MODERNISATION OF THE LAWS OF EVIDENCE

BACKGROUND

1. In Port of Spain, Law Ministers asked that consideration be given to the question of modernisation of evidence laws particularly in respect of introduction of computer evidence.

2. Law Ministers and Attorneys General of Small Commonwealth Jurisdictions at their meeting in Jersey in May 2000 recognized that existing laws of evidence were not adequate to deal with technological advances and they welcomed the convening of an expert group to consider modernisation of laws in that respect. They requested that the group also consider hearsay evidence, including business and computer records, corroboration, receiving of evidence by video–link of both vulnerable witnesses and witnesses in foreign jurisdictions, DNA evidence and the questioning of victims of sexual violence.

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

4. The third expert group considered evidence issues in relation to the topics identified. The Report of the Expert Group on Evidence (the Report) is enclosed. It formed the basis for the development of draft evidentiary provisions, which were then submitted to Senior Officials. Senior Officials considered the draft provisions and recommended the attached Model Evidentiary Provisions (the Model) be submitted to Law Ministers for approval.

THE MODEL EVIDENTIARY PROVISIONS

5. The Model contains seven (7) Parts covering the following topics:

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

6. The Model is intended to be a flexible tool that Commonwealth jurisdictions can use to modernize existing laws or adopt new provisions in relation to the specific evidence topics identified above. Each part of the Model can be used separately to develop laws on the individual subject areas. Alternatively a jurisdiction could also use the Model as a whole to enact a general miscellaneous evidence law.

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

8. The Report outlines the discussion and recommendations of the expert group and thus provides an explanation and rationale for the various provisions that are included in the Model. Given the detailed explanation provided in the Report, the content of the proposed Model will not be reviewed in this paper.

ACTION BY LAW MINISTERS

9. Law Ministers are requested to consider recommending the *Model Evidentiary Provisions*, as annexed to this paper, to countries for use in the development of domestic evidence legislation.

ANNEX

MODEL EVIDENTIARY PROVISIONS

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

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

Short Title

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

Application

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

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

PART I
DOCUMENTARY EVIDENCE

Definitions

3. In this Act,

"business" means

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

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

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

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

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

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

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

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

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

Admissibility of business documents

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

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

Hearsay and opinion statements

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

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

Exceptions

(3) The following are not admissible under subsection (1) in a criminal proceeding:

(a) an out of court statement made to a person in authority by a suspect in a criminal investigation or an accused, and

(b) a business document created in the course of a criminal investigation or prosecution.

Proof by affidavit

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

Admissibility of a copy

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

Notice and a copy

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

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

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

Opinion or clarification of document by affidavit

5. If a business document is admitted under section 3, an affidavit of a qualified person providing an opinion or clarification of the document may be admitted with the document.

Inference from absence of information

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

Proof of non issuance of document

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

Proof of official character

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

Foreign business document

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

Public document defined

9. (1) In this section, "public document" means a document that

(a) is required to be made under the authority of a public office;
(b) concerns a public matter;
(c) is intended to be a permanent record; and
(d) is publicly available.

Proof of public document

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

Court records

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

Examination of document maker and affidavit

11. On the application of a party or on its own motion, the person conducting the proceedings may order the examination of the person who made the business document or a statement in the document admitted under section 3, or a person providing an affidavit if

(a) in a criminal proceeding the judge is satisfied that it would otherwise prejudice the person's right to a fair trial;
(b) in other legal proceedings it would otherwise seriously impair the fairness of the proceedings.

PART II
FOREIGN TESTIMONIAL EVIDENCE IN A CRIMINAL PROCEEDING

Definition

12. In this Part

"testimony" means oral evidence of a witness in a foreign country and any document produced as an exhibit during the giving of the oral evidence, obtained by (country) by

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

Form of Testimony

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

Admissibility

14. (1) Subject to this Part, testimony is admissible in evidence in a criminal proceeding as truth of its content if

(a) it was taken on oath or affirmation; or
(b) it was taken according to the law of the foreign country; and

either

(i) a foreign judge certifies that it was so taken; or
(ii) the (responsible authority for mutual assistance or an authorized official of that authority) in (country) certifies that the testimony was obtained as a result of a request to a foreign country.

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

Disclosure

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

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

Mandatory exclusion of testimony

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

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

Discretionary exclusion of testimony

(4) The presiding judge may refuse to admit the testimony if satisfied that the interests of justice require its exclusion. Without limiting the matters which may be considered in making this decision, the judge must consider

(a) the extent to which the testimony provides evidence that is not otherwise available;
(b) the probative value of the testimony for any issue that will likely need to be decided;
(c) the extent to which there is a need to allow cross-examination of the person who provided the testimony;
(d) the expense and delay that would be caused by the exclusion of the testimony; and
(e) whether exclusion of the testimony would unfairly prejudice the prosecution or the accused.

PART III
PROVIDING AND RECEIVING EVIDENCE IN LEGAL PROCEEDINGS BY TECHNOLOGY

Definition

15.(1) In sections 15 and 16, "technology" means a technology that permits

(a) the virtual presence of a person before a legal proceeding; or
(b) the person conducting the proceedings and the parties to hear and examine the person.

Foreign request for evidence by technological means

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

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

Order for video or audio link

17.(1) The judge who hears an application shall make the order for the taking of evidence by a technology if satisfied that

(a) there is a legal proceeding in the foreign country;
(b) the foreign country believes that the person's evidence would be relevant to the foreign legal proceeding; and
(c) the technology for providing the evidence is available.

Provisions of order

(2) An order made under subsection (1) shall order the person

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

Law of non-disclosure and privilege apply

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

Contempt of court and perjury

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

Terms and conditions of order

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

Variation

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

Arrest Warrant

18.(1) The judge who made the order under subsection 16(1) or another judge of the same court may issue a warrant for the arrest of the person named in the order if the judge is satisfied, on an information on oath that

(a) the person did not attend or remain in attendance as required by the order or is about to abscond; and

(b) the order was personally served on the person.

Arrest

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

Receiving evidence by video technology

19. Evidence of a person, other than the accused, who is outside (country) shall be received in a legal proceeding in (country) by a technology that permits the person to testify in the virtual presence of the legal proceeding unless the person conducting the legal proceeding is satisfied that:

(a) on the basis of relative costs, the feasibility of the witness appearing and the conditions under which the evidence would be taken in the foreign country, there is no justification for the receipt of the evidence in this manner; or

(b) the reception of the evidence would be contrary to the interests of justice in the particular circumstances.

Receiving evidence by audio technology

20. Evidence of a person, other than an accused, who is outside (country) may be received in a legal proceeding in (country) by a technology that permits the person conducting the proceeding and the parties to hear and examine the person, if the person conducting the proceeding is of the opinion that it would be appropriate in the circumstances, including

(a) the nature of the person's anticipated evidence; and

(b) any potential prejudice to a party caused by the fact that the witness would not be seen at the proceeding.

Notice

21.(1) A party who wishes to call a witness to give evidence under section 19 or 20 shall give notice to the court before which the evidence is to be given and the other parties of their intention to do so not less then 14 days before the witness is scheduled to testify.

(2) A party who wishes to call a person to give evidence under section 19 or 20, shall make an application to the person conducting the legal proceeding on 14 days notice to the person conducting the proceeding and the parties for an order permitting the receiving of the evidence.

Oath, affirmation or other requirement

22.(1) Except in the case of a person who would not be required to give sworn or affirmed evidence in (country), evidence under section 19 or 20 shall be taken

(a) under oath or affirmation according to the law of (country),
(b) according to the law of the foreign country where the person is located, or
(c) in any other manner that demonstrates that the person understands the obligation to tell the truth.

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

Other laws to apply

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

No contempt of court

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

Costs of technology

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

PART IV
MEASURES FOR THE ASSISTANCE OF WITNESSES

Definition

23. In this Part "vulnerable witness" means a witness in a proceeding whose ability to give evidence is likely to be affected by one or more of the following:

(a) age or maturity;
(b) mental or physical disability;
(c) trauma suffered as a result of the conduct that is the subject of the proceeding;
(d) fear of intimidation as a result of testifying;
(e) linguistic or cultural background;
(f) relationship to the accused;
(g) the nature of the evidence the witness is expected to give; or
(h) any other ground affecting the ability of the witness to testify.

Mandatory order by the court

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

Application for an order by the prosecutor

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

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

Application for an order in other cases

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

Measures to assist a witness

25.(1) An order made under section 24 shall require a witness's testimony to be taken according to one or more of the following:

(a) behind a screen or similar device in the courtroom that allows the witness not to see the accused, provided that the screen or other device does not prevent the witness from seeing or being seen by
  (i) the judge or jury,
  (ii) counsel, or
  (iii) any interpreter or other person appointed to assist;

(b) from an appropriate place outside the courtroom by closed circuit television or other means of technology which allows the witness to be seen and heard in the courtroom and the persons listed in subparagraphs 25(1)(a)(i) to (iii) to be seen and heard by the witness[1];

(c) by a video recording of an interview of the witness made before the hearing, which represents the examination in chief of the witness. If the examination in chief is entered by a video recording under this paragraph, the cross-examination and any re-examination may also be ordered to be provided at the same time by a video recording;

(d) in the absence of the public or any member of the public;

(e) through an interpreter;

(f) with the assistance of a support person; or

(g) with the assistance of any device which improves the ability of the witness to hear or understand the proceedings and communicate answers to the questions.

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[1] In some countries it may be imperative that the accused also be able to see the witness when this particular technology is available. If a country thinks the accused should be included and has the technology to do so both in respect of one way screens and closed circuit television, then the list in 23(1) (a) should be amended to add the accused. If the technology to do so would only be available in the context of closed circuit television or other similar technology, then subsection (b) should be amended by adding after "the persons listed in subparagraphs 23(1)(a)i –iii" the words "and the accused".

Formalities of proceedings

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

Questioning by an unrepresented accused

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

Questioning by judge or person appointed

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

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

Approval of questions

(3) For each question sought to be asked under subsection (2), the judge may

(a) ask the question or allow the question to be asked by the person appointed;
(b) rephrase the question, or
(c) refuse to allow the question to be asked of the witness.

