

NORTHERN TERRITORY OF AUSTRALIA
EVIDENCE AMENDMENT ACT 2001

No. 37 of 2001

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NORTHERN TERRITORY OF AUSTRALIA

No. 37 of 2001

AN ACT

to amend the *Evidence Act*

[Assented to 19 July 2001]
[Second reading 5 June 2001]

The Legislative Assembly of the Northern Territory enacts as follows:

1. Short title

This Act may be cited as the *Evidence Amendment Act 2001*.

2. Commencement

This Act comes into operation on the date fixed by the Administrator by notice in the *Gazette*.

3. Principal Act

The *Evidence Act* is in this Act referred to as the Principal Act.

4. Definitions

Section 4 of the Principal Act is amended by inserting after the definition of "person acting judicially" the following:

" 'sexual offence' means a sexual offence within the meaning of the *Sexual Offences (Evidence and Procedure) Act*;"

5. Evidence of vulnerable witnesses

Section 21A of the Principal Act is amended —

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- (a) by omitting subsection (1) and substituting the following:

"(1) In this Part –

'vulnerable witness' means –

- (a) a witness who is under 16 years of age;
 - (b) a witness who suffers from an intellectual disability;
 - (c) a witness who is the alleged victim of a sexual offence to which the proceedings relate; or
 - (d) a witness who is, in the opinion of the Court, under a special disability because of the circumstances of the case or the circumstances of the witness.";
- (b) by omitting from subsection (2) all the words from and including "Where" to and including "orders:" and substituting "Subject to subsection (2A), a vulnerable witness is entitled to give evidence using one or more of the following arrangements as chosen by the witness:";
- (c) by inserting in subsection (2)(a) "where that facility is available" after "television";
- (d) by omitting from subsection (2)(b) "the magistrate or the judge and jury" and substituting "the Judge and the jury (if any)";
- (e) by omitting subsection (2)(c) and substituting the following:

"(c) that the vulnerable witness be accompanied by –

- (i) a relative;
- (ii) a friend; or
- (iii) any other person who the vulnerable witness requests to accompany him or her and who the Court considers is in the circumstances appropriate to accompany the vulnerable witness,

for the purpose of providing the vulnerable witness with emotional support;"

- (f) by inserting after subsection (2) the following:

"(2A) The Court may make an order that the vulnerable witness is not to give evidence using an arrangement under subsection (2) if satisfied that –

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- (a) it is not in the interests of justice for the witness's evidence to be given using that arrangement; or
- (b) the urgency of the proceeding makes the use of that arrangement inappropriate.

"(2B) In determining whether or not it is in the interests of justice to use an arrangement under subsection (2), the Court must have regard to the following matters:

- (a) the need to minimise the harm that could be caused to the vulnerable witness by giving evidence;
- (b) the interest in the vulnerable witness being able to give evidence effectively.

"(2C) The Court must state its reasons for making an order under subsection (2A).";

- (g) by omitting from subsection (3) all the words from and including "an order" to and including "the jury" and substituting "a vulnerable witness is to give evidence using an arrangement under subsection (2)(a) or (b), the Judge must issue a warning to the jury (if any)";
- (h) by omitting from subsection (3)(b) "the issue of these orders" and substituting "the use of the arrangement";
- (i) by omitting from subsection (3)(c) "such orders" and substituting "the arrangement"; and
- (j) by omitting subsections (4), (5) and (6) and substituting the following:

"(4) If an arrangement under subsection (2)(c) is used, the person who accompanies the vulnerable witness is to be placed so he or she is visible to the Judge and the jury (if any).

"(5) If an arrangement under subsection (2)(d) is used in a proceeding in which the defendant is or is apparently under 16 years of age, nothing in subsection (2)(d) is to be taken to require the exclusion from the Court or the place where the evidence is being given of a person who is required or permitted under the *Juvenile Justice Act* to be present.

"(6) If the Court is requested to determine whether a witness is a vulnerable witness, the witness is to be taken to be a vulnerable witness until the Court makes the determination."

