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**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY**

**EVIDENCE (MISCELLANEOUS PROVISIONS) AMENDMENT BILL 2011**

**EXPLANATORY STATEMENT**

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## EVIDENCE (MISCELLANEOUS PROVISIONS) AMENDMENT BILL 2011

### Overview of Bill

This Bill is part of a series of bills to reform the law of evidence in the ACT. The *Evidence Act 2011*, recently passed in the Legislative Assembly, implements model uniform evidence law into the Territory. The explanatory statement accompanying the Evidence Bill 2011 provides an extensive account of the development of uniform evidence law.

The purpose of this Bill is to amend the *Evidence (Miscellaneous Provisions) Act 1991* to update, consolidate and reorganise the Act and, more substantively, restrict access to sexual assault counselling communications in civil proceedings.

In updating, consolidating and reorganising the Act the following types of amendments have been made:

- removing redundant words and phrases in accordance with current ACT drafting practices;
- updating and simplifying the language used in accordance with current ACT drafting practices;
- updating headings in accordance with current ACT drafting practices and to ensure that they more appropriately reflect their content;
- amendments consequential on the establishment of the ACT *Evidence Act 2011* (for example, updating references to the Commonwealth *Evidence Act 1995* with references to the new ACT *Evidence Act 2011*); and
- amendments to clarify the operation of provisions.

Amendments have been made to insert existing provisions of the *Evidence Act 1971*, into the *Evidence (Miscellaneous Provisions) Act 1991*, which need to be saved when it is repealed.

Amendments have also been made to provide that the court is not bound by the rules of evidence and may inform itself as it considers appropriate when making certain determinations.

### **Sexual assault counselling communications immunity**

Division 4.5 of the *Evidence (Miscellaneous Provisions) Act 1991* currently provides immunity for sexual offence communications. It provides a framework for an ACT court to apply when a party seeks to disclose the counselling notes of a sexual offence victim in a criminal proceeding.

The policy argument in favour of the immunity is well accepted. Sexual assault counsellors serve a crucial role in the justice system, and it is not unreasonable to assume that, if counselling notes are not confidential, complainants will not seek counselling, or will not be entirely frank during counselling sessions. This will reduce the efficacy of the counselling process.

The Bill includes amendments to extend this existing protection to civil proceedings. There is no compelling reason why the protections afforded in criminal proceedings should not be extended to civil proceedings. The public interest in encouraging victims of sexual assault to seek counselling exists in both the criminal and civil sphere. Indeed, legislation in New South Wales, South Australia, and Victoria provides protection in civil and criminal proceedings.

The amendments strike a balance between ensuring that victims do not face unreasonable barriers in adducing evidence of their own counselling communications, and ensuring that unreasonable barriers are not created for other parties which could adversely impact on the administration of justice in the Territory.

The explanatory statement accompanying the Evidence (Miscellaneous Provisions) Amendment Bill 2003, which established division 4.5 in relation to criminal proceedings, provides a comprehensive explanation of how the immunity operates. The explanatory statement can be accessed at: [http://www.legislation.act.gov.au/es/db\\_5400/default.asp](http://www.legislation.act.gov.au/es/db_5400/default.asp).

#### *Human rights implications*

The amendments which extend the existing sexual assault counselling communications immunity to civil proceedings engage a number of rights under the *Human Rights Act 2004*.

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

However, the limit on the right is clearly reasonable and justifiable in a free and democratic society for the purposes in accordance with section 28 of the *Human Rights Act 2004* having regard to the following factors:

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

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

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

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

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

The amendments limit the right to a fair trial to the extent that it could result in relevant evidence being unavailable to the court. However, the privilege is not absolute and it allows a range of competing public interests to be balanced by

the court in determining whether a confidential communication should be disclosed.

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

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

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

There are no less restrictive means of achieving this purpose.

It is widely recognised that sexual assault has a devastating impact on its victims. Notwithstanding any physical injury that may occur as a result of the assault, the emotional impact, in terms of trauma and stress, can be significant and long lasting. The effects of sexual assault are also felt by the victims' families, the health system, and the criminal justice system.

The amendments are designed to extract the 'best' evidence possible from witnesses. The interests of justice are served by 'best' evidence which is accurate, reliable, coherent and complete.

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

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

### Clause Notes

**Clause 1 Name of Act** – states the title of the Act as the *Evidence (Miscellaneous Provisions) Amendment Act 2011*.

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

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

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

**Clause 3 Legislation amended** – provides that the Act amends the *Evidence (Miscellaneous Provisions) Act 1991*.

**Clause 4 Notes New section 3(2) and (3)** – inserts new subsections (2) and (3) into section 3 of the *Evidence (Miscellaneous Provisions) Act 1991*.

Section 3 provides that a note included in the Act is not part of the Act and is included for explanatory purposes only.

New subsection (2) provides that for the purposes of section 3, the term note is defined to include material enclosed in brackets under section headings. The Bill makes a number of amendments to the Act to include provisions from the *Evidence Act 1971* (to be repealed) which need to be retained. Where these amendments are being made, bracketed notes have been included that draw attention to the equivalent or comparable provisions that the new amendments will replace.

New subsection (3) provides that the material enclosed in brackets under section headings and subsections (2) and (3) expire 1 year after they commence.

**Clause 5 Definitions-pt 2 Section 5, definition of *prescribed witness*** – removes the definition of *prescribed witness* from part 2 of the *Evidence (Miscellaneous Provisions) Act 1991*.

