



Australian Capital Territory

Evidence (Miscellaneous Provisions) Amendment Act 2003

A2003-48

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2003 009B

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

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Australian Capital Territory

Evidence (Miscellaneous Provisions) Amendment Act 2003

A2003-48

An Act to amend the *Evidence (Miscellaneous Provisions) Act 1991*, and
for other purposes

*Notified under the Legislation Act 2001 on 31 October 2003
(see www.legislation.act.gov.au)*

The Legislative Assembly for the Australian Capital Territory enacts as
follows:

2003 009B

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

1 Name of Act

This Act is the *Evidence (Miscellaneous Provisions) Amendment Act 2003*.

2 Commencement

This Act commences on a day fixed by the Minister by written notice.

Note 1 The naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

Note 2 A single day or time may be fixed, or different days or times may be fixed, for the commencement of different provisions (see Legislation Act, s 77 (1)).

Note 3 If a provision has not commenced within 6 months beginning on the notification day, it automatically commences on the first day after that period (see Legislation Act, s 79).

3 Acts and regulations amended

(1) This Act (other than schedule 2) amends the *Evidence (Miscellaneous Provisions) Act 1991*.

Note The Act is also amended in sch 1.

(2) Schedule 2 amends the Acts and regulations mentioned in it.

4 Part 4*substitute***Part 4 Evidence in criminal proceedings****Division 4.1 Preliminary****37 Meaning of *sexual offence* in pt 4**

In this part:

sexual offence means an offence against the *Crimes Act 1900*, part 3 (Sexual offences).

Note The Legislation Act, s 189 provides that a reference to an offence against a Territory law includes a reference to an offence against the Criminal Code, pt 2.4 (Extensions of criminal responsibility) or the *Crimes Act 1900*, s 181 (Accessory after the fact) that relates to the Territory law.

Division 4.2 Sexual offence proceedings—general**38 Meaning of *complainant* and *sexual offence proceeding* for div 4.2**

- (1) For this division, the *complainant*, in relation to a sexual offence proceeding, is the person, or any of the people, against whom a sexual offence the subject of the proceeding is alleged, or has been found, to have been committed.
- (2) For this division, a *sexual offence proceeding* is—
 - (a) a proceeding for a sexual offence; or

- (b) a proceeding in relation to bail for a person charged with a sexual offence, whether or not the person is also charged with any other offence; or
 - (c) a sentencing proceeding for a person convicted of a sexual offence, whether or not the person is also convicted of any other offence; or
 - (d) an appeal or other review (whether by prerogative writ or otherwise) arising out of a proceeding mentioned in paragraphs (a) to (c); or
 - (e) an interlocutory proceeding in, or a proceeding ancillary to, a proceeding mentioned in paragraphs (a) to (c).
- (3) For subsection (2) (a), a *proceeding for a sexual offence* includes—
- (a) a proceeding for a sexual offence and any other offence; and
 - (b) a proceeding for a sexual offence and any other offence as an alternative to the sexual offence; and
 - (c) a proceeding for a sexual offence that may result in a finding of guilt (or committal for trial or sentence) for any other offence.
- (4) To remove any doubt, for this section, a *proceeding* includes a committal proceeding.

39 Evidence given in closed court

- (1) This section applies if the complainant gives evidence in a sexual offence proceeding.
- (2) The court may order that the court be closed to the public while all or part of the complainant's evidence (including evidence given under cross-examination) is given.
- (3) However, an order under this section does not stop a person nominated by the complainant from being in court when the evidence is given.

40 Prohibition of publication of complainant's identity

- (1) A person commits an offence if the person publishes, in relation to a sexual offence proceeding—
 - (a) the complainant's name; or
 - (b) protected identity information about the complainant; or
 - (c) a reference or allusion that discloses the complainant's identity; or
 - (d) a reference or allusion from which the complainant's identity might reasonably be inferred.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

- (2) It is a defence to a prosecution for an offence against this section if the person establishes that the complainant consented to the publication before the publication happened.
- (3) An offence against this section is a strict liability offence.
- (4) In this section:

protected identity information means information about, or allowing someone to find out, the private, business or official address, email address or telephone number of a person.

**Division 4.3 Sexual offence proceedings—
giving evidence from places other
than courtrooms**

**41 Meaning of *complainant* and *sexual offence proceeding*
for div 4.3**

- (1) For this division, the *complainant*, in relation to a sexual offence proceeding, is the person, or any of the people, against whom a sexual offence the subject of the proceeding is alleged, or has been found, to have been committed.
- (2) For this division, a *sexual offence proceeding* is—
 - (a) a proceeding for a sexual offence; or
 - (b) a sentencing proceeding for a person convicted of a sexual offence, whether or not the person is also convicted of any other offence; or
 - (c) a proceeding under the *Protection Orders Act 2001* in relation to a sexual offence; or
 - (d) a proceeding under the *Victims of Crime (Financial Assistance) Act 1983* in relation to a sexual offence; or
 - (e) a proceeding by way of an inquest or inquiry in the Coroner's Court in relation to a sexual offence; or
 - (f) an appeal arising out of a proceeding mentioned in paragraphs (a) to (e).
- (3) For subsection (2) (a), a *proceeding for a sexual offence* includes—
 - (a) a proceeding for a sexual offence and any other offence; and
 - (b) a proceeding for a sexual offence and any other offence as an alternative to the sexual offence; and

- (c) a proceeding for a sexual offence that may result in a finding of guilt (or committal for trial or sentence) for any other offence.
- (4) To remove any doubt, for this section, a *proceeding* includes a committal proceeding.

