

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN  
CAPITAL TERRITORY**

**EVIDENCE (MISCELLANEOUS PROVISIONS)  
AMENDMENT BILL 2001**

**EXPLANATORY MEMORANDUM**

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Independent

## **EVIDENCE (MISCELLANEOUS PROVISIONS) AMENDMENT BILL 2001**

### **Explanatory Memorandum**

#### **OUTLINE**

This is a Bill to amend the *Evidence (Miscellaneous Provisions) Act 1991*.

In any proceedings before a court, a party is entitled to call evidence that is relevant to the matters the court has to decide on. If someone who is not involved in the proceedings has information that is considered relevant, they can be compelled to produce this information or attend court to give evidence in person.

In recent years it has become commonplace for defence lawyers in sexual assault trials to issue subpoenas against sexual assault counsellors. Counsellors' notes are confidential records of a therapeutic process and not an investigative one. Counsellors have pointed out that complainants of sexual assault express feelings of guilt or doubt as to whether they may have been to blame in some way. These expressions can reflect a common psychological reaction to what has occurred and does not mean the complainant was not sexually assaulted. It is potentially misleading for the defence to rely upon them as evidence of consent.

The NSW Government recognised that counsellors' notes required protection in 1998 by introducing legislation aimed at restricting the right of a party to legal proceedings from issuing a subpoena for counsellors' notes.

This Bill establishes similar provisions by establishing asexual assault communications privilege. The intent is to create a presumption that a person cannot be compelled to produce details of a protected confidence to court and that it cannot be used in evidence unless the court is satisfied that the evidence will have substantive probative value.

## FORMAL CLAUSES

**Clauses 1, 2 and 3** are formal requirements. They refer to the short title of the Bill, commencement and the Act being amended.

## SUBSTITUTION

**Clause 4** inserts new Part 4 establishing a sexual assault communications privilege.

Proposed **Section 35** inserts definitions for a document recording a protected confidence, harm, preliminary proceeding, principal protected confider, protected confidence and sexual offence.

Proposed **Section 36** provides the meaning of a protected confidence and counselling communication.

Proposed **Section 37** provides that a person cannot be required to produce a protected confidence in preliminary proceedings relating to offences. It also sets out that evidence from a protected confidence is not admissible in such a proceeding.

Proposed **Section 38** provides procedures for the inspection of documents recording protected confidences in proceedings relating to offences. It allows a person in possession of a protected document to object to the production of the document for inspection on the grounds of privilege. It also sets out the conditions in which the court can rule the document must be produced for inspection.

Proposed **Section 39** provides that evidence in a proceeding for an offence (other than a preliminary proceeding) that would disclose a protected confidence, or the contents of a protected confidence document, is not admissible without the leave of the court. It also sets out the conditions in which the court can rule the evidence must be presented.

Proposed **Section 40** sets out procedures for notices of intention to inspect or adduce protected confidences in proceedings relating to offences.

Proposed *Section 41* sets out procedural requirements in proceedings relating to offences for applications for inspection of documents recording protected confidences and evidence of protected confidences under Sections 38 (2) and 39 (2).

Proposed *Section 42* provides that Part 4 does not apply if the principal protected confider has consented to the production of the document or the presenting of evidence. Consent is effective only in writing and expressly relates to privilege under this part of the Act.

Proposed *Section 43* allows the court to provide ancillary orders for the protection of protected confiders in proceedings relating to offences. The court may make orders described in the section to limit possible harm likely to be caused to a protected confider by the disclosure of evidence or a protected confidence document.

Proposed *Sections 44 and 45* provides that the privilege outlined does not apply in the case of misconduct and sets out the relationship with other laws.

Proposed *Section 46* provides that exclusion of evidence of protected communications also applies to civil proceedings if the acts in issue in the proceeding are substantially the same acts that have been issue in a proceeding for an offence.

Proposed *Sections 47 and 48* insert new Part 5 for miscellaneous provisions that create mechanisms for the Minister to approve forms for the Act and the Executive to make regulations for the Act.

Proposed *Sections 49, 50 and 51* insert transitional provisions that stipulate the application of Divisions 4.2 and 4.3 do not apply to a proceeding where the hearing began before the commencement of Part 4.