

Passed by both Houses



New South Wales

Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill 1999

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I certify that this PUBLIC BILL, which originated in the LEGISLATIVE COUNCIL, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.

Legislative Council

1999

Clerk of the Parliaments



Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill 1999

Act No , 1999

An Act to amend the *Criminal Procedure Act 1986* with respect to preservation of the confidentiality of counselling communications made by, to or in relation to victims and alleged victims of certain sexual assault offences; to make related amendments to the *Evidence Act 1995* and to the *Victims Compensation Act 1996*; and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 1999*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Criminal Procedure Act 1986 No 209

The *Criminal Procedure Act 1986* is amended as set out in Schedule 1.

4 Amendment of other Acts

The Acts specified in Schedule 2 are amended as set out in that Schedule.

Schedule 1 Amendment of Criminal Procedure Act 1986

(Clause 3)

Part 13

Insert after Part 12:

Part 13 Sexual assault communications privilege

57 Interpretation

(1) Definitions

In this Part:

court means:

- (a) the Supreme Court, or
- (b) the Court of Criminal Appeal, or
- (c) the District Court, or
- (d) a Local Court, or
- (e) any other court which, or person who, exercises criminal jurisdiction.

criminal proceedings means:

- (a) proceedings relating to the trial or sentencing of a person for an offence (whether or not a sexual assault offence), other than preliminary criminal proceedings, or
- (b) proceedings relating to an order under Part 15A (Apprehended violence) of the *Crimes Act 1900*.

harm includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).

preliminary criminal proceedings means any of the following:

- (a) committal proceedings,
- (b) proceedings relating to bail (including proceedings during the trial or sentencing of a person),

whether or not in relation to a sexual assault offence.

principal protected confider means the victim or alleged victim of a sexual assault offence by, to or about whom a protected confidence is made.

protected confidence—see section 58.

protected confider, in relation to a protected confidence, means:

- (a) the principal protected confider, or
- (b) any other person who made the protected confidence.

sexual assault offence means:

- (a) an offence referred to in section 578 of the *Crimes Act 1900*, or
- (b) any other offence prescribed by the regulations for the purposes of this definition.

(2) **Document recording a protected confidence**

In this Part, a reference to a document recording a protected confidence:

- (a) is a reference to any part of the document that records a protected confidence or any report, observation, opinion, advice, recommendation or other matter that relates to the protected confidence made by a protected confider, and
- (b) includes a reference to any copy, reproduction or duplicate of that part of the document.

(3) **Electronic documents**

For the purposes of this Part, if a document recording a protected confidence is stored electronically and a written document recording the protected confidence could be created by use of equipment that is usually available for retrieving or collating such stored information, the document stored electronically is to be dealt with as if it were a written document so created.

58 What is a protected confidence?

- (1) In this Part:

protected confidence means a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence.

- (2) A counselling communication is a protected confidence for the purposes of this Part even if it:
- (a) was made before the acts constituting the relevant sexual assault offence occurred or are alleged to have occurred, or
 - (b) was not made in connection with a sexual assault offence or alleged sexual assault offence or any condition arising from a sexual assault offence or alleged sexual assault offence.
- (3) For the purposes of this section, a communication may be made in confidence even if it is made in the presence of a third party if the third party is present to facilitate communication or to otherwise further the counselling process.
- (4) In this section:

counselling communication means a communication:

- (a) made in confidence by a person (the ***counselled person***) to another person (the ***counsellor***) in the course of a relationship in which the counsellor is counselling, giving therapy to or treating the counselled person for any emotional or psychological condition, or
- (b) made in confidence to or about the counselled person by the counsellor in the course of that relationship, or
- (c) made in confidence about the counselled person by a counsellor or a parent, carer or other supportive person who is present to facilitate communication between the counselled person and the counsellor or to otherwise further the counselling process, or
- (d) made in confidence by or to the counsellor by another counsellor or by a person who is or has counselled or otherwise treated the counselled person for any emotional or psychological condition of the person.

59 Evidence of sexual assault communications not to be required to be produced, or adduced in or in connection with, preliminary criminal proceedings

- (1) A person cannot be required (whether by subpoena or any other procedure) to produce a document recording a protected confidence in, or in connection with, any preliminary criminal proceedings.
- (2) Evidence is not to be adduced in any preliminary criminal proceedings if it would disclose:
 - (a) a protected confidence, or
 - (b) the contents of a document recording a protected confidence.

