

2019

THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Attorney-General)

Evidence (Miscellaneous Provisions) Amendment Bill 2019

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Evidence (Miscellaneous Provisions) Amendment Bill 2019

A Bill for

An Act to amend the *Evidence (Miscellaneous Provisions) Act 1991* and the *Evidence (Miscellaneous Provisions) Regulation 2009*, and for other purposes

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

1 **Part 1 Preliminary**

2 **1 Name of Act**

3 This Act is the *Evidence (Miscellaneous Provisions) Amendment Act*
4 *2019*.

5 **2 Commencement**

6 This Act commences on a day fixed by the Minister by written notice.

7 *Note 1* The naming and commencement provisions automatically commence on
8 the notification day (see [Legislation Act](#), s 75 (1)).

9 *Note 2* A single day or time may be fixed, or different days or times may be
10 fixed, for the commencement of different provisions (see [Legislation Act](#),
11 s 77 (1)).

12 *Note 3* If a provision has not commenced within 6 months beginning on the
13 notification day, it automatically commences on the first day after that
14 period (see [Legislation Act](#), s 79).

15 **3 Legislation amended**

16 This Act amends the *Evidence (Miscellaneous Provisions) Act 1991*
17 and the *Evidence (Miscellaneous Provisions) Regulation 2009*.

18 *Note* This Act also amends other legislation (see sch 1).

1 **Part 2** **Evidence (Miscellaneous**
2 **Provisions) Act 1991**

3 **4** **New chapters 1A and 1B**

4 *insert*

5 **Chapter 1A** **Ground rules hearings—**
6 **criminal proceedings**

7 **4AA** **Definitions—ch 1A**

8 In this chapter:

9 *ground rules hearing* means a hearing for a witness in a criminal
10 proceeding, where the court—

- 11 (a) considers the communication, support or other needs of the
12 witness; and
13 (b) decides how the proceeding must be conducted to fairly and
14 effectively meet those needs.

15 *witness*, in a criminal proceeding, includes the accused person in the
16 proceeding.

17 **4AB** **Direction to hold ground rules hearing**

- 18 (1) A court may, at any time, if satisfied that it is in the interests of justice,
19 direct that a ground rules hearing be held for a witness in a criminal
20 proceeding.
21 (2) However, if an intermediary is appointed for a witness in a criminal
22 proceeding, the court must direct that a ground rules hearing be held
23 for the witness.

- 1 (3) The court may make a direction—
2 (a) on its own initiative; or
3 (b) on the application of—
4 (i) the DPP; or
5 (ii) the witness; or
6 (iii) the accused person.
7 (4) An application may be made orally or in writing.

8 **4AC Ground rules hearings—time limits**

- 9 (1) If a court directs that a ground rules hearing be held for a witness in
10 a criminal proceeding, the ground rules hearing must be held before
11 the witness gives evidence in the proceeding.
12 (2) The court may extend the time for holding a ground rules hearing if
13 the court considers that it is in the interests of justice to do so.

14 **4AD Ground rules hearings—who must attend**

- 15 (1) The following people must attend a ground rules hearing for a witness
16 in a criminal proceeding:
17 (a) the DPP;
18 (b) the lawyer representing the accused person or, if the accused
19 person is not represented by a lawyer in the proceeding, the
20 accused person;
21 (c) any intermediary appointed for the witness.
22 (2) The witness is not required to attend a ground rules hearing.
23 (3) If an intermediary is appointed for the witness, the court may make
24 an order that the witness not attend a ground rules hearing.

1 **4AE Ground rules hearings—intermediary’s report**

2 If an intermediary is appointed for a witness before a ground rules
3 hearing is held for the witness, the intermediary must—

- 4 (a) prepare a written report about the communication needs of the
5 witness; and
6 (b) give the report to the court before the ground rules hearing.

7 **4AF Ground rules hearings—directions**

8 (1) At a ground rules hearing for a witness in a criminal proceeding, the
9 court may make any direction the court considers is in the interests of
10 justice, including any of the following:

- 11 (a) a direction about how a witness may be questioned;
12 (b) a direction about how long a witness may be questioned;
13 (c) a direction about the questions that may or may not be asked of
14 a witness;
15 (d) if there is more than 1 accused—a direction about the allocation
16 among the accused of the topics about which a witness may be
17 asked;
18 (e) a direction about the use of models, plans, body maps or other
19 aids to help communicate a question or an answer;
20 (f) a direction about the use of a support animal by the witness;
21 (g) a direction that if a party intends to give evidence that
22 contradicts or challenges the evidence of a witness or that
23 otherwise discredits a witness, the party is not obliged to put that
24 evidence in its entirety to the witness in cross-examination.

