

2003

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Attorney-General)

Evidence (Miscellaneous Provisions) Amendment Bill 2003

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(Attorney-General)

Evidence (Miscellaneous Provisions) Amendment Bill 2003

A Bill for

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

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

1 **1 Name of Act**

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

4 **2 Commencement**

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

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

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

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

15 **3 Acts and regulations amended**

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

18 *Note* The Act is also amended in sch 1.

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

1 **4 Part 4**

2 *substitute*

3 **Part 4 Evidence in criminal**
4 **proceedings**

5 **Division 4.1 Preliminary**

6 **37 Meaning of *sexual offence* in pt 4**

7 In this part:

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

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

15 **Division 4.2 Sexual offence proceedings—**
16 **general**

17 **38 Meaning of *complainant* and *sexual offence proceeding***
18 **for div 4.2**

19 (1) For this division, the *complainant*, in relation to a sexual offence
20 proceeding, is the person, or any of the people, against whom a
21 sexual offence the subject of the proceeding is alleged, or has been
22 found, to have been committed.

23 (2) For this division, a *sexual offence proceeding* is—

24 (a) a proceeding for a sexual offence; or

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

20 **39 Evidence given in closed court**

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

1 **40 Prohibition of publication of complainant's identity**

2 (1) A person commits an offence if the person publishes, in relation to a
3 sexual offence proceeding—

4 (a) the complainant's name; or

5 (b) protected identity information about the complainant; or

6 (c) a reference or allusion that discloses the complainant's
7 identity; or

8 (d) a reference or allusion from which the complainant's identity
9 might reasonably be inferred.

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

12 (2) It is a defence to a prosecution for an offence against this section if
13 the person establishes that the complainant consented to the
14 publication before the publication happened.

15 (3) An offence against this section is a strict liability offence.

16 (4) In this section:

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

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

23 **41 Meaning of complainant and sexual offence proceeding**
24 **for div 4.3**

25 (1) For this division, the *complainant*, in relation to a sexual offence
26 proceeding, is the person, or any of the people, against whom a

- 1 sexual offence the subject of the proceeding is alleged, or has been
2 found, to have been committed.
- 3 (2) For this division, a ***sexual offence proceeding*** is—
- 4 (a) a proceeding for a sexual offence; or
- 5 (b) a sentencing proceeding for a person convicted of a sexual
6 offence, whether or not the person is also convicted of any
7 other offence; or
- 8 (c) a proceeding under the *Protection Orders Act 2001* in relation
9 to a sexual offence; or
- 10 (d) a proceeding under the *Victims of Crime (Financial Assistance)*
11 *Act 1983* in relation to a sexual offence; or
- 12 (e) a proceeding by way of an inquest or inquiry in the Coroner’s
13 Court in relation to a sexual offence; or
- 14 (f) an appeal arising out of a proceeding mentioned in
15 paragraphs (a) to (e).
- 16 (3) For subsection (2) (a), a ***proceeding for a sexual offence*** includes—
- 17 (a) a proceeding for a sexual offence and any other offence; and
- 18 (b) a proceeding for a sexual offence and any other offence as an
19 alternative to the sexual offence; and
- 20 (c) a proceeding for a sexual offence that may result in a finding of
21 guilt (or committal for trial or sentence) for any other offence.
- 22 (4) To remove any doubt, for this section, a ***proceeding*** includes a
23 committal proceeding.

24 **42 When does div 4.3 apply?**

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

1 **43 Complainant giving evidence from place other than**
2 **courtroom**

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

19 **44 Consequential orders under div 4.3**

- 20 (1) This section applies if the complainant is to give evidence from a
21 place (the *other place*) other than the courtroom where the sexual
22 offence proceeding is heard.
- 23 (2) The court may make any order it considers appropriate—
- 24 (a) to ensure that the sexual offence proceeding is conducted
25 fairly; or
- 26 (b) to allow the complainant to identify a person or thing; or

- 1 (c) to allow the complainant to take part in a view or to watch a
2 demonstration or experiment; or
- 3 (d) to allow part of the sexual offence proceeding to be heard
4 somewhere other than in the courtroom.
- 5 (3) The court may make any other order it considers appropriate,
6 including, for example, an order specifying—
- 7 (a) who may be with the complainant at the other place; or
- 8 (b) who must not be with the complainant at the other place; or
- 9 (c) who, in the courtroom, is to be able, or must not be able, to be
10 heard, or seen and heard, by the complainant and people in the
11 other place with the complainant; or
- 12 (d) who, in the courtroom, is to be able to see and hear the
13 complainant and anyone else in the other place with the
14 complainant; or
- 15 (e) how the audiovisual link is to operate.

