



Isle of Man

Ellan Vannin

CRIMINAL EVIDENCE BILL 2018

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Explanatory Memorandum

1. This Bill is promoted by HM Attorney General on behalf of the Council of Ministers.
2. *Part 1* comprises *clauses 1 to 3* which respectively provide for the resulting Act's short title (*clause 1*) and commencement (*clause 2*) and define certain terms which will be used in the Act (*clause 3*).
3. *Part 2* contains a comprehensive restatement of the law relating to evidence in criminal proceedings.
4. *Division 1* (evidence of bad character) comprises *clauses 4 to 16*.
5. *Clause 4* defines the sort of evidence whose admissibility is to be determined under the new statutory scheme. The definition covers evidence of, or of a disposition towards, misconduct. The term "misconduct" is further defined in *clause 16* as the commission of an offence or other reprehensible behaviour.
6. The intention is that this Part of the Act will provide a new basis for the admissibility of previous convictions and other misconduct. Accordingly, *clause 5* abolishes the common law rules governing the admissibility of such evidence. This abolition does not extend to the rule that allows a person's bad character to be proved by his or her reputation. This common law rule is preserved as a category of admissible hearsay in *clause 5(2)*. However the admissibility of a person's bad character, in circumstances where it was being proved by reputation, would fall to be determined under this part of the Act.
7. *Clause 6* sets out the circumstances in which, outside the alleged facts of the offence and its investigation and prosecution, evidence can be given of the previous misconduct of a person other than a defendant in the proceedings. Evidence of such a person's bad character is not to be given without the permission of the court and can only be given if it meets one of 3 conditions, namely:
 - a. it is important explanatory evidence,
 - b. it is of substantial probative value to a matter in issue and that issue is one of substantial importance in the case, or
 - c. the prosecution and defence agree that the evidence should be admitted.
8. At present evidence of a defendant's bad character is generally inadmissible, subject to a number of restricted common law and statutory exceptions. *Clauses 8 to 12* set out the circumstances in which such evidence is to be admissible in future. In summary, these provide an inclusionary approach to a defendant's previous convictions and other misconduct or disposition, under which

relevant evidence is admissible but can be excluded in certain circumstances if the court considers that the adverse effect that it would have on the fairness of the proceedings requires this. *Clause 7* sets out the gateways through which this evidence can be admitted, whilst *clauses 8 to 12* provide additional definitional material. *Clause 13* provides an important safeguard where this sort of evidence has been influenced by other witnesses or evidence in the case and is consequently false or misleading.

9. *Clause 7(1)* provides that evidence of a defendant's bad character is admissible in the following circumstances:
 - a. all the parties agree to it being given;
 - b. the defendant introduces the evidence himself or herself or it is given in response to a question put by the defendant (or his or her counsel) that is intended to elicit it;
 - c. it is important explanatory evidence;
 - d. it is relevant to an important issue between the defendant and prosecution;
 - e. it has substantial probative value in relation to an important issue between the defendant and a co-defendant;
 - f. it corrects a false impression given by the defendant about himself or herself;
 - g. the defendant has attacked the character of another person.
10. This is subject to an application by the defendant to have the evidence excluded if admitting it would have such an adverse effect on the fairness of the trial that it ought to be excluded (*clause 7(3)*).
11. *Clause 8* defines what is meant by "important explanatory evidence". The definition mirrors that used in the context of non-defendants (see "non-defendant's bad character": *clause 6*).
12. *Clause 9* deals with the meaning of a "matter in issue between the defendant and the prosecution" and relates to evidence of a defendant's bad character that is admissible because it is relevant to an important matter at issue between the defendant and the prosecution (see *clause 7(1)(d)*).
13. *Clause 10* relates to evidence that is relevant to issues between the defendant and a co-defendant (as mentioned in *clause 7(1)(e)*). Evidence is only admissible on this basis by (or at the behest of) a co-defendant: see *clause 10(2)*.
14. *Clause 11* relates to evidence that is admissible under *clause 7(1)(f)* to correct a false impression given by the defendant. For this provision to apply, the defendant must have been responsible for an assertion that gives a false or misleading impression about himself or herself.
15. *Clause 12* deals with an "attack on another person's character" and with evidence that becomes admissible as a result of the defendant attacking another person's character (see *clause 7(1)(g)*). A defendant attacks another person's

character if he or she gives evidence that they committed an offence (either the one charged or a different one) or have behaved in a reprehensible way: (clause 7(1)(a) and 7(2)). A defendant also attacks another person's character if he or she or his or her representative ask questions that are intended (or are likely) to elicit evidence of this sort or if the defendant makes an allegation of this nature when questioned under caution or on being charged with the offence and this is heard in evidence – (clause 12(1)(b) and (c)).

16. *Clause 12* deals with circumstances in which bad character evidence has been admitted but it later emerges that the evidence is contaminated, that is, has been affected by an agreement with other witnesses or by hearing the views or evidence of other witnesses so that it is false or misleading (see clause (5)).
17. Ordinarily it is for the jury to decide whether or not to believe evidence and decide on the weight to be placed on it. However, there may be cases where it is not possible to expect the jury to put this evidence completely out of their mind. There are existing common law powers for the judge to withdraw a case from the jury at any time following the close of the prosecution case. *Clause 12* builds on these powers by conferring a duty on the judge to stop the case if the contamination is such that, considering the importance of the evidence to the case, a conviction would be unsafe.
18. *Clause 13* requires a court, when considering the relevance or probative value of bad character evidence, to assume that the evidence is true. This reflects the distinction between the roles of the judge and jury: it is for the jury to form a view on matters of fact, such as the reliability of the evidence, and for the judge to rule on issues of law.
19. *Clause 15* imposes a duty on the court to give reasons in open court for rulings given under clause 6, 7 or 13.
20. *Clause 16* provides definitions for the purposes of the Division of certain key terms.
21. *Division 2* deals with the admissibility of hearsay evidence in criminal proceedings.
22. *Subdivision 1* contains the main provisions on the admissibility of hearsay..
23. *Clause 17* reverses the former rule that hearsay evidence was, as a general rule, inadmissible in criminal proceedings. However such evidence becomes admissible if, but only if—
 - a. it is made admissible by any other provision of the Division;
 - b. any rule of law retained under clause 21 makes it admissible;
 - c. the parties all agree that it should be admissible; or
 - d. the court is satisfied that it is in the interests of justice for it to be admitted.
24. *Clause 18* defines the meaning of “statement” and “matter stated” for the purposes of the Division.

