

## Legislation table: Elements of the laws surrounding sexual assault, by jurisdiction

The offence of sexual assault: Definition								
	ACT	NSW	NT	Qld	SA	Tas.	Vic.	WA
<b>Name of offence(s)</b>	Sexual intercourse without consent	Sexual assault	Sexual intercourse without consent	Rape Sexual assault	Rape	Rape	Rape	Sexual penetration without consent
<b>Legislation that establishes the offence/s</b>	<i>Crimes Act 1900</i> s54, read with s50	<i>Crimes Act 1900</i> s61	<i>Criminal Code Act 1983</i> : s192 ss3 & 192B	<i>Criminal Code Act 1899</i> : ss347–349, read with s1 Sexual assault, s352	<i>Criminal Law Consolidation Act 1935</i> s48, read with ss5(1), (3) & 48A	<i>Criminal Code Act 1924</i> s185, read with ss1 & 127A	<i>Crimes Act 1958</i> : ss38 & 38A, read with s35	<i>Criminal Code Act 1913</i> s319, read with ss325–326
<b>Definition of offence</b>	<p>1 A person who engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years.</p> <p>2 A person who, acting in company with any other person, engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 14 years.</p> <p>3 For this section, proof of knowledge or recklessness is sufficient to establish the element of recklessness.</p>	Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years.	<p>A person is guilty of a crime if the person has sexual intercourse with another person:</p> <ol style="list-style-type: none"> <li>1 without the other person's consent; or</li> <li>2 knowing about or being reckless as to the lack of consent.</li> </ol> <p>Coerced sexual self-manipulation (192B):</p> <ol style="list-style-type: none"> <li>1 In this section, self-manipulation means the insertion, into the vagina or anus of a person, of an object manipulated by that person.</li> <li>2 Any person who coerces another person to engage in self-manipulation in circumstances where the person so coerced cannot reasonably be expected to resist, is guilty of a crime and is liable to imprisonment for 17 years.</li> </ol>	<p>Rape:</p> <ol style="list-style-type: none"> <li>1 Any person who rapes another person is guilty of a crime. Maximum penalty: life imprisonment.</li> <li>2 A person rapes another person if: <ol style="list-style-type: none"> <li>a the person has carnal knowledge with or of the other person without the other person's consent;</li> <li>b the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or</li> <li>c the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.</li> </ol> </li> <li>3 For this section, a child under the age of 12 years is incapable of giving consent.</li> </ol> <p>352 Sexual assault:</p> <ol style="list-style-type: none"> <li>1 Any person who: <ol style="list-style-type: none"> <li>a unlawfully and indecently assaults another person; or</li> <li>b procures another person, without the person's consent <ol style="list-style-type: none"> <li>i to commit an act of gross indecency; or</li> <li>ii to witness an act of gross indecency by the person or any other person;</li> </ol> </li> </ol>                     is guilty of a crime. Maximum penalty: 10 years imprisonment                 </li> <li>2 However, the offender is liable to a maximum penalty of 14 years imprisonment for an offence defined in subsection (1)(a) or (1)(b)(i) if the indecent assault or act of gross indecency includes bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person.</li> </ol>	<ol style="list-style-type: none"> <li>1 A person (the "offender") is guilty of the offence of rape if he or she engages, or continues to engage, in sexual intercourse with another person who: <ol style="list-style-type: none"> <li>a does not consent to engaging in the sexual intercourse; or</li> <li>b has withdrawn consent to the sexual intercourse, and the offender knows, or is recklessly indifferent to, the fact that the other person does not so consent or has so withdrawn consent (as the case may be).</li> </ol>                     Maximum penalty: Imprisonment for life                 </li> <li>2 A person (the "offender") is guilty of the offence of rape if he or she compels a person to engage, or to continue to engage, in: <ol style="list-style-type: none"> <li>a sexual intercourse with a person other than the offender;</li> <li>b an act of sexual self-penetration; or</li> <li>c an act of bestiality,</li> </ol>                     when the person so compelled does not consent to engaging in the sexual intercourse or act, or has withdrawn consent to the sexual intercourse or act, and the offender knows, or is recklessly indifferent to, the fact that the person does not so consent or has so withdrawn consent (as the case may be). Maximum penalty: Imprisonment for life                 </li> </ol>	1 Any person who has sexual intercourse with another person without that person's consent is guilty of a crime.	<ol style="list-style-type: none"> <li>1 A person commits rape if: <ol style="list-style-type: none"> <li>a he or she intentionally sexually penetrates another person without that person's consent: <ol style="list-style-type: none"> <li>i while being aware that the person is not consenting or might not be consenting; or</li> <li>ii while not giving any thought to whether the person is not consenting or might not be consenting; or</li> </ol> </li> <li>b after sexual penetration he or she does not withdraw from a person who is not consenting on becoming aware that the person is not consenting or might not be consenting.</li> </ol> </li> <li>2 A person (the offender) also commits rape if he or she compels a person: <ol style="list-style-type: none"> <li>a to sexually penetrate the offender or another person, irrespective of whether the person being sexually penetrated consents to the act; or</li> <li>b who has sexually penetrated the offender or another person, not to cease sexually penetrating the offender or that other person, irrespective of whether the person who has been sexually penetrated consents to the act.</li> </ol> </li> </ol>	<p>s325: A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years.</p> <p>s326: Aggravated sexual penetration without consent: A person who sexually penetrates another person without the consent of that person in circumstances of aggravation is guilty of a crime and liable to imprisonment for 20 years.</p> <p>Alternative offence: s. 321(2) or (4), 322(2) or (4), 323, 324 or 325. [Section 326 inserted by No. 14 of 1992 s. 6(1); amended by No. 70 of 2004 s. 36(3).]</p>

Definitions of "sexual intercourse" or "sexual penetration"								
	ACT	NSW	NT	Qld	SA	Tas.	Vic.	WA
<b>Genital sexual contact</b>	Penetration to any extent of the vagina or anus of one person by another person with any body part or object  Unless done for a proper medical purpose or otherwise authorised by law	Penetration of the female genitals or anus by any part the body or any object controlled by another person  Unless done for a proper medical purpose	Insertion to any extent of any body part into the internal or external female genitals or anus of another person  Unless done for medical purposes	Penetration of vagina or anus with a penis to any extent Penetration of vulva, vagina or anus to any extent with an object or part of the body other than a penis  Unless done for proper medical, hygienic or law-enforcement purposes	Penetration of the external lips of the vagina ("labia majora") or anus with any part of the body or any object  Agreement to an act on the basis that it is being done for medical or hygienic purposes is not agreement for any other purpose	Penetration to any degree of "the vagina, genitalia, anus, or mouth by the penis"  Sexual intercourse without consent	Penetration of the vagina, external genitalia or anus of another person with an object or any part of the body  Unless done in good faith for medical or hygienic purposes	Penetration of the vagina, labia majora, anus or urethra of one person with any part of the body of another or any object controlled by another person  Unless done for proper medical purposes
<b>Oral sexual contact</b>	Insertion of any part of the penis of one person into the mouth of another; Cunnilingus	Introduction of any part of the penis of one person into the mouth of another; Cunnilingus	Insertion of any part of one person's penis into the mouth of another; Cunnilingus; Fellatio	Penetration to any extent by the penis of one person into the mouth of another	Cunnilingus; Fellatio	See above	Penetration to any extent by the penis of one person into the mouth of another	Introduction to any extent of one person's penis into the mouth of another; Cunnilingus; Fellatio
<b>Continuation</b>	Continuation of sexual intercourse	Continuation of sexual intercourse	Continuation of sexual intercourse		Continuation of sexual penetration	Continuation of sexual intercourse	Continuation is included in definition of "rape"	Continuation of sexual penetration
<b>Surgically constructed genitalia</b>		"Female genitalia" includes a surgically constructed vagina	"Vagina" includes a surgically constructed vagina	"Vagina" includes a surgically constructed vagina, whether provided for a male or female. "Vulva" includes a surgically constructed vulva, whether provided for a male or female	Vagina, labia majora, penis or other sexual organ includes a reference to a surgically constructed or altered breast, vagina, labia majora, penis or sexual organ (as the case may be)	"Vagina" and "penis" include surgically constructed genitalia	"Vagina" includes a surgically constructed vagina	
<b>Additional information</b>	Sexual assaults in the first to third degree require aggravating circumstances and do not require proof of sexual intercourse	Additional offence of "sexual assault by forced self-manipulation"; Additional offences of aggravated assault; Additional offence of "assault with intent to have sexual intercourse" requires proof of aggravating circumstances but does not require proof of sexual intercourse	Additional offence of "coerced self-manipulation"	Additional offence of "assault with intent to commit rape" does not require proof of sexual penetration	Additional offence of "compelled sexual manipulation": manipulation by a person of another person's genitals or anus (whether or not including sexual intercourse)	Additional offence of aggravated sexual assault addresses penetration of the vagina, genitalia or anus by any part of the body other than a penis or by an inanimate object	"Sexual penetration" includes: a compelling a male person to sexually penetrate another person; and b compelling a person not to cease penetrating another person. Additional offence: compelling sexual penetration Additional offence of "assault with intent to commit rape" does not require proof of sexual penetration	"Sexual penetration" includes manipulation of any part of the complainant's body in order to cause sexual penetration of the accused. Additional offence: aggravated sexual penetration without consent

