

2001

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Mr Rugendyke)

Evidence (Miscellaneous Provisions) Amendment Bill 2001

A Bill for

An Act to amend the *Evidence (Miscellaneous Provisions) Act 1991*

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

2001 117B

1 Name of Act

This Act is the *Evidence (Miscellaneous Provisions) Amendment Act 2001*.

2 Commencement

This Act commences on the day it is notified in the Gazette or immediately after the commencement of the *Legislation (Consequential Amendments) Act 2001*, whichever is later.

3 Act amended

This Act amends the *Evidence (Miscellaneous Provisions) Act 1991*.

4 Part 4

substitute

**Part 4 Sexual assault
communications privilege**

Division 4.1 Preliminary

35 Definitions for pt 4

In this part:

document recording a protected confidence includes—

- (a) a part of a document recording a protected confidence; and
- (b) a copy, reproduction or duplicate of that part of the document; and
- (c) a report, observation, opinion, advice, recommendation or other matter relating to the protected confidence made by a protected confider; and

- 1 (d) a document recording a protected confidence that is stored
2 electronically if, by the use of equipment usually available for
3 retrieving or collating information so stored, a written
4 document recording the protected confidence could be created.

5 ***harm*** includes—

- 6 (a) actual physical bodily harm; and
7 (b) financial loss; and
8 (c) stress or shock; and
9 (d) damage to reputation; and
10 (e) emotional or psychological harm, including shame, humiliation
11 and fear.

12 ***preliminary proceeding*** means a proceeding of the following kind,
13 whether or not in relation to a sexual offence:

- 14 (a) a committal proceeding;
15 (b) a proceeding relating to bail, including a proceeding during the
16 trial or sentencing of a person.

17 ***principal protected confider*** means the victim or alleged victim of a
18 sexual offence by, to or about whom a protected confidence is made.

19 ***protected confidence***—see section 36.

20 ***protected confider***, in relation to a protected confidence, means—

- 21 (a) the principal protected confider; or
22 (b) anyone else who has made the protected confidence.

23 ***sexual offence*** means—

- 24 (a) an offence against the *Crimes Act 1900*, part 3A (Sexual
25 offences); or
26 (b) if a person charged with any offence is alleged, as an element
27 of the offence, to have intended to commit an offence

3 (c) an offence prescribed under the regulations.

(1) A ***protected confidence*** is a counselling communication made by, to or about a victim or alleged victim of a sexual offence.

9 (a) it is made before the happening, or alleged happening, of the
10 relevant acts constituting the sexual offence; or

12 (i) a sexual offence or an alleged sexual offence; or

15 (c) it is made to a counsellor in the presence of someone else if the
16 other person is present to facilitate communication between the
17 counselled person and the counsellor or otherwise further the
18 counselling process.

A person present to assist in the counselling process could include a parent, partner, carer or other supportive person.

23 *counselling communication* means a communication made in
24 confidence—

- 1 (b) to or about the counselled person by the counsellor in the
- 2 course of that relationship; or
- 3 (c) about the counselled person by a person (other than the
- 4 counsellor) mentioned in subsection (2) (c); or
- 5 (d) about the counselled person by or to the counsellor and
- 6 someone else who also has been or is a counsellor in relation to
- 7 the counselled person.

8 **Division 4.2 Proceedings relating to offences**

9 **37 Privilege in preliminary proceedings**

- 10 (1) A person cannot be required, (whether by subpoena or any other
- 11 procedure), in relation to a preliminary proceeding, to produce to a
- 12 court, a party or anybody else a document recording a protected
- 13 confidence.
- 14 (2) Evidence that would disclose a protected confidence or the contents
- 15 of a document that records a protected confidence is not admissible
- 16 in a preliminary proceeding.

17 **38 Inspection of documents recording protected**

18 **confidences**

- 19 (1) A person in possession of a document recording a protected
- 20 confidence may object to the production of the document for
- 21 inspection by a party in, or in relation to, a proceeding for a sexual
- 22 offence on the ground that the document is privileged under this
- 23 part.
- 24 (2) If an objection under subsection (1) is made, the person making the
- 25 objection must produce the document for inspection by the person
- 26 requiring it only if—
- 27 (a) the document is first produced for inspection by the court; and
- 28 (b) the court is satisfied, either when the document is first
- 29 produced to it or later, that—

- 1 (i) the contents of the document will, either by themselves or
2 having regard to other evidence presented or to be
3 presented, have substantial probative value; and
- 4 (ii) no other evidence of the protected confidence is
5 available; and
- 6 (iii) the public interest in allowing inspection outweighs the
7 public interest in preserving the confidentiality of
8 protected confidences and protecting the principal
9 protected confider from harm.
- 10 (3) In addition to anything else that the court may take into account for
11 subsection (2) (b) (iii), the court must take into account the
12 likelihood, nature and extent of the harm to the principal protected
13 confider if the document is produced for inspection.

