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LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

EVIDENCE (MISCELLANEOUS PROVISIONS) AMENDMENT BILL 2003

EXPLANATORY STATEMENT

Circulated by authority of the
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This explanatory statement relates to the Bill as introduced into the Legislative Assembly.

Overview of Bill

This Bill replaces part 4 of the *Evidence (Miscellaneous Provisions) Act 1991*. The new part 4 will contain all the law governing evidence in a sexual offence proceeding in ACT courts. Some of the provisions have been transferred from the *Evidence Act 1971*, while others are a consequence of recommendations from the Model Criminal Code Officers Committee (MCCOC) report, *Sexual Offences Against the Person*. The main recommendation adopted from the MCCOC report is to introduce immunity for the counselling notes of a sexual offence victim.

Schedule 1 amends part 2 of the Act to remove the references to sexual offence complainants giving evidence via closed circuit television from a room outside the courtroom. The Act continues to permit children to give closed-circuit television evidence. Schedule 1 and 2 also make consequential and technical amendments to this and other Acts and regulations.

Outline of provisions

Part 1 Preliminary

Clause 1 Name of Act

This clause sets out the name of the proposed Act as the *Evidence (Miscellaneous Provisions) Amendment Act 2003*.

Clause 2 Commencement

This clause provides for the commencement of the Act on a day to be fixed by the Minister via written notice.

Clause 3 Acts and regulations amended

This clause states that the Act (other than schedule 2) is to amend the *Evidence (Miscellaneous Provisions) Act 1991*. Schedule 2 amends those Acts and regulations mentioned in it.

Clause 4 Part 4

This clause substitutes a new part 4, evidence in criminal proceedings.

The meaning of sexual offence for part 4 is defined in new section 37. A sexual offence means an offence against part 3 of the *Crimes Act 1900*.

Sexual offence proceedings - general

New division 4.2 contains general evidentiary provisions for sexual offence proceedings. New section 38 provides for the meaning of two terms used in division 4.2. For the division a *complainant* is a person or any of the people against whom a sexual offence is alleged, or has been found, to have been committed. A *sexual*

offence proceeding is defined to be any proceeding for a sexual offence. This includes bail, committal, trial sentencing, appeals or interlocutory proceedings. If evidence may not be led under this division for a sexual offence proceeding it may not also be led in relation to another offence.

New section 39 transfers section 76D of the *Evidence Act*. The section recognises, subject to the leave of the court, the desire of complainants to give evidence in closed court without members of the public being present. A complainant will be entitled to have a person nominated by them to remain in the closed court.

New section 40 transfers section 76E of the *Evidence Act*. This provision prohibits the publication of the identity or the protected identity information of a complainant in a sexual offence proceeding without the consent of that complainant. The penalty for a breach of the prohibition is 50 penalty units, imprisonment for 6 months or both. This is a strict liability offence. Section 23 of the *Criminal Code* provides that if a law creates an offence and provides that it is one of strict liability there are no fault elements for any of the physical elements of the offence. This means that conduct alone is sufficient to make the defendant culpable.

In addition to the defence of mistake of fact provided by the *Criminal Code*, this section provides for a specific defence to a publication of protected identity information that the complainant consented. Subsection 23(3) of the *Criminal Code* makes it clear that other defences may also be available.

Sexual offence proceedings – giving evidence from places other than courtrooms

New division 4.3 deals with the giving of evidence from places other than courtrooms by a sexual offence complainant. This division is already in part 2 of the Act. It has been re-located to part 4. It is appropriate for all the evidence law for sexual offences to be co-located to this part. There has been no change in the intent of these provisions.

New section 41 provides for the meaning of two terms used in division 4.2. For the division a *complainant* is a person or any of the people against whom a sexual offence is alleged, or has been found, to have been committed. A *sexual offence proceeding* is defined to be any proceeding for a sexual offence. A proceeding means any proceeding in relation to an offence, including committals, sentencing and appeals. The part also applies to proceedings under the *Protection Orders Act 2001*, the *Victims of Crime (Financial Assistance) Act 1983* and coronial matters. Division 4.3 will apply if a complainant is to give evidence, whether or not on oath or affirmation, before a court conducting a proceeding.

New section 43 provides that a court must order a complainant's evidence to be given from a place other than the courtroom, if that other place is linked by an audiovisual link. Refusal to order evidence to be given from another place may only occur if the court is satisfied the complainant prefers to be in the courtroom, there would be unreasonable delay or there is potential for the proceedings to be conducted unfairly. Part 3 of the *Evidence (Miscellaneous Provisions) Act 1991* applies to evidence given by audiovisual link.

