

Sexual Assault Communications Privilege

STOP. THINK. PROTECT.

What is the Sexual Assault Communications Privilege?

The Sexual Assault Communications Privilege protects the privacy of a sexual assault victims' confidential counselling, medical and other therapeutic records ('counselling communications') by restricting their disclosure and use in court, or to the accused. The privilege is contained in the *Criminal Procedure Act 1986 NSW*.

The privilege applies in all criminal, AVO and some civil proceedings.

The Di Lucas Story

In December 1995 the coordinator of Canberra Rape Crisis Centre, Di Lucas, was imprisoned for refusing to comply with a court order to provide a client's counselling notes. The case received national media attention and after a hard fought campaign by sexual assault survivors, lawyers, academics, sexual assault counsellors and parliamentarians, the NSW Government announced it would introduce legislation to restrict access to counsellors' notes in criminal proceedings.

In 1997, landmark legislation was passed to protect the counselling records of sexual assault complainants. Further amendments were made to strengthen the privilege in response to narrow interpretation by the courts, the most significant in December 2010.

Why is it needed?

The Sexual Assault Communications Privilege recognises and protects confidential therapeutic relationships. The disclosure of private and sensitive records in court proceedings can seriously damage the trust between a practitioner and their client.

The privilege is based on some important guiding principles:

- Disclosure of therapeutic records can cause further harm if revealed to the accused or in court
- Counselling and other types of treatment are therapeutic tools, not investigative ones
- Counselling should be a safe place for open, honest and private communication and healing
- Keeping records private helps encourage reporting and prosecution of sexual assaults
- Ethical conflicts for counsellors and other practitioners should be minimised where possible
- Therapeutic records can contain irrelevant or speculative material that should not be brought before a court

What is counselling?

Counselling is defined very broadly, and can include information held by hospitals, GPs and other health practitioners, psychologists, social workers, counsellors, welfare workers and caseworkers, including volunteers.

A counsellor is anyone who has training or experience relevant to the process of counselling for psychological, emotional, physical or financial harm. A person is defined as a counsellor when they confidentially listen to, support, advise or treat a victim of any alleged sexual assault.

Who can claim the privilege?

The privilege can be claimed by anyone who has made a 'protected confidence'. This might be the victim, someone who was present at the counselling session, or a third party who discussed the assault during their own counselling (for example, the sibling of a victim who discloses information about the assault to their school counsellor). These people are called 'protected confiders'. The victim is called the 'principal protected confider' (see **Key Terms**).

Since late 2010, a sexual assault victim or other protected confider has a right appear in the proceedings to assert the privilege.

What information is protected?

The privilege protects evidence of 'counselling communications', which includes oral communications as well as written notes or records.

The privilege covers many types of communications, such as records that pre-date the sexual assault or are unrelated to the sexual assault, for example drug and alcohol counselling notes.

How is the privilege applied?

The privilege is absolute in preliminary criminal proceedings such as bail and committal hearings. This means that counselling and other therapeutic records cannot be subpoenaed at this stage.

At trial or sentencing, the privilege is qualified. Permission of the court ('leave') is required at three stages of the proceedings. Leave must be sought:

- to compel production of a document by subpoena or other means;
- before privileged material is produced to the court
- before the material is used in evidence.

The court will only allow disclosure of the material if it is in the public interest and it must take these factors into account:

- Can the evidence be found elsewhere?
- Is the evidence critical to a fair trial? ("substantial probative value")
- Do the benefits of disclosure outweigh protection of confidentiality?
- Would disclosure cause further harm to the victim?

Are there any exceptions?

The privilege can be waived in limited circumstances if the victim consents in writing. The consent must make explicit reference to the privilege and the actual material that can be disclosed. It should only be given after legal advice.

What legal help is available?

Legal Aid NSW is funded to provide a specialist legal service to victims. The **Sexual Assault Communications Privilege Service (SACPS)** provides legal advice and representation to victims who wish to assert the privilege, or consent to the release of records in an informed way.

SACPS accepts state wide referrals. No means or merits test is applied to the grant of legal aid in privilege matters.

SACPS can advise professionals affected by a privilege claim, and conducts extensive community legal education. We also provide education and information to the legal profession, justice and policing sectors.

Want more information?

Sexual Assault Communications Privilege Service, Legal Aid NSW

Client referrals and enquiries: sacps@legalaid.nsw.gov.au

Senior Solicitor: Rosie Lambert rosemarie.lambert@legalaid.nsw.gov.au or 9219 5632

Senior Project Officer: Meredith Osborne meredith.osborne@legalaid.nsw.gov.au or 9219 6327

Key terms

Counsellor: Someone with appropriate training, qualifications or experience in counselling people who have suffered harm. Their role involves:

- listening, giving verbal or other support or encouragement, or
- providing advice, therapy or treatment, whether paid or not.

Medical practitioners come under the definition of a counsellor.

Counselling communication: A communication made in confidence between:

- a counsellor and victim of sexual assault about any harm they may have suffered
- a counsellor and another counsellor (past or present), or a counsellor and another person, about the victim
- third parties brought into the counselling process, for example a victim's sibling or parent who is participating in family therapy.

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).

Protected confidence: A counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence. It can include medical records and other counselling records that pre-date the sexual assault.

Protected confider: The person who is being counselled, whether they are the victim of the sexual assault or a third party who has discussed the assault. eg. parent of a child who has been sexually assaulted.

Principal protected confider: The victim of the sexual assault or alleged sexual assault.