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

PART V
EVIDENCE IN CASES OF SEXUAL OFFENCES

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

OPTION 1

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

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

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

OPTION 2

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

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

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

(2) Evidence as described in paragraph (1) is not admissible for any other purpose, unless:

(a) an application in the absence of the jury is made to the presiding judge to admit the evidence or allow the question; and

(b) in exceptional circumstances, the presiding judge being satisfied that a refusal to allow the evidence to be admitted or the question to be asked would prejudice a fair trial, grants the application.

Evidence of sexual experience with the accused

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

(a) an application in the absence of the jury is made to the presiding judge to admit the evidence or allow the question; and

(b) the presiding judge, being satisfied that a refusal to allow the evidence to be admitted or the question to be asked would prejudice a fair trial, grants the application.

Permissible questions

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

Publication ban in sexual offence proceeding

30. In a criminal proceeding involving a sexual offence, the presiding judge:

(a) shall order a ban on the publication of the identity of the complainant or information that could disclose the identity of the complainant, unless the complainant consents to publication;

(b) may order a ban on the publication of the identity of the accused or a witness or information that could disclose the identity of the accused or a witness or order a general ban on publication of testimony if satisfied that it would be in the interests of justice to do so.

PART VI
WITNESS AND POLICE ANONYMITY IN A CRIMINAL PROCEEDING

Definitions

31. In sections 32 and 33

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

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

Application for witness anonymity order

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

Affidavit

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

Independent counsel inquiry

(3) If after considering the affidavit the judge is satisfied that the witness or another person or any property will be exposed to serious harm if the witness testifies without restrictions as to the disclosure of his or her identity, the judge may appoint an independent counsel:

(a) to conduct an inquiry into the witness's truthfulness; and reliability and the evidence the witness will give; and

(b) provide a report to the judge.

Conduct of inquiry

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

Information of prosecution witness

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

Information of witness for accused

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

Records reports and advice

(7) The independent counsel

(a) if the witness is to be a prosecution witness, shall be entitled to all police records relating to the investigation including all reports and advice available to the police;

and

(b) if the witness is to be a defence witness, shall be entitled to all records held by the accused or his or her counsel relating to the defence including all reports and advice available to the accused.

Voir dire[2]

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

Directions for voir dire

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

Fees and expenses

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

Witness anonymity order

33. (1) The judge may make a witness anonymity order if satisfied:

(a) on reasonable grounds that the witness or another person or any property will be exposed to the risk of serious harm if the witness gives evidence;

(b) there is no basis to doubt the truthfulness and reliability of the witness; and

(c) that the unfairness to the witness of requiring disclosure of the witness's identity exceeds the possibility of unfairness to the accused from the trial being conducted without disclosure, having

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[2] This term is used to describe the hearing of an application within a trial in the absence of the jury.

regard to:

(i) the general right of an accused to know the identity of a witness;

(ii) the principle that witness anonymity orders are justified only in exceptional circumstances to discourage intimidation of witnesses;

(iii) the importance of the witness's evidence to the case;

(iv) the effect that a witness anonymity order would have on the ability of the accused to conduct a full defence;

(v) whether other means can be used to protect the witness; and

(vi) the seriousness of the offence.

Terms of order

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

Effect of order

(3) If the court makes a witness anonymity order:

(a) the order applies to all stages of the proceeding;

(b) the witness shall not be required to state his or her true name, address or occupation or to give any particulars likely to lead to the discovery of that name, address or occupation;

(c) no evidence can be given and no question asked of the witness or any other witness relating to the true name, address or occupation of the witness; and

(d) no counsel (barrister or solicitor) officer of the court or other person involved in the proceeding can state in court the true name, address or occupation of the witness or give any particular likely to lead to the discovery of that name, address or occupation.

Discharge of order

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

Definitions

34. (1) In this section

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

(a) an offence that is punishable by imprisonment for life or a term of not less than [7[3]] years or a more grave penalty; or

(b) an offence of conspiracy or attempt to commit an offence in paragraph (a);

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

Certificate of (Commissioner of Police)

(2) If an undercover police officer will be called as a witness for the prosecution in a serious offence proceeding, the (Commissioner of Police) may, before an indictment is presented, file in the court a certificate stating:

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[3] The appropriate period of punishment will need to be determined by each jurisdiction on the basis of the penalties applicable to indictable offences.

(a) that during the period stated in the certificate, the witness was a member of the police and acted under an assumed name as an undercover police officer;
(b) the offences for which the witness has been convicted or that the witness has not been convicted of any offences;
(c) the offences under the (Police Act) for which the witness has been found guilty or that the witness has not been found guilty of such offences; and
(d) the particulars of any adverse comment made by a judge in another proceeding regarding the truthfulness of the witness.

Lack of particulars

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

Police anonymity

(4) If the (Commissioner of Police) files a certificate under subsection (2):

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

Application for leave

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

Factors to be considered

(6) The judge shall not grant leave under paragraph (4) (c) unless satisfied that:

(a) there is some evidence before the court that the witness is not telling the truth; and
(b) the accused cannot properly test the truthfulness of the witness without being informed of the true name or address of the witness.

Notice

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

PART VII
CORROBORATION AND COMPETENCY TO TESTIFY

Corroboration required

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

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

Corroboration not required

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

Presumption of competence

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

Evidence of children

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

Evidence deemed sworn

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

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

Inquiry into competence

(4) If the capacity of a proposed witness to testify is challenged and the person conducting the proceeding is satisfied that there is a basis for the challenge, before permitting the person to testify, the person conducting the proceeding shall carry out an inquiry to determine if the person is able to understand questions and provide intelligible answers.

(5) If the person conducting the proceedings determines that a person referred to in subsection (2) will not understand questions or will not be able to provide intelligible answers, the witness shall not testify.

PART VIII
DNA EVIDENCE IN CRIMINAL PROCEEDINGS

Definitions

37. In this Part

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

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

"DNA" means deoxyribonucleic acid;

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

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

Obtaining Bodily Substances from Victims of Crime

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

Bodily substance obtained with consent

39.(1) A police officer may cause to be obtained a bodily substance by a suitably qualified person by an investigative procedure described in subsection 38(5) for a forensic DNA analysis, if

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

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

and

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

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

Written consent

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

Authorization of police officer

(3) A police officer may only give an authorization under paragraph (1) (b) if he or she:

(a) has reasonable grounds to suspect the person from whom the bodily substance will be taken of having committed a designated offence; or
(b) believes that forensic DNA analysis of the bodily substance will exclude the person from suspicion of having committed a designated offence.

Bodily substance warrant

40.(1) A judge may issue a warrant authorizing a police officer to obtain or cause to be obtained a bodily substance from a person, for forensic DNA analysis, by a procedure described in subsection 35(5), if satisfied by information on oath that there are reasonable grounds to believe:

(a) a designated offence has been committed;
(b) a bodily substance has been found:

(i) at the place where the offence was committed,
(ii) on or within the body of the victim of the offence;
(iii) on anything worn or carried by the victim at the time when the offence was committed; or
(iv) on or within the body of any person or thing or at any place associated with the commission of the offence;

(c) the person was a party to the offence;

(d) a forensic DNA analysis of a bodily substance from the person will provide evidence about whether the bodily substance referred to in paragraph (b) was from that person; and

(e) the person from whom the bodily substance is to be obtained is not under ten years old.

Requirements of application

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

Oral evidence

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

Application by other means of communication

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

Investigative procedures

(5) A warrant issued under subsection (1) authorizes a suitably qualified person accompanied by a police officer to obtain and seize a bodily substance from a person by:

(a) the plucking of individual hairs from the person, including the root sheath;

(b) the taking of buccal swabs by swabbing the lips, tongue and inside cheeks of the mouth to collect epithelial cells; or

(c) the taking of blood by pricking the skin surface with a sterile lancet.

Terms of warrant

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

Execution of warrant

41.(1) Before executing a warrant, a police officer shall inform the person against whom it is to be executed of:

(a) the contents of the warrant;

(b) the nature of the investigative procedure to be used to obtain the bodily substance from the person;

(c) the purpose of obtaining a bodily substance;

(d) the possibility that the results of a forensic DNA analysis may be used in evidence;

(e) the authority of the police officer and any other person under his or her direction to use as much force as is necessary to execute the warrant; and

(f) in the case of a young person or a mentally disabled person, the requirements of subsection (4).

Detention of person under warrant

(2) A person against whom a warrant is executed:

(a) may be detained for a reasonable period to obtain a bodily substance from the person; and

(b) may be required by the police officer who executes the warrant to accompany the police officer.

Respect for privacy

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

Execution of warrant against young person or mentally disabled person

(4) A young person or a mentally disabled person against whom a warrant is executed has the right to a reasonable opportunity to consult and have the warrant executed in the presence of a legal representative and a parent; or

(a) in the absence of a parent, an adult relative; or

(b) in the absence of a parent and an adult relative, any other adult chosen by the person.

Waiver of rights

(5) A young person may waive his or her rights under subsection (4), but any waiver:

(a) must be made in writing or recorded on audio or video tape or other technological means; and

(b) contain a statement by the young person that he or she has been informed of the right being waived.

Limitations on use of bodily substance

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

Destruction of bodily substance

42.(1) A bodily substance that is obtained from a person in execution of a warrant and the results of a forensic DNA analysis shall be destroyed if:

(a) the results of the analysis establish that the bodily substance was not from that person;

(b) the person is finally acquitted of the designated offence and any other offence from the same transaction except for a verdict of not criminally responsible on account of mental disorder; or

(c) one year expires after:

(i) the person is discharged after a preliminary inquiry into the designated offence or any other offence from the same transaction;

(ii) the dismissal, for any reason other than acquittal or the withdrawal of any information charging the person with the designated offence or any other offence from the same transaction; or

(iii) any proceeding against the person for the offence or any other offence from the same transaction is stayed unless during the year a new information is laid or an indictment preferred charging the person with the designated offence or any other offence from the same transaction or the proceeding is recommenced.

Exception

(2) Despite subsection (1), a judge, on application supported by an affidavit with notice to the parties, may order that a bodily substance and the results of a forensic DNA analysis not be destroyed during any period the judge considers appropriate if the judge is satisfied that the bodily substance or analysis might be required in an investigation or prosecution of:

(a) the person for another designated offence;

(b) another person for the designated offence or any other offence from the same transaction.

Waiver of notice requirement

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

Expert report

43.(1) Subject to subsection (2), an expert report is admissible as evidence in a criminal proceeding upon its production.

(2) A copy of the expert report shall be provided to the person from whom the bodily substance was obtained as soon as it becomes available.

Non attendance of expert

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

Considerations

(4) For the purpose of determining whether to grant leave under subsection (2) the judge shall consider:

(a) the contents of the report;

(b) the reasons for dispensing with the attendance of the expert;

(c) the need for cross examination of the expert and any resulting unfairness to the accused if cross examination does not take place; and

(d) any other relevant matter.

Probative value of report

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

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

REPORT OF THE EXPERT WORKING GROUP ON EVIDENCE

The Expert Working Group on Evidence met during the week of January 15, 2001 to consider and make recommendations for model law in relation to specific topics[1] as follows:

I	Documentary evidence including business, banking and public documents
II	Foreign Evidence
III	Video/Satellite Evidence in relation to persons outside the country
IV	Vulnerable Witnesses
V	Corroboration
VI	DNA

I DOCUMENTARY EVIDENCE

A BUSINESS DOCUMENTS

The Group considered the content of a model law on business documents, applicable to both civil and criminal proceedings. In making specific recommendations, the Group noted that in enacting legislation of this nature, each jurisdiction would have to consider the existing laws relating to hearsay and the related exceptions. To the extent that there are statutory exceptions or modifications to the hearsay rule, these proposals may have to be adapted for consistency with existing laws.

The Group considered and recommended the following:

i. Definition of document

"Document" means information recorded in any form.

The Group was of the opinion that the definition of document should be framed in broad and simple terms. As recommended by the Expert Groups on Information Technology issues[2], the Group was of the view that the definition should include all types of documents, however generated or stored, including electronic records. In addition, the opinion was that the definition must be framed in flexible terms so that it would apply not only to documents created with today's technology but also future technology. The Group determined, therefore, that the term should be defined to apply to all information however recorded, which definition would provide the necessary scope and flexibility to encompass all types of records, documents and technology.

ii. Definition of business

"Business" means any business, profession, trade, calling, or undertaking of any kind carried on in X (name of country or jurisdiction) or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in X (name of country or jurisdiction) or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government.[3]

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1 The Expert Group also considered the topic of Information Technology Issues with particular emphasis on evidence laws relating to e-commerce. That part of the report of this Group has been incorporated in a separately published report on Law in Cyberspace.

2 The Secretariat had earlier convened two expert groups on information technology issues – E-commerce and computer crime. Some of the issues addressed by those groups were also considered by the evidence group.

3 In some jurisdictions this exception is limited to banking or financial institutions. This definition is framed broadly to encompass the activity of various forms of private business as well as the "business" of government.

iii. Admissibility of Business Documents

(a) Subject to subsection(c), where oral evidence in respect of a matter would be admissible in a proceeding, a statement made in a document that was created by a person in the usual or ordinary course of business, is admissible as evidence of the truth of its content in a proceeding, upon production of the document.

(b) Evidence that the document was created in the usual or ordinary course of business may be adduced in the form of an affidavit.

(c) This provision shall not apply to:
- *(i) an out of court statement made to a person in authority[4] by a suspect or accused in the course of a criminal investigation;*
- *(ii) materials created in the course of a criminal investigation.[5]*

(d) The party producing a document under this section shall, at least 14 days before its production, give notice of the intention to produce it to each other party to the proceeding and, within seven days of receiving a request from another party, provide that party with an opportunity to inspect the document.

The purpose of these provisions is to facilitate the introduction and use of documentary evidence in court proceedings, by overriding the application of the hearsay rule in the case of certain types of documents and records. The underlying rationale for such provisions was noted to be the general reliability of documents generated in a usual manner as a part of business and the necessity to provide for flexibility because of the complex and varied nature of documentation in modern times and the essential nature of the evidence for many proceedings. Several jurisdictions have already enacted legislation of this nature for various types of documentary evidence.
The Group considered the types of documents that should be covered by the model law. In some jurisdictions that have an existing law of this nature, the provision is limited to the narrow area of banker's books. In others, the law is applied broadly to all forms of business documents.

The Group was of the view that a model law should follow the latter course and be broadly framed to cover both private enterprise and government activity. It would, however, be open to jurisdictions to limit the application of the provision to only certain types of business.

The Group then considered what types of pre-conditions to admissibility should apply. After lengthy discussion, the Group concluded that the pre-conditions should be of a very limited nature. They recommended only two; that oral evidence would be admissible on the matter and that the document

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[4] This provision is intended to clearly exclude statements taken by police or other authorities from an accused or suspect in a criminal case, which statements may only be admitted if demonstrated to have been given freely and voluntarily. Therefore the term "person in authority" is used deliberately here and is intended to capture the common law definition of the term, which is " Anyone whom the prisoner might reasonably suppose to be capable of influencing the course of the prosecution. "(Cross on Evidence, 5th ed. p.541)

[5] It was the opinion of the Group that these exceptions were necessary, as arguably such documents would constitute business documents. In addition, in some jurisdictions a broader range of exceptions has been adopted excluding matters such as documents subject to privilege etc. The Group was of the view that such an extended list of exceptions was not necessary, as the requirement for the evidence to be otherwise admissible would cover this. However, for those jurisdictions that wish to include a more explicit list, an example would be section 30(10) of the *Canada Evidence Act* which provides: *Nothing in this section renders admissible in evidence in any legal proceeding*
- *(a) such part of any record as is proved to be*
  - *(i) a record made in the course of an investigation or inquiry;*
  - *(ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding;*
  - *(iii) a record in respect of the production of which any privilege exists and is claimed, or*
  - *(iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind, would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;*
- *(b) any record the production of which would be contrary to public policy; or*
- *(c) any transcript or recording of evidence taken in the course of another legal proceeding.*

was created in the usual and ordinary course of business. The Group was of the view that such an approach was necessary to facilitate the introduction of such records, particularly in light of the complex and detailed nature of business records today, which are often generated solely by electronic means.

The need for specific exceptions to the application of the provision, was discussed at length. Generally, the Group was of the view that the requirement that the evidence must be "otherwise admissible" was probably sufficient to cover such matters. However, after considering some existing legislation, it was recommended that confessions and material gathered in a criminal investigation should be specifically excluded, for greater certainty. While the Group did not recommend other additional exceptions found in existing legislation, some options in that regard have been included in footnote 3.

The Group considered whether there should be a specific provision giving the court the discretion to exclude such evidence in certain prescribed circumstances. After debate, the Group concluded that there was no requirement to include this as a statutory provision. In their opinion, once admitted, the court could determine what weight, if any, would be accorded to the evidence. In this respect, the parties could always attack the reliability of the evidence under normal rules and procedures. In the opinion of the Group, the general law already provided sufficient protection and thus, no provision on the discretion to exclude has been recommended.

iv. Admissibility of Copies

Copies of business documents, including microfiche or other photograph images, are admissible in evidence in the same manner as if it were the original of the document.

For several reasons, the Group was of the view that copies of documents should be admissible in place of the original, thus eliminating the requirement for strict compliance with the best evidence rule. The Group noted that with modern technology, it is often impossible to distinguish between originals and copies, as is the case, for example, with documents printed off of a computer. In addition, documentation is often stored on microfiche or using other photographic imagery in order to save space. In those circumstances, it may be difficult or impossible to produce an original. Thus, the Group recommended a simplified provision for admission of copies of documents. The Group was also of the view that there was no need to require certification of the copies given the nature of the technology that is used today to produce copies. It still would be open to any party to challenge the authenticity of the copy produced, either at the time of production or once it has been admitted into evidence.

v. Examination or Cross–Examination

Upon application of a party or on its own motion, the court may order the examination or cross-examination of the maker of a statement contained in a document admitted in evidence under section 3, if it would otherwise prejudice the right of a person to a fair trial.[6]

The Group was of the view that there should be reference to the ability of the court to order the examination or cross-examination of the maker of the statement in the document in appropriate cases. At the same time, the Group wanted to avoid constant applications of this nature, which would defeat the underlying purpose of the legislation. The recommendation is to include a discretion but establish a high threshold of prejudice to fair trial rights, before an order will issue.

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[6] As this provision relates to both foreign and domestic business records, jurisdictions may wish to add a provision which encourages the use of technology for such a cross –examination if the witness is outside of the country. See Part IV on the use technology to take the evidence of a witness.

vi. Explanation of Document by Affidavit

Where a document under section 3 requires clarification, an affidavit from a person qualified to provide the clarification is admissible in the same manner as the document.

This provision is intended to address the situation where the document admitted requires some kind of explanation. For example, this would be necessary where the document contains figures in columns but without any titles to the columns that would give context to the figures. For this type of technical evidence, the Group was of the view that affidavit evidence should be admissible and that there should be no pre-conditions for admissibility. The Group considered that the affidavit should be admitted in the same manner as the document would be admitted under section 3 i.e. the affidavit would be produced to the court without any further explanation or the calling of any vive voce evidence.

vii. Proof of non–issue of licence or document

Where a statute or regulation provides for the issue of a license or other document by a government department, board, commission or agency, an affidavit of an officer of that department, board, commission or agency, attesting to the fact that he or she has charge of the appropriate records and after a careful search of those records he or she has been unable to find any record of a particular license or document having been issued, shall be admitted in evidence as proof, in the absence of evidence to the contrary, that no licence or other document has been issued.

The Group was of the view that it would be very useful to include a provision allowing for proof of the absence of certain records by way of affidavit. This is the intent of this recommendation.

viii. Proof of Official Character

Where evidence is offered by affidavit under sections 3, 6 or 7, it is not necessary to prove the signature or official character of the person making the affidavit, if the official character of that person is set out in the body of the affidavit.