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

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

23 **45 Making of orders under div 4.3**

- 24 (1) The court may make an order under this division in a sexual offence
25 proceeding on its own initiative or on the application of a party to
26 the proceeding or the complainant.

- 1 (2) For the purpose of making an order under this division, the court is
2 not bound by the rules of evidence and may inform itself as it
3 considers appropriate.

4 **46 Jury to be warned about adverse inferences**

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

11 **47 Failure to comply with div 4.3**

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

16 **Division 4.4 Evidence of complainant's sexual**
17 **reputation and activities**

18 **48 Meaning of complainant and sexual offence proceeding**
19 **for div 4.4**

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

- 1 (b) a proceeding in relation to bail for a person charged with a
2 sexual offence, whether or not the person is also charged with
3 any other offence; or
- 4 (c) a sentencing proceeding for a person convicted of a sexual
5 offence, whether or not the person is also convicted of any
6 other offence; or
- 7 (d) an appeal arising out of a proceeding mentioned in
8 paragraphs (a) to (c).
- 9 (3) For subsection (2) (a), a *proceeding for a sexual offence* includes—
- 10 (a) a proceeding for a sexual offence and any other offence; and
- 11 (b) a proceeding for a sexual offence and any other offence as an
12 alternative to the sexual offence; and
- 13 (c) a proceeding for a sexual offence that may result in a finding of
14 guilt (or committal for trial or sentence) for any other offence.
- 15 (4) To remove any doubt, for this section, a *proceeding* includes a
16 committal proceeding.

17 **49 When does div 4.4 apply?**

18 This division applies to evidence in a sexual offence proceeding.

19 **50 Immunity of sexual reputation**

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

21 **51 General immunity of evidence of complainant's sexual
22 activities**

- 23 (1) Evidence of the sexual activities of the complainant is not
24 admissible in a sexual offence proceeding without leave of the court
25 dealing with the proceeding.

- 1 (2) Subsection (1) does not apply to evidence of the specific sexual
2 activities of the complainant with an accused person in the sexual
3 offence proceeding.

4 **52 Application for leave under s 51**

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

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

13 **53 Decision to give leave under s 51**

14 (1) The court must not give leave under section 51 (General immunity
15 of evidence of complainant's sexual activities) unless satisfied that
16 the evidence has substantial relevance to the facts in issue or is a
17 proper matter for cross-examination about credit.

18 (2) Evidence that relates to, or tends to establish, the fact that the
19 complainant was accustomed to engage in sexual activities is not to
20 be regarded—

- 21 (a) as having a substantial relevance to the facts in issue because
22 of any inference it may raise about general disposition; or
23 (b) as being a proper matter for cross-examination about credit in
24 the absence of special circumstances that would be likely
25 materially to impair confidence in the reliability of the
26 complainant's evidence.

27 (3) If the court gives leave under section 51, it must give written
28 reasons for its decision.

1 **Division 4.5** **Protection of counselling**
2 **communications**

3 **54** **Definitions for div 4.5**

4 In this division:

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

8 *counsellor* means a person who—

- 9 (a) has undertaken training or study, or has experience, relevant to
10 the process of counselling people who have suffered harm; or
11 (b) is supervised by someone to whom paragraph (a) applies.

12 *criminal proceeding* means—

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

21 but does not include a preliminary criminal proceeding.

22 *document recording a protected confidence* includes—

- 23 (a) a copy, reproduction, republication, duplicate or summary of,
24 or extract from, a document recording a protected confidence;
25 and
26 (b) the part of a document recording a protected confidence; and

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

12 ***harm*** includes—

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

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).

