

1995—No. 382

## EVIDENCE ACT 1995—REGULATION

(Evidence Regulation 1995)

NEW SOUTH WALES



*[Published in Gazette No. 102 of 25 August 1995]*

HIS Excellency the Governor, with the advice of the Executive Council, and in pursuance of the Evidence Act 1995, has been pleased to make the Regulation set forth hereunder.

JEFFREY SHAW, Q.C., M.L.C.,  
Attorney General.

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### Citation

1. This Regulation may be cited as the Evidence Regulation 1995.

### Commencement

2. This Regulation commences on 1 September 1995.

### Definitions

3. (1) In this Regulation:

“**notice of previous representation**” means a notice given under section 67 (1) of the Act;

“**notifying party**”, in relation to a notice, means the person giving the notice;

“**the Act**” means the Evidence Act 1995.

(2) In this Regulation, a reference to a Form is a reference to a form set out in Schedule 1.

**Note.** Section 80 (1) of the Interpretation Act 1987 provides:

“Compliance with forms

**80. (1)** If an Act or statutory rule prescribes a form, strict compliance with the form is not necessary but substantial compliance is sufficient.

(2) If a form prescribed by an Act or instrument requires the form to be completed in a specified manner, or requires specified information to be included in, attached to or furnished with the form, the form is not duly completed unless it is completed in that manner and unless it includes, or has attached to or furnished with it, that information.”

#### Notes

4. Notes included in this Regulation are explanatory notes and do not form part of this Regulation.

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

5. (1) **This clause is made for the purpose of section 67 of the Act.**

(2) A notice of previous representation must state:

- (a) subject to subclause (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 and addresses of the persons by whom, and the persons to whom, each of those representations was made, so far as they are known to the notifying party.

(3) If a notifying party intends to rely on any of sections 63 (2) (a) or (b) or 65 (2) (a), (b), (c) or (d), (3) (a) or (b) or (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 section 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 section 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) If 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 subsection (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.

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

6. (1) This clause is made for the purpose of section 99 of the Act.

(2) A notice given under section 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 and addresses of each person who saw, heard or otherwise perceived the conduct,

so far as they are known to the notifying party.

(3) A notice given under section 98 (1) of the Act (relating to the coincidence rule) must state:

- (a) the substance of the evidence of the Occurrence of two or more related 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 name and address of each person who saw, heard or otherwise perceived each of those events,

so far as they are known to the notifying party.

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

7. (1) A certificate under section 128 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.

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

8. For the purposes of section 179 (1) (a) of the Act, the prescribed form of affidavit is Form 2.

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

9. For the purposes of section 180 (1) (a) of the Act, the prescribed form of affidavit is Form 3.

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**SCHEDULE 1—FORMS**

(Cl. 7)

**Form 1**

*[Set out heading to action or matter]*

**CERTIFICATE UNDER SECTION 128 OF THE EVIDENCE ACT 1995**

This Court certifies under section 128 of the *Evidence Act 1995* of New South Wales 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 to which section 128 (7) 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)

.....  
Judge or magistrate of the Court

Note. Section 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.”.

Form 2

(Cl. 8)

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\*/affirm\*:

1. I am a fingerprint expert for the police force of *[State or Territory]*.
2. I have examined the fingerprint card marked for identification with the letter "A".
3. I have compared the fingerprints shown on that card with the fingerprints shown on the fingerprint card 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 cards are identical.
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\*/Territory\* 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 identical with the person whose fingerprints are shown on the fingerprint cards 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)

.....  
A Justice of the Peace\*/notary  
public\*/lawyer\*/person authorised to  
take affidavits in New South Wales\*

.....  
Deponent

\*delete as appropriate

## Form 3

(Cl. 9)

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. make oath and say \*/affirm\*:

1. I am a fingerprint expert for the Australian Federal Police.
2. I have examined the fingerprint card marked for identification with the letter "A".
3. I have compared the fingerprints shown on that card with the fingerprints shown on the fingerprint card 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 cards are identical.
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 identical with the person whose fingerprints are shown on the fingerprint cards referred to in paragraph 3 of this affidavit.

SWORN\*/AFFIRMED\*

by the deponent at [place]

this            day

of [month and year]

Before me:

(signature)

.....  
 A Justice of the Peace\*/notary  
 public\*/lawyer\*/person authorised to  
 take affidavits in New South Wales\*

(signature)

.....  
 Deponent

*\*delete as appropriate*

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## NOTES

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### SCHEDULE 1—FORMS

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## EXPLANATORY NOTE

The object of this Regulation is to prescribe various forms of notices and affidavits to be used in proceedings to which the Evidence Act 1995 applies. The Regulation:

- (a) prescribes the form of notice to be given of an intention to adduce evidence of a “first-hand hearsay” representation where the maker of the representation will not be called as a witness (clause 5); and
- (b) sets out requirements relating to the content of notices of intention to adduce evidence of a person’s character, reputation or conduct or of a tendency that the person has or had to prove that a person has or had a tendency to act in a particular way or to have a particular state of mind (clause 6 (2)); and
- (c) sets out requirements relating to the content of notices of intention to adduce similar fact evidence to prove a fact by coincidence reasoning (clause 6 (3)); and

- (d) sets out the form of certificate that a court may give to a witness so that evidence given by the witness that may be self-incriminatory cannot be used in court against the witness (except in a criminal proceeding in respect of the falsity of the evidence) (clause 7); and
- (e) prescribes the forms of affidavits to be given by police fingerprint experts (clauses 8 and 9).

This Regulation is made under the Evidence Act 1995, in particular sections 67 (2), 99, 128, 179 (1) (a), 180 (1) (a) and 197 (the general regulation-making power).

This Regulation comprises matter arising under legislation that is substantially uniform with legislation of the Commonwealth.

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