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Relevance, reliability and fairness

1 Relevance

- 1.1 Ensure the evidence you include in any brief you prepare only contains evidence relevant to the case.
- 1.2 *Relevant* evidence is evidence which can assist in determining the existence of a fact in issue in the case.
- 1.3 Before the hearing, tell the prosecutor of all the evidence (including that which favours the defence) whether or not it is in the brief and no matter how remotely relevant you consider it to be. Remember to supply the DPP with a 'Disclosure Certificate' in appropriate cases.

2 Reliability

- 2.1 Ensure the best available evidence is before the court.

3 Fairness

- 3.1 Treat suspects fairly. Avoid behaviour which could be regarded as unfair or oppressive.
- 3.2 Use only lawful and proper means to obtain evidence.

Documentary evidence

1 Documents as evidence

1.1 You may present evidence in three ways:

- by giving oral evidence
- by producing things (real evidence) eg: a weapon used in an assault
- by producing documents.

NB: A document is anything in or on which information is recorded and includes an audio tape, a video tape, a computer hard drive or diskette.

1.2 You must call the author of a document as a witness unless:

- an Act allows otherwise
- the document contains an admission by the defendant and the defendant has signed the document.

2 Proof of contents of documents

2.1 Where possible, present original documents to the court.

2.2 If you cannot present the original, you may present:

- a photocopy
- a facsimile copy
- a carbon copy
- a microfilm copy.

2.3 If the document is a tape recording, bring it and a transcript of it to court.

2.4 If the document is in code, eg: shorthand etc, bring it and a transcript to court.

2.5 Bring to court a printout of information stored on a computer hard drive diskette.

2.6 If the document is a ledger or other business record and you cannot bring the original to court, bring:

- a copy
- an extract
- a summary.

3 Unavailability of documents

3.1 If:

- you cannot find a document
- it has been destroyed by someone other than you or on your behalf
- you cannot bring it to court, eg: it is irremovable
- someone else did not bring it to court in answer to a subpoena/summons

you may bring to court a copy of, an extract from, or a summary of the document, or someone can give oral evidence of its contents.

4 Summary of two or more related documents

4.1 If you have evidence in two or more complex documents or a large number of related documents eg: fraud case, you can use a summary instead of bringing the documents to court by:

- preparing a summary of the documents and including it in the brief
- instructing the prosecutor to make an application to the court (before the hearing date) to use the summary
- giving the defendant and their legal representative a copy of the summary and a notice advising you wish to use it. Include your name, rank and work address on the notice
- giving them an opportunity to examine or copy the original documents.

5 Requests to produce documents

5.1 If you receive a request from the defendant to:

- produce to the defendant a document or thing
- make available for examination, copying or testing a document or thing
- arrange for someone to be at court who was involved in the production or maintenance, or who had possession, of a document or thing

immediately seek the advice of the prosecutor.

6 Handling of documents

6.1 Handle all documents with extreme care.

6.2 Preserve them in the condition they were received. Do not interfere with any tear, pen, pencil, pin or staple, or other markings.

6.3 Place documents in a clean protective covering such as a folded sheet of paper or an envelope large enough to hold them unfolded. Unfold folded documents, taking care no fresh creases are made.

7 Obtaining specimens of writing for comparison

7.1 Obtain a specimen of the suspect's handwriting which:

- they wrote on or before the day as the handwriting in question
- contains the same words as those which appear in the subject handwriting
- is in the same format eg: upper case printed to compare with upper case printed and is from the same source as the subject handwriting.

7.2 If you cannot obtain a specimen of the suspect's handwriting which meets the above requirements:

- repeat the circumstances, if known, under which the subject handwriting was written. For example, if the document was written while standing, have the suspect stand. Have the suspect sit in a comfortable position if you do not know the circumstances

- provide the writing materials used in the subject handwriting (e.g. notepaper, ball point pen, pencil, etc.)
- read the subject handwriting to the suspect. Do not leave this document in the suspect's view when the specimen is being written
- allow the suspect to arrange the words and place punctuation as they please. Do not assist with spelling, but nominate how the specimen should be written (e.g. in upper or lower case)
- introduce specimens of handwriting obtained by dictation with four or five lines of matter not connected with the text of the document in dispute. For example,

"My name is ... and I live at I have been interviewed by ... , on the ..., in connection with an offensive letter alleged to have been received through the post by ... on I am told the letter reads as follows"

Dictate the contents of the exhibit in groups of three or four words.

- if the subject handwriting contains no more than a few words or figures, such as an endorsement on a cheque, have it written a number of times in a statement, not separately. For example,

"My name is ... and I live at I have been interviewed by ..., on the ... in connection with a cheque that was sent from ... to ...of ..., on I have been told that the cheque was lost or stolen and later cashed, when it was endorsed E. Jackson and the date 21 December 1996. I have not signed the name and date E. Jackson, 21 December 1996, on this cheque, nor do I know anything about the signature E. Jackson and date 21 December, 1996, or any other cheque...."

- never ask the suspect to provide a signature alone on a piece of paper, or a number of times one under the other
- if a suspect appears to be trying to disguise their handwriting, take a second specimen. Remove the first specimen from view when it is finished
- if the writing is on a form use a dummy form to obtain the specimen. Contact the Document Examination Unit to obtain dummy forms.

8 Obtaining specimens of type for comparison

- 8.1 Reading the carbon ribbon of a typewriter can identify the machine on which it was used.
- 8.2 When obtaining a specimen of type from a typewriter, type the suspected text at least three

times on similar paper.

