



Legal issues bulletin

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Protected confidences in relation to school counsellor files concerning victims of sexual assault

This bulletin provides updated advice on issues concerning counselling communications involving victims of sexual assault as a result of amendments to the [Criminal Procedure Act 1986](#) (the Act) which commenced on 14 January 2011. It includes advice on how to respond to requests for the production of counsellor files that may contain protected confidences. Staff should refer to [legal issues bulletin 25 - Subpoenas](#) for the relevant procedures to be followed when served with a subpoena to produce other department documents or to give evidence.

What is a protected confidence?

In broad terms, a protected confidence is a communication in confidence between counsellors and victims of sexual assault.

What are the features of a protected confidence?

The [Criminal Procedure Act 1986](#) indicates that:

- a protected confidence is a counselling communication made in confidence by a victim of sexual assault to a counsellor who is counselling the person in relation to any harm the person may have suffered
- any communications in confidence between a counsellor and another counsellor or other person who is or has counselled or otherwise treated the counselled person for any emotional or psychological conditions will also be regarded as protected confidences
- a counselling communication is a protected confidence even if it was made before the sexual assault was alleged to have occurred or was not made in connection with an alleged sexual assault offence or any condition arising from an alleged sexual assault offence.

What is “counselling”?

A person “counsels” another person if the person has undertaken training or study or has experience relevant to the process of counselling people who have suffered harm and the person listens to and gives verbal or other support or encouragement to the other person or advises, gives therapy to or treats the other person.

It is a broad definition and it means communications between victims of sexual assault and school personnel other than specialist counsellors may be subject to the protected confidence provisions.

What is meant by “harm”?

“Harm” includes any actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm, such as shame, humiliation and fear.

What protections are afforded to protected confidences under the Act?

There are a number of specific protections arising from the Act, namely:

- A person cannot compel the production of a document that contains a protected confidence in any preliminary criminal proceedings. “Preliminary criminal proceedings” are defined to include committal proceedings and bail applications.
- It is impermissible to give any evidence in any preliminary criminal proceedings if it would disclose a protected confidence or the contents of a document recording a protected confidence.
- Except with the leave of court, a person cannot compel the production of a document that contains a protected confidence in any criminal proceedings.
- Evidence cannot be given in any criminal proceedings if it would disclose a protected confidence or the contents of a document recording a protected confidence unless the leave of the court is obtained.
- If a court believes any witness, party or protected confider may have grounds for objecting to the production of a document or the giving of evidence, the court must satisfy itself that the person is aware of the relevant provisions of the Act and has been given a reasonable amount of time to seek legal advice.
- Any person seeking the leave of the court must as soon as practicable give notice in writing of the application to each party and each protected confider which:
 - specifies the document sought to be produced or the evidence sought to be given
 - advises the protected confider he or she may appear in the proceedings if necessary
 - in the case of a subpoena, provides details of the day on which the document is sought to be produced.
 - can be served on the prosecutor in the criminal proceedings if the protected confider is not a party to the proceedings.
- The court cannot make an order granting leave until at least 14 days after the notice is given to the protected confider. This time period may be shortened if the court believes there are good reasons to do so.
- In determining whether to grant leave, the court is obliged to take into account the probative value of the document or evidence, whether the information in the document of the evidence can be obtained from other sources and the public interest in preserving the confidentiality of protected confidences. In determining the public interest component, the court is obliged to have regard to the following matters:
 - The need to encourage victims of sexual assault to seek counselling.
 - That the effectiveness of counselling is likely to be dependent on the maintenance of the confidentiality of the counselling relationship.
 - The public interest in ensuring victims of sexual offences receive effective counselling.
 - That the disclosure of the protected confidence is likely to damage or undermine the relationship between the counsellor and the counselled person.
 - Whether the disclosure of the protected confidence is sought on the basis of a discriminatory belief or bias.
 - That the adducing of the evidence is likely to infringe a reasonable expectation of privacy.
- The court may permit a confidential statement to be made in the form of an affidavit by or on behalf of the victim or alleged victim specifying the harm the victim is likely to suffer if leave is granted. Any confidential statement made is not made available to a party in the proceedings.
- The victim at all times retains the right to give consent for a protected confidence to be produced or evidence to be given.

What should I do if I am served with a subpoena which seeks documents that contain a protected confidence?

