

Protecting survivors' most sensitive information: A sexual assault counselling privilege for family law

A submission to the Australian Law Reform
Commission's Review of the Family Law System

Liberty Victoria's
**RIGHTS
ADVOCACY
PROJECT**

Rights Advocacy Project

libertyvic.rightsadvocacy.org.au
rap@libertyvictoria.org.au

Introduction

About Liberty Victoria and the Rights Advocacy Project

This submission is made as part of the Rights Advocacy Project (RAP), a project of Liberty Victoria.

Liberty Victoria is one of Australia's leading civil liberties organisations. RAP is a community of lawyers and activists working to advance human rights in Australia.

In drafting this submission, RAP consulted various community organisations and counselling services. A list of organisations consulted is included at the end of this submission.

Introduction

This submission addresses Question 25 of the Australian Law Reform Commission (ALRC)'s Review of the Family Law System—Issues Paper (IP 48)¹ namely:

How should the family law system address misuse of process as a form of abuse in family law matters?

In particular, this submission addresses one of the behaviours of concern identified in [190] of IP 48: 'using evidence gathering processes, including subpoenas, to obtain access to sensitive personal material such as the victim's... sexual assault service records'.

In short, this submission proposes that a qualified sexual assault communications privilege be introduced in the family law jurisdiction. This qualified privilege would bring the family law jurisdiction into line with all Australian States and Territories that, to differing extents, protect sexual assault counselling records from compulsion.

This submission:

1. outlines the rationale for sexual assault counselling privileges;
2. addresses the arguments against sexual assault counselling privileges;
3. recommends that a qualified sexual assault privilege be introduced in the family law jurisdiction; and
4. considers how this privilege would operate by comparing sexual assault counselling privileges under State and Territory laws.

1 Australian Law Reform Commission, Review of the Family Law System, Issues Paper 48 (March 2018).

1. Sexual assault counselling privileges

1. Sexual assault counselling privileges in Australian States and Territories

Every Australian State and Territory currently has, to differing extents, privileges that restrict the production or adduction of evidence of communications passing between victims of sexual assault² and counsellors or medical practitioners who seek to assist the victim to overcome emotional, psychological or psychiatric conditions associated with sexual assault.³

These privileges, sometimes called ‘confidential communications privileges’,⁴ operate differently in each jurisdiction but all aim to prevent subpoenas being issued for evidence of a confidential communication between victim and their treating professional,⁵ or documents containing such communications

in criminal proceedings. As Mary Heath explains, prior to the introduction of sexual assault counselling privileges:

A subpoena requiring the documents to be produced could be issued provided that the documents were requested “for a bona fide purpose connected with the litigation... In spite of this requirement, research demonstrates that subpoenas have been served on counselling services when no record of contact with the complainant exists or records of contact are extremely limited...⁶

These practices were generally considered to be contrary to the public interest because confidentiality and privacy concerns were perceived to discourage victims from seeking appropriate professional assistance.⁷ Put simply, if a victims knew that their most sensitive information could be accessed by use of compulsory processes, it is generally thought that fewer people would be willing to come forward and seek professional assistance, participate in therapeutic processes and report

2 For the purposes of this submission, we adopt the definition of sexual assault used in the Australian and New Zealand Standard Offence Classification: Physical contact, or intent of contact, of a sexual nature directed toward another person where that person does not give consent, gives consent as a result of intimidation or deception, or consent is proscribed (i.e. the person is legally deemed incapable of giving consent because of youth, temporary/permanent (mental) incapacity or there is a familial relationship).

See Australian Bureau of Statistics *Australian and New Zealand Standard Offence Classification (ANZSOC) (Third Edition, 2011)* (June 2011), 41.

4 *Evidence (Miscellaneous Provisions) Act 1958* (Vic); *Evidence (Miscellaneous Provisions) Act 1991* (ACT), *Evidence Act 1995* (NSW); *Evidence Act 1939* (NT); *Evidence Act 1977* (Qld); *Evidence Act 1929* (SA); *Evidence Act 2001* (Tas); *Evidence Act 1906* (WA).