42 When does div 4.3 apply?

This division applies if the complainant is to give evidence in a sexual offence proceeding in a court, whether or not the evidence is to be given on oath, affirmation or otherwise.

43 Complainant giving evidence from place other than courtroom

- (1) If the courtroom where the sexual offence proceeding is heard and another place are linked by an audiovisual link, the complainant's evidence must be given by audiovisual link from the other place unless the court orders otherwise.
- (2) The court may make an order under subsection (1) only if satisfied that—
 - (a) the complainant prefers to give evidence in the courtroom; or
 - (b) if the order is not made—
 - (i) the sexual offence proceeding may be unreasonably delayed; or
 - (ii) there is a substantial risk that the court will not be able to ensure that the sexual offence proceeding is conducted fairly.
- (3) While the complainant is at the other place for the purpose of giving evidence, the place is taken for all purposes to be part of the courtroom.

44 Consequential orders under div 4.3

- (1) This section applies if the complainant is to give evidence from a place (the *other place*) other than the courtroom where the sexual offence proceeding is heard.
- (2) The court may make any order it considers appropriate—
 - (a) to ensure that the sexual offence proceeding is conducted fairly; or
 - (b) to allow the complainant to identify a person or thing; or
 - (c) to allow the complainant to take part in a view or to watch a demonstration or experiment; or
 - (d) to allow part of the sexual offence proceeding to be heard somewhere other than in the courtroom.
- (3) The court may make any other order it considers appropriate, including, for example, an order specifying—
 - (a) who may be with the complainant at the other place; or
 - (b) who must not be with the complainant at the other place; or
 - (c) who, in the courtroom, is to be able, or must not be able, to be heard, or seen and heard, by the complainant and people in the other place with the complainant; or
 - (d) who, in the courtroom, is to be able to see and hear the complainant and anyone else in the other place with the complainant; or
 - (e) how the audiovisual link is to operate.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (4) The court may order that a person be excluded from the other place while the complainant is giving evidence.
- (5) The court may direct that an order under this section apply only to a particular part of the sexual offence proceeding.

45 Making of orders under div 4.3

- (1) The court may make an order under this division in a sexual offence proceeding on its own initiative or on the application of a party to the proceeding or the complainant.
- (2) For the purpose of making an order under this division, the court is not bound by the rules of evidence and may inform itself as it considers appropriate.

46 Jury to be warned about adverse inferences

If the complainant gives evidence from a place other than the courtroom where the sexual offence proceeding is being heard and the proceeding is before a jury, the judge must warn the jury to the effect that the jury should not draw any inference adverse to an accused person in the proceeding from the fact the evidence is given from a place other than the courtroom.

47 Failure to comply with div 4.3

- (1) If the complainant's evidence is not given in accordance with this division, the evidence is not inadmissible for that reason only.
- (2) Failure to comply with this division in relation to a sexual offence proceeding does not affect the validity of the proceeding.

Division 4.4 Evidence of complainant's sexual reputation and activities

48 Meaning of *complainant* and *sexual offence proceeding* for div 4.4

- (1) For this division, the *complainant*, in relation to a sexual offence proceeding, is the person, or any of the people, against whom a sexual offence the subject of the proceeding is alleged, or has been found, to have been committed.
- (2) For this division, a *sexual offence proceeding* is—
 - (a) a proceeding for a sexual offence; or
 - (b) a proceeding in relation to bail for a person charged with a sexual offence, whether or not the person is also charged with any other offence; or
 - (c) a sentencing proceeding for a person convicted of a sexual offence, whether or not the person is also convicted of any other offence; or
 - (d) an appeal arising out of a proceeding mentioned in paragraphs (a) to (c).
- (3) For subsection (2) (a), a *proceeding for a sexual offence* includes—
 - (a) a proceeding for a sexual offence and any other offence; and
 - (b) a proceeding for a sexual offence and any other offence as an alternative to the sexual offence; and
 - (c) a proceeding for a sexual offence that may result in a finding of guilt (or committal for trial or sentence) for any other offence.
- (4) To remove any doubt, for this section, a *proceeding* includes a committal proceeding.

49 When does div 4.4 apply?

This division applies to evidence in a sexual offence proceeding.

50 Immunity of sexual reputation

Evidence of the complainant's sexual reputation is not admissible.

51 General immunity of evidence of complainant's sexual activities

- (1) Evidence of the sexual activities of the complainant is not admissible in a sexual offence proceeding without leave of the court dealing with the proceeding.
- (2) Subsection (1) does not apply to evidence of the specific sexual activities of the complainant with an accused person in the sexual offence proceeding.

