2011

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

EVIDENCE AMENDMENT BILL 2011

EXPLANATORY STATEMENT

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Overview of Bill

This Bill is part of a series of bills to reform the law of evidence in the ACT. The *Evidence Act 2011* implements model uniform evidence law into the Territory. The explanatory statement accompanying the Evidence Bill 2011 provides an extensive account of the development of uniform evidence law and can be accessed at: <http://www.legislation.act.gov.au/b/db_41024/RelatedMaterials/explanatory_statements.asp>.

Only those parts of the model law that were in operation in the ACT through the Commonwealth *Evidence Act 1995* were implemented.

The purpose of this Bill is to amend the *Evidence Act 2011* to implement those parts of the model uniform evidence law which have not been adopted by the Commonwealth and therefore do not form part of ACT law. These amendments include:

- establishment of a professional confidential relationship privilege;
- mutual recognition of selfincrimination certificates; and
- expanding circumstances in which a person is take to not be available to give evidence.

The Bill also implements the recently enacted journalist privilege in the Commonwealth *Evidence Act 1995*, which has applied in the ACT since 13 April 2011.

Clause Notes

Clause 1 Name of Act – states the title of the Act as the *Evidence Amendment Act 2011.*

Clause 2 Commencement – provides that the Act will commence on the date that the *Evidence Act 2011* commences.

The *Evidence Act 2011* will commence on the date decided by the Minister and notified on the Legislation Register. If the Minister has not fixed a date within twelve months after the day of notification of the Act, the Act will commence on the first day after this period. The *Evidence Act 2011* was notified on 13 April 2011, and therefore the default commencement date is 13 April 2012.

Allowing the Minister to determine the commencement date of the *Evidence Act 2011* provides sufficient flexibility in the timing of the commencement of the Act to ensure a smooth transition from the application of the Commonwealth evidence law in the Territory. The application of section 79 of the *Legislation Act 2001* was removed in relation to the *Evidence Act 2011* to ensure that the package of evidence bills which will reform the law of evidence in the ACT can commence on the same date. The 12 month default commencement date provides sufficient time for all of the evidence bills to complete passage through the Legislative Assembly.

Clause 3 Legislation amended – provides that the Act amends the *Evidence Act 2011*.

Clause 4 New divisions 3.10.1A and 3.10.1C – inserts new divisions 3.10.1A and 3.10.1C into part 3.10 of the *Evidence Act 2011*. New division 3.10.1A implements division 1A of the model uniform evidence law approved for inclusion in the model law by Australian Attorneys-General in 2007. New division 3.10.1C implements the specific journalist's privilege which has been recently enacted in the Commonwealth and currently applies in the ACT.

Professional confidential relationship privilege

Part 3.10 of the *Evidence Act 2011* protects certain evidence against disclosure on the ground that it is privilege or is evidence that should not be disclosed for public policy grounds. For example, division 3.10.1 provides for protection from disclosure of confidential communications made and documents prepared in the context of the relationship between a lawyer and client (client legal privilege).

The clause amends part 3.10 of the *Evidence Act 2011* to expand the categories of privilege to include a professional confidential relationship privilege. The privilege is designed to protect evidence from disclosure on the ground that it concerns a communication made in circumstances where a professional was acting under an obligation not to disclose the evidence.

New section 126A defines a number of terms for the purpose of division 3.10.1A. Importantly, ***protected confidence*** is defined to mean a communication made by a person in confidence to someone else (referred to as the confidant):

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

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

New section 126B provides the court with a guided discretion to direct that evidence not be presented in a proceeding if the court finds that presenting it would disclose a protected confidence, the contents of a document recording a protected confidence or protected identity information.

Protected identify information is defined in section 126A to mean information about, or enabling a person to ascertain, the identity of the person who made a protected confidence.

The court must give a direction if it is satisfied that harm would or might be caused to a protected confider if the evidence is presented and the nature and extent of the harm outweighs the desirability of the evidence being presented.

New section 126B(4) lists a number of matters that the court must take into account when giving a direction, including the probative value of the evidence in the proceeding, and the importance of the evidence in the proceeding.

The list includes the two new matters which were approved for inclusion by Attorneys-General in 2010. The new matters include the public interest in preserving the confidentiality of protected confidences and the public interest in preserving the confidentiality of protected identity information.

New sections 126C and 126D set out some circumstances when division 3.10.1A will not prevent the presenting of evidence. Evidence will be able to be presented with the consent of the protected confider concerned. The privilege will be lost for communications made and documents prepared in the furtherance of a fraud, an offence, or an act that renders a person liable to a civil penalty.

New section 126E provides examples of ancillary orders that a court may make to limit the harm, or extent of the harm, that may be caused if evidence of a protected confidence or protected identity information is disclosed.

