

PARLIAMENTARY COUNSEL

Drafting Direction No. 3.9 Evidence and proof (including oaths and affirmations)

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Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 21 of 2005 and Drafting Direction No. 1 of 2003.

Contents

Part 1—Evidentiary certificates	2
Prima facie and conclusive evidence.....	2
Purported documents.....	3
Legal burden.....	3
Evidential burden.....	3
Part 2—Oaths and affirmations	3
Introduction.....	3
Ensuring that affirmations are covered.....	3
Amendment of existing provisions.....	4
Persons before whom an oath or affirmation may be made.....	4
Amendment of existing provisions.....	5

Part 1—Evidentiary certificates

Prima facie and conclusive evidence

1 In the course of drafting legislation you may be instructed to facilitate the proof of a matter by providing that a certificate or other instrument stating the matter is to be evidence of the matter. You should make clear whether the certificate or other instrument is prima facie evidence or conclusive evidence of the matter.

2 The Attorney-General's Department has expressed the view that it is preferable that evidentiary certificates should be used only in circumstances involving matters:

- (a) which are formal or technical; and
- (b) which are clearly within the responsibilities of the issuer or are specifically known to the issuer.

3 There may be constitutional difficulties in providing for a certificate or other instrument to be conclusive evidence and you should seek advice from the Australian Government Solicitor (*AGS*) if you have any concerns.

4 Unless a certificate or other instrument is to be conclusive evidence, you should include a provision stating that the certificate or other instrument is prima facie evidence of the matters stated in it.

5 If you are amending an Act to include a provision stating that a certificate or other instrument is prima facie evidence of the matters stated in it and you notice the Act contains a similar provision but does not include the words "prima facie", you should discuss with your instructors the desirability of amending the similar provision to insert those words. You will need Ministerial approval for any such amendment of a similar provision.

6 The burden of proof, imposed on a person by a provision stating that a certificate or other instrument is prima facie evidence of any matter stated in it, has been described in the following terms:

- (a) "the evidence provided by such a certificate can be rebutted by evidence to the contrary produced by the defendant" (AGS opinion 2001006064 dated 19 August 2002);
- (b) "the presumption only makes a reading of an instrument to which it applies prima facie evidence of the facts recorded. In other words, if the opponent of the person seeking to rely on the reading raises a doubt as to the accuracy of the instrument, the accuracy of the instrument will need to be proved" (AGS opinion OGC98060703 dated 13 November 1998);
- (c) "unless the accused adduces or relies upon (or there is otherwise before the court) evidence on the issue sufficient to raise a reasonable doubt in his favour he will lose" (Solicitor-General opinion vol.86 p.1489 dated 15 May 1984).

Purported documents

7 In the course of drafting legislation you may be instructed to include a provision stating that a document purporting to be a certificate or other instrument is taken to be such a certificate or other instrument and to have been duly given.

8 Before including such a provision, you should consider whether Part 4.3 (Facilitation of proof) of the *Evidence Act 1995* makes the provision unnecessary. That Part contains general provisions facilitating the proof of various matters in proceedings to which that Act applies (see sections 4 and 5 of that Act).

9 If you include a provision of the kind referred to in paragraph 7, you should discuss with your instructors what burden of proof is to be imposed on a person who is seeking to contest the authenticity or issue of the certificate or other instrument.

Legal burden

10 Provisions imposing a legal (or persuasive) burden of proof should use the words “unless the contrary is proved” or “unless the contrary is established”. Some examples are:

- (3) A document purporting to be a certificate mentioned in subsection (2) is taken to be such a certificate and to have been duly given unless the contrary is established.
- (3) Unless the contrary is proved, a document purporting to be a certificate given under this section is taken to be such a certificate and to have been duly given.

Evidential burden

11 Provisions imposing an evidential burden of proof should make it clear that a person only needs to adduce evidence to the contrary. An example is:

- (3) A document purporting to be a certificate under subsection (1) is, unless evidence to the contrary is adduced, taken to be such a certificate and to have been duly given.

Part 2—Oaths and affirmations

Introduction

12 This Part deals with provisions about the making of oaths and affirmations.

Ensuring that affirmations are covered

13 Paragraph 27(b) of the *Acts Interpretation Act 1901* provides that, unless the contrary intention appears, the word *oath* “... shall, in the case of persons allowed by law to affirm ... instead of swearing, include affirmation ...”.

14 The Australian Government Solicitor (AGS) has advised (see opinion 02124591 dated 11 February 2003) that the application of paragraph 27(b) is not clear except in the case of a specific Commonwealth law that allows a person to affirm instead of swearing. AGS takes the view that, for the purposes of many Commonwealth references to oaths, paragraph 27(b)

would be read as referring to a State or Territory law permitting people to affirm rather than swear. However, AGS recognises:

- that paragraph 27(b), and the application of State and Territory laws, could not necessarily be relied on for every Commonwealth provision that refers to an oath; and
- that it is probably safer if OPC adopts a standard approach that will ensure that references to oaths always include references to affirmations.

15 Accordingly, if you draft a provision that is intended to allow something to be done on oath or affirmation, you should not rely on paragraph 27(b) unless there is a specific Commonwealth law that allows a person to affirm instead of swearing in the particular context you are dealing with.

16 If you are not able to rely on paragraph 27(b), you should include an express reference to affirmation.

17 You may include an express reference to affirmation using one of the following methods:

- use the expression “oath or affirmation”;
- define *oath* to include affirmation (note that if your text mentions “swearing” an oath, it may be necessary to define *swear* to include affirm).

Amendment of existing provisions

18 If you are amending a provision that appears not to cover affirmations, you should offer to amend the provision to make its operation clear.

Persons before whom an oath or affirmation may be made

19 Many Commonwealth laws contain:

- a provision requiring a person appointed to a position to make an oath or affirmation of allegiance or impartiality; or
- a provision providing for, or requiring, an affidavit to be sworn or affirmed for the purposes of a proceeding in a federal court.

20 In some cases, it will be necessary for the provision to identify the persons before whom the oath or affirmation is to be made (in other cases, generic provisions such as section 186 of the *Evidence Act 1995* will apply so that such identification is not necessary).

21 Various existing provisions include a reference to a “commissioner for [taking] affidavits”. It appears that this is now an obsolete concept; apart from section 28 of the *Oaths Act 1936* of South Australia, there seems to be no current law appointing or providing for the appointment of persons as commissioners for affidavits. Accordingly, the concept should not be used in future provisions.

22 Apart from avoiding the use of “commissioner for [taking] affidavits”, the contents of a provision identifying the persons before whom an oath or affidavit may be made are to some extent a matter of policy for your instructors.

23 In particular, for oaths or affirmations by persons appointed to statutory positions, there may be policy reasons for nominating a person who has a connection with the position concerned rather than the kinds of persons who have traditionally had a role in the making of oaths or affirmations (see, for instance, section 36 of the *Australian Federal Police Act 1979*).

24 Useful precedents for descriptions of the kinds of persons who might routinely be prescribed can be found in:

- section 186 of the *Evidence Act 1995*; and
- subsection 59(1) of the *Federal Magistrates Act 1999*.

Amendment of existing provisions

25 If you are amending a provision that refers to a “commissioner for [taking] affidavits”, you should discuss with your instructors the possibility of removing that reference. Such an amendment could usually be approved by First Parliamentary Counsel as a statute law revision-type amendment.

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