52 Application for leave under s 51

Application for leave under section 51 (General immunity of evidence of complainant's sexual activities) in a sexual offence proceeding must be made—

- (a) in writing; and
- (b) if the proceeding is before a jury—in the absence of the jury; and
- (c) in the absence of the complainant, if an accused person in the proceeding requests.

53 Decision to give leave under s 51

- (1) The court must not give leave under section 51 (General immunity of evidence of complainant's sexual activities) unless satisfied that the evidence—
 - (a) has substantial relevance to the facts in issue; or

- (b) is a proper matter for cross-examination about credit.
- (2) Evidence (*sexual activity evidence*) that relates to, or tends to establish, the fact that the complainant was accustomed to engage in sexual activities is not to be regarded as having a substantial relevance to the facts in issue because of any inference it may raise about general disposition.
- (3) Sexual activity evidence is not to be regarded as being a proper matter for cross-examination about credit unless the evidence, if accepted, would be likely to substantially impair confidence in the reliability of the complainant's evidence.
- (4) If the court gives leave under section 51, it must give written reasons for its decision.
- (5) In this section:
- proper matter for cross-examination about credit*—evidence is a *proper matter for cross-examination about credit* if the credibility rule under the *Evidence Act 1995* (Cwlth), section 102 does not apply to the evidence because of that Act, section 103 (Exception: cross-examination as to credibility).

Division 4.5 Protection of counselling communications

54 Definitions for div 4.5

In this division:

counselling means counselling, therapy or treatment for an emotional or psychological condition, whether or not the counselling, therapy or treatment is provided for remuneration.

counsellor means a person who—

- (a) has undertaken training or study, or has experience, relevant to the process of counselling people who have suffered harm; or

(b) is supervised by someone to whom paragraph (a) applies.

criminal proceeding means—

- (a) a proceeding for any offence; or
- (b) a sentencing proceeding for a person convicted of any offence; or
- (c) an appeal or other review (whether by prerogative writ or otherwise) arising out of a proceeding mentioned in paragraph (a) or (b); or
- (d) an interlocutory proceeding in, or a proceeding ancillary to, a proceeding mentioned in paragraphs (a) to (c);

but does not include a preliminary criminal proceeding.

document recording a protected confidence includes—

- (a) a copy, reproduction, republication, duplicate or summary of, or extract from, a document recording a protected confidence; and
- (b) the part of a document recording a protected confidence; and
- (c) the part of a document containing a report, observation, opinion, advice, recommendation or anything else in relation to a protected confidence that is—
 - (i) made or given by the person who made the protected confidence; or
 - (ii) made or given by a third party mentioned in section 55 (4) in whose presence the protected confidence is made; and
- (d) a copy, reproduction, republication, duplicate or summary of, or extract from, the part of a document mentioned in paragraph (b) or (c).

harm includes—

- (a) actual physical harm; and
- (b) stress or shock; and
- (c) prejudice to privacy; and
- (d) emotional or psychological harm, including, for example, shame, humiliation and fear; and
- (e) damage to reputation; and
- (f) financial loss.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

preliminary criminal proceeding means—

- (a) a committal proceeding for any offence; or
- (b) a proceeding in relation to bail for a person charged with any offence; or
- (c) an appeal or other review (whether by prerogative writ or otherwise) arising out of a proceeding mentioned in paragraph (a) or (b); or
- (d) an interlocutory proceeding in, or a proceeding ancillary to, a proceeding mentioned in paragraphs (a) to (c).

protected confidence—see section 55.

protected confidence evidence means—

- (a) oral or written evidence that would disclose a protected confidence; or
- (b) a document recording a protected confidence; or

-
- (c) oral or written evidence that would disclose the contents of a document recording a protected confidence.

55 Meaning of *protected confidence* for div 4.5

- (1) For this division, a *protected confidence* is a counselling communication made by, to or about a person against whom a sexual offence was, or is alleged to have been, committed (the *counselled person*).
- (2) A counselling communication is a protected confidence even if—
 - (a) it is made before the happening, or alleged happening, of the acts constituting the sexual offence; or
 - (b) it is not made in relation to—
 - (i) the sexual offence or any sexual offence; or
 - (ii) a condition arising from the sexual offence or any sexual offence.
- (3) For this section, a *counselling communication* is a communication made in circumstances that give rise to a reasonable expectation of confidentiality or a duty of confidentiality—
 - (a) by the counselled person to a counsellor for the purpose, or in the course, of the counselling relationship between the counselled person and the counsellor; or
 - (b) to or about the counselled person by the counsellor for the purpose, or in the course, of the counselling relationship between the counselled person and the counsellor; or
 - (c) by the counselled person to a third party mentioned in subsection (4) for the purpose, or in the course, of the counselling relationship between the counselled person and the counsellor; or

- (d) to the counselled person by a third party mentioned in subsection (4) for the purpose, or in the course, of the counselling relationship between the counselled person and the counsellor; or
 - (e) about the counselled person by a third party mentioned in subsection (4) for the purpose, or in the course, of the counselling relationship between the counselled person and the counsellor to—
 - (i) the counselled person; or
 - (ii) the counsellor; or
 - (iii) another third party to whom subsection (4) applies; or
 - (f) about the counselled person by a counsellor to someone else who has also been a counsellor for the counselled person; or
 - (g) about the counselled person to a counsellor by someone else who has also been a counsellor for the counselled person.
- (4) For this section, in deciding whether a communication was made in circumstances that gave rise to a reasonable expectation of confidentiality, it does not matter that the communication was made in the presence of a third party, if the third party was present to assist or encourage communication between the counselled person and counsellor or otherwise assist the counselling process.

