of issues, the Secretariat decided to proceed with separate Expert Groups to consider the three main topics identified – Electronic Commerce, Computer Crime and Related Criminal Law issues, and Evidentiary issues. The two Expert Groups on law and technology issues examined evidentiary questions and made recommendations that are reflected in the model laws arising from the work of those groups: the Commonwealth Model Law on Electronic Transactions, and the Commonwealth Model Law on Computer and Computer-Related Crime.

The third Expert Group considered evidence issues in relation to the remaining topics. The Report of that Expert Group on Evidence formed the basis for the development of the draft Model Evidentiary Provisions.

The Model Evidentiary Provisions were submitted for consideration and approval of Law Ministers at their meeting of 18-21 November 2002, held in Kingstown, St Vincent and the Grenadines.

At that meeting, Law Ministers welcomed the preparation of the Model Evidentiary Provisions dealing with a number of aspects of the law of evidence. Law Ministers commended the Model Provisions as a valuable resource for those countries wishing to modernise their evidence laws.

Model Evidentiary Provisions

AN ACT to make provision for the modernisation of certain laws relating to the admission of evidence in proceedings.

BE IT ENACTED by the Parliament of [*name of country*] as follows:

Short Title

1. This Act may be cited as the Evidence (Modernisation) Act [*year of enactment*].

Application

2. This Act applies to all legal proceedings, including criminal and civil proceedings, for which [*Parliament*] [*legislature*] has jurisdiction, unless the contrary is specifically stated.

Note: *This provides for the broadest possible application to proceedings including inquiries and tribunals. The rules are not exclusive and so can be supplemented by other rules.*

Part I

Documentary Evidence

Definitions

3. In this Act,
- "business" means
- (a) any business, profession, trade, calling, or undertaking of any kind, carried on in [country] or elsewhere, whether or not for profit,
 - (b) any government, including any department, ministry, branch, board, commission or agency of any government in [country] or elsewhere, and
 - (c) any court or tribunal or other body or authority performing a function of government in [country] or elsewhere;

Note: *This is the broadest possible definition. It recognises three main activities: commercial, governmental and judicial, both domestic and foreign.*

"copy" means any readable reproduction, or an extract, of a document and includes microfiche and a photograph;

Note: *Countries satisfied with the general term "readable reproduction" can opt to delete the specific language of "microfiche" and "photograph".*

"court" means (court) unless the contrary is indicated;

"document" means a record of information kept in any form;

"judge" means a judge of the court unless the contrary is indicated;

"qualified person", means a person in charge of the document or any person with management responsibility for the document.

"young person" means a person under the age of [.....] years.

Admissibility of business documents

4. (1) Subject to this section, if oral evidence of a matter would be admissible in a legal proceeding, a business document created in the usual or ordinary course of business is admissible as evidence of the truth of its content upon the production of the document.

Note: *The intention of the words "evidence of the truth of its content" is to ensure that the document becomes evidence of what it says and not just as to its existence. As with all evidence however the presumption of evidence of truth is rebuttable. Countries that wish to clarify the point further could include the term rebuttable in the clause.*

Hearsay and opinion statements

- (2) A business document is admissible under subsection (1) whether or not it contains hearsay or a statement of opinion.

Note: *This is an option to ensure admissibility of the document and proper weight is given to it.*

Exceptions

- (3) The following are not admissible under subsection (1) in a criminal proceeding:
 - (a) an out of court statement made to a person in authority by a suspect in a criminal investigation or an accused, and;
 - (b) a business document created in the course of a criminal investigation or prosecution.

Proof by affidavit

- (4) Evidence that a business document was created in the usual or ordinary course of business may be adduced by an affidavit of a qualified person.

Admissibility of a copy

- (5) A copy of a document is admissible in evidence as if it were the original of the document.

Notice and a copy

- (6) A business document is admissible under subsection (1) if the party seeking its admission gives 28 days notice of the intention to produce the document to all other parties to the proceeding. The party seeking the admission of the document shall, upon request, provide a copy of the document or if it is not feasible to produce a copy of the document because of the volume of documents or other factors, the requesting party shall be given an opportunity to inspect the document within 7 days of their request.

Note: *The time limit included can be adapted as appropriate for specific countries.*

- (7) *In urgent circumstances the court may abridge the time periods set out in paragraph 6.*

Opinion or clarification of document by affidavit

5. If a business document is admitted under section 4, an affidavit of a qualified person providing an opinion or clarification of the document may be admitted with the document.

Inference from absence of information

6. (1) If a business document does not contain information which might reasonably be expected to be recorded in the document if a matter had occurred or existed, the person conducting the proceedings may admit the document in evidence to prove the absence of the information and draw the inference that the matter did not occur or exist.