25 (2) If an intermediary’s report has been given to the court under
26 section 4AE, the court must consider the matters mentioned in the
27 report in making the direction.

1 **Chapter 1B Witness intermediaries—**
2 **criminal proceedings**

3 **4AG Definitions**

4 (1) In this Act:

5 *intermediary* means a person—

6 (a) on the intermediaries panel; or

7 (b) on a panel (however described) with functions substantially
8 corresponding to the functions of the intermediaries panel, in the
9 Commonwealth, a State, the United Kingdom or New Zealand.

10 *Note* *State* includes the Northern Territory (see [Legislation Act](#), dict, pt 1).

11 (2) In this chapter:

12 *intermediaries administrator* means the person prescribed by
13 regulation as the intermediaries administrator.

14 *witness*, in a criminal proceeding, includes the defendant in the
15 proceeding.

16 **4AH Panel of witness intermediaries**

17 The intermediaries administrator must establish and maintain a panel
18 of people (the *intermediaries panel*) who have—

19 (a) either—

20 (i) a tertiary qualification in psychology, social work, speech
21 pathology or occupational therapy; or

22 (ii) other qualifications, training, experience or skills
23 prescribed by regulation; or

24 (b) qualifications, training, experience or skills suitable to exercise
25 the functions mentioned in section 4AI.

1 **4AI Functions of witness intermediaries**

- 2 (1) The functions of an intermediary appointed for a witness are to—
- 3 (a) prepare and provide reports about the witness’s communication
- 4 needs as required; and
- 5 (b) at a hearing—
- 6 (i) communicate to the witness questions put to the witness,
- 7 to the extent necessary for the witness to understand the
- 8 questions; and
- 9 (ii) communicate to the person putting questions to the
- 10 witness, the witness’s answers to the questions, to the
- 11 extent necessary for the person to understand the answers;
- 12 and
- 13 (iii) otherwise assist the court, and any lawyer appearing in the
- 14 proceeding, to communicate with the witness.
- 15 (2) An intermediary appointed for a witness is an officer of the court and
- 16 must act impartially when assisting communication with the witness.

17 **4AJ Appointment of witness intermediary—generally**

- 18 (1) A court may appoint an intermediary in a criminal proceeding for a
- 19 witness with a communication difficulty—
- 20 (a) on its own initiative; or
- 21 (b) on the application of—
- 22 (i) the DPP; or
- 23 (ii) the witness; or
- 24 (iii) the accused person.

25 **Example—communication difficulty**

26 a mental or physical disability that impedes speech

- 1 (2) A court must not appoint an intermediary for a witness under this
2 section if satisfied that the witness—
- 3 (a) is aware of their right to make an application for an intermediary
4 to be appointed; and
- 5 (b) is able to, and wishes to, give evidence without the assistance of
6 an intermediary.
- 7 (3) In making a decision under this section, the court is not bound by the
8 rules of evidence and may inform itself as it considers appropriate.

9 **4AK Appointment of witness intermediary—prescribed**
10 **witnesses**

- 11 (1) A court must appoint an intermediary in a criminal proceeding for a
12 witness prescribed by regulation.
- 13 (2) However, the court need not appoint an intermediary for a witness
14 under this section if—
- 15 (a) there is no-one available who—
- 16 (i) meets the needs of the witness; and
- 17 (ii) satisfies the requirements in section 4AL; or
- 18 (b) it is not in the interests of justice to appoint an intermediary.
- 19 (3) Also, the court must not appoint an intermediary for a witness under
20 this section if satisfied that the witness—
- 21 (a) is aware of their right to an intermediary; and
- 22 (b) is able to, and wishes to, give evidence without the assistance of
23 an intermediary.
- 24 (4) In making a decision under subsection (2) or (3), the court is not
25 bound by the rules of evidence and may inform itself as it considers
26 appropriate.

- 1 **4AL Appointment of witness intermediary—suitability of the**
2 **intermediary for the witness etc**
- 3 (1) A court may appoint an intermediary for a witness in a criminal
4 proceeding only if—
- 5 (a) the intermediaries administrator is satisfied the intermediary has
6 qualifications, training, experience or skills suitable for the
7 witness; and
- 8 (b) if the intermediary is a designated person—the court is
9 satisfied—
- 10 (i) there is no other suitable intermediary reasonably
11 available; and
- 12 (ii) the appointment is in the interests of justice.
- 13 (2) In making a decision under subsection (1), the court is not bound by
14 the rules of evidence and may inform itself as it considers appropriate.
- 15 (3) In this section:
- 16 *designated person*, in relation to a criminal proceeding, means a
17 person who is—
- 18 (a) a relative, friend or acquaintance of the witness or the accused
19 person; or
- 20 (b) a person who has assisted the witness (other than as an
21 intermediary) or the accused person in a professional capacity;
22 or
- 23 (c) a party or potential witness in the proceeding.
- 24 **4AM Witness to give evidence in presence of intermediary**
- 25 (1) If a court appoints an intermediary for a witness in a criminal
26 proceeding, the witness must give their evidence in the presence of
27 the intermediary.

- 1 (2) Evidence of a witness given in the presence of an intermediary must
2 be given in circumstances in which—
- 3 (a) the court and any lawyer appearing in the proceeding are able
4 to—
- 5 (i) see and hear the witness giving evidence; and
6 (ii) communicate with the intermediary; and
- 7 (b) the jury (if any) is able to see and hear the witness giving
8 evidence, including any assistance given by the intermediary.
- 9 *Note* A person must take an oath or make an affirmation before acting as an
10 intermediary in a proceeding (see *Evidence Act 2011*, s 22).
- 11 (3) If the proceeding is a trial by jury, the court must tell the jury that—
- 12 (a) a witness giving evidence in the presence of an intermediary is
13 a usual practice; and
- 14 (b) the jury must not draw any inference against the accused person,
15 or give the evidence more or less weight, because the
16 intermediary is present.
- 17 (4) An order that the court be closed to the public does not stop an
18 intermediary for a witness being in court while the witness gives
19 evidence.

20 **4AN Relationship to other provisions of this Act**

21 This part does not affect the operation of any other provision in this
22 Act.

1 **5** **Meaning of *proceeding*—pt 4.1**
2 **Section 37, definition of *proceeding*, paragraph (b)**

3 *after*

4 pre-trial hearing

5 *insert*

6 and ground rules hearing

7 **6** **Special requirements—particular proceedings**
8 **Section 43, new note**

9 *insert*

10 *Note 3* The court may also appoint an intermediary for a witness (see s 4AJ and
11 s 4AK).

12 **7** **Dictionary, new definitions**

13 *insert*

14 ***ground rules hearing***, for chapter 1A (Ground rules hearings—
15 criminal proceedings)—see section 4AA.

16 ***intermediaries administrator***, for chapter 1B (Witness
17 intermediaries—criminal proceedings)—see section 4AG.

18 ***intermediary***, for a witness in a criminal proceeding—see
19 section 4AG.

1 **8 Dictionary, definition of *witness***

2 *substitute*

3 *witness*—

4 (a) for chapter 1A (Ground rules hearings—criminal
5 proceedings)—see section 4AA; and

6 (b) for chapter 1B (Witness intermediaries—criminal
7 proceedings)—see section 4AG; and

8 (c) for part 4.3 (Special requirements—general)—see section 46.

1 **Part 3** **Evidence (Miscellaneous**
2 **Provisions) Regulation 2009**

3 **9** **New part 1 heading**

4 *before section 1, insert*

5 **Part 1** **Preliminary**

6 **10** **New section 2**

7 *insert*

8 **2** **Dictionary**

9 The dictionary at the end of this regulation is part of this regulation.

10 *Note 1* The dictionary at the end of this regulation defines certain terms used in
11 this regulation.

12 *Note 2* A definition in the dictionary applies to the entire regulation unless the
13 definition, or another provision of the regulation, provides otherwise or
14 the contrary intention otherwise appears (see [Legislation Act](#), s 155 and
15 s 156 (1)).