23 ***preliminary criminal proceeding*** means—

- 24 (a) a committal proceeding for any offence; or
- 25 (b) a proceeding in relation to bail for a person charged with any
26 offence; or

- 1 (c) an appeal or other review (whether by prerogative writ or
2 otherwise) arising out of a proceeding mentioned in paragraph
3 (a) or (b); or
- 4 (d) an interlocutory proceeding in, or a proceeding ancillary to, a
5 proceeding mentioned in paragraphs (a) to (c).

6 *protected confidence*—see section 55.

7 *protected confidence evidence* means—

- 8 (a) oral or written evidence that would disclose a protected
9 confidence; or
- 10 (b) a document recording a protected confidence; or
- 11 (c) oral or written evidence that would disclose the contents of a
12 document recording a protected confidence.

13 **55 Meaning of *protected confidence* for div 4.5**

- 14 (1) For this division, a *protected confidence* is a counselling
15 communication made by, to or about a victim of a sexual offence
16 (the *counselled person*).
- 17 (2) A counselling communication is a protected confidence even if—
- 18 (a) it is made before the happening, or alleged happening, of the
19 acts constituting the sexual offence; or
- 20 (b) it is not made in relation to—
- 21 (i) the sexual offence or any sexual offence; or
- 22 (ii) a condition arising from the sexual offence or any sexual
23 offence.
- 24 (3) For this section, a *counselling communication* is a communication
25 made in circumstances that give rise to a reasonable expectation of
26 confidentiality or a duty of confidentiality—

- 1 (a) by the counselled person to a counsellor for the purpose, or in
2 the course, of the counselling relationship between the
3 counselled person and the counsellor; or
- 4 (b) to or about the counselled person by the counsellor for the
5 purpose, or in the course, of the counselling relationship
6 between the counselled person and the counsellor; or
- 7 (c) by the counselled person to a third party mentioned in
8 subsection (4) for the purpose, or in the course, of the
9 counselling relationship between the counselled person and the
10 counsellor; or
- 11 (d) to the counselled person by a third party mentioned in
12 subsection (4) for the purpose, or in the course, of the
13 counselling relationship between the counselled person and the
14 counsellor; or
- 15 (e) about the counselled person by a third party mentioned in
16 subsection (4) for the purpose, or in the course, of the
17 counselling relationship between the counselled person and the
18 counsellor to—
- 19 (i) the counselled person; or
- 20 (ii) the counsellor; or
- 21 (iii) another third party to whom subsection (4) applies; or
- 22 (f) about the counselled person by a counsellor to someone else
23 who has also been a counsellor for the counselled person; or
- 24 (g) about the counselled person to a counsellor by someone else
25 who has also been a counsellor for the counselled person.
- 26 (4) For this section, in deciding whether a communication was made in
27 circumstances that gave rise to a reasonable expectation of
28 confidentiality, it does not matter that the communication was made
29 in the presence of a third party, if the third party was present to

1 assist or encourage communication between the counselled person
2 and counsellor or otherwise assist the counselling process.

3 **Examples of third parties**

- 4 1 a parent, partner, carer, spiritual adviser or other supportive person
5 2 a person present at the request of the counsellor to take notes of the
6 counselling session

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

10 (5) In this section:

11 *sexual offence* includes alleged sexual offence.

12 *victim*, of a sexual offence, means a person against whom the sexual
13 offence was, or is alleged to have been, committed.

14 **56 When does div 4.5 apply?**

15 (1) This division applies to a protected confidence made before or after
16 the commencement of this division.

17 (2) However, this division only applies in relation to—

18 (a) a preliminary criminal proceeding begun on or after the day
19 this division commences; or

20 (b) a criminal proceeding, in relation to which there is not a
21 preliminary criminal proceeding, begun on or after the day this
22 division commences; or

23 (c) a criminal proceeding, in relation to which there is a
24 preliminary criminal proceeding, if the preliminary criminal
25 proceeding began on or after the day this division commences.

26 (3) Subsection (2) and this subsection expire on 1 January 2005.

1 **57 Immunity for protected confidences in preliminary**
2 **criminal proceedings**

3 (1) A protected confidence must not be disclosed in, or for the purposes
4 of, a preliminary criminal proceeding.