Proof of non issuance of document

- (2) If a document is routinely issued by any business, an affidavit of the person in charge of the documents or any person with management responsibility for the documents stating that after a careful search he or she is unable to locate any record of a particular document having been issued, is admissible and in the absence of evidence to the contrary, proof that the document was not issued.

Proof of official character

7. If evidence is offered by affidavit under this Part, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of the person is set out in the affidavit.

Foreign business document

8. Where under this Part there are requirements for an affidavit, in the case of evidence from a foreign jurisdiction, such evidence may be adduced by way of an unsworn statement or certificate, in which the person attests that there is no provision under the law of that jurisdiction for an affidavit and it shall be admitted as if it were an affidavit.

Public document defined

9. (1) In this section, "public document" means a document that
 - (a) is required to be made under the authority of a public office;
 - (b) concerns a public matter;
 - (c) is intended to be a permanent record; and
 - (d) is publicly available.

Proof of public document

- (2) A public document is admissible as evidence of the truth of its content upon the production of the document or a copy.

Court records

10. Evidence of any proceeding or document of any court in [*country*] or elsewhere may be given by the production of a copy of the proceeding or document purporting to be under the seal of the court or certified by an officer of the court without proof of the seal or the official character of the officer or any other proof.

Examination of document maker and affidavit

11. On the application of a party or on its own motion, the person conducting the proceedings may order the examination of the person who made the business document or a statement in the document admitted under section 4, or a person providing an affidavit if
 - (1) in a criminal proceeding the judge is satisfied that it would otherwise prejudice the person's right to a fair trial;or
 - (2) in other legal proceedings it would otherwise seriously impair the fairness of the proceedings.

Part II

Foreign Testimonial Evidence in a Criminal Proceeding

Definition

12. In this Part

“testimony” means oral evidence of a witness in a foreign country and any document produced as an exhibit during the giving of the oral evidence, obtained by [country] by

- (1) a request for mutual assistance made by [country] under a scheme or treaty for mutual assistance in criminal matters; or
- (2) if no treaty or scheme exists, a letter of request or other means for obtaining assistance from a foreign country.

Form of Testimony

13. Testimony may be reduced to writing or recorded on an audio or video tape or by other electronic means and need not be in the form of an affidavit or a transcript of a proceeding.

Admissibility

14. (1) Subject to this Part, testimony is admissible in evidence in a criminal proceeding as truth of its content if
- (a) it was taken on oath or affirmation; or
 - (b) it was taken according to the law of the foreign country; and
- either
- i. a foreign judge certifies that it was so taken; or
 - ii. the [responsible authority for mutual assistance or an authorized official of that authority] in [country] certifies that the testimony was obtained as a result of a request to a foreign country.

Note: *This evidence while admitted for its truth is rebuttable. Countries that wish to clarify the point further could include the term rebuttable in the clause.*

Disclosure

- (2) Testimony is not admissible for the prosecution unless it has been disclosed to the accused within a reasonable time prior to the criminal proceeding.

Note: *Countries that have existing laws with respect to disclosure may wish to delete this provision in its entirety. Other countries may wish to make it more precise by specifying the applicable time frame for disclosure*

Mandatory exclusion of testimony

- (3) Testimony shall not be admitted in evidence if the presiding judge is satisfied that:

- (a) the person who provided the testimony is in (country) and available to testify; or
- (b) the evidence would not be admissible according to the usual rules of admissibility.

Discretionary exclusion of testimony

- (4) The presiding judge may refuse to admit the testimony if satisfied that the interests of justice require its exclusion. Without limiting the matters which may be considered in making this decision, the judge must consider
 - (a) the extent to which the testimony provides evidence that is not otherwise available;
 - (b) the probative value of the testimony for any issue that will likely need to be decided;
 - (c) the extent to which there is a need to allow cross-examination of the person who provided the testimony;
 - (d) the expense and delay that would be caused by the exclusion of the testimony; and
 - (e) whether exclusion of the testimony would unfairly prejudice the prosecution or the accused.

Part III

Providing and Receiving Evidence in Legal Proceedings by Technology

Definition

15. (1) In this Part, “technology” means a technology that permits
- (1) the virtual presence of a person before a legal proceeding; or
 - (2) the person conducting the proceedings and the parties to hear and examine the person.

Foreign request for evidence by technological means

16. If a request for assistance is made by a foreign country or court to compel a person to provide evidence in a foreign legal proceeding by a technology, any person may apply, ex parte, for an order.

Note: *The language “any person” allows for direct applications by a foreign authority to avoid delays. A jurisdiction could also restrict the provision to applications by the Minister or Attorney General.*

Order for video or audio link

17. (1) The judge who hears an application shall make the order for the taking of evidence by a technology if satisfied that
- (a) there is a legal proceeding in the foreign country;
 - (b) the foreign country believes that the person’s evidence would be relevant to the foreign legal proceeding; and
 - (c) the technology for providing the evidence is available.