6. Child witnesses

Section 21B of the Principal Act is amended by omitting from subsection (1) "has not attained the age of 16 years, the judge or magistrate" and substituting "is under 16 years of age, the Judge".

7. Use of closed circuit television

Section 21C of the Principal Act is amended –

(a) by omitting from subsection (1) all the words from and including "An order" to and including "provisions:" and substituting "Where a vulnerable witness is to give evidence using an arrangement under section 21A(2)(a), the Court may make the orders necessary to give effect to that arrangement, including but not limited to orders about one or more of the following:";

(b) by omitting subsection (1)(a) and substituting the following;

"(a) who, in addition to the officer of the Court referred to in subsection (3), may be present at the place at which the vulnerable witness is giving the evidence;"

(c) by omitting from subsection (2) "pursuant to an order under section 21A(2)(a) shall be deemed" and substituting "using an arrangement under section 21A(2)(a) is to be taken"; and

(d) by adding at the end the following:

"(3) An officer of the Court is to be present at the place at which a vulnerable witness is giving evidence using an arrangement under section 21A(2)(a)."

8. New Part

The Principal Act is amended by inserting after section 55 the following:

"PART VIA – CONFIDENTIAL COMMUNICATIONS

"56. Definitions

"In this Part –

'committal proceedings' means the examination of an accused by a Justice, and other procedures relating to the examination, under Part V of the *Justices Act*;

'confidential communication' means –

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- (a) a communication, whether oral or written, made in confidence by a victim to a counsellor or to a victim by a counsellor in the course of the relationship of counsellor and client and includes –
 - (i) a communication that is not made in connection with the sexual offence or alleged sexual offence or a condition arising from the sexual offence or alleged sexual offence; and
 - (ii) a communication made in the presence of a parent or carer of the victim or any other person who is present to facilitate communication between the victim and the counsellor or to otherwise further the counselling of the victim;
- (b) a communication, whether oral or written, made about the victim to the counsellor by the parent, carer or other person referred to in paragraph (a)(ii) or by the counsellor to the parent, carer or other person;
- (c) a communication referred to in paragraph (a) or (b) that is made before or after the acts constituting the sexual offence committed against the victim occurred or are alleged to have occurred;
- (d) a record (including an electronic record) kept by a party to a confidential communication or any other person of the confidential communication or of any observation, opinion, advice, recommendation or other matter relating to the confidential communication; or
- (e) part of a confidential communication;

'counsellor' means a person who is treating a victim for an emotional, psychological or psychiatric condition;

'harm' includes physical bodily harm, financial loss, stress or shock, damage to reputation or shame, humiliation, fear or other emotional, psychological or psychiatric harm;

'party to a confidential communication' means –

- (a) the victim to whom the confidential communication relates;
- (b) the counsellor to whom or by whom the confidential communication is made; or

- (c) a parent, carer or other person referred to in paragraph (a)(ii) of the definition of 'confidential communication';

'victim' means a victim or alleged victim of a sexual offence.

"56A. Application of Part

"(1) Subject to subsection (2), this Part applies in relation to a confidential communication whenever made.

"(2) This Part applies in relation to the following criminal proceedings:

- (a) committal proceedings in respect of a sexual offence;
- (b) the hearing of a charge for a sexual offence;
- (c) a trial in respect of a sexual offence,

where those proceedings are commenced after the commencement of this Part, regardless of when the offence is alleged to have been committed.

"(3) For the purposes of subsection (2) –

- (a) committal proceedings commence on the committal mention date;
- (b) the hearing of a charge commences on the taking of a formal plea from the accused; and
- (c) a trial commences on the arraignment of the accused.

"56B. Protection of confidential communications

"(1) A confidential communication is a privileged communication to the extent provided by this section.

"(2) Evidence that discloses a confidential communication –

- (a) is not to be subject to discovery or any other form of pre-hearing or pre-trial disclosure or inspection;
- (b) is not admissible in committal proceedings; and
- (c) is not to be adduced or produced as evidence at the hearing of a charge or at a trial except with the leave of the Court.

