



Australian Capital Territory

# Crimes (Protection of Witness Identity) Act 2011

A2011-46

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Australian Capital Territory

# **Crimes (Protection of Witness Identity) Act 2011**

**A2011-46**

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An Act to provide for the protection of the identity of operative witnesses

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

## Part 1 Preliminary

### 1 Name of Act

This Act is the *Crimes (Protection of Witness Identity) Act 2011*.

### 2 Commencement

This Act commences on the day after its notification day.

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

### 3 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 '*relevant proceeding*, in relation to an operative—see section 9.' means that the term 'relevant proceeding' is defined in that section.

*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)).

### 4 Notes

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

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

## 5 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 all offences against this Act (see Code, pt 2.1).

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.

## 6 Purpose of Act

The main purpose of this Act is to facilitate, for law enforcement purposes, investigations in relation to criminal activity, including investigations extending beyond the ACT, by—

- (a) providing for the protection of the identity of operatives; and
- (b) facilitating mutual recognition of witness identity protection certificates under corresponding laws.

## 7 Relationship to other laws

The following Acts do not apply in relation to activities, documents, and records under this Act:

- (a) the *Freedom of Information Act 1989*;
- (b) the *Territory Records Act 2002*.

**8 Powers of party's lawyer**

For this Act—

- (a) anything that may be done by a party to a proceeding may be done by the party's lawyer; and
- (b) a requirement to give something to a party to a proceeding is satisfied by giving the thing to the party's lawyer.

## **Part 2**                      **Witness identity protection certificates for operatives**

### **Division 2.1**              **Preliminary**

#### **9**                      **Meaning of *relevant proceeding***

In this Act:

*relevant proceeding*, in relation to an operative, means a proceeding in which the operative is, or may be, required to give evidence obtained as an operative.

#### **10**                      **Common law not affected by pt 2**

To remove any doubt, this part does not affect the operation of the common law in relation to the protection of the identity of a person if the person—

- (a) is not an operative; and
- (b) gives or intends to give evidence in a proceeding.

### **Division 2.2**              **Witness identity protection certificates**

#### **11**                      **Giving certificates**

- (1) The chief officer of a law enforcement agency may give a certificate (a *witness identity protection certificate*) for an operative of the agency in relation to a relevant proceeding if the chief officer is satisfied on reasonable grounds that revealing the operative's identity or where the operative lives in the proceeding is likely to—

- (a) endanger the safety of the operative or someone else; or

(b) prejudice any investigation.

*Note* The chief officer may delegate a function under this section (see s 23).

- (2) A decision to give a witness identity protection certificate—
- (a) is final and is not subject to appeal or review; and
  - (b) must not be called into question, quashed or invalidated by a court.
- (3) Subsection (2) does not prevent a decision to give a witness identity protection certificate being called into question in a proceeding of a disciplinary nature against the person who made the decision.

## **12 Form of certificates**

- (1) A witness identity protection certificate for an operative of a law enforcement agency in a relevant proceeding must state the following:
- (a) if the operative—
    - (i) is known to a party to the proceeding or a party's lawyer by a name other than the operative's real name (an *assumed name*)—the operative's assumed name; or
    - (ii) is not known to any party to the proceeding or any party's lawyer by a name—the operative's court name for the proceeding;
  - (b) the period the operative was involved in the investigation to which the proceeding relates;
  - (c) the name of the agency;
  - (d) the date of the certificate;
  - (e) the grounds for giving the certificate;
  - (f) whether the operative has been convicted or found guilty of an offence and, if so, details of each offence;



- (g) whether any charges against the operative for an offence are pending or outstanding and, if so, details of each charge;
  - (h) if the operative is or was a law enforcement officer—
    - (i) whether the operative has been found guilty of professional misconduct and, if so, details of each finding; and
    - (ii) whether any allegations of professional misconduct against the operative are outstanding and, if so, details of each allegation;
  - (i) whether, to the knowledge of the person giving the certificate, a court has commented unfavourably about the operative's credibility and, if so, details of the comment;
  - (j) whether, to the knowledge of the person giving the certificate, the operative has made a false representation and, if so, details of the representation;
  - (k) anything else the person giving the certificate knows that may be relevant to the operative's credibility.
- (2) A witness identity protection certificate for an operative must not contain information that reveals, or may reveal, the operative's identity or where the operative lives.
- (3) The chief officer must make all reasonable enquiries to find out the information mentioned in subsection (1).

