

CHILDREN'S LEGAL SERVICE  
ANNUAL CRIMINAL LAW CONFERENCE  
STARROOM SYDNEY  
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**SEXUAL ASSAULT COMMUNICATION PRIVILEGE**  
**SECTIONS 295-306 *CRIMINAL PROCEDURE ACT* NSW 1986**

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**INTRODUCTION:**

Sections 295 through to 306 *Criminal Procedure Act* provides the legislative framework in relation to evidence that falls within the scope of sexual assault communication privilege (“SACP”).

The legislation covers a very broad range of evidence that is potentially caught by the provisions of the legislation. The legislation is equally applicable to the prosecution and defence and significantly restricts access to evidence and material that falls within the ambit of the privilege.

The legislation addresses SACP at three levels of the criminal process:

1. Compelling production of evidence (for example - by subpoena).
2. The production of evidence.
3. The adducing of evidence.

The SACP applies to criminal proceedings for any offence. The legislation is not restricted to proceedings for a “sexual assault offence”. It appears

however, that the SACP does not apply in civil proceedings or to the commission of an act that renders a person liable to a civil penalty<sup>1</sup>.

**WHAT IS COVERED BY THE “SEXUAL ASSAULT COMMUNICATION PRIVILEGE”:**

The SACP covers a “protected confidence” which is defined in section 296 *Criminal Procedure Act*.

A protected confidence is a ***counselling communication*** that is made by, to or about a victim or alleged victim of a ***sexual assault offence***<sup>2</sup>: section 296(1) *Criminal Procedure Act*.

A ***counselling communication*** means a communication:

- Made in confidence by a person (the counselled person) to another (the counsellor) who is counselling the person in relation to any harm the person may have suffered; **OR**
- Made in confidence to or about the counselled person by the counsellor in the course of that counselling; **OR**
- Made in confidence about the counselled person by a counsellor/ parent/ carer or other supportive person who is person to facilitate communication between the counsellor/ counselled person or otherwise to facilitate the counselling process; **OR**
- 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.

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<sup>1</sup> Section 301 *Criminal Procedure Act*

<sup>2</sup> Defined in section 295 *Criminal Procedure Act*

A ***counselling communication*** is a protected confidence even if:

- It was made before the sexual assault offence occurred/ are alleged to have occurred; **OR**
- It was **not** made in connection with a sexual assault offence or alleged sexual assault offence or any condition arising from a sexual assault/ alleged sexual assault.

The presence of a third party, who is present to facilitate or further the counselling process, does not negative a communication being made “in confidence”. That is, the presence of an interpreter or support person does not mean that the communication was not “in confidence”.

A person “***counsels***” another person if:

- The person has undertaken training/ study/ experience that is relevant to the process of counselling persons who suffered harm; **AND**
- The person (whether or not for fee or reward):
  - Listens to and gives verbal or other support or encouragement to the other person; **OR**
  - Advises, gives therapy to or treats the other person.

### **PROHIBITION IN PRELIMINARY CRIMINAL PROCEEDINGS:**

There is an absolute prohibition on seeking to compel production, producing documents and adducing evidence of a “protected confidence” in preliminary criminal proceedings: section 297 *Criminal Procedure Act*.

***Preliminary criminal proceedings*** are defined in section 295 *Criminal Procedure Act* to mean committal proceedings or bail proceedings (including during sentence or trial) in any matter – regardless of whether the matter is a “sexual assault offence”.

### **LEAVE OF THE COURT REQUIRED AND NOTICE REQUIREMENTS:**

In criminal proceedings, the leave of the court is required for in order to:

1. Compel production of evidence.
2. Produce evidence.
3. Adduce evidence in proceedings.

Any application for leave requires written notice of the application. The notice must particularise the specific matters that are set out in section 299C *Criminal Procedure Act*.

If the “protected confider” is not a party to the proceedings, the requirement to serve notice is satisfied if the notice is provided to the prosecutor: section 299C(2) *Criminal Procedure Act*.

The notice must be served 14 days in advance of the application unless a shorter period is fixed by the court: section 299C(3) *Criminal Procedure Act*. The court has the option to waive the requirement for notice in certain situations – when prior notice given, where there is consent, or where there are exceptional circumstances: section 299C(5) *Criminal Procedure Act*.

Leave to issue the subpoena does not automatically entitle a party to access or adduce such evidence in proceedings. A further grant of leave is required to produce or adduce such evidence: section 298(2) and (3) *Criminal Procedure Act*.

## THE BALANCING TEST FOR THE GRANT OF LEAVE:

In considering whether to grant leave the court section 299D requires the court to balance:

- Whether the document/ evidence will have “substantial probative value”; **AND**
- Whether any other document/ evidence concerning the evidence is available; **AND**
- The public interest in preserving the confidentiality of the protected confidence and protecting the protected confider from harm is substantially outweighed the public interest in admitting the document/ evidence of substantial probative value.

In considering the public interest in preserving the confidentiality of protected confidences and protecting the protected confider from harm, the must take into account:

- The need to encourage victims to seek counselling (this does not specify alleged victims);
- That the effectiveness of counselling is likely dependant on confidentiality;
- The public interest in ensuring victims receive counselling;
- That the disclosure is likely to damage/ undermine the relationship of counsellor/ counselled.
- Whether disclosure is sought on the basis of discriminatory beliefs or bias;
- That the adducing is likely to infringe a reasonable expectation of privacy.

When considering a grant of leave, the court *may* permit a confidential statement to be made to it *by or on behalf of* the protected confider *by affidavit* specifying the harm the confider is likely to suffer if leave is granted: section

299D(3) *Criminal Procedure Act*. This confidential statement is not to be disclosed to any party other than the principal protected confider: section 299D(4) *Criminal Procedure Act*.