Non-consent								
	ACT	NSW	NT	Qld	SA	Tas.	Vic.	WA
<b>Consent standard</b>	Legislation states circumstances in which consent is negated	Free and voluntary agreement (includes circumstance in which consent is negated)	Free and voluntary agreement	Free and voluntary consent by a person with cognitive capacity to consent	Free and voluntary agreement	Free agreement: A person does not freely agree if they do not say or do anything to communicate consent	Free agreement (see jury direction below)	Freely and voluntarily given consent
<b>Directions that must be given to the jury</b>	<p>A person has not consented only because:</p> <p>a they did not say or do anything to indicate non-consent;</p> <p>b they did not protest, physically resist or sustain physical injury; or</p> <p>c they consented to sexual acts with the accused or someone else on this, or a previous, occasion.</p> <p>Where relevant in determining a mistaken belief of consent the judge must direct that the jury may consider whether the belief was reasonable.</p>		<p>A person has not consented only because:</p> <p>a they did not protest, physically resist or sustain physical injury; or</p> <p>b they consented to sexual acts with the accused on this, or a previous occasion.</p>		<p>A person is not to be regarded as having consented merely because:</p> <p>a they did not say or do anything to indicate non-consent;</p> <p>b they did not protest, physically resist or sustain physical injury; or</p> <p>c they consented to sexual activity:</p> <p>i of a different kind with the defendant; or</p> <p>ii previously with the defendant or another person.</p>		<p>If (and only if) relevant to the facts in issues. The judge must direct the jury on:</p> <p>a the meaning of consent;</p> <p>b when the law deems consent not to apply: if jury is satisfied beyond a reasonable doubt that a circumstance existed that invalidates consent, then it must find the complainant was not consenting;</p> <p>c the fact the complainant did not say or do anything to indicate consent is enough to show the act took place without free agreement;</p> <p>d a person is not to be regarded to have consented just because the complainant:</p> <p>i did not protest or physically resist;</p> <p>ii did not sustain physical injury; or</p> <p>iii on an earlier occasion freely agreed to engage in another sexual act (some or not) with that person or another person.</p>	
<b>Circumstances that invalidate consent</b>								
The law does not recognise consent if it is brought about by:								
<b>Force</b>	Infliction of violence or force on the complainant or someone present or nearby	Aggravated sexual assaults provisions apply	Force used against complainant or someone else	Force	Application of force on the complainant or someone else	Force used against complainant or someone else	Force used against complainant or someone else	Force
<b>Threats</b>	<ol style="list-style-type: none"> <li>Threats of violence or force against complainant or someone present or nearby</li> <li>Threats to inflict violence or force or use extortion against another person</li> <li>Threats of public humiliation, disgrace, physical or mental harassment against the complainant or someone else</li> </ol>	<ol style="list-style-type: none"> <li>Threats of force or terror against the complainant or someone else</li> <li>Intimidatory or coercive conduct, or other threat, that does not involve a threat of force</li> </ol>	See fear/intimidation, below	Threats	<ol style="list-style-type: none"> <li>Express or implied threats of the application of force on the complainant or someone else</li> <li>Express or implied threat to degrade or humiliate, disgrace or harass complainant or someone else</li> </ol>	Threats of any kind used against complainant or someone else	See fear/intimidation, below	Threats
<b>Fear/intimidation</b>		As above	Fear of force, or fear of harm of any type to complainant or someone else	<ol style="list-style-type: none"> <li>Intimidation</li> <li>Fear of bodily harm</li> </ol>	See above	Reasonable fear of force	Fear of force or harm of any type to complainant or someone else	Intimidation
<b>Circumstances affecting consciousness:</b>	<ol style="list-style-type: none"> <li>The effects of alcohol, drugs or anaesthetic</li> <li>The complainant's physical helplessness <ul style="list-style-type: none"> <li>Alcohol</li> <li>Drugs</li> <li>Intoxication</li> <li>Unconsciousness</li> <li>Sleep</li> <li>Helplessness</li> </ul> </li> </ol>	<ol style="list-style-type: none"> <li>If complainant has sexual intercourse while substantially affected by alcohol or any drug</li> <li>Complainant does not have the opportunity to consent because unconscious or asleep</li> </ol>	Complainant is asleep, unconscious or so affected by alcohol or another drug that they are not capable of free agreement	Complainant unable to form a decision about consent because asleep or intoxicated	Complainant unable to form a decision about consent because asleep, unconscious or intoxicated (alcohol or other substances) to the point of being incapable of freely and voluntarily agreeing to activity	Complainant is asleep, unconscious or unable to form a rational opinion about consent due to effects of alcohol or drugs	Complainant is asleep, unconscious, or so affected by alcohol or another drug they are unable to freely agree	
<b>Fraud and deceit (generally)</b>	A fraudulent misrepresentation of any fact					Fraud on the part of the accused		Deceit, or any fraudulent means