Examples of third parties

- 1 a parent, partner, carer, spiritual adviser or other supportive person
- 2 a person present at the request of the counsellor to take notes of the counselling session

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (5) In this section:
sexual offence includes alleged sexual offence.

56 When does div 4.5 apply?

- (1) This division applies to a protected confidence made before or after the commencement of this division.
- (2) However, this division only applies in relation to—
 - (a) a preliminary criminal proceeding begun on or after the day this division commences; or
 - (b) a criminal proceeding, in relation to which there is not a preliminary criminal proceeding, begun on or after the day this division commences; or
 - (c) a criminal proceeding, in relation to which there is a preliminary criminal proceeding, if the preliminary criminal proceeding began on or after the day this division commences.
- (3) Subsection (2) and this subsection expire on 1 January 2005.

57 Immunity for protected confidences in preliminary criminal proceedings

- (1) A protected confidence must not be disclosed in, or for the purposes of, a preliminary criminal proceeding.
- (2) Without limiting subsection (1)—
 - (a) a person cannot be required (whether by subpoena, application, notice or any other procedure), in or in relation to a preliminary criminal proceeding, to produce a document recording a protected confidence; and

- (b) protected confidence evidence is not admissible in the preliminary criminal proceeding.

Example for par (a)

A person could not be required to disclose a protected confidence in response to a request for production of documents in a preliminary criminal proceeding.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

58 General immunity for protected confidences

- (1) This section applies in relation to a criminal proceeding.
- (2) A protected confidence must not be disclosed in, or for the purposes of, the criminal proceeding unless the court dealing with the proceeding gives leave for the disclosure.
- (3) Without limiting subsection (2)—
 - (a) a person cannot be required (whether by subpoena, application, notice or any other procedure), in or in relation to the criminal proceeding, to produce a document recording a protected confidence, unless the court gives leave; and
 - (b) protected confidence evidence is not admissible in the criminal proceeding, unless the court gives leave.

Example for par (a)

A person could not be required to disclose a protected confidence in response to a request for production of documents in a criminal proceeding unless the court gives leave.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

59 Application for leave to disclose protected confidence

- (1) An application for leave must—
 - (a) be in writing; and
 - (b) set out the leave sought; and
 - (c) set out the applicant's arguments in support of the application (including the matters mentioned in section 60 (2) (Threshold test—legitimate forensic purpose)).
- (2) The application must also—
 - (a) set out briefly the nature of the protected confidence evidence (if known); and
 - (b) set out, or be accompanied by a copy of, any relevant documents.

60 Threshold test—legitimate forensic purpose

- (1) The court must refuse the leave sought under section 59 if not satisfied that the applicant has established a legitimate forensic purpose for seeking the leave.
- (2) To establish a legitimate forensic purpose, the applicant must—
 - (a) identify a legitimate forensic purpose for seeking the leave; and
 - (b) satisfy the court that there is an arguable case that the evidence in relation to which the leave is sought would materially assist the applicant in his or her case in the proceeding.
- (3) The court must decide whether or not to refuse the application under this section before it conducts a preliminary examination of the protected confidence evidence under section 61.

61 Preliminary examination of protected confidence evidence

- (1) If the court is satisfied that the applicant has established a legitimate forensic purpose for seeking the leave, the court must then conduct a preliminary examination of the protected confidence evidence to decide whether leave should be given.
- (2) For the preliminary examination, the court may—
 - (a) require anyone who has custody or control of a document recording a protected confidence to produce the document to the court for inspection; or
 - (b) require the counsellor concerned or, if the counsellor provides counselling on behalf of an entity, the principal or another representative of the entity—
 - (i) to give the court written answers to any questions; or
 - (ii) to attend the court for oral examination.
- (3) The court must not order a person to attend for oral examination under subsection (2) (b) (ii) unless the oral examination of the person is necessary for the effective conduct of the preliminary examination.
- (4) Only a person mentioned in subsection (2) may be ordered to answer questions or be examined under this section.
- (5) The preliminary examination must be conducted—
 - (a) in the absence of the public and the jury (if any); and
 - (b) in the absence of the parties to the criminal proceeding and their lawyers, except to the extent otherwise decided by the court.

- (6) Evidence taken at the preliminary examination must not be disclosed to the parties or their lawyers, except to the extent otherwise decided by the court or an appellate court under section 62 (6) (Giving of leave to disclose protected confidence).
- (7) A record of the preliminary examination must be made, but must not be made available for public access.