9 Submitting documents for comparison

- 9.1 Send specimens of handwriting, typewriting, or other written material, together with the subject document, for comparison to the Document Examination Unit.
- 9.2 If you do not personally take the documents to the Unit, attach a report which gives details of the case.
- 9.3 Send the documents to the Document Examination Unit for examination before being processed at the Fingerprint Section - the Nin-Hydrin process destroys characteristics necessary for proper handwriting examination.

Business records

1 Use of business records in evidence

1.1 Part of your evidence may include the records of a business. These documents can be admitted as evidence by bringing to court the person who made them or someone else involved in the business to prove they are business records.

1.2 If:

- you have a document, or a copy, extract or summary of a document, which is or was part of the records of a business; and
- someone recorded a fact in or on it in the course of, or for the purposes of, the business; and
- the fact was recorded by someone:
 - who knew or would have known about the fact; or
 - who was told by someone else who knew or would have known about the fact; and
- the fact was not:
 - made or obtained for a court matter; or
 - made in connection with an investigation relating or leading to a criminal proceeding; and
- the fact is important to your case;

observe the following procedure.

2 Presenting the document in your case

2.1 Either:

- bring to court the person who can give evidence of all the matters in paragraph 1.2, above; or
- get an affidavit from that person (the *deponent*), which includes those matters.

(See sample affidavit - Annexure "A").

- 2.2 Where possible, use the *'affidavit'* method. This usually avoids having to bring the person to court.
- 2.3 The statement or affidavit can include things based on the person's knowledge and belief, or information they have, provided it sets out the source of the knowledge, information or belief.
- 2.5 The above procedure is to be followed for each document you want to produce.

3 Who may give the evidence about the business record

- 3.1 The person who gives you the affidavit or you bring to court must be someone who, when the document was made or afterwards, was responsible for making or keeping the document.

NB: If you cannot find someone to give this evidence, speak to a prosecutor, as the Evidence Act 1995 provides an alternative procedure.

4 Additional requirements where the *'affidavit'* method is used

- 4.1 Serve a copy of the affidavit on the defendant or their legal representative no later than 21 days before the hearing.
- 4.2 If the defendant or their legal representative asks for the deponent to give the evidence, arrange this.

5 Bank records

- 5.1 Bank records are no different than any other business record. Apply the procedures in this Part if you want to use them as evidence.

Annexure A

AFFIDAVIT OF EVIDENCE
(in relation to Business Records)
SECTION 69/170(2) EVIDENCE ACT 1995 NO. 25

New South Wales Police

P.190

STATEMENT in the matter of:

Place:

Date:

Name:

Address:

Tel. No:

Occupation:

STATES:-

On the (date), I (name of deponent) in the state of New South Wales being duly sworn make oath and say the following:-

- 1. This statement made by me accurately sets out the evidence which I would be prepared, if necessary, to give in court as a witness. The statement is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true.**
- 2. I am (state number) years of age.**
- 3. I am a (state position in the business). (The deponent must establish they were, at the time the document was made or afterwards, responsible for making or keeping the document/s annexed to the affidavit).**
- 4. (The deponent must establish each document (Annexure 'A', etc.) attached to this affidavit is or was part of the records of the business.**
- 5. (The deponent must establish that each document (Annexure 'A', etc.) has recorded in or on it a fact that was recorded in the course of, or for the purposes of, the business).**

STATEMENT (continued) in the matter of:

Name:

- 6. (The deponent must establish the fact recorded in the document (Annexure 'A', etc.) was made by someone who knew, would have known, or was told by someone else who knew or would have known about the fact.

(An affidavit that includes evidence by the deponent based on knowledge, information or belief must set out the source of the knowledge or information or the basis of the belief).

.....
(signed)

Taken and sworn at.....

this.....day of.....

in the year.....before me,.....

(Justice of the Peace)

Proof of court orders and identity of convicted people

1 Application of proof of court orders

1.1 You might be required to prove court orders, convictions or penalties. Some examples are:

- to prove the conditions of an AVO, which have been breached
- to prove previous convictions
- to prove someone arrested on a warrant is the person named in the warrant.

2 Proving convictions, acquittals and other proceedings

2.1 If you need to prove:

- a conviction or acquittal
- a sentence or other penalty
- a court order
- a case is or was before a court

ask the clerk of the relevant court for a certificate under section 178 of the *Evidence Act 1995*.

2.2 Ensure the certificate contains:

- what you want to prove
- the time and place of the conviction, acquittal, sentence, order or proceeding
- the title of the relevant court.

2.3 Include the certificate in your brief.

3 Proving identity by fingerprints

- 3.1 If you want to prove a conviction, use the following procedures. If, however, you want to link someone's fingerprints found at a crime scene, etc, to prints on record, see 'Evidence from Experts'.
- 3.2 Obtain an affidavit from a police fingerprint expert from the relevant police force which is in the form of Annexure 'A' (for State or Territory Police fingerprint experts) or Annexure 'B' (for Australian Federal Police fingerprint experts)
- 3.3 Do not bring the fingerprint expert to court unless asked to by the defendant or the prosecutor.
- 3.4 Include the affidavit in your brief.

