
EVIDENCE ACT 1974

ANALYSIS

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EVIDENCE

No. 91 of 1974



AN ACT to amend the Evidence Act 1910.

[24 January 1975]

BE it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:—

1—(1) This Act may be cited as the *Evidence Act 1974*.

Short title and citation.

(2) The *Evidence Act 1910*, as subsequently amended, is in this Act referred to as the Principal Act.

Saving of
existing
powers.

2 Section 5 of the Principal Act is amended by omitting therefrom the word “The” and substituting therefor the words “Except as otherwise expressly provided in this Act, the”.

Births,
marriages, and
deaths.

3 Section 64 of the Principal Act is amended—

- (a) by inserting at the beginning of subsection (1) the word “A”;
- (b) by omitting from paragraphs (a) and (b) of that subsection the word “a” (wherever first occurring);
- (c) by omitting from that subsection the words “or his deputy” (wherever occurring); and
- (d) by omitting subsection (4) and substituting therefor the following subsections:—

“(4) Where the adoption of a person is entered in—

- (a) the special record kept under section 22F (1) (c) of the *Registration of Births and Deaths Act* 1895; or
- (b) the register of adoptions kept by the Registrar-General for the purposes of the *Adoption of Children Act* 1920 and particulars of the adoption have not been entered in that special record pursuant to section 22F (3) (a) of the first-mentioned Act,

a copy of, or certificate relating to, the entry in the special record or register, as the case may be (being a copy or certificate that is authenticated as provided by subsection (1)) is evidence of the adoption of that person by the person stated in the copy or certificate as having adopted him, and of the date of the adoption as appearing in the copy or certificate.

“(5) A copy of a deed poll registered under Part V of the *Registration of Births and Deaths Act* 1895, being a copy certified under the hand of the Registrar-General, is evidence of the contents of the deed poll and of its due execution.”.

Repeal of
sections 78
and 79.

4 Sections 78 and 79 of the Principal Act are repealed.

5 Part III of the Principal Act is amended by adding at the end thereof the following Division:— Amendment of Part III.

“ *Division VII—Provisions relating to modifications of the hearsay rule*

“ 81A—(1) In this Division, unless the contrary intention appears— Interpretation.

‘ document ’ includes—

- (a) any material or thing on which there is writing or other representation, or on which there are marks, symbols, or perforations having a meaning for persons who are qualified to interpret them; and
- (b) a recording;

‘ recording ’ means anything on which any material has been recorded in such a manner that, by the use of any device or instrument, it may be reproduced in a manner suitable for human perception;

‘ representation ’ includes conduct by a person expressed otherwise than by words and intended by him as a substitute for words in expressing the matter represented by him.

“(2) For the purposes of this Division—

(a) a person shall be deemed to be unavailable as a witness in a proceeding if he is—

- (i) unable to be present or to testify at the hearing thereof because of death or physical or mental illness existing at the time of the hearing;
- (ii) out of the Commonwealth;
- (iii) out of this State but elsewhere in the Commonwealth and the probable importance of his evidence is not such as to justify the expense of procuring his attendance; or
- (iv) absent from the place of hearing because the party producing his evidence does not know, and has been unable with reasonable diligence to ascertain, his whereabouts; and

(b) a person shall not be deemed to be unavailable as a witness if the judge finds that his inability to be present or to testify at the hearing of any proceeding or his absence from the place of hearing is due to—

- (i) procurement or other wrongdoing by the party producing his evidence for the purpose of preventing that person from attending or testifying; or
- (ii) the culpable neglect of that party.

Documentary evidence of facts in issue where maker of representation in document is called as witness.

Cf. A.C.T. Ordinance No. 4 of 1971, s. 28. Imp., 1968, Ch. 64, s. 6 (1).

“ 81B—(1) Where direct oral evidence of a fact or of an opinion would be admissible in a proceeding, a representation made by a person in a document tending to establish the fact or expressing the opinion, as the case may be, is, subject to this Division, admissible as evidence of the fact or the opinion in the proceeding, if—

(a) in the case of a representation—

(i) tending to establish a fact, the maker of the representation had personal knowledge of the matters dealt with by the representation; or

(ii) expressing an opinion, the person expressing the opinion is qualified to give evidence of his opinion;

(b) the maker of the representation is called as a witness in the proceeding or, in a proceeding where evidence is given by affidavit, makes an affidavit; and

(c) the court is satisfied, in the case of a representation—

(i) tending to establish a fact, that the representation was made at a time when the facts stated in the document were fresh in the memory of the witness; or

(ii) expressing an opinion, that the facts on which the opinion was based were fresh in the mind of the person expressing the opinion.