5 (2) Without limiting subsection (1)—

6 (a) a person cannot be required (whether by subpoena, application,
7 notice or any other procedure), in or in relation to a preliminary
8 criminal proceeding, to produce a document recording a
9 protected confidence; and

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

12 **Example for par (a)**

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

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

18 **58 General immunity for protected confidences**

19 (1) This section applies in relation to a criminal proceeding.

20 (2) A protected confidence must not be disclosed in, or for the purposes
21 of, the criminal proceeding unless the court dealing with the
22 proceeding gives leave for the disclosure.

23 (3) Without limiting subsection (2)—

24 (a) a person cannot be required (whether by subpoena, application,
25 notice or any other procedure), in or in relation to the criminal
26 proceeding, to produce a document recording a protected
27 confidence, unless the court gives leave; and

- 1 (b) protected confidence evidence is not admissible in the criminal
2 proceeding, unless the court gives leave.

3 **Example for par (a)**

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

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

10 **59 Application for leave to disclose protected confidence**

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

22 **60 Threshold test—legitimate forensic purpose**

- 23 (1) The court must refuse the leave sought under section 59 if not
24 satisfied that the applicant has established a legitimate forensic
25 purpose for seeking the leave.
26 (2) To establish a legitimate forensic purpose, the applicant must—
27 (a) identify a legitimate forensic purpose for seeking the leave;
28 and

- 1 (b) satisfy the court that there is an arguable case that the evidence
2 in relation to which the leave is sought would materially assist
3 the applicant in his or her case in the proceeding.
- 4 (3) The court must decide whether or not to refuse the application under
5 this section before it conducts a preliminary examination of the
6 protected confidence evidence under section 61.
- 7 **61 Preliminary examination of protected confidence**
8 **evidence**
- 9 (1) If the court is satisfied that the applicant has established a legitimate
10 forensic purpose for seeking the leave, the court must then conduct a
11 preliminary examination of the protected confidence evidence to
12 decide whether leave should be given.
- 13 (2) For the preliminary examination, the court may—
- 14 (a) require anyone who has custody or control of a document
15 recording a protected confidence to produce the document to
16 the court for inspection; or
- 17 (b) require the counsellor concerned or, if the counsellor provides
18 counselling on behalf of an entity, the principal or another
19 representative of the entity—
- 20 (i) to give the court written answers to any questions; or
21 (ii) to attend the court for oral examination.
- 22 (3) The court must not order a person to attend for oral examination
23 under subsection (2) (b) (ii) unless the oral examination of the
24 person is necessary for the effective conduct of the preliminary
25 examination.
- 26 (4) Only a person mentioned in subsection (2) may be ordered to
27 answer questions or be examined under this section.
- 28 (5) The preliminary examination must be conducted—

- 1 (a) in the absence of the public and the jury (if any); and
2 (b) in the absence of the parties to the criminal proceeding and
3 their lawyers, except to the extent otherwise decided by the
4 court.
- 5 (6) Evidence taken at the preliminary examination must not be
6 disclosed to the parties or their lawyers, except to the extent
7 otherwise decided by the court or an appellate court under
8 section 62 (6) (Giving of leave to disclose protected confidence).
- 9 (7) A record of the preliminary examination must be made, but must not
10 be made available for public access.

11 **62 Giving of leave to disclose protected confidence**

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

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

- 1 **63 Ancillary orders for protection of person who made**
2 **protected confidence**
- 3 (1) The court may make the orders it considers appropriate to limit
4 possible harm, or the extent of possible harm, to a person who made
5 a protected confidence by the disclosure of protected confidence
6 evidence.
- 7 (2) Without limiting subsection (1), the court may—
- 8 (a) order that the court be closed to the public while all or part of
9 the protected confidence evidence is presented; or
- 10 (b) for a document recording a protected confidence—order that a
11 document be edited as directed by the court or that a copy of a
12 document (or part of a document) be disclosed instead of the
13 original; or
- 14 (c) make orders in relation to the suppression or publication of all
15 or any part of the protected confidence evidence; or
- 16 (d) for a document recording a protected confidence—make orders
17 about the production or inspection of the document; or
- 18 (e) make orders in relation to the disclosure of—
- 19 (i) protected identity information about the person who
20 made the protected confidence; or
- 21 (ii) information that discloses the identity of the person who
22 made the protected confidence; or
- 23 (iii) information from which the identity of the person who
24 made the protected confidence might reasonably be
25 inferred.
- 26 (3) This section is in addition to section 40 (Prohibition of publication
27 of complainant's identity).
- 28 (4) In this section:

