NITIJELA OF THE MARSHALL ISLANDS

24th CONSTITUTIONAL REGULAR SESSION, 2003 BILL NO:141ND1

P.L. 2003-87

AN ACT

To amend certain provisions of the Evidence Act, 1989.

BE IT ENACTED BY THE NITIJELA OF THE MARSHALL ISLANDS:

Section 1. **Short Title.**

This Act may be cited as the Evidence (Amendment) Act 2003.

Section 2. **Amendments.**

(1) Rule 101 of the Evidence Act of 1989, 28 MIRC Chp. 1 ("Evidence Act"), is amended to read as follows:

"**Rule 101. Scope.**

These Rules govern proceedings in all of the courts of the Marshall Islands and in master's hearings as they may be required by the High Court or a District Court, except as otherwise provided in these Rules. In the Traditional Rights Court these Rules shall be followed, unless the High Court shall prescribe special rules. These Rules may be followed in civil or criminal proceedings in any Community Court when such court deems it best.

(2) Rule **103(a)** of the Evidence Act is amended to read as follows:

"**(a) Effect of erroneous ruling.** Error may not be

predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(3) Rule **201(g)** of the Evidence Act is amended to read as follows:

"**(g) Instructing jury.** In a criminal case before a jury, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed."

(4) Rule **404(a)(1)** of the Evidence Act is amended to read as follows:

"**(1) Character of accused.** Evidence of a pertinent trait of a person's character offered by an accused, or by the prosecution to rebut

the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;"

(5) Rule **404(b)** of the Evidence Act is amended to read as follows:

"**(b) Other crimes, wrongs, or acts**. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

(6) Rule **407** of the Evidence Act is amended to read as follows:

**"Rule 407. Subsequent remedial measures.**

When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not

admissible to prove negligence or culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This Rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

(7) Rule **408** of the Evidence Act is amended to read as follows:

"**Rule 408. Compromise and offers to compromise.**

Evidence of (1) furnishing or offering or promising to furnish; or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This Rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This Rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

(8) Rule **410** of the Evidence Act is amended to read as follows:

"**Rule 410. Inadmissibility of pleas, plea discussions, and related statements.**

Except as otherwise provided in this Rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere; or

(3) any statement made in the course of any proceedings under the rules of criminal procedure regarding either of the foregoing pleas;

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which results in a plea of guilty later withdrawn. However, such a statement is admissible;

(i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or

(ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record

and in the presence of counsel.

Rule **412** of the Evidence Act is repealed and in its place is inserted a new Rule 412 that reads as follows:

"Rule 412. **Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition**

(a) **Evidence Generally Inadmissible.** The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) **Exceptions.**

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of

sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) **Procedure To Determine Admissibility.**

(1) A party intending to offer evidence under subdivision (b) must—

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged

victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(9) There is inserted after Rule 412 three new rules numbered Rule 413, Rule 414 and Rule 415 that read as follows:

**Rule 413. Evidence of Similar Crimes in Sexual Assault Cases**

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under the laws of the Republic that involved

(1) any conduct proscribed by Chapter 31, Sections 151-153 of the Marshall Islands Revised Code, and any amendments or replacements thereof;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

**Rule 414. Evidence of Similar Crimes in Child Molestation Cases**

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may

be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under the laws of the Republic that involved —

(1) any conduct proscribed by Chapter 31, Sections 151-153 of the Marshall Islands Revised Code, and any amendments or replacements thereof that was committed in relation to a child;

(2) ***reserved***

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the

defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).

**Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation**

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(10) Rule 601 of the Evidence Act is amended to read as follows:

**Rule 601. General Rule of competency.**

Every person is competent to be a witness except as otherwise provided in these Rules.

