

PARLIAMENTARY COUNSEL

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

Note: This Drafting Direction contains references to the “head drafter”. It is a reference to the senior person who is responsible for matters of drafting policy. This form is used to enable the Drafting Directions to be applied in other organisations. In OPC the head drafter is FPC for Bills and the PLC for instruments.

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Part 1—Departures from the rules of evidence

1 Statute may override the *Evidence Act 1995* and the existing common law rules of evidence. However, the Evidence and Legislative Frameworks Section of the Attorney-General’s Department should be consulted on any such proposals. Examples of past proposals to override the rules of evidence are contained in the Administrative Law, Evidence and Legislative Instruments Scrutiny Guide.

Part 2—Evidentiary certificates

Prima facie and conclusive evidence

2 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.

3 The Evidence and Legislative Frameworks Section of the Attorney-General’s Department has expressed the view that it is preferable that evidentiary certificates should be used only in circumstances involving matters of fact, not law, which are procedural, formal, technical and non-controversial.

4 If you are instructed to provide that a certificate or other instrument stating a matter is to be evidence of the matter, you should ask your instructor to contact the Evidence and Legislative Frameworks Section at an early stage to discuss the instructions. In some circumstances the policy objective may be met by the certificate or other instrument being admissible in accordance with the general law of evidence.

5 You should make clear whether the certificate or other instrument is prima facie evidence or conclusive evidence of the matter. The Evidence and Legislative Frameworks Section has a strong policy preference for evidentiary certificates to only be prima facie evidence. There are only rare cases in which they would consider a conclusive certificate appropriate.

6 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.

7 For a legislative instrument it would be safest not to provide that an instrument is to be conclusive evidence without an express conferral of power for that purpose (see *Australasian Jam Co Pty Ltd v FCT* cited in Pearce and Argument, *Delegated Legislation in Australia*, 3rd edn, para 14.12). Even if power has been expressly conferred for a legislative instrument to provide that an instrument is to be conclusive evidence, it would be closely scrutinised by the Senate Standing Committee on Regulations and Ordinances.

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

9 If you are amending legislation 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 legislation 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. In Bill drafting, Ministerial approval is sufficient for any such amendment of a similar provision.

10 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

11 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.

12 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).

13 If you include a provision of the kind referred to in paragraph 11, 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

14 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

15 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 3—Oaths and affirmations

Introduction

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

Ensuring that affirmations are covered

17 Section 2B of the *Acts Interpretation Act 1901* includes the following definitions:

affidavit includes affirmation, declaration and promise.

oath includes affirmation, declaration and promise.

swear includes affirm, declare and promise.

18 Despite these definitions, if you draft a provision that is intended to allow something to be done on oath or affirmation, you should include a reference to both oath and affirmation. If you draft a provision that refers to something being sworn, you should also include a reference to affirmation. This is to avoid any argument that on the face of the provision there is discrimination against persons on the basis of their beliefs.

Amendment of existing provisions

19 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

20 Many Commonwealth laws contain:

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

21 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).

22 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.

23 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.

24 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*).

25 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 Circuit Court of Australia Act 1999*.

Amendment of existing provisions

26 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. In Bill drafting, such an amendment could usually be approved by First Parliamentary Counsel as a statute law revision-type amendment.

Part 4—Proposals relating to privileges and other restrictions on admissibility of evidence

27 Proposals seeking to do the following should be referred to the Evidence and Legislative Frameworks Section in the Attorney-General’s Department at an early stage:

- (a) abrogate any forms of privilege or immunity;
- (b) restrict the admissibility of evidence (e.g. by replicating legal professional privilege or establishing a new privilege).

28 Provisions of this sort are also examples of provisions that raise issues relating to evidence or procedure which should be referred to the Attorney-General’s Department under Drafting Direction 4.2.

29 You should resist any proposals to include provisions stating that privileges aren’t abrogated. Drafters should discuss such proposals with the head drafter before including such provisions.

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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.