Part 2 contains provisions dealing with the evidence of children. The term *prescribed witness* is defined for part 2 to mean a child. In updating the drafting of part 2 (at clause 9 of the Bill) direct references to child have been used which makes the definition of *prescribed witness* redundant.

For example, section 12 of the Act currently provides that an order under part 2 can be made by or on behalf of a prescribed witness. New section 12 will provide that an order under part 2 can be made by or on behalf of the child.

**Clause 6 Section 5, definition of *proceeding*** – removes the phrase ‘in relation’ from the definition of *proceeding* for part 2 of the Act. The words are redundant and have been removed in accordance with current ACT drafting practice.

**Clause 7 Section 6** – inserts new sections 6 and 7 into the *Evidence (Miscellaneous Provisions) Act 1991*.

New section 6 inserts a definition for the phrase *give evidence in a proceeding by audiovisual link* for part 2 of the Act. The phrase is defined to mean give evidence in the proceeding by audiovisual link from an external place which is linked to the courtroom by an audiovisual link. The definition has been inserted so that the language of part 2 can be simplified, removing repetitious wording.

New section 7, regarding sworn or unsworn evidence, re-enacts the content of existing section 6 of the Act with a minor update to the language in accordance with current ACT drafting practice (the phrase ‘it is immaterial’ has been replaced with the phrase ‘it does not matter’).

**Clause 8 Section 7** – updates the heading of old section 7 in accordance with current ACT drafting practice, which has now been renumbered to new section 8.

**Clause 9 Sections 8 to 15** – inserts new sections 9 to 15 into the *Evidence (Miscellaneous Provisions) Act 1991*.

The new sections replace old sections 8 to 15 of the Act (provisions dealing with the evidence of children). The structure and language of the sections have been updated in accordance with current ACT drafting practice, but this will not change the operation of the provisions.

**Clause 10 Application – div 3.2 Section 19, new note** – inserts a new note into section 19 of the *Evidence (Miscellaneous Provisions) Act 1991*.

The new note provides a reference to the definition of **proceeding** that is contained in the Dictionary of the Act. The definition of **proceeding** in the dictionary is amended by clause 82 of this Bill.

**Clause 11 Territory courts may take evidence and submissions from place other than participating State Section 32(4)** – removes the phrase ‘for all purposes’ from section 32(4) of the *Evidence (Miscellaneous Provisions) Act 1991*.

The words are redundant and have been removed in accordance with current ACT drafting practice. The removal of the words will not change the operation of section 32.

**Clause 12 Part 4 heading** – updates the heading of part 4 of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice. The heading more appropriately reflects the content of the part.

**Clause 13 Definitions-pt 4 Section 37, definition of serious violent offence, paragraph (a)(xvii)** – replaces ‘and’ with ‘or’ in paragraph (a)(xvii) of section 37 of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 14 Section 37, definition of similar act witness, paragraph (b)** – updates a reference in the definition of **similar act witness** in section 37 of the *Evidence (Miscellaneous Provisions) Act 1991* consequential on the establishment of the *Evidence Act 2011*.

The amendment replaces the reference to the Commonwealth *Evidence Act 1995* with a reference to the ACT *Evidence Act 2011*. On the day the *Evidence Act 2011* commences, the Commonwealth Evidence Act will cease to apply in the ACT. The updated reference will not change the meaning of **similar act witness** as tendency and coincidence evidence are treated the same under the Commonwealth and ACT Evidence Acts.

**Clause 15 Section 38 heading** – updates the heading of section 38 of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 16 Meaning of relevant person – div 4.2 Section 38B(3)** – removes the phrase ‘, but are not limited to,’ from section 38B(3) of the *Evidence (Miscellaneous Provisions) Act 1991*.

The words are redundant and have been removed in accordance with current ACT drafting practice. The removal of the words will not change the operation of section 38B.

**Clause 17 Accused may be screened from witness in court New section 38C(1A)** – inserts new subsection (1A) into section 38C of the *Evidence (Miscellaneous Provisions) Act 1991*.

Section 38C permits the court to arrange the courtroom to provide that certain witnesses in sexual and violent offence proceedings are not required to view the accused or anyone else the court orders, while they are giving evidence in the proceeding.

Specifically, under section 38C(1)(c)(ii), the court has a discretion to make arrangements for witnesses in less serious violent offences where the witness has a vulnerability that affects their ability to give evidence because of the circumstances of the proceeding or the witness's circumstances.

This could include, for example, a witness who is likely to suffer severe emotional trauma because of the nature of the alleged offence, or a witness who is intimidated or distressed because of the witness's relationship to the accused person.

New subsection (1A) provides that the court is not bound by the rules of evidence and may inform itself as it considers appropriate when determining whether a witness has such a vulnerability. This will allow the court to consider hearsay evidence in determining this question, such as evidence from a counsellor or from a psychologist, reducing the need to subject a witness to further trauma.

**Clause 18 Examination of witness by self-represented accused person – procedure New section 38D(1A)** – inserts new subsection (1A) into section 38D of the *Evidence (Miscellaneous Provisions) Act 1991*.

Section 38D prohibits a self-represented accused from personally cross-examining certain witnesses in sexual and violent offence proceedings.

Specifically, under section 38D(1)(c)(ii), the court has a discretion to prohibit the personal cross-examination of witnesses in less serious violent offences where the witness has a vulnerability that affects their ability to give evidence because of the circumstances of the proceeding or the witness's circumstances.

This could include, for example, a witness who is likely to suffer severe emotional trauma because of the nature of the alleged offence, or a witness who is intimidated or distressed because of the witness's relationship to the accused person.

