

Exclusion of confidential communications

Division 2A of the *Evidence (Miscellaneous Provisions) Act 1958* deals with confidential communications.

These provisions were introduced by the *Evidence (Confidential Communications) Act 1998* to protect the records of therapeutic counselling sessions made by alleged victims of sexual offences. Other Australian jurisdictions have laws with a similar aim, but only the New South Wales scheme is directly comparable to the Victorian provisions.¹

Confidential communications are defined as:

a communication, whether oral or written, made in confidence by a person against whom a sexual offence has been, or is alleged to have been committed to a registered medical practitioner or counsellor in the course of the relationship of medical practitioner and patient or counsellor and client, as the case requires, whether before or after the acts constituting the offence occurred or are alleged to have occurred.²

Sexual offence is defined as “an offence to which clause 1 of Schedule 1 to the *Sentencing Act 1991* applies”.³

A communication may be made in confidence even if it is made in the presence of a third party, if the third party’s presence is necessary to facilitate communication or further the treatment or counselling process.⁴ This allows a communication to remain confidential even if a person such as an interpreter was present.

Under section 32C:

- (a) a party cannot seek to compel another party to produce a document containing a confidential communication;
- (b) a document is not to be produced if it would disclose a confidential communication;
- (c) evidence is not to be adduced if it would disclose –
 - (i) a confidential communication; or
 - (ii) the contents of a document recording a confidential communication–

¹ See *Criminal Procedure Act 1986* (NSW) ss 295–306 and compare *Evidence Act 1929* (SA) s 67F; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 58–63; *Evidence Act 1906* (WA) s 19C.

² *Evidence (Miscellaneous Provisions) Act 1958* s 32B(1). Section 32B(1) of the Act also defines “counsellor”, “harm”, “protected confider”, “protected evidence”, “protected identity information”, and “registered medical practitioner”.

³ *Evidence (Miscellaneous Provisions) Act 1958* s 32B(1).

⁴ *Evidence (Miscellaneous Provisions) Act 1958* s 32B(2).

unless the court grants leave to compel the production of the document or to produce it or to adduce the evidence, and the party seeking to have the document produced or to produce it or to adduce the evidence has given notice of their intention in accordance with sub-section (2).

While it has not been conclusively determined, the weight of authority is leaning to the view that leave is required to adduce confidential communications even on a voir dire. This would seem to limit the ability of a party to seek a voir dire to test whether the court should grant leave to adduce the documents in the substantive hearing.⁵

Section 32C also provides that:

- The party must give at least 14 days' notice when seeking leave;
- The party must give notice to each other party to the proceeding, the informant (if it is a criminal proceeding) and the medical practitioner or counsellor (if that person is not a party);
- A court may fix a shorter period for giving notice, or may waive the requirement of notice;
- The informant must give a copy of the notice to the person who made the confidential communication ('the protected confider');
- The protected confider and the medical practitioner or counsellor may, with leave, appear in the proceeding and make submissions;
- Evidence that is not to be compelled, produced or adduced is not admissible.⁶

Test for leave to compel, produce or adduce a confidential communication

Section 32D of the *Evidence (Miscellaneous Provisions) Act 1958* sets out a negative test for when the court may grant leave to disclose a confidential communication. The court must not grant leave unless satisfied on the balance of probabilities that:

- (a) the evidence will, itself or with other evidence, have substantial probative value to a fact in issue; and
- (b) other evidence of similar or greater probative value which is not a protected communication is not available; and
- (c) the public interest in preserving confidentiality is substantially outweighed by the public interest in admitting evidence of substantial probative value.⁷

In applying this test, a court must have regard to the following guiding principles:

It is the intention of Parliament that in interpreting and applying this Division in any legal proceeding that relates (wholly or partly) to a charge for a sexual offence, courts are to have regard to the fact that –

- (a) there is a high incidence of sexual violence within society; and

⁵ See *Baker v R* [2015] VSCA 323 [51]; *SLS v R* (2014) 42 VR 64 [224]–[247].

⁶ *Evidence (Miscellaneous Provisions) Act 1958* ss 32C(2) – (5), (7).