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Non-consent								
ACT	NSW	NT	Qld	SA	Tas.	Vic.	WA	
<b>Circumstances that invalidate consent</b>								
The law does not recognise consent if it is brought about by:								
<b>Fraud or mistake about the nature or purpose of the act</b>	See above	Mistaken belief about the nature of the act induced by fraudulent means	A false representation about the nature or purpose of the act	False and fraudulent misrepresentation about the nature or purpose of the act	Mistake or unable to understand the nature of the act	Complainant being reasonably mistaken about the nature or purpose of the act	Complainant being mistaken about the sexual nature of the act	See above
<b>Fraud or mistake about medical or hygienic purposes</b>	See above	Fraud about medical or hygienic purposes for the act	Mistaken belief the act is for medical or hygienic purposes		Agreement on the basis the act is needed for medical or hygienic purposes is not consent for any other purpose		Mistaken belief the act is necessary for medical or hygienic purposes	See above
<b>Fraud or mistake about the identity of the person proposing intercourse</b>	A mistaken belief about the identity of the person proposing intercourse	1 A mistaken belief they were married to the other person 2 A mistaken belief about the identity of the other person	Mistake about the identity of the other person	The accused bringing about a mistaken belief by the complainant that the accused was the complainant's sexual partner	Fraud about the identity of the person proposing intercourse	Complainant being reasonably mistaken about the identity of the accused	Complainant being mistaken about the identity of the person proposing intercourse	See above
<b>Inability to understand the nature of the act</b>	Inability to understand the nature of the sexual act	1 Inability to understand the sexual nature or quality of the act or the nature and effect of consent 2 Does not have capacity to consent, including because of age or cognitive incapacity	Inability to understand the sexual nature of the act	Consent means free and voluntary consent given by a person who has the cognitive capacity to give consent	Inability to understand the nature of the act due to young age or cognitive impairment	Inability to understand nature of the act	Inability to understand the sexual nature of the act	
<b>Unlawful detention</b>	Unlawful detention of the complainant	Unlawful detention of the complainant	Unlawful detention of the complainant		Unlawfully detained at the time of activity	Unlawful detention of complainant or someone else	Unlawful detention	
<b>Abuse of authority or trust</b>	Abuse of a position of authority or trust in relation to the complainant	Has intercourse because the abuse of a position of authority or trust		Exercise of authority		Complainant being overborne by the nature or position of another person		
<b>Significance of physical resistance or physical injury (see also Jury instructions, above)</b>	A person has not consented just because they did not physically resist	A person has not consented just because they did not physically resist	See Jury directions, above		An accused can be found guilty of rape whether or not the complainant physically resisted	If complainant suffers serious physical harm due to, or in connection with, a sexual offence the injury is evidence of non-consent unless there is proof to the contrary	See Jury directions, above	A person has not consented just because they did not physically resist

What the accused thought ( <i>mens rea</i> )								
	ACT	NSW	NT	Qld	SA	Tas.	Vic.	WA
<b>What mental state (if any) is required for a conviction?</b>	1 Knowledge of non-consent or 2 Recklessness as to whether the person is consenting	1 Knowledge of non-consent or 2 Reckless as to whether the other person is consenting or 3 No reasonable grounds for believing that the other person consents or 4 For the purposes of making a finding, the trier of fact must have regard to all the circumstances of the case, including: a steps taken to ascertain if the other person is consenting but b not including self-induced intoxication	1 Knowledge of non-consent or 2 Recklessness as to whether the other person is consenting	1 Neither intention nor recklessness need to be proved 2 Defence of honest and reasonable but mistaken belief in consent is available	1 Knowledge of non-consent or 2 Reckless indifference: a aware of the possibility the other person might not be consenting but proceeds regardless or b aware of the possibility that the other person might not be consenting and fails to take reasonable steps to ascertain consent before deciding to proceed or c does not give any thought as to whether or not the other person is consenting	1 Intention to sexually penetrate 2 Neither intention nor recklessness need to be proved 3 Defence of honest and reasonable but mistaken belief in consent available <i>unless</i> mistaken belief is caused by a self-inflicted intoxication; b recklessness about consent; or c failure to take reasonable steps to check consent	1 Awareness of non-consent or 2 Awareness of possibility of non-consent or 3 Not giving any thought to whether there is non-consent	1 Neither intention nor recklessness need to be proved 2 Defence of honest and reasonable but mistaken belief in consent is available

