

# REPUBLIC OF VANUATU

## BILL FOR THE EVIDENCE ACT NO.     OF 2025

### Explanatory Note

**Part 1** provides for preliminary matters including the interpretation of terms used in the Bill, the preservation of common law and equity that is not inconsistent with the provisions of the Bill and the application of the Bill to all proceedings in a court. It abolishes the applicable United Kingdom statutes and abrogates the common law rules relating to documents and corroboration. It preserves the general powers of the court and sets out circumstances when the rules of evidence can be dispensed with or waived by the court.

**Part 2** sets out the standard of proof that is required in the criminal and civil proceedings. It provides that proof is not required for matters of common knowledge, judicial notice, judge's signatures or the provisions contained in other legislation. It provides that corroboration is not necessary. It lists what may be considered as unreliable evidence and requires the exercise of caution before convicting an accused in reliance upon it. It provides that the evidence of children and victims of offences against morality should not be considered inherently unreliable.

**Part 3** provides that all relevant evidence that is capable of proving or disproving anything that is of consequence to the proceedings is admissible. It provides that facts can be admitted and evidence can be admitted with the consent and agreement of the parties.

**Part 4** deals with issues relating to competence and compellability of witnesses. It provides that all persons are generally competent and compellable unless the contrary is proved. It provides that a person is not competent to give sworn evidence if they do not understand that they have an obligation to tell the truth. However, it allows the person to give unsworn evidence if the court has advised them of the importance of telling the truth. Unsworn evidence has probative value and the person giving it can be convicted if they commit perjury. Close relatives of an accused person in a criminal trial are compellable but may be excused from giving evidence if the public interest in the evidence being given is outweighed by the public interest in preventing harm resulting from the giving of that evidence. Former spouses are compellable. The accused is not competent to give evidence for the prosecution and not compellable by the prosecution or the defence. It provides protection for the accused in relation to the questioning about bad character. It sets out the circumstances where tendency evidence can be given against a co-accused, and when a co-accused is competent and compellable. It allows the court to make special arrangements for vulnerable witnesses including non-publication orders, using remote witness facilities, screening the witness from the view of the accused or having a support person.

**Part 5** provides for the manner of giving evidence. It requires the court to control the way evidence is adduced and allows the court to question witnesses. It regulates the order and manner of questioning by parties and permits the use of charts and summaries where this will assist in the comprehension of the evidence. It regulates the process of refreshing and reviving memory by the use of documents and allow evidence to be given by audio visual link. Rules relating to cross-examination are set out in this Part, including restrictions on the evidence that can be given, and the question that can be put to a witness in relation to sexual experience or reputation. It contains specific rules about re-examination and recalling witnesses. It provides directions for communication assistance and the use of interpreters. It allows the court to visit and view places that are of relevance to the case and also allows demonstrations, experiments and inspections in defined circumstances.

**Part 6** sets out the rule of proving the existence of court judgements and convictions in criminal, civil and defamation proceedings. It defines tendency evidence and sets out the circumstances when it may be offered about an accused in criminal proceedings.

**Part 7** sets out the method of obtaining and admitting identification evidence. It provides guidance for the procedures to be used by the police when obtaining identification evidence from witnesses and conducting identification parades. It provides guidance and directions for the use of photographs for identification and limits the use that can be made of voice identification evidence.

**Part 8** introduces the rules that govern the conduct of both intimate and non-intimate forensic procedures used to obtain particulars such as fingerprint, footprint, biological material, photograph and video recording for the purpose of identification. These procedures are carried out on suspects, serious offenders and certain other persons. It also sets out the rules relating to the storage, use, destruction and the admissibility of the identifying materials.

**Part 9** provides guidance for the use of documentary evidence. It sets out the processes for using documents without witnesses. It creates a rebuttable presumption about the authenticity of seals, signatures, published materials, government documents, official public records and purported acts by attesting parties. It provides the method for presenting evidence about, and obtaining copies of banking records. It provides rules for the use of translated documents, sound recordings or coded transcripts. It prescribes the method of adducing evidence of foreign laws, treaties and proclamations, including evidence of common law and unwritten law.

**Part 10** provides general rules in relation to the admissibility of hearsay evidence and sets out the exceptions to the general rule. The exceptions include business documents, tags and labels, telecommunication, personal history evidence, public or general rights and evidence adduced in interlocutory proceedings. It sets out the circumstances which allow expert evidence, expert reports and hand writing opinion evidence to be admitted. It provides strict rules for giving evidence of good character and bad character in civil proceedings.

**Part 11** provides guidance to the court for exercising its discretion to exclude evidence. It also allows the court to limit its evidence that may be prejudicial or misleading. It provides that, in criminal proceedings, the court must refuse to admit evidence if their probative value is outweighed by the danger of unfair prejudice to an accused. It provides guidance to the court in admitting or excluding evidence in the public interest.

**Part 12** sets out the method of taking evidence on commission when the court is satisfied that the attendance of the witness cannot be reasonably procured. It allows a Magistrate to take a deposition and allows for cross examination by other parties or the provision of interrogatories to the Magistrate to conduct the cross examination.

**Part 13** deals with privilege. It provides for the confidentiality of certain communications made to, or by legal professionals. It extends this protection to unrepresented parties for communications made for the dominant purpose of conducting the proceeding. It provides for the privilege against self-incrimination to be claimed in certain circumstances. It provides that religious confessions and information that would disclose an informer's identity are also privileged.

**Part 14** provides the mechanism for the courts and parties to deal with unfavourable witnesses. It provides guidance about the cross-examination of a person about a prior inconsistent statement and the weight to be given to that evidence. It sets out the circumstances when a witness can be questioned about a document made by another person and the procedure for marking the document for identification.

**Part 15** defines the confession and sets out the way such confession can be used in criminal proceedings. It requires the court to be satisfied that confessions are voluntary. It allows the court to refuse to admit an admission adduced by the prosecution if it would be unfair to the accused. It limits the use of confessions that were obtained improperly or unlawfully and provides a list of conduct which is to be considered improper. It preserves the right to remain silent by stating that an unfavourable inference must not be drawn from an accused failure to answer questions or to respond to a presentation.

**Part 16** sets out the proof required to provide evidence of births, adoptions, deaths and marriages. It provides that an original document or certified copy of a certificate or entry is evidence of the facts stated in the document.

**Part 17** contains miscellaneous provisions including transitional provisions, Regulations and rule making powers. It sets out how service of documents, previous convictions, legislation, and evidence of a public place and evidence of crown property may be adduced. It provides for the conduct of a voir dire and for the giving of an advanced ruling. It sets out the parameters of contempt by publication and allows the court to issue a warrant for the attendance of any person who is in custody.

**Minister of Youth, Justice and Community Services**



## REPUBLIC OF VANUATU

### BILL FOR THE EVIDENCE ACT NO.     OF 2025

#### Arrangement of Sections

#### **PART 1     PRELIMINARY**

1	Interpretation.....	8
2	Meaning of business .....	11
3	Meaning of identification evidence .....	12
4	Preservation of common law and equity.....	12
5	Application.....	12
6	Certain foreign laws cease to apply .....	13
7	Original documents and document rule abolished.....	13
8	Waiver of rules of evidence .....	13
9	General powers of a court .....	13

#### **PART 2     PROOF**

10	Civil standard of proof.....	14
11	Criminal standard of proof.....	14
12	Standard of proof for admission of evidence.....	14
13	Judicial notice .....	15
14	Proof of legislation.....	15
15	Judges' signatures .....	15
16	Proof of common knowledge.....	15

17	Corroboration.....	16
18	Unreliable evidence .....	16

### **PART 3 RELEVANT EVIDENCE ADMISSIBLE**

19	Relevant evidence is admissible .....	17
20	Admission by agreement .....	17
21	Provisional admission of evidence .....	17
22	Inference as to relevance.....	18

### **PART 4 COMPETENCE AND COMPELLABILITY**

23	General competence.....	19
24	Death or incompetence of witness .....	19
25	Witness with an interest or conviction.....	19
26	Examination without subpoena.....	19
27	Person producing a document is not a witness .....	20
28	Lack of capacity to give evidence.....	20
29	Determination of competency .....	20
30	Unsworn evidence.....	21
31	Persons not compellable .....	21
32	Judicial persons not compellable without leave .....	22
33	Compellability of close relative .....	22
34	Close-relative of accused may be excused .....	22
35	Former spouse compellable .....	23
36	Accused not compellable .....	23
37	Question of accused about bad character or antecedents.....	23
38	Propensity evidence against co-accused .....	24
39	Circumstances when co-accused is compellable .....	24
40	Arrangements for vulnerable witnesses .....	25
41	Vulnerable witnesses cross-examined by accused.....	26

### **PART 5 GENERAL RULES ABOUT GIVING EVIDENCE**

42	Ordinary manner of giving evidence .....	27
43	Court to control questioning .....	27
44	Court may question witness .....	28
45	Parties may question witness .....	28
46	Giving evidence in narrative form .....	28
47	Use of charts and summaries .....	28
48	Reviving memory .....	28
49	Reviving memory of facts or opinion .....	29
50	Referring to copies of documents to refresh memory.....	29
51	Alternative ways of giving evidence .....	29
52	Directions as to alternative ways of giving evidence .....	30
53	Video recorded evidence .....	31
54	Evidence by audio visual link.....	32
55	Rules may provide giving of evidence by audio visual link.....	33
56	Leading questions in examination in-chief or re-examination .....	33
57	Leading questions in cross-examination.....	33
58	Court may prohibit leading questions in cross examination on contradictory evidence .....	34
59	Contradictory evidence .....	34

60	Evidence in relation to sexual experience in offences against morality .....	34
61	Re-examination .....	35
62	Parties recalling witnesses .....	35
63	Court recalling witnesses .....	36
64	Witness to remain outside courtroom .....	36
65	Witnesses who hear evidence .....	36
66	Re-opening of case.....	36
67	Witness called in error .....	37
68	Improper questions .....	37
69	Police evidence .....	38
70	Communication assistance to accused.....	38
71	Communication assistance to witnesses .....	39
72	Hearing and speech impaired witness.....	39
73	Impartiality of interpreter.....	39
74	Viewing by the court.....	39
75	Court may make inference after viewing.....	40
76	Demonstration, experiment or inspection.....	40

## **PART 6 EVIDENCE OF JUDGMENTS AND CONVICTIONS**

77	Conviction is proof of commission of offence .....	42
78	Conviction as proof in defamation proceedings .....	42
79	Civil judgment and criminal proceedings .....	42
80	Certificate of conviction, acquittal, orders and judgments .....	43
81	Propensity evidence .....	44
82	Propensity evidence by the prosecution.....	44

## **PART 7 IDENTIFICATION EVIDENCE**

83	Identification evidence.....	46
84	Identification procedure .....	46
85	Identification parades.....	47
86	Photo identification.....	48
87	Photo boards .....	48
88	Voice identification.....	49

## **PART 8 FORENSIC EVIDENCE**

### **Division 1 Definitions**

89	Definitions .....	50
----	-------------------	----

### **Division 2 Forensic procedures on suspect**

90	Forensic procedures may be carried out with informed consent of suspect.....	53
91	Requesting consent of suspect for forensic procedure.....	53
92	Matters that suspect must be informed of before giving consent .....	54
93	Withdrawal of consent of suspect .....	56
94	Circumstances in which senior officer may order a non-intimate forensic procedure.....	57
95	Record of senior officer's order.....	58

96	Forensic procedures may be carried out on a suspect by a court order .....	58
97	Circumstances in which court may order a forensic procedure on suspect.....	59
98	Procedure at hearing of application for order .....	60

### **Division 3 Forensic procedures on a serious offender**

99	Forensic procedures may be carried out with informed consent of serious offender.....	60
100	Matters that serious offender must be informed of before giving consent .....	61
101	Non-intimate forensic procedure may be carried out on serious offender by order of senior officer.....	62
102	Circumstances in which senior officer may order non-intimate forensic procedure.....	63
103	Record of senior officer's order.....	63
104	Forensic procedures may be carried out on serious offender by order of court .....	63
105	Circumstances in which court may order a forensic procedure on serious offender.....	64

### **Division 4 Forensic procedures on certain other persons**

106	Forensic procedures may be carried out with informed consent of a volunteer .....	64
107	Matters that volunteer must be informed of before giving consent.....	65
108	Matters that parent or guardian must be informed of before giving consent .....	67
109	Forensic procedures may be carried out on a child or person with impaired mental capacity by order of court .....	68
110	Circumstances in which court may order forensic procedure on a child or person with impaired mental capacity .....	69
111	Forensic procedures may be carried out on deceased person .....	70

### **Division 5 Carrying out forensic procedures**

112	General rules for carrying out forensic procedures .....	70
113	Person who may carry out forensic procedures .....	71
114	Use of force in carrying out forensic procedures.....	72
115	Results of analysis made available .....	72

### **Division 6 Storage, use, destruction and admissibility**

116	Storage and use of identifying particulars and identifying information.....	72
118	Destroying identifying particulars .....	73
118	Inadmissibility of evidence from improper forensic procedures .....	74

## **PART 9 DOCUMENTARY EVIDENCE**

119	Reference to document .....	76
120	Use of evidence without witness .....	76
121	Evidence of contents of a document .....	77

122	Document made by a person.....	79
123	Document produced by device or process .....	79
124	Seals and signatures .....	79
125	Seal of body corporate established under a provincial or municipal law.....	80
126	Books, maps and charts .....	81
127	Summary of long or complex documents .....	81
128	Evidence of acts by justice, notary public or legal practitioner.....	81
129	Attesting witness not required to give evidence .....	82
130	Older documents .....	82
131	Tender of documents .....	82
132	Impounding documents.....	82
133	Provincial Government Council and Municipal Council records.....	82
134	Evidence of banker's record .....	83
135	Obtaining copies of banker's records .....	83
136	Gazettes and other official documents.....	84
137	Evidence of government public records .....	85
138	Documents relating to court processes .....	85
139	Official Government statistics .....	86
140	Copies of public documents.....	86
141	Translated documents and certain transcripts .....	86
142	Service or notification by post .....	87
143	Evidence of foreign law .....	88
144	Law reports of foreign countries.....	89
145	Documents sworn or verified in Commonwealth countries .....	90
146	Documents filed in foreign court or consulate.....	90
147	Published documents .....	90
148	Probate and letters of administration .....	90

## **PART 10 HEARSAY**

149	Hearsay .....	92
150	General admissibility of hearsay.....	92
151	Evidence of right or custom.....	93
152	Exception – business documents .....	94
153	Exception – tags, labels and writing .....	95
154	Exception – telecommunication.....	95
155	Exception – statements about the state of health or mind.....	96
156	Exception – evidence of personal history .....	96
157	Exception – public and general rights.....	96
158	Exception – interlocutory proceedings .....	97
159	Exception – evidence relevant for non-hearsay purpose .....	97
160	Opinion evidence .....	97
161	General admissibility of opinion.....	97
162	Expert evidence opinion .....	97
163	Opinion of handwriting.....	98
164	Court to examine and determine authenticity of document.....	98
165	Expert reports.....	98
166	Evidence of good character in civil proceedings .....	99
167	Evidence of bad character in civil proceedings .....	99



## **PART 11 DISCRETION TO EXCLUDE EVIDENCE**

168	Court's discretion to exclude evidence .....	100
169	Court's discretion to limit the use of evidence .....	100
170	Exclusion of prejudicial evidence .....	100
171	Exclusion of evidence in the public interest .....	100

## **PART 12 COMMISSION TO EXAMINE WITNESSES**

172	Evidence taken on commission.....	102
173	Adjournment for taking evidence on commission .....	103
174	Evidence on commission outside Vanuatu .....	103

## **PART 13 PRIVILEGE**

175	Legal professional privilege for legal practitioners .....	104
176	Legal professional privilege for client .....	104
177	Privilege against self-incrimination .....	104
178	No adverse inference against self-incrimination .....	106
179	Court discretion for incrimination under foreign law .....	106
180	Claiming privilege against self-incrimination .....	106
181	Self-incriminating information given in compliance with seizing order .....	107
182	No self-incrimination privilege for body corporate .....	108
183	Privilege religious confession .....	108
184	Parliamentary privileges .....	108
185	Confidential and communication for settling civil proceedings .....	108
186	Privilege for information disclosing identity of an informer .....	109
187	Waiver of privilege .....	109
188	Joint and successive interest in privilege material .....	110
189	Court may disallow claim of privilege .....	111
190	Party must be aware of rights relating to privilege .....	111
191	Court may inspect document or material relating to privilege .....	111
192	Privilege evidence inadmissible.....	111

## **PART 14 UNFAVOURABLE WITNESSES**

193	Unfavourable witnesses .....	112
194	Prior inconsistent witness statements .....	112
195	Weight to be given to evidence under this Part .....	113
196	Use of document of another person .....	113
197	Production of a document .....	114

## **PART 15 ADMISSIONS IN CRIMINAL PROCEEDINGS**

198	Definition of confession.....	115
199	Admission by accused in criminal proceedings.....	115
200	Court may refuse to admit confession .....	115
201	Exclusion of evidence obtained improperly or illegally .....	116
202	Cautioning of persons under arrest .....	117
203	Admissions by co-accused.....	118
204	Evidence of silence .....	119
205	Editing of inadmissible statements .....	119

## **PART 16 PROOF OF BIRTH, ADOPTION, DEATH AND MARRIAGE**

206	Proof of age determined by the court.....	120
207	Proof of age by birth certificate .....	120
208	Presumption of age .....	120

## **PART 17 MISCELLANEOUS**

209	Proof of service .....	121
210	Proof of previous convictions .....	121
211	Court may inform itself about legislation .....	122
212	Voir dire .....	122
213	Advance rulings .....	122
214	Leave, etc, be subject to terms .....	123
215	Averment as to public place.....	123
216	Court may order attendance of persons in custody .....	123
217	Evidence of property of the Republic of Vanuatu .....	124
218	Regulations .....	124
219	Court rules.....	124
220	Savings and transitional .....	124
221	Commencement .....	125

# REPUBLIC OF VANUATU

## BILL FOR THE EVIDENCE ACT NO. OF 2025

An Act to provide for the rules of evidence, and for related purposes.