“(2) Subsection (1) applies whether a representation is or is not consistent with the evidence given by the maker of the representation, but, where the representation—

(a) is tendered by the party by whom the witness is being called; and

(b) is inconsistent with the evidence given by the witness in the proceeding,

the representation is admissible in evidence only with the leave of the court.

“(3) A representation referred to in this section shall not, without the leave of the court, be tendered in evidence by the party by whom the witness making the representation has been called, except at the conclusion of the examination-in-chief of that witness and before his cross-examination.

“(4) Where in any proceeding a representation in a document is sought to be given in evidence under this section, it may be proved

by the production of that document or, whether or not the document is still in existence, by the production of a copy of that document, or of the material part thereof, authenticated in such manner as the court may approve.

“ 81C—(1) Where direct oral evidence of a fact would be admissible in a proceeding, a representation made by a person in a document tending to establish that fact is, subject to this section, admissible as evidence of the fact in the proceeding, if the maker of the representation—

- (a) had personal knowledge of the matters dealt with in the representation; and
- (b) is unavailable as a witness.

“(2) Notwithstanding subsection (1), a representation referred to in that subsection is not admissible in any criminal proceeding if the adverse party—

- (a) objects to its being tendered; or
- (b) is not represented by counsel or a public officer within the meaning of the *Justices Act 1959*.

“(3) Notwithstanding subsection (1), a representation referred to in that subsection is not admissible in any civil proceeding if the judge is of the opinion that, having regard to all the circumstances, the representation ought not to be admitted without being tested by cross-examination.

“(4) For the purpose of any rule of evidence or of any practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a representation admitted in evidence under this section shall not be treated as corroboration of the evidence given by that person.

“ 81D—(1) Where direct oral evidence of an opinion would be admissible in a proceeding, an opinion expressed in a document made by a person expressing the opinion or in a document made by another person on the first-mentioned person’s direction is, subject to this section, admissible as evidence of the opinion in the proceeding, if—

- (a) the person expressing the opinion would, if he had been called as a witness in the proceeding, have been qualified to give evidence of the opinion;
- (b) the court is satisfied that the facts on which the opinion was based appear sufficiently from—
 - (i) the form or contents of the document; or

Documentary evidence of facts in issue where maker of representation in document unavailable as witness.
Cf. A.C.T. Ordinance No. 4 of 1971, ss. 29 and 33.

Documentary evidence of opinions.
Ibid., s. 30.

- (ii) the circumstances in which the document expressing the opinion was made,
and that those facts are facts in respect of which evidence is given in the proceeding; and
- (c) the person expressing the opinion is unavailable as a witness.

“(2) Notwithstanding subsection (1), an opinion referred to in that subsection is not admissible in any criminal proceedings if the adverse party—

- (a) objects to its being tendered; or
- (b) is not represented by counsel or a public officer within the meaning of the *Justices Act 1959*.

“(3) Notwithstanding subsection (1), an opinion referred to in that subsection is not admissible in any civil proceeding if the judge is of the opinion that, having regard to all the circumstances, the opinion ought not to be admitted without being tested by cross-examination.

Proof of representation by production of copy of document.
Ibid., s. 35.

“81E For the purposes of this Division, a representation in a document shall be deemed to have been made by a person if the document or the material part of the document—

- (a) was written, made, or produced by him with his own hand;
or
- (b) was signed or initialled by him or otherwise acknowledged by him as his representation.

Spontaneous contemporaneous representations.

“81F—(1) Subject to subsection (2), a representation previously made by a person that is offered to prove the truth of the matter represented is admissible in any proceeding if it purports to narrate, describe, or explain an act, condition, or event perceived by that person and if it was made—

- (a) while that person was perceiving; or
- (b) spontaneously while that person was under the stress of excitement caused by perceiving,
the act, condition, or event.