25. Subdivision 2 (comprising clauses 19-23) deals with the principal categories of admissibility of hearsay.
26. *Clause 19* deals with the admissibility of a witness's statement where the witness himself or herself is unavailable.
27. *Clause 20* deals with the admissibility of documents produced in the course of a trade, business, profession or other occupation or as the holder of an office (whether paid or not).
28. *Clause 21* preserves some existing rules which already provide an exception from the hearsay rules.
29. *Clause 22* deals with the admissibility of previous inconsistent statements.
30. *Clause 23* deals with the admissibility of other previous statements made by witnesses in criminal proceedings (e.g. to rebut a suggestion of fabrication).
31. *Clause 24* lays down additional requirements to be satisfied in determining whether evidence which relies upon multiple hearsay is to be admitted.
32. *Clause 25* deals with the admissibility of documents produced as exhibits in proceedings.
33. *Clause 26* lays down the conditions about the capability of a witness which must be satisfied before a statement made by a witness is admitted under clause 19, 22 or 23.
34. *Clause 27* deals with the way in which the credibility of a witness may be addressed where the witness is not called to give evidence.
35. *Clause 28* empowers the court (or, in the case of a trial with a jury, the Deemster) to stop a trial where the case appears unconvincing.
36. *Clause 29* deals with the court's residual discretion to exclude evidence.
37. *Subdivision 4* (comprising *clauses 30 to 33*) deals with miscellaneous matters for the purposes of the Division.
38. *Clause 30* makes it clear that expert evidence may be based upon a statement made in connection with the proceedings by a third party on the basis that the statement is itself true, subject to a right for a party to apply to disapply the approach set out in the clause.
39. *Clause 31* deals with the admissibility of confessions.
40. *Clause 32* deals with representations made otherwise than by a person but which rely upon information supplied by a person. Such representations are not admissible unless the information supplied can be shown to be accurate.
41. *Clause 33* deals with the admissibility of evidence at a retrial following a direction given by the Staff of Government Division under section 33(3)(b) of the *Criminal Jurisdiction Act 1993* that the appellant be retried.

42. *Clause 34* deals with the production of a statement in evidence where the statement is contained within a larger document, and permits either the document to be produced or an authenticated part containing the statement.
43. *Clause 35* provides for the interpretation of terms used in the Division.
44. *Division 3* (comprising *clauses 36 to 39*) contains miscellaneous and supplemental provisions.
45. *Clauses 36 and 37* deal with the admissibility of evidence given by means of a video recording.
46. *Clause 38* formalises a long-standing practice in relation to the use of documents to refresh a witness's memory whilst giving oral evidence.
47. *Clause 39* defines certain terms used in the Division.
48. *Part 3* comprises *clause 40* which deals with repeals of provisions which are redundant in consequence of the provisions of Part 2, or which would otherwise conflict with the provisions of that Part.
49. It is not anticipated the Bill will have any financial impact.
50. In the opinion of the member moving the Bill, its provisions are compatible with the Convention rights within the meaning of the *Human Rights Act 2001*.



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CRIMINAL EVIDENCE BILL 2018

1 **A BILL** to make fresh provision about evidence in criminal proceedings, and for
 2 connected purposes

BE IT ENACTED by the Queen’s Most Excellent Majesty, by and with the advice and consent of the Council and Keys in Tynwald assembled, and by the authority of the same, as follows:—

3 **PART 1 – INTRODUCTORY**

4 **1 Short title**

5 The short title of this Act is the Criminal Evidence Act 2018.

6 **2 Commencement**

7 (1) This Act comes into operation on such day or days as the Department of
 8 Home Affairs (“**the Department**”) may by order appoint.

9 (2) An order under subsection (1) may make such consequential, incidental
 10 and transitional provision as the Department considers necessary.

11 **3 Interpretation**

12 In this Act—

13 “**criminal proceedings**” means criminal proceedings in relation to which the
 14 strict rules of evidence apply;

15 “**defendant**”, in relation to criminal proceedings, means a person charged with
 16 an offence in those proceedings; and “**co-defendant**”, in relation to a
 17 defendant, means a person charged with an offence in the same
 18 proceedings; and

19 “**the Department**” is to be construed in accordance with section 2(1).

PART 2 — EVIDENCE

DIVISION 1 — EVIDENCE OF BAD CHARACTER

4 Meaning of “bad character”

P2003/44/98

References in this Division to evidence of a person's “**bad character**” are to evidence of, or of a disposition towards, misconduct on that person's part, other than evidence which—

- (a) has to do with the alleged facts of the offence with which the defendant is charged, or
- (b) is evidence of misconduct in connection with the investigation or prosecution of that offence.

5 Abolition of common law rules on admissibility

P2003/44/99

- (1) The common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished.
- (2) Subsection (1) is subject to section 21(1) in so far as it preserves the rule under which in criminal proceedings a person's reputation is admissible for the purpose of proving the person's bad character.

6 Non-defendant's bad character

P2003/44/100

- (1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—
 - (a) it is important explanatory evidence,
 - (b) it has substantial probative value in relation to a matter which—
 - (i) is a matter in issue in the proceedings, and
 - (ii) is of substantial importance in the context of the case as a whole, or
 - (c) all parties to the proceedings agree to the evidence being admissible.
- (2) For the purposes of subsection (1)(a) evidence is important explanatory evidence if—
 - (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
 - (b) its value for understanding the case as a whole is substantial.
- (3) In assessing the probative value of evidence for the purposes of subsection (1)(b) the court must have regard to the following factors (and to any others it considers relevant)—

- 1 (a) the nature and number of the events, or other things, to which the
2 evidence relates;
- 3 (b) when those events or things are alleged to have happened or
4 existed;
- 5 (c) where—
6 (i) the evidence is evidence of a person's misconduct, and
7 (ii) it is suggested that the evidence has probative value by
8 reason of similarity between that misconduct and other
9 alleged misconduct,
10 the nature and extent of the similarities and the dissimilarities
11 between each of the alleged instances of misconduct;
- 12 (d) where—
13 (i) the evidence is evidence of a person's misconduct,
14 (ii) it is suggested that that person is also responsible for the
15 misconduct charged, and
16 (iii) the identity of the person responsible for the misconduct
17 charged is disputed,
18 the extent to which the evidence shows or tends to show that the
19 same person was responsible each time.
- 20 (4) Except where subsection (1)(c) applies, evidence of the bad character of a
21 person other than the defendant must not be given without leave of the
22 court.

23 7 Defendant's bad character

24 P2003/44/101

- 25 (1) In criminal proceedings evidence of the defendant's bad character is
26 admissible if, but only if—
- 27 (a) all parties to the proceedings agree to the evidence being
28 admissible,
- 29 (b) the evidence is adduced by the defendant himself or herself or is
30 given in answer to a question asked by him or her in cross-
31 examination and intended to elicit it,
- 32 (c) it is important explanatory evidence,
- 33 (d) it is relevant to an important matter in issue between the
34 defendant and the prosecution,
- 35 (e) it has substantial probative value in relation to an important
36 matter in issue between the defendant and a co-defendant,
- 37 (f) it is evidence to correct a false impression given by the defendant,
38 or
- 39 (g) the defendant has made an attack on another person's character.

