



## Evidence Regulations 2018

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I, the Honourable Paul de Jersey AC, Administrator of the Government of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 06 December 2018

Paul de Jersey AC  
Administrator of the Government of the Commonwealth of Australia

By His Excellency's Command

Christian Porter  
Attorney-General

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## 1 Name

This instrument is the *Evidence Regulations 2018*.

## 2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

| Commencement information        |  |                 |
|---------------------------------|--|-----------------|
| Column 1                        | Column 2                                     | Column 3        |
| Provisions                      | Commencement                                 | Date/Details    |
| 1. The whole of this instrument | The day after this instrument is registered. | 8 December 2018 |

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

## 3 Authority

This instrument is made under the *Evidence Act 1995*.

## 4 Schedules

Each instrument that is specified in Schedule 2 to this instrument is amended or repealed as set out in the applicable items in that Schedule, and any other item in that Schedule has effect according to its terms.

## 5 Definitions

- (1) In this instrument:

*Act* means the *Evidence Act 1995*.

*address* includes a private, business or official address.

*notice of previous representation* means a notice given under subsection 67(1) of the Act.

*notifying party*, in relation to a notice, means the person giving the notice.

- (2) In this instrument, a reference to a Form by number is a reference to the Form of that number set out in Schedule 1.

Note: Section 25C of the *Acts Interpretation Act 1901* provides that strict compliance with a form is not required and substantial compliance is sufficient.

## **6 Exceptions to hearsay rule—notices of previous representations**

- (1) This section is made for the purposes of section 67 of the Act.
- (2) A notice of previous representation must state:
  - (a) subject to subsection (6), the substance of evidence of a previous representation that the notifying party intends to adduce; and
  - (b) the substance of all other relevant representations made by the person who made that previous representation, so far as they are known to the notifying party; and
  - (c) particulars of:
    - (i) the date, time, place and circumstances at or in which each of the representations mentioned in paragraph (a) or (b) was made; and
    - (ii) the names of the persons by whom, and the persons to whom, each of those representations was made; and
    - (iii) in a civil proceeding—the address of each person so named; so far as they are known to the notifying party.
- (3) If a notifying party intends to rely on any of paragraphs 63(2)(a) or (b), 65(2)(a), (b), (c) or (d), 65(3)(a) or (b) or 65(8)(a) or (b) of the Act, the party's notice of previous representation must state particulars of the facts on the basis of which it is alleged that the person who made a representation referred to in the notice is not available to testify concerning the fact to be proved by adducing evidence of that representation.
- (4) If a notifying party intends to rely on paragraph 64(2)(a) or (b) of the Act, the party's notice of previous representation must state particulars of the facts that the party will rely on to establish the grounds specified in subsection 64(2) of the Act.
- (5) If a notice of previous representation refers to a previous representation that is in writing:
  - (a) a copy of the document, or of the relevant portion of the document, containing the representation must be attached to the notice; and
  - (b) the notice must identify the document unless:
    - (i) a copy of the document is attached to the notice; and
    - (ii) the identity of the document is apparent on the face of the copy.
- (6) Where a copy of a document, or of a portion of a document, is attached to a notice it is a sufficient compliance for the purposes of paragraph (2)(a) to specify in the notice, or in the copy of a document or portion of a document attached to the notice, the representation evidence of which the notifying party intends to adduce.
- (7) On the application of a party in a criminal proceeding, the court may make an order directing the notifying party to disclose the address of any person named in a notice of previous representation.
- (8) The direction may be given on the terms the court considers appropriate.