62 Giving of leave to disclose protected confidence

- (1) After conducting the preliminary examination of the protected confidence evidence, the court may give leave for the disclosure of the protected confidence only if satisfied that, in the circumstances of the case, the public interest in ensuring an accused person in the criminal proceeding is given a fair trial outweighs the public interest in preserving the confidentiality of the protected confidence.
- (2) To remove any doubt, if the court is satisfied under subsection (1) about part of a document only, it may give leave in relation to that part and refuse leave for the rest of the document.
- (3) In making a decision under subsection (1), the court must have regard to—
 - (a) the extent to which disclosure of the protected confidence is necessary for an accused person to make a full defence; and
 - (b) the public interest in ensuring that victims of sexual offences receive effective counselling or other treatment; and
 - (c) the extent to which disclosure of protected confidences may dissuade victims of sexual offences from seeking counselling or other treatment or diminish the value of counselling or other treatment; and

- (d) whether the evidence will have a substantial probative value to a fact in issue and whether other evidence of similar or greater probative value is available about the matters to which the evidence relates; and
 - (e) the likelihood that disclosure of the protected confidence will affect the outcome of the case; and
 - (f) whether disclosure of the protected confidence is sought on the basis of a discriminatory belief or bias; and
 - (g) whether the person to or by whom the protected confidence was made objects to the disclosure of the protected confidence; and
 - (h) the nature and extent of the reasonable expectation of confidentiality for the protected confidence and the potential prejudice to the privacy of anyone, including to the extent to which any interest in confidentiality or privacy has been lessened by the passage of time or the happening of any event since the protected confidence was made.
- (4) Subsection (3) does not limit the matters to which the court may have regard.
- (5) Leave under this section may be given subject to restrictions.
- (6) If the court refuses to give leave, and an appeal is made against the refusal, or a ground of an appeal is the refusal, the appellate court may examine the evidence taken at the preliminary examination under section 61 (Preliminary examination of protected confidence evidence), and may make the orders about the disclosure of the evidence it considers appropriate.

63 Ancillary orders for protection of person who made protected confidence

- (1) The court may make the orders it considers appropriate to limit possible harm, or the extent of possible harm, to a person who made a protected confidence by the disclosure of protected confidence evidence.
- (2) Without limiting subsection (1), the court may—
 - (a) order that the court be closed to the public while all or part of the protected confidence evidence is presented; or
 - (b) for a document recording a protected confidence—order that a document be edited as directed by the court or that a copy of a document (or part of a document) be disclosed instead of the original; or
 - (c) make orders in relation to the suppression or publication of all or any part of the protected confidence evidence; or
 - (d) for a document recording a protected confidence—make orders about the production or inspection of the document; or
 - (e) make orders in relation to the disclosure of—
 - (i) protected identity information about the person who made the protected confidence; or
 - (ii) information that discloses the identity of the person who made the protected confidence; or
 - (iii) information from which the identity of the person who made the protected confidence might reasonably be inferred.
- (3) This section is in addition to section 40 (Prohibition of publication of complainant's identity).

(4) In this section:

protected identity information means information about, or allowing someone to find out, the private, business or official address, email address or telephone number of a person.

64 No waiver of protected confidence immunity

This division applies whether or not a person who has made a protected confidence consents or does not object to the disclosure of the protected confidence.

65 No protected confidence immunity for medical information

(1) This division does not apply in relation to—

- (a) information obtained by a doctor because of a physical examination of a person against whom a sexual offence was, or is alleged to have been, committed; or
- (b) any communication made in the course, or because, of such an examination.

66 No protected confidence immunity for communications for criminal investigations and proceedings

This division does not apply to a communication made for the purpose of—

- (a) an investigation by a law enforcement entity into the commission or alleged commission of a sexual offence; or
- (b) a preliminary criminal proceeding or criminal proceeding arising from the commission or alleged commission of a sexual offence.

67 No protected confidence immunity in case of misconduct

- (1) This division does not apply in relation to a communication made, or a document prepared, in the furtherance of the commission of an offence, a fraud or an act that makes a person liable to a civil penalty.
- (2) A court may find that a communication was made, or a document was prepared, in the furtherance of the commission of an offence, a fraud or an act if there are reasonable grounds for finding that—
 - (a) the offence, fraud or act was committed; and
 - (b) the communication was made, or document prepared, in the furtherance of the offence, fraud or act.

**Division 4.6 Sexual offence proceedings—
directions and warnings to juries**

Note The *Supreme Court Act 1933*, s 68C (3) provides that in a criminal proceeding tried by a judge alone, if a Territory law would otherwise require a warning to be given to a jury in the proceeding, the judge must take the warning into account in considering his or her verdict.

68 Meaning of *complainant* and *sexual offence proceeding* for div 4.6

- (1) For this division, the *complainant*, in relation to a sexual offence proceeding, is the person, or any of the people, against whom a sexual offence the subject of the proceeding is alleged to have been committed.
- (2) For this division, a *sexual offence proceeding* is a proceeding for a sexual offence before a jury, and includes any of the following before a jury:
 - (a) a proceeding for a sexual offence and any other offence;

- (b) a proceeding for a sexual offence and any other offence as an alternative to the sexual offence;
- (c) a proceeding for a sexual offence that may result in a finding of guilt for any other offence.