- 1 (2) Sections 8 to 12 contain provision supplementing subsection (1).
- 2 (3) The court must not admit evidence under subsection (1)(d) or (g) if, on
3 an application by the defendant to exclude it, it appears to the court that
4 the admission of the evidence would have such an adverse effect on the
5 fairness of the proceedings that the court ought not to admit it.
- 6 (4) On an application to exclude evidence under subsection (3) the court
7 must have regard, in particular, to the length of time between the matters
8 to which that evidence relates and the matters which form the subject of
9 the offence charged.

10 8 “Important explanatory evidence”

11 P2003/44/102

12 For the purposes of section 7(1)(c) evidence is “important explanatory evidence”
13 if—

- 14 (a) without it, the court or jury would find it impossible or difficult
15 properly to understand other evidence in the case, and
16 (b) its value for understanding the case as a whole is substantial.

17 9 “Matter in issue between the defendant and the prosecution”

18 P2003/44/103

19 (1) For the purposes of section 7(1)(d) the “matters in issue between the
20 defendant and the prosecution” include—

- 21 (a) the question whether the defendant has a propensity to commit
22 offences of the kind with which he or she is charged, except where
23 his or her having such a propensity makes it no more likely that
24 he or she is guilty of the offence;
- 25 (b) the question whether the defendant has a propensity to be
26 untruthful, except where it is not suggested that the defendant's
27 case is untruthful in any respect.

28 (2) Where subsection (1)(a) applies, a defendant's propensity to commit
29 offences of the kind with which he or she is charged may (without
30 limiting any other way of doing so) be established by evidence that he or
31 she has been convicted of—

- 32 (a) an offence of the same description as the one with which he or she
33 is charged, or
34 (b) an offence of the same category as the one with which he or she is
35 charged.

36 (3) Subsection (2) does not apply in the case of a particular defendant if the
37 court is satisfied, by reason of the length of time since the conviction or
38 for any other reason, that it would be unjust for it to apply in his or her
39 case.

- 1 (4) For the purposes of subsection (2)—
- 2 (a) two offences are of the same description as each other if the
- 3 statement of the offence in a complaint or information would, in
- 4 each case, be in the same terms;
- 5 (b) two offences are of the same category as each other if they belong
- 6 to the same category of offences prescribed for the purposes of
- 7 this section by an order made by the Department.
- 8 (5) A category prescribed by an order under subsection (4)(b) must consist
- 9 of offences of the same type.
- 10 (6) Only prosecution evidence is admissible under section 7(1)(d).
- 11 (7) Where—
- 12 (a) a defendant has been convicted of an offence under the law of any
- 13 country or territory outside the Island (“the previous offence”),
- 14 and
- 15 (b) the previous offence would constitute an offence under the law of
- 16 the Island (“the corresponding offence”) if it were done in the
- 17 Island at the time of the trial for the offence with which the
- 18 defendant is now charged (“the current offence”),
- 19 subsection (8) applies for the purpose of determining if the previous
- 20 offence and the current offence are of the same description or category.
- 21 (8) For the purposes of subsection (2)—
- 22 (a) the previous offence is of the same description as the current
- 23 offence if the corresponding offence is of that same description, as
- 24 set out in subsection (4)(a);
- 25 (b) the previous offence is of the same category as the current offence
- 26 if the current offence and the corresponding offence belong to the
- 27 same category of offences prescribed as mentioned in subsection
- 28 (4)(b).
- 29 (9) For the purposes of subsection (10) “foreign service offence” means an
- 30 offence which—
- 31 (a) was the subject of proceedings under the service law of a country
- 32 outside the British Islands, and
- 33 (b) would constitute an offence under the law of the Island or a
- 34 service offence (“the corresponding domestic offence”) if it were
- 35 done in the Island by a member of Her Majesty’s forces at the time
- 36 of the trial for the offence with which the defendant is now
- 37 charged (“the current offence”).
- 38 (10) Where a defendant has been found guilty of a foreign service offence
- 39 (“the previous service offence”), for the purposes of subsection (2)—

- 1 (a) the previous service offence is an offence of the same description
2 as the current offence if the corresponding domestic offence is of
3 that same description, as set out in subsection (4)(a);
- 4 (b) the previous service offence is an offence of the same category as
5 the current offence if the current offence and the corresponding
6 domestic offence belong to the same category of offences
7 prescribed as mentioned in subsection (4)(b).

8 (11) In this section—

9 **“Her Majesty’s forces”** has the same meaning as in the Armed Forces Act 2006
10 (of Parliament);

11 **“service law”**, in relation to a country outside the British Islands, means the law
12 governing all or any of the naval, military or air forces of that country.

13 *Tynwald procedure for an order under subsection (4)(b) — approval required.*

14 **10 “Matter in issue between the defendant and a co-defendant”**

15 P2003/44/104

- 16 (1) Evidence which is relevant to the question whether the defendant has a
17 propensity to be untruthful is admissible on that basis under section
18 7(1)(e) only if the nature or conduct of his or her defence is such as to
19 undermine the co-defendant’s defence.
- 20 (2) Only evidence—
- 21 (a) which is to be (or has been) adduced by the co-defendant, or
22 (b) which a witness is to be invited to give (or has given) in cross-
23 examination by the co-defendant,
- 24 is admissible under section 7(1)(e).

25 **11 “Evidence to correct a false impression”**

26 P2003/44/105

- 27 (1) For the purposes of section 7(1)(f)—
- 28 (a) the defendant gives a false impression if he or she is responsible
29 for the making of an express or implied assertion which is apt to
30 give the court or jury a false or misleading impression about the
31 defendant;
- 32 (b) evidence to correct such an impression is evidence which has
33 probative value in correcting it.
- 34 (2) A defendant is treated as being responsible for the making of an
35 assertion if—
- 36 (a) the assertion is made by the defendant in the proceedings
37 (whether or not in evidence given by the defendant),
38 (b) the assertion was made by the defendant—

- 1 (i) on being questioned under caution, before charge, about
2 the offence with which he is charged, or
3 (ii) on being charged with the offence or officially informed
4 that he or she might be prosecuted for it,
5 and evidence of the assertion is given in the proceedings,
6 (c) the assertion is made by a witness called by the defendant,
7 (d) the assertion is made by any witness in cross-examination in
8 response to a question asked by the defendant that is intended to
9 elicit it, or is likely to do so, or
10 (e) the assertion was made by any person out of court, and the
11 defendant adduces evidence of it in the proceedings.
- 12 (3) A defendant who would otherwise be treated as responsible for the
13 making of an assertion is not to be so treated if, or to the extent that, he
14 or she withdraws it or disassociates himself or herself from it.
- 15 (4) Where it appears to the court that a defendant, by means of his or her
16 conduct (other than the giving of evidence) in the proceedings, is seeking
17 to give the court or jury an impression about himself or herself that is
18 false or misleading, the court may if it appears just to do so treat the
19 defendant as being responsible for the making of an assertion which is
20 apt to give that impression.
- 21 (5) In subsection (4) “conduct” includes appearance or dress.
- 22 (6) Evidence is admissible under section 7(1)(f) only if it goes no further than
23 is necessary to correct the false impression.
- 24 (7) Only prosecution evidence is admissible under section 7(1)(f).

