



Exclusion of confidential communications and protected health information

Division 2A of the *Evidence (Miscellaneous Provisions) Act 1958* (“the Act”) deals with confidential communications and protected health information.

These provisions were first 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

The operation of Division 2A was expanded in 2023 by the commencement of Part 6 of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* to also cover protected health information, and to create a process which guarantees an opportunity for complainants to make submissions about the protected material.

Within this document, “protected material” is used to refer to either a confidential communication or protected health information, and “responsible person” is used to refer to the person who collected or recorded the protected material or, if the protected health information is held by an organisation, that organisation.

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

Courts have noted that the width of this definition presents practical difficulties, as a literal interpretation would cover all confidential communications by any person who has, or is alleged to have been, the victim of a sexual offence. Division 2A would then apply regardless of whether the protected person’s status as a victim or alleged victim of a sexual offence is known to the person seeking disclosure of the communication, and regardless of whether the communication relates to treatment for that alleged offence. To overcome these practical difficulties, courts have limited the operation of the definition to cases where the communication relates to the subject matter of the alleged sexual offence and there is a relationship between the current proceeding and that alleged sexual offence.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.

Protected health information is a composite phrase. It is “health information”, within the meaning of the *Health Records Act 2001* (Vic) which has the following characteristics:

- the proceedings are criminal proceedings that relate (wholly or partly) to a charge for a sexual offence
- the health information is about a person against whom that sexual offence is alleged to have been committed or any other sexual offence has been committed or is alleged to have been committed, and
- the person who recorded or collected the information (or if the information is an opinion, formed that opinion) did so in a professional capacity.⁵

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 “applicant for leave”, “civil proceeding”, “confidential statement”, “counsellor”, “harm”, “held”, “protected evidence”, “protected identity information”, “protected person”, and “registered medical practitioner”.

3 *Staker v Kemp* [2018] VSC 367, [24]-[26], [30]; *R v Lyons* [2018] VSC 256, [42]

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

5 *Ibid* s 32BA(1).



Sexual offence is defined as “an offence to which clause 1 of Schedule 1 to the *Sentencing Act 1991* applies”.⁶

Section 32C is the principal operative provision in Division 2A. It provides that:

- a party cannot seek to compel another party to produce protected material;⁷
- a document is not to be produced if it contains protected material; and
- evidence is not to be adduced if it would disclose protected material, or the contents of a document recording protected material

unless the court grants leave to compel, produce or adduce the evidence (as the case may be) and the party has complied with the relevant notice requirements.

If the court does not give leave, then the protected material is not admissible in the proceeding,⁸ and the refusal of leave must not be referred to in the presence of the jury, if any.⁹

While it has not been conclusively determined, the weight of authority is leaning to the view that leave is required to adduce protected material 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.¹⁰

Notice requirements and rights to make submissions

The Act sets out different notice rules for civil and criminal proceedings.

In a civil proceeding, the applicant for leave must give at least 14 days notice to each other party and the responsible person. The court may fix a shorter period than 14 days, and may waive the requirement for notice.¹¹ On the hearing of the application, the protected person and the responsible person may only make submissions with leave of the court.¹²

In a criminal proceeding, the applicant must notify each other party, the informant and whichever responsible person the applicant considers appropriate. Again, notice must be given at least 14 days before the relevant hearing, a court may fix a shorter period than 14 days and may waive the requirement for notice to the responsible person.¹³

Once the applicant gives notice, the prosecuting party must notify the protected person by giving a notice in the form prescribed by the rules of Court, which must contain the following information:

- (a) a statement that the protected person may appear in the proceeding, make submissions on the application and give a confidential statement; and
- (b) an explanation of how section 32CE(3) and (4) apply to a confidential statement; and
- (c) a statement that the protected person may wish to consider whether to obtain legal advice in relation to the application; and
- (d) information about the availability of legal advice in relation to the application.¹⁴

6 Ibid s 32B(1).

7 ‘protected material’ refers to confidential communications in civil proceedings, and confidential communications or protected health information in criminal proceedings, Ibid s 32C(1AA).

8 Ibid s 32C(7).

9 Ibid s 32D(5).

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

11 *Evidence (Miscellaneous Provisions) Act 1958* s 32CA.