Sexual offences against close relatives								
	ACT	NSW	NT	Qld	SA	Tas.	Vic.	WA
<b>Legislative provisions</b>	<i>Crimes Act 1900 s62</i>	<i>Crimes Act: ss78A, 78B</i>	<i>Criminal Code Act 1983 s134</i>	<i>Criminal Code Act s222</i>	<i>Criminal Law Consolidation Act s72</i>	<i>Criminal Code Act s133</i>	<i>Crimes Act 1958 s44</i>	<i>Criminal Code Act 1913 s329</i>
<b>Name of offence</b>	Incest	<ul style="list-style-type: none"> <li>Incest</li> <li>Incest attempts</li> </ul>	Incest	<ul style="list-style-type: none"> <li>Incest</li> <li>Incest attempts</li> </ul>	Incest	Incest	Incest	Sexual offences by relatives
<b>Sexual conduct addressed</b>	Sexual intercourse	Sexual intercourse	Sexual intercourse	Carnal knowledge	Sexual intercourse	Sexual intercourse	Sexual penetration	<ul style="list-style-type: none"> <li>Sexual penetration of a person over 18</li> <li>Consent to sexual penetration by a person 18 or over</li> </ul>
<b>Relationships addressed</b>	<ul style="list-style-type: none"> <li>Lineal descendant</li> <li>Sibling</li> <li>Half-sibling</li> <li>Step-child</li> </ul>	<ul style="list-style-type: none"> <li>Close family member aged 16 or older who has been a family member since birth</li> <li>Parent</li> <li>Child</li> <li>Sibling</li> <li>Half-sibling</li> <li>Grandparent</li> <li>Grandchild</li> </ul>	<ul style="list-style-type: none"> <li>Close family member who has been a family member since birth</li> <li>Parent</li> <li>Grandparent</li> <li>Lineal descendant</li> <li>Sibling</li> <li>Half-sibling</li> </ul>	<ul style="list-style-type: none"> <li>Lineal descendant</li> <li>Half-, adoptive- or step-lineal descendant</li> <li>Sibling</li> <li>Half-, adoptive- or step-sibling</li> <li>Parent</li> <li>Grandparent</li> <li>Uncle/Aunt</li> <li>Nephew/Niece</li> </ul>	<ul style="list-style-type: none"> <li>Parent</li> <li>Child</li> <li>Sibling</li> </ul>	<ul style="list-style-type: none"> <li>Lineal ancestor</li> <li>Lineal descendant</li> <li>Sibling</li> <li>Half-sibling</li> </ul>	<ul style="list-style-type: none"> <li>Lineal descendant</li> <li>Step-child</li> <li>Lineal descendant or step-child under 18 of de facto spouse</li> <li>Sibling</li> <li>Half-sibling</li> <li>Lineal ancestor or step-parent (in the case of a person over 18 years)</li> </ul>	<ul style="list-style-type: none"> <li>Lineal ancestor</li> <li>Lineal descendant</li> <li>Sibling</li> <li>Half-sibling</li> </ul>
<b>Mental state</b>	Knowledge of the family relationship	None stated	None stated	Knowledge of the family relationship, or a relationship of that type	None stated	Knowledge of the family relationship	Knowledge of the family relationship	Knowledge of the family relationship
<b>Defences</b>	Coercion	Not realising that the other person was related	Coercion	<ul style="list-style-type: none"> <li>Coercion</li> <li>Lawful marriage</li> <li>Entitlement to be lawfully married</li> </ul>	None stated	None stated	<ul style="list-style-type: none"> <li>Coercion</li> <li>Being compelled</li> </ul>	None stated
<b>Other</b>		<ul style="list-style-type: none"> <li>No prosecution shall be commenced without the sanction of the Attorney-General</li> <li>A person on trial for sexual assault or aggravated sexual assault may be found not guilty of the sexual assault but guilty of incest</li> <li>Sexual offences against people under 16 covered by separate offences</li> </ul>		<ul style="list-style-type: none"> <li>Includes step-relationships arising from de facto relationships, fostering and other legal arrangements</li> <li>Excludes step-relationship beginning after those involved became adults</li> </ul>		Explicitly includes ancestors and descendants related by blood rather than marriage		<ul style="list-style-type: none"> <li>Explicitly includes half-relationships, blood relationships and relationships established by written law</li> <li>Sexual offences against people under 16 covered by separate offences</li> </ul>

**Protection of sexual assault counselling records**

NB. Queensland currently has no legislation protecting sexual assault counselling records, and therefore does not appear on this section of the table.