25 **12 “Attack on another person's character”**

26 P2003/44/106

- 27 (1) For the purposes of section 7(1)(g) a defendant makes “an attack on
28 another person's character” if—
29 (a) the defendant adduces evidence attacking the other person's
30 character,
31 (b) the defendant asks questions in cross-examination that are
32 intended to elicit such evidence, or are likely to do so, or
33 (c) evidence is given of an imputation about the other person made
34 by the defendant—
35 (i) on being questioned under caution, before charge, about
36 the offence with which he or she is charged, or
37 (ii) on being charged with the offence or officially informed
38 that he or she might be prosecuted for it.
- 39 (2) In subsection (1) “evidence attacking the other person's character” means
40 evidence to the effect that the other person—

1 (a) has committed an offence (whether a different offence from the
2 one with which the defendant is charged or the same one), or

3 (b) has behaved, or is disposed to behave, in a reprehensible way;

4 and “imputation about the other person” means an assertion to that
5 effect.

6 (3) Only prosecution evidence is admissible under section 7(1)(g).

7 **13 Stopping the case where evidence contaminated**

8 P2003/44/107

9 (1) If on a defendant's trial before a Deemster and a jury for an offence—

10 (a) evidence of the defendant's bad character has been admitted
11 under any of paragraphs (c) to (g) of section 7(1), and

12 (b) the Deemster is satisfied at any time after the close of the case for
13 the prosecution that—

14 (i) the evidence is contaminated, and

15 (ii) the contamination is such that, considering the importance
16 of the evidence to the case against the defendant, the
17 defendant's conviction of the offence would be unsafe,

18 the Deemster must either direct the jury to acquit the defendant of the
19 offence or, if he or she considers that there ought to be a retrial, discharge
20 the jury.

21 (2) Where—

22 (a) a jury is directed under subsection (1) to acquit a defendant of an
23 offence, and

24 (b) the circumstances are such that, apart from this subsection, the
25 defendant could if acquitted of that offence be found guilty of
26 another offence,

27 the defendant may not be found guilty of that other offence if the court is
28 satisfied as mentioned in subsection (1)(b) in respect of it.

29 (3) If—

30 (a) a jury is required to determine under section 9(6) of the *Criminal*
31 *Jurisdiction Act 1993* whether a person charged on information
32 with an offence did the act or made the omission charged,

33 (b) evidence of the person's bad character has been admitted under
34 any of paragraphs (c) to (g) of section 7(1), and

35 (c) the Deemster is satisfied at any time after the close of the case for
36 the prosecution that—

37 (i) the evidence is contaminated, and

38 (ii) the contamination is such that, considering the importance
39 of the evidence to the case against the person, a finding

- 1 that he or she did the act or made the omission would be
2 unsafe,
- 3 the Deemster must either direct the jury to acquit the defendant of the
4 offence or, if he or she considers that there ought to be a rehearing,
5 discharge the jury.
- 6 (4) This section does not limit any other power a Deemster may have to
7 direct a jury to acquit a person of an offence or to discharge a jury.
- 8 (5) For the purposes of this section a person's evidence is contaminated
9 where—
- 10 (a) as a result of an agreement or understanding between the person
11 and one or more others, or
- 12 (b) as a result of the person being aware of anything alleged by one or
13 more others whose evidence may be, or has been, given in the
14 proceedings,
- 15 the evidence is false or misleading in any respect, or is different from
16 what it would otherwise have been.

17 **14 Assumption of truth in assessment of relevance or probative value**

18 P2003/44/109

- 19 (1) A reference in this Division to the relevance or probative value of
20 evidence is a reference to its relevance or probative value on the
21 assumption that it is true, subject to subsection (2).
- 22 (2) In assessing the relevance or probative value of an item of evidence for
23 any purpose of this Division, a court need not assume that the evidence
24 is true if it appears, on the basis of any material before the court
25 (including any evidence which the court decides to hear on the matter),
26 that no court or jury could reasonably find it to be true.

27 **15 Court's duty to give reasons for rulings**

28 P2003/44/110

- 29 (1) Where the court makes a relevant ruling—
- 30 (a) it must state in open court (but in the absence of the jury, if there
31 is one) its reasons for the ruling;
- 32 (b) if it is a court of summary jurisdiction, it must cause the ruling
33 and the reasons for it to be entered in the order book.
- 34 (2) In this section "relevant ruling" means—
- 35 (a) a ruling on whether an item of evidence is evidence of a person's
36 bad character;
- 37 (b) a ruling on whether an item of such evidence is admissible under
38 section 6 or 7 (including a ruling on an application under section
39 7(3));

1 (c) a direction under section 13.

2 **16 Interpretation of this Division**

3 P2003/44/112

4 (1) In this Division—

5 “**bad character**” is to be read in accordance with section 4;

6 “**important matter**” means a matter of substantial importance in the context of
7 the case as a whole;

8 “**misconduct**” means the commission of an offence or other reprehensible
9 behaviour;

10 “**offence**” includes a service offence;

11 “**probative value**”, and “**relevant**” (in relation to an item of evidence), are to be
12 read in accordance with section 14;

13 “**prosecution evidence**” means evidence which is to be (or has been) adduced
14 by the prosecution, or which a witness is to be invited to give (or has
15 given) in cross-examination by the prosecution;

16 “**service offence**” has the same meaning as in the Armed Forces Act 2006 (of
17 Parliament);

18 (2) Where a defendant is charged with 2 or more offences in the same
19 criminal proceedings, this Division (except section 7(3)) has effect as if
20 each offence were charged in separate proceedings; and references to the
21 offence with which the defendant is charged are to be read accordingly.

22 (3) Nothing in this Division affects the exclusion of evidence—

23 (a) under the rule in section 14 of the *Evidence Act 1871* against a
24 party impeaching the credit of his or her own witness by general
25 evidence of bad character; or

26 (b) on grounds other than the fact that it is evidence of a person's bad
27 character.

¹ 2006 c. 52. The Act (other than paragraph 5(ba) of Schedule 9) extends to the Island by virtue of section 384(2)(a) and (3) subject to such modifications as Her Majesty may by Order in Council specify.



DIVISION 2 — HEARSAY EVIDENCE

*Subdivision 1 — Main provisions***17 Admissibility of hearsay evidence**

P2003/44/114

- (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—
- (a) any provision of this Division or any other statutory provision makes it admissible,
 - (b) any rule of law preserved by section 21 makes it admissible,
 - (c) all parties to the proceedings agree to it being admissible, or
 - (d) the court is satisfied that it is in the interests of justice for it to be admissible.
- (2) In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant)—
- (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
 - (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);
 - (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
 - (d) the circumstances in which the statement was made;
 - (e) how reliable the maker of the statement appears to be;
 - (f) how reliable the evidence of the making of the statement appears to be;
 - (g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
 - (h) the amount of difficulty involved in challenging the statement;
 - (i) the extent to which that difficulty would be likely to prejudice the party facing it.
- (3) Nothing in this Division affects the exclusion of evidence of a statement on grounds other than the fact that it is a statement not made in oral evidence in the proceedings.