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

- (1) This section is made for the purpose of section 99 of the Act.
- (2) A notice given under subsection 97(1) of the Act (relating to the tendency rule) must state:
  - (a) the substance of the evidence of the kind referred to in that subsection that the party giving the notice intends to adduce; and
  - (b) if that evidence consists of, or includes, evidence of the conduct of a person, particulars of:
    - (i) the date, time, place and circumstances at or in which the conduct occurred; and
    - (ii) the names of each person who saw, heard or otherwise perceived the conduct; and
    - (iii) in a civil proceeding—the address of each person so named; so far as they are known to the notifying party.
- (3) A notice given under subsection 98(1) of the Act (relating to the coincidence rule) must state:
  - (a) the substance of the evidence of the occurrence of 2 or more events that the party giving the notice intends to adduce; and
  - (b) particulars of:
    - (i) the date, time, place and circumstances at or in which each of those events occurred; and
    - (ii) the names of each person who saw, heard or otherwise perceived each of those events; and
    - (iii) in a civil proceeding—the address of each person so named; so far as they are known to the notifying party.
- (4) On the application of a party in a criminal proceeding, the court may make an order directing the notifying party to disclose the address of any person named in a notice mentioned in this section.
- (5) The direction may be given on the terms the court considers appropriate.

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

- (1) A certificate under section 128 or 128A of the Act may be in accordance with Form 1.
- (2) A certificate is not liable to be called into question by reason of its non-compliance with Form 1.

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

For the purposes of paragraph 128(13)(b) of the Act, the following provisions are prescribed for the purposes of subsection 128(12) of the Act:

- (a) section 128 of the *Evidence Act 2008* (Vic);
- (b) section 11 of the *Evidence Act 1906* (WA);
- (c) section 128 of the *Evidence Act 2001* (Tas.);

(d) section 128 of the *Evidence Act 2011* (ACT).

**10 Fingerprint evidence of identity—affidavits by State or Territory police officers**

For the purposes of paragraph 179(1)(a) of the Act, Form 2 is prescribed.

**11 Fingerprint evidence of identity—affidavits by Australian Federal Police officers**

For the purposes of paragraph 180(1)(a) of the Act, Form 3 is prescribed.

**12 State and Territory laws for certain definitions in the Act**

- (1) For the purposes of the definitions of *Australian lawyer*, *Australian legal practitioner* and *Australian practising certificate* in Part 1 of the Dictionary at the end of the Act, the following laws are specified:
  - (a) the *Legal Profession Uniform Law Application Act 2014* (NSW);
  - (b) the *Legal Profession Uniform Law Application Act 2014* (Vic);
  - (c) the *Legal Profession Act 2007* (Qld);
  - (d) the *Legal Profession Act 2008* (WA);
  - (e) the *Legal Practitioners Act 1981* (SA);
  - (f) the *Legal Profession Act 2007* (Tas.);
  - (g) the *Legal Profession Act 2006* (ACT);
  - (h) the *Legal Profession Act 2006* (NT).
  
- (2) For the purposes of the definition of *Australian-registered foreign lawyer* in Part 1 of the Dictionary at the end of the Act, the following laws are specified:
  - (a) the *Legal Profession Uniform Law Application Act 2014* (NSW);
  - (b) the *Legal Profession Uniform Law Application Act 2014* (Vic);
  - (c) the *Legal Profession Act 2007* (Qld);
  - (d) the *Legal Profession Act 2008* (WA);
  - (e) the *Legal Profession Act 2007* (Tas.);
  - (f) the *Legal Profession Act 2006* (ACT);
  - (g) the *Legal Profession Act 2006* (NT).



## Schedule 1—Forms

### Form 1—Certificate under section 128 or 128A of the Evidence Act 1995

Note: See subsection 8(1).

[Set out heading to action or matter]

#### CERTIFICATE UNDER SECTION 128 OR 128A OF THE EVIDENCE ACT 1995

This Court certifies under section 128\*/128A\* of the *Evidence Act 1995* of the Commonwealth that evidence in these proceedings by [*state name of witness*] on [*state date or dates*], a record of which is attached to this certificate\*, is evidence\*/information\* to which subsection 128(7)\*/128A(8)\* of that Act applies.

[*A transcript, or other record, of the evidence is to be attached to this certificate, and duly authenticated by the court or its proper officer.*]

Dated:

L.S.

(*affix seal*)

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Judge or magistrate of the Court

*\*Delete if not applicable*

Note: Subsection 128(7) of the *Evidence Act 1995* provides as follows:

(7) In any proceeding in an Australian court:

- (a) evidence given by a person in respect of which a certificate under this section has been given; and
- (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence;

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

Subsection 128A(8) of the *Evidence Act 1995* provides as follows:

(8) In any proceeding in an Australian court:

- (a) evidence of information disclosed by a relevant person in respect of which a certificate has been given under this section; and
- (b) evidence of any information, document or thing obtained as a direct result or indirect consequence of the relevant person having disclosed that information;

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence concerned.

