

[Act 1999 No 48]



New South Wales

# **Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill 1999**

## **Explanatory note**

This explanatory note relates to this Bill as introduced into Parliament.

### **Overview of Bill**

Division 1B of Part 3.10 of the *Evidence Act 1995* protects certain evidence from disclosure on the ground that it concerns a confidential communication or a document recording such a communication made in the course of a relationship in which a victim, or alleged victim, of a sexual assault offence was being treated (whether before or after the offence was committed or allegedly committed) by a counsellor for any emotional or psychological condition. In *R v Young* [1999] NSWCCA 166 the Court of Criminal Appeal held that Division 1B does not apply to the production of documents on subpoena so that the protection it gives does not enable a person to object to the production of a document on the ground that it would disclose such a communication.

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The objects of this Bill are as follows:

- (a) to amend the *Criminal Procedure Act 1986* to re-enact the provisions of Division 1B of Part 3.10 of the *Evidence Act 1995* with modifications to ensure that the new provisions will apply to the production (whether required by subpoena or any other procedure) of such evidence,
- (b) to expand the types of counselling communications that under the re-enacted provisions will attract the privilege,
- (c) to clarify the parts of the contents of documents that will attract the privilege,
- (d) to make provision with respect to the requirements for notice and the waiver of the privilege under the re-enacted provisions,
- (e) to amend the *Evidence Act 1995* to provide for the contents of documents and other evidence that was protected by the privilege in criminal proceedings to be protected in civil proceedings in which substantially the same acts are in issue that were in issue in the criminal proceedings,
- (f) to make a related amendment to section 84 of the *Victims Compensation Act 1996* to ensure that certain evidence that is inadmissible under that section cannot be required to be produced by subpoena or any other procedure,
- (g) to amend Schedule 3 to the *Victims Compensation Act 1996* to make an amendment for a similar purpose so that a provision of the *Victims Compensation Act 1987* which the 1996 Act repealed but that continues to have application to some matters has the same effect.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision giving effect to the amendments to the *Criminal Procedure Act 1986* set out in Schedule 1.

**Clause 4** is a formal provision giving effect to the amendments to the *Evidence Act 1995* and the *Victims Compensation Act 1996* set out in Schedule 2.

**Schedule 1** inserts proposed Part 13 (sections 57–68) into the *Criminal Procedure Act 1986*. Part 13 sets out the grounds for claiming evidence should not be produced or adduced because it relates to a sexual assault communication.

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## Interpretation

Proposed section 57 (1) defines various terms used in the proposed Part, including *sexual assault offence*, *protected confider* and *principal protected confider*.

The definition of *sexual assault offence* substantially re-enacts the definition of sexual assault offence in Division 1B of Part 3.10 of the *Evidence Act 1995*. A *principal protected confider* is the victim or alleged victim of a sexual assault offence by, to or about whom a protected confidence is made. A *protected confider* is defined as a person who makes a protected confidence and, because of the expanded definition of protected confidence explained in more detail below, will cover not only the victim or alleged victim who is the principal protected confider and counsellors but also persons such as parents who are present to further the counselling process.

Proposed section 57 (2) is an interpretation provision that makes it clear that the part of the contents of a document recording a protected confidence that is protected by the proposed Part is that part that records the confidence or any report, observation, opinion, advice, recommendation or other matter that relates to the protected confidence, and that the protection extends to any copy, reproduction or duplicate of such a part of the contents of a document.

Proposed section 57 (3) makes provision with respect to documents recording protected confidences that are stored electronically. If a protected document is recorded on a computer disc, there could be doubt as to whether the document is the disc or a folder on the disc or a file in the folder or a part of a file. This provision (which is based on section 23 of the *Freedom of Information Act 1989*) makes provision for how such a document is to be treated.

## Protected confidences

Proposed section 58 (1) defines *protected confidence* for the purposes of the new Part as a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence. A protected confidence covers a wider ambit of counselling communications than are covered by the definition of protected confidence in Division 1B of Part 3.10 of the *Evidence Act 1995*. This is because of a new definition of *counselling communication* in proposed section 58 (4). It includes communications made in confidence by or to a parent, carer or other supportive person who is present to facilitate communication or to otherwise further the counselling process and to communications between counsellors. Proposed section 58 (2) makes it clear that a counselling communication is protected even if

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it was made before the acts constituting the sexual assault offence occurred or are alleged to have occurred and although it does not relate to any condition arising from a sexual assault offence or alleged sexual assault offence. Section 58 (3) substantially re-enacts section 126G (2) of the *Evidence Act 1995*.

### **How protected confidences are protected**

*Criminal proceedings* is defined for the purposes of the proposed Part in section 57 (1) as 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 proceedings relating to an order under Part 15A (Apprehended violence) of the *Crimes Act 1900*. *Preliminary criminal proceedings* is defined as committal proceedings or proceedings relating to bail (whether or not in relation to a sexual assault offence).

