

Evidence and Public Interest Disclosure Legislation Amendment Bill 2011

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Western Australia

LEGISLATIVE ASSEMBLY

**Evidence and Public Interest Disclosure
Legislation Amendment Bill 2011**

A Bill for

An Act to amend the *Evidence Act 1906* and the *Public Interest Disclosure Act 2003*.

The Parliament of Western Australia enacts as follows:

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Part 1 — Preliminary

1. Short title

This is the *Evidence and Public Interest Disclosure Legislation Amendment Act 2011*.

2. Commencement

This Act comes into operation as follows —

- (a) Part 1 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

1 **Part 2 — Amendments to the *Evidence Act 1906* about**
2 **protection of confidential communications given in**
3 **professional confidential relationships, and protection**
4 **of journalists' sources**

5 **3. Act amended**

6 This Part amends the *Evidence Act 1906*.

7 **4. Heading replaced**

8 Delete the heading before section 19A and insert:

9

10 *Protection of confidential communications given in*
11 *counselling concerning sexual assault*
12

13 **5. Sections 20A to 20M inserted**

14 After section 19M insert:

15

16 *Protection of confidential communications given in professional*
17 *confidential relationships*

18 **20A. Terms used**

19 (1) In this section and in sections 20B to 20F —

20 *confidant* means a person to whom a communication is
21 made in confidence and includes a journalist as defined
22 in section 20G;

23 *harm* includes actual physical bodily harm, financial
24 loss, stress or shock, damage to reputation or emotional
25 or psychological harm, such as shame, humiliation and
26 fear;

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- 1 *protected confidence* means a communication made by
2 a person in confidence to another person (the
3 *confidant*) —
- 4 (a) in the course of a relationship in which the
5 confidant was acting in a professional capacity;
6 and
- 7 (b) when the confidant was under an express or
8 implied obligation not to disclose its contents,
9 whether or not the obligation arises under law
10 or can be inferred from the nature of the
11 relationship between the person and the
12 confidant;
- 13 *protected confider*, in relation to a protected
14 confidence, means the person who made the protected
15 confidence;
- 16 *protected identity information* means information
17 about, or enabling a person to ascertain, the identity of
18 the person who made a protected confidence;
- 19 *protection provisions (PCR)* means this section and
20 sections 20C to 20F.
- 21 (2) For the purposes of the protection provisions (PCR), a
22 communication may be made in confidence even if it is
23 made in the presence of a third party if the third party's
24 presence is necessary to facilitate communication.
- 25 **20B. Application of protection provisions (PCR)**
- 26 (1) The protection provisions (PCR) do not apply in
27 relation to a proceeding the hearing of which began
28 before the commencement of those provisions.
- 29 (2) The protection provisions (PCR) apply in relation to a
30 protected confidence whether made before or after the
31 commencement of those provisions.

- 1 (3) The protection provisions (PCR) do not apply in
2 relation to matters that are the subject of the protection
3 provisions as defined in section 19A(1).
- 4 (4) The protection provisions (PCR) do not affect the law
5 relating to legal professional privilege.
- 6 (5) The protection provisions (PCR) do not affect the law
7 relating to evidence of a confession made by a person
8 to a member of the clergy in the member's professional
9 capacity according to the ritual of the church or
10 religious denomination concerned.
- 11 (6) A court may give a direction under the protection
12 provisions (PCR) in respect of a protected confidence
13 or protected identity information whether or not the
14 protected confidence or protected identity information
15 is privileged or protected under another provision of
16 this Act or would be so privileged or protected except
17 for a limitation or restriction imposed by that provision.
- 18 (7) The protection provisions (PCR) are not intended to
19 exclude or limit the operation of section 5 or the power
20 of a court under any other law of the State to take any
21 action if it is in the interests of justice to do so.

22 **20C. Exclusion of evidence of protected confidences**

- 23 (1) A court may direct that evidence not be adduced in a
24 proceeding if the court finds that adducing it would
25 disclose —
- 26 (a) a protected confidence; or
27 (b) the contents of a document recording a
28 protected confidence; or
29 (c) protected identity information.
- 30 (2) A court may give such a direction —
31 (a) on its own initiative; or