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## Form 2—Affidavit of member of State or Territory police force concerning fingerprints

Note: See section 10.

### Section 179 of the Evidence Act 1995

#### AFFIDAVIT OF MEMBER OF STATE OR TERRITORY POLICE FORCE CONCERNING FINGERPRINTS

[Set out heading to action or matter]

I, [name of deponent] of [address of deponent], a member of the police force of [State or Territory] make oath and say<sup>\*</sup>/affirm<sup>\*</sup>:

1. I am a fingerprint expert for the police force of [State or Territory].
2. I have examined the fingerprint form marked for identification with the letter 'A'.
3. I have compared the fingerprints shown on that form with the fingerprints shown on the fingerprint form in the records held by the police force of [State or Territory] showing the fingerprints of [name of person and alias, if any].
4. The fingerprints on those forms were compared and in my opinion were made by the same source.
5. According to the records of the police force of [State or Territory], which I believe to be accurate, [name of person] was convicted in that State<sup>\*</sup>/Territory<sup>\*</sup> of the following offences:
6. Annexed to this affidavit and marked with the letters [insert an alphabetical sequence of letters, commencing at 'B', corresponding to the number of annexures], are certified copies or certificates of conviction for each of those convictions.
7. From an examination of the records referred to above, I believe that the person referred to in each annexed certified copy or certificate as having been convicted of the offence stated in it is the person whose fingerprints are shown on the fingerprint forms referred to in paragraph 3 of this affidavit.

SWORN<sup>\*</sup>/AFFIRMED<sup>\*</sup>

by the deponent at [place]

this            day

of [month and year] .

Before me:

(signature)

(signature)

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A Justice of the Peace<sup>\*</sup>/notary  
public<sup>\*</sup>/lawyer<sup>\*</sup>/person  
authorised to take  
affidavits in the Australian  
Capital Territory<sup>\*</sup>.

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Deponent

<sup>\*</sup>delete as appropriate

## **Form 3—Affidavit of member of Australian Federal Police concerning fingerprints**

Note: See section 11.

### AFFIDAVIT OF MEMBER OF AUSTRALIAN FEDERAL POLICE CONCERNING FINGERPRINTS

[Set out heading to action or matter]

I, [name of deponent] of [address of deponent], a member\*/special member\*/staff member\* of the Australian Federal Police of, make oath and say\*/affirm\*:

1. I am a fingerprint expert for the Australian Federal Police.
2. I have examined the fingerprint form marked for identification with the letter 'A'.
3. I have compared the fingerprints shown on that form with the fingerprints shown on the fingerprint form in the records held by the Australian Federal Police showing the fingerprints of [name of person and alias, if any].
4. The fingerprints on those forms were compared and in my opinion were made by the same source.
5. According to the records of the Australian Federal Police, which I believe to be accurate, [name of person] was convicted of the following offences against a law of the Commonwealth:
6. Annexed to this affidavit, and marked with the letters [insert an alphabetical sequence of letters, commencing at 'B', corresponding to the number of annexures], are certified copies or certificates of conviction for each of those convictions.
7. From an examination of the records referred to above, I believe that the person referred to in each annexed certified copy or certificate as having been convicted of the offence stated in it is the person whose fingerprints are shown on the fingerprint forms referred to in paragraph 3 of this affidavit.

SWORN\*/AFFIRMED\*

by the deponent at [place]

this day

of [month and year]

Before me:

(signature)

(signature)

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A Justice of the Peace\*/notary  
public\*/lawyer\*/person  
authorised to take  
affidavits in the Australian

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Deponent

**Schedule 1** Forms

**Form 3** Affidavit of member of Australian Federal Police concerning fingerprints

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Capital Territory\*.

*\*delete as appropriate*

## **Schedule 2—Repeals**

### *Evidence Regulations 1995*

#### **1 The whole of the instrument**

Repeal the instrument.