New subsection (1A) provides that the court is not bound by the rules of evidence and may inform itself as it considers appropriate when determining whether a witness has such a vulnerability. This will allow the court to consider hearsay evidence in determining this question, such as evidence from a counsellor or from a psychologist, reducing the need to subject a witness to further trauma.

**Clause 19 Section 38D(4)(b)** – replaces the word 'adduce' with the word 'present' in section 38D(4)(b) of the *Evidence (Miscellaneous Provisions) Act 1991* for consistency with the language used in the *Evidence Act 2011*.

**Clause 20 Section 38D(5), notes 1 and 2** – replaces the notes in section 38D(5) of the *Evidence (Miscellaneous Provisions) Act 1991*.

Section 38D of the Act sets out a special procedure to enable a self-represented accused to cross-examine certain witnesses in sexual and violent offence proceedings. A witness may be examined by the accused's legal representative, or where the accused does not have a legal representative, by a court appointed person.

Subsection (5) provides that a court appointed person may ask the witness only the questions that the accused person asks the person to put to the witness, and must not independently give the accused person legal or other advice.

The notes currently in subsection (5) act as a reminder that the court can disallow improper questions, under the Commonwealth *Evidence Act 1995* (section 41) and the ACT *Evidence Act 1971* (section 59), where these questions are asked by the court appointed person.

Section 41 of the Commonwealth Evidence Act has now been re-enacted as section 41 of the *Evidence Act 2011*. It is proposed to repeal section 59 of the *Evidence Act 1971* as part of the evidence reform process as it is duplicative of the power in section 41 of the *Evidence Act 2011*. The new note inserted by this clause has been updated to reflect these changes.

**Clause 21 Section 38E heading** – updates the heading of section 38E of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 22 New section 38E(1A)** – inserts new subsection (1A) into section 38E of the *Evidence (Miscellaneous Provisions) Act 1991*.

Section 38E provides an entitlement to certain witnesses in sexual and violent offence proceedings to have a support person seated close to, and within their sight, while they are giving evidence.

Specifically, under section 38E(1)(c)(ii), the court has a discretion to allow a support person for witnesses in less serious violent offences where the witness has a vulnerability that affects their ability to give evidence because of the circumstances of the proceeding or the witness's circumstances.

This could include, for example, a witness who is likely to suffer severe emotional trauma because of the nature of the alleged offence, or a witness who is intimidated or distressed because of the witness's relationship to the accused person.

New subsection (1A) provides that the court is not bound by the rules of evidence and may inform itself as it considers appropriate when determining whether a witness has such a vulnerability. This will allow the court to

consider hearsay evidence in determining this question, such as evidence from a counsellor or from a psychologist, reducing the need to subject a witness to further trauma.

**Clause 23 Sexual and violent offence proceeding – evidence to be given in closed court New section 39(1A)** – inserts new subsection (1A) into section 39 of the *Evidence (Miscellaneous Provisions) Act 1991*.

Section 39 provides the court with the discretion to order the court to be closed to the public while certain witnesses in sexual and violent offence proceedings are giving evidence.

Specifically, under section 39(1)(c)(ii), the court has a discretion to close the court for witnesses in less serious violent offences where the witness has a vulnerability that affects their ability to give evidence because of the circumstances of the proceeding or the witness's circumstances.

This could include, for example, a witness who is likely to suffer severe emotional trauma because of the nature of the alleged offence, or a witness who is intimidated or distressed because of the witness's relationship to the accused person.

New subsection (1A) provides that the court is not bound by the rules of evidence and may inform itself as it considers appropriate when determining whether a witness has such a vulnerability. This will allow the court to consider hearsay evidence in determining this question, such as evidence from a counsellor or from a psychologist, reducing the need to subject a witness to further trauma.

**Clause 24 Section 39(5)** – replaces the phrase 'from places other than courtrooms' with the phrase 'by audiovisual link' in section 39(5) of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 25 Sexual offence proceeding – prohibition of publication of complainant's identity Section 40(1)(d)** – replaces the word 'inferred' with the phrase 'worked out' in section 40(1)(d) of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 26 New section 40AA** – inserts new section 40AA into division 4.2A of the *Evidence (Miscellaneous Provisions) Act 1991*.

Division 4.2A of the Act permits an audiovisual recording between the police and certain witnesses in sexual and violent offence proceedings to be admitted into evidence as the evidence-in-chief of the witness.

Sections 40B and 40C of the Act define **sexual offence proceeding** and **violent offence proceeding** for the purposes of division 4.2A. The definitions include proceedings under the *Domestic Violence and Protection Orders Act 2008* in relation to sexual or violent offences. The definitions were designed

to ensure that the protection afforded by division 4.2A was invoked in proceedings for an offence for contravention of a protection order in relation to a sexual or violent offence.

However, there was some ambiguity over whether sections 40B and 40C had this effect because section 90 of the *Domestic Violence and Protection Orders Act 2008* is not included in the definitions of **sexual offence** and **violent offence** in section 37 of the Act.

New section 40AA has been included to clarify that the protection afforded by division 4.2A is invoked in proceedings for an offence for contravention of a protection order in relation to a sexual or violent offence.

**Clause 27 Meaning of sexual offence proceeding – div 4.2A**

**Section 40B(1)(c) to (f)** – substitutes paragraphs (c) to (f) with new paragraphs (c) to (d) in section 40B(1) of the *Evidence (Miscellaneous Provisions) Act 1991*.