“(2) Notwithstanding subsection (1), unless a person is unavailable as a witness, evidence by him of such a representation as is referred to in that subsection is not admissible in any proceeding unless the person is called to testify as a witness in the proceeding or, in a proceeding where evidence is given by affidavit, makes an affidavit.

“(3) The provisions of this section are in addition to, and not in derogation of, the common law exception to the hearsay rule known as *res gestae*.

“81G—(1) Where in any proceeding (other than committal proceedings) a party intends to adduce as evidence a representation under section 81C, section 81D, or section 81F, he shall, if he does not intend to call the maker of the representation—

Notice of intention to adduce hearsay representation in evidence.

- (a) give to every other party to the proceeding notice, in accordance with subsection (2), of his intention to adduce the evidence without calling the maker of the representation; and
- (b) deliver with that notice a copy of the representation, in the case of a representation expressed by words, or particulars thereof, in any other case.

“(2) A notice given by a party for the purposes of subsection (1)—

- (a) shall state the party's reason for not proposing to call the maker of the representation to which the notice relates; and
- (b) shall be given a reasonable time before the date fixed for the trial.

“(3) A complainant may, in committal proceedings, submit in evidence a representation that is *prima facie* admissible under section 81B, section 81C, section 81D, or section 81F.

“(4) The justices shall receive a representation to which subsection (3) applies without ruling on its admissibility, but may prohibit publication thereof.

“(5) The provisions of subsection (1) apply to a proceeding after the defendant is committed for trial.

“81H—(1) The court may, in its discretion, exclude any evidence tendered before it pursuant to section 81B, section 81C, section 81D, or section 81F, if the court is of the opinion that the probative value of the evidence is outweighed by the consideration that its admission or the determination of its admissibility—

Court's discretion of excluding evidence.

- (a) may necessitate undue consumption of time; or
- (b) may create undue prejudice, confuse the issues, or mislead the jury, in the case of a proceeding with a jury.

“(2) The provisions of subsection (1) are supplemental to, and not in derogation of, the common law discretion to exclude evidence at a criminal trial or the hearing of a summary offence.

Impeaching
credit of
persons not
called as
witnesses.
Cf. Imp., 1968,
Ch. 64, s. 7.

“ 81J—(1) Subject to subsection (2), where in any proceeding a representation made by a person who is not called as a witness is given in evidence by virtue of section 81C, section 81D, or section 81F—

- (a) any evidence that, if that person had been so called, would be admissible for the purpose of supporting or detracting from his credibility as a witness is admissible for that purpose in that proceeding; and
- (b) evidence tending to prove that, whether before or after he made that representation, that person made (whether orally or in a document or otherwise) another representation inconsistent or partly inconsistent therewith is admissible for the purpose of showing that that person has contradicted or partly contradicted himself.

“(2) Nothing in this section enables evidence to be given of any matter of which, if the person in question had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

Dying
declarations.

“ 81K—(1) A declaration by a person since deceased is admissible in any criminal proceeding in which a dying declaration is now admissible, if the declarant was at the time of making the declaration aware of his danger, and on the whole believed that he would shortly die, although he entertained some degree of hope of recovery.

“(2) No declaration to which subsection (1) applies shall be excluded because of its having been, or purporting to be, on oath, if it is otherwise admissible as a dying declaration.

Admissibility
of certain
previous
inconsistent
and
contradictory
statements and
certain previous
consistent
statements.
Ibid., s. 3.

“ 81L—(1) Nothing in this Division affects the admissibility of a representation not made admissible by this Division but which is admissible as—

- (a) a previous inconsistent or contradictory statement under section 98 or section 99; or
- (b) a previous consistent statement to rebut a suggestion of recent invention.

“(2) Where in any proceeding—

- (a) a previous inconsistent or contradictory statement made by a person who is called as a witness in that proceeding is proved by virtue of section 98 or section 99; or
- (b) a previous statement made by such a person is proved for the purpose of rebutting a suggestion that his evidence has been fabricated,

that statement is admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.

“ 81M The court may, in deciding, for the purposes of this Division, whether a person is or is not fit to attend as a witness, accept an opinion in a document purporting to be a certificate by a legally-qualified medical practitioner.