Provisions of order

- (2) An order made under subsection (1) shall order the person
 - (a) to attend at the place fixed by the judge for the taking of the evidence by the technology and to remain in attendance until excused by the person in charge of the foreign proceeding;
 - (b) to answer any questions asked of the person according to the law that applies in the foreign country;
 - (c) to make a copy of a document and bring the copy, if required; and
 - (d) to bring the original of any document or anything, if required, in order to show it to the person in charge of the proceeding by means of the technology.

Law of non-disclosure and privilege apply

- (3) Evidence shall be taken, according to an order under subsection (1), as though the person were physically before the foreign legal proceeding in the foreign country. The foreign laws relating to evidence and procedure apply but only to the extent that giving the evidence would not disclose information protected by the [country] law of non-disclosure of information or privilege.

Contempt of court and perjury

- (4) If a person gives evidence under this section, the [country] law of perjury applies and the [country] law of contempt of court apply to a refusal by the person to answer a question or produce a document or thing as ordered by the judge.

Terms and conditions of order

- (5) An order made under subsection (1) may include any terms that the judge considers desirable, including those relating to the protection of the interests of the person named in it and third parties.

Variation

- (6) The judge who made the order under subsection (1) or another judge of the same court may vary its terms and conditions.

Arrest Warrant

18. (1) The judge who made the order under subsection 17(1) or another judge of the same court may issue a warrant for the arrest of the person named in the order if the judge is satisfied, on an information on oath that
 - (a) the person did not attend or remain in attendance as required by the order or is about to abscond; and
 - (b) the order was personally served on the person.

Arrest

- (2) An arresting officer who arrests a person in execution of a warrant issued under subsection (1) shall, without delay, bring the person before the judge who issued the warrant.

Receiving evidence by video technology

19. Evidence of a person, other than the accused, who is outside [country] shall be received in a legal proceeding in [country] by a technology that permits the person to testify in the virtual presence of the legal proceeding unless the person conducting the legal proceeding is satisfied that:
 - (1) on the basis of relative costs, the feasibility of the witness appearing and the conditions under which the evidence would be taken in the foreign country, there is no justification for the receipt of the evidence in this manner; or
 - (2) the reception of the evidence would be contrary to the interests of justice in the particular circumstances.

Receiving evidence by audio technology

20. Evidence of a person, other than an accused, who is outside [country] may be received in a legal proceeding in [country] by a technology that permits the person conducting the proceeding and the parties to hear and examine the person, if the person conducting the proceeding is of the opinion that it would be appropriate in the circumstances, including
- (1) the nature of the person's anticipated evidence; and
 - (2) any potential prejudice to a party caused by the fact that the witness would not be seen at the proceeding.

Notice

21. (1) A party who wishes to call a witness to give evidence under section 19 or 20 shall give notice to the court before which the evidence is to be given and the other parties of their intention to do so not less than 14 days before the witness is scheduled to testify.
- (2) A party who wishes to call a person to give evidence under section 19 or 20, shall make an application to the person conducting the legal proceeding on 14 days notice to the person conducting the proceeding and the parties for an order permitting the receiving of the evidence.

Oath, affirmation or other requirement

22. (1) Except in the case of a person who would not be required to give sworn or affirmed evidence in [country], evidence under section 19 or 20 shall be taken
- (a) under oath or affirmation according to the law of [country];
 - (b) according to the law of the foreign country where the person is located, or;
 - (c) in any other manner that demonstrates that the person understands the obligation to tell the truth.

Note: *As some countries have legislation that restricts the persons who may administer an oath, consideration needs to be given to whether such laws need to be amended to allow the officials in the foreign country to administer the oath.*

Other laws to apply

- (2) Subject to subsection (3), evidence taken from a person who is outside [country] under section 19 or 20 shall be subject to the laws of [country] relating to evidence, procedure, contempt of court and perjury.

No contempt of court

- (3) A person shall not be found in contempt under the laws of [*country*] for refusing to answer a question if the refusal is based on a law in the foreign country that applies to the taking of the evidence. If there is an objection based on the law of the foreign country, a judge of the foreign country may decide the objection or if no judge is present, provide an opinion later.

Costs of technology

- (4)
 - (a) In a criminal proceeding, a party who wishes to call a witness to give evidence under section 19 or 20 shall pay any costs associated with the use of the technology.
 - (b) In other proceedings, costs will be determined by order of the court.

