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

TENTH ASSEMBLY

Crimes (Disclosure) Legislation Amendment Bill 2024

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004*, s 37)**

**Presented by
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Attorney-General
April 2024**

Crimes (Disclosure) Legislation Amendment Bill 2024

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The Crimes (Disclosure) Legislation Amendment Bill 2024 (the Bill) **is** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

The Bill aims to legislate the scope and content of the prosecution's obligation of disclosure of evidence in criminal proceedings through amendments to the *Court Procedures Act 2004* and the *Magistrates Court Act 1930*.

The amendments regarding the prosecution's disclosure obligation apply only in proceedings where the accused pleads not guilty and only to those proceedings that commence on the same day as the amendments come into force and thereafter. For defendants in criminal proceedings where a guilty plea is entered, the current provisions of the *Court Procedures Act 2004* and the *Magistrates Court Act 1930* continue to apply. Where a proceeding is on foot at the time of the amendments coming into effect, the existing provisions, common law and prosecution policy will continue to apply.

The Bill will also facilitate standing of complainants in sexual assault and family violence criminal matters where there is an application regarding disclosing protected confidences of the complainant under s79E of the *Evidence (Miscellaneous Provisions) Act 1991*. This brings the ACT's protected confidence laws in line with other jurisdictions including New South Wales and Victoria, and supports victim agency and voice in proceedings dealing with these matters.

CONSULTATION ON THE PROPOSED APPROACH

In developing this Bill, the Justice and Community Safety Directorate (JACS) consulted with both internal and external stakeholders, on two occasions. On the first occasion, in December 2023, a group of key justice stakeholders were invited to comment on a Discussion Paper that sought their views on Recommendations 5 and 8 of the Board of Inquiry Report (BoI Report) into the Criminal Justice System in the ACT. Those stakeholders included:

- ACT Courts and Tribunal
- ACT Director of Public Prosecutions
- ACT Policing
- Aboriginal Legal Service ACT/NSW
- Women's Legal Centre
- ACT Law Society
- ACT Bar Association
- Canberra Rape Crisis Centre

- Legal Aid ACT
- ACT Victims of Crime Commission/Victims Support ACT
- Domestic, Family and Sexual Violence Office, Community Services Directorate.

JACS has also consulted with Victim Support ACT (VSACT) on the proposed amendment for complainant standing.

Based on stakeholder feedback, the Bill has been drafted to set clear obligations for disclosure of evidence before and during criminal proceedings for prosecution, achieve improved understanding of the prosecutor's obligations under the legislation and assign specific powers to courts to enforce the disclosure obligation rules.

The majority of stakeholders supported a detailed model of disclosure obligations to reduce ambiguity, add clarity and promote standard processes and timeframes for disclosure. Stakeholders have called for detailed disclosure rules outlined in primary legislation and clear powers for courts to oversee compliance with the rules, either through excluding evidence, limiting its use, adjourning matters, or in the most extreme cases, dismissal of charges. Furthermore, stakeholders were strongly supportive of establishing timeframes for disclosure in the Bill, arguing that legislating timeframes would support fairness in pre-trial and trial stages of the process, ensuring procedural fairness for the defendant. Stakeholders called for the amendments to also further strengthen oversight of the courts in setting timelines. This feedback has been incorporated into the Bill.

The Bill's amendments include new detailed provisions that clearly articulate the rules for disclosure, including:

1. A legislated duty of disclosure for the prosecution, with a robust and objective disclosure regime.
 - a. This includes a requirement on prosecutors to disclose all evidence available to them.
 - b. A requirement for ongoing disclosure as new evidence becomes available to the prosecutor after the brief of evidence has been served.
 - c. The provision of details on what matters should be disclosed in a brief of evidence and any exceptions to these requirements.
2. Timeframes for disclosure of briefs of evidence, so that briefs of evidence must be served by a specific timeframe before a hearing (unless court approval has been obtained). The Bill introduces a timeframe for disclosure of evidence to be afforded to the defendant with such timeframe anchored 28 days before the hearing date, unless otherwise determined by the court.
3. Strong accountability mechanisms such as court-imposed sanctions for breaches.

- a. The Bill provides the court with clear powers with respect to the disclosure obligations. The court may refuse to admit evidence if not previously disclosed to the defendant or grant an adjournment to them if the evidence would prejudice the case of the party.
- b. Under the Bill, evidence that was not disclosed by prosecution in the brief of evidence will generally not be admitted, and the court will be able to refuse to admit evidence unless the defendant consents to its use or the court considers it is in the interest of justice to admit the evidence.
- c. If the court agrees to admit the evidence, the court may do so on terms and conditions that it considers to be just and reasonable.

Following the draft Bill development, between 6 March and 13 March 2024, JACS undertook further consultation with key justice stakeholders seeking their views on the draft of the Bill. Noting a relatively short consultation period, the same key justice stakeholders who were invited to provide feedback to the Discussion Paper were invited to comment on the draft Bill.

CLIMATE IMPACT

This proposal is not expected to have a direct impact on climate change.

CONSISTENCY WITH HUMAN RIGHTS

Rights engaged

This Bill engages the right to fair trial (section 21), rights in criminal proceedings (section 22) and right to privacy (section 12).

Rights Promoted

This Bill promotes a right to fair trial (s21 of the *Human Rights Act 2004*). By legislating a duty of disclosure for the prosecution, with a robust and objective disclosure regime, the Bill will ensure that the rights and obligations of the prosecution towards the defendant in criminal proceedings are recognised by law.

The legislated duty of disclosure introduced by the Bill will also promote a defendant's rights in criminal proceedings (s22 of the *Human Rights Act 2004*). Specifically, the Bill will further facilitate that a defendant is informed promptly and in detail, about the nature and reason for the charge (s22(a)).