Be it enacted by the President and Parliament as follows-

### PART 1 PRELIMINARY

#### 1 Interpretation

In this Act, unless the contrary intention appears:

**adult** means a person of 18 years of age or above;

**business** has the meaning given by section 2;

**child** means a person under the age of 18 years and includes an ex-nuptial child, adopted child, stepchild or a child living with a person as if the child were a member of the person's family;

**civil proceeding** means a proceeding other than a criminal proceeding;

**close relative of a person charged** means a spouse, parent or child of that person and includes an adoptive parent or an adopted child;

**Commissioner** has the same meaning as set out under section 1 of the Police Act [CAP 105];

**communication assistance** includes an interpreter, sign language interpreter, a person or a device which assists the court to understand the evidence given by a witness or an accused;

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

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

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

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

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

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

**country** includes a state or territory;

**court** means:

- (a) the Court of Appeal; or
- (b) the Supreme Court; or
- (c) the Magistrates' Court,

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

**criminal proceeding** means a prosecution for an offence and includes:

- (a) a proceeding for the committal of a person for trial or sentence for an offence; and
- (b) a proceeding relating to bail;

**document** includes a reference to:

- (a) any part of the document; and
- (b) any copy, reproduction or duplicate of the document or of any part of the document; and
- (c) any part of such a copy, reproduction or duplicate;

**identification evidence** has the meaning given by section 3;

**investigating official** means a police officer, and includes a person authorised by a written law with functions to prevent or investigate offences;

**leading question** means a question asked of a witness that:

- (a) directly or indirectly suggests a particular answer to the question; or
- (b) assumes the existence of a fact which is in dispute in the proceeding and the witness has not given evidence before the question is asked;

**Minister** means the Minister responsible for Youth, Justice and Community Services;

**offence** means an offence against or arising under an Act;

**offence against morality** means any offence against any section from section 90 to 101E of the Penal Code [CAP 135];

**police officer** has the same meaning as member under section 1 of the Police Act [CAP 105];

**probative value of evidence** means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue;

**propensity evidence** means evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events or circumstances with which a person is alleged to have been involved but does not include evidence of an act or omission that is:

- (a) one of the elements of the offence for which the person is being tried; or
- (b) the cause of action in the proceedings in question;

**public document** means a document that:

- (a) forms part of the records of the Republic of Vanuatu; or
- (b) forms part of the records of the government of another country; or
- (c) forms part of the records of a person holding office or exercising a function under the Constitution or any other written law or a law of another country; or

- (d) is being kept by or on behalf of the Republic of Vanuatu or the Government;

**representation** includes:

- (a) an express or implied representation (whether oral or in writing); or
- (b) a representation to be inferred from conduct; or
- (c) a representation not intended by its maker to be communicated to or seen by another person; or
- (d) a representation that for any reason is not communicated;

**spouse** includes a person married under custom and a person living as the husband of a woman or the wife of a man on a genuine domestic basis although not married under law or custom;

**video record** means a visual recording in any medium from which a moving image or a representation of a moving image may be perceived, reproduced or communicated by any means and includes an accompanying sound track or an audio component.

## **2 Meaning of business**

A reference to **business** includes a reference to all or any of the following:

- (a) a profession, calling, occupation, trade or undertaking;
- (b) an activity engaged in or carried on by the Republic of Vanuatu or the Government;
- (c) an activity engaged in or carried on by the government of another country;
- (d) an activity engaged in or carried on by a person holding office or exercising power under the Constitution or written law of Vanuatu or another country, being an activity engaged in or carried on in the performance of the function of the office or in the exercise of the power (other than in a private capacity);
- (e) the proceedings of Parliament or of a provincial assembly or of the legislature of another country and of any parliamentary committee or similar body;
- (f) a business that is not engaged in or carried on for profit;

- (g) a business engaged in or carried on outside Vanuatu.

### **3 Meaning of identification evidence**

- (1) Evidence is **identification evidence** if the evidence is an assertion that is:
  - (a) made by a person to the effect that a defendant was, or resembles (visually, aurally or otherwise) a person who was, present at or near a place where:
    - (i) the offence for which the defendant is being prosecuted was committed; or
    - (ii) an act connected to that offence was done; and
  - (b) made at or about the time at which that offence was committed or that act was done; and
  - (c) based wholly or partly on what the person making the assertion saw, heard or otherwise perceived at that place and time.
- (2) Evidence is **identification evidence** if the evidence is a report (whether oral or in writing) of an assertion referred to in subsection (1).

### **4 Preservation of common law and equity**

This Act does not operate as a Code and the principles and rules of common law and equity in relation to evidence that are not inconsistent with this Act are preserved.

### **5 Application**

- (1) Subject to section 220, this Act applies to all proceedings in a court, including:
  - (a) interlocutory proceedings or proceedings of a similar kind; and
  - (b) proceedings heard in chambers; and
  - (c) proceedings relating to bail or sentencing if the court makes a direction under subsection (2).
- (2) If a proceeding relates to sentencing or bail:
  - (a) this Act applies only if the court directs that the rule of evidence applies in the sentencing proceeding or bail application; and

- (b) if the court specifies in the direction that the rule of evidence applies only in relation to specified matters, the direction has effect accordingly.

## **6      Certain foreign laws cease to apply**

On the commencement of this Act, the British and French laws in relation to evidence that would otherwise apply by virtue of Article 95(2) of the Constitution cease to apply.

## **7      Original documents and document rule abolished**

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

## **8      Waiver of rules of evidence**

If it is in the interest of justice to do so or with the consent of the parties, a court may, at any stage of proceedings, by order, dispense with the application of any one or more of the provisions of this Act in relation to particular evidence or generally.

## **9      General powers of a court**

The power of a court to control the conduct of a proceeding consistent with this Act is preserved, including the power with respect to abuse of process in a proceeding.



## **PART 2 PROOF**

### **10 Civil standard of proof**

- (1) In a civil proceeding, the case of a party is proved if the court is satisfied that it has been proven on the balance of probabilities.
- (2) The court must, without limiting the matters that the court may take into account, in deciding whether or not it is satisfied that the case of a party is proven on the balance of probabilities, take into account:
  - (a) the nature of the cause of action or defence; and
  - (b) the nature of the subject matter of the proceeding; and
  - (c) the gravity of the matters alleged.

### **11 Criminal standard of proof**

- (1) In a criminal proceeding, the case of the prosecution is proved if the court is satisfied that it has been proven beyond reasonable doubt.
- (2) If the onus of proof is on an accused in a criminal proceeding, the court is to find the case of the accused proven if it is satisfied that the case has been proven on the balance of probabilities.
- (3) Subsection (1) does not apply to proceedings relating to sentencing, bail, amnesty or if the standard of proof is set out in any other Act.

### **12 Standard of proof for admission of evidence**

- (1) In a proceeding, a court must be satisfied that the facts necessary for deciding:
  - (a) a question whether evidence should be admitted or not admitted, whether in the exercise of a discretion or not; or
  - (b) any other question arising under this Act,have been proved on the balance of probabilities.
- (2) In considering any question under subsection (1), the court is to take into account:
  - (a) the importance of the evidence in the proceeding; and

- (b) the gravity of the matters alleged in relation to the question.

### **13      Judicial notice**

Any matter a court may take judicial notice of need not be proved.

### **14      Proof of legislation**

- (1) Proof is not required about the provisions and coming into operation (in whole or in part) of:
  - (a) an Act passed before, on or after the commencement of this Act; or
  - (b) a subsidiary legislation made, or purporting to be made, under such an Act, before, on or after the commencement of this Act; or
  - (c) a legislation referred to in Article 95(1) of the Constitution.
- (2) A court may inform itself about those matters in any way that it thinks fit.

### **15      Judges' signatures**

All courts and other judicial officers must take judicial notice of the signature of any of the Court of Appeal or Supreme Court judges, on any documents signed in exercise of judicial functions.

### **16      Proof of common knowledge**

- (1) Proof is not required about common knowledge that is not reasonably open to question and is:
  - (a) common knowledge in the locality in which the proceeding is being held or generally; or
  - (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
- (2) A court may acquire such knowledge in any way it thinks fit and is to take such knowledge into account.
- (3) The court is to give a party an opportunity:
  - (a) to make submissions; and
  - (b) to refer to relevant information,

relating to the acquiring or taking into account of such knowledge, or as is necessary to ensure that the party is not unfairly prejudiced.

- (4) For the purposes of this section, matters of custom or customary law are not to be considered as common knowledge.

### **17      Corroboration**

Subject to any other written law, it is not necessary that evidence on which a party relies be corroborated.

### **18      Unreliable evidence**

A court is not required to exercise caution before convicting an accused in reliance on all or any of the following evidence:

- (a) evidence given by a child;
- (b) evidence given by a victim of an offence against morality;
- (c) evidence in relation to an offence against morality given by any person if there was delay in reporting the offence.

## **PART 3 RELEVANT EVIDENCE ADMISSIBLE**

### **19 Relevant evidence is admissible**

- (1) All relevant evidence is admissible in a proceeding except evidence that is:
  - (a) inadmissible under this Act or any other law; or
  - (b) excluded in accordance with this Act or any other law.
- (2) Evidence that is not relevant is not admissible in a proceeding.
- (3) Evidence is relevant for the purposes of this Act if:
  - (a) the evidence has the tendency to make a fact more probable or less probable than it would be without the evidence; and
  - (b) that fact is of consequence in making the determination of an issue in the proceeding.

### **20 Admission by agreement**

- (1) In a proceeding, any fact of which oral evidence may be given, may be admitted by agreement for the purpose of that trial by or on behalf of the prosecutor or defendant.
- (2) The admission by any party of any such fact dispenses with proof of that fact and is conclusive evidence of the fact admitted against that party.
- (3) The agreed fact may include:
  - (a) relevant evidence that is not otherwise admissible; and
  - (b) evidence offered in any form or way agreed to by the parties.

### **21 Provisional admission of evidence**

- (1) If the determination of the question whether evidence adduced by a party is relevant depends on a court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant if:
  - (a) it is reasonably open to make that finding; or
  - (b) subject to further evidence being admitted at a later stage of the proceeding, that will make it reasonably open to make that finding.

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

**22 Inference as to relevance**

- (1) If a question arises as to the relevance of a document or thing, a court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.
- (2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

## **PART 4 COMPETENCE AND COMPELLABILITY**

### **23 General competence**

- (1) A person is presumed to be competent to give evidence in all proceedings.
- (2) Subject to this Act, a person who is competent to give evidence about a fact is compellable to give evidence in all proceedings.

### **24 Death or incompetence of witness**

Evidence that has been given by a witness does not become inadmissible merely because the witness, before he or she finishes giving evidence:

- (a) dies; or
- (b) ceases to be competent to give evidence.

### **25 Witness with an interest or conviction**

A person is not excused from giving evidence in any proceeding on the ground that the person:

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

### **26 Examination without subpoena**

- (1) A court may order a person who:
  - (a) is present at the hearing of a proceeding; and
  - (b) is compellable to give evidence in the proceeding,to give evidence and to produce documents or things even if a subpoena or other process requiring the person to attend for that purpose has not been served on the person.
- (2) A person so ordered to give evidence or to produce documents or things is subject to the same penalties and liabilities as if the person had been served with such a subpoena or other process.
- (3) A party who inspects a document or thing produced to the court because of subsection (1) does not need to use the document or thing in evidence.

**27 Person producing a document is not a witness**

If a person is summoned to produce a document, the person:

- (a) does not become a witness by the fact that he or she produced the document; and
- (b) cannot be cross-examined unless and until he or she is called as a witness.

**28 Lack of capacity to give evidence**

- (1) A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence is not competent to give sworn evidence.
- (2) Despite subsection (1), the person may be competent to give unsworn evidence.
- (3) Prior to a person giving unsworn evidence, a court must inform the person of the importance of telling the truth.
- (4) A person is not competent to give evidence (sworn or unsworn) about a fact if:
  - (a) for any reason (including physical disability), the person lacks the capacity to:
    - (i) understand a question about the fact; or
    - (ii) give an answer that can be understood to a question about the fact; and
  - (b) that incapacity cannot be overcome.
- (5) Despite subsection (4), the person may be competent to give evidence about other facts.
- (6) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by information from a person who has relevant specialised knowledge based on the person's training, study or experience.

**29 Determination of competency**

- (1) If the question arises as to whether a witness in a criminal proceeding is competent to give evidence in the proceeding, a court must determine the

question in accordance with this section, whether the question is raised by a party or the court.

- (2) Once the court accepts that the issue of competence is properly raised, it is for the party calling the witness to satisfy the court that, on the balance of probabilities, the witness is competent to give evidence in the proceedings.
- (3) In determining competency, the court must treat the witness as having the benefit of any of its directions that may be made in relation to the taking of his or her evidence.
- (4) Any questioning of the witness in relation to competency must be conducted by the court in the presence of the parties.
- (5) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by information from a person who has relevant specialised knowledge based on the person's training, study or experience.

### **30 Unsworn evidence**

- (1) Unsworn evidence is admissible for all purposes.
- (2) The probative value of the evidence is not decreased only because:
  - (a) the evidence is unsworn; and
  - (b) a person charged with an offence may be convicted on the evidence.

### **31 Persons not compellable**

- (1) The following persons are not compellable to give evidence:
  - (a) the President while in office; and
  - (b) a foreign sovereign; and
  - (c) the Head of State of another country while in office.
- (2) A member of Parliament is not compellable to give evidence if the member would, if compelled to give evidence, be prevented from attending:
  - (a) a sitting of Parliament; or



- (b) a meeting of a committee of Parliament, being a committee of which he or she is a member.

### **32 Judicial persons not compellable without leave**

A person who is or was acting judicially in a proceeding in Vanuatu or another country is not compellable to give evidence about the proceeding, unless the court in which the person is or was acting judicially gives leave.

### **33 Compellability of close relative**

- (1) In a criminal proceeding, a close relative of each person charged is compellable to give evidence on behalf of that person unless provided otherwise in any other law.

- (2) A close relative of a person charged is not:

- (a) compellable to give evidence for the prosecution; or
- (b) compellable to give evidence for the defence,

in a criminal proceeding, if that close relative is also charged.

### **34 Close-relative of accused may be excused**

- (1) A person who is a close relative of an accused in a criminal proceeding may be excused by the court from giving evidence for the prosecution in that proceeding.
- (2) In determining whether to excuse a close relative of an accused from giving evidence for the prosecution, the court must consider whether the public interest in the evidence being given is outweighed by the public interest in preventing harm to the relationship resulting from the giving of that evidence.
- (3) For the purpose of making the assessment required by subsection (2), the court must consider:
  - (a) the nature and gravity of the offence for which an accused is being prosecuted; and
  - (b) the substance and importance of any evidence the close relative might give and the weight likely to be given to it by the court; and

- (c) whether any other evidence concerning the matters which the person might give evidence about, is reasonably available to the prosecution; and
  - (d) the nature of the relationship between the accused and the close relative; and
  - (e) whether, in giving the evidence, the close relative would have to disclose a matter that was received by the close relative in confidence from the accused.
- (4) If any close relative of an accused is excused from giving evidence for the prosecution, the close relative must be treated as unavailable as a witness.

### **35 Former spouse compellable**

In any criminal proceeding (and at any stage of the proceeding), a former spouse of an accused is competent and compellable to give evidence on behalf of the prosecution, the accused or any person being tried jointly with the accused.

### **36 Accused not compellable**

An accused in a criminal proceeding is not competent to give evidence as a witness for the prosecution and is not compellable as a witness for the defence in that proceeding.

### **37 Question of accused about bad character or antecedents**

An accused called as a witness at his or her trial, must not be asked or required to answer, without leave of the court, any question to show that the accused is of bad character or has committed, been charged with, or found guilty of any offence, other than that with which he or she is charged, unless:

- (a) proof that the accused has committed or been found guilty of that other offence is admissible to show that the accused is guilty of the offence with which he or she is charged; or
- (b) the accused or his or her legal practitioner asked questions of a witness for the prosecution with a view to establishing the good character of the accused, or has given evidence of good character; or
- (c) the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witness for the prosecution; or
- (d) the accused has given evidence against any other person charged with the same offence.

**38 Propensity evidence against co-accused**

- (1) An accused in a criminal proceeding may offer propensity evidence against a co-accused only if that evidence is relevant to the defence raised or proposed to be raised by the accused.
- (2) An accused in a criminal proceeding who proposes to offer propensity evidence about a co-accused must give notice in writing to that co-accused and all other co-accused persons of the proposal to offer that evidence, unless the requirement to give notice is waived:
  - (a) by all of the co-accused persons; or
  - (b) by the court in the interest of justice.
- (3) A notice must:
  - (a) include the contents of the proposed evidence; and
  - (b) be given before the hearing so as to provide all the co-accused persons with a fair opportunity to prepare to meet that evidence.

**39 Circumstances when co-accused is compellable**

- (1) If an accused is charged with an offence jointly with any other person, the accused is a competent and compellable witness for the prosecution against the other person, and without the other person's consent, or for the defence of the other person, at any stage of the proceedings, if:
  - (a) the proceedings against the accused have been stayed, or the information against the accused withdrawn or dismissed; or
  - (b) the accused has been acquitted of the offence; or
  - (c) the accused has pleaded guilty to the offence; or
  - (d) the accused is being tried separately.
- (2) If two or more persons are jointly charged with any offence, the evidence of any person called as a witness for the prosecution or the defence under this section may be received as evidence either for or against any of the persons so charged.

**40 Arrangements for vulnerable witnesses**

- (1) If a court considers that the capacity of a witness to give evidence satisfactorily may be limited and that limitation may be lessened by making special arrangements for the taking of that person's evidence, the court may make such arrangements as it sees fit in the interest of justice.
- (2) Without limiting subsection (1), special arrangements may be requested by:
  - (a) a victim of a crime against morality; or
  - (b) a victim or witness in a domestic violence proceeding; or
  - (c) a person under the age of 18 years; or
  - (d) a person with a mental or physical disability, illness or impairment.
- (3) The court is to have regard to the following matters in determining what orders to make:
  - (a) the desirability of minimising distress or trauma for the witness; and
  - (b) the witness must be treated with dignity, respect and compassion; and
  - (c) the possibility of the witness being intimidated when giving evidence; and
  - (d) the proceeding should be resolved as quickly as possible.
- (4) Special arrangements that the court may make include all or any of the following:
  - (a) closing of the court;
  - (b) restriction on the publication of evidence;
  - (c) obscuring the witness from the view of the accused in a criminal trial;
  - (d) remote audio visual taking of evidence;

- (e)      allowing a support person to accompany the witness;
- (f)      suppressing the name of a victim or the witness, or both;
- (g)      making an order under section 26.

**41      Vulnerable witnesses cross-examined by accused**

- (1)      A court may intervene if the court considers that a witness's ability to testify under cross-examination may be adversely affected by the accused conducting the cross-examination.
- (2)      If the court considers it necessary in the interest of justice, it may appoint a person to ask the witness any questions that the accused requests the person to ask the witness.
- (3)      A person appointed under this section, when acting in the course of such appointment, must not give the accused or witness legal or other advice.

## **PART 5      GENERAL RULES ABOUT GIVING EVIDENCE**

### **42      Ordinary manner of giving evidence**

The ordinary way for a witness to give evidence is:

- (a)    in a criminal or civil proceeding, orally in a courtroom in the presence of:
  - (i)     the court; and
  - (ii)    the parties to the proceeding and their counsel; and
  - (iii)   any member of the public who wishes to be present, unless excluded by order of the court; or
- (b)    in a criminal proceeding, in a sworn statement filed in the court or by reading a written statement in a courtroom, if both the prosecution and the accused, or if there is more than one accused, all of the accused, consent to the giving of evidence in this form; or
- (c)    in a civil proceeding, in a sworn statement filed in the court or by reading a written statement in a courtroom, if:
  - (i)     the rules of court permit or require the giving of evidence in this form; or
  - (ii)    the parties to the proceeding consent to the giving of evidence in this form.

