

on the ground solely that such answer or discovery would or might relate to, or would tend or might tend to establish, adultery by that party or that witness, or by any other person with that party or that witness, as the case may be.

## **14 Abolition of certain privileges**

- (1) The following rules of law are hereby abrogated except in relation to criminal proceedings, that is to say—
  - (a) the rule whereby, in any proceeding, a person can not be compelled to answer any question or produce any document or thing if to do so would tend to expose the person to a forfeiture;
  - (b) the rule whereby, in any proceeding, a person other than a party to the proceeding can not be compelled to produce any deed or other document relating to the person's title to any land.
- (2) The rule of law whereby, in any civil proceeding, a party to the proceeding can not be compelled to produce any document relating solely to the party's own case and in no way tending to impeach that case or support the case of any opposing party is hereby abrogated.

## **Division 2A Sexual assault counselling privilege**

### **Subdivision 1 Preliminary**

#### **14A Meaning of *protected counselling communication***

- (1) A *protected counselling communication* is an oral or written communication made in confidence—
  - (a) by a counselled person to a counsellor; or
  - (b) by a counsellor to or about a counselled person to further the counselling process; or

- (c) about a counselled person by a parent, carer or other support person who is present to facilitate communication between the counselled person and a counsellor or to otherwise further the counselling process.
- (2) However, a communication made to or by a health practitioner about a physical examination of the counselled person conducted in the course of an investigation into an alleged sexual assault offence is not a *protected counselling communication*.
- (3) For subsection (1) it does not matter whether the communication was made—
  - (a) before or after the act or omission constituting the sexual assault offence committed or allegedly committed against the counselled person occurred; or
  - (b) in connection with the sexual assault offence, or a condition arising from the sexual assault offence, committed or allegedly committed against the counselled person.
- (4) A reference in this division to a protected counselling communication includes a reference to—
  - (a) a document to the extent it contains a protected counselling communication; or
  - (b) evidence to the extent it discloses a protected counselling communication.
- (5) In this section—

*health practitioner* means a person registered under the Health Practitioner Regulation National Law to practise a health profession.

## **14B Other definitions for division**

In this division—

*counsel* a person means—

- (a) to listen to and give verbal or other support, help or encouragement to the person, whether one-on-one or in a group; or
- (b) to advise, give therapy to or treat the person, whether one-on-one or in a group.

***counselled person*** means a person who—

- (a) is being, or has at any time been, counselled by a counsellor; and
- (b) is, or has at any time been, a victim or alleged victim of a sexual assault offence.

***counsellor*** means a person who—

- (a) has undertaken training or study, or has experience, that is relevant to the process of counselling other persons; and
- (b) in the course of the person's paid or voluntary employment, other than as a religious representative, counsels another person.

***essential person***, for a proceeding, means any of the following persons—

- (a) a Crown law officer or a person authorised by a Crown law officer;
- (b) the prosecutor;
- (c) a witness giving evidence;
- (d) a person who is an intermediary under division 4C for a witness giving evidence;
- (e) a person who a witness is entitled to have present in court under section 21A(2)(d) or 21AV or the *Criminal Law (Sexual Offences) Act 1978*, section 5(1)(g);
- (f) a person whose presence is, in the court's opinion, necessary or desirable for the proper conduct of the proceeding;
- (g) a person who applies to the court to be present and whose presence, in the court's opinion—

- (i) would serve a proper interest of the person; and
- (ii) would not be prejudicial to a counselled person's interests.

***religious representative*** means a person who—

- (a) is a member of—
  - (i) an organised religion; or
  - (ii) a religious group, even if the group is not part of, or does not consider itself to be part of, an organised religion; and
- (b) holds a position in the religion or group that allows the person to hold himself or herself out as a representative of the religion or group.

***sexual assault offence*** means—

- (a) an offence of a sexual nature, including, for example—
  - (i) an offence against a provision of the Criminal Code, chapter 32; and
  - (ii) an offence against a provision of the Criminal Code, chapter 22; or
- (b) an act or omission that would constitute an offence mentioned in paragraph (a) if the act or omission had occurred—
  - (i) in Queensland; or
  - (ii) after the offence provision commenced; or
- (c) an alleged offence mentioned in paragraph (a).

## **Subdivision 2      Committal and bail proceedings**

### **14C      Application of subdivision**

This subdivision applies to—

- (a) a committal proceeding; or

- (b) a proceeding under the *Bail Act 1980* relating to bail for an offence, including a proceeding relating to the remand of a person in custody.