This provision was included to ensure that in filing an affidavit under this law, it would not be necessary to call additional evidence to establish that the person swearing the affidavit is, who he or she states that they are. Thus, if the affidavit tendered states: "I, John Smith, Deputy Registrar of the High Court of Australia, ..." this will be sufficient proof that Mr. Smith is the Deputy Registrar in absence of any evidence to the contrary.

B PUBLIC DOCUMENTS

On a related point, the Group considered the content of a model law relating to public documents and recommended the following provisions.

1. "Public Document" means a document that:

(a) is part of a record made by someone holding a public office which obliges him or her to enquire into and record facts;

(b) concerns a public matter;

(c) must be compiled as what was intended to be a permanent record; and

(d) must be available for public inspection.

A public document or a certified copy[7] *of a public document is admissible as evidence of the truth of its content.*

The intention of this provision is to codify the existing common law exception to the hearsay rule with respect to public documents. The category of documents to be covered is those generated by persons who have a statutory or public duty to compile and record the information. It relates to information of a public nature that is to be permanently retained. The document must also be available for inspection. The Group noted however that the category of documents that are considered to be "public" and thus admissible under this provision can be expanded and additionally the legislation can provide for certificates to be issued for such documents, as in the case of certificates of incorporation under the UK Companies Act.[8]

II FOREIGN EVIDENCE

A FOREIGN PUBLIC DOCUMENTS

The Group considered the issue of foreign public documents and the difficulty of proving such material in accordance with traditional rules, which usually required complicated certifications as to authenticity. The Group was of the view that the best means to facilitate proof of such documents was through adoption and implementation of the *Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents*.

The Group recommended that countries that have yet to do so should ratify the Hague Convention and enact domestic legislation to implement that Convention. An example of implementing provisions can be found in the Australian Foreign Evidence Act.

B FOREIGN BUSINESS DOCUMENTS

The law relating to the admissibility of domestic business documents should be drafted in sufficiently broad terms so as to apply equally to foreign business documents. In particular, the definition of "business" should cover foreign and domestic entities and governments. That law should also include the following addition:

"Where under this law evidence may be adduced by way of affidavit, in the case of evidence from a foreign jurisdiction, a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, shall be admissible, whether or not it is in the form of an affidavit attested to before an official of the foreign state."

The Group considered the question of the admission of foreign business documents. After discussion, it was decided that the provisions relating to domestic business documents should apply equally to foreign business documents. The recommendations relating to domestic business documents were reviewed with this in mind. The Group determined that the definition of business was sufficiently broad to cover foreign business, both private and government, and was satisfied that the admissibility provisions were also sufficient for foreign business records.

As some of the business document provisions allow for evidence by way of affidavit, the Group considered the problem of obtaining affidavits in foreign jurisdictions. It was recognized that often it is difficult or impossible to obtain such documents from foreign jurisdictions of a different legal tradition. The Group recommended a provision in the Business Documents law, which would allow for the admission of evidence by certificate as opposed to affidavit, in the case of a foreign record.

C FOREIGN TESTIMONIAL EVIDENCE

The Group recommended the following content for a model law on foreign testimonial evidence:

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[7] The process for certification would be that provided for generally under domestic law.

[8] See section 13(7) of the Companies Act 1985.

i. Application to evidence obtained in response to a mutual assistance request

(a) This law shall apply to testimony and any exhibit annexed to such testimony obtained as a result of a request made by (name of jurisdiction/ name of responsible mutual assistance authority e.g. Attorney General) under a mutual assistance in criminal matters scheme or treaty [9]

ii Pre-conditions to admissibility

"To be admissible the testimony must:

(a) have been taken:
- *(i) on oath or affirmation; or*
- *(ii) under such caution or admonition as would be accepted by courts in the foreign country concerned, for the purposes of giving testimony in proceedings before those courts; and*

(b) either
- *(i) purport to be signed or certified by a judge, magistrate or officer in or of the foreign jurisdiction to which the request was made; or*
- *(ii) the (responsible authority for mutual assistance or an authorized officer of that authority) by signed writing has certified that the testimony and any annex was obtained as a result of a request made to a foreign country by or on behalf of the (responsible authority) in which case it is presumed (unless evidence sufficient to raise a doubt about the presumption is adduced) that the testimony and annex was obtained as a result of the request.*

iii. Form of testimony

(a) Testimony may be reduced to writing or be recorded on an audio or video tape.

(b) Testimony need not:
- *(i) be in the form of an affidavit; or*
- *(ii) constitute a transcript of a proceeding in a foreign court.*

The Group was of the view that the evidence obtained in the foreign jurisdiction could be in alternative forms such as in writing or recorded through the use of technology. The Group recommended the inclusion of a flexible provision to this effect.

iv. Admissibility

(a) Subject to subsection(b), foreign testimony may be adduced in a criminal proceeding.

(b) The foreign testimony is not to be adduced as evidence if:
- *(i) it appears to the court's satisfaction at the hearing of the proceeding that the person who gave the testimony concerned is in Australia and is able to attend the hearing; or*
- *(ii) the evidence would not have been admissible had it been adduced from the person at the hearing*

v. Discretion to prevent foreign testimony being adduced

(a) The court may direct that foreign testimony not be adduced as evidence if it appears to the court's satisfaction that, having regard to the interests of the parties to the proceeding, justice would be better served if the foreign testimony were not adduced as evidence.

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[9] The precise language used in this provision will depend on the nature of the mutual assistance legislation within the relevant jurisdiction. The principle the Group agreed upon was the provision should be of limited application applying to evidence received as a result of a requests made under a mutual assistance scheme.

(b) *Without limiting the matters that the court may take into account in deciding whether to give such a direction, it must take into account:*

(i) *the extent to which the foreign testimony provides evidence that would not otherwise be available; and*

(ii) *the probative value of the foreign testimony with respect to any issue that is likely to be determined in the proceeding; and*

(iii) *the extent to which statements contained in the foreign testimony could, at the time they were made, be challenged by questioning the persons who made them; and*

(iv) *whether exclusion of the foreign testimony would cause undue expense or delay; and*

(v) *whether exclusion of the foreign testimony would unfairly prejudice any party to the proceeding.*

vi. Prior disclosure required

In order for the prosecution to adduce foreign evidence under this law in a criminal proceeding, the evidence must have been disclosed to the defence within a reasonable time prior to the proceedings.

The Group discussed at length the possible problems that could arise with legislation that allows for the admission of testimonial evidence, even though there had been no opportunity to cross-examine on that evidence. This will be a particular concern for jurisdictions that have a written constitution, including a bill of rights. It was noted that such legislation could be challenged on the basis of a constitutional right to cross–examine or on the basis that the process would affect the fairness of the trial. Even for countries without a written constitution, such arguments would arise.

However, the Group did note that because of the inherent difficulties surrounding the introduction of evidence from another state, this type of legislation could still be very useful. The Group was of the opinion that it would be of practical value particularly where the evidence to be admitted is of a technical nature or comprised a small part of the case. Examples were given where the evidence related to a technical analysis conducted in another country, chain of possession or explanation of documentation being adduced. The Group was firmly of the view that the provisions could not be used to admit key evidence where there had been no opportunity for the defence to cross-examine.

The Group was of the opinion that while some countries may not be able to adopt such legislation because of constitutional constraints, it might be very useful for those jurisdictions that were able to implement such a scheme, provided appropriate safeguards were included.

With these issues in mind, the Group recommended that, as in the Australian legislation, the model law should give the judge a broad discretion to decide on admission or exclusion of the evidence, after considering all of the circumstances surrounding the taking of the evidence, including any opportunity to cross-examine.

III VIDEO/SATELLITE EVIDENCE (PERSONS OUTSIDE THE COUNTRY)

A VIDEO EVIDENCE – WITNESS OUTSIDE OF THE JURISDICTION[10]

The Group considered the content of a model law on video/satellite evidence relating to witnesses who are outside the jurisdiction. The Group determined that the model law should be divided into two distinct sections. The first section would address the necessary legislation for the country providing the evidence of a witness to a foreign state i.e. the jurisdiction in which the witness is physically present. The second section would address the legislation required in the jurisdiction receiving the evidence i.e. the place where the relevant trial or proceeding is being held. For purposes of clarity, the terms "sending" and "receiving" are used in reference to the two separate sections of the law.

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[10] The Group recommendations in this regard relate to witnesses outside of the country where the proceeding is being held. However, the Group noted that in the case of a country with a large geographic area, such a provision could also apply with respect to the giving of evidence from one part of the jurisdiction to another.

In addition, to ensure that the legislation is flexible and capable of application to both existing and future technology, the Group recommendation uses neutral language such as the "provision of evidence by way of technology" and "technology that allows for the virtual presence of the witness".

Section 1 – Sending evidence by way of technology from (name of jurisdiction) to a foreign jurisdiction (Model law for the Sending Jurisdiction)

i. Evidence to be provided in response to a request for mutual assistance or under other provisions relating to foreign requests for assistance.

The provisions should apply where evidence is sought by a foreign jurisdiction pursuant to a mutual assistance request or, if applicable, a letter of request from a foreign court.

After considering some existing legislative examples, the Group was of the view that the process should be initiated in the sending jurisdiction by some form of request from the foreign jurisdiction. The two most common types of requests are those presented under mutual assistance treaties or schemes or traditional letters of request or *letters rogatory*. The Group was of the view that the law should apply to all such requests.

ii. Orders to issue under mutual assistance or other legislation

Countries should amend existing mutual assistance legislation or legislation relating to the execution of requests by foreign courts to provide for orders to issue from the relevant authority[11] *for the sending of evidence by way of technology*[12] *to the foreign jurisdiction.*

Existing legislation relating to mutual assistance or *letters rogatory* will generally set out the procedures to be used in the case of the taking of testimony from witnesses. Thus, to effectively implement a scheme for sending evidence by way of technology, that legislation should be amended to make specific reference to the power of the relevant authority to order that the testimony be given via technology.

iii. Power to compel witness to attend at location where technology available

If a person is to give evidence by way of technology under (refer to mutual assistance or other foreign request legislation) in a court or other place within the jurisdiction where the technology is available, the court shall issue a subpoena to the witness to compel his or her attendance at the court or at that place.