"56C. Notice of intention to apply for leave to adduce or produce evidence of confidential communication

"A party to criminal proceedings who intends to apply for leave to adduce or produce evidence of a confidential communication must give reasonable notice in writing of that intention to –

- (a) the Court;
- (b) each other party to the proceedings; and
- (c) each party to the confidential communication who is not a party to the proceedings.

"56D. Procedural matters relating to application for leave

"(1) An application for leave to adduce or produce evidence of a confidential communication is to be heard in the absence of the jury (if any).

"(2) A party to the confidential communication may appear at the hearing of the application for leave if the party –

- (a) is not also a party to the criminal proceedings in which the evidence is sought to be adduced or produced;
- (b) is unlikely to be a witness in those proceedings; and
- (c) is given leave by the Court to appear at the hearing.

"(3) If the evidence to which the application for leave relates is a document or record, the Court may order that the document or record be produced to it and may inspect the document or record but the Court must not make the document or record available to, or disclose its contents to, the applicant for leave.

"(4) For the purposes of determining the application for leave, the Court may order the counsellor –

- (a) to provide written answers to questions;
- (b) to produce documents or records relating to the confidential communication; or
- (c) to appear for oral examination.

"(5) Evidence that is not to be adduced or produced in a criminal proceeding because of section 56A(2) is not admissible in the hearing of an application for leave.

"56E. Giving leave to adduce or produce evidence of confidential communication

"(1) A Court must not give leave to adduce or produce evidence of a confidential communication unless satisfied –

- (a) that the evidence will, either by itself or together with other evidence that has been or will be adduced or produced, have substantial probative value in respect of a fact in issue;
- (b) that other evidence of a similar or greater probative value in respect of the matters to which the confidential communication relates is not available; and
- (c) that the public interest in preserving the confidentiality of confidential communications and protecting the victim from harm is substantially outweighed by the public interest in admitting into evidence information, or the contents of a document or record, that is of substantial probative value.

"(2) Without limiting the matters the Court may take into account for the purposes of subsection (1)(c), the Court must take into account the likelihood, nature and extent of the harm that could be caused to the victim if the evidence is adduced or produced.

"(3) In giving leave to adduce or produce evidence of a confidential communication, the Court may –

- (a) allow evidence of part only of the confidential communication to be adduced or produced; or
- (b) specify the manner in which the evidence is to be adduced or produced.

"(4) The Court must state its reasons for giving or refusing to give leave to adduce or produce evidence of a confidential communication.

"56F. Limitation on privilege under this Part

"Nothing in this Part prevents the adducing or producing of –

- (a) evidence with the consent of a victim or, if the victim is under 14 years of age, the consent of a person the Court considers appropriate to give consent;
- (b) evidence of information acquired by a medical practitioner or a registered nurse within the meaning of the *Nursing Act* from a physical examination of a victim in connection with the commission or alleged commission of the sexual offence, including

evidence of communications between the practitioner or nurse and the victim during the examination; or

- (c) evidence of a criminal fraud or perjury.

"56G. Ancillary orders where evidence of confidential communication to be adduced or produced

"(1) Where the leave of the Court or consent under section 56F(a) is given to adduce or produce evidence of a confidential communication, the Court may take action to limit the harm likely to be caused to the victim or any other person because of the disclosure of the confidential communication.

"(2) The action the Court may take includes but is not limited to making one or more of the following orders:

- (a) an order that all or part of the evidence of the confidential communication be adduced or produced in camera;
- (b) an order relating to the production and inspection of a document that in the opinion of the Court is necessary to protect the safety and welfare of the victim, the counsellor or any other person who was a party to the confidential communication;
- (c) an order relating to the suppression of publication of all or part of the evidence of the confidential communication that in the opinion of the Court is necessary to protect the safety and welfare of the victim, the counsellor or any other person who was a party to the confidential communication;
- (d) an order relating to the disclosure of information about the victim, the counsellor or any other person who was a party to the confidential communication (including information that enables a person to ascertain the party's private, business or official address, email address or telephone number) that in the opinion of the Court is necessary to protect the party's safety and welfare."