

EVIDENCE AMENDMENT (SELF-INCRIMINATION) REGULATIONS 2023

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

under section 197 of the *Evidence Act 1995* (Cth)

PURPOSE AND OPERATION OF THE INSTRUMENT

Section 197 of the *Evidence Act 1995* (Cth) (Commonwealth Evidence Act) provides that the Governor-General may make regulations giving effect to the purposes of the Act.

The *Evidence Amendment (Self-incrimination) Regulations 2023* (the instrument) will make amendments to the Evidence Regulations 2018 (Cth) so that an evidentiary certificate issued under section 128 of the *Evidence (National Uniform Legislation) Act 2011* (NT) has the same effect as if it had been issued under section 128 of the Commonwealth Evidence Act. This will afford appropriate protections to witnesses and facilitate the efficient conduct of prosecutions where issues of the privilege in respect of self-incrimination arise.

Section 128 of the Commonwealth Evidence Act allows a court to issue an evidentiary certificate to a witness, with the effect that evidence given by the witness cannot be used against them in other proceedings. This is a way to facilitate the giving of evidence by a witness who might otherwise rely on the privilege against self-incrimination to refuse to give evidence.

Some state and territory evidence legislation also provides for a court to issue an evidentiary certificate to a witness. The Commonwealth Evidence Act enables state and territory evidence legislation to be prescribed for the purposes of section 128 of the Commonwealth Evidence Act. Where this occurs, an evidentiary certificate issued under the prescribed state or territory legislation will have the same effect as if issued under the Commonwealth Evidence Act.

This instrument amends the *Evidence Regulations 2018* (Cth) to prescribe section 128 of the *Evidence (National Uniform Legislation) Act 2011* (NT) for the purposes of section 128 of the Commonwealth Evidence Act. The instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. The instrument commences the day after it is registered on the Federal Registration of Legislation.

CONSULTATION

The Attorney-General's Department undertook consultation with the Commonwealth Director of Public Prosecutions and the Northern Territory Department of the Attorney-General and Justice in relation to the instrument. No feedback was received that required changes to the instrument.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation (OBPR) assessed that a Regulation Impact Statement was not required for the instrument as it is unlikely to have more than a minor regulatory impact (OBPR reference OIA23-04998).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Evidence Amendment (Self-incrimination) Regulations 2023 (Cth)

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 Disallowable Legislative Instrument

The *Evidence Amendment (Self-incrimination) Regulations 2023* (the instrument) provides that an evidentiary certificate issued under section 128 of the *Evidence (National Uniform Legislation) Act 2011* (NT) has effect for the purposes of section 128 of the *Evidence Act 1995* (Cth). This affords appropriate protections to witnesses and facilitates the efficient conduct of prosecutions where issues of the privilege in respect of self-incrimination arise.

The instrument amends the Evidence Regulations 2018 (Cth) to prescribe section 128 of the *Evidence (National Uniform Legislation) Act 2011* (NT).

The instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. The instrument commences the day after it is registered on the Federal Registration of Legislation.

Human rights implications

The instrument engages with the common law right to a fair trial provided for in article 14 of the *International Covenant on Civil and Political Rights* (ICCPR).

The instrument promotes the right of a person to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on his behalf under the same

conditions as witnesses against them, which is a minimum guarantee in criminal proceedings (article 14(3)(e) of the ICCPR). It does this by providing for evidentiary certificates issued under the *Evidence (National Uniform Legislation) Act 2011* (NT) to be recognised in certain proceedings. This is a way to facilitate the giving of evidence by a witness who might otherwise rely on the privilege against self-incrimination to refuse to give evidence.

The instrument also promotes the minimum guarantee in criminal proceedings (article 14(3) of the ICCPR) that a person charged with a criminal offence should not be ‘compelled to testify against himself or to confess guilt’ (article 14(3)(g)).

The instrument also promotes the presumption of innocence in criminal matters in accordance with article 14(2) of the ICCPR. 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.

The instrument promotes the presumption of innocence by supporting the *Evidence Act 1995* (Cth) to uphold the privilege against self-incrimination and provide for a court to issue a certificate confirming that where a witness gives evidence that may be self-incriminating, the evidence cannot be used against them in other proceedings.

The instrument is compatible with human rights because it supports the common law right to a fair trial.

NOTES ON SECTIONS

Details of the proposed Evidence Amendment (Self-incrimination) Regulations 2023

Section 1 – Name of Regulations

This section would provide that the title of the instrument is the Evidence Amendment (Self-incrimination) Regulations 2023.

Section 2 - Commencement

The section would provide that the instrument commences the day after the instrument is registered.

Section 3 – Authority

This section would provide that the Evidence Amendment (Self-incrimination) Regulations 2023 are made under the *Evidence Act 1995*.

Section 4 – Schedule

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

SCHEDULE 1 – Amendments

Item [1] – subsection 9(e)

Subsection 9(e) of the instrument would prescribe section 128 of the *Evidence (National Uniform Legislation) Act 2011* (NT) for the purposes of section 128 of the *Evidence Act 1995* (Cth). This will afford appropriate protections to witnesses and facilitate the efficient conduct of prosecutions where issues of the privilege in respect of self-incrimination arise.