When a subpoena is received, the following steps should be taken:

- Confirm the nature of the proceedings to which the subpoena relates. If it is not a criminal matter – e.g. a family law case, the provisions the Act dealing with protected confidences do not apply.
- If they are criminal proceedings, you need to establish whether any of the material sought relates to a victim of a sexual assault and that the person has been counselled in respect of any harm he or she may have suffered. The harm does not necessarily have to relate to or arise from the sexual assault. If the material does not relate to counselling in respect of any harm suffered, then the material is not captured by the protected confidence legislation and can be provided to the court in the usual way that subpoenas are responded to – refer to [legal issues bulletin 25 - Subpoenas](#).

- Identify the documents that contain the protected confidence or confidences. School counsellors should consult with their District Guidance Officers in order to confirm which documents held on school counselling files contain protected confidences.
- If protected confidences are identified and the party issuing the subpoena does not provide a notice from the court indicating leave has been granted to issue the subpoena, then do not provide any of the documents that contain the protected confidence. Any other documents held can be sent to the court in the usual way subpoenas are responded to – refer to [legal issues bulletin 25 - Subpoenas](#).
- When sending the material back to the issuing court, an accompanying letter should be provided which indicates the following:

“Material has been withheld from production as no indication that leave of the court, in accordance with Division 2 of part 5 of the Criminal Procedure Act 1986, has been given for the issue of the subpoena.”

A copy of the letter sent to the court should also be sent to the solicitors upon whose application the subpoena was issued. Alternatively, the solicitors can be contacted by telephone or email and advised of the action taken.

What action do I need to take if I receive a notice from the court indicating leave to issue a subpoena is being sought?

The legislation is not clear on what action, if any, is to be taken by a person who receives a notice that leave is being sought. Staff are advised to just identify any documents held that may be captured by the notice and await further advice.

No steps should be taken to forward any material to the court or any other person until further notice or a formal request is received from or on behalf of the presiding Judge or Magistrate to provide the information to him or her for the purpose of determining the leave application. Staff should contact the department’s Legal Services for further advice if necessary.

What should I do if I am asked to provide a confidential statement for the court in respect of an application for leave to issue a subpoena?

Again, it is not clear how the provisions of the new legislation will operate in relation to this aspect. In view of the fact the person making the confidential statement is required to provide advice on the likelihood of harm if material is provided, it is likely that in most instances, the statement will be made by the school counsellor.

School counsellors should consult with their District Guidance Officers in relation to the preparation of any confidential statement to be made. Depending on the circumstances, it may also be appropriate to contact the department’s Legal Services or the department’s Student Welfare directorate for further advice.

What should I do if I receive a subpoena which seeks material containing a protected confidence and a notice that leave has been granted to issue the subpoena is also provided?

Depending on the circumstances, it may still be appropriate to contest the production of the material in court. This would arise if departmental staff are of the view that serious harm may result to a student who has been a victim of sexual assault and his or her counselling file or other documentation is produced to the court. If counsellors or other staff, after consultation with the District Guidance Officer or other line supervisors, believe this to be the case, contact should be made with Legal Services to further discuss the options available.

What should I do if I am asked to make a statement for use in court proceedings and the information I am asked to provide includes details that would be captured by the definition of protected confidence?

As part of preparing a brief of evidence for use by police in court proceedings, staff may sometimes be asked to provide a statement outlining their knowledge of a particular matter. These briefs are generally made available to the defendant in the proceedings.

As a general rule, staff should respond positively to such requests from Police or officers from Community Services. However particular care should be taken to avoid making any statement which reveals material which falls within the meaning of protected confidence. For example, while it may be appropriate to indicate in a statement that you have had a discussion with a student, it would be inappropriate to then give details of the content of that conversation.

Staff should keep in mind that while they should be supportive of police requests, there is no obligation to include any particular information in a statement. Though police may raise concerns about declining to include information relating to a protected confidence, it is a matter that is ultimately at the discretion of the person making the statement.

If staff are asked to sign a statement that has been prepared by police, they should only do so if they are completely happy with its contents. If it contains protected confidence material, staff should ask for that particular information to be deleted before signing the statement.

School counsellors are advised to consult with their District Guidance Officers about any concerns which arise when asked to make statements that potentially reveal protected confidence material. Other staff are advised to consult with the department's Legal Services prior to providing any statement.

About Legal Services

Legal Services is here to support our government schools. **Staff can contact Legal Services by email or phone.**

Legal Services can only provide legal advice to departmental staff. It is not able to provide legal advice or assistance to parents, students or members of the public due to the potential for a conflict of interest.