### **43      Court to control questioning**

A court may make such orders as it considers just in relation to:

- (a)    the way in which witnesses are to be questioned; and
- (b)    the production and use of documents and things in connection with the questioning of witnesses; and
- (c)    the order in which parties may question a witness; and
- (d)    the presence and behaviour of any person in connection with the questioning of witnesses.

**44      Court may question witness**

- (1) In any proceedings, a court may ask a witness any question in the interest of justice.
- (2) If the court questions a witness:
  - (a) a party, other than the party who called the witness, may cross-examine the witness on any matter raised by the court's questions; and
  - (b) the party who called the witness may re-examine the witness.

**45      Parties may question witness**

- (1) In any proceeding:
  - (a) a witness must first give evidence-in-chief; and
  - (b) after giving evidence-in-chief, the witness may be cross-examined by all parties that wish to do so, other than the party calling the witness; and
  - (c) after all parties who wish to do so have cross-examined the witness, the witness may be re-examined.
- (2) If a witness gives evidence in a sworn statement or by reading a written statement in a courtroom, it is to be treated for the purpose of this Act as evidence given in chief.
- (3) The procedure for examining unfavourable witnesses is set out in Part 14.

**46      Giving evidence in narrative form**

A court may, either of its own initiative or on application, direct that a witness gives evidence-in-chief wholly or partly in narrative form.

**47      Use of charts and summaries**

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

**48      Reviving memory**

- (1) A court may, on the request of a party, give such directions as are appropriate to ensure that specified documents and things used by a

witness, otherwise than while giving evidence to try to revive his or her memory, are produced to the party for the purposes of the proceeding.

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

**49 Reviving memory of facts or opinion**

- (1) A witness must not, in the course of giving evidence, use a document to try to revive his or her memory about a fact or opinion unless the court gives leave.
- (2) Without limiting the matters that the court may take into account in deciding whether to give leave, it is to take into account:
- (a) whether the witness is able to recall the fact or opinion adequately without using the document; and
  - (b) whether so much of the document as the witness proposes to use is, or is a copy of, a document, that:
    - (i) was written or made by the witness when the events recorded in it were fresh in his or her memory; or
    - (ii) was, at such a time, found by the witness to be accurate.
- (3) If a witness has, while giving evidence, used a document to try to revive his or her memory about a fact or opinion, the witness may with the leave of the court read aloud, as part of his or her evidence, so much of the document as relates to that fact or opinion.
- (4) The court is, on the request of a party, to give such directions as the court thinks fit to ensure that so much of the document as relates to the proceeding is produced to that party.

**50 Referring to copies of documents to refresh memory**

If a witness wishes to refresh his or her memory by reference to any document, the witness may with the permission of the court refer for such purpose to a copy of the document.

**51 Alternative ways of giving evidence**

- (1) A court may direct that the evidence of a witness is to be given in alternative ways to those provided for in section 42.



- (2) Without limiting the alternative ways in which a witness may give evidence, the witness may give evidence:
  - (a) while in the courtroom, but is unable to see the defendant; or
  - (b) from an appropriate place outside the courtroom, using any form of electronic communication link, either in Vanuatu or another country; or
  - (c) by a video record made before the hearing of the proceeding.
- (3) Any appropriate practical or technical means may be used to enable the court and any counsel to see and hear the witness giving evidence pursuant to any further direction that the Chief Justice may give.
- (4) In any criminal proceeding, the defendant must be able to see and hear the witness, except where the court directs otherwise.
- (5) If in a proceeding a witness anonymity order has been made by the court, the terms of the order must be complied with.
- (6) If a video record of the evidence of a witness is to be shown at the hearing of the proceeding, the court must give directions in accordance with section 52 as to the manner in which cross-examination and re-examination are to be conducted.
- (7) The court may admit evidence that is given substantially under the terms of a direction given under section 52, despite a failure to observe strictly all the terms.

**52      Directions as to alternative ways of giving evidence**

- (1) In any proceeding, a court may, on the application of a party or on the court's own initiative, direct that a witness is to give evidence-in-chief and to be cross-examined in an alternative way provided for under section 51.
- (2) An application for directions must be made to the court as early as practicable before the proceeding is to be heard, or at any other time permitted by the court.
- (3) A direction that a witness is to give evidence in an alternative way, may be made on one or more of the following grounds:
  - (a) the age or maturity of the witness; or

- (b) the physical, intellectual, psychological, or psychiatric impairment of the witness; or
  - (c) the trauma suffered by the witness; or
  - (d) any fear of intimidation of the witness; or
  - (e) the linguistic or cultural or religious beliefs of the witness; or
  - (f) the nature of the evidence that the witness is expected to give; or
  - (g) the relationship of the witness to any party to the proceeding; or
  - (h) the absence or likely absence of the witness from Vanuatu; or
  - (i) any other ground likely to promote the purpose the Act.
- (4) In giving directions, the court must have regard to:
- (a) the need to ensure the fairness of the proceeding and in a criminal proceeding that there is a fair trial; and
  - (b) the views of the other witnesses and the need to minimise the stress on the witness; and
  - (c) in a criminal proceeding, the need to promote the recovery of a complainant from the alleged offence and any other factor that is relevant to the just determination of the proceeding.

**53 Video recorded evidence**

- (1) A video record offered as an alternative way of giving evidence must be recorded in compliance with this Act and the Regulations.
- (2) A video record that is to be offered as an alternative way of giving evidence in a proceeding must be offered for viewing by all parties or their counsels before it is offered in evidence, unless the court directs otherwise.
- (3) All parties must be given the opportunity to make submissions about the admissibility of all or part of a video record that is to be offered as an alternative way of giving evidence.
- (4) If any party indicates that it wishes to object to the admissibility of all or any part of the video record that is being offered, that video record must be viewed by the court.

- (5) The court may make an order to remove from a video record offered as evidence any material that, if the evidence were given in the ordinary way, could be excluded under this Act or any other law.
- (6) The court may admit a video record that is recorded and offered as evidence substantially in accordance with the terms of any direction under section 52 and the Regulations, despite a failure to observe strictly all of those terms.

**54 Evidence by audio visual link**

- (1) A court may permit evidence to be given from a place other than the courtroom by means of an audio-visual link or other similar facilities that enable communication between that place and the courtroom if it is in the interest of justice to do so.
- (2) If a person is permitted to give evidence by means of an audio-visual link or other similar facilities from a location outside a court, that location is taken to be part of the court in which the proceedings are being held.
- (3) While a vulnerable person is giving evidence by means of an audio-visual link or other similar facilities, only persons approved by the court may be present in the room with the vulnerable person.
- (4) While a witness is giving evidence by means of an audio-visual link or other similar facilities, the persons who have an interest in the proceedings must be able to see the witness (and any person present with the witness) on the same or another television monitor while the witness is giving evidence.
- (5) A person who is permitted to give evidence by means of an audio-visual link or other similar facilities may not give courtroom identification evidence by that means.
- (6) If the court is not equipped with an audio-visual link or other similar facilities, or it otherwise considers it appropriate to do so, the court may adjourn the proceedings or any part of the proceedings to a court or place that is equipped with such facilities to enable a witness to give evidence by such means.
- (7) A court may permit evidence to be given from a place other than a courtroom by means of telephone or similar facilities that enable communication between that place and the courtroom if it is in the interest of justice to do so and if the parties consent.

**55      Rules may provide giving of evidence by audio visual link**

Rules of court may provide for the giving of evidence to the court by an audio-visual link from a location outside of Vanuatu.

**56      Leading questions in examination in-chief or re-examination**

- (1) A leading question must not be put to a witness in examination-in-chief or in re-examination unless:
  - (a) the court gives leave; or
  - (b) the question relates to a matter introductory to the witness's evidence; or
  - (c) no objection is made to the question and (apart from the party conducting the examination-in-chief or re-examination) each other party to the proceeding is represented by a legal practitioner; or
  - (d) the question relates to a matter that is not in dispute; or
  - (e) if the witness has specialised knowledge based on the witness's training, study or experience, the question is asked for the purpose of obtaining the witness's opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be given.
- (2) Unless the court otherwise directs, subsection (1), does not apply to civil proceedings to a question that relates to an investigation, inspection or report that the witness made in the course of carrying out public or official duties.
- (3) Subsection (1) does not prevent the court from exercising any power under the Civil Procedure Rules to allow a written statement or report to be tendered or treated as evidence in chief of its maker.

**57      Leading questions in cross-examination**

Leading questions may be asked in cross-examination, but the questions put must not assume that facts have been proved, or that particular answers have been given, if such is not the case.

**58      Court may prohibit leading questions in cross examination on contradictory evidence**

A court may prohibit leading questions from being put in cross-examination to a witness who shows a strong interest or bias in favour of the cross-examining party.

**59      Contradictory evidence**

If a party fails to cross-examine a witness on substantial matters of the party's case that contradict the evidence of the witness, being a witness who is, or might be, in a position to give admissible evidence on such matters, the court may:

- (a)      grant permission for the witness to be recalled and questioned about the contradictory evidence; or
- (b)      admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence; or
- (c)      exclude the contradictory evidence; or
- (d)      make any other order which the court considers just.

**60      Evidence in relation to sexual experience in offences against morality**

- (1)      In a case of an offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the accused, except with the leave of the court if it is satisfied that:
  - (a)      the evidence does not relate to sexual reputation; and
  - (b)      the evidence has significant probative value; and
  - (c)      it is in the interest of justice to receive such evidence or allow such questions.
- (2)      In a case of an offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with the accused unless the evidence or question:
  - (a)      relates directly to the acts, events, or circumstances which constitute the offence for which the accused is being tried; or

- (b) is of such direct relevance to facts in issue in the proceeding or the issue of the appropriate sentence that it would be contrary to the interest of justice to exclude it.
- (3) In a case of an offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the experience of the complainant in sexual matters:
  - (a) for the purpose of supporting or challenging the truthfulness of the complainant; or
  - (b) for the purpose of establishing the complainant's consent.

## **61 Re-examination**

- (1) On re-examination, a witness:
  - (a) may be questioned about matters arising out of evidence given by the witness in cross-examination, including any qualification in cross-examination of evidence given by the witness in examination-in-chief; but
  - (b) may not be questioned about any other matter except with the permission of the court.
- (2) If permission is given under paragraph (1)(b), the court:
  - (a) must allow other parties to cross-examine the witness on the additional evidence given; and
  - (b) may allow further re-examination on matters arising out of that cross-examination.

## **62 Parties recalling witnesses**

- (1) A court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined if:
  - (a) the evidence concerned has been admitted; and
  - (b) the evidence concerned contradicts evidence about the matter given by the witness in examination-in-chief; and

- (c) the witness could have given evidence about the matter in examination-in-chief.
- (2) A reference in this section to a matter raised by evidence adduced by another party includes reference to an inference drawn from, or that the party intends to draw from, that evidence.

**63 Court recalling witnesses**

- (1) A court may recall a witness who has given evidence in a proceeding if the court considers that it is in the interest of justice to do so.
- (2) The court may recall a witness under this section at any time until judgment is delivered in the proceeding.

**64 Witness to remain outside courtroom**

- (1) All witnesses as to fact in a criminal proceeding, other than an accused, must remain outside of the courtroom until required to give evidence.
- (2) All witnesses as to fact in a civil proceeding other than the claimant must remain outside the courtroom until required to give evidence.

**65 Witnesses who hear evidence**

A court cannot exclude a witness from giving evidence if he or she has heard the evidence from another witness, but may take that into account when considering what weight, the evidence of such a witness is to be given.

**66 Re-opening of case**

- (1) In any proceeding, a party may not offer further evidence after closing that party's case, except with the leave of the court.
- (2) In a civil proceeding, the court may not grant leave if any unfairness caused to any other party by the granting of leave cannot be remedied by an adjournment or an award of costs, or both.
- (3) In a criminal proceeding, the court may grant leave to the prosecution if:
  - (a) further evidence relates to a purely formal matter; or
  - (b) further evidence relates to a matter arising out of the conduct of the defence, the relevance of which could not reasonably have been foreseen; or

- (c) further evidence was not available or admissible before the prosecution's case was closed; or
  - (d) for any other reason the interest of justice requires the further evidence to be admitted.
- (4) In a criminal proceeding, the court may grant leave to an accused if the interest of justice requires further evidence to be admitted.
- (5) The court may grant leave at any time until judgment is delivered.

**67      Witness called in error**

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

**68      Improper questions**

- (1) A court may disallow a question, or inform a witness that it need not be answered, if the court considers the question put to the witness in cross-examination to be:
  - (a) misleading or confusing; or
  - (b) unduly annoying, harassing, intimidating, humiliating, offensive, oppressive or repetitive; or
  - (c) put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
  - (d) without basis, other than a sexist, racial, cultural or ethnic stereotype; or
  - (e) in a language that is too complicated for the witness to understand.
- (2) A question is not to be disallowed merely because:
  - (a) the question challenges the truthfulness of the witness or the consistency or accuracy of a statement made by the witness; or
  - (b) the question requires the witness to discuss a subject that could be considered to be distasteful or private.



- (3) A party may object to a question under this section or the court may act on its own initiative.
- (4) A person must not, without the express permission of the court, print or publish a question that the court has disallowed under this section.

**69 Police evidence**

- (1) In any proceeding, a police officer may give evidence-in-chief by reading or being led through a written statement previously made by the police officer.
- (2) Evidence under subsection (1) may not be given unless:
  - (a) the statement was made by the police officer at the time of or soon after the occurrence of the events to which it refers; and
  - (b) the police officer signed the statement when it was made; and
  - (c) a copy of the statement had been given to the person charged or other party or to his or her legal practitioner at a reasonable time before the hearing of the evidence.
- (3) A reference in this section to a police officer includes a reference to a person who, at the time the statement concerned was made, was a police officer.

**70 Communication assistance to accused**

- (1) A court may order communication assistance be provided to an accused in a criminal proceeding if needed to enable the accused to understand the proceeding and to give evidence if the accused elects to do so.
- (2) Communication assistance may be provided to an accused in a criminal proceeding on the application of the accused in the proceeding or on the initiative of the court.
- (3) A person who, whilst providing communication assistance to an accused, wilfully makes any false or misleading statement to the accused or to the court commits an offence and is liable on conviction to a fine not exceeding VT 100,000 or to imprisonment for a term not exceeding 12 months, or to both.

**71      Communication assistance to witnesses**

- (1) A court may order that communication assistance be provided to a witness in a civil or criminal proceeding if needed to enable that witness to give evidence.
- (2) Communication assistance may be provided to a witness on the application of the witness or any party to the proceeding or on the initiative of the court.
- (3) A person who, whilst providing communication assistance to a witness, wilfully makes any false or misleading statement to the witness or to the court commits an offence and is liable on conviction to a fine not exceeding VT 100,000 or to imprisonment for a term not exceeding 12 months, or to both.

**72      Hearing and speech impaired witness**

- (1) A witness who cannot hear adequately may be questioned in any appropriate way.
- (2) A witness who cannot speak adequately may give evidence by any appropriate means.
- (3) This section does not affect the right of a witness to whom this section applies to give evidence about a fact through an interpreter.

**73      Impartiality of interpreter**

If a party to a proceeding disputes the ability or impartiality of a person to act as an interpreter, the person may only act as an interpreter if the court is satisfied as to the person's ability and impartiality.

**74      Viewing by the court**

- (1) If, in any proceeding, a court considers that a view is in the interest of justice, the court may hold a view.
- (2) A view may be held or ordered on the application of any party or on the court's own initiative.
- (3) The court may hold a view at any time before judgment is delivered.
- (4) Evidence obtained at a view may be used as though that information had been given in evidence.

- (5) A party, including an accused in a criminal proceeding, and a legal practitioner for the party, are entitled to attend a view, but the party and the party's legal practitioner may waive that entitlement.
- (6) In this section, **view** means an inspection by the court of a place or thing which is not in the courtroom.

**75 Court may make inference after viewing**

A court may draw any reasonable inference from what it sees, hears or otherwise notices during a view, demonstration, experiment or inspection.

**76 Demonstration, experiment or inspection**

- (1) A court may, on application, order that a demonstration, experiment or inspection be held.
- (2) The court must not make an order unless it is satisfied that:
  - (a) the parties are given a reasonable opportunity to be present; and
  - (b) the court is to be present.
- (3) Without limiting the matters that the court may take into account in deciding whether to make an order, the court is to take into account the following matters:
  - (a) whether the parties are to be present; and
  - (b) whether the demonstration, experiment or inspection will, in the court's opinion, assist the court in resolving issues of fact or understanding the evidence; and
  - (c) the danger that the demonstration, experiment or inspection might be unfairly prejudicial, might be misleading or confusing or might cause or result in an undue waste of time; and
  - (d) in the case of a demonstration, the extent to which the demonstration will properly reproduce the conduct or event to be demonstrated; and
  - (e) in the case of an inspection, the extent to which the place or thing to be inspected has materially altered.

- (4)      The court must not conduct an experiment in the course of its deliberations.
- (5)      This section does not apply to the inspection of an exhibit by the court.

## **PART 6 EVIDENCE OF JUDGMENTS AND CONVICTIONS**

### **77 Conviction is proof of commission of offence**

- (1) If the fact that a person has committed an offence is relevant to an issue in a civil proceeding, proof that the person has been convicted of that offence is conclusive proof that the person committed the offence.
- (2) Despite subsection (1), if the conviction of a person is proved under subsection (1), the court may, in exceptional circumstances:
  - (a) permit a party to the proceeding to offer evidence tending to prove that the person convicted did not commit the offence for which the person was convicted; and
  - (b) if satisfied that it is appropriate to do so, direct that the issue whether the person committed the offence be determined without reference to subsection (1).
- (3) This section applies whether or not:
  - (a) the person convicted is a party to the proceeding; and
  - (b) the person was convicted on a guilty plea.
- (4) A party to a criminal proceeding who wishes to offer evidence of the fact that a person has been convicted of an offence must first inform the court of the purpose for which the evidence is to be offered.

### **78 Conviction as proof in defamation proceedings**

In a proceeding for defamation that is based on a statement made to the effect that a person has committed an offence, proof that the person has been convicted of the offence is conclusive proof that the person committed the offence if the conviction:

- (a) subsisted at the time that the statement was made; or
- (b) subsists at the time of the proceeding.

### **79 Civil judgment and criminal proceedings**

- (1) Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in a criminal proceeding or another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given.

- (2) This section does not affect the operation of:
- (a) a judgment in rem; or
  - (b) the law relating to res judicata or issue estoppel.