Annexure A

(Cl.8)

AFFIDAVIT OF MEMBER OF STATE OR TERRITORY POLICE
FORCE CONCERNING FINGERPRINTS

[Set out heading to action or matter]

I, [name of deponent] of [address of deponent], a member of the police force of [State or Territory] make an oath and say*/affirm*:

1. I am a fingerprint expert for the police force of [State or Territory].
2. I have examined the fingerprint card marked for identification with the letter 'A'.
3. I have compared the fingerprints shown on that card with the fingerprints shown on the fingerprint card in the records held by the police force of [State or Territory] showing the fingerprints of [name of person and alias, if any].
4. The fingerprints on those cards are identical.
5. According to the records of the police force of [State or Territory], which I believe to be accurate, [name of person] was convicted in that State*/Territory* of the following offences.
6. Annexed to this affidavit and marked with the letters *[insert in alphabetical sequence of letters, commencing at 'B', corresponding to the number of annexures]*, are certified copies of certificates of conviction for each of those convictions.
7. From an examination of these records referred to above, I believe that the person referred to in each annexed certified copy or certificate as having been convicted of the offence stated in it is identical with the person whose fingerprints are shown on the fingerprint cards referred to in paragraph 3 of this affidavit.

SWORN*/AFFIRMED*

by the deponent at [place]
this day
of [month and year]

Before me:

(signature)

.....
A Justice of the Peace*/notary
public*/lawyer*/ person authorised
to take affidavits in New South
Wales*

(signature)

.....

*delete as appropriate

AFFIDAVIT OF MEMBER OF AUSTRALIAN FEDERAL POLICE
CONCERNING FINGERPRINTS

[Set out heading to action or matter]

I, [name of deponent] of [address of deponent], a member* special member*/staff member* of the Australian Federal Police, make an oath and say*/affirm*:

1. I am a fingerprint expert for the Australian Federal Police.
2. I have examined the fingerprint card marked for identification with the letter "A".
3. I have compared the fingerprints shown on that card with the fingerprints shown on the fingerprint card in the records held by the Australian Federal Police showing the fingerprints of [name of person and alias, if any].
4. The fingerprints on those cards are identical.
5. According to the records of the Australian Federal Police, which I believe to be accurate, [name of person] was convicted of the following offences against the law of the Commonwealth:
6. Annexed to this affidavit and marked with the letters *[insert in alphabetical sequence of letters, commencing at 'B', corresponding to the number of annexures]*, are certified copies of certificates of conviction for each of those convictions.
7. From an examination of these records referred to above, I believe that the person referred to in each annexed certified copy or certificate as having been convicted of the offence stated in it is identical with the person whose fingerprints are shown on the fingerprint cards referred to in paragraph three of this affidavit.

SWORN*/AFFIRMED*
by the deponent at [place]
this day
of [month and year]

Before me:

(signature)
.....

(signature)
.....

A Justice of the Peace*/notary
public*/lawyer*/ person authorised
to take affidavits in the Australian
Capital Territory*.

*delete as appropriate

Admissions and statements by suspects

1 Recording admissions

1.1 Record all admissions.

1.2 When admissions must be recorded electronically

1.2 Admissions in relation to offences under NSW law that are:

- (a) strictly indictable
- (b) indictable, but which may be dealt with summarily with the consent of the defendant; i.e. *Table 1* offences. (See Annexure 'A')

must be recorded on tape.

Use ERISP to record interviews for these offences.

2 Questioning suspects affected by alcohol or drugs

2.1 Do not interview someone who is affected by alcohol or drugs. Defer questioning until they are no longer affected.

Evidence from experts

1 Application of expert evidence

- 1.1 If you want to use an expert opinion at court eg: doctors, jewellery valuers, ballistics specialists, vehicle examiners, fingerprint experts, you can do so by tendering an 'expert certificate'.

2 Expert certificate

- 2.1 Prepare the expert certificate in the form of Annexure 'A' and include it in your brief.

3 Requirement for service of expert certificate

- 3.1 Serve a copy of the certificate and a notice (Annexure 'B') on the defendant or their legal representative, no later than 21 days before the hearing.
- 3.2 If you cannot serve it in time, ask the prosecutor to make an application to the court for a shorter period for service.

4 Proving service

- 4.1 Complete an affidavit of service using Annexure 'B'.

5 Defendant requiring expert at court

- 5.1 If you are asked to bring the expert to court, do so.

Annexure A

New South Wales Police

P.190
v2.6

STATEMENT in the matter of:

Place:

Date:

Name:

Address: (business address)

Tel. No: (business No.)

Occupation:

STATES:-

CERTIFICATE OF EXPERT EVIDENCE

Section 177, Evidence Act 1995 No. 25

1. **This statement made by me accurately sets out the evidence which I would be prepared, if necessary, to give in court as a witness. The statement is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated anything which I know to be false or do not believe to be true.**

2. **I am (state number) years of age.**

3. **I hereby certify, I am a (state field of expertise). I have a specialised knowledge based on my training, study and experience as a (state field of expertise) for the past (length of time) years. I hold the following qualifications:**

(list qualifications held)
(Include further relevant experience or training if appropriate)

4. (state examination/test/information, etc. that opinion is based upon)

5. **Based wholly or substantially on my specialised knowledge, I am of the opinion that (state opinion).**

Witness: _____

Signature: _____

Annexure B

NOTICE UNDER SECTION 177(2)(b) OF THE EVIDENCE ACT 1995 No. 25

INFORMANT

(Informant name, rank and station)

V

(Defendant name)

CHARGED WITH (offence)

FOR HEARING AT (court)

ON (date)

**The Informant proposes to tender the attached certificate(s) of
(name of person(s))
in the above mentioned matter as evidence of the opinion of an expert.**

If you require the Informant to call an expert mentioned in this notice to give evidence you must serve on the Informant a written notice requiring the Informant to call the person who signed the certificate to give evidence.