*Note* The chief officer may delegate a function under this section (see s 23).

(4) In this section:

**false representation** does not include a representation made under an authority under—

- (a) the *Crimes (Assumed Identities) Act 2009*; or
- (b) the *Crimes (Controlled Operations) Act 2008*.

*Note* A law enforcement officer of a law enforcement agency may be granted an authority to—

- (a) acquire or use an assumed identity under the *Crimes (Assumed Identities) Act 2009*; or
- (b) conduct a controlled operation on behalf of the agency under the *Crimes (Controlled Operations) Act 2008*.

**law enforcement officer**—see the *Crimes (Assumed Identities) Act 2009*, dictionary.

**outstanding**—

- (a) a charge against a person for an offence is **outstanding** until the charge is finally dealt with in any of the following ways:
  - (i) the charge is withdrawn;
  - (ii) the charge is dismissed by a court;
  - (iii) the person is discharged by a court following a committal hearing;
  - (iv) the person is acquitted, convicted or found guilty by a court of the offence.

*Note* **Found guilty**, of an offence—see the Legislation Act, dictionary, pt 1.

- (b) an allegation of professional misconduct against a person is **outstanding** if the allegation has not been finally dealt with in accordance with—
  - (i) the *Australian Crime Commission Act 2002* (Cwlth); or
  - (ii) the *Australian Federal Police Act 1979* (Cwlth).

***pending***—a charge against a person for an offence is ***pending*** if the person has not yet been charged with the offence, but the person has—

- (a) been arrested for the offence (unless the person is later released without being charged with an offence); or
- (b) been served with a summons to appear before a court to answer a charge for the offence.

***professional misconduct*** means misconduct or a breach of discipline under—

- (a) the *Australian Crime Commission Act 2002* (Cwlth); or
- (b) the *Australian Federal Police Act 1979* (Cwlth); or
- (c) a law of another jurisdiction that corresponds to the *Australian Federal Police Act 1979* (Cwlth); or
- (d) a law of a foreign country that corresponds to the *Australian Federal Police Act 1979* (Cwlth).

### **13 Filing and notification of certificates**

- (1) A witness identity protection certificate for an operative in a relevant proceeding must be filed in the court dealing with the proceeding before the operative gives evidence in the proceeding.
- (2) A person who files a certificate under subsection (1) must give a copy to—
  - (a) each party to the proceeding by the relevant day; and
  - (b) if the court orders the person to give a copy to someone else— that person.

- (3) In this section:

*relevant day* means—

- (a) the day 14 days before the operative is to give evidence; or
- (b) if a party agrees to a day less than 14 days before the operative is to give evidence—that day.

#### **14 Effect of certificates**

- (1) This section applies if a person files a witness identity protection certificate for an operative under section 13 (1) and—

- (a) the person complies with section 13 (2); or
- (b) the person does not comply with section 13 (2), but the court gives leave for this section to apply despite the non-compliance.

- (2) The operative may give evidence in the proceeding under the operative's—

- (a) assumed name; or
- (b) court name for the proceeding.

*Note* A witness identity protection certificate must state either an operative's assumed name or court name for the proceeding—see s 12 (1) (a).

- (3) A witness must not—

- (a) be asked a question if the answer may reveal the operative's identity or where the operative lives; and
- (b) answer a question, give evidence or provide information that reveals, or may reveal, the operative's identity or where the operative lives.

- (4) A person involved in the proceeding must not make a statement that reveals, or may reveal, the operative's identity or where the operative lives.

- (5) Subsections (3) and (4) apply subject to section 18.
- (6) In this section:
- person involved in the proceeding* means any of the following:
- (a) the court dealing with the proceeding;
  - (b) a party to the proceeding;
  - (c) a person given leave to be heard or make submissions in the proceeding;
  - (d) a lawyer—
    - (i) representing a person referred to in paragraph (b) or (c);  
or
    - (ii) assisting the court in the proceeding;
  - (e) an officer of the court or person assisting the court in the proceeding;
  - (f) a person executing any process or enforcing an order in the proceeding.