Consequential orders may be given for this part (new sections 44 and 45). The court may make any order necessary. Orders may be made over who is to be with the complainant at the other place, who can be heard or seen by the complainant, etc.

A warning is to be given to a jury not to draw any inference in relation to the accused person's guilt or innocence merely because a complainant's evidence is given from outside the courtroom (new section 46).

New section 47 stipulates that despite division 4.3 not being complied with, the evidence is not inadmissible for that reason only or that the validity of the proceedings is affected.

Evidence of complainant's sexual reputation and activities

New division 4.4, evidence of complainant's sexual reputation and activities, are provisions currently in the *Evidence Act 1971*. Some sections are differently phrased from those presently in the *Evidence Act*. They reflect MCCOC recommendations.

New section 48 provides definitions for complainant and sexual offence proceeding for this division. The provision adopts the same terms as section 38.

New section 49 provides that division 4.4 is to apply to evidence in a sexual offence proceeding. A sexual offence proceeding may be any proceeding and is not restricted to only an offence against part 3 of the *Crimes Act 1900*.

New section 50 provides that evidence of a complainant's sexual reputation is inadmissible. It is a restatement of subsection 76G(1) of the *Evidence Act*. It covers such situations as an accused person asserting that the alleged offence was committed with consent based on the fact that other people had told him or her the victim was of "loose morals".

New section 51 provides that evidence of a complainant's sexual activities (eg. conduct or practices) is not admissible. The evidence of the specific sexual activities of the complainant with the accused person may be admitted with the leave of the court. The section is a restatement of subsection 76G(2) of the *Evidence Act*.

An application for leave to admit evidence under new section 51 must be in writing and in the absence of any jury (new section 52). The absence of the complainant may be requested by the accused. The grounds for consideration of an application for leave are in new section 53. The court has to be satisfied the evidence has substantial relevance to the facts in issue or that it is a proper matter for cross-examination about credit. The court is not to consider evidence relevant merely because it could be inferred that the complainant had a general disposition to engage in certain activities that may have been engaged in with the accused. However, the court has discretion to consider whether a particular set of facts or circumstances in the case suggests cross-examination should be permitted.

Protection of counselling communications

New division 4.5 introduces immunity for counselling notes made for, to or on behalf of a sexual offence victim. It provides a framework for an ACT court to apply when a

party seeks a sexual offence victim's counselling notes be disclosed for a proceeding. This division does not cover an accused person's counselling notes.

The scope of the immunity is set out in sections 54 and 55. Generally, the immunity is a *protected confidence*. A protected confidence is a counselling communication made by, to, or about a sexual offence victim. A counselling communication remains a protected confidence even if it was not made in relation to a sexual offence or made before the happening or alleged happening of a sexual offence.

A *counsellor* is a person who has trained, studied, or had experience relevant to the process of counselling people who have suffered harm. A counsellor may be experienced in counselling but not professionally qualified, for example, support services and community groups. The experience must be directly relevant to the counselling process. The counselling may be for an emotional or psychological condition. It may not be provided for remuneration, eg. a sexual assault service.

Third parties present at a counselling session will not void the immunity. The third party may be a person supervised by a counsellor, or could be a parent, partner, spiritual adviser or other sexual offence victims. The immunity is not lost because a non-traditional method is chosen to counsel or treat a victim, such as group therapy, so long as it is an accepted method.

New section 56 applies this division to a protected confidence made before or after the commencement of the division. The immunity will apply prospectively. Subsection (2) ensures that if a proceeding has already begun, whether a committal or a trial, then for that proceeding it would be as if this division had not commenced. This is to ensure a party is not prejudiced by the change in the rules.

It will not generally be possible for the court to have enough information about the case presented at preliminary criminal proceedings to determine whether to maintain the immunity so new section 57 provides for an absolute immunity. A protected confidence is not to be disclosed in proceedings for the committal of a person for trial or proceedings relating to bail (*preliminary criminal proceeding*). A person cannot be required to produce protected confidence evidence nor can that evidence be adduced or admitted. This means a subpoena or similar process cannot be ordered and counsel may not seek to disclose protected confidence evidence into the preliminary criminal proceeding.

New section 58 provides that a court dealing with the proceeding may give leave, in accordance with this division, for a protected confidence to be disclosed in a trial, sentencing proceeding, appeal or review (*criminal proceeding*). Applications are restricted to the court hearing a proceeding to prevent an applicant seeking leave from another judge or court. The tests for an application require the judicial officer dealing with the proceeding to have knowledge of the matter.