#### **14D Sexual assault counselling privilege**

A person can not do any of the following things in connection with the proceeding—

- (a) compel, whether by subpoena or otherwise, another person to produce a protected counselling communication to a court;
- (b) produce to a court, adduce evidence of or otherwise use, a protected counselling communication;
- (c) otherwise disclose, inspect or copy a protected counselling communication.

### **Subdivision 3 Other proceedings**

#### **14E Application of subdivision**

This subdivision applies to a proceeding—

- (a) for the trial or sentencing of a person for an offence, other than a proceeding to which subdivision 2 applies; or
- (b) relating to a domestic violence order under the *Domestic and Family Violence Protection Act 2012*.

#### **14F Sexual assault counselling privilege**

A person can not do any of the following things in connection with the proceeding, other than with the leave of the court hearing the proceeding—

- (a) compel, whether by subpoena or otherwise, another person to produce a protected counselling communication to a court;

- (b) produce to a court, adduce evidence of or otherwise use, a protected counselling communication;
- (c) otherwise disclose, inspect or copy a protected counselling communication.

#### **14G Application for leave**

- (1) A party to the proceeding may apply for leave of the court under this subdivision.
- (2) As soon as reasonably practicable after the application is made, the applicant must give the following persons a notice complying with subsection (3)—
  - (a) each other party to the proceeding;
  - (b) if the counsellor to whom the protected counselling communication relates is not a party to the proceeding—the counsellor.
- (3) For subsection (2), the notice is a written notice stating—
  - (a) an application for leave under this subdivision has been made in relation to a protected counselling communication; and
  - (b) a description of the nature and particulars of the protected counselling communication (other than particulars disclosing the content of the communication); and
  - (c) if the counsellor or counselled person to whom the communication relates is not a party to the proceeding—that the counsellor or counselled person may appear in the proceeding under section 14L.
- (4) If the counselled person to whom the protected counselling communication relates is not a party to the proceeding, the prosecutor must, as soon as practicable after a notice is given under subsection (2), give the counselled person a copy of the notice.
- (5) The court can not decide the application until at least 14 days after subsection (2) is complied with.

- (6) However, the court may waive the requirement to comply with subsection (2) if, in relation to the proceeding—
  - (a) notice has been given of a previous application for leave under this subdivision relating to the same protected counselling communication; or
  - (b) the counselled person to whom the protected counselling communication relates has consented to the waiver of the requirement; or
  - (c) the court is satisfied—
    - (i) exceptional circumstances exist that require the waiver of the requirement; and
    - (ii) it is in the public interest to waive the requirement.
- (7) For subsection (6)(b), the consent must be given—
  - (a) in writing; or
  - (b) if the counselled person can not give written consent because of a disability—orally.

#### **14H Deciding whether to grant leave**

- (1) The court can not grant an application for leave under this subdivision unless the court is satisfied that—
  - (a) the protected counselling communication the subject of the application will, by itself or having regard to other documents or evidence produced or adduced by the applicant, have substantial probative value; and
  - (b) other documents or evidence concerning the matters to which the communication relates are not available; and
  - (c) the public interest in admitting the communication into evidence substantially outweighs the public interest in—
    - (i) preserving the confidentiality of the communication; and
    - (ii) protecting the counselled person from harm.

- (2) In deciding the matter mentioned in subsection (1)(c), the court must have regard to the following matters—
- (a) the need to encourage victims of sexual assault offences to seek counselling;
  - (b) that the effectiveness of counselling is likely to be dependent on maintaining the confidentiality of the counselling relationship;
  - (c) the public interest in ensuring victims of sexual assault offences receive effective counselling;
  - (d) that disclosure of the protected counselling communication is likely to damage the relationship between the counsellor and the counselled person;
  - (e) whether disclosure of the communication is sought on the basis of a discriminatory belief or bias;
  - (f) that the disclosure of the communication is likely to infringe a reasonable expectation of privacy;
  - (g) the extent to which the communication is necessary to enable the accused person to make a full defence;
  - (h) any other matter the court considers relevant.
- (3) For deciding the application, the court may consider a written or oral statement made to the court by the counselled person outlining the harm the person is likely to suffer if the application is granted.
- (4) If an oral statement is made by the counselled person under subsection (3), while the statement is being made the court must exclude from the room in which the court is sitting—
- (a) anyone who is not an essential person; and
  - (b) an essential person, if—
    - (i) the counselled person asks that the essential person be excluded; and
    - (ii) the court considers excluding the essential person would serve a proper interest of the counselled person.

