

## **EXPLANATORY STATEMENT**

### ***EVIDENCE REGULATIONS 2018***

Issued by the authority of the Attorney-General

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#### ***Purpose and Operation of the Instrument***

Section 197 of the *Evidence Act 1995* (Cth) (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Evidence Regulations 1995* (the Principal Regulations) sunset on 1 April 2019 and have been remade with minor amendments to ensure the Regulations remain fit for purpose and meet the needs of the community. The Principal Regulations generally provide explanatory material and forms relating to:

- A party giving notice of intention to rely on the tendency rule, the coincidence rule or exceptions to the hearsay rule,
- Prescribing the form of a certificate issued in relation to privilege against self-incrimination,
- Declaring a State and Territory provision of a law as a prescribed provision for the purpose of a certificate issued in relation to privilege against self-incrimination, and
- Prescribing the form of affidavits by State and Territory police officers and members of the Australian Federal Police in relation to fingerprint evidence.

The *Evidence Regulations 2018* (the Regulations):

- Remove a section in the Principal Regulations which referred to a repealed section of the Act;
- Add the *Evidence Act 2011* (ACT) to section 9 of the Regulations as a prescribed Act for the purpose of self-incrimination certificates;
- Amend Forms 2 and 3 in Schedule 1 to the Regulations to align with current practice in relation to fingerprint evidence;
- Repeal the Principal Regulations (Schedule 2).

Details of the Regulations are set out in **Attachment A**.

#### ***Consultation***

The Attorney-General's Department (the Department) undertook a consultation process with relevant Commonwealth, State and Territory agencies such as Attorney-General's Departments, courts, police forces, and prosecuting authorities. Feedback from this consultation has been incorporated into the proposed Regulations.

#### ***Best Practice Regulation Requirements***

The Regulations have a minor regulatory impact on business, community organisations and individuals. The Office of Best Practice Regulation was consulted about the Regulations and advised that a Regulation Impact Statement was not required.

***Human Rights Compatibility***

This instrument is disallowable. A Statement of Compatibility with Human Rights is therefore provided at **Attachment B**.

**Details of the Evidence Regulations 2018**

**Section 1 – Name**

This section would provide that the title of the proposed Regulations is the *Evidence Regulations 2018*.

**Section 2 – Commencement**

This section would provide that the proposed Regulations commence the day after the instrument is registered.

**Section 3 – Authority**

This section would provide that the proposed Regulations are made under the *Evidence Act 1995*.

**Section 4 – Schedules**

This section would provide that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

**Section 5 – Definitions**

This section would define a number of terms used in the proposed Regulations.

**Section 6 – Exceptions to hearsay rule—notices of previous representations**

This section would prescribe the form of giving notice of a party's intention to rely on evidence of a previous representation in accordance with the subsections regarding exceptions to the hearsay rule.

**Section 7 – The tendency rule and the coincidence rule—form of notices**

This section would prescribe the form of giving notice of a party's intention to adduce evidence which would rely on the tendency rule or the coincidence rule.

**Section 8 – Privilege against self-incrimination—form of certificate**

This section would provide for certificates issued for the purposes of section 128 of the Act (privilege in respect of self-incrimination in other proceedings) to be in accordance with Form 1 in the Schedule to the proposed Regulations.

**Section 9 – State and Territory provisions about certificates for subsection 128(12) of the Act**

This section would prescribe the relevant provisions in State or Territory legislation to be recognised in proceedings to which the Act applies.

#### Section 10 – Fingerprint evidence of identity—affidavits by State or Territory police officers

This section would prescribe Form 2 in the Schedule to the proposed Regulations for the purpose of a State or Territory police officer completing an affidavit in relation to fingerprint identification of a person alleged to have been convicted in that State or Territory of an offence.

#### Section 11 – Fingerprint evidence of identity—affidavits by Australian Federal Police officers

This section would prescribe Form 3 in the Schedule to the proposed Regulations for the purpose of an Australian Federal Police officer completing an affidavit in relation to fingerprint identification of a person alleged to have been convicted of an offence against a law of the Commonwealth.

#### Section 12 – State and Territory laws for certain definitions in the Act

This section would specify the relevant State and Territory legislation for the purpose of certain definitions which refer to a law of a State or Territory in the Dictionary to the Act.

#### Schedule 1 – Forms

Schedule 1 would provide the forms referred to in section 8, 10 and 11 of the proposed Regulations.

