APPENDIX J: LEGISLATION AND RELATED DOCUMENTATION

Jurisdictional Area: Australia

Criminal Procedure Ordinance 1993

This Procedure Ordinance governs the recording and documentation of statements made by suspects, in regards to their confession or admission of participating in a criminal offence. In regards to forensic archaeology, the following sections are the most relevant:

Section 32: Interpretation – In this Part, reference to question a person is a reference to questioning the person or carrying out an investigation in which the person participates, to investigate his or her involvement (if any) in an offence.

Section 34: Certain statements to be made admissible as evidence - If, in an interview with an investigating officer, a person in custody answers a question of the officer, that answer, admission or confession, is not admissible as evidence against the person in proceedings for an offence, unless sections 35 and 36 have been complied with.

Section 35: Records of answers, admissions and confessions – If an answer to a question was given, or an admission or confession was made, in circumstances where it was reasonably practicable to tape record the answer, admission or confession, anything said by or to the person in the interview must be tape recorded.

Section 36: Records of statements to be made available without charge – If the answer, admission or confession of a person in custody is recorded, the investigating officer must, make a copy of the recording available to the person or to his or her legal representative and if a transcript of the tape or video recording is prepared, make a copy of this transcript available to the person or to his or her legal representative.

Evidence Act 1995

This Act regulates the presentation and utilisation of evidence in both civil and criminal proceedings. In regards to forensic archaeology, the following sections are the most relevant:

Section 2.1: Witnesses – Any witnesses that are competent to give evidence are able to be compelled to give evidence. Witnesses may give evidence wholly or partially in narrative form if the party that called the witness has applied to the Court for a direction that the witness will give evidence in this form. In addition, a witness must not, in the course of giving evidence, use a document to try to revive memory about a fact or opinion unless the Court gives leave. Evidence can be given in the form of charts, summaries or other explanatory material if it appears to the Court that the material would be likely to aid comprehension of other evidence that has been given or is to be given.

Section 3.1: Relevance of evidence – Evidence is deemed relevant to a proceeding if the evidence could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue during the court proceedings. As such, evidence that is relevant in a proceeding is admissible in a proceeding, and evidence that is not, is inadmissible.

Section 3.3: Opinion rule – If a witness has specialised knowledge based training, study or experience, the opinion rule does not apply to the evidence of that witness, as long as the opinion is wholly or substantially proved to be based on that knowledge.

Section 3.11: Discretions to exclude evidence – The Court can refuse to admit evidence if its probative value is outweighed by the risk that: the evidence may be unfairly prejudicial to a party, be misleading or confusing, or will result in an undue waste of the Court's time.

Section 4.1: Standard of proof - In civil proceedings the Court must find the case of the party to be proved on the balance of probabilities. In criminal proceedings, the Court is not to find the case of the prosecution proved unless it accepts that the case has been proved beyond reasonable doubt.

Section 4.6: Ancillary provisions - Evidence of a witness's opinion may be adduced by presenting an expert certificate that has been signed by the witness. Such a certificate should include: the individual's name, address, relevant training, study or experience, and a statement that sets out the individual's opinion evidence that is wholly or substantially based on their expert knowledge.

Evidence Amendment Act 2008

This Act regulates the presentation and utilisation of evidence in both civil and criminal proceedings. In regards to forensic archaeology, the following sections are the most relevant:

Section 13: Competence: lack of capacity – A person is not competent to give evidence about a fact if, for any reason (including a metal, intellectual or physical disability) the person does not have the capacity to understand a question about the fact, or the person does not have the capacity to give an answer that can be understood to a question about the fact. For the purpose of determining a question arising under this section, the Court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience.

Section 41: Improper questions - The Court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the Court is of the opinion that the question: is misleading or confusing, is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or has no basis other than a stereotype. A question is not a disallowable question merely because the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness. A failure by the Court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

Section 16: Determining whether evidence is admissible -
Is the evidence relevant? No – The evidence is not admissible.
Does the hearsay rule apply? No – The evidence is not admissible.

Does the opinion rule apply? No – The evidence is not admissible.
Does the evidence contravene the rule about evidence of Judgements and convictions? No – The evidence is not admissible.
Does the tendency rule or the coincidence rule apply? No – The evidence is not admissible.
Does the credibility rule apply? No – The evidence is not admissible.
Does the evidence contravene the rules about identification evidence? No – The evidence is not admissible.
Does a privilege apply? No – The evidence is not admissible.

Section 101A: Credibility Evidence - Credibility evidence, in relation to a witness or other person, is evidence relevant to the credibility of the witness or person that is relevant only because it affects the assessment of the credibility of the witness or person.

Section 108C: Exception: evidence of persons with specialised knowledge - The credibility rule does not apply to evidence given by a person concerning the credibility of another witness if the person has specialised knowledge based on the person's training, study or experience, and the evidence is evidence of an opinion of the person that is wholly or substantially based on that knowledge, and could substantially affect the assessment of the credibility of a witness, and the Court gives leave to adduce the evidence.