The amendment is designed to clarify the operation of provisions in division 4.2A of the Act. Division 4.2A of the Act permits an audiovisual recording between the police and certain witnesses in sexual and violent offence proceedings to be admitted into evidence as the evidence-in-chief of the witness.

The division was only designed to apply in criminal proceedings where it was considered appropriate for the protections to apply. There are no criminal proceedings held in the Coroner's Court and accordingly the reference in paragraph (e) was redundant and has been removed. The reference in paragraph (d) to proceedings under the *Victims of Crime (Financial Assistance) Act 1983* is also redundant and has been removed. While criminal proceedings can be initiated under this Act, they are not the type of proceedings where it would be considered necessary or appropriate for the protections to apply.

New paragraph (c) replicates the content of existing paragraph (c) but has been updated to further clarify that the protections were designed to apply in a proceeding for contravening a protection order under the *Domestic Violence and Protection Orders Act 2008*.

New paragraph (d) replicates the content of existing paragraph (f).

**Clause 28 Meaning of violent offence proceeding – div 4.2A Section 40C(1)(c) to (f)** – substitutes paragraphs (c) to (f) with new paragraphs (c) to (d) in section 40C(1) of the *Evidence (Miscellaneous Provisions) Act 1991*.

The amendment is designed to clarify the operation of provisions in division 4.2A of the Act. The reasons for the amendment are identical to the reasons included above for clause 27.

**Clause 29 New section 40NA** – inserts new section 40NA into division 4.2B of the *Evidence (Miscellaneous Provisions) Act 1991*.

Division 4.2B of the Act permits the entire evidence of certain witnesses to be pre-recorded at a pre-trial hearing and to allow this pre-recorded evidence to be admitted into evidence at trial.

Sections 40O of the Act defines **sexual offence proceeding** for the purposes of division 4.2B. The definition includes a proceeding under the *Domestic Violence and Protection Orders Act 2008* in relation to a sexual offence. The definition was designed to ensure that the protection afforded by division 4.2B was invoked in proceedings for an offence for contravention of a protection order in relation to a sexual offence.

However, there was some ambiguity over whether section 40O had this effect because section 90 of the *Domestic Violence and Protection Orders Act 2008* is not included in the definition of **sexual offence** in section 37 of the Act.

New section 40NA has been included to clarify that the protection afforded by division 4.2B is invoked in proceedings for an offence for contravention of a protection order in relation to a sexual offence.

**Clause 30 Meaning of sexual offence proceeding – div 4.2B – Section 40O(1)(c) to (f)** – substitutes paragraphs (c) to (f) with new paragraphs (c) to (d) in section 40O(1) of the *Evidence (Miscellaneous Provisions) Act 1991*.

The amendment is designed to clarify the operation of provisions in division 4.2B of the Act. The reasons for the amendment are identical to the reasons included above for clause 27.

**Clause 31 Meaning of witness – div 4.2B New section 40P(1A)** – inserts new subsection (1A) into section 40P of the *Evidence (Miscellaneous Provisions) Act 1991*.

Section 40P defines **witness** for the purposes of division 4.2B of the Act. Division 4.2B of the Act permits the entire evidence of certain witnesses to be pre-recorded at a pre-trial hearing and allows this pre-recorded evidence to be admitted into evidence at trial.

**Witness** is defined to mean a prosecution witness who is a child, or an intellectually impaired person. In addition though, witness is also defined to mean a prosecution witness who is a complainant who the court considers must give evidence as soon as practicable because they are likely to suffer severe emotional trauma, or be intimidated or distressed.

New subsection (1A) provides that the court is not bound by the rules of evidence and may inform itself as it considers appropriate when determining whether a complainant would fall into this category. This will allow the court to consider hearsay evidence in determining this question, such as evidence

from a counsellor or from a psychologist, reducing the need to subject a witness to further trauma.

**Clause 32 Who may be present at pre-trial hearing Section 40R(2)(a)** – replaces the reference to section 81C with a reference to section 101 in section 40R(2)(a) of the *Evidence (Miscellaneous Provisions) Act 1991*.

The content of section 81C is being relocated to section 101 by clause 71 of this Bill, and accordingly the reference in section 40R is updated by this amendment.

**Clause 33 Witness may be required to attend hearing Section 40T(4)** – replaces the phrase ‘from places other than courtrooms’ with the phrase ‘by audiovisual link’ in section 40T(4) of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 34 Division 4.3 heading** – updates the heading of division 4.3 of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 35 New section 40X** – inserts new section 40X into division 4.3 of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

New section 40X inserts a definition of **proceeding** for the purposes of division 4.3 of the Act. This definition is necessary as there are a number of different definitions of proceeding which apply throughout the Act.

New section 40X inserts a definition for the phrase **give evidence in a proceeding by audiovisual link** for division 4.3 of the Act. The phrase is defined to mean give evidence in the proceeding by audiovisual link from an external place which is linked to the courtroom by an audiovisual link. The definition has been inserted so that the language of division 4.3 can be simplified, removing repetitious wording.

**Clause 36 Section 41 heading** – updates the heading of section 41 of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 37 Meaning of violent offence proceeding – div 4.3 Section 41A(1)(c) to (f)** – substitutes paragraphs (c) to (f) with new paragraphs (c) to (d) in section 41A(1) of the *Evidence (Miscellaneous Provisions) Act 1991*.

The amendment is designed to clarify the operation of provisions in division 4.3 of the Act. The reasons for the amendment are identical to the reasons included above for clause 27.

**Clause 38 New section 41B** – inserts new section 41B into division 4.3 of the *Evidence (Miscellaneous Provisions) Act 1991*.