New section 59 sets out the mechanism for applying for leave to disclose protected confidence evidence. A 'threshold test' must be met before the court is entitled to examine the contents of the protected confidence (new section 60). An application must identify a legitimate forensic purpose and must satisfy the court that there is an arguable case that disclosure would materially assist the accused's defence. Counsel should

identify expressly and with precision the legitimate forensic purpose for which he or she is seeking access to the documents. It is insufficient for an applicant to say merely that it may assist their case.

Once the threshold test is satisfied, new section 61 provides that the court is to conduct a preliminary examination. The preliminary examination is an inspection of the protected confidence by the court. The preliminary examination is to be conducted in the absence of the public, the jury and the parties and their legal representatives. The court may allow the parties and their legal representatives to be present, but the preference should be for the preliminary examination to be conducted in their absence.

No persons other than a person having custody or control of the protected confidence, a counsellor, a principal or another representative of any organisation concerned with the treatment of a complainant may be ordered to attend or produce for this examination. The court may direct production, request written answers to questions, or require oral evidence, if, in the opinion of the court, oral evidence will assist in the effective conduct of the preliminary examination. Evidence taken at a preliminary examination is not to be disclosed or made public. An appellate court is authorised to have disclosed to it the evidence heard at a preliminary examination, but only if leave is refused. Evidence may be disclosed to the parties to the proceedings or to their legal representatives where the court has determined that they may have access to that evidence for the purposes of this division. A record of the preliminary examination must be made but must not be made available for public access.

The decision to disclose is to be made on the basis of a public interest test (new section 62). It is for the court to weigh a set of factors relevant to the question of whether the public interest in ensuring a fair trial to the accused outweighs the public interest in preserving the confidentiality of the protected confidence. The seven factors to be weighed range from the ability of the accused to make a full defence; ensuring that victims of sexual offences are not dissuaded from seeking counselling; the probative value of the evidence; the potential effect on the proceeding of the disclosure and the reasonable expectation of privacy and confidentiality arising from the counselling relationship. Though the list of factors is comprehensive, the court is not limited in whatever else might be relevant in judging whether the public interest requires disclosure. Restrictions may be placed on the leave. Subsection (6) is intended to ensure the immunity does not prevent an appellate court from seeing the evidence taken at a preliminary examination.

New section 63 grants the court power to make the orders it considers appropriate to limit the potential harm to the victim in the event of the disclosure of the protected confidence evidence for the proceeding. Subsection (2) gives some guidance as to the orders the court may make. Section 63 relies on the inherent power of ACT courts to treat contravention of its orders severely. Section 40 also prohibits the publication of the victim's identity.

New section 64 makes clear that a waiver or purported waiver by the victim or anyone else will not remove the immunity. It is unnecessary for a person who had made a protected confidence to consent or object. However, one factor the court is asked to take into account in the balancing exercise at section 62 is whether the person who

made the protected confidence consents or objects to disclosure of the protected confidence evidence.

New sections 65, 66 and 67 make clear that no immunity exists in certain circumstances. There is no immunity for medical information obtained by a medical practitioner during a physical examination of a sexual offence victim. This will allow medical practitioners to testify about their observations, records and conversation during and relating to the examination.

The immunity does not apply to prevent persons responsible for the investigation or prosecution of the alleged sexual offence from producing or disclosing a communication in the nature of a protected confidence. If first disclosure is made to a counsellor and then subsequently made to the police, the police may disclose their knowledge that a counsellor was seen to the court. Division 4.5 then applies if counsel then seeks to have what was said to the counsellor disclosed in the trial.

The immunity may be removed where it appears, on reasonable grounds, that a communication or document was made in the furtherance of an offence, fraud or a similar act. Though most protected confidence evidence will be genuine, the risk exists that a conspiracy could arise between a counsellor and a complainant, together or individually, to put on record false evidence.

Sexual offence proceedings – directions and warnings to juries

New division 4.6 provides for directions and warnings to be given in sexual offence proceedings. A judge sitting alone in a proceeding must direct him or herself if a Territory law requires a jury warning.

New section 68 defines complainant and sexual offence proceeding for this division.

New section 69 provides that a judge is not to give any warning or suggestion to the effect that the law regards complainants to be an unreliable class of witnesses. Section 76F of the *Evidence Act* repealed the common law rule requiring a warning if a complainant's evidence was uncorroborated. The provision now goes further and requires nothing to be said, leaving it for the jury to determine the credibility of witnesses and the weight of their evidence.

