



New South Wales

Evidence Amendment Bill 2010

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

At its meeting on 7 May 2010, the Standing Committee of Attorneys-General (**SCAG**) approved the making of model amendments to the *Model Uniform Evidence Act* that was endorsed by SCAG on 26 July 2007. The model amendments relate to the mutual recognition of certificates concerning the privilege against self-incrimination and the definition of the unavailability of witnesses. The object of this Bill is to make amendments to the *Evidence Act 1995* that are uniform with the amendments approved by SCAG.

The Bill also provides for the making of savings and transitional regulations.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Evidence Act 1995 No 25

Mutual recognition of certificates relating to the privilege against self-incrimination

Section 128 of the *Evidence Act 1995* provides a procedure for giving a witness who objects to giving evidence a certificate (a *self-incrimination certificate*) which grants that witness use and derivative use immunity for the evidence if the witness can claim the privilege against self-incrimination. Section 128A of the Act provides a procedure for dealing with objections on the ground of self-incrimination to complying with certain orders requiring a person to disclose information as part of, or in connection with, a search order, freezing order or other order under Part 25 of the *Uniform Civil Procedure Rules 2005* in civil proceedings. If a court is satisfied that information disclosed if a person complies with such an order may incriminate the person, it may give the person a certificate (a *self-incrimination disclosure certificate*) conferring use and derivative use immunity on the person in respect of the information.

Schedule 1 [1]–[4] amend section 128 and **Schedule 1 [5]** amends section 128A to provide for the recognition in NSW courts of certificates to the same effect as self-incrimination certificates and self-incrimination disclosure certificates given under sections 128 and 128A, respectively, if given under a provision of a law of a State or Territory declared by the regulations to be a prescribed State or Territory provision.

Unavailability of witnesses

Schedule 1 [7] substitutes clause 4 of Part 2 of the Dictionary to the *Evidence Act 1995* to implement recommendation 8-2 made by the Australian, New South Wales and Victorian Law Reform Commissions in their collaborative report on the operation of the provisions of the Uniform Evidence Acts in force in the Commonwealth, New South Wales, the Australian Capital Territory and Tasmania (*Uniform Evidence Law (2005)*) by providing that a person is taken not to be available to give evidence about a fact if the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability.

Savings and transitional provisions

Schedule 1 [6] enables the making of savings and transitional regulations.

First print



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No. , 2010

A Bill for

An Act to amend the *Evidence Act 1995* to make further provision with respect to the privilege against self-incrimination and the unavailability of witnesses; and for other purposes.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Evidence Amendment Act 2010</i> .	3
2 Commencement	4
This Act commences on a day or days to be appointed by proclamation.	5

Schedule 1	Amendment of Evidence Act 1995 No 25	1
[1]	Section 128 Privilege in respect of self-incrimination in other proceedings	2 3
	Omit “If” from section 128 (3). Insert instead “Subject to subsection (4), if”.	4
[2]	Section 128 (3)	5
	Insert “is not to require the witness to give the evidence, and” before “is to inform”.	6 7
[3]	Section 128 (12)–(14)	8
	Insert after section 128 (11) (before the notes):	9
	(12) If a person has been given a certificate under a prescribed State or Territory provision in respect of evidence given by a person in a proceeding in a State or Territory court, the certificate has the same effect, in a proceeding to which this subsection applies, as if it had been given under this section.	10 11 12 13 14
	(13) For the purposes of subsection (12), a prescribed State or Territory provision is a provision of a law of a State or Territory declared by the regulations to be a prescribed State or Territory provision for the purposes of that subsection.	15 16 17 18
	(14) Subsection (12) applies to a proceeding in relation to which this Act applies because of section 4, other than a proceeding for an offence against a law of the Commonwealth or for the recovery of a civil penalty under a law of the Commonwealth.	19 20 21 22
[4]	Section 128, note 3	23
	Omit the note. Insert instead:	24
	3 Section 128 (12)–(14) of the Commonwealth Act give effect to certificates in relation to self-incriminating evidence under the NSW Act in proceedings in federal and ACT courts and in prosecutions for Commonwealth and ACT offences.	25 26 27 28
[5]	Section 128A Privilege in respect of self-incrimination—exception for certain orders etc	29 30
	Insert after section 128A (10) (before the note):	31
	(11) If a person has been given a certificate under a prescribed State or Territory provision in respect of information of a kind referred to in subsection (6) (a), the certificate has the same effect, in a proceeding to which this subsection applies, as if it had been given under this section.	32 33 34 35 36

(12)	For the purposes of subsection (11), a prescribed State or Territory provision is a provision of a law of a State or Territory declared by the regulations to be a prescribed State or Territory provision for the purposes of that subsection.	1 2 3 4
(13)	Subsection (11) applies to a proceeding in relation to which this Act applies because of section 4, other than a proceeding for an offence against a law of the Commonwealth or for the recovery of a civil penalty under a law of the Commonwealth.	5 6 7 8
[6]	Schedule 2 Savings, transitional and other provisions	9
	Insert at the end of clause 1 (1):	10
	<i>Evidence Amendment Act 2010</i>	11
[7]	Dictionary	12
	Omit clause 4 from Part 2. Insert instead:	13
	4 Unavailability of persons	14
(1)	For the purposes of this Act, a person is taken not to be available to give evidence about a fact if:	15 16
(a)	the person is dead, or	17
(b)	the person is, for any reason other than the application of section 16 (Competence and compellability: judges and jurors), not competent to give the evidence, or	18 19 20
(c)	the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability, or	21 22 23
(d)	it would be unlawful for the person to give the evidence, or	24
(e)	a provision of this Act prohibits the evidence being given, or	25 26
(f)	all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or secure his or her attendance, but without success, or	27 28 29
(g)	all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.	30 31 32

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Schedule 1 Amendment of Evidence Act 1995 No 25

(2) In all other cases the person is taken to be available to give evidence about the fact.

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