Introducing timelines for disclosure into the two relevant Acts will ensure that the defendant has adequate time and facilities to prepare their defence and to communicate with lawyers or advisors chosen by them (s22(b)).

The court will have oversight of disclosure, and the clear powers to enforce the disclosure requirements.

Under the *Human Rights Act 2004*, everyone charged with a criminal offence is entitled to the minimum guarantee to examine prosecution witnesses, or have them examined, and to obtain the attendance and examination of witnesses on their behalf under the same conditions as prosecution witnesses (s22(e)). The Bill will promote this right by the defendant having all evidence available to them in a timely manner, to be able to request and prepare for examination of witnesses. Furthermore, the legislated duty of ongoing disclosure throughout the court process will ensure that the defendant is informed as new evidence becomes available, enabling them to further scrutinise the evidence and examine new witnesses as they come forward.

The Bill will promote the right to privacy (s 12 of the *Human Rights Act 2004*) by ensuring a counselled person can put forward their views to the court on an application to release a protected confidence. The option of the counselled person providing a statement of harms to the court, which is not to be released to the parties, further promotes this right to privacy.

Rights Limited

Right to fair trial

1. Nature of the right and the limitation (s28(a) and (c))

The Bill limits the right to fair trial for complainants and victim survivors by enabling the court to decide to exclude/dismiss some of the evidence due to prosecution failing to provide it in a timely manner.

Introducing timeframes for disclosure of evidence and legislating the right of the court to dismiss evidence that is not provided in a timely manner by the prosecution, potentially could allow for key evidence in the claimant's case to be dismissed. However, the way in which the Bill is worded provides the Court with the discretion to allow for an adjournment to allow the defendant time to consider the evidence and otherwise allow for its admission. Further, the Bill also enables courts to set their own timelines for disclosure that could allow additional time for prosecution to disclose, if required.

2. Legitimate purpose (s28(b))

The overall objective of the Bill is to set clear obligations for disclosure of evidence before and during criminal proceedings, achieve improved understanding of the prosecutor's obligations under the legislation and assign specific powers to courts to enforce the disclosure obligation rules.

3. Rational connection between the limitation and the purpose (s28(d))

The Board of Inquiry into the Criminal Justice System in the ACT (the Inquiry) was established to ensure that the Territory's framework for progressing criminal investigations and prosecutions is robust, fair and respects the rights of those involved. The Inquiry Final Report contained 10 recommendations in total.

Recommendation 8 was that the ACT Government, in consultation with stakeholders, enact legislation to codify the scope and content of the obligation of disclosure owed by the Prosecution in criminal proceedings.

Currently in the ACT, the content of a prosecutor's duty of disclosure derives mainly from the Prosecution Policy, while the duty of disclosure is codified in the majority of jurisdictions in Australia. The Inquiry Final Report concluded that *"codification recognises the importance of the duty to the proper administration of justice. It guarantees a clear statement of the scope and content of the duty. It ensures observance by all prosecutors. It facilitates oversight by the court to determine disputes which may arise in relation to disclosure."*¹

This finding was supported by relevant justice stakeholders in the ACT during consultation held to examine the scope and content of legislated duty of disclosure by the Prosecution in the ACT. Stakeholders agreed that even when policies and procedures are adequate, legislating is the preferred method of regulating disclosure.

This will be achieved via the following Bill features:

- A legislated duty of disclosure for the prosecution that starts pre-trial and is ongoing throughout the judicial process.
- Timeframes for disclosure of briefs of evidence, so that briefs of evidence must be served by a specific timeframe before a hearing or in accordance with a timetable set by the court.
- Court-imposed sanctions for non-compliance with disclosure requirements, including ability to refuse evidence or grant adjournment.

The Bill establishes a detailed model of evidence disclosure obligations on the part of the prosecution in criminal proceedings, with the courts empowered to admit or reject evidence.

Currently in the ACT, the content of a prosecutor's duty of disclosure derives mainly from the Prosecution Policy and inferred within the relevant Acts. While the Prosecution Policy outlines the disclosure requirements for prosecutions in the ACT, the Inquiry concluded that this approach suffers from weaknesses, including that considerations of relevance are being prioritised above considerations of fairness.

The Inquiry Report recommended that these that should be rectified by legislating the duty of disclosure for prosecution. This legislative change, the Report found, should facilitate oversight by the court to determine disputes which may arise in relation to disclosure.

This recommendation was supported by majority of justice stakeholders in the ACT.

¹ https://www.justice.act.gov.au/_data/assets/pdf_file/0003/2263980/ACT-Board-of-Inquiry-Criminal-Justice-System-Final-Report-31-July-2023.pdf

Specifically, under the new legislation, courts will be expressly provided with the ability to enforce the rules either through excluding evidence and/or adjourning matters. Legislated timeframes will support fairness in pre-trial and trial stages of the process, ensuring procedural fairness for the defendant. There is no evidence to suggest that the current practice that relies solely on prosecution policy provides more fairness for the victim/plaintiff. Under the legislative change, disputes that may arise in relation to disclosure will be settled by the courts. Courts will be able to make decisions in individual cases where prosecution has not obeyed their disclosure duties and decide to include or reject evidence on terms that are just and reasonable.

4. Proportionality (s28 (e))

Achieving the legitimate purpose of this Bill (improving procedural fairness for the defendant) requires balancing the right to fair trial for both the defendant and complainant / victim survivor.

The Bill is the least restrictive means to achieve the legitimate purpose. A less restrictive approach already exists and is applied in the ACT via the prosecution's duty of disclosure forming an integral part of the Director of Public Prosecution's Prosecution Policy (Chapter 4: Disclosure). However, due to the Board of Inquiry recommendation and stakeholder feedback this approach is no longer considered an effective means to achieve the legitimate purpose of this Bill.

