

Criminal Procedure Act 1986

As at 30 April 2012

Chapter 6 – Evidentiary matters

Part 5 – Evidence in sexual offence proceedings

Division 2 – Sexual assault communications privilege

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ALSO – definition of *prescribed sexual offence*

295 Interpretation

(1) Definitions In this Division:

"criminal proceedings" means:

(a) proceedings relating to the trial or sentencing of a person for an offence (whether or not a sexual assault offence) including pre-trial and interlocutory proceedings but not preliminary criminal proceedings, or

(b) proceedings relating to an order under the *Crimes (Domestic and Personal Violence) Act 2007*.

"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 296.

"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) a prescribed sexual offence, or

(a1) acts that would constitute a prescribed sexual offence if those acts:

(i) had occurred in this State, or

(ii) had occurred at some later date, or

- (iii) had both occurred in this State and occurred at some later date, or
 - (b) any other offence prescribed by the regulations for the purposes of this definition.
- (2) Document recording a protected confidence In this Division, 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 Division, 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.

296 What is a protected confidence?

- (1) In this Division: "**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 Division 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.

(296 continues overleaf)

(296 Cont.)

- (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**") who is counselling the person in relation to any harm the person may have suffered, or
 - (b) made in confidence to or about the counselled person by the counsellor in the course of that counselling, 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 or to another counsellor or by or to a person who is counselling, or has at any time counselled, the person.
- (5) For the purposes of this section, a person "**counsels**" another person if:
 - (a) the person has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm, and
 - (b) the person:
 - (i) listens to and gives verbal or other support or encouragement to the other person, or
 - (ii) advises, gives therapy to or treats the other person, whether or not for fee or reward.

297 Protected confidences--preliminary criminal proceedings

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

298 Protected confidences--criminal proceedings

- (1) Except with the leave of the court, a person cannot seek to compel (whether by subpoena or any other procedure) any other person to produce a document recording a protected confidence in, or in connection with, any criminal proceedings.
- (2) Except with the leave of the court, a document recording a protected confidence cannot be produced in, or in connection with, any criminal proceedings.
- (3) Except with the leave of the court, evidence cannot be adduced in any criminal proceedings if it would disclose a protected confidence or the contents of a document recording a protected confidence.

299 Court to inform of rights under Division

If it appears to a court that a witness, party or protected confider may have grounds for making an application under this Division or objecting to the production of a document or the adducing of evidence, the court must satisfy itself (or if there is a jury, in the absence of the jury) that the person is aware of the relevant provisions of this Division and has been given a reasonable opportunity to seek legal advice.

299A Protected confider has standing

A protected confider who is not a party may appear in criminal proceedings or preliminary criminal proceedings if a document is sought to be produced or evidence is sought to be adduced that may disclose a protected confidence made by, to or about the protected confider.

299B Determining if there is a protected confidence

- (1) If a question arises under this Division relating to a document or evidence, a court may consider the document or evidence.
- (2) If there is a jury, the document or evidence is to be considered in the absence of the jury.
- (3) A court must not make available or disclose to a party (other than a protected confider) any document or evidence to which this section applies (or the contents of any such document) unless:
 - (a) the court determines that the document does not record a protected confidence or that the evidence would not disclose a protected confidence, or
 - (b) a party has been given leave under this Division in relation to the document or evidence and making available or disclosing the document or evidence is consistent with that leave.
- (4) A court may make any orders it thinks fit to facilitate its consideration of a document or evidence under this section.
- (5) This section has effect despite sections 297 and 298.

299C Notice of application for leave

- (1) An applicant for leave under this Division must, as soon as is reasonably practicable, give notice in writing of the application to each other party and each relevant protected confider (or the protected confider's nominee) that:
 - (a) specifies the document that is sought to be produced or the evidence that is sought to be adduced, and
 - (b) in the case of a notice to a protected confider who is not a party to the proceedings--advises the protected confider that the protected confider may appear in the proceedings concerned, and
 - (c) in the case of an application for leave to compel (whether by subpoena or any other procedure) a person to produce a document--specifies the day on which the document is to be produced, and

(299C continues overleaf)

(299C Cont.)