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- 1 (b) on the application of the protected confider or
2 confidant concerned, whether or not either is a
3 party.
- 4 (3) A court must give such a direction if it is satisfied
5 that —
- 6 (a) it is likely that harm would or might be caused,
7 whether directly or indirectly, to the protected
8 confider if the evidence is adduced; and
- 9 (b) the nature, extent and likelihood of the harm
10 outweigh the desirability of the evidence being
11 given.
- 12 (4) Without limiting the matters that a court may have
13 regard to for the purposes of this section, it must have
14 regard to the following matters —
- 15 (a) the probative value of the evidence in the
16 proceeding;
- 17 (b) the importance of the evidence in the
18 proceeding;
- 19 (c) the nature and gravity of the relevant offence,
20 cause of action or defence and the nature of the
21 subject matter of the proceeding;
- 22 (d) the availability of any other evidence
23 concerning the matters to which the protected
24 confidence or protected identity information
25 relates;
- 26 (e) the likely effect of adducing evidence of the
27 protected confidence or protected identity
28 information, including the likelihood of harm,
29 and the nature and extent of harm that would be
30 caused to the protected confider;
- 31 (f) the means, including any ancillary orders that
32 may be made under section 20F, available to
33 the court to limit the harm or extent of the harm

- 1 that is likely to be caused if evidence of the
2 protected confidence or the protected identity
3 information is disclosed;
- 4 (g) the likely effect of the evidence in relation to —
- 5 (i) a prosecution that has commenced but
6 has not been finalised; or
- 7 (ii) an investigation, of which the court is
8 aware, into whether or not an offence
9 has been committed;
- 10 (h) whether the substance of the protected
11 confidence or the protected identity information
12 has already been disclosed by the protected
13 confider or any other person;
- 14 (i) the public interest in preserving the
15 confidentiality of protected confidences;
- 16 (j) the public interest in preserving the
17 confidentiality of protected identity
18 information.
- 19 (5) A court must not give a direction under this section in a
20 proceeding for defamation concerning the publication
21 of alleged defamatory matter containing or relying on a
22 protected confidence unless the court is first satisfied
23 that the content of the protected confidence is true, and
24 if the court is so satisfied, subsections (3) and (4)
25 apply.
- 26 (6) A court must state its reasons for giving or refusing to
27 give a direction under this section.

28 **20D. Loss of professional confidential relationship**
29 **protection: consent**

30 The protection provisions (PCR) do not prevent the
31 giving or adducing of evidence with the consent of the
32 protected confider concerned.

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20E. Loss of professional confidential relationship protection: misconduct

- (1) In this section —
- misconduct*, in relation to a person (the *confider*) who makes a communication in confidence to another person, includes any of the following —
- (a) an offence committed by the confider;
 - (b) an act or omission on the part of the confider that renders the confider liable to a civil penalty;
 - (c) deceit, dishonesty, inappropriate partiality or a breach of trust on the part of the confider;
 - (d) the confider acting corruptly, or corruptly failing to act, in any capacity;
 - (e) the confider corruptly taking advantage of the confider's position to obtain a benefit for the confider or another person or to cause a detriment to another person;
 - (f) the confider engaging in conduct that adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of any person in any capacity;
 - (g) misuse, on the part of the confider, of information or material that the confider has acquired in any capacity, whether the misuse is to obtain a benefit for the confider or any other person or to cause a detriment to another person;
 - (h) conduct providing reasonable grounds for the termination of the confider's employment;
 - (i) conduct providing reasonable grounds for disciplining the confider in relation to unsatisfactory professional conduct or

- 1 professional misconduct, or the breach of a
2 professional standard, in relation to the
3 confider's profession, whether or not the
4 confider is a member of the body that
5 prescribed the standard.
- 6 (2) The protection provisions (PCR) do not prevent the
7 adducing of evidence of a communication made or the
8 contents of a document prepared in the furtherance of
9 misconduct by a person who makes a communication
10 in confidence to another person.
- 11 (3) For the purposes of this section, if the misconduct is a
12 fact in issue and there are reasonable grounds for
13 believing that —
- 14 (a) the misconduct occurred; and
15 (b) a communication was made or document
16 prepared in furtherance of the misconduct,
- 17 the court may find that the communication was so
18 made or document so prepared.

19 **20F. Ancillary orders**

- 20 Without limiting any action the court may take to limit
21 the possible harm, or extent of the harm, likely to be
22 caused by the disclosure of evidence of a protected
23 confidence or protected identity information, the court
24 may —
- 25 (a) order that all or part of the evidence be heard in
26 camera; and
- 27 (b) make such orders relating to the suppression of
28 publication of all or part of the evidence given
29 before the court as, in its opinion, are necessary
30 to protect the safety and welfare of the
31 protected confider and are in the interests of
32 justice.

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Protection of identity of journalists' informants

20G. Terms used

In this section and in sections 20H to 20M —
direction means a direction under section 20J(1);
identifying evidence has the meaning given in section 20I;
informant means a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium;
journalist means a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium;
national security has the meaning that it has in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Commonwealth) section 7;
news medium means a medium for the dissemination to the public or a section of the public of news and observations on news;
protection provisions (journalists) means this section and sections 20I to 20M.