Part IV

Measures For The Assistance Of Witnesses

Definition

23. In this Part “vulnerable witness” means a witness in a proceeding whose ability to give evidence is likely to be affected by one or more of the following:
- (1) age or maturity;
 - (2) mental or physical disability;
 - (3) trauma suffered as a result of the conduct that is the subject of the proceeding;
 - (4) fear of intimidation as a result of testifying;
 - (5) linguistic or cultural background;
 - (6) relationship to the accused;
 - (7) the nature of the evidence the witness is expected to give; or
 - (8) any other ground affecting the ability of the witness to testify.

Mandatory order by the court

24. (1) A complainant in a criminal proceeding who is a young person is a vulnerable witness and the presiding judge shall order that the testimony be taken according to paragraph 25(1)(a), (b) or (c). The judge may also order that the testimony be taken according to any other provision of subsection 25(1) if it would assist the witness to give complete and accurate testimony or it is in the best interests of the witness.

Application for an order by the prosecutor

- (2) Unless the complainant objects, the prosecutor shall apply to the presiding judge for a finding that an adult witness who is the complainant in a criminal proceeding involving a serious sexual offence is a vulnerable witness. If so found, the presiding judge shall order that the testimony be taken according to paragraph 25(1)(a), (b) or (c). The judge may order that the testimony be taken according to any other provision of subsection 25(1) if it would assist the witness to give complete and accurate testimony or it is in the best interests of the witness.

Note: *Clause 24(2) obliges the prosecutor to make an application to the court in these circumstances unless the complainant objects. While the objection of the complainant removes the obligation on the prosecution to do so, it would still be open to the prosecutor to make such an application on a discretionary basis despite the complainant’s objection.*

Application for an order in other cases

- (3) In any legal proceeding, on the application of a party, a witness, or on the motion of the person conducting the proceeding, the person conducting the proceeding may make a finding that a witness is a vulnerable witness and order that the testimony of that witness be taken according to one or more of the provisions of subsection 25(1).

Measures to assist a witness

25. (1) An order made under section 24 shall require a witness's testimony to be taken according to one or more of the following:
 - (a) behind a screen or similar device in the courtroom that allows the witness not to see the accused, provided that the screen or other device does not prevent the witness from seeing or being seen by
 - i. the judge or jury,
 - ii. counsel, or
 - iii. any interpreter or other person appointed to assist;
 - (b) from an appropriate place outside the courtroom by closed circuit television or other means of technology which allows the witness to be seen and heard in the courtroom and the persons listed in subparagraphs 25(1)(a)(i) to (iii) to be seen and heard by the witness¹;
 - (c) by a video recording of an interview of the witness made before the hearing, which represents the examination in chief of the witness. If the examination in chief is entered by a video recording under this paragraph, the cross-examination and any re-examination may also be ordered to be provided at the same time by a video recording;
 - (d) in the absence of the public or any member of the public;
 - (e) through an interpreter;
 - (f) with the assistance of a support person; or
 - (g) with the assistance of any device which improves the ability of the witness to hear or understand the proceedings and communicate answers to the questions.

Formalities of proceedings

- (2) The person conducting the proceeding may dispense with any formalities in the proceeding including the wearing of gowns and wigs.

Questioning by an unrepresented accused

26. (1) The accused in a criminal proceeding involving a sexual offence or domestic violence is not entitled to personally cross examine a witness who is a young person or the complainant.

Questioning by judge or person appointed

- (2) An unrepresented accused who is precluded from questioning a witness by subsection (1) may have his or her questions asked of the witness by the presiding judge or a person appointed by the judge for that purpose.

Note: *Some countries may prefer to limit this provision to a person appointed by a judge.*

Approval of questions

- (3) For each question sought to be asked under subsection (2), the judge may
 - (a) ask the question or allow the question to be asked by the person appointed;
 - (b) rephrase the question, or
 - (c) refuse to allow the question to be asked of the witness.

Note: *In some countries this may be considered to give the judge too much power with respect to the questioning of a witness. An alternative phrasing would be to provide that the judge can rephrase or restrict any questions that are inappropriate or which are posed in an unnecessarily aggressive manner.*

Part V

Evidence in Cases of Sexual Offences

Evidence of sexual reputation and experience with a person other than the accused

OPTION 1

27. In a criminal proceeding involving a sexual offence, evidence is not admissible and no question may be asked of a witness regarding:

- (1) the sexual reputation of the complainant; or
- (2) the sexual experience of the complainant with a person other than the accused

unless the presiding judge is satisfied that such evidence would be of substantial relevance to material facts in issue or would impair confidence in the reliability of the evidence of the complainant.

OPTION 2

27. (1) In a criminal proceeding involving a sexual offence, evidence is not admissible and no question may be asked of a witness regarding:

- (a) the sexual reputation of the complainant; or
- (b) the sexual experience of the complainant with a person other than the accused

for the purpose of supporting an inference that the complainant was likely to have consented to the sexual activity that is the subject of the charge, or is not worthy of belief.