18 Statements and matters stated

P2003/44/115

- (1) In this Division references to a statement or to a matter stated are to be read as follows.
- (2) A “**statement**” is any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form.
- (3) A “**matter stated**” is one to which this Division applies if (and only if) the purpose, or one of the purposes, of the person making the statement appears to the court to have been—
 - (a) to cause another person to believe the matter, or
 - (b) to cause another person to act or a machine to operate on the basis that the matter is as stated.

*Subdivision 2 — Principal categories of admissibility***19 Cases where a witness is unavailable**

P2003/44/116

- (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—
 - (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,
 - (b) the person who made the statement (“the relevant person”) is identified to the court's satisfaction, and
 - (c) any of the 5 conditions mentioned in subsection (2) is satisfied.
- (2) The conditions are—
 - (a) that the relevant person is dead;
 - (b) that the relevant person is unfit to be a witness because of his or her bodily or mental condition;
 - (c) that the relevant person is outside the Island and it is not reasonably practicable to secure that person's attendance;
 - (d) that the relevant person cannot be found although such steps as it is reasonably practicable to take to find that person have been taken;
 - (e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.
- (3) For the purposes of subsection (2)(e) “fear” is to be widely construed and (for example) includes fear of the death or injury of another person or of financial loss.

- 1 (4) Leave may be given under subsection (2)(e) only if the court considers
2 that the statement ought to be admitted in the interests of justice, having
3 regard—
4 (a) to the statement's contents,
5 (b) to any risk that its admission or exclusion will result in unfairness
6 to any party to the proceedings (and in particular to how difficult
7 it will be to challenge the statement if the relevant person does not
8 give oral evidence),
9 (c) in appropriate cases, to the fact that a direction under section 30 of
10 the Criminal Justice, Police and Courts Act 2007 could be made in
11 respect of the witness; and
12 (d) to any other relevant circumstances.
- 13 (5) A condition set out in any paragraph of subsection (2) which is in fact
14 satisfied is to be treated as not satisfied if it is shown that the
15 circumstances described in that paragraph are caused—
16 (a) by the person in support of whose case it is sought to give the
17 statement in evidence, or
18 (b) by a person acting on behalf of the person mentioned in
19 paragraph (a),
20 in order to prevent the relevant person giving oral evidence in the
21 proceedings (whether at all or in connection with the subject matter of
22 the statement).

23 20 Business and other documents

24 P2003/44/117

- 25 (1) In criminal proceedings a statement contained in a document is
26 admissible as evidence of any matter stated if—
27 (a) oral evidence given in the proceedings would be admissible as
28 evidence of that matter,
29 (b) the requirements of subsection (2) are satisfied, and
30 (c) the requirements of subsection (5) are satisfied, in a case where
31 subsection (4) requires them to be.
- 32 (2) The requirements of this subsection are satisfied if—
33 (a) the document or the part containing the statement was created or
34 received by a person in the course of a trade, business, profession
35 or other occupation, or as the holder of a paid or unpaid office,
36 (b) the person who supplied the information contained in the
37 statement (“the relevant person”) had or may reasonably be
38 supposed to have had personal knowledge of the matters dealt
39 with, and

- 1 (c) each person (if any) through whom the information was supplied
2 from the relevant person to the person mentioned in paragraph
3 (a) received the information in the course of a trade, business,
4 profession or other occupation, or as the holder of a paid or
5 unpaid office.
- 6 (3) The persons mentioned in paragraphs (a) and (b) of subsection (2) may
7 be the same person.
- 8 (4) The additional requirements of subsection (5) must be satisfied if the
9 statement—
- 10 (a) was prepared for the purposes of pending or contemplated
11 criminal proceedings, or for a criminal investigation, but
- 12 (b) was not obtained pursuant to a request under section 20 of the
13 *Criminal Justice Act 1991*.
- 14 (5) The requirements of this subsection are satisfied if —
- 15 (a) any of the 5 conditions mentioned in section 19(2) is satisfied
16 (absence of relevant person etc), or
- 17 (b) the relevant person cannot reasonably be expected to have any
18 recollection of the matters dealt with in the statement (having
19 regard to the length of time since he or she supplied the
20 information and all other circumstances).
- 21 (6) A statement is not admissible under this section if the court makes a
22 direction to that effect under subsection (7).
- 23 (7) The court may make a direction under this subsection if satisfied that the
24 statement's reliability as evidence for the purpose for which it is tendered
25 is doubtful in view of—
- 26 (a) its contents,
- 27 (b) the source of the information contained in it,
- 28 (c) the way in which or the circumstances in which the information
29 was supplied or received, or
- 30 (d) the way in which or the circumstances in which the document
31 concerned was created or received.

32 **21 Preservation of certain common law categories of admissibility**

33 P2003/44/118

- 34 (1) The following rules of law are preserved.

35 **1 Public information etc**

36 Any rule of law under which in criminal proceedings—

- 37 (a) published works dealing with matters of a public nature (such as
38 histories, scientific works, dictionaries and maps) are admissible
39 as evidence of facts of a public nature stated in them,

- 1 (b) public documents (such as public registers, and returns made
2 under public authority with respect to matters of public interest)
3 are admissible as evidence of facts stated in them,
- 4 (c) records (such as the records of certain courts, treaties, Crown
5 grants, pardons and commissions) are admissible as evidence of
6 facts stated in them, or
- 7 (d) evidence relating to a person's age or date or place of birth may be
8 given by a person without personal knowledge of the matter.

9 **2 Reputation as to character**

10 Any rule of law under which in criminal proceedings evidence of a person's
11 reputation is admissible for the purpose of proving his or her good or bad
12 character.

13 Note: The rule is preserved only so far as it allows the court to treat such
14 evidence as proving the matter concerned.

15 **3 Reputation or family tradition**

16 Any rule of law under which in criminal proceedings evidence of reputation or
17 family tradition is admissible for the purpose of proving or disproving—

- 18 (a) pedigree or the existence of a marriage,
19 (b) the existence of any public or general right, or
20 (c) the identity of any person or thing.

21 Note: The rule is preserved only so far as it allows the court to treat such
22 evidence as proving or disproving the matter concerned.

23 **4 Res gestae**

24 Any rule of law under which in criminal proceedings a statement is admissible
25 as evidence of any matter stated if—

- 26 (a) the statement was made by a person so emotionally overpowered
27 by an event that the possibility of concoction or distortion can be
28 disregarded,
29 (b) the statement accompanied an act which can be properly
30 evaluated as evidence only if considered in conjunction with the
31 statement, or
32 (c) the statement relates to a physical sensation or a mental state
33 (such as intention or emotion).