The Group noted that it was necessary to provide a power for the court to compel the witness to attend at a location where the necessary technology would be available for the live link. While some court facilities may now or in the future have such capacity, in many instances that will not be the case. Therefore, it is important to include in the legislation this power to compel the witness to attend at a location where the technology is available.

iv Laws of perjury and contempt still apply

Where a person gives evidence for a foreign proceeding by way of technology under (refer to mutual assistance or other foreign request legislation), the laws of the sending jurisdiction relating to contempt and perjury shall apply to that testimony.

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[11] In some jurisdictions, the mutual assistance scheme provides for court orders while under others the order will be made by an executive authority.

[12] As noted, the recommendation is framed in neutral terms. The phrase by way of technology contemplates evidence being given from one jurisdiction to another by means of video, satellite or other live link technology that may be developed in future.

The Group discussed which laws of perjury and contempt would apply to testimony that is given, effectively in two jurisdictions. The Group was of the view that because the witness is physically located in the sending jurisdiction, most often, it is those laws which will be the most convenient to apply. Therefore, to the extent that any issue could be raised as to the application of the law of the sending jurisdiction, given the actual proceeding is in another state, the Group recommended that this point be made clear in the law. At the same time, as will be seen later in the report, the Group was of the view that it would be appropriate to have dual jurisdiction in relation to these matters and recommended that the perjury and contempt laws of the receiving jurisdiction should apply also.

v. Applicable Law of Evidence and Procedure

Where a person gives evidence for a foreign proceeding by way of technology that allows for the virtual presence of the person before the court outside (name of jurisdiction) or that permits the parties and the court to hear and examine the witness, the evidence shall be given as though the person were physically before the court outside (name of jurisdiction) for the purposes of the laws relating to evidence and procedure but only to the extent that giving the evidence would not disclose information otherwise protected by the (name of jurisdiction)law of non- disclosure of information or privilege.

One of the most complex and difficult issues in relation to this subject, is the question of what procedures and which evidentiary laws will apply to the taking of the evidence. In practical terms, since the evidence is being adduced at a proceeding in the receiving jurisdiction, it would make most sense to apply the procedural and evidentiary laws of that jurisdiction. The laws of the sending jurisdiction would not be relevant to a proceeding in a foreign jurisdiction. For example, if the witness is in a common law country and the proceeding is in a civil law country, it would not be helpful to allow for objections on the basis of the hearsay rule when no such rule exists in the civil law jurisdiction.
However, in most jurisdictions, there are some evidentiary and procedural rules that are based on fundamental societal precepts and values. For example, privileges in relation to communications within the context of certain relationships – spouses, legal counsel and client, priest/penitent – have developed because of the need to protect such relationships and the underlying trust associated to them. Given that throughout "virtual" proceedings, the witness is still physically present in the sending jurisdiction, it is still necessary to respect those rules in the sending jurisdiction, which reflect fundamental principles and values in that society.

The Group was of the view that the appropriate solution would be to apply the procedural and evidentiary laws of the receiving jurisdiction to the greatest extent possible, with the limitation that the laws of the sending jurisdiction, with respect to privileges and the protection of information[13], should continue to be respected.

In the discussion, the Group recognized that this approach would have to be reconciled with any existing laws on mutual assistance, which generally contain provisions on the laws that will apply when the evidence is taken in a traditional manner for transmission to another state. In some jurisdictions, the witness will be entitled to object to answering questions on the basis of the laws of both jurisdiction or some other combination of the two. Therefore, consideration will have to be given to whether the laws on this point should be reconciled or if there should be a distinction maintained.

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[13] This is intended to cover laws relating to the non-disclosure of matters such as national security information or cabinet documentation.

Section II Receiving evidence by way of technology from a foreign jurisdiction (Model law for the Receiving Jurisdiction)

i. Evidence through technology that allows for virtual presence

Option 1

A person other then the accused, who is outside (name of jurisdiction) may give evidence from that place by way of technology that permits the witness to testify in the virtual presence of the parties and the court in (name of jurisdiction), but evidence may not be so given without leave of the court.

Option 2

(a) A court shall receive evidence given by a witness outside (name of jurisdiction) by means of technology that permits the witness to testify in the virtual presence of the parties and the court in (name of jurisdiction) unless one of the parties satisfies the court that the reception of such testimony would be contrary to the interests of justice.

(b) A party who wishes to call a witness in (name of jurisdiction) under subsection (1) shall give notice to the court before which the evidence is to be given and the other parties of their intention to do so not less than ten days before the witness is scheduled to testify.

Despite lengthy debate, the Group could not reach a consensus as to whether evidence given by live technology link should require the permission of the court or not. The majority view, reflected in Option 1 was that leave of the court should be required in all such cases. In the view of the majority, live link evidence constitutes a variation from the ordinary means by which evidence is given and therefore it should require the approval of the court. Those holding this view noted that the court in each instance should consider the matter with particular regard to issues such as the reasons why the witness could not be present, efforts made to secure his or her attendance, issues of cost with respect to attendance as well as the conditions under which the evidence would be given in the foreign state. In the opinion of the majority, the court should then decide in each case whether or not to receive the evidence in this manner.

The minority view was that the legislation should be framed to allow for the reception of the evidence without leave of the court, but a discretion should be retained for the court to refuse to receive the evidence if satisfied that it would be contrary to the interests of justice to do so. Those adhering to this view were of the opinion that unlike "alternative" means of giving evidence, there is little distinction to be drawn between live evidence and live link evidence. In both instances the witness can be heard and observed by all parties and the examination and cross-examination will be in real time. Thus there is no reason why adducing evidence in this way should require the leave of the court. They were also of the view that in order to overcome the potential for bias towards existing approaches and away from technology, it was necessary to allow for the evidence to be received in the absence of a party satisfying the court, on a standard of interests of justice, that it should not be done.

For this reason two options have been included for consideration in relation to the reception of this evidence.

ii. Audio evidence

A person other than the accused, who is outside (name of jurisdiction) may give evidence from that place by way of technology that permits the parties and the court in (name of jurisdiction) to hear but not see, and examine, the witness if the court is of the opinion that it would be appropriate considering all the circumstances including the nature of the witness' anticipated evidence and any potential prejudice caused by the fact that the witness would not be seen by the parties or the court.

The Group was of the opinion that the model law should cover not only live video link but audio link as well. In their view, while audio evidence would not be appropriate for all situations, it could be very useful where the nature of the evidence to be given is of a technical or minor nature and video technology is either not available or otherwise impracticable. However, unlike the case of "virtual" technology, here the Group agreed that, because the witness cannot be seen, the court must have a discretion to consider all of the circumstances and determine whether or not to receive the evidence.

iii. Application of laws of contempt of court and perjury

(a) *Subject to subsection (b), where evidence is received by a court in (name of jurisdiction) from a witness who is outside the jurisdiction, pursuant to sections 1 or 2, the evidence is deemed to be given in (name of jurisdiction) for the purposes of the laws relating to evidence, procedure, contempt of court or perjury.*

(b) *A witness shall not be found in contempt under the laws of the receiving state for refusing to answer a question, where that refusal is based on a law in the sending jurisdiction that applies to the proceedings. Where there is an issue as to the law of the sending jurisdiction or its applicability to the proceeding, the matter may be determined by a ruling of a judge of the sending jurisdiction present during the taking of the evidence or if no judge is present, by a certificate of a judge of the sending jurisdiction, provided subsequently.*[14]

As mentioned earlier, the Group was of the view that it would be appropriate to provide for dual jurisdiction over matters such as perjury or contempt of court. This provision would allow for the jurisdiction receiving the evidence via the technology to have jurisdiction in the case of perjury or contempt. While realistically it will be difficult to exercise the jurisdiction because the person in question is not present in the territory, it was still the view that there may be some instances where the receiving jurisdiction would want to pursue the matter.

At the same time, with reference to contempt, the Group was of the opinion that it was necessary to include a protection for the witness in those cases where the law of the receiving jurisdiction would require an answer to a question but the applicable evidentiary law of the sending jurisdiction would preclude it. For example, a witness is giving evidence from Switzerland to a proceeding in the UK. He or she objects to answering a question put by counsel in the UK, on the basis that the Swiss banking confidentiality law prohibits the disclosure of the information. Nothing in the UK law would permit or prevent the witness from answering the question. It would however be inappropriate for the witness, caught between the law of two jurisdictions, to have to face sanction in the UK for refusing to answer the question. Therefore the Group was of the opinion that in such cases, it should be clear that the witness could not be found in contempt in the receiving jurisdiction for relying on an applicable law of the sending jurisdiction in which he or she is located.

The Group considered the very difficult practical problems that arise because the laws of both jurisdictions, in some respects, apply to the proceedings. In particular, they discussed how decisions would be made in relation to objections raised in the course of the proceedings.

Where the objection is based on the law of the receiving jurisdiction, the Group determined that the judge at the proceeding in the receiving jurisdiction would be in a position to rule on such matters at

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[14] As is the case where evidence is taken in one jurisdiction for use in a foreign jurisdiction, in any manner, it may be necessary to resolve issues relating to the laws of the foreign jurisdiction. To that end, many jurisdictions will have existing provisions in their mutual assistance legislation, which describes how to resolve questions that arise with respect to foreign law. Where such provisions already exist, they should be amended as necessary to apply to evidence taking by way of technology. Alternatively, if there are no existing provisions on resolution of these issues, it will be necessary to provide for this in any amendments to allow for video evidence. Examples of such schemes can be found in the Australian Mutual Assistance legislation and Canadian Mutual Assistance in Criminal Matters Act.

the time. However, when the objection was based on the evidentiary law of the sending jurisdiction, e.g. a privilege was invoked, there were practical problems.