New section 126F provides for the application of division 3.10.1A. It makes it clear that the division does not apply in relation to a proceeding the hearing of which began before the commencement of the division, but applies to protected confidences made whether before or after commencement.

The court will be able to give a direction under the division in respect of a protected confidence or protected identity information whether or not the confidence or information is privileged under another section of Part 3.10 or would be so privileged except for a limitation or restriction imposed by that section. For example, section 127 of the *Evidence Act 2011* entitled members of the clergy to refuse to divulge the contents of communications made to them in their professional capacity, but is limited to communications made as religious confessions. New division 3.10.1A will enable members of the clergy to object to disclosure of confidences made to them other than confessions.

The division does not apply in relation to a protected confidence within the meaning of division 4.5 of the *Evidence (Miscellaneous Provisions) Act 1991*.

Human rights implications

The clause engages the right to a fair trial under section 21(1) of the *Human Rights Act 2004* as it could result in relevant evidence being unavailable to the court.

However, the clause places a reasonable limit on the right to a fair trial that can be demonstrably justified in a free and democratic society. In accordance with section 28 of the *Human Rights Act 2004*, in determining that the limit placed on the right to a fair trial was reasonable the following factors were considered:

- ***The nature of the right affected;***

The right to a fair trial is central to the operation of a democratic society based on the rule of law. It is not simply an individual right but protects the broader public interest in the proper administration of justice. The right to a fair trial guarantees access to the court and a fair and public hearing. In particular, the right to a fair trial is affected by clause 4 as it could result in relevant evidence being unavailable to the court.

- ***The importance of the purpose of the limitation;***

The limitation is important because it reconciles the tension between professional and ethical standards and the legal duty to provide relevant evidence to the court when requested. The ability to preserve the privacy of communications made, and to acknowledge the ethical obligations involved, is essential to the various freedoms under the *Human Rights Act 2004* (sections 12-16).

- ***The nature and extent of the limitation;***

Clause 4 limits the right to a fair trial to the extent that it could result in relevant evidence being unavailable to the court. However, the privilege is not absolute and it allows a range of competing public interests to be balanced by the court in determining whether a confidential communication should be disclosed.

- ***The relationship between the limitation and its purpose;***

The limitation on the right to a fair trial is directly and rationally connected to the purpose of preserving the privacy and inviolacy of professional confidential relationships.

- ***Less restrictive means reasonably available of achieving this purpose.***

There are no less restrictive means of achieving this purpose.

It is important to highlight that the clause promotes a number of rights under the *Human Rights Act 2004* including:

- the right under section 12 of the *Human Rights Act 2004* which provides that everyone has the right not to have his or her privacy interfered with unlawfully or arbitrarily; and
- the right under section 16 that everyone has the right to freedom of expression.

Journalist privilege

Part 3.10 of the *Evidence Act 2011* protects certain evidence against disclosure on the ground that it is privileged or is evidence that should not be disclosed for public policy grounds. For example, division 3.10.1 provides for protection from disclosure of confidential communications made and documents prepared in the context of the relationship between a lawyer and client (client legal privilege).

The clause amends part 3.10 of the *Evidence Act 2011* to expand the categories of privilege to include a specific journalist's privilege. The privilege is designed to provide that if a journalist has promised an informant not to disclose his or her identity, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable their identity to be ascertained.

This is based on the premise that it is vital that journalists can obtain information so they can accurately inform the Australian public about matters of interest. Accordingly, strong protection must be provided to enable the full disclosure of information.

New section 126J defines a number of terms for the purpose of division 3.10.1C (definitions of ***informant***, ***journalist***, and ***news medium***).

New section 126K provides a presumption that a journalist is not required to give evidence about the identity of the source of their information. This presumption can be rebutted in circumstances where the public interest outweighs any likely adverse effect for the person who provided the information to the journalist as well as the public interest in communication of information to the public by the media.

New section 126K(1) states that for the protection to apply, the journalist has promised the informant that they will not disclose to anyone the informant's identity.

If this requirement is satisfied, the journalist and their employer are entitled to refuse to disclose information that would reveal the identity of the source, or enable their identity to be discovered in a court proceeding. It does not, therefore, provide the journalist with a right to refuse to provide information where the information would not lead to the disclosure of the identity of the source.

New section 126K(2) provides that the court may order that subsection (1) does not apply if satisfied that the public interest in the disclosure of evidence of the identity of the informant outweighs: any likely adverse effect of the disclosure on the informant or any other person; and the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

New section 126K(3) allows the court to make an order under subsection (2) on such terms and conditions as the court thinks fit.

New section 126L provides a number of transitional provisions to clarify the operation of new division 3.10.1C (amendments to establish the journalist privilege).