34 **5 Confessions etc**

35 Any rule of law relating to the admissibility of confessions or mixed statements
36 in criminal proceedings.

37 **6 Admissions by agents etc**

38 Any rule of law under which in criminal proceedings—

- 39 (a) an admission made by an agent of a defendant is admissible
40 against the defendant as evidence of any matter stated, or

- 1 (b) a statement made by a person to whom a defendant refers a
2 person for information is admissible against the defendant as
3 evidence of any matter stated.

4 **7 Common enterprise**

5 Any rule of law under which in criminal proceedings a statement made by a
6 party to a common enterprise is admissible against another party to the
7 enterprise as evidence of any matter stated.

8 **8 Expert evidence**

9 Any rule of law under which in criminal proceedings an expert witness may
10 draw on the body of expertise relevant to the witness's field.

- 11 (2) With the exception of the rules preserved by this section, the common
12 law rules governing the admissibility of hearsay evidence in criminal
13 proceedings are abolished.

14 **22 Inconsistent statements**

15 P2003/44/119

- 16 (1) If in criminal proceedings a person gives oral evidence and—
17 (a) the person admits making a previous inconsistent statement, or
18 (b) a previous inconsistent statement made by the person is proved
19 by virtue of section 10, 11 or 12 of the *Evidence Act 1871*,
20 the statement is admissible as evidence of any matter stated of which oral
21 evidence by the person would be admissible.
- 22 (2) If in criminal proceedings evidence of an inconsistent statement by any
23 person is given under section 27(2)(c), the statement is admissible as
24 evidence of any matter stated in it of which oral evidence by that person
25 would be admissible.

26 **23 Other previous statements of witnesses**

27 P2003/44/120

- 28 (1) This section applies where a person (referred to below as “W”) is called
29 to give evidence in criminal proceedings.
- 30 (2) If a previous statement by W is admitted as evidence to rebut a
31 suggestion that W's oral evidence has been fabricated, that statement is
32 admissible as evidence of any matter stated of which oral evidence by W
33 would be admissible.
- 34 (3) A statement made by W in a document—
35 (a) which is used by W to refresh W's memory while giving evidence,
36 (b) on which W is cross-examined, and
37 (c) which as a consequence is received in evidence in the
38 proceedings,

- 1 is admissible as evidence of any matter stated of which oral evidence by
2 W would be admissible.
- 3 (4) A previous statement by W is admissible as evidence of any matter
4 stated of which oral evidence by W would be admissible, if—
5 (a) any of the following 3 conditions is satisfied, and
6 (b) while giving evidence the witness indicates that to the best of W’s
7 belief W made the statement, and that to the best of W’s belief it
8 states the truth.
- 9 (5) The first condition is that the statement identifies or describes a person,
10 object or place.
- 11 (6) The second condition is that the statement was made by W when the
12 matters stated were fresh in W’s memory but W does not remember
13 them, and cannot reasonably be expected to remember them, well
14 enough to give oral evidence of them in the proceedings.
- 15 (7) The third condition is that—
16 (a) W claims to be a person against whom an offence has been
17 committed,
18 (b) the offence is one to which the proceedings relate,
19 (c) the statement consists of a complaint made by W (whether to a
20 person in authority or not) about conduct which would, if proved,
21 constitute the offence or part of the offence,
22 (d) the complaint was not made as a result of a threat or a promise,
23 and
24 (e) before the statement is adduced W gives oral evidence in
25 connection with its subject matter.
- 26 (8) For the purposes of subsection (7) the fact that the complaint was elicited
27 (for example, by a leading question) is irrelevant unless a threat or a
28 promise was involved.

29 *Subdivision 3 — Supplementary provisions*

30 **24 Additional requirement for admissibility of multiple hearsay**

31 P2003/44/121

- 32 (1) A hearsay statement is not admissible to prove the fact that an earlier
33 hearsay statement was made unless—
34 (a) either of the statements is admissible under section 20, 22 or 23,
35 (b) all parties to the proceedings so agree, or
36 (c) the court is satisfied that the value of the evidence in question,
37 taking into account how reliable the statements appear to be, is so
38 high that the interests of justice require the later statement to be
39 admissible for that purpose.

- 1 (2) In this section “hearsay statement” means a statement, not made in oral
2 evidence, that is relied on as evidence of a matter stated in it.

3 **25 Documents produced as exhibits**

4 P2003/44/122

- 5 (1) This section applies if on a trial before a Deemster and a jury for an
6 offence—
- 7 (a) a statement made in a document is admitted in evidence under
8 section 22 or 23 and
- 9 (b) the document or a copy of it is produced as an exhibit.
- 10 (2) The exhibit must not accompany the jury when they retire to consider
11 their verdict unless—
- 12 (a) the Deemster considers it appropriate, or
- 13 (b) all the parties to the proceedings agree that it should accompany
14 the jury.

15 **26 Capability to make statement**

16 P2003/44/123

- 17 (1) Nothing in section 19, 22 or 23 makes a statement admissible as evidence
18 if it was made by a person who did not have the required capability at
19 the time when the person made the statement.
- 20 (2) Nothing in section 20 makes a statement admissible as evidence if any
21 person who, in order for the requirements of section 20(2) to be satisfied,
22 must at any time have supplied or received the information concerned or
23 created or received the document or part concerned—
- 24 (a) did not have the required capability at that time, or
- 25 (b) cannot be identified but cannot reasonably be assumed to have
26 had the required capability at that time.
- 27 (3) For the purposes of this section a person has the required capability if the
28 person is capable of—
- 29 (a) understanding questions put to him or her about the matters
30 stated, and
- 31 (b) giving answers to such questions which can be understood.
- 32 (4) Where by reason of this section there is an issue as to whether a person
33 had the required capability when he or she made a statement—
- 34 (a) proceedings held for the determination of the issue must take
35 place in the absence of the jury (if there is one);
- 36 (b) in determining the issue the court may receive expert evidence
37 and evidence from any person to whom the statement in question
38 was made;

- 1 (c) the burden of proof on the issue lies on the party seeking to
2 adduce the statement, and the standard of proof is the balance of
3 probabilities.