If a judge of the sending jurisdiction is present for the giving of the evidence, then he or she could rule on the matter during the proceeding. However, as the actual proceeding is being held in the receiving jurisdiction, in most instances there will be no judge present. For this reason, the Group decided that there should be a specific provision for a ruling by a judge in the sending jurisdiction to be submitted by way of certificate, subsequent to the proceedings.

In considering this issue, the Group noted that in some jurisdictions, similar provisions exist with respect to the taking of evidence generally, in response to a mutual assistance request. Thus, it would be important to ensure again that these provisions are consistent with those under existing general law.

iv. Oath, affirmation or other requirement

Except in the case of a witness who would not be required to give sworn or affirmed evidence if physically present in (name of jurisdiction), evidence given under sections (1) or (2) shall be given:

(a) under oath or affirmation in accordance with the law of (name of jurisdiction) administered via the technology[15]*; or*

(b) under or oath or affirmation in accordance with the law in the place in which the witness is physically present and administered in that place; or

(c) in any other manner that demonstrates that the witness understands that they must tell the truth.

The Group recognized that when evidence is taken in this manner, there must be provision in the law to address the differences that exist between legal systems with reference to the administration of an oath or affirmation. While in most common law systems, evidence is taken under a sworn oath or on affirmation, in many other legal systems this is not the case. For example, in some legal systems the witness will not be sworn but will confirm his or her evidence after it is taken. As a result of these differences, the Group recommended the inclusion of a flexible provision that would allow for evidence to be admissible even where not taken in accordance with the normal rules respecting oath or affirmation.

v. Other uses for video technology

The Group also noted that in addition to using video technology for the taking of evidence, countries can consider enacting legislative provisions to allow for its use in matters such as remands of persons in custody and bail applications. A sample of legislation in this regard can be found in section 515(2.2) and (2.3) of the Canadian Criminal Code.

IV VULNERABLE WITNESSES

The Group discussed the issue of special legislative provisions addressing vulnerable witnesses and recommended the following provisions for a model law.

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[15] This provision may also require consequential amendments to existing law with respect to the administering of an oath to allow for an official in the receiving jurisdiction to administer the oath via technology to the witness located in another jurisdiction.

i. Definition of Vulnerable witness[16]

A vulnerable witness means a witness, whose ability to give evidence or the quality or whose evidence, is likely to be affected by one or more of the following factors:

(a) age or maturity;
(b) physical, intellectual, or psychiatric disability;
(c) trauma suffered by the witness;
(d) the witness's fear of intimidation;
(e) the linguistic or cultural background of the witness;
(f) the nature of the proceeding;
(g) the nature of the evidence that the witness is expected to give;
(h) the relationship of the witness to any party to the proceeding;
(i) the absence of the witness from (name of country);
(j) any other ground of similar nature

The Group was of the view that the term "vulnerable witness" should be broadly defined, using a non-exhaustive list of factors that a court could consider in determining if any particular witness should be considered as "vulnerable" in a specific case. The Group recommended in that regard the factors listed in the New Zealand Law Reform Commission document. The Group considered that such an approach would provide flexibility and ensure that all types of witnesses can be protected as may be necessary.

ii. Application for directions by the Court

(a) Where the witness is the complainant in the case and is [14] years of age or under, he or she shall be taken to be a vulnerable witness and shall give evidence in a manner described in subsection 3(i),(ii) or(iii) as directed by the judge, and the judge may also apply any other measure outlined in subsections 3(iv)-(ix) in relation to that testimony.

(b) In any other case, the judge may, either on the application of a party or a witness or on the judge's own initiative, direct that a vulnerable witness is to give evidence in a manner described in Section 3.

Because of the special vulnerability of children, particularly those who are the victims of violent offences, the Group was of the view that they should always be considered to be vulnerable and their evidence should be given using a measure that will avoid a face-to-face confrontation with the accused. The Group recommended a mandatory provision to that effect for children who are complainants in the case.

The Group was of the view that such measures should also be available to other witnesses that may fall within the definition of "vulnerable witness" in a particular case. The Group recommended a section empowering the judge to direct the use of special measures in relation to particular witnesses.

(c) (i) Subject to subsection (ii), the prosecution shall apply to the court for directions in accordance with subsection 2(b) in relation to the complainant in any serious sexual offence case.

(ii) The complainant may waive the requirements of subsection 2(c)(i).

The Group considered whether the use of such measures should also be mandatory in the case of victims of serious sexual offences. Ultimately the group decided that the matter was not as clear as with children. There may be circumstances where such measures would not be appropriate for an

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[16] The group decided against any attempt to actually define vulnerable witness exhaustively in favour of a general definition and criteria. There was however discussion of the types of witnesses that were intended to be covered which included mentally or physically handicapped persons, witnesses who are ill or dying and witnesses who have reason to be fearful of facing the accused.

adult complainant even in a serious sexual offence case. At the same time, the Group did consider that some form of presumption should apply in the case of such witnesses, so that such measures would automatically be considered in every case of this nature. The Group recommended that in the case of such witnesses, the prosecution should be obligated to make an application to the court for special measures to apply. However, the Group also recognized that an adult complainant should be able to waive the requirement and choose to face the accused without the use of any special measure.

iii. Measures available in the case of vulnerable witnesses

(a) *The judge may direct under Section 2 that:*

(i) the witness gives evidence while in the courtroom but unable to see the defendant or specified party or witness by virtue of a screen or other device provided that the screen or other device does not prevent the witness from seeing or being seen by
1) the judge and/or jury;
2) the legal representatives acting in the proceedings; and
3) any interpreter or other person appointed to assist.

(ii) the witness gives evidence from an appropriate place outside the courtroom, either in (name of jurisdiction) or elsewhere by means of technology which allows for the witness to see or and hear a person in the courtroom and be seen and heard by the persons listed in subsection 3(a)il-3;

(iii) a video recording of an interview of the witness, or a portion thereof made before the hearing be admitted as evidence in chief[17];

(iv) where the examination in chief is tendered in accordance with subparagraph (iii), cross – examination and any re-examination be video – recorded and any such recording or a portion thereof be admitted as the witness' evidence on cross-examination or re- examination;

(v) no person other then those specified in subsection 3(a)(i), 1-3 and the accused, be present in the courtroom during the giving of the testimony;

(vi) the wearing of wigs or gowns be dispensed with during the giving of the evidence;

(vii) the examination, cross-examination and/or re-examination of the witness be conducted through an interpreter or other person approved by the court;

(viii) the witness be assisted in the giving of evidence by a person approved by the court; or

(ix) the witness gives evidence using a device to overcome any disability, disorder or impairment that may affect the ability of the witness to hear or understand the questions and communicate answers.

(b) In giving directions under this section, the court may provide for more then one measure in any particular case.

As previously noted, the decision had been taken by the Group to cover a spectrum of witnesses who, for one reason or another, may meet the definition of "vulnerable witness" in a particular case. This is intended to cover a range of persons, from those who may be traumatized by having to come face to face with the defendant to those who may have difficulties with communication by virtue of physical or mental impairment. As a result, it was considered necessary to include a broad range of measures that the court could draw from in giving directions in any particular case. The list was crafted on the basis of this principle, drawing from legislative examples in the UK and New Zealand. The first three of those measures were identified to be of particular importance in cases where face–to-face confrontation with the accused will be very difficult. Thus, it is one of those three measures that the judge will have to apply in the case of a child witness. Other provisions such as the use of interpreters or devices could be used in the case of a witness with an impairment affecting the ability to communicate. In addition, the Group recommended that there be a specific provision to reflect that the judge could choose to apply a combination of measures in any particular case.

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[17] In some jurisdictions, the legislation or related rules will specify either generally or in detail the manner in which such interviews should be conducted. An example of that type of provision is Section 4 of the Evidence (Special Provisions) Act No. 32 of 1999, Sri Lanka.

The majority of the Group was of the view that it would be sufficient to require only that the judge, jury , legal counsel and interpreters to be able to see and hear the witness giving evidence from outside the court via technology, without making special provision for the accused being able to see and hear. Others in the Group were concerned the accused may have a right to personally observe the witness as a part of the right of confrontation. They noted while this will not always be possible where a screen device is used under subsection (a) (depending on the types of screens available), that is because of necessity. In the case of video or other live link, the technology is such in many places that provision can be made for the witness to see and hear only those questioning him or her while all others in the courtroom can see the witness. In light of this difference, some members of the Group felt that the provision should reflect that the accused must also be able to see and hear the witness personally. If a jurisdiction considers it necessary to provide for this, subsection (ii) should be amended to add the accused at the end of the list of persons from subsection 3(i) 1-3.

Careful consideration should be given to the inclusion of a provision which allows for the admission of video taped cross - examination of the witness. If it can be argued that this requirement hampers the ability of the defence to cross-examine effectively, for example, because it will require cross-examination at an early stage of the proceedings, the legislation may be subject to challenge. Jurisdictions may wish to consider special conditions for the use of this measure such as a higher threshold before it will be ordered or a requirement that the defence must agree with the timing of the cross-examination.

The Group noted that in each jurisdiction, careful consideration would have to be given to what, if any, consequential amendments would be needed to existing legislation in order for these provisions to be effectively implemented. For example, if there is a requirement at law or by statute for trial evidence be given in the courtroom and not anywhere else, an exception will have to be created for cases where such special measures are ordered, in order that the evidence will be admissible. A good example of how this issue has been dealt with can be seen in The Evidence (Special Provisions) Act No 32 of 1999, Sri Lanka.

The Group noted that, whether by practice or by legislation, the evidence of vulnerable witnesses, particularly children and victims of serious sexual offences, should always be video recorded when given at the first proceeding (preliminary or trial), even in instances where it is not introduced by way of video tape at the proceeding. This is to ensure that if a re- trial becomes necessary for any reason, an application can be made to introduce the tape, as opposed to requiring the witness to testify again. A provision to allow for the introduction of such evidence in the case of a re-trial or subsequent proceeding, either on a discretionary or mandatory basis, should also be included in the law, unless it is already permitted under general rules.