16 **11** **New part 2**

17 *after section 3, insert*

18 **Part 2** **Witness intermediaries**

19 **3A** **Intermediaries administrator—Act, s 4AG (2), definition of**
20 ***intermediaries administrator***

21 The intermediaries administrator is the victims of crime
22 commissioner.

1 **3B Prescribed witnesses—Act, s 4AK (1)**

2 (1) The following witnesses are prescribed:

3 (a) a child complainant in a sexual offence proceeding;

4 (b) a child in a serious violent offence proceeding involving the
5 death of a person.

6 (2) In this section:

7 *child*, in a proceeding, see the [Act](#), section 42.

8 *complainant*, in relation to a proceeding for an offence—see the [Act](#),
9 section 42.

10 *serious violent offence proceeding*—see the [Act](#), section 40.

11 *sexual offence proceeding*—see the [Act](#), section 41.

12 **12 New part 3 heading**

13 *before section 4, insert*

14 **Part 3 Sexual, violent and family**
15 **violence offence proceedings**

16 **13 Prescribed person—Act, s 51 (1) and (3)**
17 **New section 4 (1) (c)**

18 *insert*

19 (c) an intermediary.

14 New dictionary*insert***Dictionary**

(see s 2)

Note 1 The [Legislation Act](#) contains definitions and other provisions relevant to this regulation.

Note 2 For example, the [Legislation Act](#), dict, pt 1, defines the following term:

- victims of crime commissioner.

Note 3 Terms used in this regulation have the same meaning that they have in the [Evidence \(Miscellaneous Provisions\) Act 1991](#) (see [Legislation Act](#), s 148). For example, the following term is defined in the [Evidence \(Miscellaneous Provisions\) Act 1991](#), dict:

- intermediary (see s 4AG).

Schedule 1 Consequential amendments

(see s 3)

Part 1.1 Criminal Code 2002

[1.1] Section 700, new definition of *intermediary*

insert

intermediary—see the *Evidence (Miscellaneous Provisions) Act 1991*, section 4AG.

[1.2] New section 702 (3)

before the note, insert

- (3) An intermediary commits an offence (also *aggravated perjury*) if—
- (a) the intermediary, by a sworn statement, assists a witness to communicate evidence in a legal proceeding with the intention of procuring someone else’s conviction for, or acquittal of, an offence (the *relevant offence*); and
 - (b) the relevant offence is punishable by imprisonment; and
 - (c) the intermediary’s statement is false or misleading; and
 - (d) the intermediary is reckless about whether the intermediary’s statement is false or misleading.

Maximum penalty: 1 400 penalty units, imprisonment for 14 years or both.

1 **[1.3] New section 703 (3)**

2 *insert*

3 (3) An intermediary commits an offence (also *perjury*) if—

4 (a) the intermediary, by a sworn statement, assists a witness to
5 communicate evidence in a legal proceeding; and

6 (b) the intermediary's statement is false or misleading; and

7 (c) the intermediary is reckless about whether the intermediary's
8 statement is false or misleading.

9 Maximum penalty: 700 penalty units, imprisonment for 7 years or
10 both.

11 **[1.4] Section 707 (1) (b) (i)**

12 *substitute*

13 (i) not attend as a witness, interpreter, intermediary or juror
14 in a legal proceeding; or

15 **[1.5] New section 707 (1) (b) (iva)**

16 *insert*

17 (iva) assist a witness to communicate evidence as an
18 intermediary in a legal proceeding in a way that makes the
19 evidence false or misleading; or

20 **[1.6] Section 707 (2) (b) (i)**

21 *substitute*

22 (i) not attend as a witness, interpreter, intermediary or juror
23 in a legal proceeding; or

- 1 **[1.7] New section 707 (2) (b) (iva)**
- 2 *insert*
- 3 (iva) assist a witness to communicate evidence as an
4 intermediary in a legal proceeding in a way that makes the
5 evidence false or misleading; or
- 6 **[1.8] Section 708 heading**
- 7 *substitute*
- 8 **708 Deceiving witness, interpreter, intermediary or juror**
- 9 **[1.9] Section 708 (a)**
- 10 *substitute*
- 11 (a) not attend as a witness, interpreter, intermediary or juror in a
12 legal proceeding; or
- 13 **[1.10] Section 709 heading**
- 14 *substitute*
- 15 **709 Threatening etc witness, interpreter, intermediary or juror**
- 16 **[1.11] Section 709 (a)**
- 17 *substitute*
- 18 (a) not attend as a witness, interpreter, intermediary or juror in a
19 legal proceeding; or
- 20 **[1.12] New section 709A (1) (da)**
- 21 *insert*
- 22 (da) assist a witness to communicate evidence as an intermediary in
23 a criminal investigation in a way that makes the evidence false
24 or misleading; or