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- (5) The court must not disclose, or make available to a party to the proceeding, a statement made to the court under subsection (3).
- (6) The court must state its reasons for granting or refusing to grant the application.
- (7) If the proceeding is a trial by jury, the court must hear and decide the application in the absence of the jury.
- (8) In this section—  
*harm* includes physical, emotional or psychological harm, financial loss, stress or shock, and damage to reputation.

## **Subdivision 4 Waiver or loss of privilege**

### **14I Waiver of privilege by counselled person**

- (1) This section applies, in relation to a proceeding to which subdivision 2 or 3 applies, if a document or evidence is a protected counselling communication.
- (2) This division does not prevent the document being produced, or the evidence being adduced, if the counselled person to whom the protected counselling communication relates—
  - (a) is 16 years or more; and
  - (b) consents to the production of the document or adducing of the evidence; and
  - (c) is not a person with an impaired capacity for giving the consent.
- (3) For subsection (2)(b), the consent must—
  - (a) expressly state the counselled person—
    - (i) consents to the production of a stated document, or the adducing of stated evidence, that is a protected counselling communication relating to the person; and

- (ii) has had an opportunity to seek legal advice about giving the consent; and
- (b) be given—
  - (i) in writing; or
  - (ii) if the counselled person can not give written consent because of a disability—orally.
- (4) To remove any doubt, it is declared that subsection (3)(b) does not require the office of the director of public prosecutions to give the counselled person legal advice.
- (5) In this section—

*impaired capacity* see the *Guardianship and Administration Act 2000*, schedule 4.

#### **14J Loss of privilege if communication made in commission of offence**

This division does not apply to a document or evidence that is a protected counselling communication if the communication was made in the commission of an offence.

### **Subdivision 5 General provisions**

#### **14K Court to inform of rights**

- (1) This section applies in relation to a proceeding to which subdivision 2 or 3 applies if it appears to the court a person may have grounds for—
  - (a) applying for leave under subdivision 3; or
  - (b) objecting to the production of a document, or the adducing of evidence, that is a protected counselling communication.
- (2) The court must satisfy itself the person is aware of the relevant provisions of this division and has had an opportunity to seek legal advice.

- (3) If the proceeding is a trial by jury, the court must satisfy itself of the matter under subsection (2) in the absence of the jury.
- (4) To remove any doubt, it is declared that subsection (2) does not require the office of the director of public prosecutions to give the person legal advice.

#### **14L Standing of counsellor and counselled person**

- (1) This section applies if—
  - (a) a counselled person or counsellor is not a party to a proceeding to which subdivision 2 or 3 applies; and
  - (b) the court is deciding whether a document or evidence relating to the counselled person or counsellor is a protected counselling communication.
- (2) The counselled person or counsellor may appear in the proceeding, including any appeal.

#### **14M Deciding whether document or evidence is protected counselling communication**

- (1) This section applies if a question arises under this division in relation to a proceeding to which subdivision 2 or 3 applies.
- (2) The court may consider a document or evidence to decide whether it is a protected counselling communication.
- (3) While the court is considering the document or evidence, the court must exclude from the room in which it is sitting—
  - (a) anyone who is not an essential person; and
  - (b) an essential person, if—
    - (i) the counselled person to whom the document or evidence relates asks that the essential person be excluded; and
    - (ii) the court considers excluding the essential person would serve a proper interest of the counselled person.

- (4) The court may make any other order it thinks fit to facilitate its consideration of the document or evidence.
- (5) This section applies despite sections 14D and 14F.

#### **14N Ancillary orders**

- (1) A court may make any order it considers appropriate to limit the extent of the harm likely to be caused to the counselled person by the production of a document, or the adducing of evidence, that is a protected counselling communication relating to the person.

*Example—*

an order that all or part of the evidence be heard, or the document produced, in camera

- (2) In this section—

*harm* see section 14H.

#### **14O Application of division despite Justices Act 1886**

To the extent of an inconsistency, this division applies despite a provision of the *Justices Act 1886*.

#### **14P Application of privilege in civil proceedings**

- (1) This section applies if, in a proceeding to which subdivision 2 or 3 applies, a protected counselling communication is privileged under this division.

*Note—*

A protected counselling communication is not privileged under this division if—

- (a) leave is granted under subdivision 3 in relation to it; or
  - (b) the privilege is waived or lost under subdivision 4.
- (2) A person can not produce a document containing, or adduce evidence of, the protected counselling communication in a civil proceeding arising from the act or omission to which the proceeding mentioned in subsection (1) relates.