Division 4.3 of the Act permits witnesses to give evidence via audiovisual link in a room separate from the courtroom.

Sections 41 and 41A of the Act define **sexual offence proceeding** and **violent offence proceeding** for the purposes of division 4.3. The definitions include proceedings under the *Domestic Violence and Protection Orders Act 2008* in relation to sexual or violent offences. The definitions were designed to ensure that the protection afforded by division 4.3 was invoked in proceedings for an offence for contravention of a protection order in relation to a sexual or violent offence.

However, there was some ambiguity over whether sections 41 and 41A had this effect because section 90 of the *Domestic Violence and Protection Orders Act 2008* is not included in the definitions of **sexual offence** and **violent offence** in section 37 of the Act.

New section 41B has been included to clarify that the protection afforded by division 4.3 is invoked in proceedings for an offence for contravention of a protection order in relation to a sexual or violent offence.

**Clause 39 Section 42(1)** – replaces everything before paragraph (a), and substitutes the following in section 42(1) of the *Evidence (Miscellaneous Provisions) Act 1991*:

**42 Proceeding to which div 4.3 applies**

(1) This division applies to the following proceedings:

The amendment (together with clause 41) simplifies section 42 in accordance with current ACT drafting practice.

**Clause 40 Section 42(1)(c)(i)** – substitutes new paragraph (i) into section 42(1)(c) of the *Evidence (Miscellaneous Provisions) Act 1991* to update the section in accordance with current ACT drafting practice.

**Clause 41 Section 42(2)** – substitutes new subsections (2) and (3) into section 42 of the *Evidence (Miscellaneous Provisions) Act 1991*.

The amendment (together with clause 39) simplifies section 42 in accordance with current ACT drafting practice.

**Clause 42 Section 43** – replaces everything before subsection (3), and substitutes the following in section 43 of the *Evidence (Miscellaneous Provisions) Act 1991*:

**43 Complainant or similar act witness giving evidence by audiovisual link**

(1) This section applies if-

- (a) a complainant or similar act witness is to give evidence in a proceeding; and
  - (b) the proceeding is to be heard in a courtroom; and
  - (c) the courtroom and an external place are linked by an audiovisual link.
- (2) The complainant's or similar act witness's evidence must be given by audiovisual link unless the court otherwise orders.

The amendment has been made to update the section in accordance with current ACT drafting practice.

**Clause 43 Section 43(3)(b)(i) and (ii)** – removes the phrase ‘sexual or violent offence’ from subparagraphs (i) and (ii) of section 43(3)(b) of the *Evidence (Miscellaneous Provisions) Act 1991*.

The words are redundant and have been removed in accordance with current ACT drafting practice. The removal of the words will not change the operation of section 43.

**Clause 44 Section 43(4) and (5)** – replaces the phrase ‘other place’ with ‘external place’ in subsections (4) and (5) of section 43 of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 45 Section 44** – replaces everything before subsection (2), and substitutes the following in section 44 of the *Evidence (Miscellaneous Provisions) Act 1991*:

#### **44 Consequential orders – div 4.3**

- (1) This section applies if a complainant or similar act witness is to give evidence in a proceeding by audiovisual link.

The amendment has been made to update the section in accordance with current ACT drafting practice.

**Clause 46 Section 44(2)(a) and (d)** – removes the phrase ‘sexual or violent offence’ from paragraphs (a) and (d) of section 44(2) of the *Evidence (Miscellaneous Provisions) Act 1991*.

The words are redundant and have been removed in accordance with current ACT drafting practice. The removal of the words will not change the operation of section 44.

**Clause 47 Section 44(3)** – replaces ‘specifying’ with ‘stating’ in section 44(3) of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 48 Section 44(3)** – replaces the phrase ‘other place’ with ‘external place’ in section 44(3) of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 49 Section 44(5)** – removes the phrase ‘sexual or violent offence’ from section 44(5) of the *Evidence (Miscellaneous Provisions) Act 1991*.

The words are redundant and have been removed in accordance with current ACT drafting practice. The removal of the words will not change the operation of section 44.

**Clause 50 Section 45** – replaces everything before subsection (2), and substitutes the following in section 45 of the *Evidence (Miscellaneous Provisions) Act 1991*:

**45 Making of orders – div 4.3**

- (1) The court may make an order under this division in a proceeding on its own initiative or on the application of-
- (a) a party to the proceeding; or
  - (b) the complainant; or
  - (c) a similar act witness.

The amendment has been made to update the section in accordance with current ACT drafting practice.

**Clause 51 Section 46** – inserts new section 46 into the *Evidence (Miscellaneous Provisions) Act 1991*.

New section 46, regarding jury warning about evidence given by audiovisual link, re-enacts the content of existing section 46 of the Act with a minor update to the language and structure of the section in accordance with current ACT drafting practice.

**Clause 52 Failure to comply with div 4.3 Section 47(2)** – removes the phrase ‘sexual or violent offence’ from section 47(2) of the *Evidence (Miscellaneous Provisions) Act 1991*.

The words are redundant and have been removed in accordance with current ACT drafting practice. The removal of the words will not change the operation of section 47.

**Clause 53 Section 48 heading** – updates the heading of section 48 of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 54 Decision to give leave under s 51 Section 53(5)** – inserts new section 53(5) into the *Evidence (Miscellaneous Provisions) Act 1991* consequential on the establishment of the *Evidence Act 2011*.