- (2) Evidence as described in subsection (1) is not admissible for any other purpose, unless:
 - (a) an application in the absence of the jury is made to the presiding judge to admit the evidence or allow the question; and
 - (b) in exceptional circumstances, the presiding judge being satisfied that a refusal to allow the evidence to be admitted or the question to be asked would prejudice a fair trial, grants the application.

Evidence of sexual experience with the accused

28. In a criminal proceeding involving a sexual offence, evidence is not admissible and no question may be asked of a witness, regarding the sexual experience of the complainant with the accused, that does not form the subject matter of the charge unless:

- (1) an application in the absence of the jury is made to the presiding judge to admit the evidence or allow the question; and
- (2) the presiding judge, being satisfied that a refusal to allow the evidence to be admitted or the question to be asked would prejudice a fair trial, grants the application.

Permissible questions

29. In a criminal proceeding involving a sexual offence, nothing in sections 27 or 28 precludes the admissibility of evidence or the questioning of a witness regarding the sexual conduct that is the subject of the charge.

Publication ban in sexual offence proceeding

30. In a criminal proceeding involving a sexual offence, the presiding judge:
- (1) shall order a ban on the publication of the identity of the complainant or information that could disclose the identity of the complainant, unless the complainant consents to publication;
 - (2) may order a ban on the publication of the identity of the accused or a witness or information that could disclose the identity of the accused or a witness or order a general ban on publication of testimony if satisfied that it would be in the interests of justice to do so.

Part VI

Witness and Police Anonymity in a Criminal Proceeding

Definitions

31. In this Part

"witness" means a person who gives evidence in a criminal proceeding;

"witness anonymity order" means an order made by a court in a criminal proceeding restricting disclosure of the identity of the witness in the course of giving evidence, through the use of devices or technology.

Application for witness anonymity order

32. (1) The prosecutor, an accused charged with an indictable offence or a person who expects to be called as a witness may apply to the court for a witness anonymity order.

Affidavit

(2) An application under subsection (1) shall be supported by an affidavit of the witness concerned.

Independent counsel inquiry

- (3) If after considering the affidavit the judge is satisfied that the witness or another person or any property will be exposed to serious harm if the witness testifies without restrictions as to the disclosure of his or her identity, the judge may appoint an independent counsel:
- (a) to conduct an inquiry into the witness's truthfulness; and reliability and the evidence the witness will give; and
 - (b) provide a report to the judge.

Conduct of inquiry

(4) In conducting the inquiry, the independent counsel must safeguard the interests of any party adverse to the witness and protect the anonymity of the witness.

Information of prosecution witness

(5) If the witness is to be a prosecution witness, the police officer in charge of the investigation must provide the independent counsel with all relevant information available to the police and an affidavit sworn by the police officer confirming that all relevant information has been provided.

Information of witness for accused

- (6) If the witness is to be a defence witness, the accused and any counsel must provide the independent counsel with all relevant information available to the accused and an affidavit sworn by the accused confirming that to the best of his or her belief all relevant information has been provided.

Records reports and advice

- (7) The independent counsel
- (a) if the witness is to be a prosecution witness, shall be entitled to all police records relating to the investigation including all reports and advice available to the police; and
 - (b) if the witness is to be a defence witness, shall be entitled to all records held by the accused or his or her counsel relating to the defence including all reports and advice available to the accused.

Voir dire²

- (8) After receiving the report of the independent counsel, the judge may conduct a voir dire or dispose of the application.

Directions for voir dire

- (9) The independent counsel and the parties may participate in the voir dire and make submissions. The court may give directions for the conduct of the voir dire to preserve the anonymity of the witness including the exclusion of the public or a party or counsel, and the use of any device to preserve anonymity.

Fees and expenses

- (10) An independent counsel is entitled to be paid a reasonable fee and expenses.

Witness anonymity order

33. (1) The judge may make a witness anonymity order if satisfied:
- (a) on reasonable grounds that the witness or another person or any property will be exposed to the risk of serious harm if the witness gives evidence;
 - (b) there is no basis to doubt the truthfulness and reliability of the witness; and
 - (c) that the unfairness to the witness of requiring disclosure of the witness's identity exceeds the possibility of unfairness to the accused from the trial being conducted without disclosure, having regard to:
 - i. the general right of an accused to know the identity of a witness;
 - ii. the principle that witness anonymity orders are justified only in exceptional circumstances to discourage intimidation of witnesses;
 - iii. the importance of the witness's evidence to the case;

- iv. the effect that a witness anonymity order would have on the ability of the accused to conduct a full defence;
- v. whether other means can be used to protect the witness; and
- vi. the seriousness of the offence.