## **15 Cancelling certificates**

- (1) This section applies if the chief officer of a law enforcement agency gives a witness identity protection certificate for an operative of the agency in a relevant proceeding.
- (2) The chief officer must cancel the certificate if the chief officer considers that the certificate is no longer necessary or appropriate to prevent disclosure of the operative's identity or where the operative lives.

- (3) If the chief officer cancels the certificate after it has been filed in a court, the chief officer must give written notice of the cancellation (a *cancellation notice*) to—
- (a) the court dealing with the proceeding (by filing the cancellation notice in court); and
  - (b) each party to the proceeding

*Note* The chief officer may delegate a function under this section (see s 23).

## **16 Directions to jury**

- (1) This section applies if—
- (a) a witness identity protection certificate for an operative in a relevant proceeding is filed in a court dealing with the proceeding; and
  - (b) there is a jury in the proceeding; and
  - (c) the operative gives evidence in the proceeding.
- (2) The court must tell the jury that the jury must not give the operative's evidence any more or less weight, or draw any inference against the defendant or another party to the proceeding, because—
- (a) there is a witness identity protection certificate for the operative; or
  - (b) if the court has made an order under section 17 (1) or section 18 (7), (8) or (9)—the court order has been made.
- (3) However, the court may refuse to direct the jury if the court considers that it would be inappropriate to give the direction.

## **Division 2.3                      Protection and disclosure of operative's identity or where operative lives**

### **17                      Orders to protect operative's identity**

- (1) If a witness identity protection certificate for an operative is filed in a court, the court may make any order it considers necessary or desirable to prevent disclosure of the operative's identity or where the operative lives.
- (2) A person commits an offence if—
  - (a) an order has been made under subsection (1); and
  - (b) the person is reckless about whether an order has been made under subsection (1); and
  - (c) the person contravenes the order.

Maximum penalty: imprisonment for 2 years.

*Note*        The fault element of recklessness can be satisfied by proof of intention, knowledge or recklessness (see Criminal Code, s 20 (4)).

- (3) Subsection (2) does not limit the court's power to punish for contempt.

### **18                      Authorised disclosure of operative's identity—court leave or order**

- (1) This section applies if a witness identity protection certificate for an operative in a relevant proceeding is filed in a court dealing with the proceeding.

- (2) A party to the proceeding, or a lawyer assisting the court in the proceeding, may apply to the court—
  - (a) for leave—
    - (i) to ask a witness a question that may reveal the operative's identity or where the operative lives; or
    - (ii) for a person involved in the proceeding to make a statement that reveals, or may reveal, the operative's identity or where the operative lives; or
  - (b) for an order requiring a witness to answer a question, give evidence or provide information that reveals, or may reveal, the operative's identity or where the operative lives.
- (3) The court may—
  - (a) give leave for a person to do anything mentioned in subsection (2) (a); or
  - (b) make an order requiring a witness to do anything mentioned in subsection (2) (b).
- (4) However, the court must not give leave or make an order under subsection (3) unless satisfied that—
  - (a) there is evidence that, if accepted, would substantially challenge the operative's credibility; and
  - (b) it would be impractical to properly test the operative's credibility without disclosing, or risking disclosure of, the operative's identity or where the operative lives; and
  - (c) it is in the interests of justice for the operative's credibility to be tested.
- (5) If there is a jury in the proceeding, the application must be heard in the absence of the jury.



- (6) Unless the court considers that the interests of justice require otherwise, the court must be closed when—
- (a) the application is made; and
  - (b) if the court gives leave or makes an order under subsection (3)—the question is asked and answered, the statement is made, the evidence is given or the information is provided.
- (7) The court must make an order suppressing the publication of anything said when—
- (a) the application is made; and
  - (b) if the court gives leave or makes an order under subsection (3)—the question is asked and answered, the statement is made, the evidence is given or the information is provided.
- (8) Subsection (7) does not prevent a transcript of court proceedings being taken, but the court may make an order about dealing with the transcript, including an order suppressing its publication.
- (9) The court may make any other order it considers appropriate to prevent disclosure of the operative's identity or where the operative lives.
- (10) A person commits an offence if—
- (a) an order has been made under subsection (7), (8) or (9); and
  - (b) the person is reckless about whether the order has been made; and
  - (c) the person contravenes the order.