- (d) in the case of an application for leave to adduce evidence--specifies the day (if known) when the proceedings are to be heard, and
 - (e) includes any other matter that may be prescribed by the regulations.
- (2) A requirement to give notice to a protected confider who is not a party to proceedings is satisfied for the purposes of this section if the notice is given to:
- (a) the prosecutor in the criminal proceedings, or
 - (b) if the regulations prescribe a different person or body, that person or body.
- (3) A prosecutor (or person or body) who is given a copy of a notice under subsection (2) must ensure that a copy of the notice is given to the protected confider within a reasonable time after its receipt.
- (4) A court cannot grant an application for leave under this Division until at least 14 days (or such shorter period as may be fixed by the court) after the relevant notices have been given under subsection (1) or (2).
- (5) A court may waive the requirement to give notice if:
- (a) notice has already been given in respect of an application under this Division, being an application that relates to the same protected confidence and the same criminal proceedings, or
 - (b) the principal protected confider has consented in writing to the notice being waived, or
 - (c) the court is satisfied that there are exceptional circumstances that require the notice to be waived.
- (6) The regulations may make provision for or with respect to the giving of notices under this section.

299D Determining whether to grant leave

- (1) The court cannot grant an application for leave under this Division unless the court is satisfied that:
 - (a) the document or evidence will, either by itself or having regard to other documents or evidence produced or adduced or to be produced or adduced by the party seeking to produce or adduce the document or evidence, have substantial probative value, and
 - (b) other documents or evidence concerning the matters to which the protected confidence relates are 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.

- (2) Without limiting the matters that the court may take into account for the purposes of determining the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm, the court must take into account the following:
 - (a) the need to encourage victims of sexual offences to seek counselling,
 - (b) that the effectiveness of counselling is likely to be dependent on the maintenance of the confidentiality of the counselling relationship,
 - (c) the public interest in ensuring that victims of sexual offences receive effective counselling,
 - (d) that the disclosure of the protected confidence is likely to damage or undermine the relationship between the counsellor and the counselled person,
 - (e) whether disclosure of the protected confidence is sought on the basis of a discriminatory belief or bias,
 - (f) that the adducing of the evidence is likely to infringe a reasonable expectation of privacy.

(299D Continues overleaf)

(299D Cont.)

- (3) For the purposes of determining an application for leave under this Division, the court may permit a confidential statement to be made to it by or on behalf of the principal protected confider by affidavit specifying the harm the confider is likely to suffer if the application for leave is granted.
- (4) A court must not disclose or make available to a party (other than the principal protected confider) any confidential statement made to the court under this section by or on behalf of the principal protected confider.
- (5) The court must state its reasons for granting or refusing to grant an application for leave under this Division.
- (6) If there is a jury, the court is to hear and determine any application for leave under this Division in the absence of the jury.

300 Effect of consent

- (1) This Division 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 Division or would be so privileged except for a limitation or restriction imposed by this Division.

301 Loss of sexual assault communications privilege: misconduct

- (1) This Division 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.

302 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.
 - (c), (d) (Repealed)
- (2) Nothing in this section limits the power of a court to make an order under section 106 or 119 of this Act or section 578A of the *Crimes Act 1900*.
- (3) (Repealed)

303, 304 (Repealed)

305 Inadmissibility of evidence

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

305A Subpoenas for production of counselling communications

The regulations may make provision for or with respect to the issue and service of subpoenas requiring the production of a document recording a counselling communication (within the meaning of section 296) in, or in connection with, any criminal proceedings or preliminary criminal proceedings, including the following:

- (a) the manner and time in which a subpoena must be served,
- (b) the form of a subpoena,
- (c) any documents or information that must be included with a subpoena.

306 Application of common law

- (1) This Division 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 Division provides otherwise expressly or by necessary intendment.
- (2) Without limiting subsection (1), this Division 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.

Chapter 1 - Section 3 - Definitions

Prescribed sexual offence means:

- (a) an offence under section 61B, 61C, 61D, 61E, 61I, 61J, 61JA, 61K, 61L, 61M, 61N, 61O, 63, 65, 65A, 66, 66A, 66B, 66C, 66D, 66EA, 66EB, 66F, 67, 68, 71, 72, 72A, 73, 74, 76, 76A, 78A, 78B, 78H, 78I, 78K, 78L, 78M, 78N, 78O, 78Q, 79, 80, 80A, 80D, 80E, 81, 81A, 81B, 86, 87, 89, 90, 90A, 91, 91A, 91B, 91D, 91E, 91F or 91G of the Crimes Act 1900, or
- (b) an offence that, at the time it was committed, was a prescribed sexual offence for the purposes of this Act or the Crimes Act 1900, or
- (c) an offence that includes the commission of, or an intention to commit, an offence referred to in paragraph (a) or (b), or
- (d) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a), (b) or (c).