Practice Note CM7 Expert Witnesses in Proceedings in the Federal Court of Australia 2009

This Practice Note provides advice to both legal practitioners and expert witnesses in regards to how expert witness testimonies should be given and how expert witnesses should be treated during civil and criminal proceedings. In regards to forensic archaeology, the following sections are the most important:

Section 1.1: An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.

Section 1.2: An expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential. In addition, an expert witness's paramount duty is to the Court and not to the person retaining the expert.

Section 2.1: An expert's written report must:
(a) Be signed by the expert who prepared the report.
(b) Contain an acknowledgement at the beginning of the report that the expert has read, understood and complied with the Practice Note.
(c) Contain particulars of the training, study or experience by which the expert has acquired specialised knowledge.
(d) Identify the questions that the expert was asked to address.
(e) Set out separately each of the factual findings or assumptions on which the expert's opinion is based.
(f) Set out separately from the factual findings or assumptions each of the expert's opinions.
(g) Set out the reasons for each of the expert's opinions.
(ga) Contain an acknowledgement that the expert's opinions are based wholly or substantially on their specialised knowledge.

Section 2.2: At the end of the report the expert should declare that "[the expert] has made all the inquires that [the expert] believes are desirable and appropriate and that no matters of significance that [the expert] regards as relevant have, to [the expert's] knowledge, been withheld from the Court".

Section 2.4: If, after the exchange of reports or at any other stage, an expert witness changes their expert opinion, having read another expert's report or for any other reason, the change should be communicated as soon as practicable to each party to whom the expert witness's report has been provided and, when appropriate, the Court.

Section 2.5: If an expert's opinion is not fully researched because the expert considers that insufficient data are available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.

Section 2.6: The expert should make it clear if a particular question or issue falls outside their relevant field of expertise.

Jurisdictional Area: New Zealand

Evidence Act 2006

This Act governs the use and presentation of evidence and witness testimonies in civil and criminal proceedings. In terms of forensic archaeology, the following sections are the most relevant:

Section 7: Fundamental principle that relevant evidence is admissible – All relevant evidence is admissible in a proceeding. Evidence that is not relevant is not admissible in a proceeding. Evidence is deemed to be relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

Section 8: General exclusion – In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding, or will needlessly prolong the proceeding. In determining whether the probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

Section 13: Establishment of the relevance of a document – If a question arises concerning the relevance of a document, the Judge may examine it and draw any reasonable inference from it, including an inference as to its authenticity and identity.

Section 14: Provisional admission of evidence – If a question arises concerning the admissibility of any evidence, the Judge may admit that evidence subject to evidence being later offered which establishes its admissibility.

Section 24: General admissibility of opinions – A witness may state an opinion in evidence in a proceeding if that opinion is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived.

Section 25: Admissibility of expert opinion evidence – An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding, or in ascertaining any fact that is of consequence to the determination of the proceedings. An opinion by an expert is not inadmissible simply because it is about an ultimate issue that is to be determined in a proceeding, or a matter of common knowledge. If an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or will be proved or judicially noted in the proceedings.

Section 26: Conduct of experts in civil proceedings – In a civil proceeding, experts are to conduct themselves in preparing and giving expert evidence in accordance with the applicable rules of the Court relating to the conduct of experts.

Section 83: Ordinary way of giving evidence – The ordinary way for a witness to give evidence is, in a criminal or civil proceeding, orally in the Courtroom in the presence of a Judge, or if there is a jury, the Judge and jury, and parties to the proceeding and their counsel, and any member of the public who wishes to be present, unless excluded by order of the Judge or the Courtroom.

Section 84: Examination of witnesses – Unless this act or any other enactment provides otherwise, or the Judge directs the Court to the contrary, in any proceeding, a witness first gives evidence in chief, and after giving evidence in chief, the witness may be cross-examined by all parties, other than the party calling the witness, who wish to do so. After all parties who wish to do so have cross-examined the witness, the witness may be re-examined. If a witness gives evidence in an affidavit or by reading a written statement in a Courtroom, it is to be treated for the purposes of this Act as evidence given in chief.

Section 85: Unacceptable questions – In any proceeding, the Judge may disallow, or direct that a witness is not obliged to answer, any question that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand. Without limiting the matters that the Judge may take into account for determining what is an unacceptable question, the Judge may

have regard to, the age or maturity of the witness, any physical, intellectual, psychological, psychiatric impairment of the witness, the linguistic or cultural background or religious beliefs of the witness, and the nature of the proceeding, and in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding.

Section 89: Leading questions in an examination in chief and re-examination – In any proceeding, a leading question must not be put to a witness in examination in chief or re-examination unless, the question relates to the introductory or undisputed matters, or the question is put with the consent of all other parties, or the Judge.

Section 90: Use of documents in questioning a witness or refreshing memory – If when questioning a witness a party proposes to use a document or to show a document to the witness, that document must be shown to every other party to the proceeding. If a witness proposes to consult a document while giving evidence, that document must be shown to every other party to the proceeding and that document may not be consulted by that witness without the prior leave of the Judge or the consent of the other parties. However, if the document is used for the purpose of refreshing his or her memory while giving evidence, a witness may, with the prior leave of the Judge, consult a document made or adopted at a time when his or her memory was fresh.