(11) Rule 609(a) of the Evidence Act is amended to read as follows:

(a) **General rule.** For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(12) Rule 612 of the Evidence Act is amended to read as follows:

**Rule 612. Writing used to refresh memory.**

If a witness uses a writing to refresh memory for the purpose of testifying, either:

(1) while testifying; or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this Rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

(13) Rule 615 of the Evidence Act is amended to read as follows:

**Rule 615. Exclusion of Witnesses.**

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This Rule does not authorize exclusion of:

(1) a party who is a natural person; or

(2) an officer or employee of a party which is not a natural person designated as its representative by its attorney; or

(3) a person whose presence is shown by a party to be essential to the presentation of the party's cause; or

(4) a person authorized by statute to be present.

(14) Rule 701 of the Evidence Act is amended to read as follows:

**Rule 701. Opinion testimony by lay witnesses.**

If the witness is not testifying as an expert, the witness's testimony in the form of opinion or inferences is limited to those opinions or inferences which are:

(1) rationally based on the perception of the witness; and

(2) helpful to a clear understanding of the

witness's testimony or the determination of a fact in issue; and

(3) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

(15) Rule 702 of the Evidence Act is amended to read as follows:

**Rule 702. Testimony by experts.**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if

(1) the testimony is based upon sufficient facts or data,

(2) the testimony is the product of reliable principles and methods, and

(3) the witness has applied the principles and methods reliably to the facts of the case.

(16) Rule 703 of the Evidence Act is amended to read as follows:

**Rule 703. Bases of opinion testimony by experts.**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the

expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

(17) Rule 801(d)(2) of the Evidence Act is amended to read as follows:

"**(2) Admission by party-opponent**. The statement is offered against a party and is:

(A) the party's own statement, in either an individual or a representative capacity; or

(B) a statement of which the party has manifested adoption or belief in its truth;

(C) a statement by a person authorized by the party to make a statement concerning the subject;

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

(18) Rule 803(6) of the Evidence Act is amended to read as follows:

**(6) Records of regularly conducted activity**. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this Paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(19) Rule 803(24) of the Evidence Act is repealed and transferred to a new Rule 807.

(20) Rule 804(5) of the Evidence Act is repealed and transferred to a new rule 807.

(21) There is inserted a new Rule 804(6) that reads as follows:

**(6) Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(22) There is inserted a new Rule 807 that reads as follows:

**Rule 807. Other exceptions.**

A statement not specifically covered by Rule 803 or 804 having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that:

(A) the statement is offered as evidence of a material fact;

(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(C) the general purposes of these Rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the

adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

(23) There is inserted after Rule 902(10) two new rules, Rule 902(11) and rule 902(12), which read as follows:

(11) **Certified domestic records of regularly conducted activity.** The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of the Nitijela or rule prescribed by the High Court pursuant to statutory authority, certifying that the record;

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the

record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(12) **Certified foreign records of regularly conducted activity.** In a civil case, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record;

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse

parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

(24) Rule 1008 of the Evidence Act is amended to read as follows:

**Rule 1008. Functions of court and jury.**

When the admissibility of other evidence of contents of writings, recordings, or photographs under these Rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised:

(a) whether the asserted writing ever existed;

(b) whether another writing, recording, or photograph produced at the trial is the original; or

(c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Section 3. **Effective Date.**

This Act shall take effect upon certification in accordance with Article IV, Section 21 of the Constitution.

**CERTIFICATE**

**I hereby certify:**

(1) that Nitijela Bill No. 141 ND-1 was passed by the Nitijela of the Marshall Islands on the 22nd day of September, 2003; and

(2) that I am satisfied that Nitijela Bill No. 141 ND-1 was passed in accordance with the relevant provisions of the Constitution of the Republic of the Marshall Islands and the Rules of Procedures of the Nitijela .

I hereby place my signature before the Clerk of the Nitijela this 3rd day of December, 2003.

**Litokwa Tomeing,**
Speaker,
Nitijela of the Marshall Islands

**Attest:**

**Joe E. Riklon**
Clerk,
Nitijela of the Marshall Islands