20H. Application of protection provisions (journalists)

- (1) The protection provisions (journalists) do not apply in relation to a proceeding the hearing of which began before the commencement of those provisions.
- (2) The protection provisions (journalists) apply in relation to information given by an informant whether given before or after the commencement of those provisions.
- (3) The protection provisions (journalists) apply to a person acting judicially in any proceeding even if the law by which the person has authority to hear, receive,

1 and examine evidence provides that this Act does not
2 apply to the proceeding.

3 (4) The protection provisions (journalists) are not intended
4 to exclude or limit the operation of section 5 or the
5 power that a person acting judicially has under any
6 other law of the State to take any action if it is in the
7 interests of justice to do so.

8 **20I. Protection of identity of informants**

9 If a journalist has promised an informant not to
10 disclose the informant's identity, neither the journalist
11 nor a person for whom the journalist was working at
12 the time of the promise is compellable to give evidence
13 that would disclose the identity of the informant or
14 enable that identity to be ascertained (*identifying*
15 *evidence*).

16 **20J. Direction to give identifying evidence**

17 (1) Despite section 20I, a person acting judicially may
18 direct a person referred to in that section to give
19 identifying evidence.

20 (2) A person acting judicially may give a direction only if
21 satisfied that, having regard to the issues to be
22 determined in the proceeding, the public interest in the
23 disclosure of the identity of the informant outweighs —

24 (a) any likely adverse effect of the disclosure of the
25 identity on the informant or any other person;
26 and

27 (b) the public interest in the communication of
28 facts and opinions to the public by the news
29 media and, accordingly also, in the ability of
30 the news media to access sources of facts.

31 (3) Without limiting the matters that a person acting
32 judicially may have regard to for the purposes of this

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- 1 section, the person acting judicially must have regard
2 to the following matters —
- 3 (a) the probative value of the identifying evidence
4 in the proceeding;
 - 5 (b) the importance of the identifying evidence in
6 the proceeding;
 - 7 (c) the nature and gravity of the relevant offence,
8 cause of action or defence and the nature of the
9 subject matter of the proceeding;
 - 10 (d) the availability of any other evidence
11 concerning the matters to which the identifying
12 evidence relates;
 - 13 (e) the likely effect of the identifying evidence,
14 including the likelihood of harm, and the nature
15 and extent of harm that would be caused to the
16 informant or any other person;
 - 17 (f) the means, including any ancillary orders that
18 may be made under section 20M, available to
19 the person acting judicially to limit the harm or
20 extent of the harm that is likely to be caused if
21 the identifying evidence is given;
 - 22 (g) the likely effect of the identifying evidence in
23 relation to —
 - 24 (i) a prosecution that has commenced but
25 has not been finalised; or
 - 26 (ii) an investigation, of which the person
27 acting judicially is aware, into whether
28 or not an offence has been committed;
 - 29 (h) whether the substance of the identifying
30 evidence has already been disclosed by the
31 informant or any other person;
 - 32 (i) the risk to national security or to the security of
33 the State;

1 (j) whether or not there was misconduct, as
2 defined in section 20K(1), on the part of the
3 informant or the journalist in relation to
4 obtaining, using, giving or receiving
5 information.

6 (4) A person acting judicially must state the person's
7 reasons for giving or refusing to give a direction.

8 **20K. Effect of misconduct as to directions**

9 (1) In this section —
10 *misconduct*, in relation to an informant or a journalist,
11 includes any of the following —

- 12 (a) an offence committed by the informant or
13 journalist;
- 14 (b) an act or omission on the part of the informant
15 or journalist that renders him or her liable to a
16 civil penalty;
- 17 (c) deceit, dishonesty, inappropriate partiality or a
18 breach of trust on the part of the informant or
19 journalist;
- 20 (d) the informant or journalist acting corruptly, or
21 corruptly failing to act, in any capacity;
- 22 (e) the informant or journalist corruptly taking
23 advantage of his or her position to obtain a
24 benefit for himself, herself or another person or
25 to cause a detriment to another person;
- 26 (f) the informant or journalist engaging in conduct
27 that adversely affects, or could adversely affect,
28 directly or indirectly, the honest or impartial
29 performance of the functions of any person in
30 any capacity;
- 31 (g) misuse, on the part of the informant or
32 journalist, of information or material that he or