1 **[1.13] Section 710 heading**

2 *substitute*

3 **710 Preventing attendance etc of witness, interpreter,**
4 **intermediary or juror**

5 **[1.14] Section 710 (a)**

6 *substitute*

7 (a) attending as a witness, interpreter, intermediary or juror in a
8 legal proceeding; or

9 **[1.15] Section 712 (2), new definition of *intermediary***

10 *insert*

11 *intermediary* includes a person who attends in the proceeding as an
12 intermediary but is not called as an intermediary.

13 **[1.16] Section 712 (2), definition of *involved person*,**
14 **paragraph (c)**

15 *substitute*

16 (c) a witness, interpreter, intermediary, juror or lawyer involved in
17 the proceeding; or

18 **[1.17] Section 726 (1) (d) and (e)**

19 *substitute*

20 (d) section 708 (Deceiving witness, interpreter, intermediary or
21 juror);

22 (e) section 709 (Threatening etc witness, interpreter, intermediary
23 or juror);

1 **Part 1.2 Evidence Act 2011**

2 **[1.18] Section 22 heading**

3 *substitute*

4 **22 Interpreters and intermediaries to act on oath or**
5 **affirmation**

6 **[1.19] Section 22 (1)**

7 *after*

8 interpreter

9 *insert*

10 or intermediary

11 **[1.20] Section 22 (2)**

12 *after*

13 acting as an interpreter

14 *insert*

15 or intermediary

16 **[1.21] Section 22 (2)**

17 *omit*

18 acts as an interpreter

19 *substitute*

20 acts in that capacity

1 **[1.22] Section 22, note**

2 *substitute*

3 *Note* The [Commonwealth Act](#) does not include intermediaries and does not
4 include s (2).

5 **[1.23] Section 23 (1)**

6 *after*

7 interpreter

8 *insert*

9 or intermediary

10 **[1.24] Section 23, note**

11 *substitute*

12 *Note* The [Commonwealth Act](#) does not include intermediaries, and s (2) differs
13 from the [Commonwealth Act](#).

14 **[1.25] Section 31 (4)**

15 *substitute*

16 (4) This section does not affect the right of a witness to whom this section
17 applies to give evidence about a fact—

18 (a) through an interpreter under section 30; or

19 (b) with the assistance of an intermediary under the [Evidence](#)
20 [\(Miscellaneous Provisions\) Act 1991](#), chapter 1B (Witness
21 intermediaries—criminal proceedings).

22 *Note* The [Commonwealth Act](#) does not include intermediaries.

1 **[1.26] Schedule 1, Oaths by intermediaries**

2 *after Oaths by interpreters, insert*

3 **Oaths by intermediaries**

4 I swear (*or the person taking the oath may promise*) by Almighty God (*or the person may*
5 *name a god recognised by the person's religion*) that I will impartially and faithfully
6 inform the court about the witness's communication needs and communicate
7 questions and answers, make true explanation of all matters and things that are
8 required of me, and do all other matters and things that are required of me in
9 this case, to the best of my ability.

10 *Note* The [Commonwealth Act](#) does not include intermediaries.

11 **[1.27] Schedule 1, Affirmations by intermediaries**

12 *after Affirmations by interpreters, insert*

13 **Affirmations by intermediaries**

14 I solemnly and sincerely declare and affirm that I will impartially and faithfully
15 inform the court about the witness's communication needs and communicate
16 questions and answers, make true explanation of all matters and things that are
17 required of me, and do all other matters and things that are required of me in
18 this case, to the best of my ability.

19 *Note* The [Commonwealth Act](#) does not include intermediaries.

20 **[1.28] Dictionary, part 1, new definition of *intermediary***

21 *insert*

22 *intermediary*, in relation to a proceeding, means a person appointed
23 as an intermediary for a witness in the proceeding under the [Evidence](#)
24 [\(Miscellaneous Provisions\) Act 1991](#) chapter 1B (Witness
25 intermediaries—criminal proceedings).

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 24 September 2019.

2 Notification

Notified under the [Legislation Act](#) on 2019.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.

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