The Group recognized that provisions of this nature, which place restrictions on the manner in which cross-examination will be conducted, could be subject to constitutional challenge. As noted above, some members of the Group were particularly concerned about the effect of such measures on the right of the accused to "confront" his or her accusers. At the same time, it was noted that such challenges have not been successful to date,[18] in those jurisdictions where they have been advanced. In addition, the Group was of the view that the fundamental concern with any such provision had to be whether it infringes on the right to a fair trial. In so far as the measures are clearly designed to permit cross-examination and the testing of the evidence, the Group was of the view that arguments that the resulting trial is unfair were unlikely to succeed.

iv. Anonymous witnesses

The Group discussed the possibility of provisions allowing for witness testimony on an anonymous basis. It was noted that in cases of terrorist groups or organized crime, such a provision could be of critical importance, to obtain any witness testimony. On the other hand, the Group was concerned

[18] See for example *R.v. D.O.L* [1993] 4 S.C.R. 419, Supreme Court of Canada, (SCC); *R. v. Levogiannis* [1993] 4 SCR 475 (SCC).

about the impact of such provisions on the rights of the accused and particularly his or her ability to cross-examine fully without knowledge of the identity of the witness. The Group recommended consideration of such provisions but only with appropriate safeguards to protect the rights of the accused, such as the use of an independent counsel for cross-examination of such persons.

v. Questioning of complainant by unrepresented accused

(a) *An accused in a sexual offence or domestic violence case is not entitled to personally cross-examine the complainant or any child witness*[19].

(b) *An unrepresented accused, who is precluded from personally questioning a witness under section (1), may have his or her questions put to the witness by the judge or a person appointed by the judge for that purpose.*

(c) *In respect of each question, the judge may*
- (i) *put the question or allow the question to be put to the witness;*
- (ii) *put the question or require the question to be put to the witness in a form rephrased by the judge; or*
- (iii) *refuse to put or refuse to allow the question to be put to the witness.*

The Group was of the view that in certain types of cases i.e. sexual offences, child abuse, domestic violence, personal cross-examination by the accused should not be permitted. In some jurisdictions with such a prohibition, there is a requirement for the court to appoint counsel to conduct the cross-examination for the accused. However, the Group recognized that small jurisdictions might not have the resources or capacity to provide counsel in every case of this nature. Thus, the alternative set out in the New Zealand Law Reform Commission Evidence Code was recommended, providing flexibility for either the judge or another person appointed by him or her (which could include counsel) to question the witness.

vi. Complainants in Sexual Offence Cases

The Group considered what legislative restrictions should apply to evidence adduced by way of cross-examination or otherwise in relation to the sexual experience of complainants in sexual assault cases. Three areas of concern were identified – evidence of sexual reputation, prior sexual history generally and prior sexual history with the accused.

The Group determined that any model law in this area would have to strike an appropriate balance between protecting complainants from abuse and further victimization and preserving the fair trial rights of the accused.

The Group recommended the following content for a model law restricting the evidence to be adduced with respect to complainants in sexual offence cases.

vii. Sexual reputation

In the case of a sexual offence, no evidence can be given and no question can be put to a witness relating directly or indirectly to the reputation of the complainant in sexual matters.

The Group considered that evidence of general sexual reputation should not be permitted. In the opinion of the Group, such evidence could never be relevant to the issues in the case and precluding such evidence would not in any way prejudice the fair trial rights of the accused. At the same time such evidence is highly offensive to the witness and allows for unacceptable inferences to be drawn.

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[19] The term complainant includes a child complainant.

viii. Evidence of prior sexual history with persons other then the accused

In the case of a sexual offence, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other then the defendant.

The Group held the same view with respect to evidence of sexual experience with persons other then the accused. Despite reflection and discussion, the Group could not think of an instance where such evidence would be relevant to the defence of the accused. Thus, on the basis of the same reasoning as outlined in relation to reputation evidence, the Group recommended that the model law prohibit such evidence.

ix. Sexual experience with the accused

(a) In the case of a sexual offence, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with the accused for the purpose of supporting an inference that the complainant:

(i) is more likely to have consented to the sexual activity that forms the subject-matter of the charge or;
(ii) is less worthy of belief.

(b) For any other purpose, in the case of a sexual offence, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with the accused, other than in relation to the sexual activity that forms the subject matter of the charge, unless:

(i) an application for leave is made to the judge ,in the absence of the jury[20]*; and*
(ii) the judge is satisfied that a refusal to allow the evidence to be given or the question to be put would prejudice the fair trial of the accused person.

In the case of evidence of sexual experience with the accused, the Group acknowledged that in some limited circumstances such evidence could be relevant and even critical to the defence and an absolute prohibition could prejudice fair trial rights. At the same time, the Group was of the view that the right to adduce such evidence should not be unlimited but rather should be allowed only where appropriate, as determined by the trial judge. The Group concluded that the evidence should never be allowed to draw the inference of propensity nor for the purposes of general credibility. Where the evidence is to be adduced for other reasons, it should be only with the leave of the court. In addition, because of problems with entrenched views and bias, even within the judiciary, the Group was of the view that there should be a very high threshold for admissibility.

x. Other protective measures in sexual offence cases

(a) In the case of a sexual offence, the judge shall order a ban on the publication or broadcast of the identity of the complainant or information that could disclose the identity of the complainant, unless the complainant consents to publication or broadcast.

(b) The judge may order a ban on the publication or broadcast of the identity of other witnesses or information that could disclose the identity of those witness, or order a general ban on publication or broadcast of testimony, where satisfied that it would be in the interests of justice to do so[21]*.*

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[20] The reference to the absence of the jury would only be applicable to those jurisdictions that have a jury system.

[21] The Group also considered the possibility of allowing for a ban on publication of the identity of the accused in sexual offence cases, because of the possible damage to reputation despite the presumption of innocence. However, the majority view was that this would be very difficult to provide for given the generally public nature of criminal proceedings and charges. It would also be difficult to justify such a measure in one case as opposed to another. For this reason, the Group did not include such a recommendation but some jurisdictions may wish to consider the possibility of doing so.

The Group also noted additional measures that should apply in the case of sexual offences. In particular they recommended a mandatory ban on the publication of the identity of the complainant, unless the complainant waives the requirement. In addition, the Group recommended a general discretion for a judge to order a ban on publication of the identity of other witnesses or a ban on publication of testimony, in cases where it would be in the interests of justice to do so.

V CORROBORATION

The Group considered the common law rules relating to corroboration. It was recognized that historically there were two types of requirements with respect to corroboration. In some cases, as a matter of law, a conviction could not be based on the uncorroborated evidence of a witness. Two common examples of the application of this rule were in relation to perjury offences and the unsworn testimony of a child witness.

In addition to the rule of law, the judges developed rules of practice, which required a warning to juries or a self-instruction, in certain cases, about the danger of convicting on the evidence of a particular witness alone. Two common instances were in the case of accomplices and the evidence of the complainant in a sexual assault case.

The Group considered the content of a model law relating to corroboration.

i. Requirement at law for corroboration

(a) *Except in relation to the offences listed in subsection (b), there shall be no requirement for corroboration in order for a person to be convicted of a criminal offence.*[22]

(b) *In the case of perjury*[23]*, treason and sedition, a conviction may not be founded on the uncorroborated evidence of a witness.*

The Group first considered requirements at law for corroboration in order to convict. It was noted that in many common law jurisdictions, such a rule is still applied in relation to certain types of offences or certain types of evidence. The Group considered that, with the exception of perjury and related false evidence offences and treason or sedition, there was no justification to maintain the requirement for corroboration as a rule of law in any case.

With respect to perjury and related offences (false statements, false oaths, false testimony) it was the view of the Group that a requirement for corroboration is necessary as a matter of law, for the purposes of the proper administration of justice. To encourage participation and cooperation in the justice system, witnesses need to have the assurance that even if they are vigorously cross-examined at a proceeding and their evidence is discredited, they will not face subsequent prosecution on that basis alone.

With respect to treason and sedition, the Group was of the view that the underlying rationale – the potential for abuse particularly in context of political instability- justified the maintenance of the requirement for corroboration in such cases as well.

ii. Mandatory Warnings or instruction

There shall be no mandatory requirement for a judge in any criminal case to warn the jury or instruct him or herself on the danger of convicting on the evidence of a particular witness alone.

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22 This type of provision will work for a jurisdiction that has requirements for corroboration under common law. If there are any statutory provisions requiring corroboration, those should be repealed specifically.

23 If a jurisdiction has other related offences such as giving false testimony or making false statements, these should also be subject to the same requirement for corroboration.

The Group was of the view that all requirements for mandatory warnings should be abolished. All evidence, whether emanating from an accomplice or any other particular witness should be assessed and weighed in the same manner. The Group noted however that the abolishment of mandatory warnings was entirely without prejudice to the general discretion of a judge to instruct him or her self or the jury on issues of evidence in any case.

The Group discussed as well, whether it might be necessary to go even further and prohibit such warnings being given at all. The point was made that in the absence of a general prohibition of warnings based on the type of evidence or witness, judges accustomed to the rules might well revert back in practice to the common law position. After consideration, the Group decided not to include a specific recommendation on this point because it may be too prescriptive of the judge's discretion for many jurisdictions. However, the Group noted that in considering amendments on corroboration, a jurisdiction might wish to include a general prohibition if that is what is necessary to eliminate warnings in relation to certain types of evidence or witnesses.

iii. Evidence of children

(a) *A witness, including a child witness, shall be presumed competent to give evidence and no inquiry into competence is required unless the judge has reason to believe the witness is unable to understand questions or provide intelligible answers.*

(b) *The evidence of a child under the age of [12] shall not be taken on oath or affirmation. However, before hearing the evidence of such a witness, the judge should instruct the child on the importance of telling the truth and not telling lies.*

(c) *Evidence given in accordance with subparagraph (b) shall be deemed to have been given under oath or affirmation.*

As noted above, the Group recommended the abolishment of a legal requirement for corroboration in the case of unsworn testimony from a child. On a related point, the Group considered the question of the evidence of children more generally and in particular the testing of competence and the requirement to determine if the evidence should be sworn or not. The Group was of the view that such requirements were outdated and inconsistent with the approach taken in relation to other types of evidence. The Group was of the view that the Court should be able to presume all witnesses competent to testify and only if there was a basis should questions of competency be examined. In addition, the Group recommended that the evidence of all children[24] be taken unsworn but at the same time be treated in the same manner as any other evidence.

