

2011

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Attorney-General)

Evidence Amendment Bill 2011

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(Attorney-General)

Evidence Amendment Bill 2011

A Bill for

An Act to amend the *Evidence Act 2011*

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

1 **1 Name of Act**

2 This Act is the *Evidence Amendment Act 2011*.

3 **2 Commencement**

4 This Act commences on the commencement of the *Evidence*
5 *Act 2011*, section 3.

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

8 **3 Legislation amended**

9 This Act amends the *Evidence Act 2011*.

10 **4 New divisions 3.10.1A and 3.10.1C**

11 *insert*

12 **Division 3.10.1A Professional confidential relationship**
13 **privilege**

14 **126A Definitions—div 3.10.1A**

15 (1) In this division:

16 *confidant*—see the definition of *protected confidence*.

17 *harm* includes actual physical bodily harm, financial loss, stress or
18 shock, damage to reputation or emotional or psychological harm
19 (for example, shame, humiliation and fear).

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

1 *protected confidence* means a communication made by a person in
2 confidence to someone else (the *confidant*)—

3 (a) in the course of a relationship in which the confidant was
4 acting in a professional capacity; and

5 (b) when the confidant was under an express or implied obligation
6 not to disclose its contents, whether or not the obligation arises
7 under law or can be inferred from the nature of the relationship
8 between the person and the confidant.

9 *protected confider* means a person who made a protected
10 confidence.

11 *protected identity information* means information about, or
12 enabling a person to ascertain, the identity of the person who made a
13 protected confidence.

14 (2) For this division, a communication may be made in confidence even
15 if it is made in the presence of a third party if the third party's
16 presence is necessary to facilitate communication.

17 **126B Exclusion of evidence of protected confidences**

18 (1) The court may direct that evidence not be presented in a proceeding
19 if the court finds that presenting it would disclose—

20 (a) a protected confidence; or

21 (b) the contents of a document recording a protected confidence;
22 or

23 (c) protected identity information.

24 (2) The court may give a direction under this section—

25 (a) on its own initiative; or

26 (b) on the application of the protected confider or confidant
27 (whether or not either is a party).

- 1 (3) The court must give a direction under this section if it is satisfied
2 that—
- 3 (a) it is likely that harm would or might be caused (whether
4 directly or indirectly) to a protected confider if the evidence is
5 presented; and
- 6 (b) the nature and extent of the harm outweighs the desirability of
7 the evidence being presented.
- 8 (4) Without limiting the matters that the court may take into account for
9 this section, it must take into account the following matters:
- 10 (a) the probative value of the evidence in the proceeding;
- 11 (b) the importance of the evidence in the proceeding;
- 12 (c) the nature and gravity of the offence, cause of action or
13 defence and the nature of the subject matter of the proceeding;
- 14 (d) the availability of any other evidence relating to the matters to
15 which the protected confidence or protected identity
16 information relates;
- 17 (e) the likely effect of presenting evidence of the protected
18 confidence or protected identity information, including the
19 likelihood of harm, and the nature and extent of harm that
20 would be caused to the protected confider;
- 21 (f) the means (including any ancillary orders that may be made
22 under section 126E) available to the court to limit the harm or
23 extent of the harm that is likely to be caused if evidence of the
24 protected confidence or the protected identity information is
25 disclosed;
- 26 (g) if the proceeding is a criminal proceeding—whether the party
27 seeking to present evidence of the protected confidence or
28 protected identity information is a defendant or the prosecutor;

- 1 (h) whether the substance of the protected confidence or the
2 protected identity information has already been disclosed by
3 the protected confider or someone else;
- 4 (i) the public interest in preserving the confidentiality of protected
5 confidences;
- 6 (j) the public interest in preserving the confidentiality of protected
7 identity information.
- 8 (5) The court must state its reasons for giving or refusing to give a
9 direction under this section.