Stakeholders were consulted on whether the existing prosecution policy is a sufficient policy tool for meeting disclosure obligations as outlined in Recommendation 8 of the Inquiry Report. The majority of stakeholders were supportive of legislating duty of disclosure instead of continuing with the current approach as better clarity will be afforded to all those involved in criminal proceedings. Stakeholders agreed that even when policies and procedures are adequate, legislation is the preferred mechanism of achieving the stated objective.

ACT Courts are well positioned to determine what evidence must be admissible in proceedings to ensure fair trial.

Furthermore, under the current legislation and rules, courts are already empowered to set timelines and accept or admit evidence applying the following legislative provisions:

- *Court Procedure Act 2004*
 - s78 Mandatory pre-trial disclosure—expert evidence (before the date set for the trial and in accordance with a timetable set by the court)
 - s79C Sanctions for non-compliance with pre-trial disclosure requirements (court can refuse to admit evidence, grant adjournment)
- *Court Procedure Rules 2006*
 - s4305 Prosecution evidence to be given to accused – prosecution evidence in committal proceedings (28 days or other period ordered by the court)

- *Evidence Act 2011*
 - s169 Failure to comply with requests (court can make orders including not to admit evidence, to adjourn proceedings or impose costs).

Courts are also able to issue their own practice directions, which are not expected to be impacted by this Bill. This Bill will explicitly allow courts to continue to issue their own practice directions regarding disclosable evidence.

It is therefore considered that there are no less restrictive reasonably available ways of achieving the policy objective of this Bill.

Right to privacy

1. Nature of the right and the limitation (s28(a) and (c))

The Bill has the potential to limit the right to privacy (s12, Privacy and reputation *Human Rights Act 2004*), as evidence presented in criminal proceedings can include private and personal information both about the victim/plaintiff, the defendant and any relevant witnesses involved.

2. Legitimate purpose (s28(b))

The overall objective of the Bill is to set clear obligations for disclosure of evidence before and during criminal proceedings, achieve improved understanding of the prosecutor's obligations under the legislation and assign specific powers to courts to enforce the disclosure obligation rules.

3. Rational connection between the limitation and the purpose (s28(d))

The Bill establishes a detailed model of evidence disclosure obligations on the part of the prosecution in criminal proceedings, with the courts empowered to admit or reject evidence. The Bill amends *Magistrates Court Act 1930* and the *Court Procedures Act 2004*.

The evidence base underpinning this approach is outlined in the rational connection section for the right to fair trial limitation above.

4. Proportionality (s28 (e))

This Bill promotes a right to fair trial (s21, *Human Rights Act 2004*). By legislating a duty of disclosure for the prosecution, with a robust and objective disclosure regime, the Bill will ensure that the rights and obligations of the prosecution towards the defendant in criminal proceedings are recognised by law.

While evidence disclosed in criminal proceedings can impact an individual's right to privacy, the principle of open justice is fundamental to ensuring that courts remain transparent and accountable for their decisions.

To ensure the protection of privacy of personal details by witnesses or others involved in court proceedings, the Bill, under sections 76E and 90AAA includes provisions about personal contact details not to be provided, including any address or contact details, or allowing address and contact details to be worked out. This will not apply only when the court is satisfied that it is in the interest of justice to disclose, and the court expects that the disclosure of contact details is not likely to create a reasonably foreseeable risk to the welfare or safety of the person in question. In situations where such risk exists, the address and contact details will only be disclosed if the court determines that the interest of justice outweighs the risk.

This section will operate in parallel to the Prosecution Policy of the ACT Office of Director of Public Prosecution. Under that policy, which is a statutory document, *“in fulfilling its disclosure obligations the prosecution must have regard to the protection of the privacy of victims and other witnesses. The prosecution will not disclose the address or telephone number of any person unless that information is relevant to a fact in issue and disclosure is not likely to present a risk to the safety of any person”*. Provisions of the Prosecution Policy pertaining to privacy will not be impacted by this Bill.

Specific provisions of the Bill address material covered by immunity or publication restriction, which is an important safeguard. Under the Bill, there will be no requirement for disclosure of anything that:

- is the subject of a claim of privilege or public interest immunity; or
- is the subject of an immunity conferred by a law applying in the ACT or elsewhere (for example the identity of people who provide information or assistance to law enforcement and regulatory agencies on the basis that their identities will be kept confidential, or where disclosure might reveal confidential methods of investigation undertaken by law enforcement and regulatory agencies); or
- would contravene a prohibition or restriction under a law applying in the ACT or elsewhere on the disclosure of the thing to the accused person.

Achieving the legitimate purpose of this Bill (improving procedural fairness for the defendant) requires balancing the right to fair trial for both the defendant and complainant / victim survivor. While it is recognised that evidence disclosed in criminal proceedings can impact an individual’s right to privacy, the principle of open justice is fundamental to ensuring that courts remain transparent and accountable for their decisions.

It is otherwise standard practice for witnesses including the complainant/victim survivor are prepared and advised on what to expect during the court process at which time any additional concerns regarding privacy and safety can be discussed and mitigated.

There are other safeguards to protect people’s privacy already in the ACT statute book.

Pursuant to section 310(1) of the *Magistrates Court Act 1930*, the hearing of a proceeding before the Magistrates Court must be in public, but the magistrate has a discretion, by order, that the hearing or part of the hearing take place in private and give directions about the people who may be present. Magistrates can also give directions prohibiting or restricting the publication of evidence given at the hearing, whether in public or in private, or of matters contained in documents lodged with the court or received in evidence by the court for the purposes of the proceeding; and give directions prohibiting or restricting the disclosure to some or all of the parties to the proceeding of evidence given at the hearing, or of a matter contained in a document lodged with the court or received in evidence by the court for the purposes of the proceeding. This Bill does not amend any of these provisions.