	ACT	NSW	NT	SA	Tas.	Vic.	WA
<b>Legislative provisions</b>	<i>Evidence (Misc Provisions) Act 1991: Div 4.5</i>	<i>Criminal Procedure Act 1986: Part 5 Div 2</i>	<i>e: Part VIA</i>	<i>Evidence Act 1929: Part 7 Div 9</i>	<i>Evidence Act 2001: s 127B</i>	<i>Evidence Act 1958: Part 2 Division 2A</i>	<i>Evidence Act 1906: ss 19A-19L</i>
<b>What is protected?</b>	<ol style="list-style-type: none"> <li>Counselling communications made by, to or about a person against whom a sexual offence was or is alleged to have been committed</li> <li>Communications made in a context giving rise to a reasonable expectation or a duty of confidentiality</li> </ol>	<p>Counselling communications:</p> <ol style="list-style-type: none"> <li>made by, to or about a victim or alleged victim of a sexual offence;</li> <li>made to or about the complainant by the counsellor or a support person in the course of counselling;</li> <li>made between counsellors about the complainant</li> </ol>	<p>Communications made:</p> <ol style="list-style-type: none"> <li>in confidence by a complainant to a counsellor in the course of the counselling relationship;</li> <li>about the complainant by a parent, carer or other supportive person to the counsellor or by a counsellor to the supportive person</li> </ol>	<ol style="list-style-type: none"> <li>Communications made to enable a counsellor to assess trauma or provide therapy to complainant</li> <li>Must be made in a therapeutic context in circumstances giving rise to a duty or reasonable expectation of confidentiality</li> </ol>	<ol style="list-style-type: none"> <li>Communications made in a context giving rise to a reasonable expectation or a duty of confidentiality</li> <li>Communication must have been made: <ol style="list-style-type: none"> <li>by the complainant to a counsellor in the course of counselling or treatment relating to harm suffered in connection with the offence;</li> <li>to, or in relation to, the victim for the purposes of counselling or treatment</li> </ol> </li> </ol>	<p>Communications made in confidence by the complainant to a registered medical practitioner or counsellor in the course of the relationship between medical practitioner and patient</p>	<ol style="list-style-type: none"> <li>Counselling communications made by, to or about a complainant in a sexual offence</li> <li>Counselling communications made: <ol style="list-style-type: none"> <li>in confidence by the complainant to a counsellor about harm the complainant may have suffered;</li> <li>to or about the complainant by the counsellor or a support person in the course of counselling;</li> <li>between counsellors about the complainant</li> </ol> </li> </ol>
<b>What is specifically not protected?</b>	<ol style="list-style-type: none"> <li>Information obtained by a doctor because of a physical examination of a complainant</li> <li>Any communication made in the course, or because, of such an examination</li> <li>Communications for criminal investigations or criminal proceedings arising from sexual offences</li> </ol>	Addressed by definition of counselling communication	Communications made about a physical examination of the complainant by a medical practitioner or registered nurse	<ol style="list-style-type: none"> <li>Communications about a physical examination of the complainant by a medical practitioner or registered nurse</li> <li>Communications made for the purposes of legal proceedings arising from the sexual offence</li> </ol>	Addressed by definition of counselling communication	<ol style="list-style-type: none"> <li>Information about a physical examination by a medical practitioner</li> <li>Communications made for the purposes of legal proceedings arising from the sexual offence</li> </ol>	Addressed by definition of counselling communication
<b>Are communications made prior to the charged sexual assault covered?</b>	Yes	Yes	Yes	Not addressed *	No	Yes	Yes
<b>Primary rules protecting sexual assault counselling communications</b>	<ol style="list-style-type: none"> <li>Counselling communications are never admissible in preliminary proceedings</li> <li>Evidence disclosing the content of sexual assault counselling is not admissible in other proceedings without permission of the court</li> </ol>	<ol style="list-style-type: none"> <li>Counselling communications are never admissible in preliminary proceedings</li> <li>Evidence disclosing the content of sexual assault counselling is not admissible in other proceedings without permission of the court</li> </ol>	Evidence disclosing the content of sexual assault counselling is not admissible without permission of the court	<ol style="list-style-type: none"> <li>Counselling communications are never admissible in preliminary proceedings and are not liable to pre-trial disclosure</li> <li>Evidence disclosing the content of sexual assault counselling is not admissible in other proceedings unless court grants permission and limits established by the court are complied with</li> <li>If counsellor is an employee an order to disclosure should be made to principal unless the court is satisfied for good reasons otherwise</li> </ol>	<ol style="list-style-type: none"> <li>Disclosure is permitted only if complainant has given consent</li> <li>There is no obligation on anyone to produce counselling related documents unless complainant has consented</li> </ol>	Evidence disclosing the content of sexual assault counselling is not admissible without permission of the court	<ol style="list-style-type: none"> <li>Evidence disclosing the content of sexual assault counselling is not admissible without permission of the court</li> <li>Production of counselling communications can be required only with the court's permission—subpoenas issued without court permission are of no effect</li> </ol>
<b>Standards that must be met for disclosure to be ordered</b>	<ol style="list-style-type: none"> <li>There must be a legitimate forensic purpose for disclosure</li> <li>Disclosure must be of significant assistance to applicant's case</li> </ol>	<ol style="list-style-type: none"> <li>The evidence must have substantial probative value</li> <li>There must be no other evidence that could prove the disputed facts</li> </ol>	<ol style="list-style-type: none"> <li>The evidence must have substantial probative value</li> <li>There must be no other evidence that could prove the disputed facts</li> </ol>	<ol style="list-style-type: none"> <li>There must be a legitimate forensic purpose for disclosure</li> <li>There is an arguable case that the evidence would materially assist the applicant in the presentation of their case</li> </ol>	Not applicable	<ol style="list-style-type: none"> <li>The evidence must have substantial probative value</li> <li>There must be no other evidence that could prove the disputed facts</li> </ol>	<ol style="list-style-type: none"> <li>There must be a legitimate forensic purpose for disclosure proved by the applicant</li> <li>There must be no other evidence that could prove the disputed facts</li> <li>Disclosure can be ordered if and only if disclosure is in the public interest</li> </ol>