10 **126C Loss of professional confidential relationship privilege—**
11 **consent**

12 This division does not prevent the presenting of evidence with the
13 protected confider's consent.

14 **126D Loss of professional confidential relationship privilege—**
15 **misconduct**

- 16 (1) This division does not prevent the presenting of evidence of a
17 communication made or the contents of a document prepared in the
18 furtherance of the commission of a fraud or an offence or the
19 commission of an act that renders a person liable to a civil penalty.
- 20 (2) For this section, if the commission of the fraud, offence or act is a
21 fact in issue and there are reasonable grounds for finding that—
- 22 (a) the fraud, offence or act was committed; and
- 23 (b) a communication was made or document prepared in
24 furtherance of the commission of the fraud, offence or act;
- 25 the court may find that the communication was made or the
26 document was prepared as mentioned in paragraph (b).

1 **126E Ancillary orders**

2 Without limiting any action the court may take to limit the possible
3 harm, or extent of the harm, likely to be caused by the disclosure of
4 evidence of a protected confidence or protected identity information,
5 the court may—

- 6 (a) order that all or part of the evidence be heard in closed court;
7 and
- 8 (b) make an order relating to the suppression of publication of all
9 or part of the evidence given before the court as, in its opinion,
10 is necessary to protect the safety and welfare of the protected
11 confider.

12 **126F Application—div 3.10.1A**

13 (1) This division extends to a protected confidence made before the
14 commencement of this division.

15 (2) This division does not apply in relation to a proceeding the hearing
16 of which began before the commencement of this division.

17 (3) This division does not apply in relation to a protected confidence
18 within the meaning of the *Evidence (Miscellaneous Provisions)*
19 *Act 1991*, division 4.5.

20 *Note* The Commonwealth Act does not include this subsection.

21 (4) The court may give a direction under this division in relation to a
22 protected confidence or protected identity information whether or
23 not the protected confidence or protected identity information is
24 privileged under another section of this part or would be privileged
25 except for a limitation or restriction imposed by that section.

26 (5) For subsection (2), the hearing of a proceeding has begun if the
27 court has begun to take oral or written evidence in the proceeding
28 (other than in relation to bail or any other interlocutory matter).

29 *Note* The Commonwealth Act and NSW Act do not include this subsection.

1 **Division 3.10.1C Journalist privilege**

2 **126J Definitions—div 3.10.1C**

3 In this division:

4 *informant* means a person who gives information to a journalist in
5 the normal course of the journalist's work in the expectation that the
6 information may be published in a news medium.

7 *journalist* means a person who is engaged and active in the
8 publication of news and who may be given information by an
9 informant in the expectation that the information may be published
10 in a news medium.

11 *news medium* means a medium for the dissemination to the public
12 or a section of the public of news and observations on news.

13 **126K Journalist privilege relating to informant's identity**

14 (1) If a journalist has promised an informant not to disclose the
15 informant's identity, neither the journalist nor the journalist's
16 employer is compellable to answer any question or produce any
17 document that would disclose the informant's identity or enable that
18 identity to be ascertained.

19 (2) The court may, on the application of a party, order that
20 subsection (1) is not to apply if it is satisfied that, having regard to
21 the issues to be decided in the proceeding, the public interest in the
22 disclosure of the informant's identity outweighs—

23 (a) any likely adverse effect of the disclosure on the informant or
24 anyone else; and

25 (b) the public interest in the communication of facts and opinion to
26 the public by the news media and, accordingly also, in the
27 news media's ability to access sources of facts.

1 (3) An order under subsection (2) may be made subject to the
2 conditions (if any) the court thinks fit.

3 *Note* The Commonwealth Act, s 126H is equivalent to this section.

4 **126L Application—div 3.10.1C**

5 (1) This division extends to information given by an informant before
6 the commencement of this division.

7 (2) This division does not apply in relation to a proceeding the hearing
8 of which began before the commencement of this division.

9 (3) This division (as applied by section 131A) does not apply to a
10 disclosure requirement mentioned in that section made before the
11 commencement of this division.

12 (4) For subsection (2), the hearing of a proceeding has begun if the
13 court has begun to take oral or written evidence in the proceeding
14 (other than in relation to bail or any other interlocutory matter).

15 *Note* The NSW Act does not include this subsection and the Commonwealth
16 Act does not include this section.