<u>Practice Notes – Expert Witness – Code of Conduct 2011</u>

This Practice Note provides advice to both legal practitioners and expert witnesses in regards to how expert witness testimonies should be given and how expert witnesses should be treated during civil and criminal proceedings. In regards to forensic archaeology, the following sections are the most important:

Section 5.1.1: A party to proceedings who engages an expert witness must either give the expert witness a copy of this code of conduct, or be satisfied that the expert witness has seen the code of conduct and is familiar with it.

Section 5.1.2: An expert witness must comply with the code of conduct in preparing any affidavit or filing with the Court, or in the preparation of a proposed brief of evidence, or in giving any oral evidence in any proceeding in the Court.

Section 5.1.3: The evidence of any expert witness who has not read, or does not agree to comply with, the code of conduct may only be adduced with leave of the Court.

Section 5.2.1: An expert witness has an overriding duty to assist the Court impartially on relevant matters within the expert's area of expertise.

Section 5.2.2: An expert witness is not, and must not behave, as an advocate for the party who engages the witness. Expert witnesses must declare any relationship with the parties calling them or any interest they may have in the outcome of the proceeding.

Section 5.3.1: In any evidence given by an expert witness, that person must, in the body of the witness's statement or affidavit (if the evidence is in writing) or orally (if the evidence is being given orally):
(a) Acknowledge that the expert has read this code of conduct and agrees to comply with it.
(b) State the witness's qualifications as an expert.
(c) Describe the ambit of the evidence given and state either that the evidence is within the expert's area of expertise, or that the witness is relying on some other (identified) evidence.
(d) Identify the data, information, facts, and assumptions considered in forming the witness's opinions.
(e) State the reasons for the opinions expressed.
(f) State that the expert witness has not omitted to consider material facts known to the witness that might alter or detract from the opinions expressed.
(g) Specify any literature or other material used or relied upon in support of the opinions expressed.
(h) Describe any examinations, tests, or other investigations on which the expert witness has relied, and identify, and give details of, the qualifications of any person who carried them out.

Section 5.3.2: If an expert witness believes that his or her evidence, or any part of it, may be incomplete or inaccurate without some qualification, that qualification must be stated in the evidence.

Section 5.3.3: If an expert witness believes that his or her opinions are not firm or concluded because of insufficient research or data, or for any other reason, that must be stated in the evidence.

Section 5.3.4: If after the exchange of a brief of evidence has occurred, an expert witness changes any of his or her opinions, that must be communicated without delay to the party or parties wishing to call the witness.

The Criminal Procedure Act 2011

This Act outlines how pre-trial evidence admissibility hearings should be conducted in criminal proceedings. In terms of forensic archaeology, the following sections are the most relevant:

Section 78: This section applies if the prosecutor or the defendant wishes to adduce particular evidence at a Judge-alone trial, that he or she believes that the admissibility of that evidence may be challenged. The prosecutor or defendant may apply to the Court for a hearing (a pre-trial admissibility hearing) for the purposes of obtaining a pre-trial order to the effect that the evidence is admissible. The Court may grant a pre-trial admissibility hearing if the Court is satisfied that it is more convenient to deal with the issues before the trial and that the evidence raises a complex admissibility issue, and the decision about whether it is admissible is likely to make a substantial difference to the overall conduct of the proceeding. Or, the outcome of the pre-trial admissibility hearing may obviate the need for a trial. Or the complaint or witness is particularly vulnerable and resolving the admissibility issue is in the interests of justice. Or, the trial is to be in a District Court and the evidence has been obtained under an order made, or warrant issued, by the High Court. The Court may grant a pre-trial admissibility hearing on any terms and subject to any conditions that the Court thinks fit. If a pre-trial admissibility hearing is granted, that pre-trial hearing must be in the High Court.

Section 79: The Court at a pre-trial admissibility hearing must give each party an opportunity to be heard. The Court may make an order that the evidence is admissible. The order may be made on any terms and subject to any conditions that the Court thinks fit.

Jurisdictional Area: Canada

Canada Evidence Act 1985

This Act governs the admissibility and use of evidence in all civil and criminal proceedings. In relation to forensic archaeology, the following sections are the most significant:

Section 5.1: No witness shall be excused from answering any question posed by the Court.

Section 7: If the defence or prosecution wishes to use expert witnesses in order to provide the Court with knowledge-based opinion evidence, no more than five such witnesses may be called by either side without the permission of the Judge or individual presiding over the case in question.

Section 38.06: Sub-Section 3.1 - The Judge or individual presiding over the case may accept into evidence anything that, in his or her opinion, is considered to be reliable and appropriate.

Section 38.06: Sub-Section 5 - The Judge or individual presiding over the case will consider all factors that are relevant for determining the admissibility of evidence during court proceedings.

Section 40: In all proceedings in which parliament has legislative authority, the laws of evidence in the province in which the proceedings are taking place are subject to the requirements of this Act and other Acts of parliament.