The court may make such order with respect to costs as it considers just against a party who has, without reasonable cause, required a party to call a person to give evidence under Section 177 of the Evidence Act 1995 No. 25.

AFFIDAVIT OF SERVICE

(Police use only)

I, (name of police officer) being duly sworn, say as follows:

I am a (rank) of police stationed at (location). On the (date) I served a copy of the within Notice and Expert Certificate upon (name of defendant), a party to the proceedings by (state method of service).

.....
(signed)

Taken and sworn at.....

this.....day of.....19.....

before me,

.....
(Justice of the Peace)

Interpreters

1 Use

1.1 Use an interpreter if the person (suspect or witness) you are interviewing:

- is unable to communicate in English
- has a limited understanding of English
- is more comfortable communicating in their own language
- is deaf, hearing impaired or speaking impaired
- is a child and the appropriate adult requires one
- wants one.

NB: Just because someone can speak English to do everyday tasks does not mean they can cope with the added stress of a police interview.

2 Exceptions to using an interpreter

2.1 Refer to the *Code of Practice for CRIME* for information about when justified in not using an interpreter.

2.2 If someone is hearing or speech impaired do not interview them without an interpreter unless they agree in writing. Conduct the interview by showing them written or typed questions and allowing them to write or type their answers.

3 Multi lingual countries and different dialects

3.1 When requesting an interpreter, ask for one who can speak the dialect of the person needing one.

NB: Many countries have more than one official language, eg: in Czechoslovakia, both Czech and Slovak are spoken. It would therefore be necessary to establish the language spoken.

4 Unapproved interpreters in emergencies

- 4.1 Do not use an unofficial interpreter except in an emergency. Record who you use so you can bring them to court if required.

5 Arranging for an interpreter at court

- 5.1 For Local Court matters, for the first appearance only, arrange an interpreter, if needed. After this, make the booking through the clerk of the local court and give as much notice as possible.
- 5.2 For District or Supreme Court, contact the Criminal Listing Directorate to arrange the booking.

6 Interviews with interpreter in attendance

- 6.1 Ask for the interpreter's identification card or letter of authority issued by the EAC unless the EAC advised you at the time of the booking the interpreter would not have identification.
- 6.2 Conduct a pre-interview session with the interpreter and:
- brief them about the case
 - tell them the objectives of the interview
 - find out cultural background information from them
 - decide the method of interpreting, eg: simultaneous or consecutive.
- 6.3 In the interview:
- introduce yourself and establish roles (including that of the interpreter)
 - seat the interpreter to one side.
 - explain how the interview will be done
 - maintain eye contact with the person, if culturally appropriate
 - speak in the 'first person'
 - speak slowly, naturally, using short sentences, and avoid using jargon

- if control slips in the interview, stop it immediately and re-state the ground rules
- summarise periodically to ensure you and the person share the same understanding
- have the interpreter read the record of the interview to the person and sign it.

- 6.4 After the interview, debrief the interpreter and ask if they have anything to say.
- 6.5 Confirm the interpreter's attendance by checking and signing their attendance book. Keep the original.
- 6.6 Report complaints you have about an interpreter to the EAC, through the appropriate Commander, Prosecuting Services.

7 Telephone Interpreter Service (TIS)

- 7.1 Do not use this service for court or lengthy interviews, particularly if important or delicate issues are being discussed. Use it for:
- providing interpreting in emergencies or developing crisis situations
 - finding out someone's language to arrange a suitable interpreter
 - helping with simple inquiries from non-English speaking people.

Consider using use either a dual handset or a conference phone facility if you regularly use this service.

8 Language identification card

- 8.1 Use the 'Language Identification Card' to identify the language of someone who doesn't speak English.

Using statements and other notes when giving evidence

1 Notes at court appearances

- 1.1 If you are aware of notes made by any witness in the case, include a copy in the brief and bring the originals to court.

2 Refreshing memory from notes

- 2.1 To be able to refresh your memory in court from notes, you must:

- make the notes when the incident is fresh in your mind
- sign someone else's notes when the incident is fresh in your mind, as being an accurate record.

3 Using a statement to give your evidence

- 3.1 If you want to read your statement when giving your evidence in chief:

- make and sign it soon (days, not weeks) after the incident
- give a copy to the defendant or to their legal representative no later than 7 days before the hearing
- tell the prosecutor you want to read it.

Hearsay

1 What is hearsay?

1.1 Hearsay is evidence which a witness did not personally see, hear or otherwise perceive.

For example, if I see A punch B, I may give evidence that I saw A punch B. However, if I tell you I saw A punch B, you cannot give evidence A punched B because you did not see A punch B.

If you think evidence fits within a hearsay exception include it in statements.

NB: Not all the exceptions are stated below. If you are in doubt about hearsay, ask a prosecutor.

2 Exceptions

2.1 The evidence is relevant for a non-hearsay purpose

2.1.1 If someone is told or reads something which causes them to act and that act is important to your case, you may include what was told or read in a statement.

Example: You search A and find drugs. You searched A because B told you A was carrying drugs.

To prove your search was lawful (ie: you had reasonable suspicion) you may include in your statement what B told you because you are relying only on the fact it was said, not that it was true.