Maximum penalty: imprisonment for 2 years.

*Note* The fault element of recklessness can be satisfied by proof of intention, knowledge or recklessness (see Criminal Code, s 20 (4)).

- (11) Subsection (10) does not limit the court's power to punish for contempt.
- (12) In this section:  
*person involved in the proceeding*—see section 14 (6).

**19 Authorised disclosure of operative's identity—chief officer notice**

- (1) This section applies if the chief officer of a law enforcement agency gives a witness identity protection certificate for an operative of the agency in a relevant proceeding.
- (2) The chief officer may, by written notice, allow a person to give information outside the proceeding that reveals, or may reveal, an operative's identity or where the operative lives if the chief officer considers it necessary or appropriate for the information to be given.
- (3) The notice—
  - (a) must state—
    - (i) the information that may be given; and
    - (ii) who may give the information; and
    - (iii) to whom the information may be given; and
  - (b) may state how the information may be given.

*Note* The chief officer may delegate a function under this section (see s 23).

**20 Offences—disclosure of operative's identity**

- (1) A person commits an offence if—
  - (a) a witness identity protection certificate for an operative in a relevant proceeding has been given; and
  - (b) the person is reckless about whether the certificate has been given; and

- (c) the certificate has not been cancelled under section 15; and
- (d) the person is reckless about whether the certificate has not been cancelled under section 15; and
- (e) the person recklessly does something (the *disclosure action*) that reveals, or is likely to reveal, the operative's identity or where the operative lives; and
- (f) the disclosure action is not—
  - (i) authorised by leave or an order under section 18; or
  - (ii) allowed under section 19; and
- (g) the person is reckless about whether the disclosure action is not—
  - (i) authorised by leave or an order under section 18; or
  - (ii) allowed under section 19.

Maximum penalty: imprisonment for 2 years.

*Note* The fault element of recklessness can be satisfied by proof of intention, knowledge or recklessness (see Criminal Code, s 20 (4)).

- (2) Absolute liability applies to subsection (1) (a), (c) and (f).
- (3) A person commits an offence if the person commits an offence against subsection (1) in circumstances in which the person is reckless—
  - (a) as to whether the disclosure action endangers, or will endanger, the health or safety of anyone; or
  - (b) about whether the disclosure action prejudices, or will prejudice, the effective conduct of an investigation.

Maximum penalty: imprisonment for 10 years.

*Note* The fault element of recklessness can be satisfied by proof of intention, knowledge or recklessness (see Criminal Code, s 20 (4)).

## Part 3 Miscellaneous

### 21 Annual report

- (1) For each financial year, the chief officer of a law enforcement agency must prepare a report about any witness identity protection certificates given by the chief officer during the year.
- (2) The report must include—
  - (a) the number of witness identity protection certificates given during the year; and
  - (b) why the chief officer was satisfied under section 11 (1) for each certificate; and
  - (c) if leave was given or an order made in a proceeding under section 18—details of the proceeding; and
  - (d) if a witness identity protection certificate was cancelled under section 15—why the certificate was cancelled; and
  - (e) if a person was allowed to give information under section 19—why the information was allowed to be given; and
  - (f) any other information about witness identity protection certificates or the operation of this Act that the Minister considers appropriate.
- (3) The report must not include information that reveals, or may reveal, an operative's identity or where the operative lives, unless the witness identity protection certificate for the operative has been cancelled.
- (4) The chief officer must give the report to the Minister as soon as practicable after the end of the financial year.

- (5) The Minister must present the report to the Legislative Assembly within 15 sitting days after receiving the report from the chief officer.