Criminal Code 1985

This Criminal Code outlines the definition of evidence and how such evidence is to be used and presented during criminal proceedings. In terms of forensic archaeology, the following sections are the most relevant:

Section 118: Evidence is defined as an assertion of fact, opinion, belief or knowledge whether material or not, and whether admissible or not.

Section 131: Every one commits perjury who, with intent to mislead, makes before a person who is authorised by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration, deposition or orally, knowing that the statement is false.

Section 132: Every one who commits perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Section 136: Every one who, being a witness in a judicial proceeding, gives evidence with respect to any matter of fact or knowledge and who subsequently, in a judicial proceeding, gives evidence that is contrary to his previous evidence is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Section 137: Every one who, with the intent to mislead, fabricates anything with the intent that it shall be used as evidence in a judicial proceeding, existing or proposed, by any means other than perjury or incitement to perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Federal Court Rules SOR/98-106

These Federal Court Rules regulate the presentation and utilisation of evidence in both civil and criminal proceedings. In regards to forensic archaeology, the following sections are the most important:

Section 52: The Court may call an assessor to assist the Court in understanding technical evidence or to provide a written opinion in a proceeding. All communications between the Court and an assessor shall be in open court. Before requesting a written opinion from an assessor, the Court shall allow the parties to make submissions in respect of the form and content of the question(s) to be asked. Before the Judgement is rendered, the Court shall provide the parties with the questions asked of, and any opinion given by, the assessor and give them the opportunity to make submissions thereon.

Section 52.1: A party to a proceeding may name an expert witness whether or not the assessor has been called. Two or more parties may jointly name an expert witness.

Section 52.2: An affidavit or statement of an expert witness shall:
(a) Set out in full the proposed evidence of the expert.
(b) Set out the expert's qualifications and the areas in respect of which it is proposed that he or she be qualified as an expert.
(c) Be accompanied by a certificate in Form 52.2 signed by the expert acknowledging that the expert has read the Code of Conduct for Expert Witnesses set out in the schedule and agrees to be bound by it.
(d) In the case of a statement, it must be signed by the expert and accompanied by a solicitor's certificate.

Section 264: A Judge who conducts a pre-trial conference shall fix the place of trial and assign a date for trial at the earliest practicable date after the pre-trial conference.

Section 274: At a trial of an action, unless the Court directs otherwise, the plaintiff shall make an opening address and then adduce evidence. When the plaintiff's evidence is concluded, the defendant shall make an opening address and then adduce evidence. When the defendant's evidence is concluded, the plaintiff may adduce reply evidence. Where the Court has made an order permitting two or more plaintiffs to put in separate cases, or where more than one defendant is separately represented, the order of presentation shall be directed by the Court.

Section 275: The Court may give directions at trial concerning the method of proving a fact or of adducing evidence.

Section 276: All exhibits adduced in evidence shall be marked and numbered.

Section 277: The Court may, in the presence of solicitors for the parties, inspect any place or thing in respect of which a question may arise at trial.

Section 278: Unless the Court directs otherwise, the parties shall be heard in argument, after all parties have been given full opportunity to put in their respective cases, in the order in which they adduced evidence. A party shall have a right to reply to the arguments of adverse parties and, if the party raises a new point of law, an adverse party may answer that point.

Section 279: Unless the Court orders otherwise, no expert witness's evidence is admissible at the trial of an action in respect of any issue unless, the issue has been defined by the pleadings, or the affidavit or statement of the expert witness prepared has been served, or the expert witness is available at the trial for cross-examination.

Section 280: Unless the Court orders otherwise, evidence in chief of an expert witness may be tendered at trial by, the witness reading into evidence all or part of an affidavit or statement, or the witness explaining any of the content of an affidavit or statement that has been read into evidence. An expert witness may tender other evidence in chief with the leave of the Court. With leave of the Court, all or part of an affidavit or statement referred to may be taken as read into evidence by the witness. Except with leave of the Court, there shall be no cross-examination before trial on affidavit or statements made by the expert witness.

Section 282: Unless the Court orders otherwise, witnesses at trial shall be examined orally in open Court. All witnesses shall testify under oath.

Section 282.1: The Court may require that some or all of the expert witnesses testify as a panel after the completion of the testimony of the non-expert witnesses of each party or at any other time that the Court may determine.

Section 282.2: Expert witnesses shall give their views and may be directed to comment on the views of other panel members and to make concluding statements. With leave of the Court, they may pose questions to other panel members. On completion of the testimony of the panel, the panel members may be cross-examined and re-examined in the sequence directed by the Court.

Section 284: Where on the day of a trial, a party who intends to call witnesses does not produce them or justify their absence, the Court may declare the party's proof closed.

Section 285: The Court may, at any time, order that any fact be proven by affidavit or that the affidavit of a witness be read at trial.

Section 287: Except with leave of the Court, no plan, photograph, model or other demonstrative evidence prepared or obtained for use at trial is admissible in evidence at trial, other than in the course of cross-examination, unless at least 30 days before the

commencement of the trial all other parties have been given the opportunity to inspect it and consent to its admission without further proof.

Jurisdictional Area: England and Wales

Data Protection Act 1998

There are eight data protection principles that must be followed in order to adhere to the stipulations of this Act. They are as follows:

1- Personal data shall be processed fairly and lawfully.