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

4 **64 No waiver of protected confidence immunity**

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

8 **65 No protected confidence immunity for medical
9 information**

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

11 (a) information obtained by a doctor because of a physical
12 examination of a victim of a sexual offence; or

13 (b) any communication made in the course, or because, of such an
14 examination.

15 (2) In this section:

16 *victim*, of a sexual offence, means a person against whom the sexual
17 offence was, or is alleged to have been, committed.

18 **66 No protected confidence immunity for communications
19 for criminal investigations and proceedings**

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

22 (a) an investigation by a law enforcement entity into the
23 commission or alleged commission of a sexual offence; or

24 (b) a preliminary criminal proceeding or criminal proceeding
25 arising from the commission or alleged commission of a sexual
26 offence.

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

5 **69 Comments on complainants' evidence**

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

10 **70 Comments on children's evidence**

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

14 **71 Comments about lack of, or delays in making, complaint**

15 (1) This section applies if, in a sexual offence proceeding, evidence is
16 given, or a question is asked of a witness, that tends to suggest
17 that—

- 18 (a) the complainant made no complaint about the alleged offence;
19 or
- 20 (b) there was a delay in making a complaint.

21 (2) The judge must—

- 22 (a) give the jury a warning to the effect that the absence of, or the
23 delay in making, the complaint does not necessarily indicate
24 that the allegation that the offence was committed is false; and

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

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

11 **72 Directions about implied consent**

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

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

22 **73 Directions about mistaken belief about consent**

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

1 Part 5 Miscellaneous

2 74 Approved forms

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

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

5 (2) If the Minister approves a form for a particular purpose, the
6 approved form must be used for that purpose.

7 (3) An approved form is a notifiable instrument.

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

9 75 Regulation-making power

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

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

13 (2) The regulations may prescribe the amounts, or the way of
14 calculating amounts, payable to a Territory court in relation to the
15 cost of, or incidental to, the provision of an audiovisual link or audio
16 link and ancillary equipment for part 3 (Use of audiovisual links and
17 audio links).

18 (3) In this section:

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

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

21 Dictionary

22 (see s 2)

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

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

- 1 • child
- 2 • Childrens Court
- 3 • Coroner’s Court
- 4 • doctor
- 5 • document
- 6 • entity
- 7 • Executive
- 8 • lawyer
- 9 • may (see s 146)
- 10 • Minister (see s 162)
- 11 • must (see s 146)
- 12 • proceeding (for this Act, pt 3).

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

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

18 **complainant**—

19 (a) for division 4.2 (Sexual offence proceedings—general)—see
20 section 38; and

21 (b) for division 4.3 (Sexual offence proceedings—giving evidence
22 from places other than courtrooms)—see section 41; and

23 (c) for division 4.4 (Evidence of complainant’s sexual reputation
24 and activities)—see section 48; and

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

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

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

- 1 ***criminal proceeding***, for division 4.5 (Protection of counselling
2 communications)—see section 54.
- 3 ***document recording a protected confidence***, for division 4.5
4 (Protection of counselling communications)—see section 54.
- 5 ***harm***, for division 4.5 (Protection of counselling communications)
6 —see section 54.
- 7 ***Magistrates Court***, for part 2 (Evidence of children)—see section 5.
- 8 ***participating State***, for part 3 (Use of audiovisual links and audio
9 links)—see section 16.
- 10 ***preliminary criminal proceeding***, for division 4.5 (Protection of
11 counselling communications)—see section 54.
- 12 ***prescribed witness***, for part 2 (Evidence of children)—see section 5.
- 13 ***proceeding***, for part 2 (Evidence of children)—see section 5.
- 14 ***protected confidence***, for division 4.5 (Protection of counselling
15 communications)—see section 55.
- 16 ***protected confidence evidence***, for division 4.5 (Protection of
17 counselling communications)—see section 54.
- 18 ***recognised court***, for part 3 (Use of audiovisual links and audio
19 links)—see section 16.
- 20 ***sexual offence***, for part 4 (Evidence in criminal proceedings)—see
21 section 37.
- 22 ***sexual offence proceeding***—
- 23 (a) for division 4.2 (Sexual offence proceedings—general)—see
24 section 38; and
- 25 (b) for division 4.3 (Sexual offence proceedings—giving evidence
26 from places other than courtrooms)—see section 41; and