17 **5 Privilege in relation to selfincrimination in other**
18 **proceedings**
19 **Section 128 (3)**

20 *omit everything before paragraph (a), substitute*

21 (3) Subject to subsection (4), if the court decides that there are
22 reasonable grounds for the objection, the court must not require the
23 witness to give the evidence and must tell the witness—

1 **6 Section 128 (7) (b)**

2 *before*

3 any

4 *insert*

5 evidence of

6 **7 New section 128 (13) to (15)**

7 *before the notes, insert*

8 (13) If a person has been given a certificate under a prescribed State or
9 Territory provision in relation to evidence given by a person in a
10 proceeding in a State or Territory court, the certificate has the same
11 effect, in a proceeding to which this subsection applies, as if it had
12 been given under this section.

13 (14) For subsection (13), a *prescribed State or Territory provision* is a
14 provision of a State or Territory law declared by regulation to be a
15 prescribed State or Territory provision for that subsection.

16 (15) Subsection (13) applies to a proceeding in relation to which this Act
17 applies because of section 4, other than a proceeding for an offence
18 against a Commonwealth law or for the recovery of a civil penalty
19 under a Commonwealth law.

20 *Note* The Commonwealth Act, s 128 (12) to (14) gives effect to certificates in
21 relation to self-incriminating evidence under this Act in proceedings in
22 federal courts and in prosecutions for Commonwealth offences.

1 **8 Privilege in relation to selfincrimination—exception for**
2 **certain orders etc**
3 **New section 128A (12) to (14)**

4 *insert*

5 (12) If a person has been given a certificate under a prescribed State or
6 Territory provision in relation to information mentioned in
7 subsection (6) (a), the certificate has the same effect, in a proceeding
8 to which this subsection applies, as if it had been given under this
9 section.

10 (13) For subsection (12), a *prescribed State or Territory provision* is a
11 provision of a State or Territory law declared by regulation to be a
12 prescribed State or Territory provision for that subsection.

13 (14) Subsection (12) applies to a proceeding in relation to which this Act
14 applies because of section 4, other than a proceeding for an offence
15 against a Commonwealth law or for the recovery of a civil penalty
16 under a Commonwealth law.

17 *Note* The Commonwealth Act does not contain provisions corresponding to
18 s 128A (12) to (14).

19 **9 Application of div 3.10.4 to preliminary proceedings of**
20 **courts**
21 **Section 131A (1) (a)**

22 *after*

23 division 3.10.1

24 *insert*

25 , division 3.10.1A, division 3.10.1C

10 Section 131A (2), new notes

insert

Note 1 The Commonwealth Act, s 131A applies only to that Act, div 1A (Journalists' privilege).

Note 2 The Commonwealth Act includes a provision (s 131B) that extends the application of that Act, div 1A to proceedings in all Australian courts for Commonwealth offences.

11 Dictionary, part 1, new definitions

insert

confidant, for division 3.10.1A (Professional confidential relationship privilege)—see section 126A (1).

harm, for division 3.10.1A (Professional confidential relationship privilege)—see section 126A (1).

informant, for division 3.10.1C (Journalist privilege)—see section 126J.

journalist, for division 3.10.1C (Journalist privilege)—see section 126J.

news medium, for division 3.10.1C (Journalist privilege)—see section 126J.

protected confidence, for division 3.10.1A (Professional confidential relationship privilege)—see section 126A (1).

protected confider, for division 3.10.1A (Professional confidential relationship privilege)—see section 126A (1).

protected identity information, for division 3.10.1A (Professional confidential relationship privilege)—see section 126A (1).

1 **12 Dictionary, part 2, section 4 (1) (c) to (f)**

2 *substitute*

3 (c) the person is mentally or physically unable to give the evidence
4 and it is not reasonably practicable to overcome that inability;
5 or

6 (d) it would be unlawful for the person to give the evidence; or

7 (e) a provision of this Act prohibits the evidence being given; or

8 (f) all reasonable steps have been taken, by the party seeking to
9 prove the person is not available, to find the person or to secure
10 the person's attendance, but without success; or

11 (g) all reasonable steps have been taken, by the party seeking to
12 prove the person is not available, to compel the person to give
13 the evidence, but without success.

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 2011.

2 Notification

Notified under the Legislation Act on 2011.

3 Republications of amended laws

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