The amendment inserts a new definition of ***proper matter for cross-examination about credit*** for section 53 to replace the reference to the Commonwealth *Evidence Act 1995* with a reference to the ACT *Evidence Act 2011*. On the day the *Evidence Act 2011* commences, the Commonwealth Evidence Act will cease to apply in the ACT. The updated reference will not change the meaning of ***proper matter for cross-examination about credit*** as credibility evidence is treated the same under the Commonwealth and ACT Evidence Acts.

**Clause 55 Definitions – div 4.5 Section 54, new definitions** – inserts new definitions of ***civil proceeding*** and ***proceeding*** into section 54 of the *Evidence (Miscellaneous Provisions) Act 1991*.

Clause 55 is part of the amendments which are designed to extend the operation of the existing sexual assault counselling communications immunity in division 4.5 to civil proceedings.

**Clause 56 Section 55 heading** – updates the heading of section 55 of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 57 Section 55(4), example heading** – updates the heading of the example in section 55(4) of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 58 General immunity for protected confidences Section 58** – removes the word ‘criminal’ from section 58 of the *Evidence (Miscellaneous Provisions) Act 1991*.

Clause 58 is part of the amendments which are designed to extend the operation of the existing sexual assault counselling communications immunity in division 4.5 to civil proceedings. Removing the word ‘criminal’, with the definitions newly inserted by clause 55, ensures that section 58 applies in both civil and criminal proceedings.

**Clause 59 Preliminary examination of protected confidence evidence Section 61(2)(b)** – removes the word ‘concerned’ from section 61(2)(b) of the *Evidence (Miscellaneous Provisions) Act 1991*.

The word is redundant and has been removed in accordance with current ACT drafting practice. The removal of the word will not change the operation of section 61.

**Clause 60 Section 61(5)(b)** – removes the word ‘criminal’ from section 61(5)(b) of the *Evidence (Miscellaneous Provisions) Act 1991*.

Clause 63 is part of the amendments which are designed to extend the operation of the existing sexual assault counselling communications immunity in division 4.5 to civil proceedings. Removing the word ‘criminal’, with the

definitions newly inserted by clause 55, ensures that section 61 applies in both civil and criminal proceedings.

**Clause 61 Giving of leave to disclose protected confidence Section 62(1)** – inserts new subsection (1) into section 62 of the *Evidence (Miscellaneous Provisions) Act 1991*.

Clause 64 is part of the amendments which are designed to extend the operation of the existing sexual assault counselling communications immunity in division 4.5 to civil proceedings.

Existing subsection (1) in relation to the test the court must apply in determining whether leave should be given to disclose a protected confidence in a criminal proceeding has been replicated. The court is required to weigh the public interest in ensuring an accused person is given a fair trial against the public interest in preserving the confidentiality of the protected confidence.

Additionally, subsection (1) now includes the test the court must apply in a civil proceeding. The court is required to weigh the public interest in ensuring the proceeding is conducted fairly against the public interest in preserving the confidentiality of the protected confidence.

**Clause 62 Section 62(3)(a)** – inserts the phrase ‘for a criminal proceeding-’ before the phrase ‘the extent’ in section 62(3)(a) of the *Evidence (Miscellaneous Provisions) Act 1991*.

Clause 65 is part of the amendments which are designed to extend the operation of the existing sexual assault counselling communications immunity in division 4.5 to civil proceedings.

Section 62(3) lists the matters that the court must have regard to in determining whether leave should be given to disclose a protected confidence and under the amendments contained in this Bill will apply in both civil and criminal proceedings. However, paragraph (a) is only applicable in criminal proceedings, and accordingly the phrase has been inserted to clarify this.

**Clause 63 Section 62(5)** – replaces ‘restrictions’ with ‘conditions’ in section 62(5) of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 64 No protected confidence immunity for medical information Section 65(1)(b)** – replaces the phrase ‘such an’ with ‘the’ in section 65(1)(b) of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 65 Division 4.6 heading, note** – substitutes a new note under the heading to division 4.6 of the *Evidence (Miscellaneous Provisions) Act 1991* which more appropriately reflects the requirements in section 68C(3) of the *Supreme Court Act 1933*.

**Clause 66 Section 68 heading** – updates the heading of section 68 of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 67 Comments about lack of, or delays in making, complaint Section 71(2), note** – removes the note contained after section 71(2) of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT draft practice.

The note acted as a reminder that the common law rule that complaint evidence in a sexual offence matter was admissible for the purpose of supporting the complainant's credit (by showing the complainant's consistency) has been abolished.

It is no longer considered necessary to retain this note. The common law will not be revived by the removal of this note as it was only informational.

**Clause 68 Divisions 4.7 and 4.8** – removes divisions 4.7 and 4.8 from the *Evidence (Miscellaneous Provisions) Act 1991*.

Division 4.7 of the Act provides that a family member of the defendant (specifically the domestic partner, parent or child) may object to being required to give evidence as a witness for the prosecution. Division 4.7 is now redundant because of sections 18 to 20 of the new *ACT Evidence Act 2011* and accordingly it is being removed.

Division 4.8 (comprising of section 81A only) provides a presumption that evidence, which has been obtained in contravention of parts of the ACT and Commonwealth Crimes Act, is to be excluded. The division only operates in relation to a proceeding in the Children's Court against a young person in relation to an offence.

Section 138 of the new *ACT Evidence Act 2011* contains a judicial discretion to exclude improperly or illegally obtained evidence and evidence that has been obtained in consequence of an impropriety or an illegality. The provision applies in both civil and criminal proceedings. Given that the nature of the vulnerability of children and young people in the criminal justice system is sufficiently recognised in section 138, it is no longer necessary to retain division 4.8 and accordingly is it being removed.