**80 Certificate of conviction, acquittal, orders and judgments**

- (1) Evidence of the following facts, if admissible, may be proved, in addition to any other mode provided by any law, by a certificate purporting to be signed by a court, a registrar or other officers having custody of the relevant court records:
- (a) the conviction or acquittal of a person charged with an offence and the particulars of the offence and of the person, and the name and date and place of incorporation of the person if the person is a body corporate;
  - (b) the sentencing by a court of a person to any penalty or other disposition of the case following a plea or finding of guilt, and the particulars of the offence for which that person was sentenced or otherwise dealt with and of the person, and the name and date and place of incorporation of the person if the person is a body corporate;
  - (c) an order or judgment of a court and the nature, parties and particulars of the proceeding to which the order or judgment relates;
  - (d) the existence of a criminal or civil proceeding, whether or not the proceeding has been concluded, and the nature of the proceeding.
- (2) The certificate referred to in paragraph (1)(a) or (b) must include the name and date of birth if the person is an individual.
- (3) A certificate under this section is sufficient evidence of the facts stated in it without proof of the signature or office of the person appearing to have signed the certificate.
- (4) Subsection (5) applies if:
- (a) a certificate under this section is offered in evidence in a proceeding for the purpose of proving the conviction or acquittal of a person, or the sentence by a court of a person to a penalty, or an order made by a court concerning a person; and

- (b) the name of the person stated in the certificate is substantially similar to the name of the person concerning whom the evidence is offered.
- (5) If this subsection applies, it is presumed, in the absence of evidence to the contrary, that the person whose name is stated in the certificate is the person concerning whom the evidence is offered.

## **81 Propensity evidence**

- (1) A party may offer propensity evidence in a civil or criminal proceeding about any person.
- (2) Propensity evidence about:
  - (a) an accused in a criminal proceeding may be offered only in accordance with section 38 or 82, whichever section is applicable; and
  - (b) a victim of an offence against morality may be offered only in accordance with section 60.

## **82 Propensity evidence by the prosecution**

- (1) The prosecution may offer propensity evidence about an accused in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on an accused.
- (2) When assessing the probative value of propensity evidence, the court must take into account the nature of the issue in dispute.
- (3) When assessing the probative value of propensity evidence, the court may consider, among other matters, the following:
  - (a) the frequency with which the acts, omissions, events or circumstances which are the subject of the evidence have occurred;
  - (b) the connection in time between the acts, omissions, events or circumstances which are the subject of the evidence and the acts, omissions, events or circumstances which constitute the offence for which an accused is being tried;
  - (c) the extent of the similarity between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts,

- omissions, events, or circumstances which constitute the offence for which an accused is being tried;
- (d) the number of persons making allegations against an accused is the same as, or similar to, the subject of the offence for which an accused is being tried;
  - (e) whether the allegations described in paragraph (d) may be the result of collusion or suggestibility;
  - (f) the extent to which the acts, omissions, events or circumstances which are the subject of the evidence and the acts, omissions, events or circumstances which constitute the offence for which an accused is being tried are unusual.
- (4) When assessing the prejudicial effect of evidence on an accused, the court must consider, among any other matters:
- (a) whether the evidence is likely to unfairly predispose the fact-finder against an accused; and
  - (b) whether the fact-finder will tend to give disproportionate weight, in reaching a verdict, to evidence of other acts or omissions.
- (5) An accused in a criminal proceeding may offer tendency evidence about himself or herself.
- (6) Despite the requirements of this section, if an accused offers tendency evidence about himself or herself, the prosecution or another party may with the permission of the court offer propensity evidence about that accused.



## **PART 7 IDENTIFICATION EVIDENCE**

### **83 Identification evidence**

- (1) A police officer may use one or more of the following procedures to help gather evidence of the identity of a person suspected of having committed an offence:
  - (a) an identification parade; or
  - (b) a photo board containing at least 12 photos of people of similar appearance, one of whom is the person suspected of having committed the offence; or
  - (c) videotape or other forms of visual recording; or
  - (d) computer generated images.
- (2) The police officer must comply with any procedures established for the taking of identification evidence.
- (3) The police officer may ask a person to take part in an identification parade.
- (4) The person may refuse to take part in the parade.
- (5) This section does not limit the procedures a police officer may use to help gather evidence of the identity of a person suspected of having committed an offence.

### **84 Identification procedure**

- (1) The way an identification procedure is conducted must allow only one witness involved in the procedure to see or hear the procedure at a time.
- (2) After a witness has taken part in the procedure, the witness must, as far as reasonably practicable, be prevented from speaking about the procedure to any other witness until the procedure ends.
- (3) The way a witness identifies a person during an identification procedure may be electronically recorded if facilities are available and it is reasonably practicable to do so.
- (4) A police officer must not stop a person being present during the procedure to support the witness unless:

- (a) the other person is a witness involved in the procedure; or
  - (b) the officer suspects the person will influence the witness's decision or disrupt the procedure.
- (5) If a police officer stops someone being present during the procedure to support a witness, the police officer must:
  - (a) give to the witness the reasons for stopping the person being present; and
  - (b) advise the witness he or she may arrange for someone else to be present to support the witness; and
  - (c) if asked, allow someone else to be present.

**85 Identification parades**

- (1) This section applies if a police officer conducts an identification parade that includes a person reasonably suspected of having committed an offence.
- (2) If reasonably practicable and if facilities are available, the police officer must cause the behaviour and position of each person in an identification parade to be photographed or otherwise electronically recorded.
- (3) The police officer must explain the procedure for an identification parade to a suspect before conducting the identification parade.
- (4) The explanation must include the police officer telling the suspect the following:
  - (a) the identification parade cannot be conducted unless the suspect agrees; and
  - (b) the suspect may have a friend, relative or legal practitioner present at the identification parade if that person can attend within a reasonable time; and
  - (c) anyone present may not interfere with the procedure in any way; and

- (d) the suspect may choose a position in the parade and change position in the parade after each witness has viewed the parade; and
  - (e) the suspect's identity will not be given to a witness unless the witness identifies the person and a proceeding is started against the person.
- (5) A police officer conducting an identification parade must, as far as reasonably practicable, replicate the conditions, described by the witness, when the witness saw a person involved in the offence, including:
  - (a) changing the lighting in the room; and
  - (b) varying the distance from which the witness views the identification parade; and
  - (c) concealing aspects of the participants in the identification parade.
- (6) Each witness must view the identification parade separately.
- (7) The police officer conducting the identification parade must ask the witness to carefully view the parade and to state whether the witness recognises anyone in the parade.
- (8) The police officer must ask the question in a way that does not suggest the identity of any participant in the identification parade.
- (9) If the witness indicates he or she recognises a person in the identification parade, the police officer conducting the parade must ask the witness to clearly identify the person recognised, such as, by stating the number of the person identified or describing his or her position in the parade.

## **86 Photo identification**

In a photo identification, to avoid directing the attention of a witness to a particular photograph, a police officer must ensure nothing is marked on any photograph or the backing board on which the photograph is mounted.

## **87 Photo boards**

- (1) A police officer showing witnesses a photo board must show the photo board to each witness separately.

- (2) The police officer must ask the witness to carefully view the photo board and to state whether the witness recognises anyone whose photo is on the photo board and must ask the question in a way that does not suggest the identity of a person whose photograph is on the photo board.
- (3) If the witness indicates he or she recognises a person in a photo on the photo board, the police officer must ask the witness to:
  - (a) clearly state the number of the photograph the witness has identified as being that of the person alleged to be responsible for committing the relevant offence; and
  - (b) write the photograph number and the date the photo board was shown to the witness:
    - (i) on the front of an unmarked photocopy of the photo board; or
    - (ii) on the back of the photo board or the selected photograph; and
  - (c) sign the photo board, photocopy or photograph where the person has written on it.

## **88 Voice identification**

Voice identification evidence offered by the prosecution in a criminal proceeding is inadmissible unless the prosecution proves on the balance of probabilities that the circumstances in which the identification was made were likely to have produced a reliable identification.

## PART 8 FORENSIC EVIDENCE

### Division 1 Definitions

#### 89 Definitions

In this Part:

**appropriately qualified person** is a person prescribed by the Regulations;

**biological material** includes but is not limited to:

- (a) a sample of hair, nail, saliva, blood, urine, or other bodily fluids, excretions or substances; and
- (b) a sample taken from a person that consists of matter taken from another person;

**forensic procedure** means:

- (a) an intimate forensic procedure; or
- (b) a non-intimate forensic procedure;

**guardian** means a customary or a legal guardian of:

- (a) a child; or
- (b) a person with impaired mental capacity;

**identifying information** means information contained in any analysts' reports made in relation to the identifying particulars of a person and includes any other information derived from the identifying particulars of the person;

**identifying particular** of a person is any of the following:

- (a) fingerprint; or
- (b) handprint; or
- (c) toeprint; or
- (d) footprint; or
- (e) voiceprint; or

- (f) handwriting sample; or
- (g) a photograph or video recording of the person's identifying features, including a photograph of scars or tattoos; or
- (h) a measurement, impression or cast of any part of the person's body; or
- (i) biological material;

**independent person** means a person other than a police officer or other person involved in the investigation of an offence to which the forensic procedure relates;

**intimate forensic procedure** is any of the following forensic procedures:

- (a) an external examination of the genital or anal area, the buttocks, or, for a female, the breasts; or
- (b) the taking of a sample of blood; or
- (c) the taking of a sample of pubic hair; or
- (d) the taking of a sample by swab or washing from the external genital or anal area, the buttocks, or, for a female, the breasts; or
- (e) the taking of a sample by vacuum suction, by scraping or by lifting by tape from the external genital or anal area, the buttocks, or, for a female, the breasts; or
- (f) the taking of a dental impression; or
- (g) the taking of a photograph or video recording of, or an impression or cast of a wound from, the genital or anal area, the buttocks, or, for a female, the breasts;

**medical professional** includes a doctor, a nurse or a dentist;

**non-intimate forensic procedure** is any of the following forensic procedures:

- (a) an examination of a part of the body (other than the genital or anal area, buttocks, or, for a female, the breasts) that requires touching of the body or removal of clothing; or
- (b) the taking of a sample of hair (other than pubic hair); or

- (c) the taking of a sample from a nail or under a nail; or
- (d) the taking of a sample of saliva or a sample by buccal swab; or
- (e) the taking of a sample of blood by a finger prick; or
- (f) the taking of a sample by swab or washing from any external part of the body (other than the genital or anal area, the buttocks, or, for a female, the breasts); or
- (g) the taking of a sample by vacuum suction, by scraping or by lifting by tape from any external part of the body (other than the genital or anal area, the buttocks, or, for a female, the breasts); or
- (h) the taking of a fingerprint, handprint, toeprint or footprint; or
- (i) the taking of a photograph or video recording of, or an impression or cast of a wound from, a part of the body (other than the genital or anal area, the buttocks, or, for a female, the breasts); or
- (j) the taking of a handwriting sample or voiceprint; or
- (k) the taking of a breath sample for breathalyser analysis;

**parent** means a parent of a child or a person with impaired mental capacity;

**person with impaired mental capacity** means an adult who, without reasonable support:

- (a) is incapable of understanding the general nature and effect of collecting identifying particulars; or
- (b) is incapable of indicating whether he or she consents or does not consent to providing identifying particulars;

**serious offence** means an offence punishable by a maximum penalty of imprisonment for life, or 5 or more years of imprisonment;

**serious offender** is a person convicted of a serious offence;

**senior officer** means a senior officer as defined in the Police Act [CAP 105];

**suspect** means a person who:

- (a) is suspected by a police officer, on reasonable grounds, to have committed an offence; or
- (b) has been charged with an offence; or
- (c) has been summoned to appear before a court for an offence;

**voiceprint** is a method of measuring the characteristics of a person's speech which can be used to identify a person in a similar way to a fingerprint;

**volunteer** means a person:

- (a) who volunteers to a police officer to undergo a forensic procedure; or
- (b) in the case of a child or a person with impaired mental capacity – whose parent or guardian volunteers on the child's or incapable person's behalf to a police officer that the child or incapable person undergo a forensic procedure.

## **Division 2 Forensic procedures on suspect**

### **90 Forensic procedures may be carried out with informed consent of suspect**

- (1) This section does not authorise the carrying out of a forensic procedure on a suspect who is a child or a person with impaired mental capacity.
- (2) A person must not carry out a forensic procedure on a suspect unless the suspect has given his or her informed consent.
- (3) A suspect gives informed consent to a forensic procedure if the suspect consents after a police officer:
  - (a) requests the suspect to consent to the forensic procedure in accordance with section 91; and
  - (b) informs the suspect about the forensic procedure in accordance with section 92.

### **91 Requesting consent of suspect for forensic procedure**

- (1) A police officer may request a suspect to consent to a forensic procedure if he or she is satisfied that:
  - (a) there are reasonable grounds to believe that the suspect has committed an offence; and



- (b) the identifying particulars to be taken include biological material, and the offence in relation to which the person is a suspect is a serious offence; and
  - (c) there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed the offence referred to in paragraph (a); and
  - (d) the request for consent to the forensic procedure is justified in all the circumstances.
- (2) In determining whether a request is justified in all the circumstances, the police officer must balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.
- (3) In balancing those interests, the police officer must have regard to the following:
  - (a) the seriousness of the circumstances surrounding the commission of the offence and the gravity of the offence; and
  - (b) the degree of the suspect's alleged participation in the commission of the offence; and
  - (c) the age, physical and mental health and cultural background of the suspect, to the extent that he or she is known to the police officer or can reasonably be discovered by the police officer; and
  - (d) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the offence; and
  - (e) any other matter considered relevant to balancing those interests.

**92 Matters that suspect must be informed of before giving consent**

- (1) Subject to subsection (2), a police officer who requests a suspect to consent to a forensic procedure must inform the suspect, at the time of the request, of the following matters:
  - (a) that the giving of information under this section, and the giving of consent by the suspect, is being or is to be recorded by audio tape,

- videotape or other electronic means, or in writing, and that the suspect has a right to a copy of that record; and
- (b) the purpose for which the forensic procedure is required; and
  - (c) the offence in relation to which the police officer wants the forensic procedure carried out; and
  - (d) the way in which the forensic procedure is to be carried out; and
  - (e) that the forensic procedure taken may produce evidence against the suspect that might be used in a court; and
  - (f) if relevant, that the forensic procedure is to be carried out by a medical professional or an appropriately qualified person; and
  - (g) that the identifying particulars or identifying information obtained may be put on a police database; and
  - (h) the rules that apply to the disclosure and use of the identifying particulars or identifying information as a result of being put on the database in paragraph (g); and
  - (i) that the suspect may consent or refuse to consent to the taking of the identifying particulars; and
  - (j) that the consent may be withdrawn at any time before the taking of the identifying particulars is completed; and
  - (k) if the suspect is requested to undergo a forensic procedure by a foreign law enforcement agency, the following additional matters are required:
    - (i) the name of the foreign law enforcement agency that has made the request; and
    - (ii) that the forensic evidence resulting from the forensic procedure is to be provided to the foreign law enforcement agency; and
    - (iii) that the forensic evidence may be used in proceedings against the suspect in the foreign country; and

- (iv) that the retention of the forensic evidence is to be governed by the laws of the foreign country; and
  - (v) that the retention of the forensic evidence is subject to undertakings given by the foreign law enforcement agency; and
  - (vi) the content of those undertakings; and
- (1) that if the suspect does not consent, the other powers, if any, under which the forensic procedure may still be conducted.
- (2) The duty of a police officer to inform a suspect under subsection (1) must be exercised in the presence of an independent person who is not a police officer, unless the suspect requests that an independent person not be present.
- (3) The police officer must, if practicable, ensure that:
  - (a) the giving of the information under subsection (1) and the suspect's responses are recorded by audiotape, videotape or other electronic means; and
  - (b) a copy of the record is made available to the suspect.
- (4) If electronic recording of the giving of the information under subsection (1) and the suspect's responses are not practicable, the police officer must ensure that:
  - (a) a written record of the giving of the information and the suspect's responses are made and signed by the suspect; and
  - (b) a copy of the record is made available to that suspect.

**93 Withdrawal of consent of suspect**

- (1) A suspect who consents under subsection 90(3) may expressly or implicitly withdraw his or her consent before or during a forensic procedure.
- (2) If:
  - (a) a suspect expressly withdraws consent to the carrying out of the forensic procedure; or

- (b) the withdrawal of such consent can reasonably be inferred from the suspect's conduct before or during the forensic procedure,

consent is taken to have been refused from the time of the withdrawal.

**94 Circumstances in which senior officer may order a non-intimate forensic procedure**

- (1) A senior officer may order the carrying out of a non-intimate forensic procedure on a suspect who is in custody if:
  - (a) the suspect was requested to consent to the forensic procedure; and
  - (b) the suspect has not consented; and
  - (c) the senior officer is satisfied of the matters in subsection (2).
- (2) For the purposes of paragraph (1)(c), the senior officer must be satisfied that:
  - (a) the person on whom the forensic procedure is proposed to be carried out is a suspect; and
  - (b) the suspect is in lawful custody; and
  - (c) there are reasonable grounds to believe that the suspect has committed an offence; and
  - (d) if the identifying particulars to be taken include biological material, the offence in relation to which the person is a suspect is a serious offence; and
  - (e) there are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed the offence referred to in paragraph (c); and
  - (f) that the carrying out of the forensic procedure is justified in all the circumstances.
- (3) For the purposes of paragraph (2)(f), the senior officer must consider the following:
  - (a) whether the public interest in obtaining the evidence outweighs the suspect's human rights to physical integrity and privacy; and

- (b) the seriousness of the circumstances surrounding the commission of the offence and the gravity of the offence; and
- (c) the degree of the suspect's alleged participation in the commission of the offence; and
- (d) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the offence; and
- (e) if the suspect gave any reasons for refusing to consent, the reasons for not consenting.

**95 Record of senior officer's order**

- (1) The senior officer may make an order under section 94 in person, or if that is not practicable, by telephone, fax or other electronic means.
- (2) A record of the order must be made and signed as soon as practicable, and must include the date and time it was made, and the reasons for the order.
- (3) The senior officer must ensure that a copy of the record is made available to the suspect as soon as practicable after the record is made.

**96 Forensic procedures may be carried out on a suspect by a court order**

- (1) A police officer or the Public Prosecutor may apply to a court for an order to carry out a forensic procedure on a suspect if:
  - (a) the suspect is not in custody, and has been requested to consent and has not consented to the forensic procedure; or
  - (b) the suspect is in custody, and has been requested to consent and has not consented to the forensic procedure; or
  - (c) the suspect is a child or a person with impaired mental capacity; or
  - (d) the forensic procedure has been requested by a foreign country in accordance with the Mutual Assistance in Criminal Matters Act [CAP 285].
- (2) The police officer or the Public Prosecutor may not apply to a court for an order to carry out a forensic procedure under this section if the procedure has been requested by a foreign law enforcement agency.

- (3) Subject to section 97, a court may order a forensic procedure to be carried out on a suspect.
- (4) A person is authorised to carry out a forensic procedure on a suspect if a court makes an order in relation to the suspect under subsection (3).
- (5) A forensic procedure carried out under this section must be carried out in accordance with Division 5 of this Part.