#### Schedule 2 – Repeals

Schedule 2 would repeal the whole of the Principal Regulations.

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

***Evidence Regulations 2018***

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Regulations**

1. The purpose of the *Evidence Regulations 2018* (the Regulations) is to provide explanatory material and forms relating to:
  - A party giving notice of intention to rely on the tendency rule (evidence of conduct, character or reputation, adduced to prove a ‘tendency’ to act or think in a particular way), the coincidence rule (evidence that ‘two or more events occurred’, adduced to prove that a person did a particular act or had a particular state of mind on the basis that it is improbable that the events occurred coincidentally) or exceptions to the hearsay rule (evidence of previous representation);
  - Prescribing the form of a certificate issued in relation to privilege against self-incrimination;
  - Declaring a State and Territory provision of a law as a prescribed provision for the purpose of a certificate issued in relation to privilege against self-incrimination; and
  - Prescribing the form of affidavits by State and Territory police officers and members of the Australian Federal Police in relation to fingerprint evidence.
2. The Regulations are proposed to be remade with the following amendments:
  - Remove a section in the Principal Regulations which refers to a repealed section of the Act;
  - Add the *Evidence Act 2011* (ACT) to section 9 of the Regulations as a prescribed Act for the purpose of self-incrimination certificates;
  - Amend Forms 2 and 3 in Schedule 1 to the Regulations to reflect that fingerprint ‘cards’ are no longer in use, and align with current terminology;
  - Repeal the Principal Regulations (Schedule 2).

**Human rights implications**

3. The Regulations support the *Evidence Act 1995* (the Act) which sets out the rules of evidence that apply in proceedings in the federal courts. The instrument engages the following human rights:
  - The right to a fair trial in criminal proceedings and a fair hearing in civil proceedings;
  - The presumption of innocence; and
  - Minimum guarantees in criminal proceedings.

### *Fair trial and fair hearing rights*

4. The Instrument engages the right to a fair trial and fair hearing in civil proceedings in accordance with article 14 of the *International Covenant on Civil and Political Rights* (ICCPR), article 40 of the *Convention on the Rights of the Child* and article 13 of the *Convention on the Rights of Persons with Disabilities*.
5. These articles provide that all persons shall be equal before the courts and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
6. The Regulations promote equality before courts for both criminal and civil proceedings, and ensure that the rules of evidence are applied equally across all proceedings.
7. The Regulations achieve this by providing for the form of notice to be given in circumstances where a party intends to adduce evidence under the tendency rule, the coincidence rule, or the hearsay rule, ensuring a clear and consistent approach across proceedings.

### *Presumption of innocence*

8. The Instrument engages the presumption of innocence in criminal matters in accordance with article 14(2) of the ICCPR.
9. The presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt.
10. The Regulations promote the presumption of innocence by prescribing procedural aspects for adducing evidence which the prosecution must comply with irrespective of a view formed in relation to the guilt of the accused. This includes instances where a party intends to rely on the tendency rule, the coincidence rule or the hearsay rule. For such evidence to be admissible it must have significant probative value, and reasonable notice must be given in the form required by these Regulations.
11. The Regulations further promote these rights by supporting the Act to uphold privilege against self-incrimination, and provide for an appropriate form for a court to issue a certificate confirming a witness will give evidence that may be self-incriminating, but that this evidence cannot be used against them in other proceedings.

### *Minimum guarantees in criminal proceedings*

12. The Instrument engages minimum guarantees in criminal proceedings in accordance with article 14, subsection (3), (5), (6) and (7) of the ICCPR.
13. The Instrument promotes these rights as it contains procedural guarantees available to a person charged with a criminal offence, such as prescribing the form of notice a party must give if they intend to rely on the tendency rule, the coincidence rule, or exceptions to the hearsay rule.
14. As identified above, the Regulations further promote minimum guarantees by supporting the Act to uphold privilege against self-incrimination, and provide for an appropriate form for a court to issue a certificate confirming a witness will give evidence that may be self-incriminating, but that this evidence cannot be used against them in other proceedings.

*Conclusion*

15. The Regulations are compatible with human rights because they support the following rights: fair trial and fair hearing rights, minimum guarantees in criminal proceedings and the presumption of innocence.
16. The Regulations intend to regulate aspects of criminal trial procedure and civil litigation procedure, thereby providing protection to an accused in criminal proceedings, and to litigants in civil proceedings.