**Clause 69 Evidence in any proceedings Part 4A** – removes part 4A from the *Evidence (Miscellaneous Provisions) Act 1991*.

Part 4A contained sections 81B, 81C, and 81D. These sections have been re-enacted as new sections 100, 101 and 102 in new part 7 (below).

**Clause 70 Part 5 heading** – updates the heading of part 5 of the *Evidence (Miscellaneous Provisions) Act 1991* in accordance with current ACT drafting practice.

**Clause 71 Parts 6 and 7** – replaces existing parts 6 and 7 by inserting new parts 6, 7, 8, 9 and 10 into the *Evidence (Miscellaneous Provisions) Act 1991*.

#### Part 6

New part 6 provides for the taking and admission into evidence in a court proceeding of the evidence of a person who is dangerously ill and is not likely to recover from the illness. New sections 90 to 94 replicate existing section 72 of the *Evidence Act 1971* but have been updated in accordance with current ACT drafting practice. The revisions make the provisions consistent with existing provisions dealing with audio or audiovisual evidence in the *Evidence (Miscellaneous Provisions) Act 1991*.

It is proposed to repeal the *Evidence Act 1971* as part of the evidence reform process as it largely contains provisions which are duplicative of provisions in the *Evidence Act 2011*. However, the content of new sections 90 to 94 are not covered under the new *Evidence Act 2011* so they need to be retained.

#### Part 7

New part 7 provides a number of provisions about evidence in any proceedings.

New division 7.1 contains provisions about evidence of witnesses with disabilities or vulnerabilities.

New sections 100, 101 and 102 re-enact the content of existing sections 81B, 81C and 81D of the *Evidence (Miscellaneous Provisions) Act 1991*.

New section 103 provides that the court is not bound by the rules of evidence and may inform itself as it considers appropriate when making an order under new sections 101 or 102. This will allow the court to consider hearsay evidence in determining this question, such as evidence from a counsellor or from a psychologist, reducing the need to subject a witness to further trauma.

New division 7.2 contains a miscellaneous provision about evidence in any proceedings.

New section 104 provides how a document that, under a law of a Commonwealth country, is admissible in the courts of that country by the production of a copy of the document may be given in a proceeding in the ACT. Evidence of the document can be given by producing an examined copy or a copy which has been endorsed by the person having custody of the original document. New section 104 replicates existing sections 50 and 51 of the *Evidence Act 1971* but has been updated in accordance with current ACT drafting practice. It is proposed to repeal the *Evidence Act 1971* as part of the evidence reform process as it largely contains provisions which are duplicative of provisions in the *Evidence Act 2011*. However, the content of new section 104 is not covered under the new *Evidence Act 2011* so it needs to be retained.

Part 8

New part 8 provides a prohibition against the publication of evidence.

New section 110 provides that part 8 applies to proceedings in the Supreme Court and the Magistrates Court, as well as an inquest or inquiry under the *Coroners Act 1997*. New section 110 replicates existing section 90.

New section 111 provides that the court may make an order prohibiting the publication of evidence, or a report of the evidence, where publication is likely to prejudice the administration of justice. The court may also make an order prohibiting the name of a party or witness in a proceeding if it considers that it is in the interests of justice for the names not to be published. If the court makes an order it can also direct who can be in the courtroom for a stated period. New section 111 replicates existing section 91 but has been updated in accordance with current ACT drafting practice.

New section 112 provides that it is an offence to not comply with a court order or direction made under section 111. The maximum penalty for the offence is 50 penalty units and imprisonment for 6 months or both. New section 112 replicates existing section 92 but has been updated in accordance with current ACT drafting practice.

Human rights implications

Part 8 engages a number of rights under the *Human Rights Act 2004*, including the right to freedom of expression (section 16) and the right to a fair trial (section 21). The offence engages the right to freedom of expression because it prevents the publication of certain material, however, the right is not absolute and it is accepted that it can be legitimately subject to reasonable restrictions. The offence is designed to promote the public interest in the administration of justice and also promotes an accused person's right to a fair trial through preventing the publication of prejudicial material. Accordingly, new section 112 of the Bill constitutes a lawful restriction on the right to freedom of expression under section 16 of the *Human Rights Act 2004*.

Part 9

New part 9 provides a number of miscellaneous provisions.

New section 120 provides that the Minister may approve forms for the Act, and where the Minister approves a form for a purpose, the form must be used for this purpose. An approved form is a notifiable instrument and must be notified on the Legislation Register (<http://www.legislation.act.gov.au>). New section 120 replicates existing section 100 of the *Evidence (Miscellaneous Provisions) Act 1991*.

New section 121 permits the Executive to make regulations for the Act. In particular, new section 121 provides that a regulation may prescribe the amounts or the way of working out amounts, payable to a territory court in relation to the cost of, or incidental to, the provision of an audiovisual link or audio link and ancillary equipment for part 3 of the Act.

Regulations made under new section 121 must be notified on the Legislation Register (<http://www.legislation.act.gov.au>), and presented to the Legislation Assembly.

New section 121 replicates existing section 101 of the *Evidence (Miscellaneous Provisions) Act 1991*.

### Part 11

New part 11 provides a number of transitional provisions to clarify the operation of the amendments made by the Bill in court proceedings.

New section 160 provides that the amendments made by this Act (the *Evidence (Miscellaneous Provisions) Amendment Act 2011*) do not apply to a proceeding in a court if the hearing of the proceeding has started before the commencement of the Act.