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- 1 she has acquired in any capacity, whether the
2 misuse is to obtain a benefit for himself, herself
3 or another person or to cause a detriment to
4 another person;
- 5 (h) conduct providing reasonable grounds for the
6 termination of the informant or journalist's
7 employment;
- 8 (i) conduct providing reasonable grounds for
9 disciplining the informant or journalist in
10 relation to unsatisfactory professional conduct
11 or professional misconduct, or the breach of a
12 professional standard, in relation to the
13 informant or journalist's profession, whether or
14 not he or she is a member of the body that
15 prescribed the standard.
- 16 (2) A person acting judicially who finds that there was
17 misconduct on the part of an informant or a journalist
18 in relation to obtaining, using, giving or receiving
19 information —
- 20 (a) may, but is not bound to, give a direction; and
21 (b) must have regard to the principles set out in
22 subsection (3) when deciding whether or not to
23 give a direction.
- 24 (3) The principles mentioned in subsection (2)(b) are as
25 follows —
- 26 (a) that generally a direction should be given if —
- 27 (i) the misconduct was the commission of
28 an offence under *The Criminal Code*
29 section 81 or a breach of a public sector
30 standard, code of conduct or code of
31 ethics, as those terms are defined in the
32 *Public Sector Management Act 1994*
33 section 3(1); and

- 1 (ii) the offence or breach concerned the
2 disclosure of information that was
3 public interest information as defined in
4 the *Public Interest Disclosure Act 2003*
5 section 3(1); and
- 6 (iii) the information could have been, but
7 was not, disclosed in accordance with
8 the *Public Interest Disclosure Act 2003*;
- 9 (b) that generally a direction should be given if the
10 information given to a journalist could have
11 been provided, in a way that did not constitute
12 misconduct, to another person to deal with the
13 concern;
- 14 (c) that generally a direction should be given if the
15 information given to a journalist could have
16 been obtained by the journalist under the
17 *Freedom of Information Act 1992* or by other
18 lawful means;
- 19 (d) that generally a direction should be given if the
20 misconduct involved a breach of privacy that
21 was not warranted in the circumstances, having
22 regard to the value to be attached to —
- 23 (i) the privacy of information regarding
24 private citizens generally; or
- 25 (ii) the privacy of information regarding
26 matters which may be commercial in
27 confidence; or
- 28 (iii) the principle of Cabinet confidentiality;
29 or
- 30 (iv) the principle of public interest
31 immunity;
- 32 (e) that generally a direction should be given if a
33 communication made to a journalist, if

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- 1 published, would give rise to a risk to national
2 security or to the security of the State;
- 3 (f) that it is otherwise in the public interest to give
4 or refuse to give a direction.
- 5 (4) For the purposes of this section, if the misconduct is a
6 fact in issue and there are reasonable grounds for
7 believing that there was misconduct on the part of the
8 informant or the journalist in relation to obtaining,
9 using, giving or receiving information, the person
10 acting judicially in the proceeding may so find.

11 **20L. Identifying informant with consent**

12 The protection provisions (journalists) do not prevent
13 the giving or adducing of identifying evidence with the
14 informant's consent.

15 **20M. Ancillary orders**

16 Without limiting any action the person acting judicially
17 may take to limit the possible harm, or extent of the
18 harm, likely to be caused by identifying evidence, the
19 person acting judicially may —

- 20 (a) order that all or part of the evidence be heard in
21 camera; and
- 22 (b) make such orders relating to the suppression of
23 publication of all or part of the evidence given
24 before the person acting judicially as, in the
25 opinion of the person acting judicially, are
26 necessary to protect the informant's safety and
27 welfare and are in the interests of justice.
28

1 **Part 3 — Amendments about further protections**
2 **under the *Public Interest Disclosure Act 2003***

3 **Division 1 — Preliminary**

4 **6. Act amended**

5 This Part amends the *Public Interest Disclosure Act 2003*.

6 **Division 2 — Amendments about injunctions**
7 **concerning reprisals**

8 **7. Section 15A inserted**

9 After section 14 insert:

10
11 **15A. Injunction or order**

12 (1) A person who believes that detrimental action has been
13 taken or may be taken against him or her in reprisal for
14 a disclosure of public interest information under this
15 Act may apply to the Supreme Court for an order or
16 injunction under this section.

17 (2) If the Supreme Court, on an application under
18 subsection (1), is satisfied that a person has taken or
19 intends to take detrimental action against the applicant
20 in reprisal for a disclosure of public interest
21 information under this Act, the Court may —

22 (a) order the person who took the detrimental
23 action to remedy that action; or

24 (b) grant an injunction in any terms the Court
25 considers appropriate.