12 Ibid s 32CB.

13 Ibid s 32CC.

14 Ibid s 32CD(4).



The court may waive the requirement to notify the protected person if satisfied that:

- the prosecuting party has ensured all reasonable steps have been taken to locate the protected person, without success
- the protected person has consented in writing to not being notified, or
- the protected person has previously been notified about the same information in the same proceeding.¹⁵

On the hearing of the application, the protected person may appear and make submissions. The protected person may also give the court a “confidential statement”, which is an affidavit describing the harm that is likely to be caused to the protected person if the application is granted. A court must not make this confidential statement available or disclose its contents to anyone except the protected person or their legal representative unless the court considers it is in the interests of justice to do so.¹⁶

The responsible person may only make submissions about the application with leave of the court.¹⁷

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 concerning the matters to which the protected evidence relates is not available; and
- (c) the public interest in preserving the confidentiality of confidential communications and protected health information and protecting a protected person from harm is substantially outweighed by the public interest in admitting evidence of substantial probative value.¹⁸

In a criminal proceeding, there is an additional requirement that the court must not give leave unless satisfied that:

- (a) the protected person—
 - (i) is aware of the application for leave; and
 - (ii) has had a reasonable opportunity to consider obtaining legal advice about the application; or
- (b) the prosecuting party has ensured that all reasonable steps to locate the protected person were taken, but the protected person has not been located; or
- (c) the protected person has consented in writing to not being notified about an application for leave under section 32C(1); or
- (d) the protected person has already been given notice under section 32CD—
 - (i) in respect of the same confidential communication or protected health information as that to which the application relates; and
 - (ii) in the same proceeding as that in which the application is made.¹⁹

¹⁵ Ibid s 32CD(5).

¹⁶ Ibid s 32CE(1)-(4).

¹⁷ Ibid s 32CE(5)-(6).

¹⁸ Ibid s 32D.

¹⁹ Ibid s 32D(1A).



In applying the test for leave, 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
- (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.²⁰

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.²¹ While s 32E(1)(a) provides that the Division does not apply to evidence disclosed with the consent of the protected person, the principles of implied consent developed in the context of legal professional privilege do not apply to confidential communications. Instead, the relevance of conduct inconsistent with maintaining the privilege is accommodated by s 32D(2)(f), which requires the court to consider the expectation of confidentiality and the potential prejudice to privacy, as one of several factors to consider.²²

In deciding whether to grant leave (either on the substantive question regarding the protected material, or on whether to give the responsible person leave to make submissions), 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.²³

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.²⁴

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.²⁵

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.²⁶

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 they 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.²⁷

²⁰ Ibid s 32AB.

²¹ *Skarbek v The Society of Jesus in Victoria* [2016] VSC 622, [35].

²² *KR v BR* [2018] VSCA 159, [64]-[71].

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

²⁴ *Todd v R* [2016] VSCA 29, [36]-[37].

²⁵ *Baker v R* [2015] VSCA 323, [45]-[52].

²⁶ *PPC v Williams* [2013] NSWCCA 286, [67]-[69].

²⁷ *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 s 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.²⁸

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.²⁹ In the context of sexual offences, the distinction between evidence relevant to credibility (truthfulness) and reliability (accuracy) can be difficult to draw.³⁰

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 complainant claims to have previously been the victim of a sexual assault to have significant probative value.³¹

The third limb of the test under s 32D(1) requires the court to determine whether:

the public interest in preserving the confidentiality of confidential communications and protected health information and protecting a protected person from harm is substantially outweighed by the public interest in admitting evidence of substantial probative value.³²

This part of s 32D recognises that decisions about the release of confidential communications affect not just the rights of individuals, but the public interest in protecting confidentiality of this class of evidence.³³

The three limbs of the tests in s 32D(1) 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.³⁴

In balancing the competing public interests between preserving confidentiality and preventing harm on the one hand, and admitting evidence of substantial probative value on the other, 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 person 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;
- (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 person 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.³⁵

The court must state its reasons for granting or refusing leave.³⁶

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

29 *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].

30 *Nicholls v R* (2005) 219 CLR 196, [51]-[52].

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

32 Evidence (Miscellaneous Provisions) Act 1958 s 32D(1). See also *KS v Veitch (No 2)* (2012) 84 NSWLR 172, [34].

33 *KR v BR* [2018] VSCA 159, [39].

34 *PPC v Williams* [2013] NSWCCA 286, [76].

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

36 *Ibid* s 32D(4).



Limitations on privilege

Section 32E of the Act deals with limitations on the privilege against adducing evidence disclosing protected material, and states:

- (1) This Division does not prevent the production or adducing of evidence -
 - (a) with the consent of the protected person 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 person 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;
 - (d) of a communication made, or the contents 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; or
 - (e) of a communication made if it is evidence of the commission of an offence of wilful and corrupt perjury.
- (2) For the purposes of subsection (1)(d), 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.
- (3) 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.

Section 32E(1)(b) presents an important limitation on the application of the protected health information provisions. The effect of this subsection is likely to be that the protected health information provisions only apply to health information obtained on occasions which are not directly related to the alleged offending. Disclosure of forensic medical examinations performed as part of the investigation of the alleged offending will not be restricted by this Division.

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 the safety or welfare of
 - (i) the protected person; or
 - (ii) a person to whom notice was required to be given under section 32CA(1)(b) or section 32CC(1)(c) or (d) (whether or not that requirement was waived); 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 person or the safety of a person referred to in paragraph (b)(ii).



Division 2A and other rules of evidence and procedure

The confidential communications and protected health information 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).³⁷