Complainant Standing Amendment

1. Nature of the right and the limitation (s28(a) and (c))

The amendment to provide for complainant standing engages and limits the right to a fair trial (section 21 of the *Human Rights Act 2004*) as it has the potential for a statement of harms to be provided to the court but not to the defence or prosecution who are the parties to the proceeding. This is known as the 'confidential statement'.

Section 21 (1) of the *Human Rights Act 2004* provides that criminal charges are to be heard in a public hearing, which ensures transparency and impartiality of proceedings. However, there are some circumstances where part of proceedings may be held in private to protect the interest of the private lives of the parties (*Human Rights Act 2004*, s 21 (2) (b)).

2. Legitimate purpose (s28(b))

The legitimate purpose is to allow the court to take into account the counselled persons views before making a decision about disclosure of a protected confidence, while minimising the potential for unnecessary distress or re-traumatisation, so that victim-survivors of sexual assault and family violence are not discouraged from engaging in the criminal justice system. This promotes victim-survivor agency.

3. Rational connection between the limitation and the purpose (s28(d))

This amendment ensures that complainants can share their experiences with counsellors in a safe and meaningful way, with the ability to inform the court of the potential harm that could be caused if the evidence of the protected confidence was released to the parties.

The *Listen. Take Action to Prevent, Believe and Heal* Report (the SAPR Report) published in December 2021, noted that many victim-survivors feel shame and embarrassment when their evidence is available for the public to hear in open court and may often feel reluctant to report their crimes due to this. Additionally, the stress and intimidation of this evidence being available to the public can result in these vulnerable witnesses not giving their best possible evidence when cross-examined.

This is because they may feel their personal honour, reputation or confidential information is accessed by anyone present in the courtroom during the criminal trial, including members of the public. This concern is elevated in culturally diverse contexts where there may be greater sensitivity around discussing sexual related matters.

The Court can already consider the impact on the victim. Under section 79H(3) of the *Evidence (Miscellaneous Provisions) Act 1991*, in making a decision whether to give leave for a disclosure of protected confidence, the Court (among other things) must have regard to whether the person to or by whom the protected confidence was made objects to the disclosure of the protected confidence. However, the *Evidence (Miscellaneous Provisions) Act 1991* is silent on the counselled person appearing in protected confidence matters to provide this information on whether they object to the disclosure of the protected confidence. Although the prosecution may be able to put forward the counselled persons views, such as in *R v Nash* [2021] ACTSC 169 (27 July 2021), if the views or position of the counselled person are in contrast with the views or position of the prosecution, this can become problematic. Allowing for the complainant to provide a confidential statement of harms to the Court, seeks to address this issue of the negative wellbeing impact on the complainant when their views and the views of the prosecution may not align.

4. Proportionality (s28 (e))

This provision is the least restrictive means as the confidential statement is not evidence to be used in the substantive proceedings, but a statement that the court can consider for the purposes of whether the protected confidence material to which the application relates should be released as evidence in those proceedings. It is not a requirement that the counselled person provide this statement of harm. It does, however, provide flexibility in how the counselled person can participate in these matters.

This amendment appropriately balances the rights of the parties to a fair trial and procedural fairness with the right to privacy for the counselled person. It does this as the amendment does not change the right for the applicant to appeal the decision of the court. Furthermore, the provision does not prevent the counselled person or their legal representative making submissions in Court. The Court will still retain its discretion on whether the protected confidence can be relied upon by a party. The amendment does not give the confidential statement more weight than the other considerations the court must turn its mind to in section 79H, and where disclosure of the protected confidence material is not approved by the Court, the Court will still need to give reasons for its decision not to release the material.

It is a necessary amendment to achieve the legitimate purpose outlined above, because the statement will provide the court with information relevant to the matters it must consider under section 79H, including the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of anyone, as well as the public interest considerations set out at section 79H(1)(b) and section 79H(1)(c).

It is proportionate for the confidential statement not to be provided to the parties because the counselled person is not a party to the proceeding, but their evidence and sometimes involvement can be crucial to the matter before the Court. This amendment allows for the Court to hear about that harm in a way that promotes victim agency.

There are other areas of law where there is the justification of exclusion of document or other information from disclosure in both criminal and civil proceedings. For example, public interest immunity and client legal privilege.

It is already the practice in both Victoria and New South Wales that the court can receive a confidential statement of harms from the complainant regarding the confidential communication. This amendment has been modelled on the existing provision in New South Wales, noting that the provision in Victoria is similar in nature.

In New South Wales, the *Criminal Procedure Act 1986* (NSW) s 299D (3)-(4) provides that for the purposes of determining an application for leave, the Court may permit a confidential statement to be made to it by or on behalf of the principal protected confider by affidavit specifying the harm the confider is likely to suffer if the application for leave is granted. The Court must not disclose or make available to a party (other than the principal protected confider) any confidential statement made to the Court under this section by or on behalf of the principal protected confider. The Court must state its reasons for granting or refusing to grant an application for leave (s 299D (5)).

In Victoria under section 32CE(3) and (4) of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic), introduced by the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022*, the Court can be provided a confidential statement from the complainant describing the harm likely to be cause to them if the application is granted. The Court can allow the protected statement to be provided if the Court considers that it is in the interest of justice to do so. This implemented recommendation 25a of the Victorian Law Reform Commission 2016 report entitled *The Role of Victims of Crime in the Criminal Trial Process*, (VLRC Victims Report) regarding the right to provide a confidential statement in these proceedings. The purpose of having a provision for the complainant to provide a confidential statement is to provide flexibility in how the protected person or complainant could appear and participate in these matters. Further, section 32CE(4) provides that the court may make the whole or part of the confidential statement available to a person other than the person (or their legal representative) if it is in the interests of justice to do so. The Explanatory Statement outlined that this requires the Court to consider the larger questions of legal principle, public interest and policy considerations.