The Bill draws a distinction between the protection to be provided for protected confidences and the contents of documents recording such confidences in preliminary criminal proceedings and protection to be provided in criminal proceedings.

#### *Preliminary criminal proceedings*

Proposed section 59 provides an absolute prohibition against requiring (whether by subpoena or any other procedure) a person to produce a document recording a protected confidence in, or in connection with, preliminary criminal proceedings and against the adducing of evidence in such proceedings if it would disclose a protected confidence or the contents of a document recording a protected confidence.

#### *Criminal proceedings*

Proposed section 60 (1) provides a prohibition against requiring (whether by subpoena or any other procedure) a person to produce a document recording a protected confidence for inspection by a party if the person objects to production on the ground that the document is privileged under the proposed Part unless the document is first inspected by the court and the court is satisfied (applying a balancing or weighing process based on that currently set out in section 126H (3) of the *Evidence Act 1995* in respect of the adducing of evidence) that:

- (a) 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
- (b) other evidence of the protected confidence or the contents of the document recording the protected confidence is not available, and

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- (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 allowing inspection of the document.

The court need not rule on the objection when it inspects the document. If, for example, there is insufficient evidence at that time for the court to perform the balancing or weighing process described in paragraph (a) the court may postpone its ruling until a later stage in the proceedings when the position is clearer.

Proposed section 60 (2)–(4) substantially re-enact section 126H (1)–(3) of the *Evidence Act 1995*. The proposed subsections prohibit the adducing of evidence that would disclose a protected confidence or that is the contents of a document recording a protected confidence unless the court gives leave. The court cannot give leave unless it 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.

### Notice

Section 126H (2) of the *Evidence Act 1995* sets out the notice requirements that must be complied with before evidence disclosing a protected confidence or the contents of a document recording a protected confidence is adduced. Proposed section 61 (2) substantially re-enacts section 126H (2). Proposed section 61 (1) extends the requirements to cover notice of the production of a document recording a protected confidence. It is not intended that service of a subpoena amount to notice for the purposes of this subsection.

Proposed section 61 (3) requires certain advice to be included in a notice given under the section to a protected confider who is not a party.

Proposed section 61 (4) and (6) facilitate the giving of notice when a principal protected confider is not a party to proceedings in respect of an offence and the defendant has no knowledge of the principal protected confider's address or whereabouts. They provide that the notice requirement is satisfied in these circumstances if notice is given to the informant (the police officer who preferred

the charge or laid the information for the offence) and the informant gives, or uses his or her best endeavours to give, a copy of the notice to the principal protected confider.

Proposed section 61 (5) enables documents to be produced for inspection or evidence adduced with the leave of the court although a protected confider (other than the principal protected confider) who is not a party has not been given the notice required by section 61 (1) and (2).

### **Effect of consent**

Proposed section 62 provides that Part 13 will not prevent the production of a document recording a protected confidence, or adducing of evidence of a protected confidence or the contents of a document recording a protected confidence, with the consent of the principal protected confider concerned. It re-enacts section 126I of the *Evidence Act 1995* with modifications intended to ensure that the consent is clearly and expressly given. Consent must be given in writing and expressly relate to the production of the document or adducing of the evidence.

### **Loss of privilege: misconduct**

Proposed section 63 substantially re-enacts section 126J of the *Evidence Act 1995* but extends its application to privilege against production of documents recording a protected confidence. It provides for loss of the privilege for protected confidences for communications made and documents prepared in furtherance of a fraud, an offence or an act that renders a person liable to a civil penalty.

### **Ancillary orders**

Proposed section 64 substantially re-enacts section 126K of the *Evidence Act 1995* (which enables a court to make various orders to limit the harm, or extent of the harm, that may be caused if evidence of a protected confidence is disclosed, including orders to ensure that protected identity information is not disclosed) but extends the ambit of orders that may be made to cover orders relating to harm caused by production of documents recording a protected confidence.

### **Miscellaneous**

Proposed sections 65–67 include provisions in Part 13 that correspond to sections 132–134 of the *Evidence Act 1995*. They relate to the duty of a court to inform witnesses and parties of their right to object or make applications under the proposed Part, its powers to inspect documents and to the admissibility of evidence that cannot be adduced or given under the Part.

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Proposed section 68 provides for the application of the Part. Among other things, it makes it clear that the Part does not apply in relation to proceedings the hearing of which began before the commencement of the Part and that the existing Division 1B of Part 3.10 of the *Evidence Act 1995* will continue to apply to such proceedings.

Proposed section 69 makes it clear that the proposed Part will affect the operation of the principles and rules of the common law relating to criminal proceedings only to the extent provided expressly or by necessary intendment by the Part.

**Schedule 2.1** contains the amendments to the *Evidence Act 1995* described in the Overview.

**Schedule 2.2** contains the amendments to the *Victims Compensation Act 1996* described in the Overview.