



New South Wales

Evidence Regulation 2020

under the

Evidence Act 1995

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Evidence Act 1995*.

MARK SPEAKMAN, MP

Attorney General, and Minister for the Prevention of Domestic Violence

Explanatory note

The object of this Regulation is to repeal and remake, with minor amendments, the provisions of the *Evidence Regulation 2015*, which would otherwise be repealed on 1 September 2020 by section 10(2) of the *Subordinate Legislation Act 1989*.

In particular, this Regulation provides for the following—

- (a) the requirements for notices that a party must give if the party intends to adduce evidence of certain “first-hand” hearsay representations, tendency evidence or coincidence evidence,
- (b) the form of the certificate that a court may give to a witness so that evidence given by the witness in the court that may be self-incriminatory cannot generally be used in other proceedings against the witness,
- (c) the form of the certificate that a court in a civil proceeding may give to a person so that information disclosed to the court in connection with certain search, freezing or other orders of the court that may be self-incriminatory cannot generally be used in other proceedings against the person,
- (d) the declaration of certain laws of other States and Territories to enable the recognition in NSW courts of certificates given under those laws that are similar to the certificates referred to in paragraphs (b) and (c),
- (e) the forms of certain affidavits to be given by fingerprint experts for the police force of a State or Territory or for the Australian Federal Police.

This Regulation is made under the *Evidence Act 1995*, including sections 67(2), 99, 128(13), 128A(12), 179(1)(a), 180(1)(a) and 197 (the general regulation-making power).

This Regulation comprises or relates to matters set out in Schedule 3 to the *Subordinate Legislation Act 1989*, namely matters arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth or another State or Territory.

Contents

	Page
1 Name of Regulation	3
2 Commencement	3
3 Definitions	3
4 Notice of previous representation	3
5 Notice of tendency evidence	4
6 Notice of coincidence evidence	4
7 Privilege against self-incrimination—form of certificate	5
8 Self incrimination certificates—declaration of prescribed State or Territory provisions	5
9 Fingerprint evidence of identity—affidavits by State or Territory police officers	5
10 Fingerprint evidence of identity—affidavits by Australian Federal Police officers	5
11 Repeal and savings	6
Schedule 1 Forms	7

Evidence Regulation 2020

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1 Name of Regulation

This Regulation is the *Evidence Regulation 2020*.

2 Commencement

This Regulation commences on the day on which it is published on the NSW legislation website.

Note. This Regulation repeals and replaces the *Evidence Regulation 2015*, which would otherwise be repealed on 1 September 2020 by section 10(2) of the *Subordinate Legislation Act 1989*.

3 Definitions

(1) In this Regulation—

address includes a private, business or official address.

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

the Act means the *Evidence Act 1995*.

Note. The Act and the *Interpretation Act 1987* contain definitions and other provisions that affect the interpretation and application of this Regulation.

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

(3) Notes included in this Regulation do not form part of this Regulation.

4 Notice of previous representation

(1) A notice given under section 67(1) of the Act (a **notice of previous representation**) must be given in accordance with the requirements of this clause.

(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 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 it is 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 that the party will rely on to establish that a person who made a representation referred to in the notice is not available to testify.
- (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 of previous representation, it is a sufficient compliance for the purposes of subclause (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 referred to in the notice.
- (7) On the application of a party in a criminal proceeding, the court may make an order directing a notifying party to disclose the address of any person named by that party in a notice of previous representation—
 - (a) who made a representation referred to in the notice, or
 - (b) to whom the representation was made.
- (8) The direction may be given on any terms that the court thinks fit.

5 Notice of tendency evidence

- (1) A notice given under section 97(1)(a) of the Act (a *notice of tendency evidence*) must be given in accordance with the requirements of this clause.
- (2) A notice of tendency evidence must state—
 - (a) the substance of the evidence to which the notice relates, 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 name 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 it is known to the notifying party.
- (3) On the application of a party in a criminal proceeding, the court may make an order directing a notifying party to disclose the address of any person named by that party in a notice of tendency evidence who saw, heard or otherwise perceived conduct or events referred to in the notice.
- (4) The direction may be given on any terms that the court thinks fit.

6 Notice of coincidence evidence

- (1) A notice given under section 98(1)(a) of the Act (a *notice of coincidence evidence*) must be given in accordance with the requirements of this clause.