60 Evidence of sexual assault communications may be required to be produced in, or in connection with, criminal proceedings, or adduced, with leave

- (1) A person who objects to production of a document recording a protected confidence on the ground that it is privileged under this Part cannot be required (whether by subpoena or any other procedure) to produce the document for inspection by a party in, or in connection with, any criminal proceedings unless:
 - (a) the document is first produced for inspection by the court for the purposes of ruling on the objection, and
 - (b) the court is satisfied (whether on inspection of the document or at some later stage in the proceedings) that:
 - (i) the contents of the document will, either by themselves or having regard to other evidence adduced or to be adduced by the party seeking production of the document, have substantial probative value, and
 - (ii) other evidence of the protected confidence or the contents of the document is not available, and
 - (iii) the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm is substantially outweighed by the public interest in allowing inspection of the document.

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- (2) Without limiting the matters that the court may take into account for the purposes of subsection (1) (b) (iii), the court must take into account the likelihood, and the nature or extent, of harm that would be caused to the principal protected confider if the document is produced for inspection.
- (3) Evidence is not to be adduced in any criminal proceedings if it would disclose:
- (a) a protected confidence, or
 - (b) the contents of a document recording a protected confidence,
- unless the court gives leave to adduce the evidence.
- (4) The court must not give leave to adduce evidence that discloses a protected confidence or the contents of a document recording a protected confidence unless the court is satisfied that:
- (a) the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have substantial probative value, and
 - (b) other evidence of the protected confidence or the contents of the document recording the protected confidence is not available, and
 - (c) the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm is substantially outweighed by the public interest in admitting into evidence information or the contents of a document of substantial probative value.
- (5) Without limiting the matters that the court may take into account for the purposes of subsection (4) (c), the court must take into account the likelihood, and the nature or extent, of harm that would be caused to the principal protected confider if the evidence that discloses the protected confidence or the contents of the document recording the protected confidence is adduced.
- (6) The court must state its reasons for requiring production or giving or refusing to give leave under this section.

- (7) A protected confider who is not a party to proceedings may, with the leave of the court, appear in the proceedings.
- (8) If there is a jury, the court is to hear and determine any objection or application referred to in subsection (1) or (3) in the absence of the jury.

61 Notice required before evidence is produced for inspection or adduced

- (1) A document recording a protected confidence is not to be required to be produced for inspection by a party in, or in connection with, any criminal proceedings unless the party seeking production of the document has given reasonable notice in writing that production has been sought to:
 - (a) each other party, and
 - (b) if the protected confider is not a party—the protected confider.
- (2) Evidence disclosing a protected confidence or the contents of a document recording a protected confidence is not to be adduced in any criminal proceedings unless the party adducing the evidence has given reasonable notice in writing of the party's intention to adduce the evidence to:
 - (a) each other party, and
 - (b) if the protected confider is not a party—the protected confider.
- (3) Notice given under this section to a protected confider who is not a party must:
 - (a) advise the protected confider that he or she may, with the leave of the court, appear in the proceedings concerned, and
 - (b) in the case of notice given under subsection (1) (b)—advise the protected confider of the day on which the document is (by the subpoena or other procedure concerned) to be produced, and
 - (c) in the case of notice given under subsection (2) (b)—advise the protected confider of the day (if known) when the proceedings are to be heard.

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- (4) It is sufficient compliance with a requirement under subsection (1) (b) or (2) (b) to give notice to a protected confider who is not a party and who is the principal protected confider if the party gives reasonable notice that the party has sought production, or of the party's intention to adduce the evidence, to the informant and the informant gives, or uses the informant's best endeavours to give, a copy of the notice to the principal protected confider within a reasonable time after the informant receives the notice.
- (5) Despite subsections (1) and (2), a document recording a protected confidence may, with the leave of the court, be required to be produced for inspection, or evidence disclosing a protected confidence or the contents of a document recording a protected confidence adduced, although notice has not been given to a protected confider who is not a party (not being the principal protected confider) as required by those subsections.
- (6) In this section:
informant, in relation to criminal proceedings with respect to an offence, means the police officer who preferred the charge or laid the information for the offence.

62 Effect of consent

- (1) This Part does not prevent the production of any document recording a protected confidence or the adducing of evidence disclosing a protected confidence or the contents of a document recording a protected confidence, in, or in connection with, any proceedings, if the principal protected confider to whom the proceedings relate has consented to the production of the document or adducing of the evidence.
- (2) Consent is not effective for the purposes of this section unless:
- (a) the consent is given in writing, and
 - (b) the consent expressly relates to the production of a document or adducing of evidence that is privileged under this Part or would be so privileged except for a limitation or restriction imposed by this Part.

63 Loss of sexual assault communications privilege: misconduct

- (1) This Part does not prevent the adducing of evidence of a communication made, or the production or adducing of a document prepared, in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.
- (2) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:
 - (a) the fraud, offence or act was committed, and
 - (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,the court may find that the communication was so made or document so prepared.

