

Protected Counselling Materials

Key Points

- Requires leave to request the documents that are Protected Counselling Communications (“PCC”) as a privilege now attaches to the materials. Whilst the counselled person and the counsellor may appear at the application, the privilege attaches to the counselled person only.¹
- Procedure for obtaining (well, attempting to obtain) PCC is in [Practice Direction 15 of 2021](#).
- A court does not **have** to inspect the materials to determine if the PCC can be used, but may as each case requires the court to make its own decision on if this course is warranted. [TRKJ v Director of Public Prosecutions \(Qld\) & Ors; KAY v Director of Public Prosecutions \(Qld\) & Ors \[2021\] QSC 297](#)
- If they are to be allowed in, the documents **must** have **substantial probative value** and other documents are not available. Three conditions present must be met before leave can be given under 14H(1):
 1. Will² have substantial probative value³;
 2. AND
 3. Allowing it must substantially outweigh the public policy in excluding it
- The counsellor and the counselled person have standing in the application, the DPP have been taking a neutral approach to the issue – Women’s Legal Service have been assisting in this respect.

¹ *R v TRKJ* [2020] QDCPR 124 at [28].

² *R v JML* [2019] QDCPR 23, Fantin DCJ at [46] means that the statutory condition is not satisfied by the mere possibility that the protected counselling communication has a “substantial probative value”.

³ *R v JML* [2019] QDCPR 23, Fantin DCJ at [55] Citing *Rohan v R* [2018] NSWCCA 89 “Substantial probative value” requires a higher standard of relevance than significant probative value, which itself connotes something more than mere relevance.

- (1) A **"protected counselling communication"** is an oral or written communication made in confidence—
- (a) by a [counselled person](#) (a person counselled about a sexual assault offence)to a [counsellor](#) (including a religious 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.

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.
- (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.

Summary of the relevant sections

14A	What is PCC?
14B	Further definitions
14C	In a bail application or committal, there is a prohibition on compelling or subpoenaing PCC to a Court, adduce evidence of PPC or otherwise disclose, inspect or copy PCC.
14D	
14E	Application of the protections to trials, sentences and DV applications
14F	Leave of the court is required to: compel, disclose, inspect, copy, subpoena, produce to a court, adduce evidence of PCC
14G	Procedure to apply for leave to do the above
14H	Factor to be considered when granting leave for matters in 14F
14I	Consent by counselled person can be given as long as they have capacity and are over 16 years old.
14J	No protections to PCC extend if the PCC was made in the commission of an offence
14K	The court is to inform the counselled person of their rights and that they can obtain legal advice on the matter – the court can do this on its own volition
14L	Allows the counselled person or counsellor to appear in the proceeding including any appeal (as they are not strictly a <i>party</i> to the proceeding)
14M	Court may consider material to determine if the materials is PCC – and make any orders it sees fit to facilitate the consideration.
14N	Court can make orders to limit the harm that may be cause to the counselled person by the production or adducing of evidence that is PCC
14O	Extends the application of the Division to the Justices Act
14P	Application to civil proceedings (Domestic Violence Applications) general prohibitions on and then process for leave applies