2- Personal data shall be obtained for one or more specified and lawful purposes.

3- Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they were collected.

4- Personal data shall be accurate and kept up to date.

5- The personal data that has been collected shall not be kept for longer than is necessary for the purpose or purposes for which it was collected.

6- Personal data shall be processed in accordance with the rights of the data subjects stipulated by this Act.

7- There will be appropriate technical and organisation measures in place to protect the personal data from unauthorized or unlawful processing, and against accidental loss, destruction or damage.

8- Personal data shall not be transferred outside the European Economic Area, unless that country or territory has adequate data protection measures in place.

In addition, Section 7, states that a data subject is entitled to be informed by the data controller of: what personal data is being held, the purpose or purposes for which such data has been or is being collected, and a list of who has access to the personal data.

Police and Criminal Evidence Act 1984

This Act controls the use of evidence in criminal proceedings. In regards to forensic archaeology, the following sections are the most relevant:

Section 78: Exclusion of unfair evidence – The Court may refuse to allow evidence

which may have an adverse effect on the fairness of the proceedings.

Section 81: Advance notice of expert evidence in Crown Court – The Court may require any party involved in the proceedings to disclose to the other party or parties expert evidence which they wish to present during the course of the proceedings.

Criminal Justice Act 2003

This Act controls the presentation and use of evidence in criminal proceedings. In regards to forensic archaeology, the following sections are the most important:

Section 35: Notification of names of experts instructed by defendant – If the accused wishes to use an expert witness in order to provide an expert opinion during the trial, they must give the Court and the prosecution a notice that specifies the expert's name and address.

Section 102: Important explanatory evidence – Evidence is deemed to be important explanatory evidence if without it the Court or jury would have difficulty in properly understanding other evidence presented in the case.

Section 107: Stopping the case where evidence is contaminated – If the Court is satisfied after the close of the case for the prosecution that the evidence presented to the Court is contaminated, and the contamination is such, that the conviction of the defendant would be unsafe, the Court must direct the jury to acquit the defendant or, if the Court decides that there ought to be a retrial, discharge the jury.

Section 109: Assumption of truth in assessment of relevance or probative value – In assessing the relevance or probative value of an item of evidence, the Court need not assume that the evidence is true if it appears, on the basis of the evidence presented to the Court, that no Court or jury could reasonably find such evidence to be true.

Section 118: Preservation of certain common law categories of admissibility- An expert witness may draw on expertise relevant to his or her field when presenting expert opinion evidence to the Court.

Section 125: Stopping the case where evidence is unconvincing – If during the course of proceedings the Court is satisfied after the close of the case for the prosecution that the

evidence provided by the witness is so unconvincing, that the conviction of the defendant would be unsafe, the Court must direct the jury to acquit the defendant or, if the Court decides that there ought to be a retrial, discharge the jury.

Section 126: Court's general discretion to exclude evidence – In criminal proceedings the Court may refuse to admit a statement as evidence, if the Court is satisfied that the case for excluding the statement outweighs the case for admitting it.

Section 139: Use of documents to refresh memory – A witness giving oral evidence in criminal proceedings about any matter can, at any stage, refresh their memory of it from a document that has been created and verified by that witness at an earlier time.

Criminal Evidence (Experts) Act 2011

This Act governs the admissibility of expert evidence in criminal proceedings. In relation to forensic archaeology, the following sections are the most relevant:

Section 1: Basic rules – Expert evidence will be deemed to be admissible in criminal proceedings if the Court is satisfied that such evidence will provide evidence that is likely to be outside the Judge's or jury's experience and knowledge. If there is any doubt about whether an expert's evidence should be classified as fact or opinion evidence, it is to be regarded as opinion evidence.

Section 2: "Qualified to do so" – An individual may be qualified to give expert evidence to the Court by virtue of study, training, experience or other appropriate means.

Section 3: Impartiality – The expert is required to provide the Court with objective and unbiased expert evidence. This duty outweighs any obligation to the person from whom the expert is receiving instructions or by whom the expert is being paid. If the Court believes there to be a significant risk that the expert will not or has not complied with these stipulations, the expert's evidence will not be deemed to be admissible, unless the Court determines that it is in the best interests of justice to do so.

Section 4: Reliability - Expert evidence is sufficiently reliable if the opinion is soundly based. Expert evidence may be dismissed on the basis of its lack of reliability if the opinion is based on: a hypothesis that has not been subjected to sufficient scrutiny

(experimental or other testing), flawed data, or relies on an examination, technique, method or process which has not been properly carried out or was not appropriate for use in the particular case.

Section 6: Reliability - If a protest is made to the Court that the expert evidence is not sufficiently reliable to be admitted, and it appears to the Court that it might not be, the party that is proposing to present the evidence to the Court must demonstrate that the expert evidence is sufficiently reliable to be admitted.

Section 9: Court-appointed experts – If the Court needs assistance in establishing whether an expert's evidence is sufficiently reliable to be admitted, the Court may appoint an expert to help it determine that question, if it believes it is in the interests of justice to do so.