Terms of order

- (2) If the court makes a witness anonymity order, the court may give any necessary directions to preserve the anonymity of the witness, including excluding the public and screening the witness from persons other than counsel calling the witness, the judge, the jury and court officials.

Effect of order

- (3) If the court makes a witness anonymity order:
 - (a) the order applies to all stages of the proceeding;
 - (b) the witness shall not be required to state his or her true name, address or occupation or to give any particulars likely to lead to the discovery of that name, address or occupation;
 - (c) no evidence can be given and no question asked of the witness or any other witness relating to the true name, address or occupation of the witness; and
 - (d) no counsel [*barrister or solicitor*] officer of the court or other person involved in the proceeding can state in court the true name, address or occupation of the witness or give any particular likely to lead to the discovery of that name, address or occupation.

Discharge of order

- (4) The court may at any time, either on the application of a party or on its own motion discharge or vary a witness anonymity order.

Definitions

34. (1) In this section

"serious offence proceeding" means a proceeding in which a person will be proceeded against by indictment for:

- (a) an offence that is punishable by imprisonment for life or a term of not less than [7³] years or a more grave penalty; or
- (b) an offence of conspiracy or attempt to commit an offence in paragraph (a);

"undercover police officer" means a member of the police whose identity was concealed for the purposes of an investigation.

Certificate of [*Commissioner of Police*]

- (2) If an undercover police officer will be called as a witness for the prosecution in a serious offence proceeding, the [*Commissioner of Police*] may, before an indictment is presented, file in the court a certificate stating:
 - (a) that during the period stated in the certificate, the witness was a member of the police and acted under an assumed name as an undercover police officer;
 - (b) the offences for which the witness has been convicted or that the witness has not been convicted of any offences;
 - (c) the offences under the [*Police Act*] for which the witness has been found guilty or that the witness has not been found guilty of such offences; and
 - (d) the particulars of any adverse comment made by a judge in another proceeding regarding the truthfulness of the witness.

Lack of particulars

- (3) The information provided under subsection (2) shall not contain the true name or address of the witness or provide sufficient detail so that the true name or address may be determined.

Police anonymity

- (4) If the [*Commissioner of Police*] files a certificate under subsection (2):
 - (a) it is presumed that the certificate was given for a witness who is called by the prosecution and testifies that he or she was a member of the police and acted as an undercover police officer under the name specified in the certificate;
 - (b) the witness will be identified by the name set out in the certificate or some other name assigned by the court, and unless leave is given under paragraph (c) the witness shall not be required to state his or her true name or address or to give any particulars likely to lead to the discovery of that name or address;
 - (c) except with leave of the court, no evidence can be given and no question can be asked of the witness or any other witness relating to the true name or address of the witness; and
 - (d) unless leave is given under paragraph (c), no counsel [*barrister or solicitor*] officer of the court or other person involved in the proceeding can state in court the true name or address of the witness or give any particulars likely to lead to the discovery of that name or address.

Application for leave

- (5) An application for leave under paragraph 4(c) shall be dealt with in chambers, in the absence of the jury.

Factors to be considered

- (6) The judge shall not grant leave under paragraph (4) (c) unless satisfied that:
 - (a) there is some evidence before the court that the witness is not telling the truth; and
 - (b) the accused cannot properly test the truthfulness of the witness without being informed of the true name or address of the witness.

Notice

- (7) If the [*Commissioner of Police*] files a certificate under this section, the [*Commissioner of Police*] must serve a copy on the accused or his or her counsel at least 14 days before the witness is to testify.

Part VII

Corroboration and Competency to Testify

Corroboration required

35. (1) A conviction for perjury, treason or sedition may not be founded on the uncorroborated evidence of a witness.

Note: *Some jurisdictions may decide to extend the requirement for corroboration to other offences such as where the only evidence is that of an anonymous witness.*

Corroboration not required

- (2) In any other case, there is no requirement for corroboration to convict a person or to warn the jury regarding corroboration of a witness and the requirements for corroboration to convict a person and to warn the jury regarding corroboration are abrogated.

Presumption of competence

36. (1) A person of any age is presumed to be competent to testify as a witness in any legal proceeding.

Evidence of children

- (2) In any legal proceeding, the person conducting the proceeding shall instruct a child under the age of [.....] years on the importance of telling the truth and not telling lies but shall not take the child's evidence under oath or affirmation.

Evidence deemed sworn

- (3) Evidence taken according to subsection (2) is deemed to have been taken under oath.