VI DNA

The Group considered existing legislation in some Commonwealth jurisdictions as well as the "Recommendation" adopted by the Committee of Ministers of the Council of Europe.[25]The Group took cognisance of the fact that forensic DNA analysis would assist in the determination of guilt or innocence of persons in criminal trials. However, in noting its potentially positive impact, the Group was especially careful to ensure that fundamental principles such as the inherent dignity of the individual, respect for the human body and the rights of accused persons to a fair trial should be taken into account when considering legislation.

More so "although DNA analysis is sometimes referred to as "DNA fingerprinting" the analogy is incorrect. The differentiation achieved by a genetic profile will depend on a number of factors, such

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[24] The definition of child would depend on the relevant law of the particular jurisdiction.

[25] The use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system; explanatory memorandum.Recommendation No. R (92) 1 adopted by the Committee of Ministers of the Council of Europe on 10 February 1992 and explanatory memorandum.

as the technique employed and, particularly the quality of the original material. At best a profile may produce odds of several million to one against the DNA having originated from someone other than the individual involved. At the other end of the scale the differentiation achieved may be low. It is accordingly not possible to generalise over the use of DNA analysis as the sole basis for a conviction: it will be for the court to decide in any particular case."[26]

A. *Taking of Samples*

The Group strongly felt that unless there was informed consent, authorisation for the taking of bodily samples should be obtained from a court on application in accordance with specified criteria . Provision was made for urgent cases , with safeguards against abuse.

1. *A sample may be taken from a person only:*

   (a) If a police officer of at least the rank of [.....] authorises it to be taken and;

   (b) If appropriate written consent is given.

   "appropriate consent", in this context means,

   (i) the written consent of the person from whom the sample is to be taken if the person is 17 years or older;
   (ii) the written consent of the parent or guardian and the consent of the person from whom the sample is to be taken if the person is 14 years or older but under 17 years old;
   (iii) the written consent of the parent or guardian of the person from whom the sample is to be taken if the person is under the age of 14.

2 *A police officer may only give an authorisation under [subsection 1(a)] if he or she has reasonable grounds :*

   (a) for suspecting the involvement of the person from whom the sample is to be taken in an [offence][27]; and

   (b) for believing that the sample will tend to confirm or disprove the involvement of the suspect in the offence.

3 *In the absence of consent, a sample must be obtained by a warrant from a judge who on ex parte application is satisfied by information on oath that there are reasonable grounds to believe*

   (a) that a [specified/designated][28] offence has been committed,

   (b) that a bodily substance has been found
   (i) at the place where the offence was committed,
   (ii) on or within the body of the victim of the offence,
   (iii) on anything worn or carried by the victim at the time when the offence was committed, or
   (iv) on or within the body of any person or thing or at any place associated with the commission of the offence,

   (c) that a person from whom a sample is sought was a party to the offence, and

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[26] Ibid; Par.13, pg. 14.

[27] Different jurisdictions may wish to distinguish between minor and more serious offences, and accordingly use terminology relevant to its legal system.

[28] Different jurisdictions will use different terms.

(d) that forensic DNA analysis of a bodily substance from the person will provide evidence about whether the bodily substance referred to in paragraph (b) was from that person

and who is satisfied that it is in the best interests of the administration of justice to do so may issue a warrant in writing authorizing a police officer to obtain, or cause to be obtained under the direction of the police officer, a bodily substance from that person, by means of an investigative procedure described below for the purpose of forensic DNA analysis.

4 *The ex parte application must be supported by an affidavit setting out the grounds on which the sample is required.*

5 *In urgent matters, the ex parte application may be supported by oral evidence, provided that an affidavit is filed with the court as soon as is practicable.*

6 *Telewarrant*

Where a police officer believes that it would be impracticable to appear personally before a judge to make an application for a warrant under this section, a warrant may be issued under this section on an information submitted by telephone or other means of telecommunication setting out the grounds referred to in paragraph 1.3 above. In such case, as soon as practicable thereafter, the police officer should submit in writing an affidavit outlining the information provided by telephone or other means of telecommunication.

B. *Investigative procedures*

The warrant authorizes a police officer or another person under the direction of a police officer to obtain and seize a bodily substance from the person named in the warrant.[29]

C. *Terms and conditions*

The warrant shall include any terms and conditions that the judge considers advisable to ensure that the seizure of a bodily substance authorized by the warrant is reasonable in the circumstances.

D. *Execution of warrant*

1. *Before executing a warrant, a police officer shall inform the person against whom it is to be executed of*

(a) the contents of the warrant;
(b) the nature of the investigative procedure by means of which a bodily substance is to be obtained from that person;
(c) the purpose of obtaining a bodily substance from that person;
(d) the possibility that the results of forensic DNA analysis may be used in evidence;
(e) the authority of the police officer and any other person under the direction of the police officer to use as much force as is necessary for the purpose of executing the warrant; and

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[29] The term "bodily substance" includes the following:
(a) individual hairs plucked from the person, including the root sheath;
(b) buccal swabs obtained by swabbing the lips, tongue and inside cheeks of the mouth to collect epithelial cells; or
(c) blood obtained by pricking the skin surface with a sterile lancet, or
(d) a dental impression.

2. *In the case of a young person or a mentally disabled person, the information set out in paragraphs (a) to (e) above must be given in the presence of a legal representative or a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person or mentally disabled person.*

E. *Detention of person under warrant*

A person against whom a warrant is executed:

(a) may be detained for the purpose of executing the warrant for a period that is reasonable in the circumstances for the purpose of obtaining a bodily substance from the person; and

(b) may be required by the police officer who executes the warrant to accompany the police officer to the place where the warrant is to be executed.

F. *Respect of privacy*

A police officer who executes a warrant against a person or a person who obtains a bodily substance from the person under the direction of the police officer shall ensure that the privacy of that person is respected in a manner that is reasonable in the circumstances. The person taking the sample shall be of the same sex as the person from whom the sample is being taken.

G. *Execution of warrant against young person or mentally disabled person.*

The Group noted that special care should be taken in respect of obtaining samples from vulnerable persons, viz. young persons and mentally disabled persons.

A young person or a mentally disabled person against whom a warrant is executed has, in addition to any other rights arising from his or her detention under the warrant,

(a) the right to a reasonable opportunity to consult with, and

(b) the right to have the warrant executed in the presence of a legal representative or a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person.

H. *Waiver of rights of young person*

A young person may waive his or her rights under subsection (.....) but any such waiver

(a) must be recorded on audio tape or video tape or otherwise; or

(b) must be made in writing and contain a statement signed by the young person that he or she has been informed of the right being waived.

I. *Destruction of bodily substances*

Whilst there was some discussion on the retaining of all samples obtained in a databank, the Group was of the view that this would be an infringement of an individual's rights and accordingly decided to allow such retention and usage in specified and limited circumstances.

A bodily substance that is obtained from a person in execution of a warrant and the results of forensic DNA analysis shall be destroyed forthwith after

(a) *the results of that analysis establish that the bodily substance referred was not from that person;*

(b) *the person is finally acquitted of the designated offence and any other offence in respect of the same transaction otherwise than by reason of a verdict of not criminally responsible on account of mental disorder; or*

(c) *the expiration of one year after*

(i) *the person is discharged after a preliminary inquiry into the designated offence or any other offence in respect of the same transaction, .*

(ii) *the dismissal, for any reason other than acquittal, or the withdrawal of any information charging the person with the designated offence or any other offence in respect of the same transaction, or*

(iii) *any proceeding against the person for the offence or any other offence in respect of the same transaction is stayed, unless during that year a new information is laid or an indictment is proferred charging the person with the designated offence or any other offence in respect of the same transaction or the proceeding is recommenced.*

J. *Exception*

Notwithstanding the above, a judge, on application supported by affidavit and upon notice to the affected party, may order that a bodily substance that is obtained from a person and the results of forensic DNA analysis not be destroyed during any period that the judge considers appropriate if the judge is satisfied that the bodily substance or results might reasonably be required in an investigation or prosecution of the person for another designated offence or of another person for the designated offence or any other offence in respect of the same transaction. A Judge may waive notice being given to the other party upon application, if it is found to be in the interests of justice. [30]

K. *Expert Reports*

(1) *Subject to (2) an expert report shall be admissible as evidence in criminal proceedings, whether or not the person making it attends to give oral evidence in those proceedings.*

(2) *If it is proposed that the person making the report shall not give oral evidence, the report shall only be admissible with the leave of the court.*

(3) *For the purpose of determining whether to give leave the court shall have regard –*

(a) *to the contents of the report;*

(b) *to the reasons why it is proposed that the person making the report shall not give oral evidence;*

(c) *to any risk, having regard in particular to whether it is likely to be possible to controvert statements in the report if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and*

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[30] Some jurisdictions who may wish to ensure that there are further express safeguards in the use of the bodily substances and the results of forensic DNA analysis should add the following clause:

"Limitations on use of bodily substances

(1) No person shall use a bodily substance that is obtained in execution of a warrant except in the course of an investigation of the designated offence for the purpose of forensic DNA analysis.

Limitations on use of results of forensic DNA analysis

(2) No person shall use the results of forensic DNA analysis of a bodily substance that is obtained in execution of a warrant except in the course of an investigation of the designated offence or any other designated offence in respect of which a warrant was issued or a bodily substance found in the circumstances in the application for the warrant or in any proceedings for such an offence."

(d) to any other circumstances that appear to the court to be relevant.

(4) An expert report, when admitted, shall be evidence of any fact or opinion of which the person making it could have given oral evidence.

(5) In this section "expert report" means a written report by a person dealing wholly or mainly with matters on which he is (or would if living be) qualified to give expert evidence.

Note: The Expert Group was of the view that this was an appropriate scenario to apply for the taking of the expert witnesses evidence by video-link in view of the cost factors for small jurisdictions.

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