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**Protection of sexual assault counselling records**

NB. Queensland currently has no legislation protecting sexual assault counselling records, and therefore does not appear on this section of the table.

	ACT	NSW	NT	SA	Tas.	Vic.	WA
<b>Factors court must consider in deciding whether to order disclosure</b>	<ol style="list-style-type: none"> <li>Whether public interest in ensuring fair trial outweighs public interest in maintaining confidentiality</li> <li>Whether disclosure is necessary for full defence</li> <li>Public interest in ensuring complainants receive counselling</li> <li>Whether disclosure will allow proof of a disputed fact</li> <li>Whether disputed facts could be proved in another way</li> <li>Probability disclosure will change outcome</li> <li>Whether request for disclosure was made on the basis of a "discriminatory belief or bias"</li> <li>Whether complainant or counsellor object to disclosure</li> <li>Whether confidentiality of information has decreased with time or changed circumstances</li> </ol>	<ol style="list-style-type: none"> <li>Whether public interest in disclosure substantially outweighs public interest in protection of confidential communications and the confider</li> <li>The "likelihood, nature and extent" of potential harm to the complainant</li> </ol>	<ol style="list-style-type: none"> <li>Whether public interest in disclosure outweighs potential harm to the complainant</li> <li>Likelihood, nature and extent of potential harm to the complainant</li> </ol>	<ol style="list-style-type: none"> <li>Probative value of the evidence and whether exclusion may lead to a miscarriage of justice</li> <li>Whether public interest in maintaining confidentiality between complainant and therapist outweighs risk of miscarriage of justice from non-disclosure</li> <li>Complainant's attitude to disclosure</li> <li>Whether application for disclosure is being made on basis of discriminatory beliefs or bias</li> <li>Need to encourage complainants to seek counseling, the effectiveness of which may depend on confidentiality</li> <li>Extent of infringement of reasonable expectation of privacy to anyone who would otherwise be protected by public interest immunity</li> </ol>	Not applicable	<ol style="list-style-type: none"> <li>Whether public interest in disclosure substantially outweighs interest in preservation of confidentiality and possible harm to the complainant</li> <li>Likelihood, nature and extent of potential harm to the complainant</li> <li>The extent to which disclosure is necessary to make a full defence</li> <li>The need to encourage victims of sexual assault offences to seek counselling and the extent to which victims may be discouraged to do so, or effectiveness of counselling may be diminished if protected evidence is produced</li> <li>Whether the party seeking the evidence is doing so because of a discriminatory or biased belief</li> <li>Whether protected confider objects to disclosure</li> <li>Nature and extent of a reasonable expectation of confidentiality and potential prejudice to privacy of any person</li> </ol>	<ol style="list-style-type: none"> <li>Whether information will provide substantial evidence</li> <li>Extent to which disclosure is necessary for a full defence</li> <li>Likelihood that outcome will be affected</li> <li>Public interest in access to effective counselling</li> <li>Public interest in adequate counselling records</li> <li>Likelihood, nature and extent of potential harm to complainant</li> <li>Any other relevant matter</li> </ol>
<b>Is court inspection of documents required or discretionary?</b>	Preliminary examination <i>must</i> be made if court is satisfied the applicant has a legitimate forensic purpose and evidence would significantly assist the applicant's case	If the court needs to rule on an objection concerning a confidential document, the document <i>must</i> be produced for inspection by the court		<ol style="list-style-type: none"> <li>Preliminary examination <i>may</i> be made only if court is satisfied the applicant has a legitimate forensic purpose and there is an arguable case the evidence would significantly assist the applicant's case</li> <li>For purposes of a preliminary examination of evidence, court may order a therapist to: <ol style="list-style-type: none"> <li>provide written answers;</li> <li>produce written materials; or</li> <li>appear for oral examination, although such an order should only be made if the examination cannot otherwise be effectively conducted</li> </ol> </li> <li>Rules governing preliminary examination: <ol style="list-style-type: none"> <li>absence of jury and public;</li> <li>evidence disclosed to parties to the extent determined by court</li> </ol> </li> </ol>		For the purpose of determining an application for leave, the court <i>may</i> inspect the document	Preliminary examination <i>may</i> be made only if court is satisfied the applicant has proved a legitimate forensic purpose
<b>Is notice required?</b>		Applicant must give reasonable notice in writing to all other parties and the protected confider if they are not a party			Consent of complainant is required	The applicant must give 14 days' written notice to other parties, the informant and the medical practitioner or counsellor if not a party	Court must notify the applicant and all other parties when the application is going to be heard in court
<b>Significance of complainant's consent to disclosure</b>	These provisions apply whether or not the confider has consented or has not objected to disclosure	Disclosure permitted with express consent of an adult complainant in writing	Disclosure permitted with consent of the confider, or of an appropriate person where complainant is under 14	Permission for disclosure cannot be granted by the counsellor, the complainant or their guardian	The confidential communication cannot be admitted as evidence unless the alleged victim consents to disclosure	Disclosure permitted with consent of the confider, or of an appropriate person where complainant is under 14	<ol style="list-style-type: none"> <li>Disclosure permitted with express consent of an adult complainant in writing</li> <li>Consent by or on behalf of a child witness not permitted</li> </ol>