⁷ *Evidence (Miscellaneous Provisions) Act 1958* s 32D.

- (b) sexual offences are significantly under-reported; and
- (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and
- (d) offenders are commonly known to their victims; and
- (e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.⁸

These principles give rise to real difficulties in seeking to apply principles of waiver, developed in relation to legal professional privilege, to the privilege granted under Division 2A.⁹

In deciding whether to grant leave, the court may require a person to provide the document to the court on a confidential basis. The court may then inspect the document, but must not provide it to the parties or disclose its contents to the applicant for leave.¹⁰

This process can help judges and magistrates decide whether the communication has substantial probative value to a fact in issue. However, it is a question for the judge or magistrate to decide whether it is necessary or appropriate to exercise this power. This discretion must be exercised in each case based on the facts and circumstances.¹¹

The test puts the onus on the applicant to demonstrate that leave should be granted and imposes a more onerous threshold than merely demonstrating that the subpoena is not a 'fishing expedition'. Instead, the applicant must show that the evidence 'will' have 'substantial probative value to a fact in issue'. This is a high hurdle, as the test is not met by speculation about the potential probative value of the evidence depending on the complainant's other possible answers in cross-examination.¹²

The test is more onerous than the 'legitimate forensic purpose' test that applies generally to subpoenaed material. The test must also be applied on a document-by-document basis (or class-by-class basis), rather than the court adopting a global approach on the premise that leave in relation to all documents is necessary to make the relevant documents comprehensible.¹³

In assessing whether evidence has substantial probative value, the court must consider whether the documents would be ultimately admissible. Other exclusionary rules, such as the prohibition on sexual history evidence, may apply to exclude certain confidential communications. Courts may therefore need to resolve questions of admissibility before it can determine whether the evidence will have substantial probative value. Where relevant, this consideration applies at the subpoena and production stages, as well as when seeking leave to use the material.¹⁴

⁸ *Evidence (Miscellaneous Provisions) Act 1958* s 32AB.

⁹ *Skarbek v The Society of Jesus in Victoria* [2016] VSC 622 [35].

¹⁰ *Evidence (Miscellaneous Provisions) Act 1958* s 32C(6).

¹¹ *Todd v R* [2016] VSCA 29 [36]–[37].

¹² *Baker v R* [2015] VSCA 323 [45]–[52].

¹³ *PPC v Williams* [2013] NSWCCA 286 [67] – [69].

¹⁴ *PPC v Williams* [2013] NSWCCA 286 [67], [88] – [96]; *KS v Veitch (No 2)* (2012) 84 NSWLR 172 [37]; *NAR v PPC1* [2013] NSWCCA 25 [29].

While section 32D requires a separate grant of leave at each stage (subpoena, production and use), the fact that a court has previously granted leave is significant. A later judge or magistrate should not refuse leave unless there is some change in circumstances which means that the basis for leave no longer exists.¹⁵

If the complainant's credibility is inextricably linked with a fact in issue, the court will likely treat the complainant's credibility as a fact in issue.¹⁶ In the context of sexual offences, the distinction between evidence relevant to credibility (truthfulness) and reliability (accuracy) can be difficult to draw.¹⁷

However, evidence that the complainant claims to have previously been the victim of a sexual offence is unlikely, without more, to have significant probative value. Assuming that the accuracy of the earlier claim cannot be tested, it will be difficult for evidence that the victim claims to have previously been the victim of a sexual assault to have significant probative value.¹⁸

The third limb of the test under section 32D(2) requires the court to determine whether:

the public interest in preserving confidentiality is substantially outweighed by the public interest in admitting evidence of substantial probative value.¹⁹

There are two key components to weigh when assessing the public interest in preserving confidentiality. First, the court must consider the public interest in maintaining confidences generally. Second, the court must also consider the possible harm that would be caused to the confider in question.²⁰

The three limbs of the tests in section 32D(2) all apply at each stage of proceedings (subpoena, production and use). It is an error to consider the third limb only at the stage of use.²¹

In balancing the competing public interests between preserving confidentiality and admitting evidence of substantial probative value the court must take into account the following matters:

- (a) the likelihood, and the nature or extent, of harm that would be caused to the protected confider if the protected evidence is produced or adduced;
- (b) the extent to which the protected evidence is necessary to allow the accused to make a full defence;
- (c) the need to encourage victims of sexual offences to seek counselling and the extent to which victims may be discouraged to do so, or the extent to which the effectiveness of counselling may be diminished, if the protected evidence were produced or adduced;

¹⁵ See *SLS v R* (2014) 42 VR 64 [233].