69 Comments on complainants' evidence

If evidence is given by a complainant in a sexual offence proceeding, the judge must not give the jury any warning or suggestion to the effect that the law regards complainants to be an unreliable class of witnesses.

70 Comments on children's evidence

If evidence is given by a child in a sexual offence proceeding, the judge must not give the jury any warning or suggestion to the effect that the law regards children to be an unreliable class of witnesses.

71 Comments about lack of, or delays in making, complaint

- (1) This section applies if, in a sexual offence proceeding, evidence is given, or a question is asked of a witness, that tends to suggest that—
 - (a) the complainant made no complaint about the alleged offence; or
 - (b) there was a delay in making a complaint.
- (2) The judge must—
 - (a) give the jury a warning to the effect that the absence of, or the delay in making, the complaint does not necessarily indicate that the allegation that the offence was committed is false; and

- (b) tell the jury that there may be good reasons why a victim of a sexual offence may not make, or may hesitate in making, a complaint about the offence.

Note The *Evidence Act 1971*, s 76C (Evidence of complaint) was repealed by the *Evidence (Miscellaneous Provisions) Amendment Act 2003*. Section 76C abolished the common law rule that complaint evidence in a sexual offence matter was admissible for the purpose of supporting the complainant's credit (by showing the complainant's consistency). The common law is not revived by the repeal of section 76C (see *Legislation Act*, s 86).

72 Directions about implied consent

In a sexual offence proceeding, the judge must, in a relevant case, direct the jury that a person is not to be regarded as having consented to a sexual act just because—

- (a) the person did not say or do anything to indicate that the person did not consent; or
- (b) the person did not protest or physically resist; or
- (c) the person did not sustain a physical injury; or
- (d) on that or an earlier occasion, the person had consented to engage in a sexual act (whether or not of the same kind) with the accused person or someone else.

73 Directions about mistaken belief about consent

In a sexual offence proceeding, the judge must, in a relevant case, direct the jury that, in deciding whether the accused person was under a mistaken belief that a person consented to a sexual act, the jury may consider whether the belief was reasonable in the circumstances.

Part 5 Miscellaneous

74 Approved forms

- (1) The Minister may, in writing, approve forms for this Act.

Note For other provisions about forms, see Legislation Act, s 255.

- (2) If the Minister approves a form for a particular purpose, the approved form must be used for that purpose.
- (3) An approved form is a notifiable instrument.

Note A notifiable instrument must be notified under the Legislation Act.

75 Regulation-making power

- (1) The Executive may make regulations for this Act.

Note Regulations must be notified, and presented to the Legislative Assembly, under the Legislation Act.

- (2) The regulations may prescribe the amounts, or the way of calculating amounts, payable to a Territory court in relation to the cost of, or incidental to, the provision of an audiovisual link or audio link and ancillary equipment for part 3 (Use of audiovisual links and audio links).
- (3) In this section:

audio link—see section 16 (Definitions for pt 3).

Territory court—see section 16 (Definitions for pt 3).

Dictionary

(see s 2)

Note 1 The Legislation Act contains definitions and other provisions relevant to this Act.

Note 2 For example, the Legislation Act, dict, pt 1, defines the following terms:

- child
- Childrens Court
- Coroner’s Court
- doctor
- document
- entity
- Executive
- lawyer
- may (see s 146)
- Minister (see s 162)
- must (see s 146)
- proceeding (for this Act, pt 3).

audio link, for part 3 (Use of audiovisual links and audio links)—see section 16.

audiovisual link means a system of 2-way communication linking different places so that a person at any of them can be seen and heard at the other places.

complainant—

- (a) for division 4.2 (Sexual offence proceedings—general)—see section 38; and
- (b) for division 4.3 (Sexual offence proceedings—giving evidence from places other than courtrooms)—see section 41; and
- (c) for division 4.4 (Evidence of complainant’s sexual reputation and activities)—see section 48; and

(d) for division 4.6 (Sexual offence proceedings—directions and warnings to juries)—see section 68.

counsellor, for division 4.5 (Protection of counselling communications)—see section 54.

court, for part 2 (Evidence of children)—see section 5.

criminal proceeding, for division 4.5 (Protection of counselling communications)—see section 54.

document recording a protected confidence, for division 4.5 (Protection of counselling communications)—see section 54.

harm, for division 4.5 (Protection of counselling communications)—see section 54.

Magistrates Court, for part 2 (Evidence of children)—see section 5.

participating State, for part 3 (Use of audiovisual links and audio links)—see section 16.

preliminary criminal proceeding, for division 4.5 (Protection of counselling communications)—see section 54.

prescribed witness, for part 2 (Evidence of children)—see section 5.

proceeding, for part 2 (Evidence of children)—see section 5.

protected confidence, for division 4.5 (Protection of counselling communications)—see section 55.

protected confidence evidence, for division 4.5 (Protection of counselling communications)—see section 54.

recognised court, for part 3 (Use of audiovisual links and audio links)—see section 16.

sexual offence, for part 4 (Evidence in criminal proceedings)—see section 37.

sexual offence proceeding—

- (a) for division 4.2 (Sexual offence proceedings—general)—see section 38; and
- (b) for division 4.3 (Sexual offence proceedings—giving evidence from places other than courtrooms)—see section 41; and
- (c) for division 4.4 (Evidence of complainant’s sexual reputation and activities)—see section 48; and
- (d) for division 4.6 (Sexual offence proceedings—directions and warnings to juries)—see section 68.