14 **39 Evidence of protected confidences**

- 15 (1) In a proceeding for an offence (other than a preliminary
16 proceeding), evidence that would disclose a protected confidence, or
17 the contents of a document recording a protected confidence, is not
18 admissible without the leave of the court.

19 *Note* In preliminary proceedings evidence of protected confidences is not
20 admissible—see s 37 (Privilege in preliminary proceedings).

- 21 (2) The court may give leave to present evidence mentioned in
22 subsection (1) only if satisfied that—
- 23 (a) the evidence will, either by itself or having regard to other
24 evidence presented or to be presented by the person seeking to
25 present the evidence, have substantial probative value; and
- 26 (b) no other evidence of the protected confidence or the contents
27 of the document is available; and
- 28 (c) the public interest in allowing the evidence to be presented
29 outweighs the public interest in preserving the confidentiality
30 of protected confidences and protecting the principal protected
31 confider from harm.

- 1 (3) In addition to anything else that the court may take into account for
2 subsection (2) (c), the court must take into account the likelihood,
3 nature and extent of the harm to the principal protected confider if
4 the evidence is presented.

5 **40 Notices of intention to inspect or adduce protected**
6 **confidences**

- 7 (1) A party to a proceeding for an offence may require the production
8 for inspection of a document recording a protected confidence only
9 if the party has given reasonable written notice of the party's
10 intention—

11 (a) to each other party; and

12 (b) to each protected confider who is not a party to the proceeding.

13 *Note* If a form is approved under s 47 (Approved forms) for a notice under
14 this subsection, the form must be used.

- 15 (2) A party to a proceeding for an offence may present evidence that
16 would disclose a protected confidence or the contents of a document
17 recording a protected confidence only if the party has given
18 reasonable written notice in writing of the party's intention—

19 (a) to each other party; and

20 (b) to each protected confider who is not a party to the proceeding.

21 *Note* If a form is approved under s 47 (Approved forms) for a notice under
22 this subsection, the form must be used.

- 23 (3) A party is not required to give a notice under subsection (1) (b) or
24 (2) (b) to a principal protected confider if the court is satisfied that
25 another party to the proceeding has given the principal protected
26 confider a copy of the notice that the other party has received.

- 27 (4) A party is not required to give a notice under subsection (1) (b) or
28 (2) (b) to a protected confider (other than a principal protected
29 confider) if the court exempts the party from the requirement.

1 **41 Applications under s 38 (2) and s 39 (2)—procedural**
2 **matters**

- 3 (1) A protected confider who is not a party to the proceeding in relation
4 to which an application for an order under section 38 (2) or leave
5 under section 39 (2) is made may, with the leave of the court, appear
6 at the hearing of the application.
- 7 (2) If the proceeding in relation to which an application for an order
8 under section 38 (2) or leave under section 39 (2) is made is heard
9 before a jury, the application must be decided in the absence of the
10 jury.
- 11 (3) If a question relating to a document arises under this division, the
12 court may order that the document be produced to it and may
13 inspect the document for the purpose of deciding the question.
- 14 (4) If it appears to a court that a party or a witness may have grounds
15 for making an application or objection under a provision of this
16 division, the court must satisfy itself that the party or witness is
17 aware of the effect of the provision.
- 18 (5) If the proceeding is before a jury, an inquiry under subsection (4)
19 must be carried out in the absence of the jury.
- 20 (6) A court that decides an application for an order under section 38 (2)
21 or leave under section 39 (2) must state the reasons for its decision.

22 **42 Effect of consent**

- 23 (1) This part does not prevent the production of a document recording a
24 protected confidence or the presenting of evidence disclosing a
25 protected confidence or the contents of a document recording a
26 protected confidence if the principal protected confider to whom the
27 proceeding relates has consented to the production of the document
28 or the presenting of the evidence.
- 29 (2) Consent is effective only if—
30 (a) it is in writing; and

- 1 (b) it expressly relates to the production of a document, or the
2 presenting of evidence, that is privileged under this part or
3 would be except for a limitation or restriction under this part.