- 1 (c) for division 4.4 (Evidence of complainant's sexual reputation
2 and activities)—see section 48; and
- 3 (d) for division 4.6 (Sexual offence proceedings—directions and
4 warnings to juries)—see section 68.
- 5 **State**, for part 3 (Use of audiovisual links and audio links)—see
6 section 16.
- 7 **Territory court**, for part 3 (Use of audiovisual links and audio
8 links)—see section 16.
- 9 **tribunal**, in relation to a State, for part 3 (Use of audiovisual links
10 and audio links)—see section 16.

1 **Schedule 1 Evidence (Miscellaneous**
2 **Provisions) Act 1991—**
3 **consequential and technical**
4 **amendments**

5 (see s 3 (1))

6 **[1.1] New sections 2 to 4**

7 *in pt 1, insert*

8 **2 Dictionary**

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

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

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

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

20 **3 Notes**

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

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

1 **4 Offences against Act—application of Criminal Code etc**

2 Other legislation applies in relation to offences against this Act.

3 *Note 1 Criminal Code*

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

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

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

11 *Note 2 Penalty units*

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

14 **[1.2] Part 2 heading**

15 *substitute*

16 **Part 2 Evidence of children**

17 **[1.3] Section 2**

18 *substitute*

19 **5 Definitions for pt 2**

20 In this part:

21 *court* means—

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

25 *Magistrates Court* includes the Childrens Court.

1 *prescribed witness* means a child.

2 *proceeding* means a proceeding in relation to which this part
3 applies.

4 **[1.4] Section 3**

5 *renumber as section 6*

6 **[1.5] Section 4**

7 *omit*

8 **[1.6] Section 5**

9 *renumber as section 7*

10 **[1.7] Section 6 (1) (b)**

11 *omit*

12 a closed-circuit television system

13 *substitute*

14 an audiovisual link

15 **[1.8] Section 6 (1)**

16 *omit*

17 system

18 *substitute*

19 audiovisual link

20 **[1.9] Section 6**

21 *renumber as section 8*

22 **[1.10] Section 7 (1)**

23 *omit*

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

Amendment [1.11]

1 section 6 (1)

2 *substitute*

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

4 **[1.11] Section 7 (2) (f)**

5 *omit*

6 closed-circuit television system

7 *substitute*

8 audiovisual link

9 **[1.12] Section 7 (3)**

10 *omit*

11 section 6 (1)

12 *substitute*

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

14 **[1.13] Section 7**

15 *renumber as section 9*

16 **[1.14] Section 8**

17 *omit*

18 section 5 (a) (i)

19 *substitute*

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

21 **[1.15] Section 8**

22 *omit*

1 section 6 (1)
2 *substitute*
3 section 8 (1) (Location of prescribed witness giving evidence)

4 **[1.16] Section 8**

5 *renumber as section 10*

6 **[1.17] Section 9 (a)**

7 *omit*

8 section 6 (1)
9 *substitute*
10 section 8 (1) (Location of prescribed witness giving evidence)

11 **[1.18] Section 9**

12 *renumber as section 11*

13 **[1.19] Section 10 (1) (c)**

14 *substitute*

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

16 **[1.20] Sections 10 to 12**

17 *renumber as sections 12 to 14*

18 **[1.21] Section 13**

19 *omit everything before*

20 18

21 *substitute*

Amendment [1.22]