State, for part 3 (Use of audiovisual links and audio links)—see section 16.

Territory court, for part 3 (Use of audiovisual links and audio links)—see section 16.

tribunal, in relation to a State, for part 3 (Use of audiovisual links and audio links)—see section 16.

Schedule 1 Evidence (Miscellaneous Provisions) Act 1991—consequential and technical amendments

(see s 3 (1))

[1.1] New sections 2 to 4

in pt 1, insert

2 Dictionary

The dictionary at the end of this Act is part of this Act.

Note 1 The dictionary at the end of this Act defines certain terms used in this Act, and includes references (*signpost definitions*) to other terms defined elsewhere in this Act.

For example, the signpost definition '*participating State*, for part 3 (Use of audiovisual links and audio links)—see section 16.' means that the term 'participating State' is defined in section 16 for part 3.

Note 2 A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see Legislation Act, s 155 and s 156 (1)).

3 Notes

A note included in this Act is explanatory and is not part of this Act.

Note See Legislation Act, s 127 (1), (4) and (5) for the legal status of notes.

4 Offences against Act—application of Criminal Code etc

Other legislation applies in relation to offences against this Act.

Note 1 Criminal Code

The Criminal Code, ch 2 applies to the following offence against this Act (see Code, pt 2.1):

- s 40 (Prohibition of publication of complainant’s identity).

The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg *conduct*, *intention*, *recklessness* and *strict liability*).

Note 2 Penalty units

The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

[1.2] Part 2 heading

substitute

Part 2 Evidence of children

[1.3] Section 2

substitute

5 Definitions for pt 2

In this part:

court means—

- (a) the Supreme Court; or
- (b) the Magistrates Court; or
- (c) the Coroner’s Court.

Magistrates Court includes the Childrens Court.

prescribed witness means a child.

proceeding means a proceeding in relation to which this part applies.

[1.4] Section 3

renumber as section 6

[1.5] Section 4

omit

[1.6] Section 5

renumber as section 7

[1.7] Section 6 (1) (b)

omit

a closed-circuit television system

substitute

an audiovisual link

[1.8] Section 6 (1)

omit

system

substitute

audiovisual link

[1.9] Section 6

renumber as section 8

[1.10] Section 7 (1)

omit

section 6 (1)

substitute

section 8 (1) (Location of prescribed witness giving evidence)

[1.11] Section 7 (2) (f)

omit

closed-circuit television system

substitute

audiovisual link

[1.12] Section 7 (3)

omit

section 6 (1)

substitute

section 8 (1) (Location of prescribed witness giving evidence)

[1.13] Section 7

renumber as section 9

[1.14] Section 8

omit

section 5 (a) (i)

substitute

section 7 (a) (i) (Application of pt 2)

[1.15] Section 8

omit

section 6 (1)

substitute

section 8 (1) (Location of prescribed witness giving evidence)

[1.16] Section 8

renumber as section 10

[1.17] Section 9 (a)

omit

section 6 (1)

substitute

section 8 (1) (Location of prescribed witness giving evidence)

[1.18] Section 9

renumber as section 11

[1.19] Section 10 (1) (c)

substitute

(c) by a parent or guardian of the prescribed witness.

[1.20] Sections 10 to 12

renumber as sections 12 to 14

[1.21] Section 13

omit everything before

18

substitute

15 Child turning 18 during proceeding

If a person who was a prescribed witness in a proceeding turns

[1.22] Section 14, definition of *audiovisual link*

omit

[1.23] Sections 14 to 22

renumber as sections 16 to 24

[1.24] Section 23

omit

section 22

substitute

section 24

[1.25] Section 23

renumber as section 25

[1.26] Section 24 (1)

omit

section 23

substitute

section 25

Schedule 1 Evidence (Miscellaneous Provisions) Act 1991—consequential and technical amendments

Amendment [1.27]

[1.27] Sections 24 to 27

renumber as sections 26 to 29

[1.28] Section 28 (a) (iii)

omit

section 27

substitute

section 29

[1.29] Sections 28 to 33

renumber as sections 30 to 35

[1.30] Section 34

omit

section 18 or 30

substitute

section 20 (Territory courts may take evidence and submissions from outside ACT) or section 32 (Use of link in proceedings)

[1.31] Section 34

renumber as section 36

Schedule 2 **Consequential amendments**

(see s 3 (2))

Part 2.1 **Commercial Arbitration Act 1986**

[2.1] Section 20A (1)

omit

section 18 (1) or 30 (1)

substitute

section 20 (1) (Territory courts may take evidence and submissions from outside ACT) or section 32 (1) (Use of link in proceedings)