64 Ancillary orders

- (1) Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of, or the contents of a document recording, a protected confidence, the court may:
 - (a) order that all or part of the evidence be heard or document produced in camera, and
 - (b) make such orders relating to the production and inspection of the document as, in the opinion of the court, are necessary to protect the safety and welfare of any protected confider, and
 - (c) make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of any protected confider, and
 - (d) make such orders relating to disclosure of protected identity information as, in the opinion of the court, are necessary to protect the safety and welfare of any protected confider.

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- (2) Nothing in this section limits the power of a court to make an order under section 577A, 578 or 578A of the *Crimes Act 1900*.

- (3) In this section:

protected identity information means information about, or enabling a person to ascertain, the private, business or official address, email address or telephone number of a protected confider.

65 Court to inform of rights to make applications and objections

If it appears to a court that a witness or a party may have grounds for making an application or objection under a provision of this Part, the court must satisfy itself (if there is a jury, in the absence of the jury) that the witness or party is aware of the effect of that provision.

66 Court may inspect documents

If a question arises under this Part relating to a document, a court may order that the document be produced to it and may inspect the document for the purpose of determining the question.

67 Inadmissibility of evidence that must not be adduced or given

Evidence that, because of this Part, must not be adduced or given in proceedings is not admissible in the proceedings.

68 Application of Part

- (1) This Part does not apply in relation to criminal proceedings the hearing of which began before the commencement of this Part. Division 1B of Part 3.10 of the *Evidence Act 1995*, as in force immediately before the commencement of this subsection, continues to apply in relation to such proceedings.
- (2) This Part applies, subject to subsection (1), in relation to a requirement (whether by subpoena or other procedure) to produce a document on or after the commencement of this subsection even if the requirement was issued before that commencement.

- (3) This Part applies, subject to subsection (1), in respect of a protected confidence whether made before or after the commencement of this subsection.
- (4) The court may, subject to subsection (1), give leave under this Part in respect of a protected confidence whether or not the confidence is privileged under Part 3.10 of the *Evidence Act 1995* or would be so privileged except for a limitation or restriction imposed by that Part.

69 Application of common law

- (1) This Part does not affect the operation of a principle or rule of the common law in relation to evidence in criminal proceedings, except so far as this Part provides otherwise expressly or by necessary intendment.
- (2) Without limiting subsection (1), this Part does not affect the operation of such a principle or rule so far as it relates to the inspection of a document required to be produced in, or in connection with, criminal proceedings.

Schedule 2 Amendment of other Acts

(Clause 4)

2.1 Evidence Act 1995 No 25

[1] Section 126F Application of Division

Insert “or Part 13 of the *Criminal Procedure Act 1986*” after “Division 1B” in section 126F (3).

[2] Part 3.10, Division 1B

Omit the Division. Insert instead:

Division 1B Sexual assault communications privilege

Note. The Commonwealth Act does not include this Division.

126G Definitions

In this Division:

criminal proceeding has the same meaning as criminal proceedings has in Part 13 of the *Criminal Procedure Act 1986*.

principal protected confider has the same meaning as it has in Part 13 of the *Criminal Procedure Act 1986*.

protected confidence has the same meaning as it has in Part 13 of the *Criminal Procedure Act 1986*.

sexual assault offence has the same meaning as it has in Part 13 of the *Criminal Procedure Act 1986*.

126H Exclusion of evidence of protected sexual assault communications

- (1) This section applies only in a civil proceeding in which substantially the same acts are in issue as the acts that were in issue in relation to a criminal proceeding.

- (2) If evidence was found to be privileged in a criminal proceeding under Part 13 of the *Criminal Procedure Act 1986*, the evidence may not be adduced in a civil proceeding to which this section applies.

126I Application of Division

- (1) This Division does not apply in relation to a civil proceeding the hearing of which began before the commencement of this section.
- (2) This Division applies, subject to subsection (1), in respect of a protected confidence whether made before or after the commencement of this section.

2.2 Victims Compensation Act 1996 No 115

[1] Section 84 Inadmissibility of certain evidence in subsequent criminal proceedings

Insert at the end of the section:

- (2) A person cannot be required (whether by subpoena or any other procedure) to produce any application, document or transcript of evidence that is not admissible in evidence in criminal proceedings under subsection (1) in, or in connection with, any criminal proceeding.

[2] Schedule 3 Savings, transitional and other provisions

Insert after clause 3:

3A Inadmissibility of certain evidence in subsequent criminal proceedings

Despite clause 3 (1), section 25 of the repealed Act applies in relation to evidence given in connection with an application for compensation referred to in that subclause as if the following subsection were inserted at the end of the section:

“(2) A person cannot be required (whether by subpoena or any other procedure) to produce any application, document or transcript of evidence that is not admissible in evidence in criminal proceedings under subsection (1) in, or in connection with, any criminal proceeding.”