2.2 Coronial matters

2.2.1 Include all relevant evidence in coronial briefs. The hearsay rule does not apply in coronial proceedings.

2.3 Criminal proceedings - maker not available

2.3.1 A witness (including you) can be permitted to give evidence of a fact about which someone wrote or spoke if they are unavailable to give evidence because:

- they are dead

- they are not competent to give the evidence
- it would be unlawful for them to give evidence about it
- you cannot find them or get them to court, having taken all reasonable steps to do so (including use of subpoena, summons or warrant)

AND

- they wrote or spoke about the fact:
 - while under a duty to do so, or
 - when or shortly after the fact occurred and in circumstances which make it unlikely they were not truthful, or
 - in circumstances making it highly probable they were telling the truth, or
 - when to do so was, at the time, against their interests.

In other words, if what existed at the time something was said or written makes it highly reliable it might be admitted as to what was said or written.

Example: You attend an address in response to a 'disturbance'. As you walk into the house, you hear a sound similar to a gunshot and see **A** walking out of the house. When you enter the house, you see **B** lying in a pool of blood. **B** says, "A shot me". **B** then dies.

In this case, you might be able to give evidence of what **B** said to you because the circumstances at the time it was said make it highly reliable.

2.3.2 If you want to introduce this type of evidence, contact a prosecutor. You must also notify the defendant of your intention to introduce this evidence, see 2.3.3.

2.3.3 Notice to be given of intention to present hearsay evidence

2.3.4 No later than 21 days before the hearing, serve a notice on the defendant or their legal representative.

2.3.5 Ensure that the notice states:

- the provision/s of the *Evidence Act* on which you intend to rely to argue the evidence is an exception to the hearsay rule
- the evidence you intend to present

- all other relevant statements the person has made
- the date, time, place and circumstances when each of the statements mentioned above was made
- the names of who made the statements (do not include addresses) and who they were made to; and
- in detail, why the person is unavailable to give the evidence.

2.3.6 Attach any written statement, which contains the relevant evidence, to the notice.

2.3.7 Seek help from a prosecutor in preparing the notice.

2.4 Statements identifying a person, place or thing

2.4.1 When a witness in your case has identified a person, place or thing to you or another witness and it is important to your case, include what the witness said when making the identification in their statement and the statements of anyone else who was present.

Example: While on beat duty, you are approached by **A** and **B**. **A** complains she has just been assaulted by an unknown male. As you are talking to **A** and **B**, **C** walks past. **A** points at **C** and says, *"That's him! That's the fellow that punched me!"*

Put what **A** said (ie: *"That's him! That's the fellow that punched me."*) in your statement and those of **A** and **B**.

This also applies when a witness identifies a defendant from photographs, during an identification parade or from a crowd scene.

2.4.2 Have the witness who identified the person, place or thing at court to give evidence.

2.5 Business records

Refer to 'Business Records'.

2.6 Tags, labels and writing

2.6.1 If a tag, label or writing has been placed on something in the course of a business to describe its identity, nature, ownership, destination, origin or weight or contents, and the

information is important to your case, bring the object, with the tag, label or writing attached, to court. You do not need to bring whoever put the information on the tag, label or writing.

Example: You charged someone with 'Bring Alcohol into a Prison' after they were found bringing a bottle of *Jim Beam Bourbon* into the prison. To prove it was alcohol, simply bring the bottle to court, as the label states *Jim Beam Bourbon* and '37% alcohol'. You do not have to have the contents analysed.

2.7 Telecommunications

2.7.1 If a message transmitted by electronic mail, fax, telegram, lettergram or telex is endorsed with:

- the identity of who sent it or on whose behalf it was sent
- the date and/or time it was sent
- who or where it was sent to

to prove the endorsement, include it in your brief so it can be tendered at court. No further proof is required.

Example: In a charge of 'Demand money with menaces', it is alleged the defendant faxed the threat to the victim's home from the defendant's place of work at 2.30pm on Monday 24 February 1997. You examine the fax and see it is endorsed with the time and date it was sent, where it was sent from, and who and where it was sent to.

To prove the details in the endorsement, the fax is tendered. No further proof is required.

2.8 Contemporaneous statements about health, feelings, sensations, intention, knowledge or state of mind

2.8.1 If someone tells someone else their present health, feelings, sensations, intention, knowledge or state of mind, you can prove that state of health, etc by including what was said in the statements of who said it (if that person is available) and who heard it.

Example: You attend an alleged assault by a husband on his wife. She tells you he punched her to the side of her head. There are no admissions or witnesses and the wife has no visible injuries. Whilst speaking to her shortly after the alleged assault, she says, "*My head is aching. I'm going to go see my doctor.*"

Include what she told you in her statement and yours.

Tendency and coincidence evidence

Seek the advice of the prosecutor at the earliest opportunity if you wish to present to the court tendency or coincidence evidence.

1 Requirements for the admissibility of tendency evidence

1.1 You may introduce evidence of the character, reputation or conduct of the defendant, or evidence of a tendency the defendant has or had, if:

- the evidence, considered with all the other evidence in the case, is likely to show there is no other reasonable explanation other than the defendant's guilt; and
- you have given the defendant notice you intend to present this evidence, no later than 21 days before the hearing. (See Paragraph 2.1 below for further requirements concerning notice).

Example: **A** was charged with the murder of **B**, a 10 year old boy (whose body was never found). The evidence established **B** was abducted for sexual purposes and murdered. **A** was in his car at the location where **B** was last seen (a picnic ground), admitted speaking to **B** at that time and **B** had borrowed his fishing knife and entered his car to return it.

Twelve months after **B** disappeared, **A** was convicted of abducting and raping another young boy in similar circumstances. In this case, **A** used his car to abduct the young boy. After being arrested for this offence, he told his wife he had been thinking of 'it' (sexually assaulting a young boy) for the past 12 months.

This evidence was admitted in **A**'s trial for the murder of **B** to prove **A**'s tendency to abduct young boys for sexual purposes. Together with the fact that **A** had the opportunity to abduct **B** and the similarities between the two abductions, it establishes it as fanciful that someone else with the same tendencies would have been present and had the opportunity to abduct and murder **B**.

2 Notification requirements

2.1 Use the notice as found in Annexure A.

3 Requirements for the admissibility of coincidence evidence

- 3.1 You can introduce evidence of events which are substantially similar and occurred in circumstances which are substantially similar to another event to prove someone committed an offence.

You can do this only if the events, considered with all the other evidence in the case, are likely to show that there is no other reasonable explanation for the whole of the evidence other than the defendant's guilt

AND

you have given the defendant notice you intend to present this evidence, no later than 21 days before the hearing. (See Paragraph 2 further requirements concerning notice).

Example: The defendant is charged with the offence of *Wilful and Obscene Exposure*. Although he states that he has been incorrectly identified, his criminal record reveals 12 convictions for the same offence.

You have evidence that on each of the 12 other occasions, as well as on the occasion in question, the defendant exposed himself at the Chatswood Railway Station on the number 3 platform at 7.50am on a Saturday. Further, the defendant is described as having certain unusual physical characteristics and was on all occasions carrying a red brief case which he held in front of his trouser zipper until he confronted each **victim**, following which he would move the case to his side, thereby exposing himself.

You can present the evidence of the 12 other offences because to do so would leave no room for any reasonable explanation for the whole of the evidence other than the defendant's guilt on this occasion. The only explanations for the evidence would be that either the defendant was the perpetrator on the occasion in question, or there was a similar looking person at the same location, at the same time, and who adopted exactly the same modus operandi as the defendant. Having regard to the whole of the evidence the latter explanation cannot reasonably be accepted.

3.1.1 Notification requirements

Use the notice as found in Annexure B

4 How the evidence is to be presented

- 4.1 Present all the evidence of the defendant's other conduct; ie: calling witnesses (including the arresting police, if necessary), tendering exhibits, (including records of interview, if necessary), etc.

Annexure A

**NOTICE UNDER SECTION 97 OF THE *EVIDENCE ACT 1995* No 25
TENDENCY NOTICE**

To : Name
 Number and street
 Suburb State Postcode

Matter of :

Charges :

You are hereby notified that it is the intention of police to adduce evidence of your character, reputation or conduct, or a tendency you have or had, to prove that you have or had a tendency (whether because of your character or otherwise) to act in a particular way, or to have a particular state of mind.

The substance of the evidence the prosecution intends to adduce includes:

NB: If the evidence consists of, or includes evidence of the conduct of a person, also include particulars of:

- (I) the date, time, place and circumstances at or in which the conduct occurred; and
- (ii) the names of each person who saw, heard or otherwise perceived the conduct;

so far as they are known to the prosecution.

*The Court may dispense with this notice requirement, s100 of the *Evidence Act 1995*.

*Service of this notice may be proved by affidavit, s181 of the *Evidence Act 1995*.

Annexure B

**NOTICE UNDER SECTION 98 OF THE *EVIDENCE ACT 1995* No 25
COINCIDENCE NOTICE**

To : Name
 Number and street
 Suburb State Postcode

Matter of :

Charges :

You are hereby notified that it is the intention of police to adduce evidence that two or more related events occurred to prove that, because of the improbability of the events occurring coincidentally, you did a particular act or had a particular state of mind.

The substance of the evidence the prosecution intends to adduce includes:

and, particulars of:

- (I) (include here the date, time, place and circumstances at or in which each of those events occurred); and

- (ii) (include here the names of each person who saw, heard or otherwise perceived each of those events)

so far as they are known to the prosecution.

*The Court may dispense with this notice requirement, s100 of the *Evidence Act 1995*.

*Service of this notice may be proved by affidavit, s181 of the *Evidence Act 1995*.

Identification evidence

1 Identification evidence in criminal cases

- 1.1 When investigating an offence, consider identification must be proved beyond reasonable doubt and the best form of identification evidence is the *identification parade*.

2 Procedure when conducting an identification parade

- 2.1 Select a suitable place within the police station to conduct the identification parade.
- 2.2 Get six or more people of similar age, height and appearance as the suspect. Do not use police officers.
- 2.3 Tell the suspect they can have a legal representative present during the identification parade. If one is present, do not allow them to interfere.
- 2.5 Tell the suspect they may stand anywhere in the parade they choose and can change position before the next witness enters the area, and allow them to do so.
- 2.6 Ask the suspect if they object to anyone in the parade or the way it is to be conducted. Comply with any reasonable request.
- 2.7 Place a consecutively numbered board at the feet of each person in the parade.
- 2.8 Before any witness enters the parade area, show the suspect blank pieces of paper corresponding to the number of witnesses to be called. Tell the suspect should a witness identify anyone, the witness will write the number in front of the identified person on a blank piece of paper.
- 2.9 Ensure these pieces of paper remain in sight of the suspect at all times during the conduct of the parade.
- 2.10 Before the parade starts, ask each witness to write their name, address and date of birth on a piece of paper and to sign it - one piece per witness.
- 2.11 Decide the order the witnesses will enter the parade area and write the number that corresponds with that order on the piece of paper referred to in the previous Paragraph.
- 2.12 Before each witness enters the area, tell them should they identify someone, they are to write on one of the blank pieces of paper referred to in Paragraphs 2.8 and 2.9 above the

number on the board in front of that person.

