



**EVIDENCE (CONFIDENTIAL COMMUNICATIONS) AMENDMENT
ACT 1999**

No. 17 of 1999

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ANNO QUADRAGESIMO OCTAVO

ELIZABETHAE II REGINAE

A.D. 1999

No. 17 of 1999

An Act to amend the Evidence Act 1929.

[Assented to 1 April 1999]

The Parliament of South Australia enacts as follows:

Short title

1. (1) This Act may be cited as the *Evidence (Confidential Communications) Amendment Act 1999*.

(2) The *Evidence Act 1929* is referred to in this Act as "the principal Act".

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Insertion of headings

3. The following headings are inserted in Part VII of the principal Act:

(a) immediately before section 59j insert—

DIVISION 1—POWER TO DISPENSE WITH FORMAL PROOF;

(b) immediately before section 60 insert—

DIVISION 2—NOTICE OF ACTION;

(c) immediately before section 62 insert—

DIVISION 3—FACILITATION OF PROOF OF CERTAIN MATTERS;

(d) immediately before section 66 insert—

DIVISION 4—TAKING AFFIDAVITS ETC OUTSIDE THE STATE;

(e) immediately before section 67a insert—

DIVISION 5—ADMISSION OF OFFICIAL DOCUMENTS IN EVIDENCE;

(f) immediately before section 67ab insert—

**DIVISION 6—POWER OF FOREIGN AUTHORITY
TO TAKE EVIDENCE;**

(g) immediately before section 67b insert—

DIVISION 7—SELECT COMMITTEE EVIDENCE;

(h) immediately before section 67c insert—

DIVISION 8—EVIDENCE OF SETTLEMENT NEGOTIATIONS.

Insertion of Division

4. The following Division is inserted in Part VII of the principal Act after section 67c:

DIVISION 9—PROTECTED COMMUNICATIONS

Interpretation

67d. In this Division—

"**committal proceedings**" means proceedings for the preliminary examination of a charge of an indictable offence;

"**counsellor or therapist**" means a person whose profession or work consists of, or includes, providing psychiatric or psychological therapy to victims of trauma (and includes a person who works voluntarily in that field);

"**protected communication**" means a communication that is protected by public interest immunity under section 67e;

"**psychiatric or psychological therapy**" includes counselling;

"**therapeutic context**"—a communication relating to a victim or alleged victim of a sexual offence is made in a therapeutic context if—

(a) the communication is made—

(i) to enable a counsellor or therapist to assess the nature and severity of the trauma suffered by the victim or alleged victim, or consequent psychiatric, psychological or emotional harm; or

(ii) for the purposes, or in the course, of psychiatric or psychological therapy provided to the victim or alleged victim; and

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- (b) the communication is made in circumstances that give rise to a duty of confidentiality or a reasonable expectation of confidentiality.

Certain communications to be protected by public interest immunity

67e. (1) A communication relating to a victim or alleged victim of a sexual offence is, if made in a therapeutic context, protected from disclosure in legal proceedings by public interest immunity.

(2) However, the following communications are not subject to public interest immunity:

- (a) a communication made for the purposes of, or in the course of, a physical examination of the victim or alleged victim of a sexual offence by a registered medical practitioner or registered nurse; or
- (b) a communication made for the purposes of legal proceedings arising from the commission of the alleged offence or for commencing such legal proceedings; or
- (c) a communication as to which reasonable grounds exist to suspect that the communication evidences a criminal fraud, an attempt to pervert the administration of justice, perjury or another offence.

(3) A public interest immunity arising under this section cannot be waived by—

- (a) the counsellor or therapist; or
- (b) a party to the protected communication; or
- (c) the victim or alleged victim of the sexual offence or the guardian of the victim or alleged victim.

Evidence of protected communications

67f. (1) Evidence of a protected communication—

- (a) is entirely inadmissible in committal proceedings; and
- (b) cannot be admitted in other legal proceedings unless—
- (i) the court gives leave to a party to the proceedings to adduce the evidence; and
- (ii) the admission of the evidence is consistent with any limitations or restrictions fixed by the court; and
- (c) is not liable to discovery or any other form of pre-trial disclosure.

(2) On an application for leave to adduce evidence of a protected communication, the judge may make a preliminary examination of the relevant evidence if satisfied that—

- (a) the applicant has a legitimate forensic purpose for seeking leave to adduce the evidence; and

(b) there is an arguable case that the evidence would materially assist the applicant in the presentation or furtherance of his or her case.

(3) For the purposes of a preliminary examination of evidence, the court may order the counsellor or therapist to do one or more of the following:

- (a) to provide written answers to questions;
- (b) to produce written materials relating to the relevant protected communications;
- (c) to appear for oral examination.

Exceptions—

1. If the counsellor or therapist who provided the counselling or therapy is an employee, answerable to another (the principal) in the organisation in which the counsellor or therapist is employed, an order under this subsection is to be addressed to the principal unless the court is satisfied that there are good reasons for not taking that course in the circumstances of the particular case.
2. An order requiring a person to appear for oral examination is not to be made unless the court is satisfied that the examination cannot otherwise be effectively conducted.

(4) The following provisions govern the conduct of a preliminary examination:

- (a) the preliminary examination is to be conducted—
 - (i) in the absence of the jury (if any); and
 - (ii) in a room closed to the public; and
- (b) the evidence taken at the preliminary examination is not to be disclosed to the parties or their legal representatives except to the extent determined by the court; and
- (c) no record of the preliminary examination is to be available for public access.

(5) In deciding whether to grant leave to adduce evidence of a protected communication, the court is to weigh—

- (a) the public interest in preserving the confidentiality of protected communications;

against—

- (b) the public interest in preventing a miscarriage of justice that might arise from suppression of relevant evidence.

(6) In weighing the above considerations, the court is to have regard to—

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- (a) the need to encourage victims of sexual offences to seek psychiatric or psychological therapy and the extent to which the effectiveness of such therapy is dependent on the maintenance of confidentiality between the counsellor or therapist and the victim;
- (b) the probative value of the evidence and whether its exclusion may lead to a miscarriage of justice;
- (c) the attitude of the victim or alleged victim to whom the communication relates (or the guardian of the victim or alleged victim) to the admission of the evidence;
- (d) whether admission of the evidence is being sought on the basis of a discriminatory belief or bias;
- (e) the extent to which admission of the evidence would infringe a reasonable expectation of privacy and the potential prejudice to any person who would otherwise be protected by public interest immunity.

(7) The court is not to grant leave to adduce evidence of a protected communication unless satisfied that the public interest in preserving the confidentiality of protected communications is outweighed, in the circumstances of the case, by the public interest in preventing a miscarriage of justice that might arise from suppression of relevant evidence.

(8) If the court decides to grant leave to adduce evidence of a protected communication, it may make ancillary orders—

- (a) to prevent further publication or dissemination of the evidence; or
- (b) for any other purpose the court considers appropriate.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

E. J. NEAL Governor