- (2) A notice of coincidence evidence 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 name 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 it is known to the notifying party.
- (3) On the application of a party in a criminal proceeding, the court may make an order directing a notifying party to disclose the address of any person named by that party in a notice of coincidence evidence who saw, heard or otherwise perceived conduct or events referred to in the notice.
- (4) The direction may be given on any terms that the court thinks fit.

7 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.

8 Self incrimination certificates—declaration of prescribed State or Territory provisions

- (1) The following provisions are declared to be prescribed State or Territory provisions for the purposes of section 128(12) of the Act—
 - (a) section 128 of the *Evidence Act 2011* of the Australian Capital Territory,
 - (b) section 128 of the *Evidence Act 2004* of Norfolk Island,
 - (c) section 128 of the *Evidence (National Uniform Legislation) Act 2011* of the Northern Territory,
 - (d) section 128 of the *Evidence Act 2001* of Tasmania,
 - (e) section 57 of the *Coroners Act 2008* of Victoria,
 - (f) section 128 of the *Evidence Act 2008* of Victoria,
 - (g) section 47 of the *Coroners Act 1996* of Western Australia,
 - (h) section 11 of the *Evidence Act 1906* of Western Australia.
- (2) The following provisions are declared to be prescribed State or Territory provisions for the purposes of section 128A(11) of the Act—
 - (a) section 128A of the *Evidence Act 2011* of the Australian Capital Territory,
 - (b) section 128A of the *Evidence (National Uniform Legislation) Act 2011* of the Northern Territory,
 - (c) section 128A of the *Evidence Act 2001* of Tasmania,
 - (d) section 128A of the *Evidence Act 2008* of Victoria.

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

For the purposes of section 179 of the Act, the prescribed form of affidavit is Form 2.

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

For the purposes of section 180 of the Act, the prescribed form of affidavit is Form 3.

11 Repeal and savings

- (1) The *Evidence Regulation 2015* is repealed.
- (2) Any act, matter or thing that, immediately before the repeal of the *Evidence Regulation 2015*, had effect under that Regulation is taken to have effect under this Regulation.

Schedule 1 Forms

(Clause 3(2))

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

(Clause 7)

[Set out heading to action or matter]

This Court certifies under section 128*/128A* 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*/information* to which section 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)

Judge or magistrate of the Court

**Delete if not applicable*

Note. Section 128(7) of the *Evidence Act 1995* provides as follows—

- (7) In any proceeding in a NSW court or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence—
- (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.

Section 128A(8) of the *Evidence Act 1995* provides as follows—

- (8) In any proceeding in a NSW court or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence—
- (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.

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

(Clause 9)

(Section 179(1)(a) of the Evidence Act 1995)

[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 [*state 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*]

Date:

Before me:

(signature)

(signature)

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

**Delete if not applicable*

Certificate under section 34(1)(c) of Oaths Act 1900

**Please cross out any text that does not apply*

I [*insert name of witness*], a Justice of the Peace*/notary public*/Australian lawyer*/person authorised to take affidavits in New South Wales*, certify the following matters concerning the making of this affidavit by the person who made it—

1. *I saw the face of the person *or* *I did not see the face of the person because the person was wearing a face covering, but I am satisfied that the person had a special justification for not removing the covering.
2. *I have known the person for at least 12 months *or* *I have confirmed the person’s identity using an identification document and the document I relied on was [*describe identification document relied on*].

[*insert signature of witness*]

Date:

Form 3 Affidavit of member of Australian Federal Police concerning fingerprints

(Clause 10)

(Section 180(1)(a) of the Evidence Act 1995)

[*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 [*state 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*]

Date:

Before me:

(signature)

(signature)

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

**Delete if not applicable*

Certificate under section 34(1)(c) of Oaths Act 1900

**Please cross out any text that does not apply*

I [*insert name of witness*], a Justice of the Peace*/notary public*/Australian lawyer*/person authorised to take affidavits in New South Wales*, certify the following matters concerning the making of this affidavit by the person who made it—

- 1 *I saw the face of the person *or* *I did not see the face of the person because the person was wearing a face covering, but I am satisfied that the person had a special justification for not removing the covering.
- 2 *I have known the person for at least 12 months *or* *I have confirmed the person's identity using an identification document and the document I relied on was [*describe identification document relied on*].

[*insert signature of witness*]

Date: