Response to the ALRC *Review of the Family Law System Discussion Paper* DP86 (2018)

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My submission is fully supported by the newly formed Australasian Confederation of Psychoanalytic Psychotherapies: https://acpp.org.au/. The ACPP is the first organization in Australia to exclusively promote and advocate for psychoanalytic psychotherapies to become an acknowledged part of the mental health service delivery model in Australia. The ACPP represents the following organisations: The Australian Association of Group Psychotherapy (AAGP), The Australian & New Zealand Society of Jungian Analysts (ANZSJA),The Australian Psychoanalytic Society (APAS) and The Psychoanalytic Psychotherapy Association of Australasia (PPAA).

My submission is based on over 30 years professional experience in mental health in the UK and in Australia, as well as on a well-received paper that I have presented to four different groups of psychotherapists in NSW during 2017/2018. The paper is called: *A quiet crisis in the consulting room. Everything/nothing that is said here is confidential.* It is in-press with the international peer-reviewed *Journal of Analytical Psychology* based in London and will be published later this year. Source material for this paper was my own clinical experience, conversations with colleagues, a review of the relevant literature, and conversations with patients.

I am writing with particular reference to the *Sensitive Records Subsection of Chapter 8 'Reducing Harm'* (pp. 203-209), and specifically, Proposal 8-6: *Power to exclude evidence of protected confidences*, pp.204-205, and Proposal 8-7: *Guidelines in relation to sensitive records*, p.208.

In my professional experience, there is an argument to be made for privileging psychotherapy and psychotherapeutic relationships and notes in a similar way to Legal Professional Privilege. In my opinion, psychotherapy merits special protection as a vital human right just as Legal Professional Privilege does.

There are two main ideas that I would like to address in this submission. The first is that that subpoenas directed at psychotherapists profoundly undermine the work of psychotherapy and counselling and impact on a basic human right. This has consequences for Society as a whole. The second is that the assumption that psychotherapeutic notes and records represent potential hard evidence that can be sought under subpoena represents a *category error:* psychotherapy is about emotions and feelings, but the court process is to do with facts and reliable evidence.

Proposal 8–6, Power to exclude evidence of protected confidences, pp.204-205.

Subpoenas undermine the profession of psychotherapy and counselling because responding to a subpoena places a psychotherapist in an ethically compromised predicament where they are forced to undermine the foundation of confidentiality on which their work depends in order to comply with the law.

- The breaking of confidentiality through subpoena compliance undermines the public's trust in psychotherapy, deterring people from seeking help.
- Knowing they are vulnerable to being subpoenaed impacts on the way that psychotherapists' think. Psychotherapy is about emotions, feelings and thoughts and not unambiguous facts, but in the present climate psychotherapist's can find themselves listening out for 'evidence', trying to find 'facts' rather than empathically listening to the patient's emotional experience in order to help them with their distress. This is counter-productive.
- Being vulnerable to subpoena can affect the kind of cases that psychotherapists will accept: I have come across examples where, in the knowledge that their notes could be subpoenaed, psychotherapist's decline cases when the courts are already involved. This is damaging for potential patients, particularly when the referral concerns children caught up in family disputes.
- The damage done to established on-going psychotherapy by the intrusion of a subpoena cannot be underestimated; it can re-traumatise already traumatised people. In some cases it can take years for the psychotherapeutic process to recover, in other cases the psychotherapy can break down irrevocably. It is hard to quantify the damage done by subpoena to already damaged and vulnerable patients; it can be devastating.

The tension between 'Reducing Harm' and 'Preventing Further Harm'

It is clear from reading the Reducing Harm section of Chapter 8 of the Review, that a lot of careful thought has gone into trying to think about minimizing harm. Implicit in the idea of 'Reducing Harm' is the knowledge that using notes that were created in order to support an empathically attuned therapeutic process by taking them out of context and inserting them within a litigious legal process, is inevitably harmful: this illustrates the consequences of the *'category error'*.

I think that this *category error* can be avoided through establishing Professional Psychotherapy Privilege with the intention of Preventing Further Harm. There is precedent for this in the United States Supreme Court's Jaffee v. Redmond (1996) decision, which established a federal privilege for psychotherapy and the establishment of state legislative privilege:

"…..(b) Significant private interests support recognition of a psychotherapist privilege. Effective psychotherapy depends upon an atmosphere of confidence and trust, and therefore the mere possibility of disclosure of confidential communications may impede development of the relationship necessary for successful treatment. The privilege also serves the public interest, since the mental health of the Nation's citizenry, no less than its physical health, is a public good of transcendent importance. In contrast, the likely evidentiary benefit that would result from the denial of the privilege is modest."
https://supreme.justia.com/cases/federal/us/518/1/

I contend that the Courts can draw on many other routes to obtain the evidence that is needed without undermining a profession that is vital to the welfare of Society as a whole. My recommendation is that Professional Privilege for Psychotherapy should be the base-line, with the provision that psychotherapists would only be subpoenaed in the most extreme situations, and even then, with caution, and not for notes, but *only for a report in response to*

particular questions. And even then, there should be provision for an objection-to-subpoena-process. This is in order to *prevent* further harm, as opposed to trying to reduce it.

Proposal 8-7: Guidelines in relation to sensitive records, p.208.

I would advocate for constructive discussion between psychotherapists and other professionals and that there be representation from ACPP in the Working Group that is suggested in *Proposal 8–7* on p. 208 of the Discussion Paper. Although the ACPP as an umbrella body is newly formed, it represents psychotherapy organisations that have a long history in the region. Much of the *'category error'* is based on a misunderstanding of what psychotherapy is and so members of the judiciary often do not know what they are intruding on when subpoena's are issued, or, possibly, even that they are intruding. It is in Society's best interests if psychotherapy and counselling are considered to be safe, confidential and reliable places from which to seek help and that can only be possible with Professional Privilege for Psychotherapy.