New section 70 provides that a judge must not warn or suggest in any way that the law regards children to be an unreliable class of witness. The credibility of the child is to be assessed with regard to the individual and not on the basis of a general statement that children, as a class, are unreliable witnesses.

New section 71 provides for a jury warning where evidence is given, or it is suggested that, no complaint was made or there was a delay in making a complaint. The judge must warn the jury to the effect that the delay in making a complaint does not necessarily indicate the alleged offence is false and inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making an immediate complaint.

In the ACT complaint evidence may be given despite the abrogation, by section 76C of the *Evidence Act 1971*, of the rule of law permitting evidence to be admitted relating to

the making or the terms of a complaint by a complainant of a sexual offence (the complaint rule). The rule allowed the evidence to be admitted to demonstrate consistency with the evidence of the complainant but as a matter of law was not capable of corroborating that evidence. The complaint rule made the evidence relevant only to the witness' credit. It was not evidence of the truth of the facts in issue.

Subsection 76C(2) of the *Evidence Act 1971* allowed the evidence in if it was otherwise admissible under another rule of law or practice. The commencement of the *Evidence Act 1995 (Cth)* provided another such avenue for complaint evidence to be adduced. The reform is considered to have 'backfired' because it has not prevented the defence from raising the issue of delay in making a complaint and the prosecution is prevented from the opportunity to show a complaint had been made promptly.

Upon the repeal of section 76C the law governing the admissibility of complaint evidence will be the Commonwealth *Evidence Act*. The complaint rule is not revived (section 86 of the *Legislation Act 2001*).

New section 72 formalises the directions to be given on the issue of a complainant's consent in sexual offence prosecutions. It is aimed at averting the assumption that a jury may make as to passive acquiescence or physical inaction. This provision is consistent with the present policy of section 67 of the *Crimes Act 1900*.

New section 73 provides for a direction where an accused raises mistaken belief as to consent. The jury may consider whether it was reasonable in the circumstances for the accused to hold the belief there was consent. The direction may arise where the accused raises mistaken belief as a defence or is cross-examined as to what action he or she took to ensure there was free agreement.

Part 5 Miscellaneous

New part 5 inserts machinery provisions for this Act, allowing for approved forms (section 72) and reinserts the Act's regulation power. The dictionary for the Act follows this part.

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

[1.1] New sections 2 to 4

Inserts in part 1:

New section 2 placing the dictionary at the end of the Act. The dictionary forms a part of the Act.

New section 3 makes clear that notes in the Act are explanatory only and do not form part of the Act.

New section 4 is a standard section providing that other legislation applies for offences against this Act. This section increases awareness of the *Criminal Code* and alerts the reader to the fact that Chapter 2 of the *Criminal Code*, setting out the general principles of criminal responsibility, applies to this Act.

[1.2] Part 2 heading

Substitutes the heading of part 2 to reflect its intent, dealing with the evidence of children.

[1.3] Section 2

Substitutes a new section 5 to reflect the renumbering arising from inserting new sections 2 to 4 above. This section also updates the definitions of part 2 to deal only with those definitions needed for children's evidence.

[1.4] to [1.13]

These provisions renumber sections and makes consequential amendments to cross-references. There is no difference between the current sections in the Act and what is to be substituted. It was considered convenient to separate those provisions that relate to sexual offence complainants giving evidence via audiovisual link from those relating to children's evidence. The provisions in relation to sexual offence complainants are in division 4.3.

[1.14] Section 10(1)(c)

Amends before renumbering the current paragraph to make it clearer than its current wording.

[1.15] Sections 10 to 12

Renumbers the sections to be 12, 13 and 14 respectively.

[1.16] Section 13

Amends and renumbers section 13 to be new section 15. The amendment merely updates the language of the section.

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

The definition is omitted from section 14 as the phrase is now used also for parts 2 and 4. It now appears in the dictionary.

[1.18] Sections 14 to 22

Renumbers the sections as sections 16 to 24.

[1.19] to [1.26]

These provisions renumber sections and makes consequential amendments to cross-references.

Schedule 2 Consequential amendments

The renumbering of parts 1 to 3 of the Act require other Acts and regulations that contain references to audio and audiovisual links to be amended.

Part 2.4 amends section 5(d) of the *Court Security Act 2001* (right of entry, etc to court premises) to reflect the renumbered provisions and includes additional provisions where members of the public can be excluded from the court after amending the *Evidence (Miscellaneous Provisions) Act 1991*.

Part 2.6 provides for the repeal of part 10A of the *Evidence Act*. Those provisions still relevant from part 10A have been placed in this Bill.