Note: *Some jurisdictions may decide to exclude this provision and allow for the admission of the evidence only as an unsworn statement.*

Inquiry into competence

- (4) If the capacity of a proposed witness to testify is challenged and the person conducting the proceeding is satisfied that there is a basis for the challenge, before permitting the person to testify, the person conducting the proceeding shall carry out an inquiry to determine if the person is able to understand questions and provide intelligible answers.
- (5) If the person conducting the proceedings determines that a person referred to in subsection (2) will not understand questions or will not be able to provide intelligible answers, the witness shall not testify.

Part VIII

DNA Evidence in Criminal Proceedings

Definitions

37. In this Part

"designated offence" means an offence punishable by a term of more than [...] years imprisonment;

Note: *These provisions can be made applicable to a broader or narrower range of offences depending on the position of the authorities within the relevant jurisdiction. Some countries may not have designated sentences and therefore may wish to use a different formulation.*

"DNA" means deoxyribonucleic acid;

"forensic DNA analysis" means a forensic DNA analysis of a bodily substance taken from a person under this Part and comparison of the results of that analysis with the results of an analysis of the DNA in a bodily substance identified by a police investigation of a designated offence and includes any incidental tests associated with the analysis;

"expert report" means a report of a qualified expert containing a forensic DNA analysis.

Obtaining Bodily Substances from Victims of Crime

38. Nothing in this Act precludes the taking of a bodily substance from the victim of a crime by consent.

Bodily substance obtained with consent

39. (1) A police officer may cause to be obtained a bodily substance by a suitably qualified person by an investigative procedure described in subsection 40(5) for a forensic DNA analysis, if

(a) consent is given after a police officer has informed the person of:

- i. the nature of the procedure to be used to obtain the bodily substance;
- ii. the purpose for obtaining a bodily substance;
- iii. the possibility that the results of a forensic DNA analysis may be used in evidence;
- iv. the fact that the person may refuse consent; and
- v. the consequences of not consenting i.e. that a warrant may be obtained;

and

(b) a police officer of the rank of [*inspector*] or higher authorizes it to be taken.

Note: *Some jurisdictions may require that bodily substances can only be taken by obtaining a court order, and not by consent.*

Written consent

- (2) For the purposes of subsection (1), consent means the written consent of the person from whom the bodily substance is to be taken, if the person is 18 years of age or older and is not mentally disabled;

Authorization of police officer

- (3) A police officer may only give an authorization under paragraph (1) (b) if he or she:
- (a) has reasonable grounds to suspect the person from whom the bodily substance will be taken of having committed a designated offence; or
 - (b) believes that forensic DNA analysis of the bodily substance will exclude the person from suspicion of having committed a designated offence.

Bodily substance warrant

40. (1) A judge may issue a warrant authorizing a police officer to obtain or cause to be obtained a bodily substance from a person, for forensic DNA analysis, by a procedure described in subsection 40(5), if satisfied by information on oath that there are reasonable grounds to believe:
- (a) a designated offence has been committed;
 - (b) a bodily substance has been found:
 - i. at the place where the offence was committed,
 - ii. on or within the body of the victim of the offence;
 - iii. on anything worn or carried by the victim at the time when the offence was committed; or
 - iv. on or within the body of any person or thing or at any place associated with the commission of the offence;
 - (c) the person was a party to the offence;
 - (d) a forensic DNA analysis of a bodily substance from the person will provide evidence about whether the bodily substance referred to in paragraph (b) was from that person; and
 - (e) the person from whom the bodily substance is to be obtained is not under 10 years old.

Requirements of application

- (2) An application under subsection (1) shall be made ex parte and supported by an affidavit.

Oral evidence

- (3) In a case of urgency, a judge under subsection (1) may receive oral evidence for the purpose of establishing reasonable grounds provided that an information on oath is filed with the court as soon as practicable.

Application by other means of communication

- (4) If a police officer believes that it would be impracticable to appear personally before a judge to make an application under subsection (1), a warrant may be issued on information submitted by telephone or other means of telecommunication establishing reasonable grounds, provided that an information on oath is filed with the court as soon as practicable.

Investigative procedures

- (5) A warrant issued under subsection (1) authorizes a suitably qualified person accompanied by a police officer to obtain and seize a bodily substance from a person by:
 - a) the plucking of individual hairs from the person, including the root sheath;
 - b) the taking of buccal swabs by swabbing the lips, tongue and inside cheeks of the mouth to collect epithelial cells; or
 - c) the taking of blood by pricking the skin surface with a sterile lancet.

Terms of warrant

- (6) A warrant issued under subsection (1) shall contain any terms the judge considers necessary to ensure that the seizure of a bodily substance is reasonable in the circumstances.