1 **15 Child turning 18 during proceeding**

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

3 **[1.22] Section 14, definition of *audiovisual link***

4 *omit*

5 **[1.23] Sections 14 to 22**

6 *renumber as sections 16 to 24*

7 **[1.24] Section 23**

8 *omit*

9 section 22

10 *substitute*

11 section 24

12 **[1.25] Section 23**

13 *renumber as section 25*

14 **[1.26] Section 24 (1)**

15 *omit*

16 section 23

17 *substitute*

18 section 25

19 **[1.27] Sections 24 to 27**

20 *renumber as sections 26 to 29*

21 **[1.28] Section 28 (a) (iii)**

22 *omit*

1 section 27

2 *substitute*

3 section 29

4 **[1.29] Sections 28 to 33**

5 *renumber as sections 30 to 35*

6 **[1.30] Section 34**

7 *omit*

8 section 18 or 30

9 *substitute*

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

12 **[1.31] Section 34**

13 *renumber as section 36*

1 **Schedule 2 Consequential amendments**
2 (see s 3 (2))

3 **Part 2.1 Commercial Arbitration Act**
4 **1986**

5 **[2.1] Section 20A (1)**

6 *omit*

7 section 18 (1) or 30 (1)

8 *substitute*

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

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

13 **[2.2] Section 176 (5), note**

14 *omit*

15 s 14

16 *substitute*

17 s 16

1 **Part 2.3** **Coroners Act 1997**

2 **[2.3] Section 42A (1)**

3 *omit*

4 section 18 (1) or 30 (1)

5 *substitute*

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

8 **Part 2.4** **Court Security Act 2001**

9 **[2.4] Section 5 (2) (d) and (e)**

10 *substitute*

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

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

21 **[2.5] Section 5 (2)**

22 *renumber paragraphs when Act next republished under Legislation*
23 *Act*

1 **Part 2.5 Discrimination Act 1991**

2 **[2.6] Section 96A (1)**

3 *omit*

4 section 18 (1) or 30 (1)

5 *substitute*

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

8 **Part 2.6 Evidence Act 1971**

9 **[2.7] Part 10A**

10 *omit*

11 **Part 2.7 Guardianship and**
12 **Management of Property Act**
13 **1991**

14 **[2.8] Section 36A (1)**

15 *omit*

16 section 18 (1) or 30 (1)

17 *substitute*

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

1 Part 2.8 Magistrates Court Act 1930

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

3 *omit*

4 section 18 (1) or 30 (1)

5 *substitute*

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

8 [2.10] Section 72A (3)

9 *substitute*

10 (3) In this section:

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

13 [2.11] Section 254B (1)

14 *omit*

15 section 18 (1) or 30 (1)

16 *substitute*

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

1 **Part 2.9** **Magistrates Court (Civil**
2 **Jurisdiction) Act 1982**

3 **[2.12] Section 187 (8) and 482 (6)**

4 *omit*

5 section 18 (1) or 30 (1)

6 *substitute*

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

9 **Part 2.10** **Mental Health (Treatment and**
10 **Care) Act 1994**

11 **[2.13] Section 90 (5) (c)**

12 *omit*

13 section 30 (1)

14 *substitute*

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

16 **[2.14] Section 91A (1)**

17 *omit*

18 section 18 (1) or 30 (1)

19 *substitute*

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

1 **Part 2.11** **Protection Orders Regulations**
2 **2002**

3 **[2.15] Regulation 32**

4 *omit*

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

8 *substitute*

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

11 **[2.16] Regulation 53 (5)**

12 *omit*

13 section 18 (1) or 30 (1)

14 *substitute*

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

17 **Part 2.12** **Residential Tenancies Act**
18 **1997**

19 **[2.17] Section 96A (1)**

20 *omit*

21 section 18 (1) or 30 (1)

22 *substitute*

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

1 **Part 2.13 Royal Commissions Act 1991**

2 **[2.18] Section 34A (1)**

3 *omit*

4 section 18 (1) or 30 (1)

5 *substitute*

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

8 **Part 2.14 Supreme Court Act 1933**

9 **[2.19] Section 37N (3) (c)**

10 *substitute*

11 (c) by audiovisual link or audio link;

12 **[2.20] New section 37N (4)**

13 *insert*

14 (4) In this section:

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

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

19 **[2.21] Section 55A (4)**

20 *substitute*

21 (4) In this section:

22 ***audiovisual link***—see the *Evidence (Miscellaneous Provisions)*
23 *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.

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