CRIMES (DISCLOSURE) LEGISLATION AMENDMENT BILL 2024

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Crimes (Disclosure) Legislation Amendment Bill 2024**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

Crimes (Disclosure) Legislation Amendment Bill 2024

Detail

Part 1 – Preliminary

Clause 1 – Name of Act

This Act is the *Crimes (Disclosure) Legislation Amendment Act 2024*.

Clause 2 – Commencement

This Act (other than parts 2 and 4) commenced on the date after its notification day.

Parts 2 and 4 commence 12 months after this Act's notification day.

Clause 3 – Legislation Amended

This Act amends the following legislation:

- *Court Procedures Act 2004*;
- *Evidence (Miscellaneous Provisions) Act 1991*;
- *Magistrates Court Act 1930*.

Part 2 – Court Procedures Act 2004

Clause 4 – New division 8.2A Pre-trial disclosure-general

This new division is inserted into the *Court Procedures Act 2004* before Division 8.3 Pre-trial disclosure of expert evidence. It adds eight new sections to the Act: 76A, 76B, 76C, 76D, 76E, 76F, 76G and 76H. It aims to introduce pre-trial legislated obligations on the prosecution to disclose to the defence the evidence available to them.

Section 76A

This section elaborates on the Bill commencement date and that it applies to trials on indictment in which the ACT Supreme Court has jurisdiction. Subsection (2) allows the court to dispense with application of the provisions under Division 8.2A if the court is satisfied that it is in the interest of justice to do so.

Section 76B

This section outlines the details of the evidence that the prosecutor must provide to the accused person. It is a new section containing provisions that previously did not exist in the *Court Procedures Act 2004*.

The purpose of this amendment is to rectify the previous gap in the *Court Procedures Act 2004* where only the duty to disclose expert evidence was legislated.

Subsection (a) outlines that the prosecutor must provide to the accused person, all evidence in their possession, including the information that was provided to the prosecutor by the police or other persons responsible for investigating the offence. That information must be reasonably regarded as relevant to either the prosecution case or the defence case and

includes evidence that has not been previously disclosed to the accused. The Bill intends that information that would “reasonably be regarded to either the prosecution or defence case” is to be informed by the significant body of common law that exist in respect of this concept.

The subsection about the information not being previously disclosed is entered to reflect the fact that some disclosure may have already happened if the accused under s90 of the *Magistrates Court Act 1939* had been committed to trial by the ACT Magistrates Court.

Under subsection (b), if the prosecutor is aware of evidence but that evidence is not available to them, they must provide the accused person with any information they have about where they believe that evidence can be found, provided that that evidence has not previously been disclosed to the accused person.

The prosecutor will also have to provide a list of all statements taken from witnesses that the prosecutor proposes to call at the trial (subsection (c)). This subsection is introduced to clarify that not all witnesses that will be called at the trial will provide written statements ahead of the trial, and only those statements that are recorded and are available to the prosecutor will be disclosed to the accused.

The prosecutor must comply with the provisions under this section in accordance with the timetable set by the court, or if no timetable is set by the court, the relevant material will have to be disclosed not later than 28 days before the date set for the trial in the proceeding.

Section 76C

Section 76C is introduced to clarify that the prosecution’s duty of disclosure is ongoing throughout the entire criminal proceeding. This section rectifies the previous gap where the ongoing duty of disclosure was not legislated. It puts the onus on the prosecutor to continuously disclose to the accused, the evidence as it becomes available to them, and after they have disclosed evidence under section 76B during the pre-trial procedure. By way of clarity, the prosecution may use evidence or information which has come into their possession or been made aware of for the first time after complying with section 76B(1), provided that it is disclosed to the accused as soon as possible.

Section 76D

This section links to section 76B and 76C, and the requirement to, where evidence is not readily available to be provided in a suitable format, provide notice to the accused about the existence of that evidence. The duty to allow inspection of evidence is legislated under this section, and the prosecutor must allow the inspection of the information, document or any other exhibit that is available to the prosecution. Under the ordinary principles of statutory interpretation, the specific obligations for the manner in which evidence is disclosed in other schemes, such as section 53 of the *Evidence (Miscellaneous Provisions) Act 1991*, will override the general obligation in this division. Section 76H of this Bill and section 55(4) of the *Evidence (Miscellaneous Provisions) Act 1991* mean that information may be withheld from disclosure under this division and instead be disclosed only under section 53 to 55 of the *Evidence (Miscellaneous Provisions) Act 1991*. The obligation pursuant to section 76D is only in relation to access. The prosecution could allow access under this division by following the specific process for this kind of evidence as set out in section 53 to 55 of the *Evidence (Miscellaneous Provisions) Act 1991*.

Section 76E

New section 76E aims to protect the privacy of all those involved in court proceedings that are subject of disclosure obligation pursuant to this division. When providing copies of information/evidence or allowing inspection of information, the prosecutor must ensure, to the extent possible, that address or contact details are not disclosed, or that they cannot be worked out from the information provided. The section specifically refers to 'contact details' and is not otherwise limited to a telephone number. No definition is included within this provision as it is the policy intention that 'contact details' includes email, addresses, telephone numbers and social media account names. This section also provides examples to assist what can be redacted from documents.

This prosecution's obligation will not apply only if the court is satisfied that it is in the interest of justice that the address and contact details are disclosed, either because the disclosure would not create a reasonably foreseeable risk to the welfare and safety of the person, or the interest of justice outweighs the risk.

The court will maintain the discretion to make an order requiring the prosecutor to comply with subsection (2) in a particular way or subject to conditions to counterbalance the discretion given to the prosecution under subsection (2).

Section 76F

This section clarifies that the prosecution is not obliged to give an accused person a copy of, or notice about the right to inspect, any information, document or other thing that was prepared or used only in the course of giving an evidentiary certificate. Evidentiary certificate in this section is defined as a certificate that, under a territory law, is evidence of the matters stated in the certificate.