Part 2.2 **Confiscation of Criminal Assets Act 2003**

[2.2] Section 176 (5), note

omit

s 14

substitute

s 16

Part 2.3 Coroners Act 1997

[2.3] Section 42A (1)

omit

section 18 (1) or 30 (1)

substitute

section 20 (1) (Territory courts may take evidence and submissions from outside ACT) or section 32 (1) (Use of link in proceedings)

Part 2.4 Court Security Act 2001

[2.4] Section 5 (2) (d) and (e)

substitute

(d) the following sections of the *Evidence (Miscellaneous Provisions) Act 1991*:

- section 9 (Consequential orders);
- section 39 (Evidence given in closed court);
- section 44 (Consequential orders under div 4.3);
- section 52 (c) (Application for leave under s 51);
- section 61 (5) (Preliminary examination of protected confidence evidence);
- section 63 (2) (a) (Ancillary orders for protection of person who made protected confidence); and

[2.5] Section 5 (2)

renumber paragraphs when Act next republished under Legislation Act

Part 2.5 Discrimination Act 1991

[2.6] Section 96A (1)

omit

section 18 (1) or 30 (1)

substitute

section 20 (1) (Territory courts may take evidence and submissions from outside ACT) or section 32 (1) (Use of link in proceedings)

Part 2.6 Evidence Act 1971

[2.7] Part 10A

omit

Part 2.7 Guardianship and Management of Property Act 1991

[2.8] Section 36A (1)

omit

section 18 (1) or 30 (1)

substitute

section 20 (1) (Territory courts may take evidence and submissions from outside ACT) or section 32 (1) (Use of link in proceedings)

Part 2.8 Magistrates Court Act 1930

[2.9] Section 54A (2) (a)

omit

section 18 (1) or 30 (1)

substitute

section 20 (1) (Territory courts may take evidence and submissions from outside ACT) or section 32 (1) (Use of link in proceedings)

[2.10] Section 72A (3)

substitute

(3) In this section:

audiovisual link—see the *Evidence (Miscellaneous Provisions) Act 1991*, dictionary.

[2.11] Section 254B (1)

omit

section 18 (1) or 30 (1)

substitute

section 20 (1) (Territory courts may take evidence and submissions from outside ACT) or section 32 (1) (Use of link in proceedings)

Part 2.9 Magistrates Court (Civil Jurisdiction) Act 1982

[2.12] Section 187 (8) and 482 (6)

omit

section 18 (1) or 30 (1)

substitute

section 20 (1) (Territory courts may take evidence and submissions from outside ACT) or section 32 (1) (Use of link in proceedings)

Part 2.10 Mental Health (Treatment and Care) Act 1994

[2.13] Section 90 (5) (c)

omit

section 30 (1)

substitute

section 32 (1) (Use of link in proceedings)

[2.14] Section 91A (1)

omit

section 18 (1) or 30 (1)

substitute

section 20 (1) (Territory courts may take evidence and submissions from outside ACT) or section 32 (1) (Use of link in proceedings)

Part 2.11 Protection Orders Regulations 2002

[2.15] Regulation 32

omit

section 18 (1) (Territory courts may take evidence and submissions from outside the Territory) or section 30 (1) (Use of link in proceedings)

substitute

section 20 (1) (Territory courts may take evidence and submissions from outside ACT) or section 32 (1) (Use of link in proceedings)

[2.16] Regulation 53 (5)

omit

section 18 (1) or 30 (1)

substitute

section 20 (1) (Territory courts may take evidence and submissions from outside ACT) or section 32 (1) (Use of link in proceedings)

Part 2.12 Residential Tenancies Act 1997

[2.17] Section 96A (1)

omit

section 18 (1) or 30 (1)

substitute

section 20 (1) (Territory courts may take evidence and submissions from outside ACT) or section 32 (1) (Use of link in proceedings)

Part 2.13 Royal Commissions Act 1991

[2.18] Section 34A (1)

omit

section 18 (1) or 30 (1)

substitute

section 20 (1) (Territory courts may take evidence and submissions from outside ACT) or section 32 (1) (Use of link in proceedings)

Part 2.14 Supreme Court Act 1933

[2.19] Section 37N (3) (c)

substitute

(c) by audiovisual link or audio link;

[2.20] New section 37N (4)

insert

(4) In this section:

audio link—see the *Evidence (Miscellaneous Provisions) Act 1991*, section 16 (Definitions for pt 3).

audiovisual link—see the *Evidence (Miscellaneous Provisions) Act 1991*, dictionary.

[2.21] Section 55A (4)

substitute

(4) In this section:

audiovisual link—see the *Evidence (Miscellaneous Provisions) Act 1991*, dictionary.

Endnotes

Republications of amended laws

- 1 For the latest republication of amended laws, see www.legislation.act.gov.au.

Penalty units

- 2 The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

[Presentation speech made in Assembly on 26 June 2003]

I certify that the above is a true copy of the Evidence (Miscellaneous Provisions) Amendment Bill 2003 which was passed by the Legislative Assembly on 23 October 2003.

Clerk of the Legislative Assembly

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