5 See e.g. *Evidence (Miscellaneous Provisions) Act 1958* (Vic) Pt II Div 2A.

5 Typically a counsellor, psychologist or, possibly, a psychiatrist. For ease of reference, we use the term ‘treating professional’. Please note that it is common to all sexual assault counselling privileges that the treating professional must be a professional and not, for example, a friend or family member who provides emotional support.

6 Mary Heath, ‘The Law and Sexual Offences Against Adults in Australia’ (2005) 4 *Australian Centre for the Study of Sexual Assault Issues* 1, citing: → Ian Freckleton “Sexual offence prosecutions: A barrister’s perspective” in Patricia Eastal (ed), *Balancing the scales: Rape, law reform and Australian culture* (Federation Press, Sydney, 1998) 143; and → Liz Olle, “Protecting confidential counselling files of sexual assault complaints from disclosure in legal proceedings: A Victorian act” (1999) 6 *Women against Violence: An Australian Feminist Journal* 78.

7 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC Final Report (2005), [15.48], citing Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person*, Report (1999), 277–279.

crimes to the police.⁸

In other words, sexual assault counselling privileges exist to protect the confidentiality of victims from unwarranted intrusion because confidentiality is the bedrock of the therapeutic relationship.⁹ As one victim explains in *No Longer Silent: A study of women's help-seeking decisions and service responses to sexual assault*:¹⁰

It's helpful being able to pour your heart out in confidential surroundings, where you're safe and it's okay to ask about any fears. They brought me back from not being able to handle anything to getting through the process. The counsellor has been my lifesaver, literally...¹¹

Breaching this confidence can dissuade victims from seeking professional assistance, or from continuing their engagement with professionals. For example, the Australian Institute of Criminology has noted that confidentiality concerns are an important factor to victims and the providers of sexual assault counselling services.¹² Thus, the Sydney Rape Crisis Centre explains:

We consider knowledge that counsellors' notes can be subpoenaed to be a major barrier for women who have been raped to laying a complaint with police, going ahead with a hearing, contacting sexual assault services and even continuing contact with this Centre ... SRCC is the only rape crisis/sexual assault service in NSW where women who contact can remain completely anonymous ... Women who contact frequently mention that they would not contact another [service] because of a perceived and/or actual lack of complete confidentiality of files.¹³

In their joint report on Uniform Evidence Laws,¹⁴ the Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission accepted that there was a public interest in protecting sexual assault counselling records¹⁵ and ultimately recommended that a qualified sexual assault counselling privilege applicable in civil and criminal proceedings be inserted into the *Evidence Act 1995* (Cth).¹⁶

That recommendation was not adopted. Consequently, the Commonwealth is the only jurisdiction without any form of sexual assault counselling privilege. The ALRC's Inquiry into the Family Law System offers the opportunity to reconsider the introduction of a sexual assault

8 Ibid.

9 Australian Institute of Family Studies, Supporting victims through the legal process, (November 2010), Publications – Supporting victims through the legal process, <<https://aifs.gov.au/publications/supporting-victims-through-legal-process/philosophy-sexual-assault-services>>.

→ See also Simon Bronnitt 'The use and abuse of counseling records in sexual assault trials: Reconstructing the "rape shield"?' (1997) 8(2) *Criminal Law Forum* 259, 266-267.

10 Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (2005) Australian Institute of Criminology, Canberra.

11 Ibid 16 and 67.

12 Ibid 16 and 67.

13 Anne Cossins and Ruth Pilkinton, 'Balancing the Scales: The Case for the Inadmissibility of Counselling Records in Sexual Assault Trials' (1996) 19(2) *University of New South Wales Law Journal* 222, 226.

14 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC Final Report (2005).

15 Ibid [15.71].

16 Ibid, Recommendation 15-4. See also Australian Law Reform Commission, Family Violence - A National Legal Response, Report No 114 (2010), [27.137].

2. A family law sexual assault counselling privilege?

counselling privilege in family law matters in order to curb inappropriate use of subpoenas as noted by the ALRC in IP 48.

2. A family law sexual assault counselling privilege?

The issues associated with subpoenas for sexual assault counselling records have typically been considered in the criminal law context. However, these issues are no less relevant in any other jurisdiction where the use of subpoenas and other compulsory processes may breach the confidences of victims in order to obtain evidence that can be of questionable relevance.

Anecdotally, it is common for subpoenas to be issued to sexual assault counselling services and other therapeutic service providers in family law proceedings, particularly parenting proceedings.¹⁷ For the reasons outlined above, it is worth questioning whether it is always appropriate for such evidence to be sought, especially as subpoenas for sexual assault counselling records (or evidence of sexual assault counselling sessions) may be used to perpetrate or perpetuate coercive and controlling behaviour against a victim.¹⁸

This is because, once a subpoena is issued and served, a party who objects to production of the documents must produce those documents to a court pending determination of the objection.¹⁹ A party may therefore breach a victims' confidential relationship with their treating professional (thereby undermining the therapeutic relationship and possibly re-traumatising the victim), even if the subpoena is liable to be set aside (e.g. as a fishing expedition

or as lacking legitimate forensic purpose).²⁰ In other words, the use of a subpoena seeking production of those records has the potential to cause harm, and that opportunity can be used as a threat to obtain a collateral advantage in family law proceedings, or to dissuade a victim from participating fully in those proceedings.

A qualified sexual assault counselling privilege can assist in reducing the risk that subpoenas for sexual assault counselling records are used inappropriately. This is because a qualified sexual assault counselling privilege would place the onus upon the party seeking the subpoena to justify the relevance of the information sought, rather than on the victim to object. In our view, such a privilege could assist in restricting the inappropriate use of subpoenas and is therefore worthy of consideration in order to achieve the broader public policy purposes outlined above.

As regards those public policy purposes, it is important to note that a qualified sexual assault counselling privilege would restrict, but not entirely prevent, the use of subpoenas for a specifically defined class of protected evidence. Therefore, these subpoenas would still be available to parties in appropriate cases. As such, it is important to acknowledge that, even where a qualified sexual assault counselling privilege is in operation, the risks associated with breaching the therapeutic relationship will still exist (e.g. the risk that victims will be dissuaded from seeking appropriate assistance).

However, the proposed privilege is not intended to prevent access to sexual assault

17 Women's Legal Service of New South Wales, *Sense and Sensitivity: Family Law, Family Violence and Confidentiality* (May 2016), 21.

18 Australian Law Reform Commission, *Review of the Family Law System, Issues Paper 48* (March 2018), [189]-[190].

19 *The Commissioner for Railways (NSW) v Small* (1938) 38 SR(NSW) 564, 574 (Jordan CJ).

20 See:
→ Victoria Legal Aid, *Case note: when there is family violence in family law litigation* (July 2016), <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-case-note-when-there-is-family-violence-in-a-family-law-litigation.docx>>; and
→ Women's Legal Service of New South Wales, *Sense and Sensitivity: Family Law, Family Violence and Confidentiality* (May 2016), 28-29.

3.

Objections to sexual assault counselling privileges

counselling records in all cases. It is intended to re-calibrate the balance, in our view more appropriately, between: (1) the public interest in parties (and courts) having all relevant information available in litigation; and (2) the public interest in encouraging survivors to seek appropriate professional therapeutic assistance. It does so by placing the onus of proof on the party seeking to issue the subpoena for a narrowly defined class of protected information.

3. Objections to sexual assault counselling privileges

The primary objection to a sexual assault counselling privilege is that the restrictions placed on the ability to seek or compel that evidence deprive a court, and the parties, of potentially relevant evidence.