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

New section 161 provides that division 4.5 of the *Evidence (Miscellaneous Provisions) Act 1991* will apply to a protected confidence made before or after the commencement of this Act (the *Evidence (Miscellaneous Provisions) Amendment Act 2011*).

The effect of new section 161 is to ensure that counselling communications which have been made before the amendments commence (for example counselling communications made in February 2011) must not be disclosed in, or for the purposes of, a civil proceeding unless the court dealing with the proceeding gives leave for disclosure.

A similar provision was made for the commencement of the division in relation to criminal proceedings (see section 56 of the Act).

However, as explained above, new section 161 only has effect in relation to a proceeding in a court where the hearing of the proceeding has started after the commencement of this Act (the *Evidence (Miscellaneous Provisions) Amendment Act 2011*).

*Example based on the Act commencing on 1 January 2012 (date chosen for example purposes only)*

A counselling communication which is made in February 2010 will require the leave of the court to be disclosed in a civil proceeding, if the hearing of the proceeding starts on 1 March 2011.

A counselling communication which is made in February 2010 won't require the leave of the court to be disclosed in a civil proceeding, if the hearing of the proceeding starts on 20 December 2010 and continues until 1 March 2011.

New section 162 provides the Executive, in combination with new section 121, with a transitional regulation-making power. This power will enable the

Executive to deal quickly with unanticipated issues that arise as a consequence of the amendments made to the *Evidence (Miscellaneous Provisions) Act 1991* by the Bill. When an issue is identified, the Executive may make a transitional regulation if the Executive considers that the issue is not, or is not adequately or appropriately, dealt with in part 11. The transitional regulation making power will expire 2 years after the day it commences (see new section 163).

New section 163 provides that part 11 expires 2 years after commencement.

**Clause 72 Dictionary, note 2** – inserts Commonwealth country, DPP, foreign country, and Governor-General into the list of definitions in note 2 in the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991*.

Note 2 contains a number of terms, relevant to the Act, which are defined in the *Legislation Act 2001* and therefore do not need to be separately defined in the Act.

The terms inserted by this clause have been included the Act as a consequence of the amendments made in this Bill.

**Clause 73 Dictionary, note 2** – removes proceeding from the list of definitions in note 2 in the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991*.

Note 2 contains a number of terms, relevant to the Act, which are defined in the *Legislation Act 2001* and therefore do not need to be separately defined in the Act.

The Act does contain a definition of **proceeding** in the dictionary and it has been amended by this Bill (clause 85) to, among other things, incorporate the definition in the *Legislation Act 2001*. Accordingly, proceeding no longer needs to be included in the list at note 2.

**Clause 74 Dictionary, new definitions** – inserts new definitions of **ACT court** and **civil proceeding** in the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991* as a consequence of the amendments made in this Bill.

**Clause 75 Dictionary, definition of complainant, paragraph (d)** – updates the definition of **complainant** in the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991* as a consequence of the amendments made in this Bill (clause 34).

**Clause 76 Dictionary, definition of criminal proceeding** – updates the definition of **criminal proceeding** in the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991* as a consequence of the amendments made in this Bill.

**Clause 77 Dictionary, new definitions** – inserts new definitions of **dangerously ill person**, **evidence receiving entity** and **external place** in

the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991* as a consequence of the amendments made in this Bill.

**Clause 78 Dictionary, definition of *family objection*** – removes the definition of ***family objection*** from the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991*. The term used in division 4.7 has been removed from the Act (see the explanation at clause 71 above).

**Clause 79 Dictionary, new definition of *give evidence in a proceeding by audiovisual link*** – inserts a new definition of ***give evidence in a proceeding by audiovisual link*** in the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991*. The term has been inserted into new sections 6 and 40X (see the explanations at clauses 7 and 35 above).

**Clause 80 Dictionary, definition of *less serious violent offence*** – updates the definition of ***less serious violent offence*** in the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991* as a consequence of the amendments made in this Bill.

**Clause 81 Dictionary, definition of *prescribed witness*** – removes the definition of ***prescribed witness*** from the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991*. The term has been removed from the Act (see the explanation at clause 5 above).

**Clause 82 Dictionary, definition of *proceeding*** – updates the definition of ***proceeding*** in the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991* as a consequence of the amendments made in this Bill.

**Clause 83 Dictionary, definition of *serious violent offence*** – updates the definition of ***serious violent offence*** in the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991* as a consequence of the amendments made in this Bill.

**Clause 84 Dictionary, definition of *sexual offence*** – updates the definition of ***sexual offence*** in the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991* as a consequence of the amendments made in this Bill.

**Clause 85 Dictionary, definition of *sexual offence proceeding, paragraph (d)*** – updates the definition of ***sexual offence proceeding*** in the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991* as a consequence of the amendments made in this Bill.

**Clause 86 Dictionary, definition of *similar act witness*** – updates the definition of ***similar act witness*** in the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991* as a consequence of the amendments made in this Bill.

**Clause 87 Dictionary, definition of *violent offence*** – updates the definition of ***violent offence*** in the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991* as a consequence of the amendments made in this Bill.

**Clause 88 Dictionary, definition of *violent offence proceeding*, paragraph (c)** – updates the definition of *violent offence proceeding* in the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991* as a consequence of the amendments made in this Bill.

**Clause 89 Dictionary, definition of *witness with a disability*** – updates the definition of *witness with a disability* in the dictionary of the *Evidence (Miscellaneous Provisions) Act 1991* as a consequence of the amendments made in this Bill.