Section 76G

This section provides for the discretionary power of the court to refuse to admit evidence. In circumstances where the prosecutor proposes to adduce evidence in a criminal proceeding that they failed to previously disclose to the accused, the court can refuse to admit evidence or grant an adjournment to a party (other than the prosecutor) in the proceeding. This is to ensure that the case for that party is not prejudiced by the late inclusion of evidence.

Section 76H

Section 76H explains the effect of division 8.2A on other laws and explains that this new division does not limit other territory laws that put disclosure requirements on the prosecution. A note included in this section makes it clear that territory law includes common law.

Subsection (2) addresses the issue of immunity and restrictions on disclosure. The prosecutor will not be required to disclose anything that is the subject of claim of privilege or public interest immunity that is conferred by law applying in the ACT or elsewhere or it is the subject of a prohibition or restriction on disclosure to the accused person (a non-disclosure obligation) under ACT laws or other jurisdictional laws.

Under subsection (3), for any evidence that is not disclosed in accordance with the above provision, the prosecutor must provide the accused person with a statement that describes

the evidence with as much detail as possible, but not prejudicing the immunity privilege or contravening the non-disclosure obligation. The statement must also outline the nature of privilege, immunity or non-disclosure obligation. The statement must be included in the material disclosed to the accused, or as per the ongoing disclosure obligation, if not included in that material, it must be provided as soon as the information becomes available to the prosecutor or they become aware of it.

Part 3 – Evidence (Miscellaneous Provisions) Act 1991

Clause 5 – Definitions – div 4.4.3

This clause inserts 'counselled person' and refers to section 79A(1).

Clause 6 – Application for leave to disclose protected confidence

This clause provides for new section 79E (3) to (6) to the Act. Subsection (3) provides that an applicant must give written notice of an application to the counselled person who is the subject of the protected confidence for a civil proceeding and to the prosecutor for a criminal proceeding.

Subsection (4) provides for what information must be contained in the notice.

Subsection (5) provides that the prosecutor in a criminal proceeding is given notice under subsection (3), the prosecutor must give it to the counselled person who is subject of the protected confidence. This is to prevent re-traumatisation a counselled person might experience should the applicant be the defendant in a criminal proceeding, and the notice being received from that defendant. This also prevents the disclosure of the counselled persons contact details to the defendant.

However, the requirement to provide a notice to the counselled person does not apply if the court is satisfied that:

- (a) The applicant in a civil proceeding or the prosecutor in a criminal proceeding has taken all reasonable steps to find the counselled person, but has not found them; or
- (b) The counselled person has consented in writing to not be notified about the application; or
- (c) The counselled person has already been given notice under this section about another application for leave in the same proceeding about the same protected confidence.

Clause 7 – Threshold test – legitimate forensic purpose

This clause inserts new section 79F(2A) and (2B). This section provides that if an applicant is required to give notice of the application under section 79E, the court must not decide whether to refuse the application under this section until at least 14 days after the applicant has given notice. The purpose of this notice period is to give counselled persons, and their legal representatives, sufficient time to consider and prepare for any application to obtain protected confidence material.

The court has the discretion to provide that the notice can be given less than 14 days if satisfied it is in the interests of justice to do so. Relevant considerations for this interests of justice test include the reasonableness of the request to waive the 14 day notice period, the

impact on the other parties, the impact on the counselled person, whether the applicant had the opportunity to make the application earlier, and whether the counselled person consents to the notice period being less than 14 days.

For example, there may be situations where an applicant applies within 14 days of the trial of the matter. If the court does not waive the 14-day notice period requirement, the trial would likely have to be vacated and adjourned for a later date in order to hear the application prior to the trial. This would have an impact on the parties and witnesses, and having the trial delayed could have a retraumatising impact on the counselled person. In these circumstances, the applicant should give compelling reasons as to why the application was not made more than 14 days prior to the trial.

This provision is modelled on *Evidence (Miscellaneous Provisions) Act 1958* (Vic), s 32CC.

Clause 8 – Preliminary examination of protected confidence evidence

This clause inserts new section 79G(2A) that provides that the court may also permit a written statement be made by the counselled person about the harm the counselled person is likely to suffer if leave is given.

The purpose of this provision is to provide flexibility in how the protected person or complainant could appear and participate in these matters. It is not a requirement to provide a statement of harm.

It is the practice in both Victoria and New South Wales that the court can receive a confidential statement of harms from the complainant regarding the confidential communication. This provision is modelled on *Criminal Procedure Act 1986* (NSW) s 299D (3),

Clause 9 – Section 79G(6)

This clause substitutes this section. Evidence taken at preliminary examination, if it is taken as a statement under subsection (2A) must not be disclosed to the parties or their lawyers, save for the counselled person or their lawyers or in any other case, or except to the extent otherwise decided by the court.

This provides that the statement of harm is a confidential statement, which is modelled on *Criminal Procedure Act 1986* (NSW) s 299D (3). The intent of this is to allow the complainant to outline the harm they may incur if the protected confidence was released, without inadvertently disclosing the contents of that protected confidence. It also ensures that victim-survivors of sexual assault and family violence are not discouraged from engaging in the criminal justice system.

Clause 10 – Giving of leave to disclose protected confidence

This clause affects section 79H(6) with the insertion of “(other than a statement taken under section 79G(2A))” after “disclosure of the evidence”. This allows for the appeal court to consider the confidential statement (which was given under section 79G(2A)). However, it does not allow the appeal court to order that the statement may be disclosed to the parties.

The purpose of this is again to ensure the statement of harms remains confidential, so the complainant can outline the harm that may incur if the protected confidence was released, without inadvertently disclosing the contents of that protected confidence.