Importantly, this section:

- Does not require that the court “must” or “shall” have a confidential statement. It is not essential. This is a discretionary matter (“may”).
- Requires that the confidential statement be in the form of an affidavit (presumably this excludes the tender of a psychological/ psychiatric report in the usual court report format). There is no provision in the legislation for any other form of the confidential statement.
- The statement must be made by or on behalf of the protected confider.

### **CONSENT BY THE PROTECTED CONFIDER:**

A protected confider may consent in writing (in a particular form) to the production or adducing of evidence of a protected confidence: section 300 *Criminal Procedure Act*.

### **PRACTICAL APPLICATION:**

A protected confider has “standing” and a right to appear: section 299A *Criminal Procedure Act*.

If it appears to the court that a witness/ party/ protected confider may have grounds for making an application/ objection to the production or adducing of evidence, the court must satisfy itself that the person is aware of the relevant

provisions and has been given a reasonable opportunity to seek legal advice:  
section 299 *Criminal Procedure Act*.

Legal advice is frequently provided by a referral to the Sexual Assault  
Communication Privilege Unit in the Civil Division of Legal Aid NSW.

If the matter is a proceeding before a jury – all applications under this  
legislation are to be determined in the absence of the jury.

To determine whether the SACP is properly enlivened, the court *may* consider  
the document or evidence: section 299B(1) *Criminal Procedure Act*.

Whilst section 299B contains the word “may, as was noted by His Honour  
Justice Adams in *NAR v PPC1* [2013] NSWCCA 25 at [3] and [4]:

“The reason that the documents will almost without exception need to  
be produced is that, otherwise, it will be impossible for the court to  
determine the issues prescribed by s 299D” .....

“Generally speaking, it is obvious that the section 299D issues cannot  
be considered without examining the documents themselves or having  
sufficient information to make what might be the statutory inquiries. The  
practical reality will almost invariably be that the documents have to be  
examined”.

The court must **not** make available or disclose to a party (other than the  
protected confider) any document **or** evidence unless the document does not  
record a protected confidence **or** evidence would not disclose a protected  
confidence **or** leave has been granted: section 299B *Criminal Procedure Act*.

The effect of section 299B *Criminal Procedure Act*, is that only the judicial  
officer and protected confider are able to read and consider any material that  
potentially contains a protected confidence. The party seeking access to this  
material (either the Crown and/or defence) does not get to see this material

for the purpose of making submissions as to whether the material has substantial probative value for the purpose of the balancing exercise. There is an onerous task placed on the judicial officer to engage in the balancing exercise absent any submissions from either the Crown or defence lawyer who are best positioned to make submission on the potential probative value or potential lack thereof.

The Crown and defence lawyer are entitled to make submissions as to why leave should be granted – albeit the submissions are in somewhat of a vacuum - as the party is not privy to the contents of the documents being considered. Submissions as to probative value, can be made by a quasi “opening” to the judicial officer as to the issues in the crown/defence case (ie the credibility of the complainant is a significant issue in this trial, the various and inconsistent versions of the complainant is a live issue, the timing of various statements and issues of collusion will be raised etc). Submissions can also be made to ensure compliance with the legislation - for example:

- It should not be assumed that a document contains or records a “protected confidence” or falls within the scope of the definition of “protected confidence”. Is the document/ evidence in fact a protected confidence.
- It should not be assumed that a counselling communication was made “in confidence” – is there evidence that it was made in confidence.
- Is the court furnished with evidence as to the qualifications of the “counsellor” (ie have they undertaken training or study etc relevant to the process of counselling persons who have suffered harm”);
- Are there other documents/ evidence to which the protected confidence relates available? Is so – what evidence does the court have to assess this issue.



- Does the court need to consider evidence of the potential harm to the protected confider and if so - is the court furnished with evidence as to the potential harm to the protected confider.
- Is the confidential statement (to assess harm) in a proper affidavit format for the purpose of the application.
- Is it appropriate to grant leave to produce the document but then to make an ancillary order relating to the inspection of the document.

Importantly, an application for leave to compel production, produce, or adduce can be made repeatedly and at any point during proceedings, There is no limit as to the number of times that application is renewed. It may be that the probative value of the evidence was not evident to the judicial officer at the beginning of proceedings but has subsequently become evident after the evidence in chief or cross-examination of the complainant.

Following are some examples of where SACP arises:

- The subpoenaing of sexual assault counsellors notes;
- Subpoenaing of doctors/ GP notes.
- Subpoenaing of school records – including records from a school counsellor.
- Complaint evidence in the Crown case.
- Complaint evidence/ history in the SAIK that was provided to the Doctor administering the SAIK from the social worker at the hospital (who is in turn assisting/ supporting the complainant).

- Disclosure(s) made by a complainant to workers at refuges/ support accommodation service providers.

Detailed consideration needs to be given to what documents the court will be provided with in order to determine whether to grant leave. All documents relevant to the application will need to be provided to the court. The protected confider's representative will not necessarily have the police brief of evidence so is usually not in a position to tender documents on the application. Prior agreement should be reached between all relevant parties as to what documents need to be tendered on the application.

The material that potentially contains the protected confidence is usually provided to the judicial officer in a sealed envelope. Any confidential statement is usually provided to the judicial officer in a sealed envelope.

The court has power to make ancillary orders to limit the possible harm or extent of harm caused by any disclosure including effectively closed court and orders as to the production and inspection of the document: section 302 *Criminal Procedure Act*.

The two current and relevant cases on this issue are:

Vietch 1 & 2  
NR v PC1

Both are worth considering in detail prior to making or arguing any application.

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