New section 126L provides that division 3.10.1C will apply to information given by an informant before or after the commencement of this Act (the *Evidence Amendment Act 2011*).

New section 126L also provides that division 3.10.1C does not apply to a proceeding in a court if the hearing of the proceeding has started before the commencement of the Act.

A hearing of the proceeding is considered to have started if the court has begun to take oral or written evidence in the proceeding.

Until this Act (the *Evidence Amendment Act 2011*) commences, the existing Commonwealth journalist privilege in the *Evidence Act 1995* applies in the ACT courts. If a proceeding has started in an ACT court before commencement of this Act, new section 126L provides that division 3.10.1C will not apply in these proceedings. However, section 8 of the Commonwealth *Acts Interpretation Act 1901* ensures that the existing Commonwealth journalist privilege would continue to operate in these proceedings.

Human rights implications

The clause engages the right to a fair trial under section 21(1) of the *Human Rights Act 2004* as it could result in relevant evidence being unavailable to the court.

However, the clause places a reasonable limit on the right to a fair trial that can be demonstrably justified in a free and democratic society. In accordance with section 28 of the *Human Rights Act 2004*, in determining that the limit placed on the right to a fair trial was reasonable the following factors were considered:

- ***The nature of the right affected;***

The right to a fair trial is central to the operation of a democratic society based on the rule of law. It is not simply an individual right but protects the broader public interest in the proper administration of justice. The right to a fair trial guarantees access to the court and a fair and public hearing. In particular, the right to a fair trial is affected by clause 4 as it could result in relevant evidence being unavailable to the court.

- ***The nature of the right affected;***

The right is concerned with the quality of the process and imposes certain requirements on the system of justice, as well as guaranteeing a series of individual rights to achieve its purpose. In particular, the right is affected by the clause as it could result in relevant evidence being unavailable to the court.

- ***The importance of the purpose of the limitation;***

The limitation is important because it reconciles the tension between professional and ethical standards and the legal duty to provide relevant evidence to the court when requested. The ability to preserve the privacy of communications made, and to acknowledge the ethical obligations involved, is essential to the various freedoms under the *Human Rights Act 2004* (sections 12-16).

- ***The nature and extent of the limitation;***

Clause 4 limits the right to a fair trial to the extent that it could result in relevant evidence being unavailable to the court. However, the privilege is not absolute and it allows a range of competing public interests to be balanced by the court in determining whether a confidential communication should be disclosed.

- ***The relationship between the limitation and its purpose;***

The limitation on the right to a fair trial is directly and rationally connected to the purpose of preserving the privacy and inviolacy of professional confidential relationships.

- ***Less restrictive means reasonably available of achieving this purpose.***

There are no less restrictive means of achieving this purpose.

It is important to highlight that the clause promotes a number of rights under the *Human Rights Act 2004* including:

- the right under section 12 of the *Human Rights Act 2004* which provides that everyone has the right not to have his or her privacy interfered with unlawfully or arbitrarily; and
- the right under section 16 that everyone has the right to freedom of expression.

Clause 5 Privilege in relation to selfincrimination in other proceedings
Section 128(3) – amends subsection 128(3) to ensure that the Act clearly expresses the intention to establish a statutory privilege against selfincrimination.

Clause 6 Section 128(7)(b) – inserts the phrase ‘evidence of’ before the term ‘any’ in section 128(7)(b) to correct a drafting error which removed the words as part of the process of making amendments to the model uniform evidence law following the 2005 review.

Clause 7 New section 128(13) to (15) – inserts new subsections (13), (14) and (15) into section 128 of the *Evidence Act 2011*.

<u>Mutual recognition of selfincrimination certificates</u>

The new subsections provide for the recognition in ACT courts of certificates to the same effect as selfincrimination certificates given under section 128 if given under a provision of a law of a State or Territory declared by regulation to be a prescribed State or Territory provision.

The intention of the privilege against selfincrimination is to encourage witnesses to testify and potentially provide valuable evidence on the matter at hand without fear of incriminating themselves in another matter. Mutual recognition of state and territory certificates reinforces this policy objective.

Clause 8 Privilege in relation to selfincrimination – exception for certain orders etc New section 128A(12) to (14) – inserts new subsections (12), (13) and (14) into section 128A of the *Evidence Act 2011*.

Mutual recognition of selfincrimination certificates
The new subsections provide for the recognition in ACT courts of certificates to the same effect as selfincrimination disclosure certificates given under section 128A if given under a provision of a law of a State or Territory declared by regulation to be a prescribed State or Territory provision.

As noted above, mutual recognition of state and territory certificates reinforces the policy objective for the privilege against selfincrimination.

Clause 9 Application of div 3.10.4 to preliminary proceedings of courts Section 131A(1)(a) – inserts a reference to new division 3.10.1A into section 131A of the *Evidence Act 2011*.