Execution of warrant

41. (1) Before executing a warrant, a police officer shall inform the person against whom it is to be executed of:
 - (a) the contents of the warrant;
 - (b) the nature of the investigative procedure to be used to obtain the bodily substance from the person;
 - (c) the purpose of obtaining a bodily substance;
 - (d) the possibility that the results of a forensic DNA analysis may be used in evidence;
 - (e) the authority of the police officer and any other person under his or her direction to use as much force as is necessary to execute the warrant; and
 - (f) in the case of a young person or a mentally disabled person, the requirements of subsection (4).

Detention of person under warrant

- (2) A person against whom a warrant is executed:
 - (a) may be detained for a reasonable period to obtain a bodily substance from the person; and
 - (b) may be required by the police officer who executes the warrant to accompany the police officer.

Respect for privacy

- (3) A police officer or person responsible for executing the warrant shall ensure that the privacy of the person is respected in a reasonable manner. The person taking the bodily substance shall be suitably qualified and shall be of the same sex as the person from whom the bodily substance is taken, unless the person consents to a person of the opposite sex taking the sample.

Execution of warrant against young person or mentally disabled person

- (4) A young person or a mentally disabled person against whom a warrant is executed has the right to a reasonable opportunity to consult and have the warrant executed in the presence of a legal representative and a parent; or
 - (a) in the absence of a parent, an adult relative; or
 - (b) in the absence of a parent and an adult relative, any other adult chosen by the person.

Waiver of rights

- (5) A young person may waive his or her rights under subsection (4), but any waiver:
 - (a) must be made in writing or recorded on audio or video tape or other technological means; and
 - (b) contain a statement by the young person that he or she has been informed of the right being waived.

Limitations on use of bodily substance

- (6) No person shall use a bodily substance that is obtained in execution of a warrant and the results of the forensic DNA analysis except in the course of an investigation of the designated offence or any other designated offence and any subsequent prosecution without the consent of the person from whom the bodily substance was obtained.

Destruction of bodily substance

42. (1) A bodily substance that is obtained from a person in execution of a warrant and the results of a forensic DNA analysis shall be destroyed if:
 - (a) the results of the analysis establish that the bodily substance was not from that person;
 - (b) the person is finally acquitted of the designated offence and any other offence from the same transaction except for a verdict of not criminally responsible on account of mental disorder; or
 - (c) one year expires after:

- i. the person is discharged after a preliminary inquiry into the designated offence or any other offence from the same transaction;
- ii. the dismissal, for any reason other than acquittal or the withdrawal of any information charging the person with the designated offence or any other offence from the same transaction; or
- iii. any proceeding against the person for the offence or any other offence from the same transaction is stayed unless during the year a new information is laid or an indictment preferred charging the person with the designated offence or any other offence from the same transaction or the proceeding is recommenced.

Exception

- (2) Despite subsection (1), a judge, on application supported by an affidavit with notice to the parties, may order that a bodily substance and the results of a forensic DNA analysis not be destroyed during any period the judge considers appropriate if the judge is satisfied that the bodily substance or analysis might be required in an investigation or prosecution of:
 - (a) the person for another designated offence;
 - (b) another person for the designated offence or any other offence from the same transaction.

Waiver of notice requirement

- (3) A judge may waive notice being given to another party under subsection (2) if it would be in the interests of justice to do so.

Expert report

43. (1) Subject to subsection (2), an expert report is admissible as evidence in a criminal proceeding upon its production.
- (2) A copy of the expert report shall be provided to the person from whom the bodily substance was obtained as soon as it becomes available.

Non attendance of expert

- (3) If the expert making the report is not going to attend the proceeding to give oral evidence, the report is not admissible without leave of the court.

Considerations

- (4) For the purpose of determining whether to grant leave under subsection (2) the judge shall consider:
 - (a) the contents of the report;
 - (b) the reasons for dispensing with the attendance of the expert;
 - (c) the need for cross examination of the expert and any resulting unfairness to the accused if cross examination does not take place; and
 - (d) any other relevant matter.

Probative value of report

(5) An expert report, if admitted, is evidence of the truth of its contents.

Note: *The information set out in the report is rebuttable and some jurisdictions may wish to make this explicit.*

Endnotes

1. In some countries it may be imperative that the accused also be able to see the witness when this particular technology is available. If a country thinks the accused should be included and has the technology to do so both in respect of one way screens and closed circuit television, then the list in 23(1) (a) should be amended to add the accused. If the technology to do so would only be available in the context of closed circuit television or other similar technology, then subsection (b) should be amended by adding after “the persons listed in subparagraphs 23(1)(a)i–iii” the words “and the accused”.
2. This term is used to describe the hearing of an application within a trial in the absence of the jury.
3. The appropriate period of punishment will need to be determined by each jurisdiction on the basis of the penalties applicable to indictable offences.



The Commonwealth