## **22 Mutual recognition of certificates under corresponding laws**

- (1) The following provisions apply, with any necessary changes, to a corresponding witness identity protection certificate as if it were a witness identity protection certificate given under section 11:
- (a) section 13 (Filing and notification of certificates);
  - (b) section 14 (Effect of certificates);
  - (c) section 16 (Directions to jury);
  - (d) section 17 (Orders to protect operative's identity);
  - (e) section 18 (Authorised disclosure of operative's identity—court leave or order);
  - (f) section 20 (Offences—disclosure of operative's identity).

- (2) In this section:

*corresponding witness identity protection certificate* means a witness identity protection certificate given under a provision of a corresponding law that corresponds to section 11.

## **23 Delegation**

- (1) Despite any other territory law, the functions of a chief officer of a law enforcement agency under this Act must not be delegated to anyone else.
- (2) However, a chief officer of a law enforcement agency may delegate to a senior officer of the law enforcement agency any of the chief officer's functions under this Act.

(3) In this section:

*senior officer* means—

- (a) in relation to the Australian Federal Police—a deputy chief police officer; or
- (b) in relation to the Australian Crime Commission—
  - (i) the Director National Operations; or
  - (ii) a position of the Australian Crime Commission prescribed by regulation.

*Note*        For the making of delegations and the exercise of delegated functions, see the Legislation Act, pt 19.4.

## **24            Regulation-making power**

The Executive may make regulations for this Act.

*Note*        A regulation must be notified, and presented to the Legislative Assembly, under the Legislation Act.

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## Dictionary

(see s 3)

*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:

- ACT
- chief police officer
- Commonwealth
- financial year
- found guilty
- function
- in relation to
- Legislative Assembly
- Minister (see s 162)
- police officer
- position
- territory law.

*assumed name*, for an operative—see section 12 (1) (a) (i).

*Australian Crime Commission* means the Australian Crime Commission established by the *Australian Crime Commission Act 2002* (Cwlth).

*chief officer* means—

- (a) in relation to the Australian Federal Police—the chief police officer; and
- (b) in relation to the Australian Crime Commission—the chief executive officer of the Australian Crime Commission.

*conduct* includes an act or omission.

***corresponding law*** means a law of another jurisdiction that corresponds to the provisions of this Act, and includes a law of another jurisdiction that is declared by regulation to correspond to this Act.

***court*** includes a tribunal or person authorised to receive evidence by law or consent of parties to a proceeding.

***court name***, for an operative in relation to a relevant proceeding, means a code or name, other than the operative's real name, used to identify the operative in the proceeding.

***criminal activity*** means conduct that involves the commission of an offence by 1 or more people.

***investigation***—

- (a) means an investigation in relation to criminal activity; and
- (b) includes an investigation extending beyond the ACT.

***jurisdiction*** means the Commonwealth or a State or Territory of the Commonwealth.

***law enforcement agency*** means—

- (a) the Australian Federal Police; or
- (b) the Australian Crime Commission.

***operative*** means a person who is, or was—

- (a) authorised to acquire and use an assumed identity under the *Crimes (Assumed Identities) Act 2009*; or
- (b) a participant in an authorised operation under the *Crimes (Controlled Operations) Act 2008*.



**party**, to a proceeding, means—

- (a) for a criminal proceeding—the prosecutor and each accused person; or
- (b) for a civil proceeding—each person who is a litigant to the proceeding; or
- (c) for any other proceeding—each person who may appear or give evidence in the proceeding.

**proceeding**—

- (a) means a criminal, civil or other proceeding or inquiry, reference or examination in which evidence is or may be given by law or consent of parties to the proceeding; and
- (b) includes an arbitration.

**relevant proceeding**, in relation to an operative—see section 9.

**witness**, in relation to a relevant proceeding, includes an operative.

**witness identity protection certificate**—see section 11 (1).

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## Endnotes

**1 Presentation speech**

Presentation speech made in the Legislative Assembly on 25 August 2011.

**2 Notification**

Notified under the Legislation Act on 7 November 2011.

**3 Republications of amended laws**

For the latest republication of amended laws, see [www.legislation.act.gov.au](http://www.legislation.act.gov.au).

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I certify that the above is a true copy of the Crimes (Protection of Witness Identity) Bill 2011, which was passed by the Legislative Assembly on 27 October 2011.

Clerk of the Legislative Assembly

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