- 2.13 Ask each witness, one at a time, to enter the area.
- 2.14 Do not say or do anything at any time that may influence any witness to identify a particular person. Do not permit a witness to see the identification made by another witness. Do not permit more than one witness at a time to be in the area. (As to conduct of witnesses, see also Paragraph 3 below).
- 2.15 As each witness enters the area, collect from them the piece of paper referred to in Paragraph 2.10.
- 2.16 Address each witness as sir, madam, miss, etc, or 'witness 1', 'witness 2' etc. Do not address by name.
- 2.17 Ensure all conversation between you and the witness is clearly heard by all members of the parade.
- 2.18 Once the witness writes the number, as required in Paragraph 2.12 above, read it aloud and show it to the person identified.
- 2.19 Record the date and time of the identification on the piece of paper referred to in the previous Paragraph, along with your name, rank and station. Then sign it.
- 2.20 Attach the piece of paper referred to in the previous Paragraph to the piece of paper referred to in Paragraph 2.10.
- 2.21 Write in your notebook anything said by the witness during the parade.

3 Conduct of witnesses before the parade

- 3.1 Do not allow any communication between witnesses. If possible, keep all witnesses separated before and after the parade.
- 3.2 Do not allow witnesses to see anyone involved in the parade before it commences.

4 Recording details of participants of parade

- 4.1 Do not record the names and addresses of the participants of the parade.
- 4.2 If a video camera is available, tape the entire parade. If not, take a photograph depicting all participants, including the suspect.

5 Stopping the parade

- 5.1 Stop the parade if the suspect no longer wants to participate or is not co-operating, eg: tries to cover their face, etc.
- 5.2 Record in your notebook why you stopped the parade and any conversation with the suspect. Ask the suspect to read the record and sign it.

6 Children as suspects in identification parades

- 6.1 Do not conduct an identification parade if the suspect is under 18 unless the suspect agrees, or requests in writing, one be conducted and a responsible adult agrees in writing.

7 Using photographs

- 7.1 You can show photographs of a suspect to others to determine who to arrest, but do not show ones which suggest they are photographs of people in police custody.
- 7.2 If the defendant refuses to take part in an identification parade or you do not conduct one you may use another form of identification evidence, such as photographs.
- 7.3 Record in your notebook why you resorted to using photographs in preference to an identification parade. Record the conversation in which the offer was made and the refusal in your notebook and ask the suspect to read and sign it. If possible record the refusal electronically.
- 7.4 Do not use photographs for the purpose of identification merely because they are available or using them will be easier than conducting an identification parade.
- 7.5 Use photographs to enable a witness to identify a suspect:
 - if the suspect refuses to participate in an identification parade
 - if the suspect does not co-operate with the conduct of the parade eg: hides face or keeps head lowered to make identification difficult
 - if the suspect gives conditions regarding their participation in an identification parade eg: only with a solicitor present, and it is unreasonable to wait
 - if the appearance of the suspect has changed significantly since the time of the offence eg: now clean shaven or has a shaved head.

- 7.6 If someone is suspected of a crime for which they have not been arrested and it is not reasonable to hold an identification parade, you may use any photograph for the purpose of the identification, but once again do not use photographs which indicate they are people in police custody.
- 7.7 Once someone is arrested for the crime, and it is necessary to have them identified, use an identification parade. If you cannot do this, then (unless Paragraph 7.8 applies) take a fresh photograph of the suspect while in your custody, ensuring it does not indicate they are in custody, and use it for the identification.
- 7.8 If the suspect's appearance differs significantly from their appearance at the time of the offence, you may use an older photograph, provided it shows how they looked at the time of the offence, and it does not indicate they are in police custody.
- 7.9 When using photographs to enable a witness to identify a suspect:
- use as many as possible. A minimum of 20 photographs is preferable. If the offence is a Commonwealth offence, you must show photographs of at least nine different people
 - use ones of people who resemble the suspect in age and general appearance and which do not have features visibly different from those described by the witness before viewing the photographs
 - ensure they do not suggest the people are in police custody
 - do not say or do anything which might lead the witness to infer they were taken when the people depicted were in police custody
 - do not say or do anything which might cause or influence a witness to select a particular one
 - if more than one witness will be asked to identify a suspect from photographs, do not allow any witness to be present when any other witness is called upon to make the identification
 - tell the witness the suspect might not be among the photographs being viewed.
- 7.10 If a witness identifies a suspect from a photograph:
- write in your notebook what the witness did and the words used when it was made, and ask the witness to read, sign and date the entry
 - include the conversation referred to in the previous sub paragraph in your statement for court, the statement of the witness, and the statement of anyone else who was present when it took place

- ask the witness to sign and date the photograph from which the suspect was identified
- retain all the photographs used in the identification and include them in your brief of evidence
- notify the suspect and their legal representative, in writing, of the fact the suspect was identified from photographs and allow the photographs to be inspected by them on application (provided this does not compromise your investigation).

8 Identification from crowd scene

8.1 If the suspect refuses to take part in an identification parade or you do not conduct one, you may ask a witness to identify a suspect from a crowd scene.

8.2 Take the witness to an area where there is a crowd of people in which you believe the suspect might be present and the crowd:

- contains a typical cross section of the community in terms of sex, age, physical characteristics etc
- is in an area in which there is sufficient lighting to enable an accurate identification.

Examples of suitable crowd scenes include shopping malls, hotels, foyers of public theatres and, in the case of an already accused person, the public foyer of a court house.