Section 131A expands the scope of the privileges in part 3.10 of the Act so that they apply to any process or order of a court which requires disclosure as part of preliminary proceedings. As noted in the explanatory statement to the Evidence Bill 2011, section 131A implements recommendation 14-6 in full and recommendations 14-1, 15-3, 15-6 and 15-11 in part of the 2005 LRCs' Report.

Clause 9 extends the application of the professional confidential relationship privilege, established by clause 4 of this Bill, to pre-trial stages of civil and criminal proceedings.

Clause 10 Section 131A(2), new notes – inserts new notes into section 131A(2) of the *Evidence Act 2011*. The new notes provide information about the operation of the Commonwealth *Evidence Act 1995*.

Clause 11 Dictionary, part 1, new definitions – inserts new definitions into part 1 of the Dictionary of the *Evidence Act 2011*. The new definitions provide cross-references to the sections in the Act where the terms are defined. The new definitions form part of establishing the professional confidential relationship privilege and the journalist privilege.

Clause 12 Dictionary, part 2, section 4(1)(c) to (f) – substitutes new paragraphs (c) to (f) into section 4, part 2 of the dictionary of the *Evidence Act 2011*.

Expanding circumstances in which a person is taken to not be available to give evidence

The amendment has been made to insert a new paragraph (c) to extend the circumstances in which a person is taken to not be available to give evidence. New paragraph (c) provides that a person is taken to not be available to give evidence about a fact if the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability.

New paragraphs (d) to (g) incorporate the old paragraphs (c) to (f) which have been renumbered to allow for the additional circumstance described above. No changes have been made to the content of these paragraphs.

New paragraph (c) implements recommendation 8-2 of the 2005 LRCs' Report, which has also been implemented in the Evidence Acts of New South Wales, Victoria and Tasmania.

The recommendation was made based on concerns raised in the review of the uniform evidence acts that the existing definition failed to take into account certain circumstances where requiring a person to give evidence may cause that person such serious emotional or psychological harm that they should be considered unavailable.

It was noted in the Report that it is not intended that the amendment should lower the standard of 'unavailability' generally. It would be insufficient for a witness to merely produce a medical certificate asserting that they are incapable of giving evidence. A real mental or physical inability to testify must be shown. These are factual questions courts are well placed to consider on a case-by-case basis, looking to all the circumstances.

The definition of unavailability of people is primarily relevant to the operation of sections 63 and 65 of the *Evidence Act 2011*, which provide exceptions to the hearsay rule where a person who has made a previous representation is not available to give evidence about an asserted fact.

Human rights implications

Extending the circumstances in which a person is taken to not be available to give evidence broadens the operation of sections 63 and 65. Therefore, clause 11 engages the right to a fair trial under section 12(1) of the *Human Rights Act 2004* and the right of a defendant to examine prosecution witnesses under section 22(2)(g) of the *Human Rights Act 2004*.

Whether the right to a fair trial requires the availability and examination of witnesses has been considered in international jurisprudence. In 2009, the European Court of Human Rights found that where a conviction is based solely or to a decisive degree on depositions that have been made by a person the accused has had no opportunity to re-examine or to have

examined the rights of the defence are restricted to an extent that is incompatible with the right to a fair trial[1]. However, The UK Supreme Court has since held that hearsay evidence leading to a conviction is not unsafe and can be justified where there are counter-balancing measures that respect the rights of the defence, but that this must be assessed on a case by case basis[2]. The UK Supreme Court even went so far as to note that the hearsay rule and exceptions scheme existing in the Australian uniform evidence acts is both nuanced and circumscribed, with a view to ensuring the overall fairness of the proceedings. The scheme operates to ensure that hearsay evidence is only permissible as a last resort, where all other options have been exhausted.

As recognised by the UK Supreme Court the *Evidence Act 2011* contains a number of safeguards for exceptions to the hearsay rule in proceedings where the maker is not available. The material can only be used where the court has considered a number of circumstances and issues. The safeguards include consideration of factors such as whether a statement was made contemporaneously or shortly after asserted facts occurred and whether it was made in circumstances that make it unlikely that it was a fabrication. A court will have to make sure that a statement was made in circumstances that make it highly probable that the representation is reliable. The court has to consider whether or not statements are made against the interests of the person who made them and even in those circumstances whether they were made in circumstances that mean the representation is reliable. The Act also contains a safeguard against reliance on hearsay evidence in section 135. Clause 135 provides the Court with the discretion to exclude such evidence where its prejudice outweighs its probative value.

[1] Al-Khawaja and Tahery v United Kingdom [2009] ECHR 26766/05.
[2] R v Horncastle & Ors [2009] UKSC 14 (9 December 2009).