Criminal Procedure Rules 2011

These rules govern the presentation of evidence in criminal proceedings. In regards to forensic archaeology, the following sections are the most significant:

Rule 33.1: Reference to expert – An 'expert' is an individual who is required to present or prepare expert evidence for criminal proceedings.

Rule 33.2: Expert's duty to the Court – The expert must provide the Court with an unbiased opinion on matters within their expertise. Experts also have an obligation to inform all parties and the Court if their opinion changes from that which was originally provided in the report or statement given to the Court as evidence.

Rule 33.3: Content of expert's report – An expert's report must:
(a) Contain the expert's qualifications, relevant experience and accreditation.
(b) Provide references of any literature that the expert has relied upon whilst making the report.
(c) Contain a statement summarising all of the facts that were given to expert which were influential in forming their opinion.
(d) Outline which of the facts stated in the report are within the expert's expertise.
(e) State who carried out any examination, measurement, test or experiment which the

expert has used in the report, and provide the qualifications, relevant experience and accreditation of that person.

(f) Provide a summary of the expert's findings.

(g) If there is a range of opinion regarding matters considered in the report, the expert should summarise these opinions, and give the reasons for their own.

(h) Contain a summary of the conclusions reached.

(i) Include a statement which explains that the expert has understood their duty to the Court, and that they have complied and will continue to comply with this duty throughout the proceedings.

(j) Include the same declaration of truth as is found in a witness statement.

Rule 33.4: Service of expert evidence – The party who wants to introduce expert evidence must inform the Court and the opposing party of their intention to do so. If the opposing party wishes to review a record of any examination, measurement, test or experiment on which the expert's findings or opinion will be based, the party must give them a copy, or provide them with an opportunity to inspect it.

Rule 33.6: Pre-hearing discussion of expert evidence – If more than one party wishes to introduce expert evidence to resolve a fact in issue, the Court may direct the experts to discuss the issues during the proceedings, and prepare a statement for the Court which outlines the factors on which they agree and disagree, and their reasons for doing so.

Jurisdictional Area: Scotland

Criminal Procedure (Scotland) Act 1995

This Act governs the presentation of evidence in criminal proceedings. In regards to forensic archaeology, the following sections are the most significant:

Section 67: Witnesses – The list of witnesses shall consist of the names of the witnesses together with an address at which they can be contacted.

Section 256: Agreements and admissions as to evidence - In any trial it shall not be necessary for the accused or the prosecutor to prove any fact which is admitted by the other, which is not in dispute between them.

Section 257: Duty to seek agreement of evidence – The prosecutor and the accused (or each of the accused if more than one) shall each identify any facts which are facts, which he would be seeking to prove, which he considers unlikely to be disputed by the other party (or any of the other parties), and which he does not wish to lead to oral evidence.

Section 281: Routine evidence: autopsy and forensic science reports – Where in a trial an autopsy report is lodged by the prosecutor it shall be presumed that the body of the person identified in that report is the body of the deceased identified in the indictment or complaint. At the time of lodging an autopsy or forensic science report as a production the prosecutor may intimate to the accused that it is intended that only one of the pathologists or forensic scientists purporting to have signed the report shall be called to give evidence in respect thereof. Where such intimation is given, the evidence of one of those pathologists or forensic scientists, shall be sufficient evidence of any fact or conclusion as to fact contained in the report and of the qualifications of the signatories.

Criminal Justice (Scotland) Act 2003

This Act controls the presentation and use of evidence in criminal proceedings. In regards to forensic archaeology, the following section is the most important:

Section 56: Retaining samples or relevant physical data where given voluntarily – A sample or relevant physical data taken from and with the consent of the person in connection with the investigation of an offence may be held and used in connection with the investigation and prosecution of that or any other offence as may any information derived from that sample or those data.

Jurisdictional Area: Northern Ireland

Criminal Evidence Act (Northern Ireland) 1923

This Act controls the use of evidence in criminal proceedings. In regards to forensic archaeology, the following sections are the most relevant:

Section 1: Competency of witnesses in criminal cases – Every person charged with an offence, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with another person.

Section 3: Right of reply – In cases where the right of reply depends upon the question of whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution's right to reply.

Police and Criminal Evidence Act 1984

This Act controls the use of evidence in criminal proceedings. In regards to forensic archaeology, the following sections are the most relevant:

Section 78: Exclusion of unfair evidence – In any proceedings the Court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the Court that, having regard to all circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it.

Section 81: Advance notice of expert evidence in Crown Court – Any party to the proceedings before the Court must disclose to the other party or parties any expert evidence which he proposes to adduce in the proceedings.

Criminal Justice (Evidence) (Northern Ireland) Order 2004

This Act controls the use of evidence in criminal proceedings. In regards to forensic archaeology, the following sections are the most relevant:

Section 7: Important explanatory evidence – Evidence is important explanatory evidence if without it, the Court or jury would find it impossible or difficult to properly

understand other evidence in the case, and its value for understanding the case as a whole is substantial.