8.3 When conducting a crowd scene identification:

- record in your notebook the time, date and place it was conducted, the general description and approximate number of people in the crowd (including sex, age range etc)
- write what the witness did and the words used when the identification was made, and ask the witness to read, sign and date it
- include the conversation referred to in the previous sub-paragraph in your statement for court, the statement of the witness, and the statement of anyone else who heard it.

8.4 Record in your notebook why you used crowd scene identification in preference to an identification parade.

9 Identification from fingerprints

- 9.1 If you want present evidence showing a suspect's fingerprints were found at the scene of the crime or on an item relevant to the offence, obtain a statement from the fingerprint expert who conducted the comparison. (See 'Evidence from Experts').

10 Description by witnesses

- 10.1 Whenever a witness provides you a description of a suspect, record it in your notebook.
- 10.2 Ask the witness read, sign and date the entry.
- 10.3 Include the conversation in which the witness gave the description in your statement for court, the statement of the witness and the statement of anyone else who heard it.
- 10.4 Notify, in writing, the suspect, or their legal representative, that a copy of the notebook entry is available.

Commonwealth laws

If the offence you are investigating is a Commonwealth offence comply with the following.

1 Tape recording admissions

1.1 Record all admissions on ERISP.

1.2 If you cannot record an admission on tape, eg: ERISP equipment not available:

- write the conversation in your notebook at the time, or as soon as practicable thereafter
- as soon as possible after the conversation is written down, conduct an ERISP with the suspect
- during the ERISP, read aloud the conversation from in your notebook after telling the suspect to interrupt at anytime to correct errors or omissions
- at the end of the reading give the suspect the opportunity to make any corrections
- give the suspect a copy of the written record and the tape recording as soon as possible and within seven days.

2 Suspect's rights to be recorded

2.1 At the start of the ERISP ask the suspect the following and give them the chance to answer.

“Before I ask you further questions, I want you to understand you do not have to answer any questions or take part in this interview unless you want to, as anything you say will be recorded. Do you understand that?”

“Can you now tell me, in your own words what, I have just said?”

“Do you want to take part in this interview?”

“Will you answer my questions?”

“You have the right to speak with a friend or relative, and have a friend or relative present during this interview. Do you understand that?”

“Do you want to speak with someone?”

“Do you want someone here during this interview?”

“You have the right to speak with a lawyer, and to have a lawyer here during the interview. Do you understand that?”

“Do you want to speak with a lawyer?”

“Do you want a lawyer here during the interview?”

“You have the right to an interpreter. Do you understand that?”

“Do you want to speak to an interpreter or have one here?”

“You have the right to speak with a consular official. Do you understand that?”

“Do you want to speak with a consular official?”

“Are you an Aborigine or a Torres Strait Islander?”

If they tell you they are an Aborigine or Torres Strait Islander, notify a representative of an Aboriginal legal aid organisation and tell the suspect of this. You do not have to comply with this requirement if the suspect has already arranged for a legal practitioner to attend the interview.

3 Questioning children, Aborigines and Torres Strait Islanders

3.1 Children

Do not question a suspect who is under 18 unless:

- there is present during the questioning someone who is:
 - a parent or guardian of the suspect
 - a legal representative acting for the child
 - if none of the above is, a relative or friend of the child 18 or over
 - if none of the above is available, an independent adult who is not employed by the Police Service
- the person has had an opportunity to speak to the child without being overheard before the interview.

3.2 Aborigines and Torres Strait Islanders

Do not question an Aborigine or Torres Strait Islander unless:

- there is present during the questioning someone person who is:
 - a relative or friend chosen by the suspect
 - a lawyer acting for the suspect
 - a representative of an aboriginal legal aid organisation
 - if none of the above is available, someone on the list of ‘interview friends for Aborigines and Torres Strait Islanders’ - a copy of which is to be held at all police stations
- the person has had an opportunity to speak to the suspect without being overheard before the interview.

3.3 Exceptions

You do not have to comply with 3.1 or 3.2 if you reasonably believe compliance will result in:

- an accomplice taking steps to avoid apprehension
- the concealment, fabrication or destruction of evidence
- a witness being intimidated
- the safety of someone being jeopardised.

3.4 Time limits for investigation

3.4.1 You may detain someone you suspect has committed a Commonwealth offence, for the purpose of questioning or conducting further investigations, provided you act reasonably and comply with the following.

3.4.2 Do not detain a suspect who is under 18, an Aborigine or a Torres Strait Islander for more than 2 hours after the time of arrest.

3.4.3 Do not detain any other suspect for more than 4 hours after the time of arrest.

3.4.4 You will not be permitted to give evidence of admissions made in response to questioning after the time limit has finished.

3.4.5 Before the time limit finishes you must either:

- release the suspect (on bail or otherwise)

- bring the suspect before a magistrate (if this is not practicable do so, as soon as possible thereafter).
- 3.4.6 If you want to detain the suspect beyond the time limit, you must, before it finishes apply to a magistrate for an extension.
- 3.4.7 When calculating the time limit, you are to deduct from it (ie: the clock stops running):
- the time taken to convey the suspect to the police station
 - time allowed for the suspect to contact any of the people mentioned
 - time spent waiting for someone contacted to arrive
 - time spent on medical treatment of the suspect
 - time spent arranging an identification parade
 - time allowed for the suspect to recover from intoxication
 - time for the suspect to rest and take refreshment or toilet breaks
 - time you take to make an application for an extension of time for the suspect's detention .