Clause 11 – New sections 79IA and 79IB

This clause provides for new section 79IA which provides that a counselled person may appear in a proceeding where a protected confidence is sought to be disclosed. The section provides that a counselled person may appear in any proceeding in relation to the disclosure of a protected confidence made by, to or about the counselled person or the production of a document recording a protected confidence made by, to or about the counselled person or the admission of protected confidence evidence for a protected confidence made by, to or about the counselled person.

Section 79IB provides that a court must be satisfied that the counselled person is informed of rights under the division. Specifically, if it appears to the court that a counselled person may have grounds to make an objection or seek an order in relation to something mentioned in section 79IA(a) to (c), the court must satisfy itself that the counselled person is aware of the effect of this division and has been given a reasonable opportunity to seek legal advice about whether to make an objection or seek an order.

Clause 12 – New Chapter 13

Chapter 13 provides for transitional amendments, noting that commencement day means the day the *Crimes (Disclosure) Legislation Amendment Act 2024*, section 12 commences.

Section 166 provides that these amendments do not apply to proceedings begun before the commencement day. Section 167 provides that the amendments apply to protected confidences made before, on or after the commencement day, subject to section 166.

Section 168 provides that this part expires 3 years after the commencement day.

Clause 13 – Dictionary, new definition of *counselled person*

This clause inserts the definition of ‘counselled person’ for the purposes of division 4.4.3 (sexual and family violence proceedings – protection of counselling communication) – see section 79A(1).

Part 4 – Magistrates Court Act 1930

Clause 14 – Section 90

Section 90 is substituted with new provisions that outline the disclosure obligation by the prosecutor as well as the content of the brief of evidence that the prosecutor must provide to the accused person prior to a committal hearing.

Subsection (1) details the commencement of the Bill and its application. This section applies to charges for indictable offences that happened on or after the day of commencement of the Crimes (Disclosure) Legislation Amendment Bill 2024 and when committal hearings are held in relation to those charges. Previous section 90 will continue to apply in relation to persons charged before the amendments commence.

Subsection (2) outlines the content of the brief of evidence that the prosecutor must provide to the accused person and the timeline within which it must be provided. The timeline for the brief of evidence to be provided will be determined by the court. If no timeline is provided by the court, then the prosecution must provide the brief of evidence not later than 28 days before the start of the committal hearing.

Subsection (3) outlines the content of the brief of evidence that the prosecutor must provide to the accused person, which must include all written statements that will be tendered at the hearing, copies of exhibits to be tendered or notice to inspect those exhibits and any other information, document or other thing that comes to the possession of the prosecutor regardless of whether they can be admitted as evidence. This subsection is included to ensure that all evidence available to the prosecutor is made available to the accused person, even when that evidence is not admitted in court. This provision is introduced to ensure that no evidence remains hidden from the accused person, as long as that evidence is relevant or reasonably capable of being relevant to the prosecution or defence case and can affect the strength of the prosecution case. Similarly, what is relevant or reasonably capable of being relevant is to be informed by common law regarding this concept.

Under subsection (4), all of the aforementioned documents and exhibits must be filed in court before the date set for the committal hearing in accordance with the period prescribed by the court.

Subsection (5) was introduced to clarify that the duty of disclosure by prosecutor is ongoing and continues throughout the court process, and after the committal hearing brief of evidence has been provided to the accused person. The prosecution is obliged to disclose new evidence as it becomes available, and as soon it comes to their possession or notice.

Subsection (6) provides that where it is impracticable to copy the information or a document or other thing, the accused must be allowed to inspect, provided they agree to inspect it.

Section 90AAA

This section provides that addresses and contact details of people must not generally be disclosed as part of pre-committal disclosure. The intention behind this provision is to ensure the right to privacy is not limited by the disclosure scheme. This provision is mirrored in the *Court Procedures Act 2004* above.

The section specifically refers to 'contact details' and is not otherwise limited to a telephone number. No definition is included within this provision as it is the policy intention that this 'contact details' includes email, addresses, telephone numbers and social media account names. This section also provides examples to assist what can be redacted from documents.

This prosecution's obligation will not apply only if the court is satisfied that it is in the interest of justice that the address and contact details are disclosed, either because the disclosure would not create a reasonably foreseeable risk to the welfare and safety of the person or the interest of justice outweighs the risk.

The court will maintain the discretion to make an order requiring the prosecutor to comply with subsection (2) in a particular way or subject to conditions to counterbalance the discretion given to the prosecution under subsection (2).

Section 90AAB

This section provides for material used to give an evidentiary certificate need not to be disclosed as part of pre-committal disclosure. This provision is mirrored in the *Court Procedures Act 2004* above.

Section 90AAC

Section 90AACp does not limit another territory law that requires the prosecution in a criminal proceeding to disclose something to a person charged with an indictable offence in relation to a committal hearing. The section includes a note to clarify that territory law include the common law.

This section otherwise addresses the issue of immunity and restrictions on disclosure under other laws in the ACT. The prosecutor will not be required to disclose anything that is the subject of claim of privilege or public interest immunity that is conferred by law applying in the ACT or elsewhere or it is the subject of a prohibition or restriction on disclosure to the accused person (a non-disclosure obligation) under ACT laws or other jurisdictional laws.

Under subsection (4), for any evidence that is not disclosed in accordance with the above provision, the prosecutor must provide the accused person with a statement that describes the evidence with as much detail as possible, but not prejudicing the immunity privilege or contravening the non-disclosure obligation. The statement must also outline the nature of privilege, immunity or non-disclosure obligation. The statement must be included in the brief of evidence, or as per the ongoing disclosure obligation, if not included in the brief of evidence, must be provided as soon as the information becomes available to the prosecutor or they become aware of it.

Section 90AAD

Section 90AAD is introduced to clarify that the prosecutor must comply with any request to inspect evidence the existence of which is disclosed in the brief of evidence provided to the accused. The request to inspect may come from the accused person or their defence lawyers, and the prosecutor must comply with that request. While the accused person will be able to inspect the information or listen or view a recording, they will not be automatically allowed to make a copy or be provided with a copy of that recording.