4 **43 Ancillary orders for the protection of protected confiders**

- 5 (1) The court may make the orders it considers appropriate to limit the
6 possible harm, or the extent of the possible harm, likely to be caused
7 to a protected confider by the disclosure of evidence of a protected
8 confidence or of a document recording a protected confidence.
- 9 (2) Without limiting subsection (1), the court may—
- 10 (a) order that the court be closed to the public while all or part of
11 the evidence is given or the document is produced; and
- 12 (b) make the orders relating to the suppression or publication of all
13 or any part of the evidence that, in the court's opinion, are
14 reasonably necessary to protect the safety and welfare of a
15 protected confider; and
- 16 (c) for evidence relating to a document—make the orders relating
17 to the production or inspection of the document that, in the
18 court's opinion, are reasonably necessary to protect the safety
19 and welfare of a protected confider; and
- 20 (d) make the orders relating to the disclosure of protected identity
21 information that, in the court's opinion, are reasonably
22 necessary to protect the safety and welfare of a protected
23 confider.
- 24 (3) This section is in addition to the powers of the court under the
25 *Evidence Act 1971*, part 10A (Evidence in sexual offence
26 proceedings).
- 27 (4) In this section:
- 28 *protected identity information* means information about, or
29 allowing a person to find out, the private, business or official
30 address, email address or telephone number of a protected confider.

44 No privilege in case of misconduct

- (1) This division does not apply in relation to a communication made, or a document prepared, in the furtherance of the commission of an offence, a fraud or an act that renders a person liable to a civil penalty.
- (2) A court may find that a communication was made, or a document was prepared, in the furtherance of the commission of an offence, a fraud or an act if there are reasonable grounds for finding that—
 - (a) the offence, fraud or act was committed; and
 - (b) the communication was made, or document prepared, in the furtherance of the offence, fraud or act.

45 Relationship with other laws.

- (1) A court may grant leave under this division in relation to a protected confidence whether or not the confidence, or evidence relating to the confidence, is privileged under another provision of this Act or another law.
- (2) Except so far as this part expressly or by necessary implication provides, this part does not affect the operation of a principle or rule of the common law relating to—
 - (a) evidence in proceedings for offences; or
 - (b) the inspection of documents required to be produced in, or in relation to, proceedings for offences.

Division 4.3 Civil proceedings

46 Exclusion of evidence of protected communications

- (1) This section applies in relation to a civil proceeding if the acts in issue in the proceeding are substantially the same acts that have been in issue in a proceeding for an offence.

- 3 proceeding.

4 Part 5 Miscellaneous

5 47 Approved forms

- 6 (1) The Minister may, in writing, approve forms for this Act.
- 7 (2) If the Minister approves a form for a particular purpose, the
8 approved form must be used for that purpose.
- 9 (3) An approved form is a notifiable instrument.

10 *Note* A notifiable instrument must be notified under the *Legislation Act 2001*.

11 **48 Regulation-making power**

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

13 *Note* Regulations must be notified, and presented to the Legislative
14 Assembly, under the *Legislation Act 2001*.

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

19 **Part 6** **Transitional**

20 **49 Application of div 4.2**

- (1) Division 4.2 does not apply in relation to a proceeding for a sexual offence the hearing of which began before the commencement of part 4.
- (2) Subject to subsection (1), division 4.2 applies in relation to—

- 1 (a) a requirement, whether by subpoena or other procedure, to
2 produce a document after the commencement of part 4, even if
3 the requirement was issued before the commencement; and
4 (b) a protected confidence, whether made before or after the
5 commencement.

6 **50 Application of div 4.3**

- 7 (1) Division 4.3 does not apply in relation to a civil proceeding the
8 hearing of which began before the commencement of part 4.
9 (2) For a civil proceeding that began after the commencement of part 4,
10 division 4.3 applies in relation to—
11 (a) acts and circumstances that happened before the
12 commencement; and
13 (b) protected confidences made, and documents created, before the
14 commencement.

15 **51 Expiry of pt 6**

16 This part expires 2 years after its commencement.

17 *Note* The expiry of a transitional provision does not end its continued
18 effect—see *Legislation Act 2001*, s 82, def of **repeal** and s 88 (1).

Endnote

Act amended

- 1 Republished as in force on 30 June 2000 (Republication No 4). See also
2001 No 44.