4 **27 Credibility**

5 P2003/44/124

- 6 (1) This section applies if in criminal proceedings—
- 7 (a) a statement not made in oral evidence in the proceedings is
8 admitted as evidence of a matter stated, and
- 9 (b) the maker of the statement (who is referred to below in this
10 section as “M”) does not give oral evidence in connection with the
11 subject matter of the statement.
- 12 (2) In such a case—
- 13 (a) any evidence which (if M had given such evidence) would have
14 been admissible as relevant to M’s credibility as a witness is so
15 admissible in the proceedings;
- 16 (b) evidence may with the court’s leave be given of any matter which
17 (if M had given such evidence) could have been put to M in cross-
18 examination as relevant to M’s credibility as a witness but of
19 which evidence could not have been adduced by the cross-
20 examining party;
- 21 (c) evidence tending to prove that M made (at whatever time) any
22 other statement inconsistent with the statement admitted as
23 evidence is admissible for the purpose of showing that M
24 contradicted himself or herself.
- 25 (3) If as a result of evidence admitted under this section an allegation is
26 made against M, the court may permit a party to lead additional
27 evidence of such description as the court may specify for the purposes of
28 denying or answering the allegation.
- 29 (4) In the case of a statement in a document which is admitted as evidence
30 under section 20 each person who, in order for the statement to be
31 admissible, must have supplied or received the information concerned or
32 created or received the document or part concerned is to be treated as M
33 for the purposes of subsections (1) to (3).

34 **28 Stopping the case where evidence is unconvincing**

35 P20003/44/125

- 36 (1) If on a defendant’s trial before a Deemster and jury for an offence the
37 court is satisfied at any time after the close of the case for the prosecution
38 that—
- 39 (a) the case against the defendant is based wholly or partly on a
40 statement not made in oral evidence in the proceedings, and

(b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his or her conviction of the offence would be unsafe,

the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.

(2) Where—

(a) a jury is directed under subsection (1) to acquit a defendant of an offence, and

(b) the circumstances are such that, apart from this subsection, the defendant could if acquitted of that offence be found guilty of another offence,

the defendant may not be found guilty of that other offence if the court is satisfied as mentioned in subsection (1) in respect of it.

(3) If—

(a) a jury is required to determine under section 21 of the *Criminal Jurisdiction Act 1993* whether a person charged on information with an offence did the act or made the omission charged, and

(b) the Deemster is satisfied as mentioned in subsection (1) above at any time after the close of the case for the prosecution that—

(i) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and

(ii) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the person, a finding that he or she did the act or made the omission would be unsafe,

the Deemster must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a rehearing, discharge the jury.

(4) This section does not limit any other power a Deemster may have to direct a jury to acquit a person of an offence or to discharge a jury.

29 Court's general discretion to exclude evidence

P2003/44/126

(1) In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if—

(a) the statement was made otherwise than in oral evidence in the proceedings, and

(b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in

1 undue waste of time, substantially outweighs the case for
2 admitting it, taking account of the value of the evidence.

3 (2) Nothing in this Division limits or otherwise affects any power of a court
4 to exclude evidence (whether by preventing questions from being put or
5 otherwise) at its discretion.

6 *Subdivision 4 – Miscellaneous*

7 **30 Expert evidence: preparatory work**

8 P2003/44/127

- 9 (1) This section applies if—
- 10 (a) a statement has been prepared for the purposes of criminal
11 proceedings,
- 12 (b) the person who prepared the statement had or may reasonably be
13 supposed to have had personal knowledge of the matters stated,
- 14 (c) notice is given under rules of court made —
- 15 (i) in the case of the Court of General Gaol Delivery under
16 section 25 of the *High Court Act 1991* as applied by section
17 57 of the *Criminal Jurisdiction Act 1993*, or
- 18 (ii) in the case of a court of summary jurisdiction under section
19 91 of the *Summary Jurisdiction Act 1989*,
- 20 that another person (the expert) will in evidence given in the
21 proceedings orally or under Part I of Schedule 4 to the *Criminal*
22 *Law Act 1981* base an opinion or inference on the statement, and
- 23 (d) the notice gives the name of the person who prepared the
24 statement and the nature of the matters stated.
- 25 (2) In evidence given in the proceedings the expert may base an opinion or
26 inference on the statement.
- 27 (3) If evidence based on the statement is given under subsection (2) the
28 statement is to be treated as evidence of what it states.
- 29 (4) This section does not apply if the court, on an application by a party to
30 the proceedings, orders that it is not in the interests of justice that it
31 should apply.
- 32 (5) The matters to be considered by the court in deciding whether to make
33 an order under subsection (4) include—
- 34 (a) the expense of calling as a witness the person who prepared the
35 statement;
- 36 (b) whether relevant evidence could be given by that person which
37 could not be given by the expert;
- 38 (c) whether that person can reasonably be expected to remember the
39 matters stated well enough to give oral evidence of them.

- (6) Subsections (1) to (5) apply to a statement prepared for the purposes of a criminal investigation as they apply to a statement prepared for the purposes of criminal proceedings, and in such a case references to the proceedings are to criminal proceedings arising from the investigation.

31 Confessions

P2003/44/128

- (1) After section 11 of the *Criminal Justice Act 1991* insert—

“11A Confessions may be given in evidence for co-accused

- (1) In any proceedings a confession made by an accused person may be given in evidence for another person charged in the same proceedings (a “co-accused”) in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.
- (2) If, in any proceedings where a co-accused proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—
- (a) by oppression of the person who made it; or
 - (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by that person in consequence of whatever was said or done,
- the court shall not allow the confession to be given in evidence for the co-accused except in so far as it is proved to the court on the balance of probabilities that the confession (notwithstanding that it may be true) was not so obtained.
- (3) Before allowing a confession made by an accused person to be given in evidence for a co-accused in any proceedings, the court may of its own motion require the fact that the confession was not obtained as mentioned in subsection (2) to be proved in the proceedings on the balance of probabilities.
- (4) The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence—
- (a) of any facts discovered as a result of the confession; or
 - (b) where the confession is relevant as showing that the accused speaks, writes or expresses himself or herself in a particular way, of so much of the confession as is necessary to show that he or she does so.

- 1 (5) Evidence that a fact to which this subsection applies was
 2 discovered as a result of a statement made by an accused shall not
 3 be admissible unless evidence of how it was discovered is given
 4 by the accused or on behalf of the accused.
- 5 (6) Subsection (5) applies—
- 6 (a) to any fact discovered as a result of a confession which is
 7 wholly excluded in pursuance of this section; and
- 8 (b) to any fact discovered as a result of a confession which is
 9 partly so excluded, if the fact is discovered as a result of
 10 the excluded part of the confession.
- 11 (7) In this section “oppression” includes torture, inhuman or
 12 degrading treatment, and the use or threat of violence (whether or
 13 not amounting to torture).”
- 14 (2) Subject to subsection (1), nothing in this Division makes a confession by a
 15 defendant admissible if it would not be admissible under section 11 of
 16 the *Criminal Justice Act 1991*.

17 32 Representations other than by a person

18 P2003/44/129

- 19 (1) Where a representation of any fact—
- 20 (a) is made otherwise than by a person, but
- 21 (b) depends for its accuracy on information supplied (directly or
 22 indirectly) by a person,
- 23 the representation is not admissible in criminal proceedings as evidence
 24 of the fact unless it is proved that the information was accurate.
- 25 (2) Subsection (1) does not affect the operation of the presumption that a
 26 mechanical device has been properly set or calibrated.