Court may act on medical certificate. Cf. A.C.T. Ordinance No. 4 of 1971, s. 37.

“ 81N Where the maker of a representation referred to in section 81C or section 81D, although not proved to be unavailable—

(a) is not called as a witness in a civil proceeding; or

(b) in a civil proceeding where evidence is given by affidavit, is not produced for cross-examination pursuant to notice,

a judge may, if, having regard to all the circumstances of the case, he is satisfied—

(c) that undue delay or expense would otherwise be caused; or

(d) that it would not for any reason be inexpedient in the interests of justice to do so,

make an order that the representation be admitted in evidence.

Powers of judge in relation to certain representations where makers not called as witnesses, &c.

“ 81P In a criminal proceeding a representation in a document admitted under section 81B, section 81C, or section 81D shall be read out at the trial, but, unless the judge is satisfied that the contents of the representation are so complex that the representation could not reasonably be comprehended by members of the jury without reading it for themselves, it shall not be made available to them as an exhibit.

Representations to be read out in criminal proceedings in certain cases.

“ 81Q—(1) An apparently genuine document purporting to be a document of a prescribed nature and to relate to the transportation or shipment of any person or goods, from one place to another—

(a) is admissible in evidence on production without further proof; and

(b) is evidence of any fact stated, or referred to, in the document, or to be inferred from the document, and, where the document relates to the shipment of goods, shall be evidence that the ownership of goods referred to in the document is in the consignee named in the document or his assignee.

Documents relating to transportation of persons or goods.

“(2) Evidence of the description of any package or property, or of any inscription or mark upon any package or property, is admis-

sible (without production of the original inscription or mark) for the purpose of raising an inference as to the identity of the package or property with that referred to in a document admissible in evidence under this section.

“(3) For the purpose of determining the evidentiary weight (if any) of a document admitted in evidence under this section, consideration shall be given to the source from which the document is produced, the safeguards (if any) that have been taken to ensure its accuracy, and any other relevant matters.

“(4) In this section—

‘document of a prescribed nature’ means—

(a) a bill of lading, manifest, shipping receipt, consignment note, way-bill, delivery sheet, register or order, invoice, ticket, or passenger list or register, and any document of a like nature; or

(b) any reproduction of any such document by photographic, photostatic, lithographic, or other like process;

‘shipment’ means carriage by any means by air, land, or water.”.

Dying
declarations.

6 Section 112 of the Principal Act is repealed.

Interpretation.

7 Section 145 of the Principal Act is amended—

(a) by omitting the definition of “foreign tribunal”; and

(b) by adding at the end thereof the following definition:—

“‘judicial authority’ means a judge or other person who, or a court or body which, is authorized by the law of a place outside this State to take or receive evidence on oath in that place.”.

Power of
solicitor to
take affidavit
or declaration
for purposes of
Act.

8 Section 146 of the Principal Act is amended by omitting the words “foreign tribunal” and substituting therefor the words “judicial authority”.

Power of person
appointed by
foreign
authority to
take evidence
and administer
oaths.

9 Section 146A of the Principal Act is amended—

(a) by omitting from subsection (1) the words “foreign tribunal” and substituting therefor the words “judicial authority”;

(b) by omitting from that subsection the word “tribunal” (wherever occurring) and substituting therefor, in each case, the word “authority”; and

(c) by omitting from subsection (2) the word “tribunal” and substituting therefor the words “judicial authority”.

10 Section 148 (1) of the Principal Act is amended—

(a) by omitting therefrom the words “foreign tribunal” and substituting therefor the words “judicial authority”; and

(b) by omitting therefrom the words “in the said tribunal” and substituting therefor the words “before or in that authority”.

Certificate of
consul or vice-
consul or
consular agent.

11 Section 149 (2) of the Principal Act is amended by omitting therefrom the words “in any foreign tribunal” and substituting therefor the words “before or in a judicial authority”.

False affidavit
or declaration.

12 The heading to Part VII of the Principal Act is amended by omitting the words “FOREIGN TRIBUNAL’S EVIDENCE” and substituting therefor the words “EVIDENCE FOR USE IN PLACES OUTSIDE THE STATE”.

Consequential
amendment of
the Principal
Act.