However, this is an inevitable consequence of any rule of evidence that restricts the production of, or makes inadmissible, certain information or documents. For example, in upholding the constitutional validity of the New South Wales sexual assault counselling privilege, Basten JA said:

[Because the sexual assault counselling privilege] is a law relating to evidence and procedure, it stands squarely within the power of the Parliament with respect to the regulation of criminal trials. It reflects a public policy which has received greater attention and emphasis in recent years than in earlier times, but is arguably a product of more enlightened attitudes towards the victims of sexual offences and the importance of balancing the legitimate interests of the accused against the legitimate interests of victims of sexual assaults. The law is neither arbitrary nor manifestly disproportionate in its response to a perceived weakness in traditional trial

procedure... (citations omitted)²¹

His Honour continued:

...as noted by Gummow J in [*Nicholas v R* (1998) 193 CLR 173], its effect may be to make it more difficult for an accused person in certain circumstances to defend himself. **Nevertheless, to protect the confidences as between the victim and a counsellor is not to deprive the accused of some source of information to which he is presumptively entitled.** Nor is the exclusion of protected confidences a law which would tend to bring the criminal trial process into disrepute (emphasis added).²²

Therefore, any assessment of the effect of a sexual assault counselling privilege should also account for the potential **quality** of the protected evidence, not merely the privilege's effect in depriving a court of that evidence. That is, if the protected evidence is not probative of the facts in issue for which it is sought, then the positive effects of a sexual assault counselling privilege, as recognised by the ALRC, New South Wales Law Reform Commission and Victorian Law Reform Commission²³, may outweigh the deleterious effects of depriving courts and parties of evidence.

In this respect, some have noted sexual assault counselling records may not be particularly probative of common issues raised in trials (usually credibility, reliability or, in some cases, whether alleged sexual offences occurred).²⁴ This is because such records are

21 *KS v Veitch (No 2)* [2012] NSWCCA 266; (2012) 84 NSWLR 172, [64].

22 *KS v Veitch (No 2)* [2012] NSWCCA 266; (2012) 84 NSWLR 172, [65].

23 Above n 16.

24 See e.g. Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, Uniform Evidence Law,

4. How do sexual assault counselling privileges work?

made for the purpose of providing treatment and support to victims, not for a forensic or investigative purpose. Furthermore, records of professional assistance provided by counsellors (who may practice without a medical or psychology qualification) are unlikely to be of assistance in determining a victim's fitness to parent or psychological condition, and may clothe some inexperienced opinions with the appearance of professionalism. Finally, sexual assault counselling records may also be focused on the negative aspects of a victim's recovery rather than documenting a complete picture of the victim's wellbeing.

4. How do sexual assault counselling privileges work?

How then would such a privilege operate? As discussed above, we consider that a qualified privilege (as opposed to an absolute privilege) should be implemented in the family law jurisdiction.

In our view, the privilege should operate in respect of communications passing

between a victim and a their counsellor or registered medical practitioner (**confidential communications**)²⁵, or documents recording such communications (e.g. a sexual assault counselling record, or a medical record recording treatment provided in respect of sexual assault).

Such material should be prohibited from compulsion production or adduction, except with leave of the court or by consent. Leave may be granted on consideration of various public interest factors and the probative value of the evidence.

For example, in Victoria, a party seeking a subpoena for the production of protected evidence must show that:

- ↳ the material sought will have substantial probative value to a fact in issue;
- ↳ other evidence of similar or greater probative value concerning the matters to which the protected evidence relates is not available; and
- ↳ the public interest in preserving the confidentiality of confidential communications and protecting a victim from harm is substantially outweighed by the public interest in admitting, into evidence, evidence of substantial probative value.²⁶

In determining the application, a court has various powers, including the power to inspect documents sought²⁷ and to order partial release of documents.²⁸ A court's power to

Report 102, NSWLRC Report 112, VLRC Final Report (2005), [15.49]:

The MCCOC also suggests that records of counselling will have very limited relevance in cases involving allegations of sexual assault. Sexual assault counsellors argued that sexual assault counselling is concerned with the emotional and psychological responses of the complainant to the assault. As such, the 'facts' surrounding the assault are likely not to be discussed, and the exploration of feelings will undermine the forensic reliability of what is recorded.