¹⁶ *Baker v R* [2015] VSCA 323 [50]; *SLS v R* (2014) 42 VR 64 [240]–[242]; *KS v Veitch (No 2)* (2012) 84 NSWLR 172 [37]; *PPC v Williams* [2013] NSWCCA 286 [33]; *LAL v R* [2011] VSCA 111 [79].

¹⁷ *Nicholls v R* (2005) 219 CLR 196 [51]–[52].

¹⁸ *LAL v R* [2011] VSCA 111 [84]; *Baker v R* [2015] VSCA 323 [50].

¹⁹ *Evidence (Miscellaneous Provisions) Act 1958* s 32D(2).

²⁰ *KS v Veitch (No 2)* (2012) 84 NSWLR 172 [34].

²¹ *PPC v Williams* [2013] NSWCCA 286 [76].

- (d) whether the party seeking to compel the production of or to produce or adduce the protected evidence is doing so on the basis of a discriminatory belief or bias;
- (e) whether the protected confider objects to the disclosure of the protected evidence;
- (f) the nature and extent of the reasonable expectation of confidentiality and the potential prejudice to the privacy of any person.²²

The court must state its reasons for granting or refusing leave.²³

Limitations on privilege

Section 32E of the *Evidence (Miscellaneous Provisions) Act 1958* deals with limitations on the privilege against adducing evidence disclosing a confidential communication.

Section 32E of the Act provides:

- (1) This Division does not prevent the production or adducing of evidence –
 - (a) with the consent of the protected confider or, if he or she is under 14 years of age, with the consent of any person whom the court regards as being an appropriate person to give that consent; or
 - (b) of information acquired by a registered medical practitioner by physical examination (including communications made during the examination) of the protected confider in relation to the commission or alleged commission of the sexual offence; or
 - (c) of a communication made, or the contents of a document prepared, for the purpose of a legal proceeding arising from the commission or alleged commission of the sexual offence;
- (2) If consent to the adducing of evidence is not given under sub-section (1)(a), that fact must not be referred to in the presence of the jury, if any.

Ancillary orders available on a granting of leave

Section 32F of the *Evidence (Miscellaneous Provisions) Act 1958* deals with the ancillary orders available when a court grants leave to allow evidence disclosing confidential communications to be adduced in a criminal proceeding.

Section 32F of the Act provides:

Without limiting any action that the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of protected evidence, the court may –

- (a) order that all or part of the evidence be heard in camera; or
- (b) 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

²² *Evidence (Miscellaneous Provisions) Act 1958* s 32D(3).

²³ *Evidence (Miscellaneous Provisions) Act 1958* s 32D(4).

the safety or welfare of the protected confider or the registered medical practitioner or counsellor, as the case requires; or

- (c) make such orders relating to disclosure of protected identity information as, in the opinion of the court, are necessary to protect the safety or welfare of the protected confider or the safety of the registered medical practitioner or counsellor, as the case requires.

Division 2A and other rules of evidence and procedure

The confidential communications provisions do not affect the operation of these other legislative provisions:

- Section 28 of the *Evidence (Miscellaneous Provisions) Act 1958* (Confessions to doctors);
- Sections 41, 103 and 127 of the *Evidence Act 2008* (Improper questions, cross-examination on credibility and religious confessions);
- Division 1A of Part 6 of the *Sentencing Act 1991* (Victim impact statements); and
- Part 8.2 of the *Criminal Procedure Act 2009* (Various provisions regarding witnesses, many of which apply specifically to sexual offence cases).²⁴

²⁴ *Evidence (Miscellaneous Provisions) Act 1958* s 32G.