27 33 Evidence at retrial

28 P2003/44/131

29 In section 46 of the *Criminal Jurisdiction Act 1993* for subsections (7) and (8)
 30 substitute—

- 31 “(7) Evidence given at a retrial must be given orally if it was given
 32 orally at the original trial, unless—
- 33 (a) all the parties to the retrial agree otherwise;
- 34 (b) section 19 of the *Criminal Evidence Act 2018* applies
 35 (admissibility of hearsay evidence where a witness
 36 is unavailable); or
- 37 (c) the witness is unavailable to give evidence,
 38 otherwise than as mentioned in subsection (2) of
 39 that section, and section 17(1)(d) of that Act

(admission of hearsay evidence under residual discretion) applies.”.

Subdivision 5 — General provisions

34 Proof of statements in documents

P2003/44/133

Where a statement in a document is admissible as evidence in criminal proceedings, the statement may be proved by producing either —

- (a) the document, or
- (b) (whether or not the document exists) a copy of the document or of the material part of it,

authenticated in whatever way the court may approve.

35 Interpretation of Division 2

P2003/44/134

(1) In this Division—

"copy", in relation to a document, means anything on to which information recorded in the document has been copied, by whatever means and whether directly or indirectly;

"document" means anything in which information of any description is recorded;

"oral evidence" includes evidence which, by reason of any disability, disorder or other impairment, a person called as a witness gives in writing or by signs or by way of any device;

"statutory provision" means any provision contained in, or in an instrument made under, this or any other Act, including any Act passed after this Act.

(2) Section 18 (statements and matters stated) contains other general interpretative provisions.

(3) Where a defendant is charged with 2 or more offences in the same criminal proceedings, this Division has effect as if each offence were charged in separate proceedings.

DIVISION 3 — MISCELLANEOUS AND SUPPLEMENTAL

36 Evidence by video recording

P2003/44/137(1) to (5) {adapted}

(1) This section applies where—

- (a) a person is called as a witness in proceedings for an offence triable on information,

- 1 (b) the person claims to have witnessed (whether visually or in any
2 other way)—
- 3 (i) events alleged by the prosecution to include conduct
4 constituting the offence or part of the offence, or
- 5 (ii) events closely connected with such events,
- 6 (c) the person has previously given an account of the events in
7 question (whether in response to questions asked or otherwise),
- 8 (d) the account was given at a time when those events were fresh in
9 the person's memory (or would have been, assuming the truth of
10 the claim mentioned in paragraph (b)),
- 11 (e) a video recording was made of the account,
- 12 (f) the court has made a direction that the recording should be
13 admitted as evidence in chief of the witness, and the direction has
14 not been rescinded, and
- 15 (g) the recording is played in the proceedings in accordance with the
16 direction.
- 17 (2) If, or to the extent that, the witness in his or her oral evidence in the
18 proceedings asserts the truth of the statements made by the witness in
19 the recorded account, they shall be treated as if made by the witness in
20 that evidence.
- 21 (3) A direction under subsection (1)(f)—
- 22 (a) may not be made in relation to a recorded account given by the
23 defendant;
- 24 (b) may be made only if it appears to the court that—
- 25 (i) the witness's recollection of the events in question is likely
26 to have been significantly better when he or she gave the
27 recorded account than it will be when he or she gives oral
28 evidence in the proceedings, and
- 29 (ii) it is in the interests of justice for the recording to be
30 admitted, having regard in particular to the matters
31 mentioned in subsection (4).
- 32 (4) Those matters are—
- 33 (a) the interval between the time of the events in question and
34 the time when the recorded account was made;
- 35 (b) any other factors that might affect the reliability of what
36 the witness said in that account;
- 37 (c) the quality of the recording;
- 38 (d) any views of the witness as to whether his or her evidence
39 in chief should be given orally or by means of the
40 recording.

- 1 (5) For the purposes of subsection (2) it does not matter if the statements in
2 the recorded account were not made on oath.

3 **37 Video evidence: further provisions**

4 P2003/44/138 (2), (3) and (5)

- 5 (1) The reference in subsection 1(f) of section 36 to the admission of a
6 recording includes a reference to the admission of part of the recording;
7 and references in that section and this one to the video recording or to
8 the witness's recorded account shall, where appropriate, be read
9 accordingly.
- 10 (2) In considering whether any part of a recording should be not admitted
11 under section 36, the court must consider—
- 12 (a) whether admitting that part would carry a risk of prejudice to the
13 defendant, and
- 14 (b) if so, whether the interests of justice nevertheless require it to be
15 admitted in view of the desirability of showing the whole, or
16 substantially the whole, of the recorded interview.
- 17 (3) Nothing in section 36 affects the admissibility of any video recording
18 which would be admissible apart from that section.

19 **38 Use of documents to refresh memory**

20 P2003/44/139

- 21 (1) A person (“P”) giving oral evidence in criminal proceedings about any
22 matter may, at any stage in the course of doing so, refresh P’s memory of
23 it from a document made or verified by P at an earlier time if—
- 24 (a) P states in P’s oral evidence that the document records P’s
25 recollection of the matter at that earlier time, and
- 26 (b) P’s recollection of the matter is likely to have been significantly
27 better at that time than it is at the time of P’s oral evidence.
- 28 (2) Where—
- 29 (a) P giving oral evidence in criminal proceedings about any matter
30 has previously given an oral account, of which a sound recording
31 was made, and P states in that evidence that the account
32 represented P’s recollection of the matter at that time,
- 33 (b) P’s recollection of the matter is likely to have been significantly
34 better at the time of the previous account than it is at the time of
35 P’s oral evidence, and
- 36 (c) a transcript has been made of the sound recording,
- 37 P may, at any stage in the course of giving evidence, refresh P’s memory
38 of the matter from that transcript.

- 1 **39 Interpretation of Division 3**
2 P2003/44/140
3 In this Division —
4 “**document**” means anything in which information of any description is
5 recorded, but not including any recording of sounds or moving images;
6 “**oral evidence**” includes evidence which, by reason of any disability, disorder
7 or other impairment, a person called as a witness gives in writing or by
8 signs or by way of any device;
9 “**video recording**” means any recording, on any medium, from which a moving
10 image may by any means be produced, and includes the accompanying
11 sound-track.

12 **PART 3 — CLOSING PROVISIONS**

- 13 **40 Repeals**
14 The following are repealed—
15 (a) paragraphs (f) and (h) of the proviso to section 1 of the *Criminal*
16 *Evidence Act 1946*;
17 (b) the *Criminal Evidence Act 1967*.

IN THE COUNCIL

CRIMINAL EVIDENCE BILL 2018

A **BILL** to make fresh provision
about evidence in criminal
proceedings, and for connected
purposes

Leave to introduce given by the
Council of Ministers on 14 June 2018.

HM ATTORNEY
GENERAL

26 JUNE 2018