26 (3) The Supreme Court, pending the final determination of
27 an application under subsection (1), may —

28 (a) make an interim order in the terms of
29 subsection (2)(a); or

- 1 (b) grant an interim injunction.
2

3 **Division 3 — Amendments about relocation**

4 **8. Section 15B inserted**

5 Before section 15 insert:
6

7 **15B. Relocation of public service employee**

- 8 (1) In this section —
9 *employing authority*, in relation to a public service
10 employee, means that person's employing authority
11 under the *Public Sector Management Act 1994*
12 section 5;
13 *public service employee* means —
14 (a) a public service officer; or
15 (b) an employee employed in an organisation;
16 *organisation* means an organisation as defined in the
17 *Public Sector Management Act 1994* section 3(1).
18 (2) A public service employee may apply in writing to his
19 or her employing authority for relocation on the
20 grounds that —
21 (a) detrimental action has been taken or may be
22 taken against the employee in reprisal for a
23 disclosure of public interest information under
24 this Act; and
25 (b) the only practical means of removing or
26 substantially removing the danger of a reprisal
27 is to relocate the employee.
28 (3) If the employing authority is satisfied that the grounds
29 are established it must, as far as practicable, make
30 arrangements to relocate the employee away from the

1 employee's existing work location whether within the
2 employee's current department or organisation or to
3 another department or organisation.

4 (4) Subsection (3) does not authorise the relocation of a
5 public service employee unless the employee consents
6 to the specific arrangements proposed by the
7 employing authority.
8

9 **Division 4 — Amendments about anonymous disclosure**

10 **9. Section 5 amended**

11 After section 5(5) insert:
12

13 (6A) A person may make a disclosure of public interest
14 information anonymously.
15

16 **10. Section 8 amended**

17 After section 8(3) insert:
18

19 (4) Subsection (3) does not apply in respect of a person
20 who made an anonymous disclosure.
21

22 **11. Section 10 amended**

23 After section 10(4) insert:
24

25 (5) Subsections (1), (2), (3) and (4) do not apply in respect
26 of a person who made an anonymous disclosure.
27

1 **12. Section 12 amended**

2 After section 12(4) insert:

3

4 (5A) Subsection (4)(b) does not apply in respect of a person
5 who made an anonymous disclosure.

6

7 **13. Section 16 amended**

8 After section 16(2) insert:

9

10 (3A) Subsection (2) does not apply in respect of a person
11 who made an anonymous disclosure.

12

13 **14. Section 17 amended**

14 After section 17(1) insert:

15

16 (2A) Subsection (1)(a) does not apply in respect of a person
17 who made an anonymous disclosure.

18

19 **Division 5 — Amendments about disclosure to journalists**

20 **15. Section 7A inserted**

21 At the end of Part 2 Division 1 insert:

22

23 **7A. Disclosure to journalist**

24 (1) In this section —

25 *journalist* means a person engaged in the profession or
26 occupation of journalism in connection with the
27 publication of information in a medium for the

1 dissemination to the public or a section of the public of
2 news and observations on news.

3 (2) A person may make a disclosure to a journalist of
4 substantially the same information that was the subject
5 of a disclosure of public interest information that the
6 person has already made under this Act if the proper
7 authority to which the disclosure was made, or the
8 person to whom a matter raised by the disclosure was
9 referred under section 9(1)(b) —

- 10 (a) has refused to investigate, or has discontinued
11 the investigation of, a matter raised by the
12 disclosure; or
13 (b) has not completed an investigation of a matter
14 raised by the disclosure within the period
15 ending 6 months after the disclosure was made;
16 or
17 (c) has completed an investigation of a matter
18 raised by the disclosure but has not
19 recommended the taking of action in respect of
20 the matter; or
21 (d) has not complied with section 10(1) or (4), if
22 applicable, in relation to the disclosure.
23

24 **16. Section 16 amended**

25 (1) After section 16(1)(c) insert:

- 26
27 (d) the disclosure is made in accordance with an
28 order of a court or any other person or body
29 having authority to hear, receive and examine
30 evidence; or
31

Evidence and Public Interest Disclosure Legislation Amendment Bill 2011

Part 3 Amendments about further protections under the Public Interest Disclosure Act 2003

Division 5 Amendments about disclosure to journalists

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1 (2) After section 16(3)(d) insert:
2

3 (e) the disclosure is made in accordance with an
4 order of a court or any other person or body
5 having authority to hear, receive and examine
6 evidence; or
7

8 **17. Section 18A inserted**

9 At the end of Part 3 insert:
10

11 **18A. Protections as to disclosure to journalist**

12 A person who makes a disclosure to a journalist in
13 accordance with section 7A(2) is, for the purposes of
14 this Part, to be taken to be a person who makes a
15 disclosure of public interest information.
16

=====