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**Protection of sexual assault counselling records**

NB. Queensland currently has no legislation protecting sexual assault counselling records, and therefore does not appear on this section of the table.

	ACT	NSW	NT	SA	Tas.	Vic.	WA
<b>Circumstances in which protection can be lost</b>	Communications in the commission of a criminal offence, fraud or civil wrong	Communications in the commission of fraud, or an act giving rise to a civil penalty	Where there is evidence of criminal fraud or perjury	Communications providing evidence of a criminal fraud, perjury or other offence	Not addressed	Communications in the commission of a fraud, perjury or an act giving rise to a civil penalty	Communications as part of a fraud, offence or an act giving rise to a civil penalty
<b>Additional orders the court can make if disclosure is ordered</b>	<p>Orders designed to limit harm to complainant, including:</p> <ol style="list-style-type: none"> <li>orders closing the court to the public while the protected evidence is disclosed;</li> <li>orders that the document be edited or a copy be disclosed instead of the original;</li> <li>orders suppressing publication; and</li> <li>orders about disclosure of information about the identity of the protected confider</li> </ol>	<p>Orders designed to limit harm to complainant, including:</p> <ol style="list-style-type: none"> <li>orders closing the court to the public while the protected evidence is disclosed;</li> <li>orders for production, inspection and copying, which may be necessary for safety and welfare;</li> <li>orders suppressing publication; and</li> <li>orders restricting access to identities of people mentioned in documents</li> </ol>	<p>Orders designed to limit harm to complainant, including:</p> <ol style="list-style-type: none"> <li>orders closing the court to the public while the protected evidence is disclosed;</li> <li>orders for production and inspection, which may be necessary for safety and welfare;</li> <li>counsellor or any other party;</li> <li>orders suppressing publication; and</li> <li>orders restricting access to identities of people mentioned in documents</li> </ol>	<p>Orders to prevent publication or dissemination of the evidence; or for any other purpose the court considers appropriate</p>	Not addressed	<p>Orders designed to limit harm to complainant, including:</p> <ol style="list-style-type: none"> <li>orders closing the court to the public while the protected evidence is disclosed;</li> <li>orders suppressing publication; and</li> <li>orders about disclosure of the identity of the confider or practitioner</li> </ol>	<p>Orders designed to limit the harm caused by disclosure, including:</p> <ol style="list-style-type: none"> <li>orders closing the court to the public while protected evidence is disclosed;</li> <li>orders for production, inspection and copying, which may be necessary for safety and welfare;</li> <li>orders suppressing publication; and</li> <li>orders restricting access to identities of people mentioned in documents</li> </ol>

Note: \* *Wilson v Magistrates Court of South Australia and Anor* [2004] SASC 297 found that the provisions could apply to records of counselling prior to a *disclosure* of sexual assault, but found it unnecessary to decide whether counselling prior to the commission of an alleged offence would be protected.