Section 12: Stopping the case where evidence is contaminated – If on a defendant's trial before a Judge and jury evidence is found to be contaminated, and the contamination is such that, considering the importance of the evidence to the case against the defendant, his conviction of the offence would be unsafe. The Court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.

Section 14: Assumption of truth in the assessment of the relevance or probative value – The relevance or probative value of evidence is a reference to its relevance or probative value on the assumption that it is true. In assessing the relevance or probative value of an item of evidence for any purpose, the Court need not assume that the evidence is true if it appears, on the basis of any material before the Court (including any evidence it decides to hear on the matter), that no Court or jury could reasonably find it to be true.

Section 29: Stopping the case where evidence is unconvincing – If on a defendant's trial before a Judge and jury for an offence the Court is satisfied at any time after the close of the case for the prosecution that the evidence provided is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe.

Section 30: Court's general discretion to exclude evidence – In criminal proceedings the Court may refuse to admit a statement as evidence of a matter stated if the statement was made otherwise than in oral evidence in the proceedings, and the Court is satisfied that the case for excluding the statement substantially outweighs the case for admitting it, taking account of the value of the evidence.

Section 41: Use of documents to refresh memory – A person giving oral evidence in criminal proceedings about any matter may, at any stage in the course of doing so, refresh his memory of it from a document made or verified by him at an earlier time.

Jurisdictional Area: Ireland

Criminal Justice (Forensic Evidence) Act 1990

This Act controls the collection and use of forensic evidence in criminal proceedings. In regards to forensic archaeology, the following section is the most relevant:

Section 2: Power to take bodily samples – A member of the Garda may take, or cause to be taken, from a suspect for the purpose of forensic testing all or any of the following samples – blood, pubic hair, urine, saliva, hair other than pubic hair, a nail, any material found under the nail, a swab from any part of the body other than a body orifice or a genital region, a swab from a body orifice or genital region, a dental impression, a footprint or similar impression of any part of the person's body other than of his hand or mouth.

Rules of the Superior Courts (Evidence) 2007

These Superior Court Rules regulate the presentation and utilisation of evidence in both civil and criminal proceedings. In regards to forensic archaeology, the following sections are the most important:

Section 6: The Court may in any cause or matter, at any stage of the proceedings, order the attendance of any person for the purpose of producing any writings or other documents named in the order which the Court may think fit to be produced; provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial.

Section 7: Any person willfully disobeying any order requiring his attendance for the purpose of being examined or producing any document, shall be deemed guilty of contempt of Court, and may be dealt with accordingly.

Section 8: Any person required to attend for the purpose of being examined, or of producing any document, shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in Court.

Section 9: Where any witness or person is ordered to be examined before any officer of

the Court, or before any person appointed for the purpose, the person taking the examination shall be furnished by the party on whose application the order was made with a copy of the summons, and pleadings, if any, or with a copy of the documents necessary to inform the person taking the examination of the questions at issue between the parties.

Section 10: The examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses shall be subject to cross-examination and re-examination.

Section 11: The depositions taken before an officer of the Court, or before any other person appointed to take the examination, shall be taken down in writing by or in the presence of the examiner, so as to represent as nearly as may be the statement of the witness, and when completed shall be read over to the witness and signed by him in the presence of the parties, or such of them as may think fit to attend. If the witness shall refuse to sign the depositions, the examiner shall sign the same. The examiner may put any question to the witness as to the meaning of any answer, or as to any matter arising in the course of the examination. Any questions which may be objected to shall be taken down by the examiner in the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question.

Section 12: If any person duly summoned by subpoena to attend for examination shall refuse to attend, or if having attended, he shall refuse to be sworn or to answer any lawful question, a certificate of such refusal, signed by the examiner, shall be filed in the Central Office, and thereupon the party requiring the attendance of the witness may apply to the Court ex parte or on the notice for an order directing the witness to attend, or to be sworn, or to answer any question, as the case may be.

Section 13: If any witness shall object to any question which may be put to him before an examiner, the question so put, and the objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the Central Office to be there filed, and the validity of the objection shall be decided by the Court.

Section 15: When the examination of any witness before any examiner shall have been

concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the Central Office, and there filed.

Section 16: The person taking the examination of a witness under this Order may, and if need be shall make, a special report to the Court touching such examination, and the conduct or absence of any witness or other person thereon, and the Court may direct such proceedings and make such order as upon the report it may think just.

Section 17: Except where by this Order otherwise provided or directed by the Court no deposition shall be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the Court is satisfied that the deponent is dead, or beyond the jurisdiction of the Court, or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence saving all just exceptions without proof of the signature to such certificate.

Section 19: Any party in any cause or matter may by subpoena ad testificandum or duces tecum require the attendance of any witness before an officer of the Court, or other person appointed to take the examination, for the purpose of using his evidence upon any proceeding in the cause or matter in like manner as such witness would be bound to attend and be examined at the hearing or trial; and any party or witness having made an affidavit to be used or which shall be used on any proceeding in the cause or matter shall be bound on being served with such subpoena to attend before such officer or person for cross-examination.

Section 20: Evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial.

Section 21: The practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial shall extend and be applicable to evidence taken in any cause or matter at any stage.