**97 Circumstances in which court may order a forensic procedure on suspect**

- (1) The court may make an order under subsection 96(3) if it is satisfied that:
  - (a) the person on whom the forensic procedure is proposed to be carried out is a suspect; and
  - (b) there are reasonable grounds to believe that the suspect has committed an offence; and
  - (c) if the identifying particulars to be taken include biological material, the offence in relation to which the person is a suspect is a serious offence; and
  - (d) there are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed the offence referred to in paragraph (b); and
  - (e) if the forensic procedure has been requested by a foreign country, the applicant has complied with the Mutual Assistance in Criminal Matters Act [CAP 285]; and
  - (f) the carrying out of the forensic procedure is justified in all the circumstances.
- (2) For the purposes of paragraph (1)(f), a court must consider the following:
  - (a) whether the public interest in obtaining the evidence outweighs the suspect's human rights to physical integrity and privacy; and
  - (b) if the forensic procedure has been requested by a foreign country, whether the public interest in providing and receiving international assistance in criminal matters outweighs the suspect's human rights to physical integrity and privacy; and

- (c) the seriousness of the circumstances surrounding the commission of the offence and the gravity of the offence; and
- (d) the degree of the suspect's alleged participation in the commission of the offence; and
- (e) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the offence; and
- (f) if the suspect gave any reasons for refusing to consent, the reasons for not consenting.

### **98 Procedure at hearing of application for order**

If an application for an order is made under section 96, the suspect must be present at the hearing of the application unless:

- (a) the application and any summons issued by the court has been served on the suspect and the suspect is not present; or
- (b) it is not practicable to bring the suspect to court and the court is satisfied that the probative value of any identifying particulars obtained in carrying out the forensic procedure concerned is likely to be lost or destroyed if there is delay in carrying out the forensic procedure.

## **Division 3 Forensic procedures on a serious offender**

### **99 Forensic procedures may be carried out with informed consent of serious offender**

- (1) This section does not apply to the carrying out of a forensic procedure on a serious offender who is a child or person with impaired mental capacity.
- (2) A person is authorised to carry out a forensic procedure to which this Division applies on a serious offender who is serving a sentence of imprisonment with the informed consent of the serious offender.
- (3) A serious offender gives informed consent to a forensic procedure if the serious offender consents after a police officer:
  - (a) requests the serious offender to consent to forensic procedure; and
  - (b) informs the serious offender about the forensic procedure in accordance with section 100; and

- (c) gives the serious offender the opportunity to communicate, or attempt to communicate, with a lawyer of the serious offender's choice.
- (4) The police officer must allow the serious offender to communicate, or attempt to communicate, with a lawyer in private unless the police officer suspects on reasonable grounds that the serious offender might attempt to destroy or contaminate any identifying particulars that might be obtained by carrying out the forensic procedure.
- (5) A person must, as soon as practicable, carry out a forensic procedure on a serious offender who has given informed consent.
- (6) A police officer must not use the identifying particulars taken from a serious offender for a purpose other than that stated to the person at the time of seeking consent.
- (7) A forensic procedure carried out under this section must be carried out in accordance with Division 5 of this Part.

**100 Matters that serious offender must be informed of before giving consent**

- (1) Subject to subsection (2), a police officer requesting a serious offender's consent to a forensic procedure must inform the serious offender, at the time of the request, of the following matters:
  - (a) that a record is to be made of the giving of information under this section, if the serious offender gives consent, and that the serious offender has a right to a copy of that record; and
  - (b) the purpose for which the identifying particulars are required; and
  - (c) the offence if the police officer wants the forensic procedure carried out in relation to that offence; and
  - (d) the way in which the identifying particulars are to be taken; and
  - (e) that the identifying particulars taken may produce evidence that could be used in court against the serious offender; and
  - (f) if relevant, that any forensic procedure is to be carried out by a medical professional or an appropriately qualified person; and



- (g) that the identifying particulars or identifying information obtained may be put on a police database; and
  - (h) the rules that apply to the disclosure and use of the identifying particulars or identifying information as a result of being put on the database in paragraph (g); and
  - (i) that the person may consent or refuse to consent to the taking of the identifying particulars; and
  - (j) that the consent may be withdrawn at any time before the taking of the identifying particulars is completed; and
  - (k) that if the suspect does not consent, the other powers, if any, under which the forensic procedure may still be conducted.
- (2) The duty of a police officer to inform a serious offender in subsection (1) must be exercised in the presence of an independent person who is not a police officer, unless the serious offender requests that an independent person not be present.
- (3) The police officer must, if practicable, ensure that:
- (a) the giving of the information in subsection (1) and the serious offender's responses are recorded by audiotape, videotape or other electronic means; and
  - (b) a copy of the record is made available to the serious offender.
- (4) If electronic recording of the giving of the information in subsection (1) and the serious offender's responses are not practicable, the police officer must ensure that:
- (a) a written record of the giving of the information and the serious offender's responses are made; and
  - (b) a copy of the record is made available to the serious offender.
- 101 Non-intimate forensic procedure may be carried out on serious offender by order of senior officer**
- (1) This section does not apply to the carrying out of a non-intimate forensic procedure on a serious offender who is a child or person with impaired mental capacity.

- (2) Subject to section 102, a person is authorised to carry out a non-intimate forensic procedure on a serious offender who is serving a sentence of imprisonment by order of a senior officer.
- (3) A non-intimate forensic procedure carried out under this section must be carried out in accordance with Division 5 of this Part.

**102 Circumstances in which senior officer may order non-intimate forensic procedure**

A senior officer may order the carrying out of a non-intimate forensic procedure on a serious offender who is serving a sentence of imprisonment if:

- (a) the serious offender was requested to consent to the forensic procedure; and
- (b) the serious offender has not consented; and
- (c) the senior officer is satisfied that the carrying out of the forensic procedure without consent is justified in all the circumstances.

**103 Record of senior officer's order**

- (1) A senior officer may make an order under section 102 in person, or if that is not practicable, by telephone, fax or other electronic means.
- (2) A record of the order made under subsection (1), must be made and signed as soon as practicable, and must include the date and time it was made, and the reasons for the order.
- (3) The senior officer must ensure that a copy of the record is made available to the serious offender as soon as practicable after the record is made.

**104 Forensic procedures may be carried out on serious offender by order of court**

- (1) The Public Prosecutor or a police officer may apply to a court for an order to carry out a forensic procedure on a serious offender who is serving a sentence of imprisonment.
- (2) Subject to section 105, a court may order a forensic procedure to be carried out on a serious offender who is serving a sentence of imprisonment.
- (3) A person is authorised to carry out a forensic procedure on a serious offender who is serving a sentence of imprisonment if a court makes an order in relation to the serious offender under subsection (2).

- (4) A forensic procedure carried out under this section must be carried out in accordance with Division 5 of this Part.

**105 Circumstances in which court may order a forensic procedure on serious offender**

- (1) The court may make an order under subsection 104(2) if it is satisfied that:
- (a) the person is a serious offender who is serving a sentence of imprisonment; and
  - (b) the carrying out of the forensic procedure without consent is justified in all the circumstances.
- (2) For the purposes of paragraph (1)(b), a court must consider:
- (a) whether the public interest in obtaining the evidence outweighs the serious offender's human rights to physical integrity and privacy; and
  - (b) if the serious offender gave any reasons for refusing to consent, the reasons for not consenting.

**Division 4 Forensic procedures on certain other persons**

**106 Forensic procedures may be carried out with informed consent of a volunteer**

- (1) A person must not carry out a forensic procedure under this section on a volunteer if the volunteer is a suspect.
- (2) A person may carry out a forensic procedure on a volunteer:
- (a) if the volunteer is not a child or person with impaired mental capacity – with the informed consent of the volunteer; or
  - (b) if the volunteer is a child or person with impaired mental capacity – with the informed consent of the parent or guardian of the volunteer.
- (3) A police officer must allow the volunteer, or parent or guardian of the volunteer, to consult a lawyer of his or her choice in private before the volunteer, or parent or guardian of the volunteer, decides whether or not to consent to the forensic procedure.

- (4) The person must, as soon as practicable, carry out a forensic procedure on a volunteer after informed consent has been given by the volunteer or a parent or guardian of the volunteer.
- (5) The police officer must not use the identifying particulars taken from a person for a purpose other than that stated to the volunteer, or parent or guardian of the volunteer, at the time of seeking consent.
- (6) If the volunteer, or parent or guardian of the volunteer, consents to a forensic procedure being carried out on the volunteer and identifying particulars are taken from the volunteer, the volunteer, or parent or guardian of the volunteer, is taken to consent to the retention of the identifying particulars and identifying information.
- (7) The police officer and the volunteer, or parent or guardian of the volunteer, may set the period for which the identifying particulars or identifying information may be retained by the police officer.
- (8) A forensic procedure carried out under this section must be carried out in accordance with Division 5 of this Part.

**107 Matters that volunteer must be informed of before giving consent**

- (1) Subject to subsection (2), a police officer who requests a volunteer to consent to a forensic procedure must inform the volunteer, at the time of the request, of the following matters:
  - (a) that a record is to be made of the giving of information under this section, and the giving of consent by the volunteer, and that the volunteer has a right to a copy of that record; and
  - (b) that the volunteer is under no obligation to consent to undergoing the forensic procedure; and
  - (c) the purpose for which the identifying particulars are required; and
  - (d) the offence if the police officer wants the forensic procedure carried out in relation to that offence; and
  - (e) the way in which the identifying particulars are to be taken; and
  - (f) that the identifying particulars taken may produce evidence that could be used in court; and

- (g) if relevant, that any forensic procedure is to be carried out by a medical professional or an appropriately qualified person; and
  - (h) that the volunteer may consult a lawyer of his or her choice before deciding whether or not to consent to the forensic procedure; and
  - (i) that if the volunteer consents to the forensic procedure:
    - (i) the consent is also consent to the retention of identifying particulars taken and identifying information; and
    - (ii) the police officer and the volunteer may set a period for which the particulars or information may be retained, but it must then be destroyed unless a court otherwise orders retention; and
  - (j) if the volunteer is requested to undergo a forensic procedure by a foreign law enforcement agency, the following additional matters are required:
    - (i) the name of the foreign law enforcement agency that has made the request; and
    - (ii) that forensic evidence resulting from the forensic procedure is to be provided to the foreign law enforcement agency; and
    - (iii) that the forensic evidence may be used in proceedings in the foreign country; and
    - (iv) that the retention of the forensic evidence is governed by the laws of the foreign country; and
    - (v) that the retention of the forensic evidence is subject to undertakings given by the foreign law enforcement agency; and
    - (vi) the content of those undertakings; and
  - (k) that the volunteer may at any time withdraw consent to undergoing the forensic procedure or to retention of the identifying particulars taken or of information obtained from the analysis of the material.
- (2) The duty of a police officer to inform a volunteer under subsection (1), must be exercised in the presence of an independent person who is not a
-

police officer, unless the volunteer requests that the independent person not be present.

**108 Matters that parent or guardian must be informed of before giving consent**

- (1) Subject to subsection (2), a police officer who requests a parent or guardian of a volunteer to consent to a forensic procedure must inform the parent or guardian, at the time of the request, of the following matters:
- (a) that a record is made of the giving of information under this section, and the giving of consent by the parent or guardian, and that the parent or guardian has a right to a copy of that record; and
  - (b) that the parent or guardian is under no obligation to consent to the volunteer undergoing the forensic procedure; and
  - (c) the purpose for which the identifying particulars are required; and
  - (d) the offence if the police officer wants the forensic procedure carried out in relation to an offence; and
  - (e) the way in which the identifying particulars are to be taken; and
  - (f) that the identifying particulars taken may produce evidence that could be used in court; and
  - (g) if relevant, that any forensic procedure is to be carried out by a medical professional or an appropriately qualified person; and
  - (h) that the parent or guardian may consult a lawyer of his or her choice before deciding whether or not to consent to the forensic procedure; and
  - (i) that if the parent or guardian consents to the forensic procedure:
    - (i) the consent is also consent to the retention of identifying particulars taken and identifying information; and
    - (ii) the police officer and the parent or guardian may set a period for which the particulars or information may be retained, but it must then be destroyed unless a court otherwise orders retention; and

- (j) if the volunteer is being asked to undergo a forensic procedure because of a request by a foreign law enforcement agency, the following additional matters are required:
    - (i) the name of the foreign law enforcement agency that has made the request; and
    - (ii) that forensic evidence resulting from the forensic procedure is to be provided to the foreign law enforcement agency; and
    - (iii) that the forensic evidence may be used in proceedings in the foreign country; and
    - (iv) that the retention of the forensic evidence is governed by the laws of the foreign country; and
    - (v) that the retention of the forensic evidence is subject to undertakings given by the foreign law enforcement agency; and
    - (vi) the content of those undertakings; and
  - (k) that the parent or guardian may at any time withdraw consent to undergoing the forensic procedure or to retention of the identifying particulars taken or of information obtained from the analysis of the material.
- (2) The duty of a police officer to inform a parent or guardian under subsection (1), must be exercised in the presence of an independent person who is not a police officer, unless the parent or guardian requests that an independent person not be present.
- 109 Forensic procedures may be carried out on a child or person with impaired mental capacity by order of court**
- (1) The Public Prosecutor or a police officer may apply to a court for an order to carry out a forensic procedure to which this Part applies on a child or person with impaired mental capacity.
  - (2) Subject to section 110, a court may order a forensic procedure to be carried out on a child or person with impaired mental capacity.

- (3) A court may not order the carrying out of a forensic procedure on a child or person with impaired mental capacity under this section if the procedure has been requested by a foreign law enforcement agency.
- (4) A person may carry out a forensic procedure on a child or person with impaired mental capacity if a court makes an order in relation to a child or person with impaired mental capacity under subsection (2).
- (5) A forensic procedure carried out under this section must be carried out in accordance with Division 5 of this Part.

**110 Circumstances in which court may order forensic procedure on a child or person with impaired mental capacity**

- (1) The court may make an order under subsection 109(2) if it is satisfied that the carrying out of the forensic procedure is justified in all the circumstances and one of the following applies:
  - (a) the consent of the parent or guardian of the child or person with impaired mental capacity to the carrying out of the forensic procedure cannot reasonably be obtained; or
  - (b) the parent or guardian of the child or person with impaired mental capacity refuses to consent to the carrying out of the forensic procedure and the court is satisfied that there are reasonable grounds to believe that:
    - (i) the parent or guardian is a suspect; and
    - (ii) the forensic procedure is likely to produce evidence tending to confirm or disprove that the parent or guardian committed an offence; or
  - (c) the parent or guardian of the child or person with impaired mental capacity consented to the carrying out of the forensic procedure, but subsequently withdraws that consent; or
  - (d) if the forensic procedure has been requested by a foreign country, the applicant has complied with the Mutual Assistance in Criminal Matters Act [CAP 285].
- (2) Prior to making an order under subsection 109(2), a court must consider the following:



- (a) if the forensic procedure is being carried out for the purposes of the investigation of a particular offence – the seriousness of the circumstances surrounding the commission of the offence; and
- (b) the best interests of the child or person with impaired mental capacity; and
- (c) any wishes of the child or person with impaired mental capacity with respect to whether the forensic procedure should be carried out; and
- (d) except in the circumstances referred to in paragraph (1)(b), any wishes expressed by the parent or guardian of the child or person with impaired mental capacity with respect to whether the forensic procedure should be carried out.

**111 Forensic procedures may be carried out on deceased person**

- (1) Subject to subsection (2), a person is authorised to carry out a forensic procedure on a deceased person by order of a police officer.
- (2) A police officer may order the carrying out of a forensic procedure on a deceased person if satisfied that the forensic procedure is reasonably necessary for the purpose of identifying the person or for the purpose of a criminal investigation.

**Division 5 Carrying out forensic procedures**

**112 General rules for carrying out forensic procedures**

- (1) A forensic procedure:
  - (a) must be carried out in circumstances providing reasonable privacy to the person who is the subject of the procedure; and
  - (b) must not involve the removal of more clothing than is necessary for carrying out the procedure; and
  - (c) must not involve more visual inspection than is necessary for carrying out the procedure; and
  - (d) must be carried out in a way consistent with appropriate medical or other relevant professional standards prescribed by the Regulations; and

- (e) must be carried out by the least painful technique known and available to the person.
- (2) An intimate forensic procedure or a non-intimate forensic procedure that involves touching the person who is the subject of the procedure, must not:
  - (a) except if permitted by the person who is the subject of the procedure, wherever possible, be carried out in the presence or view of anyone who is of the opposite sex to the person; and
  - (b) except if permitted by the person who is the subject of the procedure, be carried out in the presence or view of a person whose presence is not necessary for the forensic procedure or required or permitted under another provision of this Act.
- (3) A forensic procedure must not be carried out in a cruel, inhuman or degrading way.
- (4) The carrying out of a forensic procedure on a person in accordance with this Act is not taken to be cruel, inhuman or degrading to the person who is the subject of the procedure.

**113 Person who may carry out forensic procedures**

- (1) A medical professional or an appropriately qualified person may carry out a forensic procedure under this Part.
- (2) A police officer may carry out a non-intimate forensic procedure under this Part.
- (3) A police officer must not carry out an intimate forensic procedure other than:
  - (a) an external examination of the genital or anal area, the buttocks, or, for a female, the breasts; or
  - (b) the taking of a photograph or video recording or, or an impression or cast of a wound from, the genital or anal area, the buttocks, or, for a female, the breasts.
- (4) Only a police officer of the rank of sergeant or above and of the appropriate gender can carry out the procedure under subsection (3).

**114 Use of force in carrying out forensic procedures**

- (1) A person authorised to carry out a forensic procedure on a person may use reasonably necessary and proportionate force:
  - (a) to enable a forensic procedure to be carried out; or
  - (b) to prevent loss, destruction or contamination of any sample.
- (2) The force that may be used under this section must not exceed the force that is likely to cause more than a trivial or transitory physical injury or harm to a person.
- (3) This section does not apply to a forensic procedure authorised under section 106.

**115 Results of analysis made available**

- (1) If biological material is taken from a person who is the subject of a forensic procedure and is analysed in the investigation of a matter by a police officer, that person may request a copy of the results of the analysis from the police officer.
- (2) A police officer must ensure that a copy of the results of the analysis is made available to the person under subsection (1).

**Division 6 Storage, use, destruction and admissibility**

**116 Storage and use of identifying particulars and identifying information**

- (1) Any identifying particulars and identifying information must be stored in a secure and safe place that is approved by the Commissioner.
- (2) The identifying particulars and identifying information may only be accessed by persons who are authorised in writing by the Commissioner to have access.
- (3) A person who is authorised to access identifying particulars and identifying information may do so only for all or any of the following purposes:
  - (a) to administer the storage system;
  - (b) to assist in the investigation of an offence;
  - (c) any purpose that is permitted under any other Act;

- (d) to assist in matching the identifying particulars or the identifying information with information or samples:
  - (i) of missing persons or deceased persons; or
  - (ii) of persons suspected of having committed an offence; or
  - (iii) of persons convicted of an offence; or
  - (iv) obtained at a crime scene or taken from a victim or witness to a crime.