Under the ordinary principles of statutory interpretation, the specific obligations for the manner in which evidence is disclosed in other schemes, such as section 53 of the *Evidence (Miscellaneous Provisions) Act 1991*, will override the general obligation in this division. Section 108AH of this Bill and section 55(4) of the *Evidence (Miscellaneous Provisions) Act 1991* mean that information may be withheld from disclosure under this division and instead be disclosed only under section 53 to 55 of the *Evidence (Miscellaneous Provisions) Act 1991*. The obligation pursuant to section 76D is only in relation to access. The prosecution could thus allow access under this division by following the specific process for this kind of evidence as set out in section 53 to 55 of the *Evidence (Miscellaneous Provisions) Act 1991*.

Clause 15 – Written statements may be admitted in evidence Section 90AA(1)

This section omits “the informant has served a copy of the written statement” and is replaced with “the prosecutor has served a copy of a written statement mentioned in section 90(3)(a)”. This is done to clarify that duty of disclosure rests with the prosecution.

Clause 16 – New part 3.5A

New part 3.5A is added so that the pre-hearing disclosure obligations apply to offences punishable summarily or an indictable offence being dealt with summarily.

Section 108AA

Subsection (1) clarifies that this part of the Bill applies to a criminal proceeding that begins on or after the day that section 13 of the Bill commences where the defendant pleads not guilty to a summary offence, or an indictable offence being dealt with summarily. For those proceedings that are on foot prior to the commencement of this Bill, disclosure obligations pursuant to statute, the prosecution policy and the common law remain to apply.

Under subsection (2), the court is enabled to waive the disclosure obligations to ensure matters are dealt with appropriately in any particular proceeding.

Section 108AB

Subsection (1) outlines the timeframe for the prosecutor to provide the brief of evidence to the defendant who pleads not guilty about the offence that the proceeding is held for. The timetable for provision of the brief of evidence will be determined by the court, or if not determined by the court the prosecutor will have to provide the brief of evidence not later than 28 days before the date set for the court to hear the prosecution case.

Subsection (2) lists the content of the brief of evidence provided to the accused, which must include list of witnesses, any statements taken from witnesses, copies of documents or notices of the right to inspect the documents or exhibits or notice to inspect those exhibits and any other information, document or other thing that comes to the possession of the prosecutor.

Subsection (3) specifies that the brief of evidence must include the evidence and information available to the prosecutor, regardless of whether they can be admitted as evidence. This subsection is included to ensure that all evidence available to the prosecutor is made available to the accused person, even when that evidence is not admitted in court. This provision is introduced to ensure that no evidence remains hidden from the accused person, as long as that evidence is relevant or reasonably capable of being relevant to the prosecution or defence case and can affect the strength of the prosecution case. In respect of what is ‘relevant’, it is intended that the common law inform this concept.

Subsection (4) provides that where it is impracticable to copy the information or a document or other thing, the accused must be allowed to inspect, provided they agree to inspect it.

Section 108AC

This provision provides that the duty of disclosure by prosecutor is ongoing and continues throughout the court proceeding. The prosecution is obliged to disclose new evidence as it

becomes available, and as soon as it comes to their possession or notice. It is intended that the prosecution may use such new evidence, provided they have disclosed it to the accused, even after their compliance with section 108AB.

Subsection (2) provides that the prosecutor must give the defendant a notice about the right to inspect information, a document, or another thing only if it is impracticable to copy the information, document or other things or the defendant agrees to inspect rather than receive a copy.

Section 108AD

Section 108AD is introduced to clarify that the prosecutor must comply with any request to inspect evidence the existence of which is disclosed in the brief of evidence provided to the accused. The request to inspect may come from the accused person or their defence lawyers, and the prosecutor must comply with that request.

Section 108AE

This section provides that addresses and contact details of people must not generally be disclosed under Part 3.5A. The intention behind this provision is to ensure the right to privacy is not limited by the disclosure scheme. This provision is mirrored in the *Court Procedures Act 2004* and *Magistrates Court Act 1930* above.

Section 108AF

This section provides that material used to give an evidentiary certificate need not be disclosed under Part 3.5A. This provision is mirrored in the *Court Procedures Act 2004* and *Magistrates Court Act 1930* above.

Section 108AG

This section provides for the discretionary power of the court to refuse to admit evidence. In circumstances where the prosecutor proposes to adduce evidence in a summary proceeding that they failed to previously disclose to the accused, the court can refuse to admit such evidence. This is to ensure that the case for that party is not prejudiced by the late inclusion of evidence.

Section 108AH

This section provides for the effect of Part 3.5A on other laws, noting that it does not limit another territory law that requires the prosecution in a criminal proceeding to disclose something to a defendant. The section includes a note to clarify that territory law also includes common law. This section provides for when the obligation of disclosure is not required, that is anything that is subject to a claim of privilege or public interest immunity, an immunity conferred by a law or prohibition or restriction under a law on the disclosure of the thing to the defendant. This section provides that where something is not disclosed by virtue of subsection (2), the prosecution must provide a statement to the defendant that describes the thing without prejudicing a claim of intended claim or immunity or contravene a non-disclosure obligation and outlines the nature of the claim for the non-disclosure.

Clause 17 – New Chapter

New Chapter 15 provides for transitional provisions to ensure that the existing provisions of section 90 and 90AA(1) continue to apply if a person was charged with an indictable offence before the commencement day and a committal hearing is to be held in relation to the charge. Section 90AAA to 90AAD do not apply in relation to the accused person. Existing laws regarding disclosure including the prosecution policy and common law continue to apply in this regard. This chapter otherwise expires 2 years after the commencement day.