Section 22: The practice of the Court with respect to evidence at a trial, when applied to

evidence to be taken before an officer of the Court or other person in any cause or matter after the hearing or trial, shall be subject to any special directions which may be given in any case.

Section 23: No affidavit or deposition filed or made before issue joined in any cause or matter shall without special leave of the Court be received at the hearing or trial thereof, unless within one month after issue joined or within such longer time as may be allowed by special leave of the Court, notice in writing shall have been given by the party intending to use the same to the opposing party of his intention in that behalf.

Section 24: All evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter.

Jurisdictional Area: United States of America

Frye Standard 1923

This standard was developed as a result of a landmark federal case - Frye v. United States, 293F. 1013 (D.C. Cir. 1923). This case considered the admissibility of evidence based on the results of a systolic blood pressure test; a technique that had not yet been widely accepted amongst physiological and psychological academic community. In response, the Court stated that any scientific technique that is used to provide evidence to the Court "must be sufficiently established to have gained general acceptance from the particular field in which in belongs" (ID. at 1014). Thus, under the auspices of the Frye Standard, experts must demonstrate that the technique that they had chosen to use during the course of a forensic investigation has been generally accepted by their peers in order to ensure that the evidence they present as a result of using this technique is accepted by the Court.

Daubert Standard 1993

This standard was developed as a result of a Supreme Court case - Daubert V. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 249, (U.S. Jun 28, 1993) (No 92-102). The case centred on the admissibility of innovative or unusual scientific knowledge in court proceedings. The Court determined that such evidence can only be admitted into proceedings once it has been established that such evidence is

reliable and scientifically valid. The trial also emphasised the role of the Judge as the "gatekeeper" of the Court, and that he or she must prevent "junk science" from being entered into the court proceedings as evidence. As a consequence, five factors were developed to aid the Judge in assessing whether an expert's scientific testimony is based on a methodology that is scientific and is relevant to the facts in issue –

Factor 1 - Whether the technique or theory used can be and has been tested.
Factor 2 - Whether the technique or theory has been subjected to peer review and publication.
Factor 3 - Whether the technique or theory has a known or potential rate of error.
Factor 4 - Whether the technique or theory has standards controlling its operation and whether these standards have been maintained.
Factor 5 - Whether the technique or theory has gained widespread acceptance within the particular field to which it belongs.

Federal Rules of Evidence 2011

These rules regulate the presentation and utilisation of evidence in both civil and criminal proceedings. In regards to forensic archaeology, the following sections are the most important:

Rule 401: Test for relevant evidence - Evidence is deemed to be relevant if it will make a fact more or less probable than it would have been without the evidence.

Rule 402: General admissibility of relevant evidence – Evidence that has been established to be relevant is admissible unless any of the following deem otherwise: the United States Constitution, a Federal Statute, the Federal Rules of Evidence (2011), or other rules that have been prescribed by the Supreme Court. If evidence has been classified as irrelevant, it will not be admissible in the court proceedings.

Rule 403: Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons - The Court has the authority to exclude relevant evidence if its probative value is outweighed by one or more of the following factors: unfair prejudice to one of the parties, it will confuse the facts in issue, it will mislead the jury, it will result in an undue delay or waste of the Court's time, or if one of the parties is needlessly presenting

cumulative evidence.

Rule 601: Competency to testify in general - Every person is competent to be a witness unless the Federal Rules of Evidence (2011) state otherwise.

Rule 615: Excluding witnesses – At a party's or Judge's request, witnesses can be excluded from the Courtroom so that they cannot hear other witnesses' testimonies.

Rule 702: Testimony by expert witnesses – A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion if the following requirements are met:

- The expert's scientific, technical, or other specialised knowledge will help the Court to understand the evidence or resolve a fact in issue.
- The testimony is based on sufficient facts or data.
- The testimony is the product of reliable principles and methods.
- The expert in question has applied the principles and methods appropriately to the facts of the case.

Rule 703: Bases of an expert's opinion testimony - An expert may base his or her opinion on facts or data in the case that he or she has been made aware of or has been personally involved with. If experts within the particular field in question would rely on such facts or data in order to form an expert opinion on the fact in issue, such facts or data need not to have met the admissibility regulations for the expert's opinion to be deemed admissible. But, if such facts or data would otherwise be inadmissible, the expert may only present them to the jury or presiding authority if their probative value outweighs their prejudicial effect.

Rule 705: Disclosing the facts or data underlying an expert's opinion - Unless the Judge or individual presiding over the court proceedings says otherwise, an expert may state his or her opinion and give their reasons for it before presenting the underlying facts or data.

Rule 706: Court-appointed expert witnesses - A party or court motion may order the parties to explain why expert witnesses should not be appointed, and may request the

parties to submit nominations. The Court can then appoint any expert that the parties agree upon, or of its own choosing, as long as the selected expert consents to act in this role. The Court will then inform the expert of their duties either orally or in writing. As a court-appointed expert witness the expert must advise all parties of any findings that they make. The expert may also be called to testify during the court proceedings, and can be cross-examined by either party. This rule does not prevent either party from calling upon their own experts to testify.