**118 Destroying identifying particulars**

- (1) This section applies if identifying particulars have been taken from a person other than a volunteer under section 106.
- (2) If a period of 12 months has lapsed since the identifying particulars were taken, and the person:
  - (a) is not found guilty of an offence; or
  - (b) is not further proceeded against for the offence,any identifying particulars or identifying information in relation to them taken under this Part must be destroyed as soon as practicable.
- (3) Subsection (2) does not apply if:
  - (a) the person has previously been found guilty of another serious offence, whether before, on or after the commencement of this Act; or
  - (b) the identifying particulars and any related identifying information are required for the investigation or prosecution of another offence that the person is suspected, on reasonable grounds, of having committed; or
  - (c) the person is not proceeded against for the original offence because he or she has been found incapable of mental capacity; or
  - (d) a court order is made under subsection (5).
- (4) If a person's identifying particulars or any related identifying information are not destroyed due to the operation of paragraph (3)(b), and the person

is not found guilty of the other offence, or the proceedings for the other offence are discontinued, the identifying particulars and any identifying information must be destroyed as soon as practicable:

- (a) 12 months after the identifying particulars and any identifying information were taken; or
  - (b) the date on which the proceedings for the other offence are finalised or discontinued.
- (5) A court may, on application by a police officer, extend for a period not exceeding 12 months the period for which identifying particulars and any identifying information derived from them may be retained under this section, if the court is satisfied that there are special reasons for doing so.
- (6) In deciding whether there are special reasons under subsection (5), a court must be satisfied that:
- (a) the person from whom the identifying particulars or identifying information were taken has been notified by the applicant for the extension that the application has been made; and
  - (b) the person or his or her legal representative has been given the opportunity to speak to or make a submission to the court concerning the extension.
- (7) An extension in relation to particular identifying particulars or identifying information may be given on more than one occasion.

### **118 Inadmissibility of evidence from improper forensic procedures**

- (1) This section applies if:
- (a) a forensic procedure has been carried out on a person; and
  - (b) there has been a breach of, or a failure to comply with, any provision of this Part in relation to the forensic procedure carried out on the person.
- (2) This section applies to the following evidence:
- (a) identifying particulars taken from the person by a forensic procedure; and
  - (b) evidence of any results of the analysis of the forensic material; and

- (c) any evidence obtained because of or in connection with the carrying out of the forensic procedure.
- (3) Evidence mentioned in subsection (2), is only admissible in any proceedings against the person in a court if:
  - (a) the person does not object to the admission of the evidence; or
  - (b) the court is satisfied on the balance of probabilities that the evidence should be admitted in the proceeding despite the breach of, or failure to comply with, any provision of this Part.
- (4) The court may take into consideration the following matters in deciding whether evidence should be admitted:
  - (a) the probative value of the evidence, including whether equivalent evidence or evidence of equivalent probative value could have been obtained by other means; and
  - (b) the reasons given for the breach of, or failure to comply with, the provisions of this Part; and
  - (c) the gravity of the breach of, or failure to comply with, the provisions of this Part; and
  - (d) whether the breach or failure to comply was intentional or reckless; and
  - (e) the nature of the provision of this Part that was breached or not complied with; and
  - (f) the nature of the offence concerned and the subject matter of the proceeding; and
  - (g) any other matters the court considers relevant.
- (5) The probative value of the evidence does not by itself justify the admission of the evidence.

## **PART 9 DOCUMENTARY EVIDENCE**

### **119 Reference to document**

- (1) A reference in this Part to a document in question is a reference to a document as to the contents of which it is sought to adduce evidence.
- (2) A reference in this Part to a copy of a document in question includes a reference to a document that is not an exact copy of the document in question but that is identical to the document in question in all relevant respects.

### **120 Use of evidence without witness**

- (1) A party must give notice in writing to any other party that it proposes to offer a document (whether or not it is a public document), a copy of which is attached to the notice, as evidence in the proceeding without calling a witness to produce the document.
- (2) A party who intends to object to the authenticity of the document to which the notice refers, or to the fact that it is to be offered in evidence without being produced by a witness, must give notice of objection in writing to the party giving the notice.
- (3) If party does not object to a proposal to offer a document as evidence without calling a witness to produce it, or if the court dismisses an objection to the proposal:
  - (a) the document, if otherwise admissible, may be admitted in evidence; and
  - (b) it is to be presumed, in the absence of evidence to the contrary, that the nature, origin, and contents of the document are as shown on its face.
- (4) A party who proposes to offer a document without calling a witness to produce it must give notice of the proposal:
  - (a) in sufficient time before the hearing to provide all the other parties with a fair opportunity to consider the proposal; or
  - (b) within the time, whether before or after the commencement of the hearing, as the court allows and subject to any conditions that the court may impose.

- (5) A party must give notice of objection to a proposal to offer a document without calling a witness to produce it:
  - (a) in sufficient time before the hearing to provide all the other parties with a fair opportunity to consider the notice; or
  - (b) within the time, whether before or after the commencement of the hearing, as the court allows and subject to any conditions that the court may impose.
- (6) The court may, in the interest of justice, dispense with the requirement to give notice under subsection (1) or (2) subject to any conditions that the court may impose.

**121 Evidence of contents of a document**

- (1) A party may adduce evidence of the contents of a document in question by tendering the document in question or by any one or more of the following methods:
  - (a) adducing evidence of an admission made by another party to the proceeding as to the contents of the document in question; or
  - (b) tendering a document that:
    - (i) is or purports to be a copy of the document in question; and
    - (ii) has been produced, or purports to have been produced, by a device that reproduces the contents of documents; or
  - (c) if the document in question is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound, or in which words are recorded in a code (including shorthand writing), tendering a document that is or purports to be a transcript of the words; or
  - (d) if the document in question is an article or thing on or in which information is stored in such a way that it cannot be used by the court unless a device is used to retrieve, produce or collate it, tendering a document that was or purports to have been produced by use of the device; or
  - (e) tendering a document that:



- (i) forms part of the records of or kept by a business (whether or not the business is still in existence); and
  - (ii) is or purports to be a copy of, or an extract from or a summary of, the document in question, or is or purports to be a copy of such an extract or summary; or
- (f) if the document in question is a public document, tendering a document that is or purports to be a copy of the document in question and that is or purports to have been printed by the authority of:
  - (i) the Government, a Provincial Government Council or a Municipal Council; or
  - (ii) the Parliament or a Committee of Parliament; or
  - (iii) another country.
- (2) Subsection (1) applies to a document in question whether the document in question is available to the party or not.
- (3) If the party adduces evidence of the contents of a document under paragraph (1)(a), the evidence may only be used:
  - (a) in respect of the party's case against the other party who made the admission concerned; or
  - (b) in respect of the other party's case against the party who adduced the evidence in that way.
- (4) A party may adduce evidence of the contents of a document in question that is not available to the party, or the existence and contents of which are not in issue in the proceeding, by:
  - (a) tendering a document that is a copy of, or an extract from or summary of, the document in question; or
  - (b) adducing from a witness, evidence of the contents of the document in question.

**122 Document made by a person**

For the purposes of this Act, a representation contained in a document is taken to have been made by a person if:

- (a) the document was written, made or otherwise produced by the person; or
- (b) the representation was recognised by the person as his or her representation by signing, initialling or otherwise marking the document.

**123 Document produced by device or process**

(1) If:

- (a) a party offers evidence that was produced wholly or partly by a machine, device, or technical process; and
- (b) the machine, device, or technical process is of a kind that ordinarily does what a party asserts it to have done,

it is presumed that on a particular occasion the machine, device, or technical process did what that party asserts it to have done, in the absence of evidence to the contrary.

- (2) If information or other matter is stored in such a way that it cannot be used by the court unless a machine, device, or technical process is used to display, retrieve, produce or collate it, a party may offer a document that was or purports to have been displayed, retrieved, or collated by use of the machine, device, or technical process.

**124 Seals and signatures**

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

- (a) the national seal of Vanuatu; or
- (b) another seal of the Government; or
- (c) a seal of another country; or
- (d) the seal of a body (including a court or a tribunal), or a body corporate, established by a law in Vanuatu or a law of another country,

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

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

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

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

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

(4) In this section, **office holder** means:

- (a) the President; or
- (b) a person holding any other office under the Constitution or a law in Vanuatu or a law of another country.

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

**125 Seal of body corporate established under a provincial or municipal law**

(1) If the imprint of a seal appears on a document and purports to be the imprint of the seal of a body (other than a court or a tribunal), or a body corporate, established under a provincial or municipal law, it is presumed, unless the contrary is proved, that:

- (a) the imprint is the imprint of that seal; and

- (b) the document was duly sealed as it purports to have been sealed.
- (2) This section applies to documents sealed before the commencement of this Act.

### **126 Books, maps and charts**

A court may presume, until the contrary is shown, that any book to which it may refer for information on matters of public or general interest and that any published map or chart, which is produced for its inspection, was written and published by the person and at the time and place by whom or at which it purports to have been written or published.

### **127 Summary of long or complex documents**

- (1) A court may direct that a party may adduce evidence of the contents of one or more documents in question in the form of a summary if:
  - (a) an application is made to it by the party before the hearing concerned; and
  - (b) it is satisfied that it would not otherwise be possible conveniently to examine the evidence because of the volume or complexity of the documents in question.
- (2) The court may only make a direction if the party seeking to adduce the evidence in the form of a summary has:
  - (a) served on each other party, a copy of the summary that discloses the name and address of the person who prepared the summary; and
  - (b) given each other party a reasonable opportunity to examine or copy the documents in question.
- (3) The opinion rule that evidence about an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed, does not apply to evidence adduced in accordance with a direction under this section.

### **128 Evidence of acts by justice, notary public or legal practitioner**

It is presumed, unless the contrary is proved, that a document was attested or verified by, or signed or acknowledged before, a justice of the peace, a legal practitioner, Commissioner of Oaths or notary public if:

- (a) a law requires, authorises or permits it to be attested, verified, signed or acknowledged by a justice of the peace, a legal practitioner, a Commissioner of Oaths or a notary public; and
- (b) it purports to have been so attested, verified or acknowledged.

**129 Attesting witness not required to give evidence**

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

**130 Older documents**

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

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

**131 Tender of documents**

- (1) A party is not required to tender a document that the party, whether under this Act or otherwise:
  - (a) called for the document to be produced to it; or
  - (b) inspected it when it was so produced.
- (2) The party who produces a document called for, is not entitled to tender the document if the party to whom it was produced, or who inspected it, fails to tender it.

**132 Impounding documents**

A court may direct that a document that has been tendered or produced before the court (whether or not it is admitted in evidence) is to be impounded and kept in the custody of an officer of the court or of another person for such period, and subject to such conditions, as the court thinks fit.

**133 Provincial Government Council and Municipal Council records**

All public acts and records of any Provincial Government Council or Municipal Council that are proved or authenticated in accordance with this Act are to be given in a court and in any other public office in Vanuatu, such faith and credit as they have by law or usage in the public offices of that province or municipality.

**134 Evidence of banker's record**

- (1) A bank or officer of a bank must not in any proceeding, other than proceedings instituted by or against the bank, be compelled to produce any banker's record the contents of which can be proved under this section, or to appear as a witness to prove the matters, transactions or accounts in such record except:
  - (a) in civil proceedings, by order of a court made for special cause; and
  - (b) in criminal proceedings, by order of the court of trial.
- (2) In any proceeding, the matters referred to in paragraphs (1)(a) and (b) in relation to a banker's record may be proved, orally or by sworn statement, by an officer of the bank.
- (3) Any sworn statement in subsection (2) must, on its production without further proof, be admitted in evidence and may include:
  - (a) an explanation of the contents of the copy of any entry or matter recorded in such banker's record which is tendered in evidence; and
  - (b) any abbreviations, symbols or other markings appearing in such copy that may be relevant in the proceeding; and
  - (c) a description of the banker's record, its nature and use, and the procedures followed in keeping it.
- (4) Any matter to be stated in a sworn statement under this section may be made to the best of the knowledge and belief of the person making the sworn statement.

**135 Obtaining copies of banker's records**

- (1) On the application of any party to any proceedings, a court may order that such party be at liberty to inspect and take copies of any entries in a banker's record for any of the purposes of such proceedings.
- (2) An order under this section may be made either with or without summoning the bank or any other party, and must be served on the bank 5 working days before the order is to be complied with, unless the court otherwise directs.

- (3) The costs of any application to the court under this section, and the costs of anything done or required to be done under an order of the court made under this section, is in the discretion of the court.
- (4) The court may order the costs under subsection (3) or any part of them to be paid to any party by the bank, if such costs have been occasioned by default or delay on the part of the bank.
- (5) Any such order against a bank may be enforced as if the bank were a party to the proceeding.

**136 Gazettes and other official documents**

- (1) Subsection (2) applies to a document that purports:
  - (a) to have been printed in the Gazette; or
  - (b) to have been printed or published by authority of the Government; a Provincial Government Council or a Municipal Council; or
  - (c) to have been printed or published by the authority of the government of another country; or
  - (d) to have been printed or published under the authority of the Parliament.
- (2) The document is presumed, unless the contrary is proved, to be what it purports to be and to have been so printed and published and to have been published on the date on which it purports to have been published.
- (3) Subsection (4) applies to a document that purports to have been printed or published:
  - (a) in a government or official gazette or similar document of another country; or
  - (b) by the government or official printer of another country; or
  - (c) by the authority of the legislative, executive, or judicial branch of the government of another country; or
  - (d) by an international organisation.

- (4) The document is presumed, unless the contrary is proved, to be what it purports to be and to have been so printed or published in the manner provided in subsection (3) and to have been published on the date on which it purports to have been published.

**137 Evidence of government public records**

- (1) Evidence of a record or of a public record of the Government, a Provincial Government Council or a Municipal Council may be adduced by producing a document that:
- (a) purports to be such a record and to be signed or sealed by:
    - (i) a Director General or the Secretary General of a Provincial Government Council or a Municipal Council; or
    - (ii) a person who might reasonably have custody of the record; or
  - (b) purports to be a copy of or extract from the record that is certified to be a true copy or extract by:
    - (i) a Director General or the Secretary General of a Provincial Government Council or Municipal Council; or
    - (ii) a person who might reasonably have custody of the record.
- (2) If such a document is produced, it is presumed, unless evidence that is sufficient to raise doubt about the presumption is adduced, that:
- (a) the document is the record, copy or extract that it purports to be; and
  - (b) the Director General or the Secretary General:
    - (i) signed or sealed the record; or
    - (ii) certified the copy or extract as a true copy or extract.

**138 Documents relating to court processes**

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



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

**139 Official Government statistics**

A document that purports:

- (a) to be published by the Chief Statistician within the meaning of the Statistics Act No.7 of 2022; and
- (b) to contain statistics or abstracts compiled and analysed by the Chief Statistician,

is evidence that those statistics or abstracts were compiled and analysed by the Chief Statistician under the Statistics Act No.7 of 2022 or under any other law.

**140 Copies of public documents**

- (1) Subsection (2) applies to a document that purports to be a public document, or a copy of or extract from or a summary of a public document, and to have been:
  - (a) sealed with the seal of a person or a body that might reasonably be supposed to have the custody of that public document; or
  - (b) certified to be such a copy, extract or summary by a person who might reasonably have the custody of that public document.
- (2) The document is presumed, unless the contrary is proved, to be a public document or a copy of the public document or an extract from or summary of the public document, and may be offered in evidence to prove the truth of its contents.

**141 Translated documents and certain transcripts**

- (1) A party may offer a document that purports to be a translation into English of a document in a language other than English if notice is given to all other parties in sufficient time before the hearing to provide those other parties with a fair opportunity to scrutinise the translation and the original document.

- (2) The translation is presumed to be an accurate translation in the absence of evidence to the contrary.
- (3) If notice is given to all other parties in sufficient time before the hearing to provide those other parties with a fair opportunity to scrutinise a transcript, a party may offer a document that purports to be the transcript of information or other matter that is recorded:
  - (a) in a code (including shorthand writing or programming code); or
  - (b) in a way that is capable of being reproduced as sound or script.
- (4) A party who offers a transcript of information or other matter in a sound recording under subsection (3) must play all or part of the sound recording in court during the hearing if:
  - (a) the sound recording is available; and
  - (b) the court so directs, either on the application of another party or on the court's own initiative.

**142 Service or notification by post**

- (1) If a document is authorised or required to be served, or any notice is authorised or required to be given, by post or by registered post, a certificate purporting:
  - (a) to certify that:
    - (i) a specified document or notice, addressed to a person named in the certificate, was addressed to that person at a specified address; and
    - (ii) the appropriate postage on the document or notice was prepaid; and
    - (iii) the document or notice was dispatched by post or by registered post at a time and place specified in the certificate; and
  - (b) to be signed at the time and place specified in the certificate by the person who:

- (i) ensured that the appropriate postage on the document or notice was prepaid; and
- (ii) dispatched the document or notice by post or by registered post at the specified time and place,

is to be admitted in any proceeding before any court on its production without further proof.

- (2) On the production of a certificate under subsection (1):
  - (a) the court before which it is produced must, until the contrary is proved, presume that:
    - (i) the facts stated in it relating to the posting of the document or notice specified in it are true; and
    - (ii) the certificate was signed at the time and place specified in it by the person who posted the specified document or notice; and
  - (b) the certificate is prima facie evidence of all of the matters stated.

### **143 Evidence of foreign law**

- (1) A party may offer as evidence of a written law, treaty, or act of state, of another country:
  - (a) evidence given by an expert; or
  - (b) a copy of a written law, treaty, or act of state that is certified as a true copy by a person who might reasonably be supposed to have the custody of the written law, treaty, or act of state; or
  - (c) any document containing the written law, treaty, or act of state that purports to have been issued by the government or official printer of the country or by authority of the government or administration of the country; or
  - (d) any document containing the written law, treaty, or act of state that appears to the court to be a reliable source of information.
- (2) A party who wishes to adduce evidence under paragraph (1)(b) or (d) of the contents of the document in question must, not less than 28 days (or

such other period as may be prescribed by the Regulations or by the Civil Procedure Rules before the day on which the evidence is adduced, serve on each other party a copy of the document proposed to be tendered unless the court otherwise directs.

- (3) In addition, or as an alternative, to the evidence of an expert, a party may offer as evidence of the unwritten or common law of another country or as evidence of the interpretation of a written law of another country a document:
  - (a) containing reports of judgments of the courts of the country; and
  - (b) that appears to the court to be a reliable source of information about the law of that country.
- (4) A party may offer as evidence of a written law of another country or of the unwritten or common law of another country any publication that:
  - (a) describes or explains the law of that country; and
  - (b) appears to the court to be a reliable source of information about the law of that country.
- (5) A court is not bound to accept or act on a statement in any document as evidence of the law of another country.
- (6) A reference in this section to a **written law** of another country includes a reference to a proclamation, regulation, rule, by-law or other instrument of subordinate legislation of the country.

#### **144 Law reports of foreign countries**

- (1) Evidence of the unwritten or common law of another country may be adduced by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the unwritten or common law of the country.
- (2) Evidence of the interpretation of a statute of another country may be adduced by producing a book containing reports of judgments of courts of that other country if the book is or would be used in the courts of that other country for the interpretation of the statute.

**145 Documents sworn or verified in Commonwealth countries**

- (1) All documents required to be sworn or affirmed or verified in cases or matters pending in any court, must be sworn or affirmed or verified in any Commonwealth country before any court, judge, notary public or person lawfully authorised to administer oaths in such country, or a consular officer in that Commonwealth country.
- (2) The judges and officers of any court must take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public or person lawfully authorised to administer oaths, or consular officer attached, appended, or subscribed to any document referred to in subsection (1).

**146 Documents filed in foreign court or consulate**

- (1) All documents legally and properly filed or recorded in any foreign court or consulate according to the law and practice of such court or consulate, and all copies of such documents, are admissible in evidence in any proceedings on being proved in like manner as any documents filed or recorded in any foreign court are provable under this Act or any other written law.
- (2) All documents whatsoever so filed or recorded in any foreign court or consulate, and all copies of such documents, are, when so proved and admitted, to be held authentic and effectual for all purposes of evidence as the same would be held in such foreign court or consulate.

**147 Published documents**

A court may, in matters relating to public history, literature, science, or art, admit as evidence, any published documents as the court considers to be reliable sources of information on the subjects to which they respectively relate.

**148 Probate and letters of administration**

- (1) The probate of a will or codicil or letters of administration with the will or codicil annexed is evidence of the original will or codicil.
- (2) A probate of any will or codicil or letters of administration with the will or codicil annexed is in all cases, prima facie evidence of the death and the date of the testator or intestate.
- (3) In this section, **probate of a will or codicil or letters of administration with the will or codicil annexed** includes:
  - (a) an exemplification of probate or of letters of administration; and

- (b) any document accepted as sufficient in place of such exemplification by a court.

## PART 10 HEARSAY

### 149 Hearsay

A hearsay statement is not admissible except as provided by this Act or any other law.

### 150 General admissibility of hearsay

- (1) A hearsay statement is admissible in any proceeding if:
  - (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
  - (b) either:
    - (i) the maker of the statement is unavailable as a witness; or
    - (ii) in any case where the court considers that undue expense and delay would be caused if the maker of the statement were required to be a witness.
- (2) In a criminal proceeding, no hearsay statement may be offered in evidence unless:
  - (a) the party proposing to offer the statement has given reasonable notice of the intention to rely on the statement; or
  - (b) the other party has waived the requirement for notice; or
  - (c) the court dispenses with the requirement for notice in the interest of justice.
- (3) If an accused in a criminal proceeding does not give evidence, the accused may not offer his or her hearsay statement as evidence in the proceeding.
- (4) In this section, **circumstances**, in relation to the statement by a person who is not a witness, include:
  - (a) the nature of the statement; and
  - (b) the contents of the statement; and
  - (c) the circumstances that relate to the making of the statement; and

- (d) the circumstances that relate to the truthfulness of the person; and
  - (e) any circumstances that relate to the accuracy of the observation of the person.
- (5) For the purposes of this section, a person is unavailable as a witness in a proceeding if the person:
  - (a) is dead; or
  - (b) is outside Vanuatu and it is not reasonably practicable for him or her to be a witness; or
  - (c) is unfit to be a witness because of age or a physical or mental or medical condition; or
  - (d) cannot with reasonable diligence be identified or found; or
  - (e) is not compellable to give evidence.
- (6) Subsection (1) does not apply to a person whose statement is sought to be offered in evidence by a party who has caused the person to be unavailable in order to prevent the person from attending or giving evidence.

**151 Evidence of right or custom**

- (1) If a court has to form an opinion as to the existence of any general custom or right, evidence may be given of general reputation with reference to such custom or right among persons who would be likely to know of its existence.
- (2) If in any proceeding a question arises as to the existence of any right or custom, evidence may be given of:
  - (a) any transaction by which the right or custom in question was created, modified, recognised, asserted or denied or which was inconsistent with its existence; and
  - (b) particular instances in which the right or custom was claimed, recognised, or asserted, or in which its exercise was disputed, asserted, or departed from.



- (3) The hearsay rule does not apply to a previous representation about the existence or non-existence, or the content, of the traditional laws and customs of an indigenous Vanuatu tribal group.
- (4) The opinion rule does not apply to evidence of an opinion expressed by a member of a tribal group about the existence or non-existence, or the content, of the traditional laws and customs of the group.

**152 Exception – business documents**

- (1) This section applies to a document if the document:
  - (a) either:
    - (i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or
    - (ii) at any time, was or formed part of such a record; and
  - (b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.
- (2) The hearsay rule does not apply to the document (so far as it contains the representation) if the representation was made:
  - (a) by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact; or
  - (b) on the basis of information directly or indirectly supplied by a person who had or might reasonably be supposed to have had personal knowledge of the asserted fact.
- (3) Subsection (2) does not apply if the representation:
  - (a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, a proceeding in Vanuatu or another country; or
  - (b) was made in connection with an investigation relating or leading to a criminal proceeding.

- (4) The hearsay rule does not apply to evidence that tends to prove that there is no record kept, in accordance with a system, or the occurrence of an event, if:
- (a) the occurrence of the event of a particular kind is in question; and
  - (b) in the course of a business, the system has been followed of making and keeping a record of the occurrence of all events of that kind.
- (5) For the purposes of this section, a person is taken to have had personal knowledge of a fact if the person's knowledge of the fact was or might reasonably be supposed to have been based on what the person saw, heard or otherwise perceived (other than a previous representation made by a person about the fact).

**153 Exception – tags, labels and writing**

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

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

**154 Exception – telecommunication**

- (1) The hearsay rule does not apply to a representation contained in a document recording a message that has been transmitted by electronic mail, fax, social media or any other form of communication so far as the representation is a representation as to:
- (a) the identity of the person from whom or on whose behalf the message was sent; or
  - (b) the date on which or the time at which the message was sent; or
  - (c) the message's destination or the identity of the person to whom the message was addressed.

- (2) Before relying on evidence of such a representation, the court must take into account the possibility of such a representation being false, whether deliberately or not.

**155 Exception – statements about the state of health or mind**

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

**156 Exception – evidence of personal history**

- (1) The hearsay rule does not apply to evidence of reputation concerning:
- (a) whether a person was, at a particular time or at any time, a married person; or
  - (b) whether a man and a woman cohabitating at a particular time were married to each other at that time; or
  - (c) a person's age; or
  - (d) a family history or a family relationship; or
  - (e) a tribal affiliation of a person.
- (2) In a criminal proceeding, subsection (1) does not apply to evidence adduced by an accused unless:
- (a) it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted; or
  - (b) an accused has given reasonable notice in writing to each other party of the accused's intention to adduce the evidence.
- (3) In a criminal proceeding, subsection (1) does not apply to evidence adduced by the prosecutor unless it tends to contradict evidence of a kind referred to in subsection (1) that has been admitted.

**157 Exception – public and general rights**

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

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

**158     Exception – interlocutory proceedings**

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

**159     Exception – evidence relevant for non-hearsay purpose**

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

**160     Opinion evidence**

A statement of an opinion is not admissible in a proceeding except as provided by this Act.

**161     General admissibility of opinion**

A witness may state an opinion in evidence in a proceeding if that opinion is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard or otherwise perceived.

**162     Expert evidence opinion**

- (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.
- (2) An opinion by an expert is not inadmissible if it is about:
- (a) an ultimate issue to be determined in a proceeding; or
  - (b) a matter of common knowledge.
- (3) Subject to subsection (4), if an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or is to be proved or judicially noticed in the proceeding.
- (4) If expert evidence that includes an opinion about the sanity of a person also includes a statement that the person made to the expert about the state of mind of the person:

- (a) the statement of the person is admissible to establish the facts on which the expert's opinion is based; and
- (b) neither the hearsay rule nor the prior inconsistent statements rule applies to evidence of the statement made by the person.

**163 Opinion of handwriting**

- (1) If a court has to form an opinion as to the person by whom any document was written or signed, any person acquainted with the handwriting of the person by whom such document is alleged to have been written or signed may give evidence that in his or her opinion it was or was not written or signed by that person.
- (2) A person is taken to be acquainted with the handwriting of another person if:
  - (a) he or she has seen that person write; or
  - (b) he or she has received documents purporting to be written by that other person in reply to documents written by himself or herself or by his or her direction and addressed to that other person; or
  - (c) in the ordinary course of business, documents purporting to contain that other person's handwriting have habitually come under his or her notice.

**164 Court to examine and determine authenticity of document**

- (1) If a question arises as to the relevance of a document or thing, a court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.
- (2) Subsection (1) does not limit the matters from which inferences may properly be drawn.
- (3) The court may compare a disputed writing with any writing that is genuine and act upon its own conclusions.

**165 Expert reports**

- (1) Evidence of a person's opinion may be adduced by tendering a report signed by the person that:
  - (a) states the person's name; and

- (b) states that the person has specialised knowledge based on his or her training, study or experience, as specified in the report; and
  - (c) sets out an opinion that the person holds and that is expressed to be wholly or substantially based on that knowledge.
- (2) Subsection (1) does not apply unless the party seeking to tender the report has served on each other party a copy of the report:
  - (a) not later than 28 days before the hearing; or
  - (b) not later than a period ordered by the court.
- (3) If such a report is so used, the court may, if it thinks fit, summon the expert and examine him or her as to the subject-matter of such report.

**166 Evidence of good character in civil proceedings**

In a civil proceeding, evidence may not be given that a party to the proceeding bears a good character in any respect unless:

- (a) the character of such party in that respect is a fact in issue; or
- (b) evidence has already been given to show that such party bears a bad character in that respect.

**167 Evidence of bad character in civil proceedings**

In a civil proceeding, evidence may not be given that a party to the proceeding bears a bad character in any respect unless:

- (a) the character of such party in that respect is in issue; or
- (b) damages are claimed for any wrong done to or in connection with such person and the evidence is tendered with a view to the reduction of such damages.

## **PART 11 DISCRETION TO EXCLUDE EVIDENCE**

### **168 Court's discretion to exclude evidence**

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

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

### **169 Court's discretion to limit the use of evidence**

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

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

### **170 Exclusion of prejudicial evidence**

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

### **171 Exclusion of evidence in the public interest**

- (1) If the public interest in admitting into evidence information or a document that relates to matters of the state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, a court may direct that the information or document not be adduced as evidence.
- (2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).
- (3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit.
- (4) Without limiting the circumstances in which information or a document may be taken to relate to matters of the state for the purposes of subsection (1), the information or document is taken for the purposes of that subsection to relate to matters of the state if adducing it as evidence would:

- (a) prejudice the security, defence or international relations of Vanuatu; or
  - (b) damage relations between the Government and a Provincial Government Council or a Municipal Council or between two or more Councils; or
  - (c) prejudice the prevention, investigation or prosecution of an offence; or
  - (d) prejudice the prevention or investigation of, or the conduct of, proceedings for recovery of civil penalties brought with respect to other contraventions of any other Act; or
  - (e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of an Act; or
  - (f) prejudice the proper functioning of the Government.
- (5) Without limiting the matters that the court may take into account for the purposes of subsection (1), the court is to take into account the following matters:
- (a) the importance of the information or the document in the proceeding; and
  - (b) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding; and
  - (c) the likely effect of adducing evidence of the information or document, and the means available to limit its publication; and
  - (d) whether the substance of the information or document has already been published.
- (6) For the purposes of this section, a person is taken to be liable to a civil penalty if, in a proceeding in Vanuatu or another country (other than a criminal proceeding), the person would be liable to a penalty arising under a law in Vanuatu or a law in that other country.



## **PART 12 COMMISSION TO EXAMINE WITNESSES**

### **172 Evidence taken on commission**

- (1) If, in the course of any proceeding, a court is satisfied that:
  - (a) the examination of a witness is necessary in the interest of justice;  
and
  - (b) the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable,

the court may issue a commission to a Magistrate or legal practitioner, to take the evidence of such witness.
- (2) The Magistrate or legal practitioner to whom the commission is issued must proceed to the place where the witness is or must summon the witness before him or her, and must take down his or her evidence in the same manner, and may for this purpose exercise the same powers, as in the case of a trial.
- (3) The parties to any proceeding in which a commission is issued may respectively forward any interrogatories in writing which the court or Magistrate directing the commission may think relevant to the issue, and the Magistrate or legal practitioner to whom the commission is directed must examine the witness upon such interrogatories.
- (4) Any such party may, by a legal practitioner or in person, appear before the Magistrate or legal practitioner, and may examine, cross-examine or re-examine (as the case may be) the witness.
- (5) After any commission issued has been duly executed it must be returned, together with the deposition of the witness examined, to the court or to the Magistrate (as the case may be), and the commission, the return, and the deposition must be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and forms part of the record.
- (6) Any deposition so taken may also be received in evidence at any subsequent stage of the case before another court.

**173 Adjournment for taking evidence on commission**

In a case in which a commission is issued for taking the evidence of a witness, the proceedings may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.

**174 Evidence on commission outside Vanuatu**

If a court is satisfied that a witness is unable to give evidence in Vanuatu and it is in the interest of justice to do so, the court may order that a commission be issued to allow a witness to be examined at a location outside Vanuatu.

## **PART 13 PRIVILEGE**

### **175 Legal professional privilege for legal practitioners**

A person must not be compelled to disclose to a court any confidential communication which has taken place between the person and his or her legal practitioner.

### **176 Legal professional privilege for client**

- (1) Except with the express consent of his or her client, a legal practitioner is not at any time to disclose, during the course of evidence given by the legal practitioner:
  - (a) any communication made to the legal practitioner by or on behalf of his or her client in the course and for the purpose, of acting for the client; or
  - (b) the contents of any document with which the legal practitioner has become acquainted in the course and for the purpose, of acting for his or her client; or
  - (c) any advice given by the legal practitioner to his or her client in the course and for the purpose, of acting for the client.
- (2) This section does not protect from disclosure:
  - (a) anything done, or any communication made or document prepared in furtherance of the commission of a fraudulent or corrupt act, or a criminal offence, or an act that renders a person liable to a civil penalty, or of an act which constitutes an abuse of office; or
  - (b) any fact observed by any legal practitioner in the course of acting for a client showing that any crime of fraud has been committed since the legal practitioner commenced acting for the client.
- (3) For the purposes of this section, a person is taken to be liable to a civil penalty if, in a proceeding in Vanuatu or another country (other than a criminal proceeding), the person would be liable to a penalty arising under the law of Vanuatu or that other country.

### **177 Privilege against self-incrimination**

- (1) This section applies if:

- (a) apart from this section, specific information is required to be provided:
    - (i) in the course of a proceeding; or
    - (ii) by a person exercising a statutory power or duty; or
    - (iii) by a police officer or other person holding a public office in the course of an investigation into a criminal offence or a possible criminal offence; and
  - (b) the information would, if so provided, tend to incriminate the person under an offence punishable by a fine or imprisonment.
- (2) The person:
- (a) has a privilege in respect of the information and cannot be required to provide it; and
  - (b) cannot be prosecuted or penalised for refusing or failing to provide the information, whether or not the person claimed the privilege when the person refused or failed to provide the information.
- (3) Subsection (2) has effect:
- (a) unless a written law explicitly removes the privilege against self-incrimination either expressly or by necessary implication; and
  - (b) to the extent that a written law does not explicitly or by necessary implication, remove the privilege against self-incrimination.
- (4) Subsection (2) does not enable a claim of privilege to be made:
- (a) on behalf of a body corporate; or
  - (b) on behalf of any person other than the person required to provide the information (except by a legal practitioner on behalf of a client who is so required); or
  - (c) by an accused in a criminal proceeding in relation to information about a matter for which an accused is being tried.

**178 No adverse inference against self-incrimination**

No adverse inference is to be drawn if a person exercises the privilege against self-incrimination.

**179 Court discretion for incrimination under foreign law**

- (1) This section applies to any specific information:
  - (a) that is, apart from this section, required to be provided:
    - (i) in the course of a proceeding; or
    - (ii) by a person exercising a statutory power or duty; or
    - (iii) by a police officer or other person holding a public office in the course of an investigation into a criminal offence or a possible criminal offence; or
  - (b) that would, if so provided, tend to incriminate the person under any foreign law for an offence punishable by:
    - (i) capital punishment; or
    - (ii) corporal punishment or imprisonment, or to both.
- (2) A court may direct that the person cannot be required to provide the information if the court, after having regard to the likelihood of extradition and other relevant matters, thinks that it would be unreasonable to require the person to incriminate himself or herself by providing the information.
- (3) Subsection (2) does not enable the court to give a direction in respect of:
  - (a) a body corporate; or
  - (b) any person other than the person required to provide the information (other than a legal adviser on behalf of a client who is so required); or
  - (c) an accused in a criminal proceeding when giving evidence about the matter for which an accused is being tried.

**180 Claiming privilege against self-incrimination**

- (1) If, in any proceeding, it appears to a court that a party or witness may have grounds to claim a privilege against self-incrimination in respect of

specific information required to be provided by that person, the court must be satisfied that the person is aware of the privilege and its effect.

- (2) A person who claims a privilege against self-incrimination in a court proceeding must offer sufficient evidence to enable the court to assess whether self-incrimination is reasonably likely if the person provides the required information.

**181 Self-incriminating information given in compliance with seizing order**

- (1) This section applies if a party to a civil proceeding, objects to giving particular information in compliance with a seizing order on the ground that the information may tend to incriminate that person under an offence punishable by a fine or imprisonment.
- (2) A party who is required to provide particular information in a civil proceeding in compliance with a seizing order must comply with the terms of the order.
- (3) If the court is satisfied that there is a tendency to self-incriminate if the party provides the particular information, the court must order that the information is not to be used in any criminal proceeding against the party who provides the information.
- (4) The party must offer sufficient evidence to enable the court to assess whether there is a tendency for self-incrimination to occur if the party provides the required information.
- (5) Information given by a person in respect of which an order under subsection (3) has been made, and evidence of any information, document, or thing obtained directly or indirectly as a result of the person having given that information, cannot be used against the person in any criminal proceeding in Vanuatu, except in a criminal proceeding that concerns the falsity of the information.
- (6) In this section, **seizing order** means an order made by a court under the Civil Procedure Rules or any other written law in a civil proceeding that includes a direction that a party permits another party or its representatives:
  - (a) to enter any premises in order to establish the presence of certain items and, if warranted, to remove them for safekeeping; and
  - (b) to disclose information or documents, or both, that would not necessarily be found solely by the entry described in paragraph (a).

**182 No self-incrimination privilege for body corporate**

A body corporate is not entitled to claim privilege against self-incrimination.

**183 Privilege religious confession**

- (1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or divulge the contents of a religious confession made to the person when he or she is a member of the clergy.
- (2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose.
- (3) This section applies even if a written law provides that:
  - (a) the rules of evidence do not apply or that a person or body is not bound by the rules of evidence; or
  - (b) a person is not excused from answering any question or producing any document or other thing on the ground of privilege or any other ground.
- (4) In this section, **religious confession** means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination concerned.

**184 Parliamentary privileges**

This Act does not affect the law relating to the privileges of Parliament.

**185 Confidential and communication for settling civil proceedings**

- (1) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication was:
  - (a) intended to be confidential; and
  - (b) made in connection with an attempt to settle the dispute between the persons.
- (2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to negotiate a settlement of the dispute.

- (3) This section does not apply:
- (a) if an agreement settling the dispute has been concluded; or
  - (b) in a proceeding in which the conclusion of such an agreement is in issue.

**186 Privilege for information disclosing identity of an informer**

- (1) An informer has a privilege in respect of information that would disclose, or is likely to disclose, the informer's identity.
- (2) A person is an informer for the purposes of this section if the person:
- (a) has supplied, gratuitously or for reward, information to an enforcement agency, or to a representative of an enforcement agency, concerning the possible or actual commission of an offence in circumstances in which the person has a reasonable expectation that his or her identity will not be disclosed; and
  - (b) is not called as a witness by the prosecution to give evidence relating to that information, unless a relevant application is made to the court.
- (3) An informer may be a police officer working undercover.

**187 Waiver of privilege**

- (1) A person who has a privilege conferred under this Part may waive that privilege either expressly or impliedly.
- (2) A person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document in circumstances that are inconsistent with a claim of confidentiality.
- (3) A person who has a privilege waives the privilege if the person:
- (a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or
  - (b) institutes a civil proceeding against a person who is in possession of the privileged communication, information, opinion, or



document the effect of which is to put the privileged matter in issue in the proceeding.

- (4) A person who has a privilege in respect of a communication, information, opinion, or document that has been disclosed to another person does not waive the privilege if the disclosure occurred involuntarily or mistakenly or otherwise without the consent of the person who has the privilege.
- (5) The privilege conferred in relation to settlement negotiations may be waived only by all the persons who have that privilege.

**188 Joint and successive interest in privilege material**

- (1) A person who jointly with some other person or persons has a privilege conferred under this Part in respect of a communication, information, opinion, or document:
  - (a) is entitled to assert the privilege against third parties; and
  - (b) is not restricted from having access or seeking access to the privileged matter; and
  - (c) may, on the application of another holder of the privilege who wishes the privilege to be maintained, be ordered by a court not to disclose the privileged matter in a proceeding.
- (2) A person who jointly has a privilege conferred with some other person or persons may waive the privilege with the consent of the other privilege holders or by order of the court.
- (3) If a person is entitled to legal professional privilege in respect of a communication, information, opinion or document, the personal representative of the person or other successor in title to property of the person:
  - (a) is entitled to assert the privilege against third parties; and
  - (b) is not restricted from having access or seeking access to the privileged matter.
- (4) However, subsection (3) applies only to the extent that a court is satisfied that the personal representative or other successor in title to property has a justifiable interest in the communication, information, opinion, or document.

- (5) A personal representative of a deceased person who has a privilege conferred by this Part in respect of a communication, information, opinion, or document and any other successor in title to the property of a person who has such a privilege may, on the application of another holder of the privilege who wishes the privilege to be maintained, be ordered by a court not to disclose the privileged matter in a proceeding.

**189 Court may disallow claim of privilege**

- (1) A court may disallow a claim of privilege conferred under this Part in respect of a communication or information if the court is of the view that evidence of the communication or information is necessary to enable an accused in a criminal proceeding to present an effective defence.
- (2) Any communication or information disclosed as the result of the disallowance of a claim of privilege under subsection (1) and any information derived from that disclosure cannot be used on that basis alone against the holder of the privilege in another proceeding.
- (3) Any communication or information asserting a claim of privilege may be disallowed by the court on the basis that it was obtained from or relates to the commission of a criminal offence.

**190 Party must be aware of rights relating to privilege**

If it appears to a court that a witness or a party may have grounds for making a claim, application or objection under a provision of this Part, the court must be satisfied that the witness or party is aware of the effect of that provision.

**191 Court may inspect document or material relating to privilege**

If a question arises under this Part in relation to a document or other material, a court may order that the document or material be produced to it and may inspect the document or material for the purpose of determining the question.

**192 Privilege evidence inadmissible**

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

## **PART 14 UNFAVOURABLE WITNESSES**

### **193 Unfavourable witnesses**

- (1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about:
  - (a) evidence given by the witness that is unfavourable to the party; or
  - (b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination-in-chief, making a genuine attempt to give evidence; or
  - (c) whether the witness has, at any time, made a prior inconsistent statement; or
  - (d) matters relating to the credit of the witness.
- (2) Questioning a witness under this section is taken to be cross-examination.
- (3) Questioning under this section is to occur before the other parties cross-examines the witness, unless the court otherwise directs.

### **194 Prior inconsistent witness statements**

- (1) A witness may be cross-examined about a prior inconsistent statement alleged to have been made by the witness whether or not:
  - (a) complete particulars of the statement have been given to the witness; or
  - (b) a document containing a record of the statement has been shown to the witness.
- (2) If, in cross-examination, a witness does not admit that he or she has made a prior inconsistent statement, the cross-examiner is not to adduce evidence of the statement otherwise than from the witness unless, in the cross-examination, the cross-examiner:
  - (a) informed the witness of sufficient circumstances of the making of the statement to enable the witness to identify the statement; and
  - (b) drew the witness's attention to so much of the statement as is inconsistent with the witness's evidence.

- (3) For the purpose of adducing evidence of the statement, a party may reopen the party's case with the leave of the court.

**195 Weight to be given to evidence under this Part**

In estimating the weight to be attached to a statement rendered admissible as evidence under this Part, regard must be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including:

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

**196 Use of document of another person**

- (1) Except as provided by this section, a cross-examiner must not question a witness about a previous representation alleged to have been made by a person other than the witness.
- (2) A cross-examiner may, with leave of the court, question a witness about the representation and its contents if:
  - (a) evidence of the representation has been admitted; or
  - (b) the court is satisfied that it is to be admitted.
- (3) If the representation is contained in a document that has not been admitted, or a document that the court cannot be satisfied is to be admitted, the document may be used to question a witness as follows:
  - (a) the document must be produced to the witness; and
  - (b) if the document is a tape recording, or any other kind of document from which sounds are reproduced, the witness must be provided with the means, such as headphones, to listen to the contents of the document without other persons present at the cross-examination hearing those contents; and

- (c) the witness must be asked whether, having examined or heard the contents of the document, the witness stands by the evidence that he or she has given; and
    - (d) neither the cross-examiner nor the witness is to identify the document or disclose any of its contents.
  - (4) A document that is so used may be marked for identification.
- 197 Production of a document**
- (1) This section applies if a party is cross-examining or has cross-examined a witness about:
    - (a) a prior inconsistent statement alleged to have been made by the witness that is recorded in a document; or
    - (b) a previous representation alleged to have been made by another person that is recorded in a document.
  - (2) If a court so orders or if another party so requires, the party must produce to the court or to that other party:
    - (a) the document or a copy of the document obtained with the leave of the court; or
    - (b) such evidence of the contents of the document as is available to the party.
  - (3) The court may:
    - (a) examine a document or evidence that has been so produced; and
    - (b) give directions as to its use; and
    - (c) admit it even if it has not been tendered by a party.
  - (4) Subsection (3) does not permit the court to admit a document or evidence that is not admissible.
  - (5) The mere production of a document to a witness who is being cross-examined does not give rise to a requirement that the cross-examiner tender the document.

## **PART 15 ADMISSIONS IN CRIMINAL PROCEEDINGS**

### **198 Definition of confession**

In this Part, **confession** means an admission made at any time by a person accused of an offence stating or suggesting that the person committed the offence.

### **199 Admission by accused in criminal proceedings**

- (1) This section applies only to a criminal proceeding and only to evidence of a confession made by an accused:
  - (a) to or in the presence of an investigating official who was at the time performing functions in connection with the investigation of the commission or possible commission of an offence; or
  - (b) as a result of an act of another person who is capable of influencing the decision whether a prosecution of an accused should be brought or should be continued.
- (2) Evidence of the confession is not admissible unless the court is satisfied on the balance of probability that the admission was voluntary.
- (3) Without limiting the matters that the court may take into account for the purposes of subsection (2), the court is to take into account:
  - (a) any relevant condition or characteristic of the person who made the confession, including age, personality, language and education and any mental, intellectual or physical disability to which the person is or appears to be subject; and
  - (b) if the confession was made in response to questioning:
    - (i) the nature of the questions and the manner in which they were put; and
    - (ii) the nature of any threat, promise or other inducement made to the person questioned.

### **200 Court may refuse to admit confession**

In a criminal proceeding, a court may refuse to admit evidence of a confession, or refuse to admit the evidence to prove a particular fact if:

- (a) the evidence is adduced by the prosecution; and

- (b) having regard to the circumstances in which the admission was made, it would be unfair to an accused to use the evidence.

**201 Exclusion of evidence obtained improperly or illegally**

- (1) Evidence that was obtained:
  - (a) improperly or in contravention of any law; or
  - (b) in consequence of an impropriety or of a contravention of any law,  
  
is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.
- (2) Without limiting subsection (1), evidence of a confession that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning:
  - (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning; or
  - (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission; or
  - (c) engaged in conduct, or threatened to engage in conduct that was violent, oppressive or degrading towards any person.
- (3) Without limiting the matters that the court may take into account under subsection (1), the court is to take into account:
  - (a) whether the impropriety or contravention was contrary to or inconsistent with a right of a person; and
  - (b) the probative value of the evidence; and
  - (c) the importance of the evidence in the proceeding; and

- (d) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
- (e) whether the impropriety or contravention was deliberate or reckless; and
- (f) the gravity of the impropriety or contravention; and
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
- (h) the difficulty of obtaining the evidence without impropriety or contravention of any law.

**202 Cautioning of persons under arrest**

- (1) For the purposes of this Part, evidence of a statement made or an act done by a person during questioning is taken to have been obtained improperly if:
  - (a) the person was under arrest for an offence at the time; and
  - (b) the questioning was conducted by an investigating official who was at the time empowered, because of the office that he or she held, to arrest the person; and
  - (c) before starting the questioning, the investigating official did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence.
- (2) Evidence of a statement made or an act done by a person during official questioning is taken to have been obtained improperly if:
  - (a) the questioning was conducted by an investigating official who did not have the power to arrest the person; and
  - (b) the statement was made, or the act was done, after the investigating official formed a belief that there was sufficient evidence to establish that the person has committed an offence; and
  - (c) the investigating official did not, before the statement was made or the act was done, caution the person that the person does not have



to say or do anything but that anything the person does say or do may be used in evidence.

- (3) The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.
- (4) Subsections (1), (2) and (3) do not apply so far as any law requires the person to answer questions put by, or to do things required by, the investigating official.
- (5) A reference in subsection (1) to a person who is under arrest includes a reference to a person who is in company of an investigating official for the purpose of being questioned if:
  - (a) the official believes that there is sufficient evidence that the person has committed an offence that is to be the subject of the questioning; or
  - (b) the official would not allow the person to leave if the person intended to do so; or
  - (c) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.
- (6) A person is not treated as being under arrest under subsection (5) if:
  - (a) the official is performing functions in relation to persons or goods entering or leaving Vanuatu and the official does not believe the person has committed an offence against a law of Vanuatu; or
  - (b) the official is exercising a power under any written law to detain and search the person or to require the person to provide information or to answer questions.

### **203 Admissions by co-accused**

The common law relating to the admissibility of a confession by one accused against another, if an ex-curial statement made in the absence of the other accused is inadmissible as against the co-accused, prevails.

**204 Evidence of silence**

- (1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused:
  - (a) to answer one or more questions; or
  - (b) to respond to a representation,  
  
put or made to the party or other person by an investigating official who was at the time performing functions in connection with the investigation of the commission or possible commission of an offence.
- (2) Evidence of that kind is not admissible if it can only be used to draw such an inference.
- (3) Subsection (1) does not prevent use of the evidence to prove that the party or other person failed or refused to answer the question or to respond to the representation if the failure or refusal is a fact in issue in the proceeding.
- (4) In this section, **inference** includes:
  - (a) an inference of consciousness of guilt; and
  - (b) an inference relevant to a party's credibility.

**205 Editing of inadmissible statements**

- (1) If part of a statement is determined by a court to be inadmissible, the court may direct that a party who intends to use an admissible part of the statement, edits the statement to exclude the inadmissible part.
- (2) A party may not edit a statement under subsection (1) unless, in the opinion of the court, the inadmissible parts of the statement can be excluded without obscuring or confusing the meaning of the admissible part of the statement.

## **PART 16 PROOF OF BIRTH, ADOPTION, DEATH AND MARRIAGE**

### **206 Proof of age determined by the court**

In any proceeding if a court does not consider that there is evidence or sufficient evidence to determine the age of a person, the court having seen the person, may itself determine the question.

### **207 Proof of age by birth certificate**

An official document purporting to be either the original or a certified copy of a certificate, entry or record of a birth, adoption, death or marriage alleged to have taken place whether in Vanuatu or another country, is evidence in a proceeding of the facts stated in the document, unless it is proved otherwise.

### **208 Presumption of age**

If the age of a person is relevant to proceedings before a court and:

- (a) a document appears to be a certified copy of, or extract from, the register of births and deaths under the Civil Registration and Identity Management Act No. 28 of 2021, or a register of births kept under the law of the country in which the person was born, is produced to the court; and
- (b) the name of the person to whom the document relates is the name or a former name of the person whose age is to be considered,

it is to be presumed, in the absence of evidence to the contrary, that the person whose age is to be established is the person named in the document produced to the court and that the date of his or her birth is the date of birth shown on that document.

## **PART 17 MISCELLANEOUS**

### **209 Proof of service**

Service for the purposes of this Act may be proved by sworn statement or the oral evidence of a witness in court.

### **210 Proof of previous convictions**

- (1) In any inquiry, trial or proceeding, a previous conviction may be proved, in addition to any other mode provided by any law:
  - (a) by an extract certified, under the hand of the officer having the custody of the records of the court in which such conviction was made, to be a copy of the sentence or order; or
  - (b) by a certificate by the officer-in-charge of the correctional centre or prison in which the punishment or any part of it was inflicted, or by production of the warrant of commitment under which the punishment was suffered; or
  - (c) by production of the officer having the custody of the appropriate court register recording such conviction or an extract from such register certified under the hand of such officer to be a copy of it,together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted.
- (2) A certificate given under the hand of a police officer appointed by the Commissioner in that behalf, who has compared the fingerprints of an accused person with the fingerprints of a person previously convicted, is prima facie evidence of the matters stated in the certificate.
- (3) A previous conviction in any place outside Vanuatu may be proved by the production of a certificate purporting to be given under the hand of a police officer in the country where the conviction was made, containing a copy of the sentence or order, and a copy of the fingerprint record, or a photograph of the person so convicted, together with evidence that the fingerprint record or photograph is of the accused person.
- (4) A certificate referred to in subsections (2) and (3), is prima facie evidence of all facts set out in it without proof that the officer purporting to sign it did in fact sign it and was empowered so to do.

**211 Court may inform itself about legislation**

- (1) A court or tribunal may inform itself about a written law in any way it considers appropriate, such as using an electronic version of a written law as available on the internet or on a CD- ROM or universal serial bus (USB) or other storage device.
- (2) The court or tribunal must consider whether the document or source it intends to consult appears to be a reliable source of information.
- (3) Subsection (1) does not limit a written law providing for a way in which a court or tribunal may be informed about a written law, including any other provisions of this Act.

**212 Voir dire**

- (1) If the determination of a question whether:
  - (a) evidence should be admitted (whether in the exercise of a discretion or not); or
  - (b) evidence can be used against a person; or
  - (c) a witness is competent or compellable,depends on a court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question.
- (2) In the hearing of a preliminary question about whether an accused's admission should be admitted into evidence (whether in the exercise of a discretion or not) in a criminal proceeding, the issue of the admission's truth or untruth is to be disregarded unless the issue is introduced by the accused.
- (3) In a hearing to determine a preliminary question of fact, the facts in issue are taken to include the fact to which the hearing relates.

**213 Advance rulings**

If a question arises in a proceeding, being a question about:

- (a) the admissibility of evidence proposed to be adduced; or
- (b) the operation of a provision of this Act or another law in relation to evidence proposed to be adduced,

the court may, if it thinks appropriate, give a ruling or make a finding in relation to the question before the evidence is adduced.

**214 Leave, etc, be subject to terms**

- (1) A court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.
- (2) Without limiting the matters that the court may take into account in deciding whether or not to give the leave, permission or direction, the court is to take into account:
  - (a) the extent to which to do so would be likely to add unduly to, or to shorten the length or cost of the hearing; and
  - (b) the extent to which to do so would be unfair to a party or to a witness; and
  - (c) the importance of the evidence in relation to which the leave, permission or direction is sought; and
  - (d) the nature of the proceeding; and
  - (e) the power of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

**215 Averment as to public place**

- (1) If in any proceeding before a court, in respect of any offence, it is an essential element of the offence that the place (where any fact or matter occurred or was done) should be a public place, an allegation, in the complaint or information, that the place (specified as that in which the fact or matter charged occurred or was done) was a public place, is *prima facie* evidence that the place was a public place.
- (2) The court may, if it thinks fit, and at any stage of the proceeding, permit evidence to be called with respect to the question whether the place was a public place.

**216 Court may order attendance of persons in custody**

A court may, on application or on its own initiative, issue a warrant or order for bringing up any person in lawful custody before the court to enable such person to be prosecuted or to pursue or defend or be examined as a witness in, any proceedings, either criminal or civil, before such court.

**217 Evidence of property of the Republic of Vanuatu**

In a criminal proceeding, an allegation or statement, in a complaint or another initiating process, or in a pleading or sworn statement, that stated property is the property of the Republic of Vanuatu is prima facie evidence of this.

**218 Regulations**

The Minister may make Regulations:

- (a) to give effect to the provisions of this Act or for the better carrying out of the provisions of this Act; and
- (b) to prescribe matters required to be prescribed under this Act.

**219 Court rules**

Subject to any Regulations made under this Act, the Chief Justice may make rules or practice directions for the purpose of giving effect to any matter under this Act.

**220 Savings and transitional**

- (1) This Act applies to all proceedings in all courts commenced before the commencement of this Act except:
  - (a) the continuation of a hearing that commenced before the commencement of this Act; and
  - (b) any appeal or review arising out of such a continued hearing; and
  - (c) any re-trial of such a continued hearing,and the rule of evidence as in force immediately before the commencement of this Act continues to apply to any such continued hearing, appeal, review or re-trial.
- (2) Despite subsection (1), the provisions of this Act relating to arrest and cautioning apply only to arrests made or cautions administered on or after the commencement of this Act.
- (3) For the purposes of this section, criminal proceedings commence when the information is laid or the summons filed.
- (4) Despite subsection (1), in respect of any proceedings commenced before the commencement of this Act, a court may give leave to admit evidence that was adduced before the commencement of this Act.

**221 Commencement**

This Act commences on the day on which it is published in the Gazette.