

2012

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

Evidence Regulation 2012

SL2012-6

EXPLANATORY STATEMENT

**Circulated by authority of the
Attorney-General
Mr Simon Corbell MLA**

Evidence Regulation 2012

Overview of the Amendment Regulation

The *Evidence Regulation 2012* (the Regulation) prescribes regulations under the *Evidence Act 2011* (the Act).

The Regulation prescribes the following:

- a. requirements relating to the giving of notice in writing of an intention to adduce, a previous representation, tendency and coincidence evidence;
- b. a form for self-incrimination certificates to be given to a witness; and
- c. forms of affidavit for fingerprint experts for a State or Territory police force or for the Australian Federal Police to give evidence of the identity of alleged offenders.

Human Rights Implications

The Regulation contains provisions which engage rights under the *Human Rights Act 2004* (HRA).

The Regulation prescribes the form in which a notice of an intention to adduce, a previous representation, tendency and/or coincidence evidence is to be provided to the Court. Prescribing this form of notice positively engages the right to a fair trial (section 21 of the HRA) by ensuring processes are followed by both parties in relation to entering specific types of evidence.

The Regulation also engages the right to privacy. Regulation 7 and 10 state that on application by a party in a criminal proceeding, the court may make an order directing the notifying party to disclose the address of the person named in a notice.

Section 12 of the HRA provides that everyone has the right not to have his or her privacy interfered with unlawfully or arbitrarily. It is reasonable for a court to order disclosure of a person's address in these circumstances, as it permits the person to be subpoenaed to attend court, so the veracity of the evidence can be tested. In this way, the Regulation positively engages the right to fair trial.

The explanatory statement to the Act gives a detailed analysis of the Human Rights engaged by the Act.

Clause notes

Clause 1 Name of regulation

This clause states that this regulation is the *Evidence Regulation 2012*.

Clause 2 Commencement

This clause states that this regulation commences on the commencement of the *Evidence Act 2011*, section 3.

Clause 3 Dictionary

This clause states that the dictionary at the end of the regulation is part of the regulation.

Clause 4 Notes

This clause states that a note included in the regulation is explanatory and is not part of the regulation.

Clause 5 Notice of previous representation-Act, s 67 (2)

‘Representation’ is defined in the Dictionary of the Act as including:

- (a) an express or implied representation (whether oral or in writing); or
- (b) a representation to be inferred from conduct; or
- (c) a representation not intended by its maker to be communicated to or seen by someone else; or
- (d) a representation that for any reason is not communicated.

‘Previous representation’ is defined in the Dictionary of the Act as meaning a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be presented.

Clause 5 inserts requirements for a notice of previous representation. The notice must include the substance of evidence of a previous representation and all other relevant representations made by the person who made the previous representation, so far as they are known to the notifying party.

As far as known the notice should include the date, time, place and circumstances in which each of the representations was made and the names and addresses of each person the representation was made to.

If a notifying party intends to rely on section 63(2)(a) or (b), section 65 (2) (a), (b), (c) or d, section 65(3)(a) or (b) or section 65 (8) (a) or (b) of the Act they must state why the alleged person who made a made a representation mentioned in the notice is not available to testify about the fact by presenting evidence of the representation.

If a notifying party intends to rely on section 64(2)(a) or (b) their notice must state details of the facts that the party will rely on to establish the grounds stated in section 64(2).

Clause 6 Notice of previous representation – written previous representations – Act s 67 (2)

Clause 6 states that if a notice of previous representation mentions a previous representation that is in writing they must provide a copy of the document, or of the relevant part of the document with the notice.

The notice must identify the document unless a copy is attached to the notice and the identity of the document is apparent on the face of the copy.

Clause 7 Notice of previous representation – criminal proceeding – Act s67 (2)

On application in a criminal proceeding the court may make an order directing the notifying party to disclose the address of a person named in a notice of a previous representation. The direction may be given on the terms the court considers appropriate.

Clause 8 Notice of tendency evidence – Act, s99

Tendency evidence is evidence of the character, reputation or conduct of a person, or a tendency he or she has or had, that a party adduces to prove the person has or had a tendency to act in a particular way or to have a particular state of mind.

Clause 8 provides that a notice of an intention to adduce tendency evidence must state the substance of the evidence.

If the tendency evidence consists of or includes evidence of the conduct of the person, the notice must also state, so far as they are known to the party, the date, time, place and circumstances in which the conduct occurred and the names and addresses of each person who heard or otherwise witnessed the conduct.

In a civil proceeding the address of each person who heard or otherwise perceived the conduct must also be provided.

Clause 9 Notice of coincidence evidence – Act, s99

Coincidence evidence is evidence of 2 or more related events, being events that are substantially and relevantly similar occurring in circumstances which are substantially similar, adduced to prove that because of the improbability of the events occurring coincidentally a person did a particular act or had a particular state of mind.

A notice in writing of an intention to adduce coincidence evidence must state the substance of the evidence and, so far as they are known by the party, the date, time place and circumstances in which each of the events occurred and the names of each person who heard or otherwise perceived the events.

In a civil proceeding the address of each person who heard or otherwise perceived the conduct must also be provided.

Clause 10 Notice of tendency or coincidence evidence – criminal proceeding – Act s 99

On application in a criminal proceeding the court may make an order directing the notifying party to disclose the address of a person named in a notice of tendency or coincidence evidence. The direction may be given on the terms the court considers appropriate.

Clause 11 Selfincrimination certificates – State and Territory provisions – Act, s 128 (14)

Section 128 subsections (13) (14) and (15) provide for the recognition in ACT courts of certificates to the same effect as selfincrimination certificates given under section 128 if given under a provision of a law of a State or Territory declared by regulation to be a prescribed State or Territory provision.

Clause 11 provides mutual recognition of selfincrimination certificates in Norfolk Island, NSW, Tasmania, Victoria and Western Australia.

The intention of the privilege against selfincrimination is to encourage witnesses to testify and potentially provide valuable evidence on the matter at hand without fear of incriminating themselves in another matter. Mutual recognition of state and territory certificates reinforces this policy objective.

Clause 12 Selfincrimination certificates – State and Territory provisions – Act s 128A (13)

Section 128A provides for the recognition in ACT courts of certificates to the same effect as selfincrimination disclosure certificates given under section 128A if given under a provision of a law of a State or Territory declared by regulation to be a prescribed State or Territory provision.

Clause 12 provides mutual recognition of selfincrimination certificates in NSW, Tasmania and Victoria.

As noted in clause 11, mutual recognition of state and territory certificates reinforces the policy objective for the privilege against selfincrimination.

Clause 13 Fingerprint evidence of identity – affidavits by State or Territory Police officers – Act s 179 (1) (a)

For affidavits by state or territory police officers in relation to fingerprint evidence of identity a form approved under section 15 is prescribed.

Clause 14 Fingerprint evidence of identity – affidavits by Australian Federal Police officers – Act s 180 (1) (a)

For affidavits by Australian Federal Police officers in relation to fingerprint evidence of identity a form approved under section 15 is prescribed.

Clause 15 Approved forms

Clause 15 provides that the Minister may approve forms for this regulation. If the Minister approves a form the approved form must be used for that purpose. The approved form is a notifiable instrument.