See also:

- Deb Parkinson, 'Supporting victims through the legal process: The role of sexual assault service providers' ACSSA Wrap No 8 (November 2010), 7-8; and
- Anne Cossins and Ruth Pilkinton, 'Balancing the Scales: The Case for the Inadmissibility of Counselling Records in Sexual Assault Trials' 19(2) University of New South Wales Law Journal 222, 226.

25 See e.g. *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32B(1).

26 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32D(1). Note that there are a series of mandatory considerations set out by *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32D(2) which must be considered by the court in assessing the public interest.

27 *Ibid* s 32C(6).

28 *Ibid* s 32D(3).

inspect records is discretionary, meaning that the court is not required to breach therapeutic confidence for the purposes of determining the application.²⁹ In our view, this gives the court sufficient power to ensure that material is available to it for determination of the application, and (in appropriate cases) the substantive proceedings.

A similar model applies in the Australian Capital Territory, where there is a two-step process for any person seeking to issue a subpoena for sexual assault counselling communication. First, the issuing party must satisfy the threshold test and demonstrate a 'legitimate forensic purpose' for seeking leave, and an arguable case that the evidence would 'materially assist' the applicant in their case.³⁰ Once the court is satisfied that the party has met the threshold, the court will conduct a preliminary examination of the material in scope and will grant leave if the public interest in ensuring the proceeding is conducted fairly outweighs the public interest in preserving the confidentiality of the protected communication.

Both the Victorian and Australian Capital Territory models mean that any party seeking disclosure of a sexual assault counselling communication is required to justify the subpoena they seek for material protected by the privilege, rather than casting the onus on the victim to object.

However, the issuing party is not prevented, in appropriate cases, from accessing information that may contribute to the just determination of the dispute. It gives the court discretion to engage in a balancing exercise between the public interest in ensuring that survivors of sexual offending are not dissuaded from receiving counselling treatment against the public interest in making available evidence

that has substantial probative value.³¹

The design of a privilege is a matter that will need to balance numerous interests, including the interests of parties to family law litigation, independent children's lawyers, the courts, treating professionals and the legal profession. As such, we do not propose to set out a design for the privilege, but note that consideration should be given to the following factors:

- the scope of protected material;
- the restrictions placed on the protected material (e.g. Do limitations apply to production of the material by subpoena, or does the restriction also apply to adduction of evidence?);
- the threshold to be met to compel (or adduce) the material sought;
- whether the court may (or must) inspect the material sought (if the material is in the form of documents); and
- circumstances in which the privilege does not apply (e.g. Do ordinary principles of waiver apply? Or is the privilege one that cannot be waived, but that does not apply where the victim consents?)³²

29 *Todd (a Pseudonym) v The Queen [2016] VSCA 29.*

30 *Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 60(2).*

31 *Ibid* s 62.

32 NB: There may be other exceptions for rarer circumstances, such as fraud or perjury.

Conclusion

Conclusion

Recognising the prevalence of sexual assault and violence in domestic relationships, **we recommend** that a qualified privilege be introduced into the *Family Law Act 1975* (Cth) to curb the use of inappropriate subpoenas for therapeutic records, protect the clear public interest in maintaining the confidences of victims and create the conditions for them to seek professional assistance.

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- Barwon Centre Against Sexual Assault
- Djirra
- Domestic Violence Victoria
- Gatehouse Centre Against Sexual Assault
- Rape and Domestic Violence Services Australia
- Safe Steps
- WESNET
- Women's Legal Service NSW (we would also refer the ALRC to Women's Legal Service NSW's report titled *Sense and Sensitivity*³³ for a detailed discussion of this, and other issues concerning evidence and confidentiality in family law litigation).

RAP would also wish to thank the supervisors of this project, Diane White and Keren Adams, for their invaluable guidance and generosity.

33 Women's Legal Service of New South Wales, *Sense and Sensitivity: Family Law, Family Violence and Confidentiality* (May 2016). A digital version of the report is accessible at <<http://www.wlsnsw.org.au/wp-content/uploads/WLS-NSW-Sense-and-Sensitivity-web.pdf>>.

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